Judicial officers shall have basic knowledge in computers operation.

VIJENDRA KUMAR VERMA

V/S

PUBLIC SERVICE COMMISSION, UTTARAKHAND & ORS. 2011 (1) SCC 150

SUPREME COURT OF INDIA (FROM ALLAHABAD) *(D.B.)*

VIJENDRA KUMAR VERMA
V/S
PUBLIC SERVICE COMMISSION, UTTARAKHAND & ORS

Date of Decision: 08 October 2010

Citation: 2010 LawSuit(SC) 685

Hon'ble Judges: Anil R Dave, Mukundakam Sharma

Case Type: Civil Appeal

Case No: 8861 of 2010

Subject: Service

Head Note:

Uttaranchal Judicial Service Rules, 2005 - Rule 8 - eligibility criteria - appointment - for filling up 50 posts of Civil Judge (Junior Division) - advertisement issued - the appellant appeared in the preliminary examination - declared successful. However, his name did not appear in the final list of selected candidates because according to the respondents the appellant did not have basic knowledge of computer operation - the appellant filed writ petition and prayed for declaration that since the respondents have introduced a new selection criterion during the midstream of the selection, therefore, the selection process was vitiated - dismissed - appeal - the basic knowledge of the appellant in computer operation was tested at the time of his interview by an expert in the field of Computer who opined that the appellant did not possess the basic knowledge of computer operation. Since possession of such knowledge of computer operation was one of the eligibility criteria for being selected for the aforesaid post and as the

appellant was not found suitable and lacking in basic knowledge of computer operation, he was not selected - the requirement and the necessity for having basic knowledge of computer operation as one of the eligibility criteria and conditions for selection is prescribed in Rule 8 itself. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process - this Court held that knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction - appeal dismissed.

Acts Referred:
Constitution Of India Art 16, Art 14

Final Decision: Appeal dismissed

Eq. Citations: 2011 (1) SCC(L&S) 21, 2010 (127) FLR 723, 2010 (7) Supreme 406, 2011 (2) AWC 1503, 2010 (11) JT 111, 2010 (6) LawHerald(SC) 3938, 2011 (1) SCC 150, 2010 (4) SCT 556, 2010 (9) UJ 4650, 2010 (4) UPLBEC 2930, 2011 (2) SCJ 153

Advocates: Shyam Divan, B S Mor, Ms Manjit Singh, R C Kaushik And Harikesh Singh, Anuvrat Sharma, S S Shamshery, Ms Rachana Srivastava, Jatinder Kr Bhatia, B N Jha, Ajay Bhatia

Reference Cases:
Cases Cited in (+): **42**

Judgement Text:-

Mukundakam Sharma, J

[1] By passing an order on 15.9.2010, we dismissed SLP(C) No. 12787 of 2008 which was connected with SLP(C) No. 12788 of 2008. SLP (C) No. 12787 of 2008 was dismissed as not pressed.

[2] SLP(C) No. 12788 of 2008 was filed by the petitioners namely Shri Vijendra Kumar Verma and Shri Harendra Kumar Ozha. But so far as Shri H.K. Ozha is concerned, on his behalf a prayer was made to withdraw his name from the petition as he was

appointed as a judicial officer in the State of Uttar Pradesh.

By an order passed on the same day i.e. 15.9.2010, we removed his name as petitioner from the said petition with a further direction that the aforesaid petition would be considered only so far as Shri Vijendra Kumar Verma is concerned.

[3] After passing the aforesaid order, we proceeded to hear the learned counsel appearing for the parties and after hearing the parties at length, we reserved our orders.

[4] Leave granted.

[5] By this common judgment and order, we now propose to dispose of the appeal in terms of our discussion and reasons recorded herein. The selection of judicial officers for Uttaranchal Judicial Service is governed by a set of rules called the Uttaranchal Judicial Service Rules, 2005. The Rules deal with the procedure and mode of selection, recruitment and appointment in the Uttaranchal Judicial Service comprising group A and B posts. In Uttaranchal Judicial Service, there is a post called Civil Judge (Junior Division). Rule 8 of the said Rules lays down the eligibility criterion that a candidate for direct recruitment to the service apart from holding qualification of Bachelor of Law must possess a thorough knowledge of Hindi in Devnagari script as well as the basic knowledge of computer operation.

[6] Rule 8 reads as follows:-

"8. A candidate for direct recruitment to the Service must be -

(a) A bachelor of Law from a University established by law in Uttaranchal or any other University of India recognized for this purpose by the Governor.

(b) Must possess thorough knowledge of Hindi in Devnagri script.

(c) Basic knowledge of Computer operation."

[7] Rule 14 of the said Rules lays down that the examination may be conducted at such time and on such dates as may be notified by the Commission and the same would

consist of a written examination on such legal and allied subjects in the syllabus prescribed under Rule 17, an examination to test the knowledge of the candidate in Hindi and in English and an interview for assessing the merit of the candidates.

[8] Rule 17 provides that the syllabus and the Rules relating to the competitive examination shall be such as given in Appendix II. The said Appendix II contains the syllabus as well as the individual aggregate marks to be allocated against individual papers.

[9] Rule 18 of the said Rules speaks of the manner and mode of the preparation of the final list of the selected candidates in order of their proficiency as disclosed by the aggregate of marks finally awarded to such candidates in the written examination and interview whereas Rule 19 makes a provision as to how on submission of the final list of the candidates prepared by the Commission, appointment is to be made to the Post of Civil Judge (Junior Division). It provides that on receipt of the list of candidates submitted by the Commission, the Governor shall make appointment to the post of Civil Judge (Junior Division) in the order in which their names are given in the list.

[10] An advertisement was issued on 16.2.2006 inviting applications from eligible candidates for filling up 50 posts of Civil Judge (Junior Division). The appellant herein submitted his application for one of the aforesaid posts. The appellant appeared in the preliminary examination and he was declared successful in the said examination on 16.9.2006.

[11] Thereafter, he was called for the Viva Voce examination also, but despite his appearance in the viva voce examination and doing reasonably well according to his own estimation, he was not selected and his name did not appear in the final list of selected candidates. The appellant, however, came to know that he received total of 576 marks together in written examination and in viva voce examination and on the basis thereof in his estimation he should have been selected as persons getting total marks of 568 were inducted into the service. The appellant submitted that to his knowledge and information he was not selected because according to the respondents the appellant did not have basic knowledge of computer operation. The reason for non-selection of the appellant was also disclosed in the counter affidavit filed on behalf of Respondent No. 1 against the writ petition filed by the appellant. In the said counter affidavit, it was stated that the appellant was to put to test for determining and ascertaining as to whether he possessed the basic knowledge of computer operation. It is also stated in the said affidavit that an expert in the field of computer was associated

for determining, assessing and ascertaining the aforesaid fact and it was found that the appellant did not possess basic knowledge in computer operation. Therefore, he was not selected.

[12] The aforesaid writ petition was filed by the appellant praying for declaration that since the respondents have introduced a new selection criterion during the midstream of the selection, therefore, the selection process was vitiated. It was also submitted that the action of the respondents in failing the appellant only on the ground that he did not have basic knowledge in computer operation should be set aside and quashed and that the appellant should now be inducted into the service.

[13] The aforesaid writ petition was heard by the Division Bench of the Uttarakhand High Court and finally by the impugned judgment and order dated 28.3.2008, the writ petition was dismissed with certain observations contained in the said judgment.

[14] Being aggrieved by the aforesaid judgment and order, the present appeal is filed by the appellant on which we heard the learned counsel appearing for the parties.

[15] Mr. Shyam Diwan, the learned senior counsel appearing for the appellant submitted before us that no syllabus was ever prescribed by the respondents for judging and ascertaining the basic knowledge of the candidate in computer operation either before the selection process was initiated or even at the time when the advertisement was issued and therefore such a syllabus could not have been introduced by the respondents in the midstream of such selection process and therefore, the action of the respondent, in introducing a benchmark at a subsequent stage is without jurisdiction and the same is required to be set aside.

[16] It was also submitted by the learned counsel for the appellant that the benchmark provided for judging the suitability of the person in computer operation being vague and there being no proper guidelines for adjudging the said competence and suitability, failing the appellant only on the ground that he did not have sufficient knowledge in basic computer operation was uncalled for and unjustified and therefore the appellant should be declared to have passed the examination as he had passed even in the viva voce examination as he scored more than the minimum marks obtained by the successful candidates.

[17] The aforesaid submissions of the learned counsel appearing for the appellant were refuted by the learned counsel appearing for the respondents who has taken us through the records and on the basis of which he submitted that the respondents have all along

spelt out that the candidate desiring to be appointed to the aforesaid post of Civil Judge (Junior Division) must have the basic knowledge of computer operation and therefore the same was a part and parcel of the syllabus which was known to each one of the candidates including the appellant and therefore no grievance could be raised in that regard.

[18] It was also submitted by him that the appellant having participated in the entire selection process and having specific knowledge that he would be required to have basic knowledge in computer operation and then having taken a chance therein by appearing in the viva voce and facing the questions of the expert on the computer operation, he cannot now turn back and take a stand that the said selection process is vitiated.

[19] In the light of the aforesaid submissions of the learned counsel appearing for the parties, we have considered the records. The advertisement inviting applications from eligible candidates for filling up the posts was published in a newspaper on 16.2.2006. In the said advertisement, conditions of eligibility have also been mentioned in clause 4 wherein the essential qualifications were prescribed. In clause 4(c), it was specifically mentioned that the candidate should have basic knowledge of computer operation. In clause 9 of the aforesaid advertisement, it was stated that the candidate desiring to apply should read the advertisement carefully and apply only if he is satisfied regarding eligibility according to the conditions of advertisement. In paragraph 12(4), it was also mentioned that only those candidates would be called for interview who would be declared successful on the basis of main examination (written examination).

[20] The candidates were thereafter called for the written examination which was held from 17.1.2007 to 19.1.2007 and a list of successful candidates in the written examination was published by the Uttarakhand Public Service Commission on 26.4.2007. In the aforesaid notification which was published, it was also mentioned that the aforesaid successful candidates in the written competitive examination will have to establish that they have sufficient knowledge of Hindi in Devnagari script and basic knowledge of computer operation. It was further stated that with regard to the basic knowledge of computer operations, the candidates should have the knowledge of Microsoft Operating System and Microsoft Office operation. Interview letters were thereafter issued and in so far as the appellant is concerned, his interview letter was dated 21.5.2007. In the said call letter for the interview also, it was specifically mentioned that basic knowledge of the computer operation would be essential to the candidate and in connection with the basic knowledge of the computer operation,

knowledge of Microsoft Operating System and Microsoft Office Operation would be essential to the candidate and the said knowledge of the candidate would be examined at the time of interview. Therefore, the appellant knowing fully well about the requirement of having basic knowledge of computer operation went for his viva voce examination and gave the said test without any protest or demur of the kind that is being raised in the writ petition and before us.

[21] The basic knowledge of the appellant in computer operation was tested at the time of his interview by an expert who was sitting with the interview members conducting the interview. The said expert after testing the knowledge, the suitability of the appellant and his basic knowledge in computer operation gave his opinion that the appellant did not possess the basic knowledge of computer operation. Since possession of such knowledge of computer operation was one of the eligibility criteria for being selected for the aforesaid post of Civil Judge and as the appellant was not found suitable and lacking in basic knowledge of computer operation, he was not selected. The issue is whether such a course adopted by the respondent could be said to be illegal, without jurisdiction and unheard of.

[22] In support of his contention, the learned counsel appearing for the appellant relied upon the decisions of the Supreme Court in K. Manjusree Vs. State of Andhra Pradesh & Anr., 2008 3 SCC 512. In paragraph 25 and 27 of the said judgment, it was said that introducing minimum marks for interview in the midstream of the selection process is illegal.

[23] The counsel for the appellant also relied upon a judgment of this Court in Hemani Malhotra Vs. High Court of Delhi, 2008 7 SCC 11 and Ramesh Kumar Vs. High Court of Delhi & Anr., 2010 3 SCC 104 in support of the contention that minimum benchmark provided for selection during the midstream of the selection process is without jurisdiction.

[24] In our considered opinion, the reliance on the aforesaid judgments by the counsel appearing for the appellant was misplaced as in the present case the requirement and the necessity for having basic knowledge of computer operation as one of the eligibility criteria and conditions for selection is prescribed in Rule 8 itself. The said clause was also specifically mentioned in the advertisement issued making it clear to all the intending candidates that they must have basic knowledge of computer operation.

[25] When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with

regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office Operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office Operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction.

[26] In this connection, we may refer to the decision of the Supreme Court in Dr. G. Sarana Vs. University of Lucknow & Ors., 1976 3 SCC 585 wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus:-

> "15.... He seems to have voluntarily appeared before the Committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the Committee."

[27] In P.S. Gopinathan Vs. State of Kerala and Others, 2008 7 SCC 70, this Court relying on the above principle held thus;

> "44. .....Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992.

> "The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow....."

[28] In Union of India and Others vs. S. Vinodh Kumar and Others, 2007 8 SCC 100 at paragraph 18 it was held that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. Besides, in K.H. Siraj vs. High Court of Kerala and Others, 2006 6 SCC 395 in paragraph 72 and 74 it was held that candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel.

[29] Now, while deciding the submission of the counsel appearing for the appellant that judging the suitability of the candidate by laying down the benchmark of basic knowledge of computer operation being sufficient or insufficient is vague, we are of the opinion that possessing of basic knowledge of computer operation is one of the criteria for selection and in order to judge such knowledge, an expert on the subject was available at the time when the candidate was facing the Interview Board. In order to ascertain the candidate's knowledge of computer operation, he put questions and thereafter he gave remarks that the candidate has sufficient knowledge or that he does not have sufficient knowledge.

[30] It is also to be considered that the Indian judiciary is taking steps to apply e-governance for efficient management of courts. In the near future, all the courts in the country will be computerized. In that respect, the new judges who are being appointed are expected to have basic knowledge of the computer operation. It will be unfair to overlook basic knowledge of computer operation to be an essential condition for being a judge in view of the recent development being adopted. Therefore, we are of the considered opinion that requirement of having basic knowledge of computer operation should not be diluted. We also deem fit not to comment over the standard applied by the expert in judging the said knowledge as the same is his subjective satisfaction. However directions can be recommended to make the procedure more transparent. The directions in respect of same have already been given by the High Court we do not think proper to prescribe the directions for the same separately.

[31] The aforesaid procedure for testing the knowledge may not be foolproof but at the

same time it cannot be said that the same was not reasonable or that it was arbitrary. Therefore, after giving very thoughtful consideration to the issues, we are of the opinion that the appellant has failed to make out any case before us for interference with the orders passed by the High Court. We find no merit in this appeal and the same is dismissed.

Definitions of computer, computer network, source code, and mobile phone. Hon’ble High Court of Andhra Pradesh. 2005 CrLJ 4314

HIGH COURT OF ANDHRA PRADESH

SYED ASIFUDDIN
V/S
STATE OF ANDHRA PRADESH

Date of Decision: 29 July 2005

Citation: 2005 LawSuit(AP) 580

Hon'ble Judges: V V S Rao

Case Type: Criminal Petition

Case No: 2601 and 2602 of 2003

Subject: Civil, Criminal, Direct Taxation, Intellectual Property Rights

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 415, SEC 405, SEC 420, SEC 409, SEC 120B
CODE OF CRIMINAL PROCEDURE, 1973 SEC 482
INCOME TAX ACT, 1961 SEC 66, SEC 65
COPYRIGHT ACT, 1957 SEC 14, SEC 13, SEC 63, SEC 2
INFORMATION TECHNOLOGY ACT, 2000 SEC 2(1), SEC 65

Final Decision: Petition dismissed

Eq. Citations: 2006 (1) ALD(Cri) 96, 2005 CrLJ 4314

Advocates: Rama Rao Ghanta, D Deshadri Naidu

Reference Cases:
Cases Cited in (+): **1**

Judgement Text:-

V V S Rao, J

[1] These two petitions are filed by different persons under Section 482 of Code of Criminal Procedure, 1973 (Cr. P. C.) seeking similar relief. Both the matters were admitted on the same day and since then both the matters are being listed together for being disposed of as such, this common order covers both the matters. The petitioners in both the matters seek the relief of quashing F. I. R. No. 20 of 2003 of Criminal Investigation Department (C. I. D.) Police, Hyderabad, registered under Sections 409, 420 and 120B of Indian Penal Code, 1860 (for short, IPC), Section 65 of the Information Technology Act, 2000 (for short, IT Act) and Section 63 of the Copyright Act, 1957 (for short, Copyright Act).

[2] The crime was registered against the petitioners on a written complaint given by the Head of Sales and Marketing Wing of M/s. Reliance Infocomm Ltd., Hyderabad, the second respondent herein. In the complaint, it is alleged that certain vested elements of the trade of mobile telephone services began to woo the subscribers of Reliance India Mobile (RIM) into various other schemes promoted by other similar service providers, which would have the impact on the image as well as the revenues of the second respondent. Reliance Infocomm under Dhirubhai Ambani Pioneer Offer launched telephone services named as 'Reliance India Mobile' with a view to make communication affordable to the masses. The same was later modified and the scheme titled 'POBF, which is the most affordable in the market today. Under the said scheme, the subscriber gets a digital handset worth Rs. 10.500/- as well as service bundle for three years with an initial payment of Rs. 3.350/-and monthly outflow of meager Rs. 600/-. The subscriber also gets one year warranty and insurance for three years. The handset given to the subscriber is third generation digital handset with a host of features which are of first of its kind coupled with attractive tariff options. In view of this, the market response in twin cities has been phenomenal. This has an impact on the business of other service providers for the reason that those service providers attempted unethical and illegal practices for weaning away the subscribers of the second respondent.

[3] In the complaint, the modus operandi adopted by other mobile service providers is described as follows : The subscribers of the second respondent are attracted by making phone calls impressing upon them that the tariff plans and services provided by others are better than the services of Reliance Infocomm and also advise them that they have an option to shift the service provider by paying an amount of Rs. 3,000/~ towards

plan charges and deposits if desired are only Rs. 540/- towards activation fee. Certain unknown persons in Abids, Begumpet, Koti, Himayatnagar and Malak-pet are making the calls to the subscribers of second respondent. Once the subscriber agrees that he can keep a world class handset which is proprietary to Reliance and also enjoy the best tariff plan of the competitor, he is asked to meet any of the business associates of rival service providers. At the rendezvous, the customer is asked to wait for an hour and an usher carries the handset to an undisclosed location in Secunderabad for conversion process, which takes about 45 minutes to an hour and half. During this time, ESN number of Reliance instrument is hacked by reprogramming and the subscriber is given the handset and instructed to switch off and switch on the handset later in the day and start enjoying the new services.

[4] After receiving above written complaint lodged by the second respondent through its Head of Sales and Marketing Wing, the senior executive officer of Criminal Investigation Department, on instructions of the Additional Director General of Police, CID, registered crime No. 20 of 2003 under various provisions of IPC, IT Act and Copyright Act as mentioned hereinabove and took up investigation. The crime was registered on 31-5-2003. Investigation revealed that all the handsets of Reliance India Mobile are being migrated to TATA Indicom network at the behest of TATA Indicome staff members and that same is illegal as there is an agreement between the manufacturers of the Reliance handsets and Reliance India Mobile Limited. In view of the statements given by the witnesses, the investigating officer came to a conclusion that prima facie case is made out against the staff members of TATA Indicom and directed two inspectors to conduct raids at the Head Office of TATA Indicom situated in Khan Lathif Khan Estate, Hyderabad. This was ordered in view of specific information received about tampering of Reliance handsets by the staff members of TATA Indicom. Further on specific information about similar such practices going on at TATA Indicom centre opposite to Harihara Kala Bhavan, Secunderabad, the investigating officer along with two other inspectors and panch witnesses proceeded to LM counter at the above place when one Raj Naren, Officer of TATA Indicom revealed that the General Manager (Marketing), Madhavan and Anil Ambati, Manager (Marketing) of TATA Indicom are accepting the handsets belonging to Reliance Infocomm Limited and re-programming with their network with different tariff packages. At the time of conducting raid in Secunderabad Office of TATA Indicom, the investigating officer also came across one Shaik Mustaffa who stated that he purchased handset from Reliance Infocomm network. Therefore, the investigating officer arrested Raj Naren and Shaik Mustaffa, and seized two mobile telephone handsets, one each from the possession of the two arrested

persons. On examination, it was found that the handset recovered from Raj Naren is Samsung N191 co-branded with Reliance with ESN No. 3F7AB 832. The said set was migrated to TATA Indicom with No. 56376361 allotted by TATA Indicom. Its original Reliance India Mobile number was 31086523. The two accused along with mobile sets were brought to the office of C. I. D., and kept under surveillance of C. I. D., staff. The team of inspectors sent to the Office of TATA Indicom at Khan Lathif Khan Estate also arrested Syed Asifuddin, Patlay Navin Kumar and Khaja/Gareed Nawaj (petitioners in Criminal Petition No. 2601 of 2003) and Manoj (petitioner No. 2 in Criminal Petition No. 2602 of 2003). Two Samsung N191 co-branded with Reliance re-programmed handsets with distinct ESN and serial numbers were also seized along with 63 application forms of persons who migrated from Reliance India Limited to TATA Indicom along with the affidavits. After getting the details of the search team, the investigating officer filed remand report before the Court of IX Metropolitan Magistrate, Hyderabad on 3-6-2003. In the remand report, it is further stated as under :

> The investigation made so far revealed that the Reliance Infocomm is offering under Dhirubhai Ambani Pioneer Scheme a third generation digital handset costing about Rs. 10.500/- for a mere payment of Rs. 3.350/- with a condition to sail with their network for a period of 3 years with option to exit either by surrendering the handset or paying the cost of the handset to the company. Investigation also reveals that there is an agreement existing between the Samsung manufacturers and LG manufacturers With Reliance Infocomm regarding their exclusive models Samsung N191 and LG-2030. These model handsets are to be exclusively used by Reliance India Mobile Limited only. In contravention to the above contract the TATA Indicom staff members who are figured as an accused are tampering with pre-programmed CDM-A digital, handsets belonging to Reliance Infocomm and activating with their network with all dubious means which is an offence under Section 65, I.T. Act. Secondly, the customer is not barred from exiting from the Reliance network as such and to quit from that network he has to fulfil the obligations laid down in the terms and conditions of the Reliance company. Till the lock in period of 3 years is over, the handset supplied to the customer by Reliance Infocomm is a joint property of the company and any kind of transaction on the part of the subscriber without fulfilling the obligations laid down in the terms and conditions is clear case of Breach of Trust since the customer has not settled the accounts with the company. Further as the competition between the CDMA service providers blown out of proportions, the TATA Indicom has hatched a conspiracy to hijack the

customers of Reliance Infocomm by all fraudulent means and as a part of their Infocomm by all fraudulent means and as a part of their conspiracy trying to woo the customers of Reliance Infocomm with different tariff packages and trying to trap gullible customers and succeeded in their attempt to attract their customers and so far as many as 63 customers belonging to Reliance Infocomm so far migrated to TATA Indicom by illegal means.

[5] These two petitions came to be filed on 17-6-2Q03 for quashing crime No. 20 of 2003 by the means of TATA Indicom. While admitting the petitions, this Court passed orders in criminal miscellaneous petition No. 3951 of 2003 staying all further proceedings including investigation of the crime pending disposal of the main petition. The Public Prosecutor filed criminal miscellaneous petition No. 232 of 2005 for vacating the said order. The matters were "finally heard at that stage itself and are being, disposed of finally.

[6] The petitioners in both the petitions are employees of Tata Tele Services Limited (TTSL) which provides basic telephone services including Wireless in Local Loop (WLL) services on non-exclusive basis in the service area including State of Andhra Pradesh under the name of Tata Indicom. All of them are alleged to have committed offences punishable under Sections 420, 409 and 120B of IPC, Section 65 of IT Act and Section 63 of Copyright Act. Learned Senior Counsel for the petitioner, Sri C. Padmanabha Reddy, submits that it is always open for the subscriber to change from one service provider to the other service provider and the subscriber who wants to change from Tata Indicom always takes his handset, to BSNL or to Reliance to get service connected and to give up services of TTSL. According to the learned counsel, the CDMA handsets brought to TTSL by subscribers of other service providers are capable of accommodating two separate lines and can be activated on principal assignment mobile (NAM 1 or NAM 2). The mere activation of NAM 1 or NAM 2 by TTSL in relation to a handset brought to it by the subscriber of other service provider does not amount to any crime. According to learned counsel, an offence under Section 409 of IPC is not at all made out even by going through the FIR, as well as remand report. In the absence of dishonest appropriation or conversion to their own use, alleged criminal breach of trust by the petitioners does not arise.

[7] The learned Senior Counsel also submits that there was no allegation against the petitioners that they deceived the second respondent fraudulently and dishonestly to

deliver the property or to retain the property and therefore the offence of cheating under Section 420 of IPC does not arise: As Section 120B of IPC is relatable only to the offences under Sections 490 and 420 of IPC, the charge under Section 120B of IPC is misconceived. Insofar as the offence under Section 65 of IT Act is concerned, the submission of the learned Senior Counsel is as follows : A telephone handset is not a computer nor a computer system containing a computer programme. Alternatively, in the absence of any law which is in force requiring the maintenance of "computer source code", the allegation that the petitioners concealed, destroyed or altered any computer source code, is devoid of any substance and therefore the offence of hacking is absent. In the absence of any allegation by the second respondent that they have a copyright to the source code of the computer programme in the handsets supplied by second respondent, the infringement of copyright does not arise. He lastly submits that the allegation that TTSL has a subscriber base of 100 thousand (one lakh) customers in Andhra Pradesh and therefore there was no necessity for TTSL to woo the customers/subscribers of second respondent.

[8] The learned Additional Public Prosecutor, Sri H. Prahlad Reddy and the learned counsel for the second respondent, Sri D. Seshadri Naidu, submit that when a cognizable offence under various provisions of different statutes is registered and investigation is pending, this Court cannot quash the F. I. R., at the stage of investigation. After conducting appropriate preliminary investigation and examining witnesses the police have come to the conclusion that the petitioners have committed offences involving highly technical aspects, and therefore unless and until proper evidence is let in before the criminal Court, on mere assertions of the accused a crime cannot be quashed. They would contend that the cell phone handsets with CDMA technology supplied by the second respondent to its subscribers are dedicated to Reliance Indicomm Limited and by interfering with the computer programme and converting the handsets to be responsive to the technology adopted by TTSL is itself an offence and therefore these petitions are not maintainable.

[9] The submission of the learned Senior Counsel that even if the allegations in F. I. R., are taken to be true, an offence under Sections 409, 420 and 120B of IPC, is not made put has force. Admittedly, a subscriber of second respondent is given a mobile phone instrument and connection with an understanding that the subscriber has exclusive right to use the phone. If the accused allegedly induced the subscriber of the second respondent to opt for the services provided by TTSL, an offence under Section 409 of IPC., cannot be said to have made out. Section 405 of IPC, defines 'criminal breach of trust The offence of criminal breach of trust requires entrustment with property and

dishonest use or disposal of the property by the person to whom the property is entrusted. Both these things are absent. There is no allegation that the property in respect of which the second respondent has right was entrusted to TTSL or its employees who are the petitioners herein. Similarly, an offence of cheating as defined under Section 415 of IPC., is not at all made out because a subscriber of second respondent was never induced to deliver the property to TTSL nor there was dishonest or fraudulent inducement by the petitioners of the second respondent or its subscribers to deliver the property. Indeed the delivery of the property as such is not present in the case. In so far as offence of Section 120B of IPC, is concerned, the same is made in relation to alleged offence under Sections 409, 420 and 120B of IPC., and therefore the petitioners cannot be prosecuted for offences under Sections 409, 420 and 120B of IPC. Insofar as these alleged offences are concerned, if any criminal trial is conducted, the same Would result in miscarriage of justice for as held by the Supreme Court in State of West Bengal v. Swapan Kumar, and State of Haryana v. Bhajan Lal, , when the F.I.R., does not disclose commission of cognizable offence, the police have no power to investigate such offence. In such a case, this Court would be justified in quashing investigation on the basis of information laid with the police.

[10] The petitioners are also alleged to have committed offences under Section 63 of Copyright Act and Section 65 of IT Act. In the considered opinion of this Court, it would be necessary first to deal with the allegations separately and then deal with the case of the prosecution on the basis of prima facie conclusions. Before doing so, it is necessary to briefly mention about computer and computer source code.

[11] The I.T. Act defines computer in clause (i) of Section 2(1) of the Act. According to the definition, 'computer' means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network. 'Computer system' is defined in clause (1) of Section 2(1) of I.T. Act, as to mean a device or collection of devices, including input and Output support devices which are programmable, capable of being used in conjunction with external files which contain computer programmes, electronic instructions, data storage and retrieval and communication control. The I.T. Act also defines 'computer network' in clause (j) of Section 2(1) of the Act, which reads as under :

> (j) computer network' means the interconnection of one or more computer

through-

(i) the use of satellite, microwave, terrestrial line or other communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained;

[12] A reading of clauses (i), (j) and (1) of Section 2(1) of the I.T. Act would show that any electronic, magnetic or optical device used for storage of information received through satellite, microwave or other communication media and the devices which are programmable and capable of retrieving any information by manipulations of electronic, magnetic or optical impulses is a computer which can be used as computer system in a computer network.

[13] A computer has to be appropriately instructed so as to make it work as per its specifications. The instructions issued .to the computer consists of a series of Os and is in different permutations and combinations. This machine language can be in different form in different manner, which is called computer language. The communicator as well as the computer understand "a language" and mutually respond with each other. When specified or particular instructions are given, having regard to the capacity of the computer it performs certain specified functions. The instructions or programme given to computer in a language known to the computer are not seen by the users of the computer/consumers of computer functions. Known as source code in computer parlance, the programme written in whatever computer language by the person who assembled the programme are not seen by the users. A source code is thus a programme as written by the programmer. Every computer functions as a separate programme and thus a separate source code.

[14] Computer source code or source code, or just source or code may be defined as a series of statements written in some human readable computer programming language constituting several text files but the source code may be printed in a book or recorded on a tape without a file system, and this source code is a piece of computer software. The same is used to produce object code. But a programme to be run by interpreter is not carried out on object code but on source code and then converted again. [Diane Rowland and Elizabeth Macdonald : Information Technology Law; Canandish Publishing

Limited, (1997). p. 17] Thus, source code is always closely guarded by the computer companies, which develop different function specific computer programmes capable of handling various types of functions depending on the need. The law as we presently see is developing in the direction of recognizing a copyright in the source code developed by a programmer. If source code is copied, it would certainly violate copyright of developer. With this brief background in relation to computer source code, we may now consider in brief the technological aspects of a cell phone and how it works. This is necessary to understand the controversy involved in this case.

[15] Alexander Graham Bell invented telephone in 1876. This enabled two persons at two different destinations to communicate with each other through a network of wires and transmitters. In this, the sound signals are converted into electrical impulses and again re-converted into sound signals after reaching the destination. The radio communication was invented by Nikolai Tesla in 1880, which was formerly presented by Guglielmo Marconi in 1894. A combination of telephone technology and radio technology resulted in radio telephone, which became very popular as technology advanced. Two persons can communicate with each other through radio telephone without there being any intervention of network of wires and other infrastructure. The radio signals travel through atmosphere medium and remain uninterrupted as long as the frequency at which radio signals travel is not disturbed. The science realized that the radio telephone communication required heavy equipment by way of powerful transmitter and that it can facilitate only 25 people to use the system. The problem was solved by communication technology by dividing a large area like a city into small cells and any two persons connected to a cell system - at a time receive 800 frequencies and crores of people can simultaneously communicate with each other at the same time. That is the reason why the term 'cell mobile phone or cell phone'.

[16] In the cell technology, a person using a phone in one cell of the division will be plugged to the central transmitter, which will receive the signals and then divert the signals to the other phone to which the same are intended. When the person moves from one cell to other cell in the same city, the system i.e., Mobile Telephone Switching Office (MTSO) automatically transfers signals from tower to tower when the telephone user moves from one division to another. [How Cell Phones Work? See website - ttp: //electronics, howstuffworks. com. Much of the information on technological aspects of Cell Phones is taken from this. cell phone, it looks the database and diverts the call to that cell phone by picking up frequency pair that is used by the receiver cell phone.] Another advantage in a cell phone compared with radio phone is that when the radio phone is used, one person can talk at a time as both the persons can communicate

simultaneously and also receive sound signals simultaneously.

[17] All cell phone service providers like Tata Indicom and Reliance India Mobile have special codes dedicated to them and these are intended to identify the phone, the phone's owner and the service provider. To understand how the cell phone works, we need to know certain terms in cell phone parlance. System Identification Code (SID) is a unique 5-digit number that is assigned to each carrier by the licensor. Electronic Serial Number (ESN) is a unique 32-bit number programmed into the phone when it is manufactured by the instrument manufacturer. Mobile Identification Number (MIN) is a 10-digit number derived from cell phone number given to a subscriber. When the cell phone is switched on, it listens for a SID on the control channel, which is a special frequency used by the phone and base station to talk to one another about things like call set-up and channel changing. If the phone cannot find any control channels to listen to, the cell phone displays "no service" message as it is out of range. When cell phone receives SID, it compares it to the SID programmed into the phone and if these code numbers match, cell knows that it is communicating with its home system. Along with the SID, the phone also transmits registration request and MTSO which keeps track of the phone's location in a database, knows which cell phone you are using and gives a ring. When MTSO gets a call intended to one

[18] The essential functions in the use of cell phone, which are performed by the MTSO, is the central antenna/central transmitter and other transmitters in other areas well coordinated with the cell phone functions in a fraction of a second. All this is made possible only by a computer, which simultaneously receives, analyses and distributes data by way of sending and receiving radio/electrical signals.

[19] So as to match with the system of the cell phone provider, every cell phone contains a circuit board, which is the brain of the phone. It is a combination of several computer chips programmed to convert analog to digital [Analog - Anything analogous to something else.

> Analog computer - A computing machine so designed and constructed as to provide information in terms of physical quantities analogous to those in which the problems are formulated.

> Digital - 1. Of, pertaining to, or like the fingers or digits 2. Digitate. 3. Showing information, such as numerals, by means of electronics : digital watches.

> Digital computer - An electronic computing machine which receives problems and processes the answers in numerical form, especially one using the binary system.
>
> (See "The New International Webster's Comprehensive Dictionary of the English Language", Encyclopedic Edition, 2003 edn., pp. 52 and 358).]
>
> and digital to analog conversion and translation of the outgoing audio signals and incoming signals. This is a micro processor similar to the one generally used in the compact disk of a DeskTop computer. Without the circuit board, cell phone instrument cannot function. Therefore, it is not possible to accept the submission that a cell phone is not a computer. Even by the very definition of the computer and computer network as defined in IT Act, a cell phone is a computer which is programmed to do among others the function of receiving digital audio signals, convert it into analog audio signal and also send analog audio signals in a digital form externally by wireless technology.

[20] The main allegation against the petitioners is that the MIN of Reliance phone is irreversibly integrated with ESN and the petitioners hacked ESN so as to wean away RIM customers to TATA Indicom service. The question is whether the manipulation of this electronic 32-bit number (ESN) programmed into Samsung N191 and LG-2030 cell phone instrument exclusively franchised to second respondent amounts to altering source code used by these computer handsets i.e., cell phone instruments. In the background facts, a question would also arise whether such alteration amounts to hacking with computer system? If the query answered in the affirmative, it is always open to the police to alter the F. I. R., or it is always open to the criminal Court to frame a charge specifically with regard to hacking with computer system, which is an offence under Section 66 of the IT Act. At this stage, we may read Sections 65 and 66 of the IT Act.

> 65. Tampering with computer source documents :- Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law

for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

Explanation.- For the purposes of this, "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

66. Hacking with Computer System :- (1) Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking.

(2) Whoever commits hacking shall be punished with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

[21] The offence of tampering with computer source documents under Section 65 of the IT Act is made out when a person,

(i) intentionally conceals, destroys or alters a computer source code used for a computer, computer programme, computer system or computer network;

(ii) intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network; and

(iii) (a) However, the offence is made out only when computer source code is required to be kept or

(b) when computer source code is maintained by law for the time being in force.

[22] The punishment prescribed by law for the above offence is imprisonment up to

three years or a fine of Rs. 2,00,000/- or both.

[23] What is a computer source code is also defined in the Explanation to Section 65 of IT Act, which reads as under :

> Explanation : For the purposes of this, "computer source code" means the listing of programmes, computer commands, design and layout and programme analysis of computer resource in any form.

[24] By the very definition of 'computer source code,' a) list of programmes; b) computer commands; (c) design and layout and d) programme analysis of computer resource in any form, is a 'computer source code' for the purpose of Section 65 of I.-T. Act. Going by the definition, ESN of Samsung N191 model cell phone handset or ESN of LG-2030 model cell phone handset exclusively used by the second respondent as well as SID of second respondent come within the definition of computer source code. Every cell phone operator is required to obtain SID from the licensor i.e., Government of India. Further, ESN is a permanent part of the phone whereas MIN and SID are programmed into phone when one purchases a service plan and have the phone activity. When a customer of second respondent opts for its services, the MIN and SID are programmed into the handset. If some one manipulates and alters ESN, as per the case of second respondent, Samsung/LG handsets which are exclusively used by them become usable by other service providers like TATA Indicom. Therefore, prima facie, when the ESN is altered, the offence under Section 65 of I.T. Act is attracted because every service provider like second respondent has to maintain its own SID code and also gives a customer specific number to each instrument used to avail the services provided. The submission that as there is no law which requires a computer source code to be maintained, an offence cannot be made out, is devoid of any merit. The disjunctive word "or" is used by the Legislature between the phrases "when the computer source code is required to be kept" and the other phrase "maintained by law for the time being in force" and, therefore, both the situations are different. This Court, however, hastens to add that whether a cell phone operator is maintaining computer source code, is a matter of evidence. So far as this question is concerned, going by the allegations in the complaint, it becomes clear that the second respondent is in fact maintaining the computer source code. If there is allegation against any person including the petitioners, certainly an offence under Section 65 of I.-T. Act is made out. Therefore, the crime registered against the petitioners cannot be quashed with regard to Section 65 of the I.-T. Act.

[25] That takes me to the allegation that the petitioners violated Section 63 of Copyright

Act, 1957. So as to keep pace with the advancement in science and technology especially in the field of communication and data processing, Parliament has amended Copyright Act, 1957 in 1995 bringing within its fold computer programme also as literary work to be protected by Copyright Act.

[26] Section 2(ffb), (fie) and 2(o) of Copy-right Act read as under.

> 2(ffb) "computer" includes any electronic or similar device having information processing capabilities;
>
> 2(ffc) "computer programme" means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result;
>
> 2(o) "literary work" includes computer programmes, tables and compilations including computer databases;

[27] Section 14 defines the copyright as exclusive right subject to provisions of the Copyright Act, to do or authorise the doing of any of the Acts enumerated in respect of the work or substantial part thereof. Section 14(b) of the Copyright Act reads as under :

> 14. Meaning of copyright.- For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely :-
>
> (a) omitted.
>
> (b) in the case of a computer programme,-
>
> (i) to do any of the acts specified in Clause (a); (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme :

Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental;

(c) and (d) omitted.

[28] Therefore, reading Section 2(o), (ffc) and Sections 13 and 14 together, it becomes clear that a computer programme is by very definition original literary work and, therefore, the law protects such copyright. Under Section 63 of the Copyright Act, any infringement of the copyright in a computer programme/source code is punishable. Therefore, prima facie, if a person alters computer programme of another person or another computer company, the same would be infringement of the copyright. Again the entire issue in this regard is subject to the evidence that may be led by the complainant at the time of trial. This Court, however, examined the submission of the learned senior counsel for the petitioners in the background of the provisions of the Copyright Act and observations made herein are not intended to decide the question one way or the other. The trial Court has to deal with these aspects.

[29] As noticed hereinabove, unless and until investigation by the Police into a complaint is shown to be illegal or would result in miscarriage of justice, ordinarily the criminal investigation cannot be quashed. This principle is well settled and is not necessary to burden this judgment with the precedents except making a reference to R.P. Kapoor v. State of Punjab, ; State of Haryana v. Bhajan Lal, 1992 Cri LJ 527 (SC) (supra) and State of Tamil Nadu v. Thirukkural Permal, .

[30] In the result, for the above reasons, Crime No. 20 of 2003 insofar as it is under Sections 409, 420 and 120-B of Indian Penal Code, 1860 is quashed and insofar as the crimes under Section 65 of the Information Technology Act, 2000 and Section 63 of the Copyright Act, 1957, the criminal petitions are dismissed. The C.I.D. Police, which registered Crime No. 20 of 2003, is directed to complete investigation and file a final report before the Metropolitan Magistrate competent to take cognizance of the case within a period of three months from the date of receipt of this order.

[31] The criminal petitions are accordingly dismissed.

When an objection is taken on admissibility of a document. Procedure to be followed by the trial Courts whenever an objection is raised regarding admissibility of any material or any item of oral evidence.

BIPIN SHANTILAL PANCHAL

V/S

STATE OF GUJARAT 2001 AIR(SC) 1158.

SUPREME COURT OF INDIA (FROM GUJARAT) *(D.B.)*

BIPIN SHANTILAL PANCHAL
V/S
STATE OF GUJARAT

Date of Decision: 22 February 2001

Citation: 2001 LawSuit(SC) 332

Hon'ble Judges: R P Sethi, B N Agrawal

Case Type: Miscellaneous Criminal Petition

Case No: 862 of 2001

Subject: Constitution, Criminal

Head Note:

Constitution of India, 1950 - Art 21 - Evidence Act, 1872 - Sec 5,3, - Respondent was detained in prison - He was not bailed out during trial proceedings despite the repeat motion - Trial Court could not proceed fast - high Court has dismissed the application for bail - If the Court finds Magistrate can keep such evidence excluded from consideration there is no illegality in adopting such course - If the objection relates to deficiency of stamp duty of document the Court has to decide objection before proceeding further - Procedure to be followed by the trial Courts whenever an objection is raised regarding admissibility of any material or any item of oral evidence - This Court would not do any thing to deprive the accused in custody of right to move for bail on account of delay thus for occasioned - Held, Bail application would be disposed of by Court concerned on its own merits.

Acts Referred:

Constitution of India Art 21

Code of Criminal Procedure, 1973 Sec 309

Eq. Citations: 2001 (1) EastCriC 295, 2001 (74) ECC 287, 2001 (134) ELT 611, 2001 (1) AllCriR 800, 2001 (3) AllCriR 16, 2001 AllMR(Cri) 452, 2001 CalCriLR 322, 2001 (2) LRI 939, 2001 (1) OrissaLR 428, 2001 (2) PLJR(SC) 132, 2001 CrLR 231, 2001 (1) RajLW 169, 2001 (1) RCR(Cri) 859, 2001 (1) EFR 541, 2001 (2) Scale 167, 2001 SCCriR 492, 2001 (3) GCD 1796, 2001 (3) GLR 168, 2001 (3) GLR 2024, 2001 (1) UC 471, 2001 (1) UJ 573, 2001 (1) JCC 269, 2001 (3) JT 120, 2001 (1) CgLJ 366, 2001 (1) ChandCriC 177, 2001 (2) AD(SC) 305, 2001 AIR(SC) 1158, 2001 AIR(SCW) 841, 2001 (1) ALD(Cri) 548, 2001 (1) ALT(Cri)(SC) 230, 2001 CrLJ 1254, 2001 (1) CurCriR 278, 2001 (2) GLH 545, 2002 (1) LW(Cri) 115, 2001 (3) SCC 1, 2001 SCC(Cri) 417, 2001 (1) SCJ 460, 2001 (2) SCR 29, 2001 (3) SRJ 437, 2001 (2) Supreme 65, 2001 (1) Crimes(SC) 288, 2001 (42) AllCriC 635

Advocates: Mukul Rohatgi, H A Raichura, Saroj H Raichura, Hemantika Wahi, Sunita Hazarika, Ashok Srivastav, B K Prasad, P Parmeswaran

Reference Cases:
Cases Cited in (+): **122**

Judgement Text:-

K T Thomas, J

[1] This is yet another opportunity to inform the trial Courts that despite the procedural trammels and vocational constraints we have reached a stage when no effort shall be spared to speed up trials in the Criminal Courts. It causes anguish to us that in spite of the exhortations made by this Court and a few High Courts, time and again, some of the trial Courts exhibit stark insensitivity to the need for swift action, even in cases where the accused are languishing in prisons for long years as undertrials only on account of the slackness, if not inertia, in accelerating the process during trial stage.

[2] We shall narrate, in a brief manner, as to what happened thus far in the present case though this seems to be one of the rare cases in which an undertrial prisoner has been facing a record time for reaching culmination of the trial proceedings.

[3] The genesis of the proceedings is interception of a consignment at the Air

Warehouse, Mumbai, which was meant for export to Nairobi. The consignment, when opened, was found containing a very huge quantity of Mandrex tablets (Methaqualone). Respondent (Dr. Bipin S. Panchal) was arrested on 8-11-1993 in connection with the aforesaid seizure of narcotic or psychotropic substance. It led to the unearthing of a further huge quantity of Mandrex tablets which, added with the earlier interception, is quantified at about 2000 kgs. The Directorate of Revenue Intelligence, Ahmedabad filed a complaint against certain persons including respondent Bipin S. Panchal, for various offences under the Narcotic Drugs and Psychotropic Substances (N.D.P.S.) Act. The said case is being tried before the Court of Additional City Sessions Judge, Ahmedabad.

[4] Respondent was detained in prison as he was not bailed out during the trial proceedings despite repeated motions made by him. Once in 1994, when respondent approached for bail, this Court directed the trial Court to expedite the trial. Though the evidence taking started on 4-9-1996, the case is still lingering on as the trial persisted thereafter for years. This is in spite of the permission accorded to the trial Court for holding proceedings inside the jail where some of the accused are being interned, as per Sec. 268 of the Code of Criminal Procedure.

[5] For so many reasons the trial Court could not proceed fast, for which the respondent has also contributed substantially. From the records available with us we have perceived that the respondent moved the High Court of Gujarat for bail on the ground that the Court is not closing the trial despite the direction for speeding up the steps. However, the High Court dismissed the application for bail as per a detailed order passed on 29-10-1999. That order was challenged by the respondent before this Court by seeking special leave to appeal.

[6] The said special leave petition was disposed of on 31-3-2000 with the following order :

> As the Special Judge who is trying the case has reported to us that he reasonably expects to close the trial within six months, we dispose of this special leave petition permitting the petitioner to move for bail again in case the trial is not closed within six months.

[7] Even the aforesaid period of six months is over by now, but the culmination of trial is still a far cry. It was in the above back-ground that the present application is made by the Directorate of Revenue Intelligence praying for modification of the order dated 31-3-2000 by extending the period for closing of the trial for a further period of six

months.

[8] We notice that the immediate impact of the order dated 31-3-2000 was a positive response as five witnesses were examined on 3-4-2000 itself. But as the Additional Sessions Judge (Shri A. R. Bhatt) expected his retirement two months, hence he chose to remain in limbo in regard to this case, and hence no progress was made until 10-7-2000 when his successor (Shri B. N. Jain) took up the matter. The successor Judge appears to have determined to close the trial within the time-frame. He, therefore, decided to follow the legislative mandate contained in Sec. 309 of the Code and ordered day-to-day trial for which he made a schedule also.

[9] But the initial alacrity shown by the trial Judge did not last long as the swiftness of the trial was bridled on account of trumpery reasons. The defence Counsel questioned the admissibility of certain documents and raised objections with regard to the same. Though the trial Court disallowed the objections as per an order passed on 24-7-2000 (presumably after hearing both sides at length) the trial Judge adopted a very unwholesome procedure by stopping the trial for a lengthy period, just to enable the defence to take up that order before the High Court. Even though the prosecution brought witnesses to be examined on 8-8-2000, the trial Judge hesitated to examine them, and extended the stay granted by himself and did not choose to take the evidence of those witnesses on the said date. However, the defence failed to challenge the said order and hence the trial proceedings were resuscitated on 16-8-2000.

[10] On that day the defence raised another objection regarding admissibility of another document. The trial Judge heard elaborate arguments thereon and upheld the objection and consequently refused to admit that particular document. What the prosecution did at that stage was to proceed to the High Court against the said order and in the wake of that proceeding respondent filed an application on 9-11-2000, for enlarging him on bail on the strength of the order passed by this Court on 31-3-2000 (extracted above).

[11] We are compelled to say that the trial Judge should have shown more sensitivity by adopting all measures to accelerate the trial procedure in order to reach its finish within the time-frame indicated by this Court in the order dated 31-3-2000 since he knew very well that under his orders an accused is continuing in jail as an undertrial for a record period of more than seven years. Now, we feel that the Additional Judge, whether the present incumbent or his predecessor, was not serious in complying with the directions issued by this Court, though the parties in the case have also contributed their share in by-passing the said direction.

[12] As pointed out earlier, on different occasions the trial Judge has chosen to decide questions of admissibility of documents or other items of evidence, as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. The worse part is that after passing the orders the trial Court waited for days and weeks for the concerned parties to go before the higher Courts for the purpose of challenging such interlocutory orders.

[13] It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fall-out of the above practice is this : Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the Appellate or Revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the trial Court. In such a situation the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves? Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

[14] When so recast, the practice which can be a better substitute is this : Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view, there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document, the Court has to decide the objection before proceeding further. For all other objections, the procedure suggested above can be followed.)

[15] The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses

need not wait for long hours, if not days. Second is that the superior Court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

[16] We, therefore, make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence.

[17] Now, for disposal of the present application we may State that there is no point in our granting further time to the trial Court to complete the trial. It is for the trial Court to complete it as early as possible. But we would not do anything to deprive the accused in custody of his right to move for bail on account of the delay thus far occasioned. The bail application would be disposed of by the Court concerned on its own merits. With the above observations we dispose of this application.

Difference between objection on admissibility of a document and objection on mode of proof. The objections as to admissibility of documents in evidence may be classified into two classes :-

(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and

(ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit,' an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.

R V E VENKATACHALA GOUNDER

V/S

ARULMIGU VISWESARASWAMI AND V P TEMPLE.

2003 AIR(SC) 4548.

SUPREME COURT OF INDIA (FROM MADRAS) *(D.B.)*

R V E VENKATACHALA GOUNDER
V/S
ARULMIGU VISWESARASWAMI AND V P TEMPLE

Date of Decision: 08 October 2003

Citation: 2003 LawSuit(SC) 974

Hon'ble Judges: R C Lahoti, Ashok Bhan

Case Type: Civil Appeal

Case No: 10585 of 1996

Subject: Civil, Constitution, Contract, Society & Trust

Head Note:

CPC -- Section 100 -- title of suit property -- no question of law much less a substantial question of law arose in the case worth being gone into the by the High Court in exercise of its second appellate jurisdiction under Section 100 of the CPC. The High Court was bound by the findings of fact arrived at by the two Courts below and should not have entered into the exercise of re-appreciating and evaluating the evidence. The findings of facts arrived at by the courts below did not suffer from any perversity. There was no non-reading or misreading of the evidence. A high degree of preponderance of probability proving title to the suit property was raised in favour of the appellant and the courts below rightly concluded the burden of proof raised on the plaintiff having been discharged while the onus shifting on the defendant remaining undischarged. The judgment of the High Court cannot be sustained and has to be set aside.

Acts Referred:
Constitution Of India Art 133
Code Of Civil Procedure, 1908 Or 13R 4, Sec 100

Evidence Act, 1872 Sec 32(2), Sec 34, Sec 116, Sec 3

Specific Relief Act, 1963 Sec 34

Tamil Nadu Hindu Religious And Charitable Endowments Act, 1959 Sec 23

Tamil Nadu District Municipalities Act, 1920 Sec 88

Final Decision: Appeal allowed

Eq. Citations: 2003 AIR(SCW) 5316, 2004 (1) ALD(SC) 18, 2004 (1) ARC 137, 2004 (1) CalHN 66, 2004 (1) CivCC 1, 2004 (136) PunLR 612, 2004 (97) CutLT 647, 2003 (2) RCR(Civ) 579, 2003 (4) RCR(Civ) 704, 2003 (4) RCR(Civ) 705, 2003 (8) Scale 474, 2003 (8) SCC 752, 2004 (1) SRJ 425, 2004 (1) ICC 205, 2003 (8) Supreme 193, 2003 (11) IndLD 672, 2003 (4) CCC 299, 2003 AIR(SC) 4548, 2004 (13) AllIndCas 389, 2003 (2) ApexCJ 614, 2004 (2) LJR 595, 2004 (1) LW 728, 2004 (6) JT 442, 2003 (2) RCR(Rent) 579, 2003 (Supp4) SCR 450, 2003 (6) SLT 307, 2005 (61) AllLR 11, 2004 ACJ 204

Advocates: R Nedumaran, Beno Benugar, M F Humayunisa, M A Chinnaswamy, Subramanium Prasad, R Gopala Krishnan, Abhay Kumar

Reference Cases:

Cases Cited in (+): **169**

Cases Referred in (+): **7**

Judgement Text:-

Ashok Bhan, J

[1] Present appeal has been filed against the judgment and decree in Second Appeal No. 316 of 1983, dated 12-4-1996 by the High Court of Judicature at Madras. By the impugned order the High Court has set aside the judgment and decree of the Courts below as a result of which the suit filed by the plaintiff-appellant (hereinafter referred to as 'the appellant') has been ordered to be dismissed.

[2] A brief reference to the pleadings of the parties may be made to appreciate the points raised in this appeal.

[3] Appellant claimed himself to be the owner of the property bearing No. D. No. 40

comprised in T.S. No. 201, Block No. 4, Ward No. 5 in the Municipal City of Tirupur. That M. R. Arunachala Mudaliar, defendant No. 2 (hereinafter referred to as the ' tenant') was inducted as a tenant in the year 1952 by his father at a rent of Rs. 300/- which was enhanced to Rs. 400/- in the year 1965. Arulmigu Visweswaraswamy and Veera-ragava Perumal Temples, defendant No. 1 (hereinafter referred to as the 'temple') also claim ownership to the property. Appellant claimed himself to be a hereditary trustee of the temple. Originally, from 1946-47 till 1959, the property stood recorded in the Municipal register in the name of three persons, namely, K. N. Palanisami Gounder, R. V. Easwaramurthi Gounder and A. Narayaanaswami Gounder. Easwaramurthi Gounder was the father of the appellant. After the death of Easwaramurthi Gounder, father of the appellant, the name of the appellant came to be registered in the Municipal record along with the other two persons. In an oral family partition the property came to the share of the appellant and thereafter the names of K. N. Palanisami Gounder and A. Narayaanaswami Gounder were removed from the Municipal register and the appellant alone came to be recorded as the sole owner of the suit property in the Municipal record. That temple taking advantage of the litigation pending between it and the appellant in respect of the trusteeship of the temple, laid claim to the suit property. Tenant paid rent till 1969 to the appellant and thereafter attorned as a tenant to temple and started paying rent to it. Appellant filed the suit for declaration of title, arrears of rent for three years immediately preceding the filing of the suit and possession of the suit premises.

[4] The temple-defendant No. 1, in its written statement, admitted that the father of the appellant and after his death the appellant has been a trustee of the temple. In 1968 new set of trustees were appointed by the Charity Commissioner and the Executive Officer took charge of the temple. The temple further alleged that the suit property belonged to the temple and the appellant wrongly claimed himself to be the absolute owner of the property. The assessment stood in the name of the appellant as Dharmakartha and not in his individual capacity. From 1969 onwards, tenant began to pay rent to temple and the rate of rent was enhanced from Rs. 42.50 to Rs. 129/- per month. On 19th July, 1975 the tenant executed a lease deed in favour of the temple. That appellant was not entitled to the suit property and was estopped from denying the title of temple. The tenant-defendant No. 2, in his written statement, took the stand that he became the tenant of the suit property under the temple. He admitted that he had been paying rent to the appellant but from the year 1969 onward he started paying rent to the temple. That the claim of the appellant for arrears of rent was not tenable and the suit for declaration and for arrears of rent was not maintainable.

[5] On the pleadings of the parties the trial Court framed three issues, viz., (i) relating to the title of the suit property; (ii) entitlement of the appellant to receive rent, and (iii) entitlement of the appellant to get possession.

[6] By way of oral evidence appellant stepped in the witness-box as P.W. 1. On behalf of the temple, Rajapandian, an employee of the temple, stepped in the witness-box as D.W. 1 and the tenant appeared as his own witness as D.W. 2. By way of documentary evidence appellant produced Exhibit A1 to Exhibit A34 consisting of books of accounts; copies of the Municipal registers; receipts of payment of property tax paid in the Municipal Committee; documents showing collection of rent; Exhibit A-30 dated 14-10-1969 is the order of the Assistant Commissioner, H.R. and C.E. Administrative Department, Coimbatore in which it has been held that the suit property does not belong to the temple. Exhibit A-34 dated 6-7-1970 is a rent agreement executed between the appellant and tenant in respect of the suit property. Documents A-30 and A-34 are the photostat copies of the original; they were admitted in evidence and marked as exhibits without any objection from other side. Temple produced Exhibits B1 to B46 pertaining to receipt of rent from the tenant and payment of property tax to the Municipal Committee after the year 1969.

[7] Trial Court relying upon the oral as well as documentary evidence held that the appellant was the owner of the property and that respondent No. 2 was the tenant of the appellant. Appellant was held to be the owner and entitled to recover the possession as well as the arrears of rent for three years immediately preceding the filing of the suit. Temple filed an appeal before the District Judge, Coimbatore which was dismissed. Aggrieved temple filed the second appeal in the High Court. High Court reversed the judgment and decree of the Courts below and held that no reliance could be placed upon the documentary evidence. The books of accounts produced by the appellant were not kept in regular course of business and, therefore, no reliance could be placed on them. Entry made of property in the Municipal records in the name of a person was not evidence of the title of that person to the property. That the Courts below erred in admitting Exhibits A-30 and A-34 in evidence as these were photostat copies. Documents being photostat copies could not be admitted in evidence without producing the originals. That Exhibit A-34 was not even readable.

[8] Learned counsel for the parties have been heard at length.

[9] While entertaining the second appeal the High Court framed the following three questions as substantial questions of law as arising for its consideration.

"1. Whether a person who has been in possession of the temple as an hereditary trustee can claim title to one of the items of the property belonging to the temple as his own?

2. Whether the certificate issued by the Assistant Commissioner, Hindu Religious and Charitable Endowments is conclusive as the question of title to the immovable properties belonging to the temple?

3. Whether the right of a temple can be negatived on the mere strength of the assessment register standing in the name of the plaintiff-respondent or any other person?"

(Emphasis supplied)

[10] All the three questions framed proceed on the assumption as if the property belongs to the temple whereas the findings of the Courts below were to the contrary. Second appeal in the High Court can be entertained only on substantial questions of law and not otherwise. The point in issue was as to whom the property belongs. Instead of proceeding to decide the issues arising in the suit the High Court assumed second appellate jurisdiction by erroneously assuming the fact that property belongs to the temple while framing the substantial questions of law. High Court seems to have unwitting fallen into a serious error in doing so. As to whether the appellant or the temple had the title to the property in suit was the question to be determined in the case and the High Court erred in assuming and proceeding on an assumption that the property belonged to the temple. The questions framed by the High Court did not arise as substantial questions of law based on the findings recorded by the Courts below concurrently in this case. In our opinion, the High Courts' judgment deserves to be set aside on this short ground and the case remitted back to the High Court for decision afresh and in accordance with the law, after re-framing only such substantial questions of law, if any, as do arise in the appeal. But since the suit was filed in the year 1978 and the parties have been in litigation for the last 25 years, we are refraining from remitting the case back to the High Court for redecision on merits.

[11] Onus to prove title of the property undoubtedly is on the person asserting title to the property. Appellant produced Ledger Books A9, A11, A13, A15, A17, A19, A21, A23, A25 and A27 for the years 1952, 1953, 1954, 1955, 1957, 1958, 1959, 1960, 1962 and

1964 respectively maintained by the father of the appellant up to 1959 and thereafter by him. Exhibits A10, A12, A14, A16, A18, A20, A22, A24, A26 and A28 are the entries of receipt of rent from tenant made at pages 158, 81,57, 92, 115, 137, 180, 16, 171 and 139 of Ledger Books marked A9, A11, A13, A15, A17, A19, A21, A23, A25 and A27 respectively. In his statement in Court, appellant stated that the ledgers were maintained properly and were submitted to the income-tax authorities. The Ledger Books bear the seal of the department of income-tax. That the books were maintained by his father till 1959 and after his death the appellant has maintained the ledgers. Courts below accepted that the books were maintained in regular course of business but the High Court ruled out the ledger accounts from consideration on the ground that day books supporting the ledger entries were not produced. That the person who made the entries in the ledger books was not produced which caused a doubt as to whether the books were kept in due course or not. We do not agree with the finding recorded by the High Court. On a perusal of the statement of the appellant and the books of accounts it becomes abundantly clear that the accounts were duly maintained by the father of the appellant till 1959 and thereafter by the appellant for every year separately and were submitted to the department of income-tax with annual returns. The books bear the seal of the income-tax department. These facts deposed to by the appellant under oath were not even challenged in cross-examination. No question was asked from the appellant to the effect that the books were not maintained by him or by his father properly. No questions were asked from him in cross-examination about the authenticity of the books or the entries made therein. In the ledger, for each year, there is an entry regarding receipt of rent. In our view, the books were maintained properly and regularly and there is no reason to doubt their veracity.

[12] Section 34 of the Evidence Act declares relevant the entries in books of account regularly kept in the course of business whenever they refer to a matter into which the Court has to enquire. When such entries are shown to have been made in the hands of a maker who is dead, the applicability of Cl. (2) of S. 32 of the Evidence Act is attracted according to which the statement made by a dead person in the ordinary course of business and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business etc. is by itself relevant. The maker of the entry is not obviously available to depose incorporation of the entry. In a given case, depending on the facts and circumstances brought on record, the Court of facts may still refuse to act on the entry in the absence of some corroboration. In the present case the Courts of fact, subordinate to High Court, have not felt the need of any further corroboration before acting upon the entries in the ledger books made by the deceased-

father of the appellant. So far as the entries made by the appellant are concerned, he has deposed to making of the entries and corroborated the same by his own statement. The appellant has been believed by the trial Court and the first appellate Court and his statement has been found to be enough corroboration of the entries made by him. Here again no such question of law arose as would enable the High Court to reverse that finding. The entries amply prove that for a length of time, up to the year 1959 the appellant'-deceased-father, and then the appellant, was collecting the rent of the suit property claiming to be the landlord from the defendant No. 2 inducted as tenant by them. They were in possession of the property through their tenant, the defendant No. 2.

[13] We are definitely of the opinion that the High Court has erred in ruling out the books from consideration on the ground that the same were not duly maintained or were not proved in the absence of the maker having stepped in the witness-box.

[14] A2 is the extract of Property Tax Demand Register. A3 is the receipt of payment of property tax by the appellant to the Municipal Committee. The name of the appellant is entered in ownership column of Municipal record. Earlier the entries were in the name of his father, K. N Palanisami Gounder and A. Narayaanaswami Gounder. A31 is the letter/notice issued by the Commissioner, Tirupur Municipality to the appellant in the complaint filed by one Subramaniam Tirupur under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as 'the Act'). A32 is the reply filed by the appellant to the said notice. A33 is the postal acknowledgment signed by the Commissioner of the receipt of the reply sent by the appellant. A30 is the photo copy of the order passed by Assistant Commissioner H.R. and C.E. (Admn.) Department, Coimbatore in exercise of its jurisdiction under S. 63 of the Act in which it has been held that temple is not the owner of the property in dispute. A34 is the photo copy of the rent agreement executed between the appellant and the tenant-respondent No. 2. The said rent note has also been attested as witness by the Executive Officer of the Municipal Committee. Tenant while appearing as D.W. 2 admitted having signed rent note. Exhibit A34 in favour of the appellant.

[15] The High Court has, by entering into the question of admissibility in evidence of the abovesaid two very material pieces of documentary evidence which were admitted in evidence without any objection when they were tendered in evidence and taken into consideration by the two Courts below while evaluating evidence and recording findings of facts, excluded the documents from consideration. Was it permissible for the High Court to do so?

[16] One document A30 is the photocopy of a certified copy of the decision given by Charity Commissioner. This document was tendered in evidence and marked as an exhibit without any objection by the defendants when this was done. The plaintiff has in his statement deposed and made it clear that the certified copy, though available, was placed on the record of another legal proceedings and, therefore, in the present proceedings he was tendering the photocopy. There is no challenge to this part of the statement of the plaintiff. If only the tendering of the photocopy would have been objected to by the defendant, the plaintiff would have been and there sought for the leave of the Court either for tendering in evidence a certified copy freshly obtained or else would have summoned the record of the other legal proceedings with the certified copy available on record for the perusal of the Court. It is not disputed that the order of Charity Commissioner is a public document admissible in evidence without formal proof and certified copy of the document is admissible in evidence for the purpose of proving the existence and contents of the original. An order of Charity Commissioner is not per se the evidence of title inasmuch as the Charity Commissioner is not under the law competent to adjudicate upon questions of title relating to immovable property which determination lies within the domain of a Civil Court. However, still the order has relevance as evidence to show that the property forming subject-matter of the order of the Charity Commissioner was claimed by the temple to be its property but the temple failed in proving its claim. If only the claimant temple would have succeeded, the item of the property would have been directed by the Charity Commissioner to be entered into records as property of the charity, i.e. the temple, which finding and the entry so made, unless dislodged, would have achieved a finality. On the contrary, the appellant herein, who claimed the property to be his and not belonging to the charity, succeeded in the claim asserted by him.

[17] The other document is the rent note executed by defendant No. 2 in favour of plaintiff. Here also photocopy of the rent note was produced. The defendant No. 2 when in witness-box was confronted with this document and he admitted to have executed this document in favour of the plaintiff and also admitted the existence of his signature on the document. It is nobody' case that the original rent note was not admissible in evidence. However, secondary evidence was allowed to be adduced without any objection and even in the absence of a foundation for admitting secondary evidence having been laid by the plaintiff.

[18] The abovesaid facts have been stated by us in somewhat such details as would have been otherwise unnecessary, only for the purpose of demonstrating that the

objection raised by the defendant-appellant before the High Court related not to the admissibility of the documentary evidence but to the mode and method of proof thereof.

[19] Order 13, R. 4 of the C.P.C. provides for every document admitted in evidence in the suit being endorsed by or on behalf of the Court, which endorsement signed or initiated by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced.

[20] The learned counsel for the defendant-respondent has relied on the Roman Catholic Mission v. State of Madras and another, AIR 1966 SC 1457 in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes :- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit,' an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the Court to apply its mind and pronounce its decision on the

question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

[21] Privy Council in Padman and others v. Hanwanta and others (AIR 1915 PC 111) did not permit the appellant to take objection to the admissibility of a registered copy of a Will in appeal for the first time. It was held that this objection should have been taken in the trial Court. It was observed:

> "The defendants have now appeal to the Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the Will of 1898 was admitted in evidence without sufficient foundation being led for its admission. No objection, however, appears to have been taken in the first Court against the copy obtained from the Registrar' office being put in evidence. Had such objection being made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention."

[22] Similar is the view expressed by this Court in P. C. Purushothama Reddiar v. S. Perumal (1972 (2) SCR 646). In this case the police reports were admitted in evidence without any objection and the objection was sought to be taken in appeal regarding the admissibility of the reports. Rejecting the contention it was observed :

> "Before leaving this case it is necessary to refer to one of the contention taken by Mr. Ramamurthi, learned counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility - see Bhagat Ram

v. Khetu Ram and another (AIR 1929 PC 110)."

[23] Since documents A30 and A34 were admitted in evidence without any objection, the High Court erred in holding that these documents were inadmissible being photo copies, the originals of which were not produced.

[24] So is the observation of the High Court that the photocopy of the rent note was not readable. The photocopy was admitted in evidence, as already stated. It was read by the trial Court as also by the first appellate Court. None of the said two Courts appear to have felt any difficulty in reading the document and understanding and appreciating its contents. May be, that the copy had fainted by the time the matter came up for hearing before the High Court. The High Court if it felt any difficulty in comfortable reading of the document then should have said so at the time of hearing and afforded the parties an opportunity of either producing the original or a readable copy of the document. Nothing such was done. The High Court has not even doubted the factum of the contents of the document having been read by the two Courts below, drawn deductions therefrom and based their finding of fact on this document as well. All that the High Court has said is that the document was inadmissible in evidence being a photocopy and with that view we have already expressed our disagreement. Nothing, therefore, turns on the observation of the High Court that the document was not readable when the matter came up for hearing before it.

[25] Exhibit A34 is a decision of the Deputy Commissioner in exercise of his jurisdiction under the Act. He has recorded a finding that the temple is not the owner of the property in dispute. This decision has become final between the parties. This document has relevance at least to the extent that the temple was held by Charity Commissioner to be not the owner of the property. Consequence of this would be that the attornment by the tenant in favour of temple during the continuance of tenancy in favour of the appellant was not valid. The defendant No. 2 had attorned as a tenant to temple treating the latter to be the owner which it could not do as he was inducted as tenant by the appellant and the estoppel flowing from S. 116 of the Evidence Act operated against him.

[26] From the other documents produced by the appellant i.e. the account books and Exhibit A34 rent note, it is proved that tenant had always been treating the appellant as landlord and paying rent to him. Only after 1969 tenant started paying rent to the temple treating it to be the landlord. In the property tax register the appellant and prior to that his predecessors have been shown to be the owners. An entry in the Municipal record is

not evidence of title. The entry shows the person who was held liable to pay the rates and taxes to the Municipality. The entry may also, depending on the scope of the provision contemplating such entry, constitute evidence of the person recorded being in possession of the property. Such entries spread over a number of years go to show that the person entered into the records was paying the tax relating to the property and was being acknowledged by the local authority as the person liable to pay the taxes. If the property belonged to the temple, there is no reason why the temple would not have taken steps for having its own name mutated into the Municipal records and commencing payment of taxes or claimed exemption from payment of taxes if the charity was entitled under the law to exemption from payment of taxes. Temple has not been able to produce any evidence oral or documentary to prove its title to the property. Only because tenant attorned to the temple and started paying rent to the temple in 1969 or that the temple paid the property tax to the Municipal Committee after 1969 does not establish its title to the property in question. These documents are not of much evidentiary value as these documents came in existence after the dispute had arisen between the parties. In the absence of any other lawful claimant the appellant on the strength of the documents produced by was rightly held to be the owner by the Courts below the High Court. Attornment by the tenant in favour of the temple was also rightly held to be invalid. The appellant, in our opinion, would be entitled to recover possession well as the arrears of rent.

[27] The High Court has, for the purpose of non-suiting the plaintiff, placed reliance on Brahma Nand Puri v. Neki Pur since deceased represented by Mathra Puri and another, AIR 1965 SC 1506, wherein it has been held that in a suit for ejectment the plaintiff has to succeed or fail on the title he establishes and if he cannot succeed on the strength of his title his suit must fail notwithstanding that the defendant in possession has no title to the property. The law has been correctly stated and the High Court rightly felt bound to follow the law as laid down by this Court. However, the question is one of applicability of the law so stated by this Court.

[28] Whether a civil or a criminal case, the anvil for testing of 'proved,' 'disproved' and 'not proved,' as defined in S. 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be 'proved' when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by applicability of the rule, which makes the difference. "The probative effects of evidence in civil and criminal cases are not however always the same and it

has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision : but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (BEST, S. 95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See Sarkar on Evidence, 15th Edition, pp. 58-59). In the words of Denning, LJ (Bater v. B, 1950 2 All ER 458, 459). "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability." Agreeing with this statement of law, Hodson, LJ said "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (Hornal v. Neuberger P. Ltd., 1956 (3) All ER 970, 977).

[29] In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored with him. However, as held in A. Raghavamma and another v. Chenchamma and another, AIR 1964 SC 136, there is an essential distinction between burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff' title.

[30] In the present case, the trial Court and the first appellate Court have noted that the plaintiff has not been able to produce any deed of title directly lending support to his claim for title and at the same time the defendant too has no proof of his title much less even an insignia of title. Being a civil case, the plaintiff cannot be expected to proof his title beyond any reasonable doubt; a high degree of probability lending assurance of the availability of title with him would be enough to shift the onus on the defendant and if the

defendant does not succeed in shifting back the onus, the plaintiff' burden of proof can safely be deemed to have been discharged. In the opinion of the two Courts below, the plaintiff had succeeded in shifting the onus on the defendant and, therefore, the burden of proof which lay on the plaintiff had stood discharged. The High Court, in exercise of its limited jurisdiction under S. 100 of C.P.C. ought not to have entered into the evaluation of evidence afresh. The High Court has interfered with a pure and simple finding of fact based on appreciation of oral and documentary evidence which the High Court ought not to have done.

[31] The suit property, which is a shop, is situated just adjoining the property owned by the temple. It has come in the evidence that the property which is now owned by the temple was at one time owned by the forefathers of the plaintiff and they made an endowment in favour of the temple. The father of the plaintiff, and then the plaintiff, continued to be the trustees. The trouble erupted when in the late sixties the Charity Commissioner appointed other trustees and Chief Executive Officer of the trust dislodging the plaintiff from trusteeship. The plaintiff staked his claim to trusteeship of the temple submitting that the office of the trustee of the temple was hereditary and belonged to the plaintiff. The plaintiff was managing the trust property as trustee while the property adjoining to the property of the temple, i.e. the suit property, was in possession of the plaintiff as owner occupied by the tenant, the defendant No. 2, inducted as such by the father of the plaintiff. At the instance of the Chief Executive Officer of the trust, the defendant No. 2, during the continuance of the tenancy in favour of the plaintiff, executed a rent note in favour of the temple attorning the latter as his landlord. This the defendant No. 2 could not have done in view of the rule of estoppel as contained in S. 116 of the Evidence Act. It was at the instance of the newly appointed trustees and the Chief Executive Officer who on behalf of the temple started claiming the suit property in occupation of the tenant, defendant No. 2, to be trust property belonging to the temple. But for this subsequent development the title of the plaintiff to the suit property would not have been in jeopardy and there would have been no occasion to file the present case.

[32] The learned counsel for the temple, defendant-respondent No. 1, faintly urged that the appellant being a trustee of the temple was trying to misappropriate the property belonging to the temple. For such an insinuation there is neither any averment in the written statement nor any evidence laid. Such a submission made during the course of hearing has been noted by us only to be summarily rejected. We have already held that the appellant is the owner of the suit property entitled to its possession and recovery of arrears of rent from the defendant No. 2.

[33] The offshoot of the above discussion is that no question of law much less a substantial question of law arose in the case worth being gone into the by the High Court in exercise of its second appellate jurisdiction under S. 100 of the C.P.C. The High Court was bound by the findings of fact arrived at by the two Courts below and should not have entered into the exercise of re-appreciating and evaluating the evidence. The findings of facts arrived at by the Courts below did not suffer from any perversity. There was no non-reading or misreading of the evidence. A high degree of preponderance of probability proving title to the suit property was raised in favour of the appellant and the Courts below rightly concluded the burden of proof raised on the plaintiff having been discharged while the onus shifting on the defendant remaining undischarged. The judgment of the High Court cannot be sustained and has to be set aside.

[34] For the reasons stated above, the appeal is accepted. Judgment and decree of the High Court is set aside and that of the trial Court as confirmed by the first appellate Court is restored. No costs.

Appeal allowed.

Another ruling of Apex Court.

STATE THROUGH SPECIAL CELL, NEW DELHI

V/S

NAVJOT SANDHU @ AFSHAN GURU. 2003 (6) SCC 641.

SUPREME COURT OF INDIA *(D.B.)*

STATE THROUGH SPECIAL CELL, NEW DELHI
V/S
NAVJOT SANDHU @ AFSHAN GURU

Date of Decision: 09 May 2003

Citation: 2003 LawSuit(SC) 574

Hon'ble Judges: S N Variava, Brijesh Kumar

Case Type: Criminal Appeal

Case No: 725 to 728 of 2003

Subject: Constitution, Criminal

Head Note:

Prevention of Terrorism Act, 2002 (POTA) -- Section 34 -- Parliament attack case -- respondents applied before Special Judge seeking a direction that the intercepted conversation not be used as evidence in the trial for proving the charge/s under POTA -- the Special Judge held that the provisions of POTA had to be followed only if the investigation was done under the provisions of the POTA -- resulted in a peculiar situation where two judges of the High Court, hearing the statutory appeal under Section 34, POTA, may be precluded from deciding an important point of law by an order passed by a Single Judge of the High Court -- since a plain reading of Section 34 shows that no appeal would lie against an interlocutory order -- held neither the power under Article 227 nor the power under Section 482 enabled the High Court to correct an error in interpretation even if the High Court felt that the order dated 11th July 2002 was erroneous. Even if the High Court did not agree with the correctness of that order, the High Court should have refused to interfere as the order could be corrected in the appeal under Section 34, POTA. To be remembered that by the time the impugned

order was passed the evidence had already been recorded. Thus there was no abuse of process of Court which could now be prevented. Even the end of justice did not require interference at this stage. In fact the ends of justice required that the statutory intent of Section 34, POTA be given effect to -- appeals allowed.

Acts Referred:

Constitution of India Art 227

Code of Criminal Procedure, 1973 Sec 482, Sec 397, Sec 309

Prevention of Terrorism Act, 2002 Sec 34, Sec 45

Final Decision: Appeal allowed

Eq. Citations: 2003 (104) DLT 64, 2003 (2) RCR(Cri) 860, 2003 (4) Scale 629, 2003 (6) SCC 641, 2004 (1) GLR 570, 2003 (4) Supreme 133, 2003 (2) UJ 1233, 2003 (4) JT 605, 2003 SCC(Cri) 1545, 2003 (Supp1) SCR 130, 2003 (2) Crimes(SC) 483

Advocates: Gopal Subramaniam, Dayan Krishnan, Siddharth Agrawal, Mukta Gupta, D S Mahra, Rajeev Dhavan, Nikhil Nayyar, Nitya Ramakrishnan, Anitha Shenoy, Sanjay Parikh

Reference Cases:

Cases Cited in (+): **139**

Cases Referred in (+): **22**

Judgement Text:-

S N Variava, J

[1] Leave granted.

[2] Heard parties.

[3] Briefly stated, the facts are as follows :

> On 13-12-2001 five terrorists attacked the Parliament of India. After an encounter with the security forces, the five terrorists were shot dead. A F.I.R. was lodged by the Station House Officer, Police Station, Parliament Street. A case under Secs. 120, 120-B, 121, 121-A, 122, 124, 186, 332, 353, 302 and

307 I.P.C., Secs. 3, 4 and 5 of the Explosive Substances Act and Secs. 25 and 27 of the Arms Act was registered. Investigation was then initiated, From the slain terrorists apart from arms, ammunitions and other items, three mobile phones, six S.I.M. cards and slips of paper containing five mobile telephone numbers and other two telephone numbers were recovered. It is the case of the prosecution that due to urgency, authorisation to intercept was granted by the Joint Director of Intelligence Bureau, who was associated with the investigation. It is the case of the prosecution that this authorisation was as per the provisions of the Telegraph Act i.e., Sec. 5 of the Telegraph Act read with Rule 419-A. It is the case of the prosecution that the interception disclosed the involvement of the respondents in the conspiracy to attack the Parliament of India. It is the case of the prosecution that as a result of the interceptions and the interrogation of the respondents, it was disclosed that the slain terrorists and the respondents were in touch with one Ghazi Baba, who is a Pakistani national and the Supreme Commander of Jaish-e-Mohammed which is a notified and banned terrorist organisation under Sec. 18 of the Prevention of Terrorism Act, 2002 and the schedule thereto (the Prevention of Terrorism Act will hereinafter be referred to as P.O.T.A.). It is the case of the prosecution that after the investigating officers had, in the course of the investigation, collected the relevant and cogent material it was found that a case under P.O.T.A. was made out. It is the case of the prosecution that relevant Sections of P.O.T.A. were added on 19-12-2001 only after it was ensured that offences under P.O.T.A. were made out. It is the case of prosecution that this was done in view of the well-established law laid down by this Court, in the context of T.A.D.A., that there must be due application of mind and cogent material before the special rigorous regime is added. It is the case of the prosecution that on 31-12-2002 the Home Secretary approved the interception.

[4] It is the case of the prosecution that after the investigation was completed the charge-sheet was filed on 14-5-2002. It is the case of the prosecution that copy of the transcripts of the intercepted conversation were given to the accused along with the charge-sheet. On 8-7-2002 the respondents applied before the Special Judge seeking a direction that the intercepted conversation not be used as evidence in the trial for proving the charge(s) under P.O.T.A.. The procedure which the Special Judge should have followed is as laid down by this Court in the case of Bipin Shantilal Panchal v. State of Gujarat, 2001 (3) GLR 2024 (SC) : 2001 (3) SCC 1 : 2001 SCC (Cri.) 417. In

this case, it has been held as follows :

"12. As pointed out earlier, on different occasions the trial Judge has chosen to decide questions of admissibility of documents or other items of evidence, as and when objections thereto were raised and then detailed orders were passed either upholding or overruling such objections. The worse part is that after passing the orders the trial Court waited for days and weeks for the parties concerned to go before the higher Courts for the purpose of challenging such interlocutory orders.

13. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But the fallout of the above practice is this : Suppose the trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional Court, when the same question is reconvened, could take a different view on the admissibility of that material in such cases the appellate Court would be deprived of the benefit of the evidence, because that was not put on record by the trial Court. In such a situation, the higher Court may have to send the case back to the trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be re-cast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so re-cast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an Exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make

it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections, the procedure suggested above can be followed).

15. The above procedure, if followed, will have two advantages. First is that the time in the trial Court, during evidence-taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial Court, can determine the correctness of the view taken by the trial Court, can determine the correctness of the view taken by the trial Court regarding that objection, without bothering to remit the case to the trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

16. We, therefore, make the above as a procedure to be followed by the trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence."

Had the Special Judge followed the above dictum no prejudice would have been caused to the respondents inasmuch as their arguments/objections would have been decided at the stage of final hearing. If the Court was in their favour the evidence could have been eschewed and not considered. Any decision given at that stage could then have been challenged in the appeal under Sec. 34 P.O.T.A.. Ignoring the above dictum the Special Judge chose to hear detailed arguments and by his order dated 11-7-2002, dismissed the applications. The Special Judge held that the evidence collected by various police officials when the case was registered under different provisions of law cannot be washed away merely because the provisions of P.O.T.A. were added on 19-12-2001. The Special Judge held that the provisions of P.O.T.A. had to be followed only if the investigation was done under the provisions of P.O.T.A. By dictating an order and passing the interlocutory order the Special Judge enable the respondents to adopt the course that they have. This has resulted in a peculiar situation where two

Judges of the High Court, hearing the statutory appeal under Sec. 34 P.O.T.A., may be precluded from deciding an important point of law by an order passed by a single Judge of the High Court.

[5] Thereafter, the trial proceeded. The evidence was recorded/taken.

[6] The respondent Ms. Navjot Sandhu filed Criminal Writ Petition No. 774 of 2002. On 22-7-2002 the following order was passed therein :

"Learned Counsel for the petitioner wishes to withdraw this petition in order to take appropriate action in accordance with law. Leave as prayed for is granted.

Cri. W. No. 774 of 2002 and Cri. M. No. 588 of 2002 are accordingly disposed of."

[7] Respondent Ms. Navjot Sandhu then filed Misc. Criminal No. 2331 of 2002 under Sec. 482 of the Criminal Procedure Code read with Arts. 226 and 227 of the Constitution of India seeking quashing of the order dated 11-7-2002 of the Special Judge.

[8] Respondent Syed Abdul Rehman Geelani filed criminal appeal, the title of which reads as under :

"IN THE HIGH COURT OF DELHI AT NEW DELHI

Criminal Appeal No... of 2002

In the matter of :

Syed Abdul Rehman Geelani,

S/o. Syed Abdul Wali Geelani

R/o 535, IInd Floor,

Mukherjee Nagar, Delhi ....Appellant/accused

Versus

State (N.C.T. of Delhi)

In the matter of : F.I.R. No. 417 of 2002 under Secs. 3/4/5 P.O.T.A., 2002 read with Secs. 120-B/121/121-A/122 I.P.C., and Secs. 3/5 of the Explosive Substances Act PS : Parliament Street

Pending before the Court of Shri S. N. Dhingra, Special Judge (P.O.T.A.), New Delhi

Next date of hearing : 25-7-2002

Appeal, under Sec. 34 of the Prevention of Terrorism Act, 2002 read with Sec. 482 of the Code of Criminal Procedure against the order dated 11-7-2002, whereby the application made on behalf of appellant/accused for eschewing/exclusion of evidence relating to alleged intercepted communication was dismissed."

The affidavit in support of the appeal, inter alia, reads as follows :

"2. That the accompanying memorandum of appeal has been drafted by the Counsel under my instructions. I have read and understood the contents thereof and the same are true and correct to my knowledge."

Thus, respondent Geelani had not invoked Art. 227 of the Constitution of India. He had filed an appeal under Sec. 34 P.O.T.A. against the order dated 11-7-2002. As Sec. 482 of the Criminal Procedure Code was invoked the petition was numbered as a miscellaneous criminal petition and was placed

before a single Judge of the High Court. It nevertheless remained an appeal under Sec. 34 P.O.T.A.

[9] It would be appropriate to set out, at this stage Sec. 34 P.O.T.A.. It reads as follows :

"34. (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

Explanation : For the purposes of this Section, 'High Court' means a High Court within whose jurisdiction, a Special Court which passed the judgment, sentence or order, is situated.

(2) Every appeal under sub-sec. (1) shall be heard by a Bench of two Judges of the High Court.

(3) Except as aforesaid, no appeal or revision shall lie to any Court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-sec. (3) Sec. 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this Section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from :

Provided that High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days."

A plain reading of Sec. 34 shows that no appeal would lie against an interlocutory order. It could not be denied that the order dated 11-7-2002 was an interlocutory order. It must also be noted that the appeal must be

heard by a Bench of two Judges of the High Court.

[10] It must be mentioned that respondent Shaukat Hussain had also filed Misc. Criminal Application No. 2484 of 2002 praying that the order dated 11-7-2002 be quashed.

[11] By the impugned judgment the High Court has disposed of all the above petitions/applications. The High Court has not mentioned whether it was exercising its power of superintendence under Art. 227 of the Constitution of India or its inherent power under Sec. 482 of the Criminal Procedure Code. The question thus arises as to what power or jurisdiction the High Court has exercised. The only source of power which might have been used/invoked was either under Art. 227 of the Constitution of India or the inherent power under Sec. 482 of the Criminal Procedure Code. The further question which then arises is whether, on the facts of this case, the High Court could or should have exercised power under Art. 227 or jurisdiction under Sec. 482.

[12] For a consideration of these questions it is first necessary to note the stage at which the trial was when the impugned judgment was delivered. This is best indicated by reproducing herein a relevant Paragraph from the impugned judgment. The Paragraph reads as follows :

> "I am told that in the meantime the prosecution evidence has been completed and the trial of the case is at its fag end. Therefore, it will be appropriate that this Court restricts the decision on the legal points which are absolutely necessary to decide leaving all other objections raised in these petitions to be canvassed before the trial Court for consideration at the time of the final decision."

[13] As is being set out hereafter there is no legal point which was "absolutely necessary" to be decided at that stage.

[14] Mr. Shanti Bhushan submitted that the High Court had exercised power under Art. 227 of the Constitution of India. As stated above, the High Court does not state that it is exercising power of superintendence under Art. 227 of the Constitution of India. To be remembered that respondent Geelani had not invoked Art. 227 of the Constitution of India. Thus, Dr. Dhavan submitted that the order was passed in exercise of inherent jurisdiction under Sec. 482 of the Criminal Procedure Code. The impugned order is a

common order passed in all the applications/petitions. It, therefore, follows that the impugned order cannot be in exercise of the power of superintendence under Art. 227 of the Constitution of India. For this reason, it is difficult to accept the submission of Mr. Shanti Bhushan that the order is under Art. 227 of the Constitution of India.

[15] We, however, are not required to go into the controversy whether the impugned order is under Art. 227 of the Constitution of India or passed in exercise of inherent jurisdiction under Sec. 482 of the Criminal Procedure Code. It appears to us that, on facts of this case, neither the power under Art. 227 of the Constitution of India nor inherent jurisdiction under Sec. 482 of the Criminal Procedure Code should have been exercised, even if such powers were available.

[16] The law on the subject is clear. It is now necessary to look at the law.

[17] In the case of State of Gujarat v. Vakhatsinghji Vajesinghji Vaghela, 1969 GLR 48 (SC) : AIR 1968 SC 1481 : 1968 (3) SCR 692 it is held that Art. 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. It is held that this jurisdiction cannot be limited or fettered by any act of the State Legislature. It is held that the supervisory jurisdiction extends to keeping the subordinate Tribunals within the limits of the authority and to seeing that they obey the law.

[18] In the case of Madhu Limaye v. State of Maharashtra, 1977 (4) SCC 551 : 1978 SCC (Cri.) 10 : AIR 1978 SC 47, the question was whether the High Court can exercise its inherent power under Sec. 482 of the Criminal Procedure Code to quash an interlocutory order. In this judgment the provision of Sec. 397(2) of the Criminal Procedure Code, which barred a revision against an interlocutory order, was also considered. It was held that the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding is to bring about expeditious disposal of cases finally. It was held that more often than not the revisional power of the High Court was resorted to in relation to intelocutory orders for delaying the final disposal of the proceeding. It was held that the legislature in its wisdom decided to check this delay by introducing Sec. 397(2). It was held that Sec. 482 provided that "Nothing in this Code" shall be deemed to limit or affect the inherent powers of the High Court. It was held that the term "Nothing in the Code" would include Sec. 397(2). It was held that Sec. 397(2) could not prevent the High Court from exercising its inherent powers under Sec. 482. It was held that in exercising power under Sec. 482 the High Court must adhere to the following principles viz. (a) that the

power is not to be resorted to if there is a specific provision in the Code for redress of grievance of the aggrieved party; (b) that it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the end of justice; (c) that it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

[19] In the case of Jagir Singh v. Ranbir Singh, 1979 (1) SCC 560 : 1979 SCC (Cri.) 348, it is held as follows :

> "6. If the revision application to the High Court could not be maintained under the provisions of the Criminal Procedure Code, could the order of the High Court be sustained under Art. 227 of the Constitution, as now suggested by the respondent? In the first place the High Court did not purport to exercise its power of superintendence under Art. 227. The power under Art. 227 is a discretionary power and it is difficult to attribute to the order of the High Court such a source of power when the High Court itself did not, in terms, purport to exercise any such discretionary power. In the second place the power of judicial superintendence under Art. 227 could only be exercised sparingly, to keep subordinate Courts and Tribunals within the bounds of their authority and not to correct mere errors. Where the statute banned the exercise of revisional powers by the High Court, it would indeed require very exceptional circumstances to warrant interference under Art. 227 of the Constitution since the power of superintendence was not meant to circumvent statutory law."

[20] In the case of Krishnan v. Krishnaveni, 1997 (4) SCC 241 : 1997 SCC (Cri.) 544 it is held that even though a second revision to the High Court is prohibited by Sec. 397(3) of the Criminal Procedure Code, the inherent power is still available under Sec. 482 of the Criminal Procedure Code. It was held that the object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. It is held that the recent trend is to delay the trial and threaten the witnesses or to win over even the witnesses by promise or inducement. It is held that these malpractices need to be curbed and that public justice can be ensured only if trial is allowed to be conducted expenditiously. It is held that even though the power under Sec. 482 is very wide it must be exercised sparingly and cautiously and only to prevent abuse of process or miscarriage of justice.

[21] In the case of Pepsi Foods Ltd. v. Special Judicial Magistrate, 1998 (5) SCC 749 :

1998 SCC (Cri.) 1400 it has been held as follows :

> "21. The questions which arise for consideration are if in the circumstances of the case, the appellants rightly approached the High Court under Arts. 226 and 227 of the Constitution and if so, was the High Court justified in refusing to grant any relief to the appellants because of the view which it took of the law and the facts of the case. We have, thus, to examine the power of the High Court under Arts. 226 and 227 of the Constitution and Sec. 482 of the Code.

[22] It is settled that the High Court can exercise its power of judicial review in criminal matters. In State of Haryana v. Bhajan Lal, 1992 Supp. (1) SCC 335 : 1992 SCC (Cri.) 426 this Court examined the extraordinary power under Art. 226 of the Constitution and also the inherent powers under Sec. 482 of the Code which it said could be exercised by the High Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. While laying down certain guidelines where the Court will exercise jurisdiction under these provisions, it was also stated that these guidelines could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case, but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. One of such guidelines is where the allegations made in the First Information Report or the complaint, even if they are taken at their face-value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused. Under Art. 227 the power of superintendence by the High Court is not only of administrative nature, but is also of judicial nature. This Article confers vast powers on the High Court to prevent the abuse of the process of law by the inferior Courts and to see that the stream of administration of justice remains clean and pure. The power conferred on the High Court under Arts. 226 and 227 of the Constitution and under Sec. 482 of the Code have no limits but more the power more due care and caution is to be exercise while invoking these powers. When the exercise of powers could be under Art. 227 or Sec. 482 of the Code, it may not always be necessary to invoke the provisions of Art. 226. Some of the decisions of this Court laying down principles for the exercise of powers by the High Court under Arts. 226 and 227 may be referred to.

[23] In Waryam Singh v. Amarnath, AIR 1954 SC 215 this Court considered the scope of Art. 227. It was held that the High Court has not only administrative superintendence

over the subordinate Courts and Tribunals but it has also the power of judicial superintendence. The Court approved the decision of the Calcutta High Court in Dalmia Jain Airways Ltd. v. Sukumar Mukherjee, AIR 1951 Cal. 193 (S.B.) where the High Court said that the power of superintendence conferred by Art. 227 was to be exercised most sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting their mere errors. The Court said that, it was therefore, a case which called for an interference by the Court of the Judicial Commissioner and it acted quite properly in doing so.

[24] In Babhutmal Raichand Oswal v. Laxmibai R. Tarta, 1975 (1) SCC 858, this Court again reaffirmed that the power of superintendence of the High Court under Art. 227 being extraordinary was to be exercised most sparingly and only in appropriate cases. It said that the High Court could not, while exercising jurisdiction under Art. 227, interfere with the findings of fact recorded by the subordinate Court or Tribunal and that its function was limited to seeing that the subordinate Court or Tribunal functioned within the limits of its authority and that it could not correct mere errors of fact by examining the evidence or re-apportioning it. The Court further said that the jurisdiction under Art. 227 could not be exercised, 'as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issues raised in the proceedings'. The Court referred with approval the dictum of Morris, L.J., in R. v. Northumberland Compensation Appeal Tribunal, ex. p. Shaw, 1952 (1) All ER 122 : 1952 (1) KB 338 (CA).

[25] In Nagendra Nath Bora v. Commr. of Hills Division and Appeals, AIR 1958 SC 398, this Court observed as under :

> 'It is thus, clear that the powers of judicial interference under Art. 227 of the Constitution with orders of judicial or quasi-judicial nature, are not greater than the powers under Art. 226 of the Constitution. Under Art. 226, the power of interference may extend to quashing an impugned order on the ground of a mistake apparent on the face of the record. But under Art. 227 of the Constitution, the power of interference is limited to seeing that the Tribunal functions within the limits of its authority." (Emphasis supplied)
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> 22. In the case of Industrial Credit and Investment Corpn. of India Ltd. v. Grapco Industries Ltd., 1999 (4) SCC 710, it has been held that there is no bar on the High Court examining merits of a case in exercise of its jurisdiction under Art. 227 of the Constitution of India if the circumstances so

require. It has been held that, under Art. 227 of the Constitution of India, the High Court can even interfere with interim orders of Courts and Tribunals if the order is made without jurisdiction.

23. In the case of Roy V. D. v. State of Kerala, 2002 (8) SCC 590 : 2001 SCC (Cri.) 42, the question was whether arrest and search by an officer not empowered or authorised, and therefore, in violation of Sec. 41 and 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was per se illegal and would vitiate trial. This Court held that when criminal proceedings are initiated on the basis of material collected on search and arrest which are per se illegal, power under Sec. 482 can be exercised to quash the proceedings as continuance of such proceedings would amount to abuse of the process of the Court.

24. In the case of Puran v. Rambilas, 2001 (6) SCC 338 : 2001 SCC (Cri.) 1124 this Court has held that the High Court's inherent jurisdiction under Sec. 482 is not affected by the provisions of Sec. 397(3) of the Code of Criminal Procedure. It is held that the High Court can interfere even if the order is an interlocutory order. It is held that for securing the ends of justice the High Court can interfere with an order which causes miscarriage of justice or is palpably illegal or is unjustified. It was also noticed that the High Court may refuse to exercise jurisdiction, under Sec. 482, on the basis of self-imposed restriction.

25. In the case of Satya Narayan Sharma v. State of Rajasthan, 2001 (8) SCC 607 : 2002 SCC (Cri.) 39, it has been held that Sec. 482 of the Criminal Procedure Code starts with the words "Nothing in this Code". It is held that this inherent power can be exercised even if there is a contrary provision in the Criminal Procedure Code. It is held that Sec. 482 of the Criminal Procedure Code does not provide that inherent jurisdiction can be exercised "notwithstanding any other provision contained in any other enactment". It has been held that if any other enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar.

[26] In the case of Ouseph Mathai v. M. Abdul Khadir, 2002 (1) SCC 319, it has been

held as follows :

"5. In Waryam Singh v. Amarnath, 1986 (4) SCC 447 this Court held that power of superintendence conferred by Art. 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bora v. Commr. of Hills Division and Appeals, 1977 (2) SCC 437. In Babhutmal Raichand Oswal v. Laxmibai R. Tarta (supra), this Court held that the High Court could not, in the guise of exercising its jurisdiction under Art. 227 convert itself into a Court of appeal when the legislature has not conferred a right of appeal. After referring to the judgment of Lords Denning in R. v. Northumberland Compensation Appeal Tribunal, ex. p. Shaw (supra), (All ER at p. 128) this Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Gurum, 1986 (4) SCC 447, held :-

'20. It is true that in exercise of jurisdiction under Art. 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Arts. 226 and 227 of the Constitution to look into the fact in the absence of clear and cut-down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior Tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice (see Trimbak Gangadhar Telang v. Ramchandra Ganesh Bhide, 1977 (2) SCC 437). Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under Art. 227 of the Constitution. On the first point, therefore, the High Court was in error.'

6. In Laxmikant Revchand Bhojwani v. Pratapsing Mohansingh Pardeshi, 1995 (6) SCC 576 this Court held that the High Court was not justified in extending its jurisdiction under Art. 227 of the Constitution of India in a dispute regarding eviction of tenant under the Rent Control Act, a special legislation governing landlord-tenant relationship. To the same effect is the judgment in Koyilerian Janaki v. Rent Controller (Munsiff), 2000 (9) SCC 406.

7. In the present appeals, the High Court appears to have assumed the jurisdiction under Art. 227 of the Constitution without referring to the facts of the case warranting the exercise of such a jurisdiction. Extraordinary powers appear to have been exercised in a routine manner as if the power under Art. 227 of the Constitution was the extension of powers conferred upon a litigant under a specified statute. Such an approach and interpretation is unwarranted. By adopting such an approach some High Courts have assumed jurisdiction even in matters to which the legislature had assigned finality under the specified statutes. Liberal assumption of powers without reference to the facts of the case and the corresponding hardship to be suffered by a litigant has unnecessarily burdened the Courts resulting in accumulation of arrears adversely affecting the attention of the Court to the deserving cases pending before it."

(Emphasis supplied)

[27] In the case of State of Karnataka v. M. Devendrappa, 2002 (3) SCC 89 : 2002 SCC (Cri.) 539 this Court has held that the High Court has inherent power under Sec. 482 of the Criminal Procedure Code to quash proceedings. It is held that the power should not be exercised to stifle a legitimate prosecution. It is held that the High Court should not assume the role of a trial Court and embark upon an enquiry. It is held that the power should be exercised sparingly, with caution and circumspection.

[28] Thus, the law is that Art. 227 of the Constitution of India gives the High Court the power of superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction. This jurisdiction cannot be limited or fettered by any Act of the State Legislature. The supervisory jurisdiction extends to keeping the

subordinate Tribunals within the limits of their authority and to seeing that they obey the law. The powers under Art. 227 are wide and can be used, to meet the ends of justice. They can be used to interfere even with an interlocutory order. However, the power under Art. 227 is a discretionary power and it is difficult to attribute to an order of the High Court, such a source of power, when the High Court itself does not in terms purport to exercise any such discretionary power. It is settled law that this power of judicial superintendence, under Art. 227, must be exercised sparingly and only to keep subordinate Courts and Tribunals within the bounds of their authority and not to correct mere errors. Further, where the statute bans the exercise of revisional powers it would require very exceptional circumstances to warrant interference under Art. 227 of the Constitution of India since the power of superintendence was not meant to circumvent statutory law. It is settled law that the jurisdiction under Art. 227 could not be exercised "as the cloak of an appeal in disguise".

[29] Section 482 of the Criminal Procedure Code starts with the words "Nothing in this Code". Thus, the inherent jurisdiction of the High Court under Sec. 482 of the Criminal Procedure Code can be exercised even when there is a bar under Sec. 397 or some other provisions of the Criminal Procedure Code. However as is set out in Satya Narayan Sharma case (supra) this power cannot be exercised if there is a statutory bar in some other enactment. If the order assailed in purely of an interlocutory character, which could be corrected in exercise of revisional powers or appellate powers the High Court must refuse to exercise its inherent power. The inherent power is to be used only in cases where there is an abuse of the process of the Court or where interference is absolutely necessary for securing the ends of justice. The inherent power must be exercised very sparingly as cases which require interference would be few and far between. The most common case where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without jurisdiction. Most of the cases set out hereinabove fall in this category. It must be remembered that the inherent power is not to be resorted to if there is a specific provision in the Code or any other enactment for redress of the grievance of the aggrieved party. This power should not be exercised against an express bar of law engrafted in any other provision of the Criminal Procedure Code. This power cannot be exercised as against an express bar in some other enactment.

[30] This being the law, let us now see whether the High Court was right in interfering at this stage. As has been set out hereinabove, by the time the High Court delivered the impugned judgment the evidence, objected to, had already been recorded. The order dated 11-7-2002 was clearly an interlocutory order. Section 34 P.O.T.A. clearly provides

that no appeal revision would lie to any Court an order which was an interlocutory order. As stated above, the impugned order is a common order in all applications/petitions. Respondent Geelani had filed an appeal under Sec. 34 P.O.T.A.. Merely because he chose to involve Sec. 482 of the Criminal Procedure Code did not mean that his application was not an appeal. Clearly, the High Court could not have interfered at this stage. The High Court has not indicated that it was exercising power of superintendence under Art. 227. Such a power being a discretionary power, it is difficult to attribute to the order of the High Court such a source of power. Even otherwise, in respect of respondent Geelani power under Art. 227 could not have been invoked or exercised.

[31] On facts of this case, we find that the effect of the impugned order is that the statutory provision of Sec. 34 P.O.T.A. has been circumvented. The impugned order has also led to the very peculiar situation set out hereinabove. To repeat, under Sec. 34 P.O.T.A. the appeal is to be heard by a Bench of two Judges of the High Court. We are informed that the appeal is being heard by a Bench of two Judges of the High Court. An appeal under Sec. 34 P.O.T.A. is both on facts and on law. The correctness of the interlocutory order could, by virtue of Sec. 34 P.O.T.A., have been challenged only in the appeal filed against the final judgment. The respondents by filing the applications/petitions and the learned Judge having chosen to entertain them, has resulted in a party being deprived of an opportunity of canvassing an important point of law in the statutory appeal before the Division Bench. The peculiar situation is that the Division Bench, hearing a statutory appeal (both on law and facts) is bound/ constrained by an order of a single Judge. The order of the Special Judge is based on an interpretation of the various provisions of P.O.T.A. The Special Judge undoubtedly had authority and jurisdiction to interpret the various provisions of P.O.T.A. and other laws. The Special Judge had jurisdiction to decide whether the evidence collected by interception could be used for proving a charge under P.O.T.A. The Special Judge was acting within the limits of his authority in passing the impugned order. We are told that before the single Judge of the High Court the arguments, by both sides, went on for approximately two weeks. Even before us considerable time was taken. This is being mentioned only to indicate that the question is not so clear. It requires interpretation of various provisions of P.O.T.A. Neither the power under Art. 227 nor the power under Sec. 482 enabled the High Court to correct an error in interpretation even if the High Court felt that the order dated 11-7-2002 was erroneous. Even if the High Court did not agree with the correctness of that order, the High Court should have refused to interfere as the order could be corrected in the appeal under Sec. 34 P.O.T.A. To be remembered that by the time the impugned order was passed the evidence had already been recorded. Thus, there was no abuse of process of Court which could now be

prevented. Even the ends of justice did not require interference at this stage. In fact the ends of justice required that the statutory intent of Sec. 34 P.O.T.A. be given effect to. The High Court should have directed the respondents to raise all such points in the statutory appeal, if any, required to be filed under Sec. 34 P.O.T.A. If in the appeal, the Division Bench felt that the order was not correct or that it was erroneous it would set aside the order, eschew the evidence and not take the same into consideration. Thus, no prejudice was being caused or would be caused to the respondents. Their rights were fully protected as per the provisions of P.O.T.A. At this stage, there was no miscarriage of justice or palpable illegality which required immediate interference. We are, therefore, of the opinion that even if powers under Art. 227 or under Sec. 482 could have been exercised this was a case where the High Court should not have exercised those powers.

[32] It was submitted that the prosecution had not raised the point of manageability of the applications/petitions before the High Court. It was submitted that the prosecution chose to argue on merits before the High Court, and therefore, they should now not be permitted to raise these contentions before this Court. It does appeal that the question of maintainability was not argued before the High Court. However, we are informed that Sec. 34 P.O.T.A. was brought to the notice of the High Court. The High Court was also aware that, by the time it heard the matter, the evidence had already been recorded and the trial had reached the final stage. On the abovementioned settled law, the High Court should have on its own refused to interfere and should have left the parties to agitate their contentions in the appeal to be filed under Sec. 34 P.O.T.A.

[33] It must be mentioned that before us also arguments on merits were made. At one stage, this Court did consider giving a decision on merits. However, on a proper consideration of the matter, it appears to us that to give a decision on merits would be to perpetrate the mistake committed by the High Court. It would result in depriving one or the other party of a valuable right of agitating the point in the statutory appeals, which are at present going on before the Division Bench of the High Court. We, therefore, refrain from expressing any opinion on merits. We clarify that all parties will be free to urge all questions in the pending appeals before the Division Bench of the High Court.

[34] In the above view, we allow the appeals and set aside the impugned order. There will be no order as to cost.

One more ruling of Apex Court on same issue.

SHALIMAR CHEMICAL WORKS LTD

V/S

SURENDRA OIL & DAL MILLS (REFINERIES) & ORS.2010 (8) SCC 423

SUPREME COURT OF INDIA (FROM ANDHRA PRADESH) *(D.B.)*

SHALIMAR CHEMICAL WORKS LTD
V/S
SURENDRA OIL & DAL MILLS (REFINERIES) & ORS

Date of Decision: 27 August 2010

Citation: 2010 LawSuit(SC) 560

Hon'ble Judges: Aftab Alam, R M Lodha

Case Type: Civil Appeal

Case No: 52 of 2005

Subject: Civil, Intellectual Property Rights

Head Note:

Trade and Merchandise Marks Act, 1958 - Sec 31 - Code of Civil Procedure, 1908 - Or 41 Rule 27 - additional evidence - appellant claiming to be registered owner of trade mark "Shalimar" - filed suit for permanent injunction for infringement of its trade marks "Shalimar" that appellant was using since 1945 - plaintiff produced photocopies of registration certificates - suit dismissed - appeal thereagainst rejected by ld. Single Judge - Division Bench did not allow production of original registration certificate at appellate stage as additional evidence which was allowed by Single Judge of High Court - learned single judge rightly allowed appellant's plea for production of original certificates of registration of trade mark as additional evidence because that was simply in interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41, Rule 27 - but then single judge seriously erred in proceeding simultaneously to allow appeal and not giving defendants/respondents an opportunity to lead evidence in rebuttal of documents taken in as additional evidence - Division Bench was again wrong in taking view that in facts of case, production of additional evidence was

not permissible under Order 41, Rule 27 - as shown above additional documents produced by appellant were liable to be taken on record as provided under Order 41, Rule 27 (b) in interest of justice - but it was certainly right in holding that way learned single judge disposed of appeal caused serious prejudice to defendants/respondents - in facts and circumstances of case, therefore, proper course for division bench was to set aside order of learned single judge without disturbing it insofar as it took originals of certificates of registration produced by appellant on record and to remand matter to give opportunity to defendants/respondents to produce evidence in rebuttal if they so desired - impugned order of Division Bench set aside - order accordingly.

Acts Referred:
Code Of Civil Procedure, 1908 Or 13R 4, Or 41R 27
Trade And Merchandise Marks Act, 1958 Sec 31

Final Decision: Appeal allowed

Eq. Citations: 2010 (6) ALD(SC) 70, 2010 (3) ARC 603, 2010 (44) PTC 1, 2011 (2) AWC 1353, 2010 (9) JT 126, 2011 (1) KerLJ 48, 2010 (4) CalLT 90, 2010 AIR(SCW) 5200, 2010 (6) AllMR 457, 2010 (28) LCD 1345, 2010 (5) LawHerald(SC) 3566, 2010 (8) Scale 502, 2010 (8) SCC 423, 2010 (10) SCR 703, 2010 (8) UJ 3979, 2010 (8) UJ 4022, 2010 (4) BBCJ(SC) 196, 2010 (95) AllIndCas 72, 2010 (83) AllLR 244, 2011 (1) KarLJ 48, 2010 (3) MIPR 1

Advocates: P P Rao, S B Sanyal, V V Ramana, G Ramakrishna Prasad, B Suyodhan, Amarpal, Bharat J Joshi, Mohd Wasay Khan, P S Narsimha, M Srinivas Rao, K Parmeshwar, V G Pragasam

Reference Cases:
Cases Cited in (+): **38**
Cases Referred in (+): **3**

Judgement Text:-

Aftab Alam, J

[1] This is the plaintiff's appeal arising from a suit for permanent injunction based on

allegations of infringement of its registered trade mark. The appellant is a company incorporated and registered under the Companies Act. The case of the appellant is that from the year 1945 it is engaged in the business of manufacture and sale of high grade coconut oil used for cooking as well as manufacturing of various toilet products under the distinctive trade mark "Shalimar". The appellant claims to be the registered owner of the trade mark "Shalimar" in Class 03 in respect of coconut hair oil and in Class 29 in respect of all edible oils included in that class. Alleging that the respondents were marketing their product in infringement of its registered trade mark, the appellant filed a suit (OS No.1 of 1995) before the Third Additional Chief Judge, City Civil Court, Hyderabad, seeking permanent injunction restraining the defendants from marketing or offering for sale edible oil products bearing the name "Shalimar" on containers, labels or wrappers, or using any name identical or deceptively similar to the appellant's trade mark.

[2] In course of the trial, the appellant produced before the court photocopies of registration certificates under Trade and Merchandise Marks Act, 1958 along with the related documents attached to the certificates. The photocopies submitted by the appellant were "marked" by the trial court as Exs.A1-A5, "subject to objection of proof and admissibility". At the conclusion of the trial, the court dismissed the suit of the appellant by judgment and order dated September 28, 1998 inter alia holding that the available evidence on record did not establish the case of the plaintiff and there was no prima facie case in favour of the plaintiff nor the balance of convenience was in favour of the plaintiff. The trial court arrived at its findings mainly because the appellant did not file the trade mark registration certificates in their original. In that connection, the trial court made the following observations:

> "All the above documents i.e. Ex.A1-A5 are marked subject to objection of proof and admissible (sic admissibility) and also mention so in the deposition of PW1. PW1 is his cross- examination has admitted that all the above documents are xerox copies. He has also admittedly not filed legal certificate for the same.
>
> Sec.31 of Trade and Merchandise Marks Act, 1958 specifically reads as follows:
>
> Sec.31(1) "In all legal proceedings relating to a trade mark registered under the Act, the original registration of the trade mark and of all subsequent

assignments and transmissions of the trade mark shall be prima facie evidence of the validity thereof."

Therefore the plaintiff has to file the original of the registration or the certified copies thereof. Exs.A1-A4 are xerox copies. It is well settled law that xerox copies are not admissible in evidence. Once those documents are not held admissible, the plaintiff cannot be permitted to rely on it. These documents Ex.A1-A4 are basic documents of Trade Mark and Merchandise Act."

[3] Against the judgment and decree passed by the trial court, the appellant filed appeal (CCC Appeal No.17 of 1999) before the Andhra Pradesh High Court. In that appeal, the appellant also filed an application under Order 41, Rule 27 (CMP No.2972 of 2000) for accepting the originals of the trade mark registration certificates and the allied documents (of which Xerox copies were filed before the trial court) as additional evidence. A learned single judge of the High Court took up the application for additional evidence along with the hearing of the appeal. He allowed the application and, together with it the appeal, setting aside the judgment and decree passed by the trial court and allowing the appellant's suit granting decree of permanent injunction against the defendants/respondents.

[4] The respondents filed an intra-court appeal (LPA No.111 of 2001) against the judgment and decree passed by the single judge. The division bench of the High Court took the view that there was no occasion or justification for admitting the original trade mark registration certificates at the appellate stage as additional evidence. Referring to the provisions of Order 41, Rule 27 of the Civil Procedure Code (hereafter 'CPC'), the division bench made the following observations:

"In three circumstances production of additional evidence can be allowed by the Appellate Court. Firstly, the Trial Court had refused to admit evidence which ought to have been admitted. Secondly the party who wanted to produce additional evidence had exercised due diligence and such evidence was not within his knowledge or reach during the trial of the suit. Thirdly, the additional evidence can be ordered to be produced if the Court feels that a document was necessary for pronouncing of the judgment. Neither of these three conditions were satisfied in this case. The original documents were all along in possession of the plaintiff. At no stage the Trial Court had refused to admit them in evidence. Since the documents were all along in the

possession of the plaintiff, therefore he could not fill up the lacuna by producing them in the Appellate Court. It may also be necessary to mention that production of these documents and allowing of the application under Order 41, Rule 27 of the Code while disposing of the appeal has also caused a prejudice to the defendants because when the cross-examination of P.W.1 which were not admissible in evidence."

[5] Once the original trade mark registration certificates were taken off the record of the case, the appellant's suit was bound to be dismissed. And that is how the division bench dealt with the appeal. It allowed the appeal of the defendant-respondent by judgment dated April 25, 2003 setting aside the judgment of the learned single judge and restoring the judgment passed by the trial court.

[6] The appellant has now brought this matter in appeal before this Court by grant of a special leave.

[7] Mr. P.P. Rao, learned senior advocate, appearing for the appellant assailed both, the procedure adopted by the trial court and the view taken by the division bench of the High Court, on the basis of the provisions of Order 41, Rule 27. Mr. Rao submitted that if the trial court was of the view that the Xerox copies of the documents in question were not admissible in evidence, it ought to have returned the copies at the time of their submission. In that event, the appellant would have substituted them by the original registration certificates and that would have been the end of the matter. But once the Xerox copies submitted by the appellant were marked as exhibits, it had no means to know that while pronouncing the judgment, the court would keep those documents out of consideration, thus, causing great prejudice to the appellant. Mr. Rao submitted that the provision of Order 13, Rule 4 of CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the court, and the endorsement signed or initialed by the judge amounts to admission of the document in evidence. An objection to the admissibility of the document can be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend, the document being endorsed admitted or not admitted in evidence. In support of the submission he relied upon a decision of this Court in R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple and Another, 2003 8 SCC 752 (paragraph 20) where it was observed as follows:

"20..... The objections as to admissibility of documents in evidence may be

classified into two classes:-(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court."

[8] Learned counsel contended that since the procedure followed by the trial court was contrary to the procedure prescribed by Order 13, Rule 4, in appeal against the trial court judgment, the learned single judge of the High Court was fully justified in accepting the originals of the documents concerned in evidence and the division bench was not

right in holding that the originals of the concerned documents were wrongly taken in evidence.

> Mr. Rao submitted that while enumerating the circumstances in which production of additional evidence may be allowed, the division bench overlooked the words "or for any other substantial reason" at the end of clause (b) of rule 27 (1). He submitted that those words greatly enlarged the scope of the provision and were especially relevant for a case like the one in hand where the plaintiff had suffered great prejudice due to the incorrect procedure followed by the trial court. In support of his submission he relied upon the decision of this Court in K. Venkataramiah vs. A. Seetharama Reddy & Ors., 1964 2 SCR 35 (at page 46).

> "... Apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment," it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27(1)(b) of the Code. "

[9] Mr. Rao further submitted that the very narrow view of Order 41, Rule 27 taken by the division bench has only led to frustrate the ends of justice. In order to lend strength to his submission, Mr. Rao referred to the illuminating and perennially relevant passage from the judgment of Vivian Bose, J. in Sangram Singh vs. Election Tribunal, Kotah, Bhurey Lal Baya, 1955 2 SCR 1 (at page 8) :

> "Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it."

[10] Mr. P.S. Narasimha, learned senior advocate, appearing for the respondents submitted that in terms of section 31 of the Trade and Merchandise Marks Act, 1958 original registration certificate of the trade mark was the primary evidence in the case instituted by the appellant and in the absence of the original registration certificates brought on record, the only course open to the trial court was to dismiss the suit, which it rightly did. Mr. Narasimha further pointed out that the learned single judge after taking the originals on record, straightaway proceeded to pronounce the final judgment in the appeal even without allowing the defendants/respondents an opportunity of rebuttal. The denial of any opportunity of rebuttal of the additional evidence taken by the appellate court caused immense prejudice to the defendants/respondents.

[11] To an extent Mr. Narasimha is justified in his submission. Having regard to the manner in which the proceedings took place before the trial court, the learned single judge was not unjustified in taking the originals of the certificates of registration as additional documents but the error lay in the fact that the learned single judge allowed the application for taking additional evidence and at the same time proceeded to finally allow the appeal on the basis of the evidence taken by him on record. Alluding to this aspect of the matter, the division bench made the following criticism:

> "We have seen that the cross-examination of P.W.1 was very brief and it only related to the fact that the photo stat were being produced. Any good lawyer would do the same thing, but had the original documents been produced, which were admissible in evidence at the time of trial, the cross-examination perhaps would have covered these documents as well. Once the learned single Judge, had decided to allow the plaintiff to produce the documents, then it was necessary also to provide an opportunity to the defendants to further cross-examine the witness who produced those documents. But we have seen from the judgment of the learned single Judge that the application under Order 41, Rule 27 of the Code was decided along with the appeals itself."

[12] On a careful consideration of the whole matter, we feel that serious mistakes were committed in the case at all stages. The trial court should not have "marked" as exhibits the Xerox copies of the certificates of registration of trade mark in face of the objection raised by the defendants. It should have declined to take them on record as evidence and left the plaintiff to support its case by whatever means it proposed rather than

leaving the issue of admissibility of those copies open and hanging, by marking them as exhibits subject to objection of proof and admissibility The appellant, therefore, had a legitimate grievance in appeal about the way the trial proceeded. The learned single judge rightly allowed the appellant's plea for production of the original certificates of registration of trade mark as additional evidence because that was simply in the interest of justice and there was sufficient statutory basis for that under clause (b) of Order 41, Rule 27. But then the single judge seriously erred in proceeding simultaneously to allow the appeal and not giving the defendants/respondents an opportunity to lead evidence in rebuttal of the documents taken in as additional evidence. The division bench was again wrong in taking the view that in the facts of the case, the production of additional evidence was not permissible under Order 41, Rule 27. As shown above the additional documents produced by the appellant were liable to be taken on record as provided under Order 41, Rule 27 (b) in the interest of justice. But it was certainly right in holding that the way the learned single judge disposed of the appeal caused serious prejudice to the defendants/respondents. In the facts and circumstances of the case, therefore, the proper course for the division bench was to set aside the order of the learned single judge without disturbing it insofar as it took the originals of the certificates of registration produced by the appellant on record and to remand the matter to give opportunity to defendants/respondents to produce evidence in rebuttal if they so desired. We, accordingly, proceed to do so. The judgment and order dated April 25, 2003 passed by the division bench is set aside and the matter is remitted to the learned single judge to proceed in the appeal from the stage the original of the registration certificates were taken on record as additional evidence. The learned single judge may allow the defendants/respondents to lead any rebuttal evidence or make a limited remand as provided under Order 41, Rule 28.

[13] In the result, the appeal is allowed, as indicated above but with no order as to costs.

I already shared a judgement on definition of cell phone. Now on the importance of IMEI number in recovery of a mobile phone to establish its identity. Hon'ble Mumbai High Court in ARUN MARUTI WAGHCHAURE Vs THE STATE OF MAHARASHTRA dealt with the said question.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1291 of 2012

ARUN MARUTI WAGHCHAURE)
Age : 23 years, Adult, Indian Inhabitant,)
Residing at : Adiwashi Wadi, Taluka Karjat)
District : Raigad.)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)
Through Khalapur Police Station, Raigad.)...RESPONDENT

Mr.Satyavrat Joshi, Advocate for the Appellant.

Mr.Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 19th MARCH 2015.

JUDGMENT :

1 This appeal is directed against the judgment and order dated 1st December 2011, passed by the Additional Sessions Judge, Raigad, Alibaug, in Sessions Case No.51 of 2012, convicting the appellant of an offence punishable under Section

395 of the Indian Penal Code (IPC) and sentencing him to suffer Rigorous Imprisonment for a period of seven years and to pay a fine of Rs.3,000/-, in default, to suffer Rigorous Imprisonment for 2 months. The appellant was the accused no.1 in the said case and there were four others, who were also prosecuted along with the appellant. However, the learned Additional Sessions Judge found the said four persons not guilty and acquitted them.

2 The prosecution case, as found in the 'brief facts of the case', mentioned in column no.17 of the printed prescribed proforma of the Police Report, is, as follows :

That, on 12th September 2007, at about 10.00 p.m., the First Informant – Ashok Joshi – was driving his motor vehicle – Tavera car – on the Mumbai – Pune Road. When the First Informant got down from the car to remove a stone that was lying on the road, the appellant and the other accused robbed him of his gold bracelet, mobile telephone and gold chain, totally worth about Rs.36,000/-, and thereby, committed an offence punishable under Section 395 of the IPC.

3 In order to prove its case against the appellant and the other accused, the prosecution examined eight witnesses during the trial. As aforesaid, upon considering the evidence adduced, the learned Additional Sessions Judge found the appellant guilty, but, the others not guilty.

4 I have heard Mr.Satyavrat Joshi, the learned counsel for the appellant. I have heard Mr.Deepak Thakre, the learned APP for the State. With their assistance, I have gone through the entire evidence adduced during the trial. I have also carefully gone through the impugned judgment.

5 The details of the prosecution case are to be found in the testimony of the First Informant – Ashok Jadhav (PW4). According to him, he was working as a driver on Tavera jeep, owned by one Manish Vishwanath Balavali. *This is inconsistent with the facts of the case mentioned in the printed prescribed proforma of the chargesheet, where the First Informant is said to be the 'owner' of the Tavera vehicle in question. This, though shows*

non-application of mind by the Investigating Officer while submitting the police report, is actually of no consequence in determining the guilt or innocence of the appellant. It has been mentioned only to point out how careless the Investigating Officer has been, even in mentioning the 'facts of the case' in the police report. The evidence of Ashok Jadhav (PW4) shows that on 12th September 2006, he took passengers in the said Tavera jeep from Borivali to Pune. Those passengers – husband and wife – were dropped at Pune Airport, at about 6.30 p.m. Ashok was then coming back to Borivali. After he had crossed Khalapur Chowk, he saw that two stones had been put on the road. He, therefore, reduced the speed of the Tavera jeep. At that time, two persons came and stopped in front of the Tavera jeep. At the same time, about 4 to 5 persons came from behind and dragged Ashok out of the jeep. The said persons snatched the gold chain, gold bracelet, mobile telephone instrument of Nokia company, a wrist watch and cash of Rs.7,000/- from Ashok and ran away. Ashok, then, went to Borivali, and told about the incident to his master. On the next day, he lodged a report with the Khalapur Police Station, which

was treated as the First Information Report (FIR). Ashok showed the spot of the incident to the police. In the course of investigation, the police called Ashok to Tahsildar Office, at Khalapur. There, he identified the appellant. Some articles were shown to Ashok in his examination-in-chief, which he identified as the same articles, that were snatched away from him by the culprits.

6 It is evident that the appellant – and even the other accused – were not previously known to Ashok. The evidence against the appellant consists of his identification, as one of the culprits, by Ashok, and the recovery of certain articles, said to be part of the robbed property, at the instance of the appellant.

7 Mr.Satyavrat Joshi, the learned counsel for the appellant, submitted that, the evidence of identification of the appellant, as one of the culprits, was not at all satisfactory, and that, as a matter of fact, the evidence in respect of the appellant's identification – as one of the culprits – in the Test Identification

Parade, was not believed by the learned Additional Sessions Judge. He also submitted that the evidence of recovery of part of the robbed property, allegedly, at the instance of the police, was also not reliable. He submitted that the identity of the recovered articles, as the same that were robbed, was not at all established.

8 I have examined the evidence, adduced during the trial, on these aspects.

9 The first circumstance against the appellant is of the alleged recovery of a mobile telephone instrument of Nokia company, and also of a gold bracelet – both said to be a part of the robbed property, allegedly at his instance.

The prosecution case is that pursuant to the information disclosed by the appellant, a mobile telephone instrument, which formed part of the robbed property, came to be recovered from Sameer Bhase (PW1) under a panchnama. In this context, the evidence of Sameer Bhase (PW1) and that of Ravindra Patil (PW6) – who is a panch in respect of the said recovery, is relevant, apart from the evidence of P.I. Devkar (PW8).

10 The evidence of Sameer shows that Police Officer Devkar of Khalapur Police Station (PW8) had come to him for making enquiries in respect of a mobile, and that, he produced a mobile of Nokia company before Devkar. Sameer, then, states that the said mobile had been given to him by the appellant, saying that he was in need of money, and that, the appellant had taken an amount of Rs.2,000/- from Sameer, against the said mobile. That, the Police Officer told Sameer that the mobile was part of the property involved in the offence of dacoity, and that, therefore, he gave the same to the police. A mobile telephone, marked as Article No.5, was shown to him, when he identified it, as the same that had been given to him by the appellant.

11 In his cross-examination, he admitted that such type of mobile handsets are available in the market. He, however, denied that he was making a false allegation against the appellant, at the instance of the police.

12 Ravindra Patil (PW6) – a panch, however, did not support the case of the prosecution. According to him, the police had called him and one Bhagwan Chavan - the other panch – in Tahisldar Office, on 17th October 2006, and they obtained his signature and that of Bhagwan Chavan, without making any enquiries or without telling anything to them. Ravindra Patil was declared hostile, and in the questions put by the learned APP to him, thereafter, he admitted that Sameer Bhase had produced one mobile before the Police, in his presence. In the cross examination, that was taken on behalf of the accused, he admitted that Sameer Bhase had taken him and the panch to Khalapur Police Station, and that Sameer Bhase instructed them to sign the panchanama. According to him, he came to know the contents of the panchanama from Sameer Bhase. The evidence of this witness is rather absurd and is not worth taking into consideration, either for or against the prosecution.

13 Ashok did identify the mobile telephone instrument that was shown to him during his evidence. However, the question is, whether the identity of the said mobile telephone instrument, as the same one, that had been robbed, has been satisfactorily established. It may be recalled that the IMEI number of the mobile telephone instrument has not been brought on record. It was easily possible for the investigating agency to have collected such information, so as to fix the identity of the mobile telephone instrument, as the same that was being used by the first informant Ashok. Even assuming that Ashok did not know the IMEI number, it was easily possible to ascertain the same from the connectivity number i.e. the mobile telephone number itself. The same, however, has not been done.

14 Certainly, merely because the IMEI number of the mobile telephone instrument has not been established or attempted to be established, the evidence of the identity thereof, as the same article of which Ashok was robbed, may not be

discarded, but in the instant case, the evidence of Sameer Bhase and panch Ravindra Patil, which seeks to establish the recovery of the mobile instrument at the instance of the appellant, is itself highly unsatisfactory. Sameer Bhase does not give any details, such as the time and / or date of the appellant giving to him, or handing over to him the mobile telephone.

15 So far as the alleged recovery of the gold bracelet – also said to be a part of the robbed property – pursuant to the information disclosed by the appellant to the police is concerned, the evidence that is relevant in that context is that of Kamlesh Oswal (PW3), who is the owner of a jewellery shop, and Bhausaheb Kolape (PW5). According to Kamlesh Oswal, police of Khalapur Police Station came to him with the appellant on 15th October 2006, and made enquiries with him, when he told the police that the appellant had pledged a bracelet with him, by saying that his daughter was sick. According to Kamlesh, he had paid Rs.3,000/- to the appellant. That, he produced bracelet before the police. He identified the bracelet (Article No.3), which

was shown to him, *as the same which was produced by him before the police.* In the cross-examination, he admitted that, he had no license to accept the gold jewellery, by way of pledge. The omission to state before the police that the appellant had said that his daughter was sick, and that, therefore, he was pledging the ornament, was brought on record in the cross-examination. In the cross-examination, he claimed that he had noted in writing in his notebook, the fact of the appellant having kept the bracelet with him, and his having paid Rs.3,000/- to the appellant, but that the police did not seize the said notebook. He also admitted in the cross-examination, that '*the bracelet appeared to be newly made*'. The suggestion that Police Officer Devkar got the said bracelet made from his shop, was denied by him.

16 Bhausaheb Kolape (PW5) is one of the panchas, in whose presence, the bracelet was allegedly recovered from Kamlesh Oswal. Bhausaheb appears to have acted as a panch in respect of different panchanamas. He appears to have acted as a panch in respect of a disclosure statement, allegedly made by a

co-accused i.e. accused no.2 - Ram Hari Pawar also. His evidence is not at all satisfactory, but it is not necessary to discuss the same in detail, in as much as, when the bracelet (Article 3) was shown to him, he stated that he was unable to identify whether it was the same bracelet. Moreover, in the cross examination, he admitted that when he went to the police station, the panchanama was ready. His evidence fails to lend any support to the testimony of Kamlesh Oswal, which itself is highly unsatisfactory.

17 Thus, in my opinion, the evidence of recovery of a bracelet and a mobile telephone instrument of a Nokia Company, which are said to be part of the robbed properties at the instance of the appellant, is not satisfactory. In any case, the evidence fails to establish the identity of these articles as the same that were stolen. It may be recalled that, admittedly, the bracelet appeared to be new, and the individuality of the mobile telephone instrument, ***which could have been easily established****, was not even attempted to be established*.

18 The question is now about the identification of the appellant, as one of the culprits, as done by Ashok. Interestingly, Ashok was not asked '*whether any of the persons, who robbed him, were present in the Court.*' He does not say so in his evidence. As a matter of fact, a reading of his evidence does not show that he identified the appellant, as one of the culprits. His evidence in that regard, reads as under :-

> "Police called me to Tahasildar Office at Khalapur. It was for purpose of identification of accused. I identified one accused. He is present in the Court. He is accused no.1"

Thus, his statement about the identity relates to the identification of the accused done by him in the Tahsildar Office. In other words, what he says is that, '*he identified the accused in the Test Identification Parade*.' I am afraid, this does not amount to his identifying him, as one of the culprits. The manner in which the evidence of the witness, with regard to the identity of the

appellant, has been recorded, is far from satisfactory. Anyway, since the witness has claimed that he identified the appellant because he had stood in front of the jeep, and that he had seen the appellant in the head light of the jeep, it may be *presumed* that he had identified the appellant in the test identification parade, as one of the culprits, though the witness has not stated this directly.

19 It is well settled that evidence of the identification of the persons, not previously known to the identifying witness, for the first time in court, is a weak piece of evidence. It is because of the possibility of witnesses making a mistake with respect to the identity, which may result from the fact that a particular person is already alleged to be the culprit. It is for this reason, that, Test Identification Parades are held. The Test Identification Parades serve a dual purpose. First and foremost is, that, they give an assurance to the Investigating Officer, that the investigation is proceeding on the right lines. The second purpose, which the Test Identification Parades serve, is that, they lend support to the evidence of the identification, which the witness would give in the

court. The fact of having identified the person as the culprit previously, from amongst several others, would lend support to the identification of the culprit, that would be subsequently made by a witness, during his evidence before the court. In this case, the evidence of the Test Identification Parade is not found to be acceptable by the learned Additional Sessions Judge. He has not placed any reliance on the evidence of the Test Identification Parade. The learned Judge observed that, the identification parade held by Nayab Tahsildar – Chandrasen Pawar, was not in conformity with the guidelines in that regard. If that was so, this was certainly not a case, where implicit reliance on the identification of the appellant as one of the culprits, could be placed. As already observed, Ashok, infact, does not say that the appellant was one of the culprits, and the evidence is not that he identified the appellant as the culprit, but the evidence is that, 'he identified one of the *accused* in the office of the Nayab Tahsildar, and that the person identified by him, at that time, was the appellant.' Thus, that the appellant was one of the culprits, is not directly stated by Ashok, but the same is required to be inferred, with the reasoning that, since he identified the appellant in the office of Nayab Tahsildar, he must have identified him as

one of the culprits. Not much value to such type of identification can be given.

19 The weaknesses in the prosecution case were noticed by the learned Additional Sessions Judge also, but he sought to overcome them with a certain peculiar reasoning. The learned Judge observed that 'the identity of the recovered bracelet was not satisfactorily established', but still accepted the theory of the prosecution by observing that, 'though the bracelet *appeared* to be *newly made* it was of 13 grams', and that, 'it was very unlikely that the jeweler could produce gold article of his own before the police.' In other words, the learned Judge thought that, since the bracelet had been given to the police by the jeweler Kamlesh Oswal, it must have been given to him by the appellant. This reasoning is not correct. When the claim was that it was the same bracelet, which had been robbed by the appellant from Ashok, why and how it could appear as new, needed some explanation, which is not provided by the sort of reasoning resorted to, by the learned Judge. Moreover, there could be several reasons for a

jeweler, who is perhaps indulging into acts of receiving stolen property, to handover a particular article to the police. One obvious reason would be to avoid himself being accused of knowingly receiving stolen property, arrested and prosecuted.

20 The manner in which the evidence was recorded during the trial, leaves much to be desired. The evidence has been recorded in a perfunctory manner, without requiring necessary details to be given by the witnesses. For instance, even Kamlesh Oswal's evidence does not categorically say that '*the appellant had pledged the bracelet with him*', but what it says is, that, 'the police came to him with the appellant, that, when the police inquired with him, *he told the police that the appellant had pledged bracelet with him*', and that, 'he then produced the bracelet before the police.' Thus, his evidence only relates to what had happened, *after* the police had come to him with the appellant, and like in the case of identification of appellant by Ashok, we are required to infer that 'since he told the police that the appellant had pledged the bracelet with him, it had indeed happened that

way.' The learned Judge did not realize that, the evidence of this witness is **not** that the appellant had pledged a bracelet with this witness, but the evidence is that, he **told** the police that appellant had pledged the bracelet with him.

21 Considering that neither the recovery of the robbed property, allegedly at the instance of the appellant, was satisfactorily established, nor the evidence of the identification of the appellant, as one of the culprits, was satisfactory, this was a case, where the appellant should have been given the benefit of doubt, and should have been acquitted. The order of conviction, as recorded by the learned trial Judge, is not proper or legal.

22 The Appeal is allowed.

23 The judgment and order of conviction of the appellant, as recorded by the learned Additional Sessions Judge and the sentences imposed by him upon the appellant are set aside.

24 The appellant stands acquitted.

25 He be set at liberty forthwith, unless required to be detained in some other case.

26 Fine, if paid, be refunded to him.

(ABHAY M. THIPSAY, J.)

Sections 3 and 5 -- Expression "Relevancy and Admissibility" are normally used as synonymous but their legal implications are different and distinct.

RAM BIHARI YADAV

V/S

STATE OF BIHAR.1998 CrLJ 2515.

SUPREME COURT OF INDIA (FROM PATNA) *(D.B.)*

RAM BIHARI YADAV
V/S
STATE OF BIHAR

Date of Decision: 21 April 1998

Citation: 1998 LawSuit(SC) 468

Hon'ble Judges: M K Mukherjee, S S M Quadri

Case Type: Criminal Appeal

Case No: 500 of 1990

Subject: Criminal

Head Note:

CONCURRENT FINDINGS -- Concurrent findings as to admissibility of dying declaration -- Dying declaration recorded by the Magistrate after satisfying that she was fully fit to make the statement. It was testified by the trainee nurse because the Dr. was not available at the time -- Relying upon concurrent findings as to admissibility of dying declaration was proper and upheld.

EVIDENCE ACT, 1872
Probative value of evidence -- Sections 3 and 5 -- Expression "Relevancy and Admissibility" are normally used as synonymous but their legal implications are different and distinct. For example, communication made by spouses during marriage or between an advocate and his client though relevant are not admissible and the fact which are admissible may not be relevant. For example, questions permitted to be put in cross examination though may not be relevant but would be admissible in evidence -- Thus, though dying declaration is indirect evidence being special of hearsay yet it is an exception to the rule against admissibility of hearsay evidence.

BRIDE BURNING -- Burning of wife by the accused -- Where the accused set the wife on fire by sprinkling of kerosene oil which was supported by dying declaration. It was further corroborated by the evidence of witnesses finding her in a room smelling kerosene and also by medical evidence. The plea that she caught fire accidental and that the accused tried to save her by pouring water on her not believed as there was no sign of water in the kitchen. The conviction upheld.

The doctor who conducted the post-mortem examination after four days of the accident noticed smell of kerosene from the scalp of the deceased, statements of PWs 4 and 6 who rushed to the house of the appellant immediately after hearing of the incident and found that the house was locked from inside and the appellant was delaying in opening the lock on one pretext of the other; the plea of the appellant that she died of accident while igniting the oven and that the appellant and DW-2 put water on her was belied from the evidence on record as no sign of water was found in the kitchen and that the ash in the oven was found intact. These facts corroborate and lend assurance to the truth of the declaration of the deceased "mere pati ne mujhe jala diya hai". In such circumstances the conviction based on dying declaration was proper.

EVIDENCE ACT, 1872

Recording of dying declaration -- Section 32 -- Normally dying declaration should be recorded in question-answer form, but if dying declaration is not elaborate but consists only few sentences in actual words of the maker the same can be relied upon. The mental condition of the maker, alertness of mind, memory and understanding as to what he was saying are relevant matters which can be observed, by any person, but to lend assurance to such factors having regard to the importance of dying declaration certificate of a medically trained person is insisted upon.

Acts Referred:

Indian Penal Code, 1860 Sec 300

Evidence Act, 1872 Sec 32, Sec 5, Sec 3

Final Decision: Appeal dismissed

Eq. Citations: 1998 (2) EastCriC 56, 1998 AIR(SC) 1850, 1998 AIR(SCW) 1647, 1998 (2) BLJR 989, 1998 CriAppR 324, 1998 CrLJ 2515, 1998 (2) PLJR(SC) 169, 1998 CrLR

562, 1998 (2) CurCriR 234, 1998 (3) RajLW 289, 1998 (2) RCR(Cri) 403, 1998 (3) Scale 200, 1998 SCCriR 562, 1998 (2) ChandCriC 176, 1998 (4) AD(SC) 154, 1998 (2) AICLR 1, 1998 (2) AllCriR 1, 1998 (2) AllCriR 1178, 1998 (3) JT 290, 1998 (4) SCC 517, 1998 SCC(Cri) 1085, 1998 (2) SCJ 253, 1998 (2) SCR 1097, 1998 (4) Supreme 178, 1998 (2) Crimes(SC) 254, 1998 (37) AllCriC 116

Advocates: Pankaj Kalra, Vijay Kumar, B K Sharma, Uday Sinha, Anil Jha

Reference Cases:
Cases Cited in (+): **91**

Judgement Text:-

S S M Quadri, J

[1] On October 8, 1987, the learned VII Additional Sessions Judge, Dhanbad convicted the appellant, in S. C. No. 80 of 1986, for an offence punishable under Section 302, IPC for committing the murder of his wife, Smt. Shivratri Devi, by causing burn injuries and sentenced him to imprisonment for life after trying him for offences under Section 377 IPC, for committing sodomy with PW-2, and under Section 302, IPC for intentionally causing death of his wife on November 13, 1985. The conviction of the appellant was upheld by the Division Bench of Patna High Court in Criminal Appeal No. 207 of 1987 (R) on August 5, 1988. Against that judgment of the High Court, he filed this appeal by special leave.

[2] The appellant was working as the Officer-in-charge, Tisra P. S. in November, 1985 but was residing with his family in the quarters allotted to him at his former place of posting within the compound of Jharia P. S. He had a servant, Narsingh Kumar (PW-2), aged about 16 years, with whom he was indulging in carnal intercourse which led to strained relations between him and his wife. At about 8.00 a.m., on November 13, 1985, after throwing kerosene oil on her person, he set fire to her and thus caused burn injuries. Thereafter, he went to the house of Dr. Mohan Kanaujiya (PW-8) who was residing behind the Jharia P. S. and informed him that his wife had suffered burn injuries. Dr. Kanaujiya proceeded to his house. Hearing about this, the neighbours, Tribhuban Jha (PW-3) and Anirudh Prasad Singh (PW-4) also came to the quarters of the appellant. PW-3 and PW-4, found, among other things, the main gate of the quarters locked and when PW-6 could not get keys from the appellant, the door of the house was

broken and they entered the house. After securing the car of S. I. Kanhaiya Upadhyay (PW-6), they sent her for treatment to Sadar Hospital, Dhanbad, where she was admitted as an in-patient. On 16-11-1985, the Inspector P. N. Ram (PW-11) could find PW-2 to record his statement and F.I.R. was got lodged through him. On the same day, PW-11 requested Sub-Divisional Judicial Magistrate, Dhanbad, to record the statement of Smt. Shivratri Devi. At about 1.00 p.m., on that day, Shri L. K. Sharma, II Class Judicial Magistrate (PW-7) went to the Sadar hospital and recorded her dying declaration (Exh. 2) wherein she stated that her husband had burnt her. On the following day she succumbed to the injuries. Dr. Roy Sudhir Prasad (PW-5) assisted by Dr. D. K. Dhiraj (PW-9) conducted post-mortem examination on her dead body. PW-5 has stated that the scalp hair of the deceased was burnt up to the roots in both parietal areas in 6" x 31/2" and faint smell of kerosene oil was present on the scalp. He opined that the burn injuries were of first degree and were cause of her death and that the death was homicidal but not accidental. He issued post-mortem report (Exh. 1). PWs. 2 and 6, however, turned hostile at the trial of the appellant.

[3] His defence was one of denial; however, he took the plea that when Shivratri Devi went for ignitting the oven inside the kitchen, she caught fire accidentally. He examined three witnesses, DWs. 1 to 3. Paridhan Yadav (DW-1) is the appellant's father-in-law and Rajnath Yadav (DW-2) is appellant's brother-in-law. DW-1 spoke that the relations between the deceased and the appellant were cordial. DW-2 also said about their cordial relations and added that he and the appellant poured water on the body of the deceased when she caught fire.

[4] Shri D. D. Thakur, the learned senior counsel and Shri Kalra, appearing for the appellant, have contended that there are no eye-witnesses to the occurrence and that the conviction was based solely on the dying declaration of the deceased (Exh. 2) by both the Courts and when the deceased had given two dying declarations-the first being Exh. 5/4, recorded by Shri R. B. Singh, A.S.I. and the second being Exh. 2, recorded by the learned II Class Judicial Magistrate, Dhanbad (PW-7) which are inconsistent Exh. 2 should not have been relied upon; further Exh. 2 is not in the form of question-answers and that it has not been certified by the doctor as to the mental capacity of the victim to give the declaration; the trainee nurse who attested was not examined; and that it is not corroborated by any independent evidence.

[5] On the above contentions, the short question that arises for consideration is whether the Courts below are justified in convicting the appellant on the basis of Exh. 2, the dying declaration of the deceased.

[6] The law relating to dying declaration, the relevancy, admissibility and its probative value is fairly settled. More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant may not be admissible, for example, communication made by spouses during marriage or between an Advocate and his client though relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case. In this case, the thrust of the submission relates not to relevancy or admissibility but to the value to be given to Exh. 2. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section 32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case.

[7] Mr. Kalra strenuously contended that the deceased made two dying declaration, Exh. 5-4 and Exh. 2 which are inconsistent and therefore Exh. 2 should not have been taken into consideration. According to the learned counsel the first dying declaration is Exh. 5/4. The original of Exh. 5/4 is not to be found on record. Shri R. B. Singh, A.S.I. who is said to have recorded the original of Exh. 5/4 has not been examined. Assertions in documents produced in Court, when no witness is testifying are inadmissible as evidence of that which is asserted. As such Exh. 5/4 is not admissible in evidence. It is, however, suggested that on the basis of the original of Exh. 5/4 entry in the case diary, GD 517 is made so it could be treated as the original. We are afraid we cannot accept this contention as well. GD entry only keeps a copy of the dying declaration. The Station House Officer who made that entry has not come into the witness box. PW 11, the Investigating Officer, who is said to have signed that entry did not prove the same. It follows that neither Exh. 5/4 nor GD 517 can be taken as the evidence of the first dying declaration of Smt. Shivratri Devi. Thus, Exh. 2, is the only dying declaration which remains and was rightly relied up for convicting the appellant.

[8] The learned counsel next relied up the observations of this Court in Khushal Rao v. State of Bombay, 1958 SCR 552 : (AIR 1958 SC 22) and State (Delhi Administration v. Laxman Kumar, (1985) 4 SCC 476 : (AIR 1986 SC 250)), and argued that Exh. 2, not being in the form of question answer and not having been certified by the doctor should not have been accepted by the Courts below to convict the appellant. In Khushal Rao's case, this Court has laid down, inter alia, that a dying declaration which was recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and as far as practicable, in the words of the maker of the declaration stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character. In that case, three dying declarations were recorded within two and a half hours of the occurrence; the first by the doctor attending on the victim; the second by the police officer and the third by the learned Magistrate. The High Court took the view that corroboration of the dying declarations, was necessary and on the question whether the conduct of the accused in absconding and being arrested in suspicious circumstances, would be enough to corroborate the dying declarations, certificate under Articles 134 (1) (c) was granted by the Bombay High Court. This Court held that the said circumstances could not afford corroboration if corroboration was necessary and that there was no absolute rule of law, not even rule of prudence that had ripened into a rule of law that a dying declaration in order that it might sustain an order of conviction must be corroborated by other independent evidence.

[9] In Laxman Kumar's case (AIR 1986 SC 250) (supra), the housewife was admitted to the hospital with burn injuries. Her dying declaration was recorded by the police officer but it was not in question-answer form and it was not certified by the doctor to the effect that she was in a fit condition to give the statement though it was merely attested by him. It contained partial impression of finger tip of the deceased. The trial Court pointed out various suspicious factors for not accepting the dying declaration for resting conviction thereon. The High Court, however, relied upon the dying declaration and convicted the accused. On appeal, this Court endorsed the suspicious circumstances indicated by the trial Court, which included that under the relevant Rules applicable to the accused, the investigating officer was not to scribe the dying declaration; that it was not in question-answer form and that there was no positive evidence that the palms or left hand thumb of the victim had been so badly affected that she was not in a position to use thumb or any of the fingers and concluded that the dying declaration was not acceptable. This Court did not lay down, in any of the aforementioned cases, that unless the dying declaration is in question-answer form, it could not be accepted. Having regard to the sanctity attached to a dying declaration as it comes from the mouth of a

dying person though, unlike the principle of English law he need not be under apprehension of death, it should be in the actual words of the maker of the declaration. Generally, the dying declaration ought to be recorded in the form of questions-answers but if a dying declaration is not elaborate but consists of only a few sentences and is in the actual words of the maker the mere fact that it is not in question-answer form cannot be a ground against its acceptability or reliability. The mental condition of the maker of the declaration, alertness of mind, memory and understanding of what he is saying, are matters which can be observed by any person. But to lend assurance to those factors having regard to the importance of the dying declaration, the certificate of a medically trained person is insisted upon. In the absence of availability of a doctor to certify the abovementioned factors, if there is other evidence to show that the recorder of the statement has satisfied himself about those requirements before recording the dying declaration there is no reason as to why the dying declaration should not be accepted. However, it is pointed out by Shri Kalra that in a recent case in State of Orissa v. Parsuram Naik, (1997) 11 SCC 15 : (1997 AIR SCW 3675), this Court has declined to rely upon the dying declaration as it was not certified by the doctor that the maker of the declaration was in full senses and was medically fit to make a statement. There the accused was charged with committing the murder of his wife by burning her at her parental house. The dying declaration was recorded by the doctor who, however, did not certify that she was in full senses and was medically fit to make a statement. The maker of the declaration died within fifteen minutes of the recording of the statement. On the facts of that case, the High Court did not consider it safe to rely upon the dying declaration and acquitted the accused. This Court, in the appeal against acquittal having regard to the fact that she had sustained extensive burn injuries and died within fifteen minutes of the recording of the statement, took the view that she might not be in a proper and fit condition to make a statement as regards her cause of death and agreed with the High Court that exclusive reliance could not be placed on such a dying declaration to hold the husband guilty of committing her murder.

[10] In the light of the above discussion we shall read here Exh. 2 which reads thus :

> "Mujhe mere pati ne jala diya. Mujhe pata nahin kyon jalaya. Main jyada nahin Kah sakti hoon kyon ke bahut pyass lagi hai."

> The learned II Class Judicial Magistrate (PW-7) stated that pursuant to the order of Sub-Divisional Judicial Magistrate, on November 16, 1985 he recorded the dying declaration of Smt. Shivratri Devi in Sadar Hospital and

signed the same; as both the hands of Smt. Shivratri Devi were badly burnt, he took impression of her left toe on the declaration and certified accordingly. He further stated that he put certain questions to Smt. Shivratri Devi with a view to test her memory but he did not record this fact in the statement and that she was conscious while giving her statement; he added, he got the doctor searched but no doctor was available at 1.00 P.M. when the statement was recorded by him; a trainee nurse was attending upon her and he got her signature on the statement. He also stated that the ASI who was with him identified the lady and after making enquiries from the lady, he satisfied himself about her identity.

[11] From a plain reading of Exh. 2 as well as the statement of PW 7, it is clear that the learned Magistrate has satisfied himself about the identity of Smt. Shivratri Devi; he put questions to her and satisfied himself about her condition that she was fit enough to make the statement. The statement itself consists of two sentences. Having regard to all the facts and circumstances both the Courts below have relied upon the dying declaration and we find no cogent reason to take a different view of the matter. Having found that the dying declaration is true and acceptable there is no escape from the conclusion that the appellant was responsible for intentionally causing burn injuries to his wife Smt. Shivratri Devi, which resulted in her death.

[12] Though no corroboration of dying declaration as such is necessary to convict the accused - a principle which has been laid down in Khushal Rao's case (AIR 1958 SC 22) (supra), however, in this case, there is circumstantial evidence which corroborates the dying declaration, viz., the statements of PWs 3 and 4 that they found the victim in her room where the smell of kerosene was present, the statement of PW-5, the doctor who conducted the post-mortem examination after four days of the accident noticed smell of kerosene from the scalp of the deceased, statements of PWs 4 and 6 who rushed to the house of the appellant immediately after hearing of the incident and found that the house was locked from inside and the appellant was delaying in opening the lock on one pretext or the other; the plea of the appellant that she died of accident while igniting the oven and that the appellant and DW-2 put water on her was belied from the evidence on record as no sign of water was found in the kitchen and that the ash in the oven was found intact. These facts corroborate and lend assurance to the truth of the declaration of the deceased "mere pati ne mujhe jala diya hai".

[13] Before parting with this case we consider it appropriate to observe that though the

prosecution has to prove the case against the accused in the manner stated by it and that any act or omission on the part of the prosecution giving rise to any reasonable doubt would go in favour of the accused, yet in a case like the present one where the record shows that investigating officers created a mess by bringing on record Exh. 5/4 and GD Entry 517 and have exhibited remiss and/or deliberately omitted to do what they ought to have done to bail out the appellant who was a member of the police force or for any extraneous reason, the interest of justice demands that such acts or omissions of the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice.

[14] For the above reasons, we are of the view that the trial Court as well as the High Court has rightly based the conviction on Exh. 2, the dying declaration. We find no merit in the appeal and accordingly dismiss the same. The appellant, who is on bail, will now surrender to his bail bonds to serve out the sentence imposed upon him.

Appeal dismissed.

On compact disc(CD).The amended definition of "evidence" in section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in section 2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation.Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

K K VELUSAMY

V/S

N PALANISAMY 2011 (11) SCC 275.

SUPREME COURT OF INDIA *(D.B.)*

K K VELUSAMY
V/S
N PALANISAMY

Date of Decision: 30 March 2011

Citation: 2011 LawSuit(SC) 271

Hon'ble Judges: A K Patnaik, R V Raveendran

Case Type: Civil Appeal

Case No: 2795-2796 of 2011

Subject: Civil

Head Note:

Code of Civil Procedure, 1908 - Sec 151, Or 18 Rule 17 - Evidence Act, 1872 - Sec 3, 8 - Information Technology Act, 2000 - Sec 2(t) - reopening of electronic evidence in suit for specific performance of sale deed for purpose of further cross examination - extent and scope under Sec 151 and Or 18 Rule 17 CPC - electronically recorded conversation is admissible in evidence, if voice or photograph is relevant to matter in issue, by eliminating possibility of erasure, addition or manipulation - however, power under Sec 151 or Or 18 Rule 17 CPC is not intended to be used routinely, merely for asking - it is for Courts below to consider whether it was necessary to reopen evidence and if so, in what manner and to what extent further evidence should be permitted - thus, inherent power under Sec 151 is not affected by express power conferred upon Court under Or 18 Rule 17 to recall any witness - Trial Court to consider matter afresh.

Reopening of evidences - denial of - for interests of justice and to prevent abuse of process, Court may exercise its discretion on valid and sufficient reasons - it's discretion to do those things does not disappear merely because arguments are

head, either fully or partly - impugned orders dismissing application under Or 18 Rule 17 affirmed while dismissal of application under Sec 151 set aside - appeals partly allowed.

Acts Referred:
CODE OF CIVIL PROCEDURE, 1908 OR 18R 17, SEC 151
EVIDENCE ACT, 1872 SEC 8
INFORMATION TECHNOLOGY ACT, 2000 SEC 2(T)

Final Decision: Appeal allowed

Eq. Citations: 2011 (4) SCJ 48, 2011 (3) AllMR 445, 2011 AIR(SCW) 2296, 2011 (86) AllLR 457, 2011 (2) ARC 1, 2011 (1) CgLRW 501, 2011 (2) PLJR(SC) 138, 2011 (3) RajLW 2457, 2011 (113) RevDec 414, 2011 (2) Supreme 667, 2011 (3) AWC 3104, 2011 (4) JT 38, 2011 (2) KCCR(SN) 132, 2011 (2) KerLJ 240, 2011 (5) CalHN 28, 2011 (2) KerLT 19, 2011 (1) CgBCLJ 254, 2011 AIR(SC)(Civ) 1000, 2011 (3) AllMR 455, 2011 (3) CTC 422, 2011 (2) KCCR 132, 2011 (29) LCD 919, 2011 (3) ICC 1, 2011 (3) LW 738, 2011 (2) KarLJ 240, 2011 (3) LawHerald(SC) 2036, 2011 (2) RCR(Civ) 875, 2011 (4) Scale 61, 2011 (11) SCC 275, 2011 (4) SCR 31, 2011 (3) BBCJ(SC) 44, 2011 (2) CivCC 823, 2011 (2) AIRKarR 752, 2011 (2) OrissaLR 13, 2011 (3) WbLR 629, 2011 (7) MadLJ 612, 2011 (4) GLR 2857

Advocates: S Mahendran, P Vishwanatha Shetty, G Indira, K V Jagdishwaran, Mona K Rajvanshi

Reference Cases:
Cases Cited in (+): **58**
Cases Referred in (+): **11**

Judgement Text:-

R V Raveendran, J

[1] Leave granted.

[2] The respondent herein has filed a suit for specific performance (OS No.48/2007) alleging that the appellant-defendant entered into a registered agreement of sale dated

20.12.2006 agreeing to sell the suit schedule property to him, for a consideration of Rs.240,000/-; that he had paid Rs.160,000/- as advance on the date of agreement; that the appellant agreed to execute a sale deed by receiving the balance of Rs.80,000/- within three months from the date of sale; that he was ready and willing to get the sale completed and issued a notice dated 16.3.2007 calling upon the appellant to execute the sale deed on 20.3.2007; and that he went to the Sub-Registrar's office on 20.3.2007 and waited, but the appellant did not turn up to execute the sale deed. On the said averments, the respondent sought specific performance of the agreement of sale or alternatively refund of the advance of Rs.160,000/- with interest at 12% per annum from 20.12.2006.

[3] The appellant resisted the suit. He alleged that he was in need of Rs.150,000 and approached the respondent who was a money lender, with a request to advance him the said amount as a loan; that the respondent agreed to advance the loan but insisted that the appellant should execute and register a sale agreement in his favour and also execute some blank papers and blank stamp-papers, as security for the repayment of the amount to be advanced; and that trusting the respondent, the appellant executed the said documents with the understanding that the said documents will be the security for the repayment of the loan with interest. The appellant therefore contended that the respondent - plaintiff was not entitled to specific performance.

[4] The suit was filed on 26.3.2007. The written statement was filed on 12.9.2007. Thereafter issues were framed and both parties led evidence. On 11.11.2008 when the arguments were in progress, the appellant filed two applications (numbered as IA No.216/2009 and IA No.217/2009). The first application was filed under section 151 of the Code of Civil Procedure ('Code' for short) with a prayer to reopen the evidence for the purpose of further cross-examination of Plaintiff (PW1) and the attesting witness Eswaramoorthy (PW2). IA No.217/2009 was filed under Order 18 Rule 17 of the Code for recalling PWs.1 and 2 for further cross examination. The appellant wanted to cross-examine the witnesses with reference to the admissions made during some conversations, recorded on a compact disc (an electronic record). In the affidavits filed in support of the said applications, the appellant alleged that during conversations among the appellant, respondent and three others (Ponnuswamy alias Krishnamoorthy, Shiva and Saravana Kumar), the respondent-plaintiff admitted that Eswaramoorthy (PW2) had lent the amount (shown as advance in the agreement of sale) to the appellant through the respondent; and that during another conversation among the appellant, Eswaramoorthy and Shiva, the said Eswaramoorthy (PW2) also admitted that he had lent the amount (mentioned in the agreement of sale advance) through the

respondent, that both conversations were recorded by a digital voice recorder; that conversation with plaintiff was recorded on 27.10.2008 between 8 a.m. to 9.45 a.m. and the conversation with Eswaramoorthy was recorded on 31.10.2008 between 7 to 9.50 p.m.; and that it was therefore necessary to reopen the evidence and further cross-examine PW1 and PW2 with reference to the said admissions (electronically recorded evidence) to demonstrate that the agreement of sale was only a security for the loan. It is stated that the Compact Disc containing the recording of the said conversations was produced along with the said applications.

[5] The respondent resisted the said applications. He denied any such conversations or admissions. He alleged that the recordings were created by the appellant with the help of mimicry specialists and Ponnuswamy, Shiva and Saravana Kumar. He contended that the application was a dilatory tactic to drag on the proceedings.

[6] The trial court, by orders dated 9.9.2009, dismissed the said applications. The trial court held that as the evidence of both parties was concluded and the arguments had also been heard in part, the applications were intended only to delay the matter. The revision petitions filed by the appellant challenging the said orders, were dismissed by the High Court by a common order dated 7.4.2010, reiterating the reasons assigned by the trial court. The said order is challenged in these appeals by special leave. The only question that arises for consideration is whether the applications for reopening/recalling ought to have been allowed.

[7] The amended definition of "evidence" in section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in section 2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. In R.M Malkani vs. State of Maharastra, 1973 AIR(SC) 157, this court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. This Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence.

[8] Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate, 2009 4 SCC 410]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in- chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

[9] There is no specific provision in the Code enabling the parties to re- open the evidence for the purpose of further examination-in-chief or cross- examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re- open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

[10] The respondent contended that section 151 cannot be used for re- opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (See : Padam Sen vs. State of UP, 1961 AIR(SC) 218; Manoharlal Chopra vs. Seth Hiralal, 1962 AIR(SC) 527; Arjun

Singh vs. Mohindra Kumar, 1964 AIR(SC) 993; Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal, 1966 AIR(SC) 1899; Nain Singh vs. Koonwarjee, 1970 1 SCC 732; The Newabganj Sugar Mills Co.Ltd. vs. Union of India, 1976 AIR(SC) 1152; Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax, New Delhi, 1977 AIR(SC) 1348; National Institute of Mental Health & Neuro Sciences vs. C Parameshwara, 2005 2 SCC 256; and Vinod Seth vs. Devinder Bajaj, 2010 8 SCC 1). We may summarize them as follows:

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.

(c) A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in

any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

[11] The Code earlier had a specific provision in Order 18 Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1.7.2002. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

[12] The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in

regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

[13] The learned counsel for respondent contended that once arguments are commenced, there could be no re-opening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments.

[14] Neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion under section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.

[15] The appellant - defendant has taken a consistent stand in his reply notice, written statement and evidence that the agreement of sale was executed to secure a loan of Rs.150,000, as the respondent insisted upon execution and registration of such agreement. If after the completion of recording of evidence, PW1 and PW2 had admitted during conversations that the amount paid was not advance towards sale price, but only a loan and the agreement of sale was obtained to secure the loan, that would be material evidence which came into existence subsequent to the recording of the depositions, having a bearing on the decision and will also clarify the evidence

already led on the issues. According to the appellant, the said evidence came into existence only on 27.10.2008 and 31.10.2008, and he prepared the applications and filed them at the earliest, that is on 11.11.2008. As defendant could not have produced this material earlier and if the said evidence, if found valid and admissible, would assist the court to consider the evidence in the correct perspective or to render justice, it was a fit case for exercising the discretion under section 151 of the Code. The courts below have not applied their minds to the question whether such evidence will be relevant and whether the ends of justice require permission to let in such evidence. Therefore the order calls for interference.

[16] We may add a word of caution. The power under section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

[17] Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. Courts should constantly endeavour to follow such a time schedule. The amended Code expects them to do so. If that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of pendency, the more the number of interlocutory applications which in turn add to the period of pendency.

[18] In this case, we are satisfied that in the interests of justice and to prevent abuse of the process of court, the trial court ought to have considered whether it was necessary to re-open the evidence and if so, in what manner and to what extent further evidence should be permitted in exercise of its power under section 151 of the Code. The court ought to have also considered whether it should straightway recall PW1 and PW2 and permit the appellant to confront the said recorded evidence to the said witnesses or whether it should first receive such evidence by requiring its proof of its authenticity and only then permit it to be confronted to the witnesses (PW1 and PW2).

[19] In view of the above, these appeals are allowed in part. The orders of the High Court and Trial Court dismissing IA No. 216/2009 under section 151 of the Code are set aside. The orders are affirmed in regard to the dismissal of IA No.217/2009 under Order 18 Rule 17 of the Code. The trial court shall now consider IA No.216/2009 afresh in accordance with law.

In view of the definition of 'document' in Evidence Act, and the law laid down by Supreme Court, that the compact disc is also a document.

SHAMSHER SINGH VERMA

V/S

STATE OF HARYANA 2015 LawSuit(SC) 1145.

SUPREME COURT OF INDIA (FROM PUNJAB & HARYANA) *(D.B.)*

SHAMSHER SINGH VERMA
V/S
STATE OF HARYANA

Date of Decision: 24 November 2015

Citation: 2015 LawSuit(SC) 1145

Hon'ble Judges: Dipak Misra, Prafulla C Pant

Case Type: Criminal Appeal

Case No: 1525 of 2015

Subject: Criminal

Acts Referred:
Indian Penal Code, 1860 Sec 376, Sec 354
Code Of Criminal Procedure, 1973 Sec 294(1), Sec 313, Sec 294
Protection Of Children From Sexual Offences Act, 2012 Sec 4, Sec 12

Final Decision: Appeal allowed

Reference Cases:
Cases Referred in (+): **2**

Judgement Text:-

Prafulla C Pant, J

[1] This appeal is directed against order dated 25.8.2015, passed by the High Court of Punjab and Haryana at Chandigarh, whereby said Court has affirmed the order dated

21.2.2015, passed by the Special Judge, Kaithal, in Sessions Case No. 33 of 2014, and rejected the application of the accused for getting exhibited the compact disc, filed in defence and to get the same proved from Forensic Science Laboratory.

[2] We have heard learned counsel for the parties and perused the papers on record.

[3] Briefly stated, a report was lodged against the appellant (accused) on 25.10.2013 at Police Station, Civil Lines, Kaithal, registered as FIR No. 232 in respect of offence punishable under Section 354 of the Indian Penal Code (IPC) and one relating to Protection of Children from Sexual Offences Act, 2015 (POCSO) in which complainant Munish Verma alleged that his minor niece was molested by the appellant. It appears that after investigation, a charge sheet is filed against the appellant, on the basis of which Sessions Case No. 33 of 2014 was registered. Special Judge, Kaithal, after hearing the parties, on 28.3.2014 framed charge in respect of offences punishable under Sections 354A and 376 IPC and also in respect of offence punishable under Sections 4/12 of POCSO. Admittedly prosecution witnesses have been examined in said case, whereafter statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, 1973 (for short "CrPC"). In defence the accused has examined four witnesses, and an application purported to have been moved under Section 294 CrPC filed before the trial court with following prayer: -

> "In view of the submissions made above it is therefore prayed that the said gadgets may be got operated initially in the court for preserving a copy of the text contained therein for further communication to F.S.L. for establishing their authenticity. It is further prayed that the voice of Sandeep Verma may kindly be ordered to be taken by the experts at FSL to be further got matched with the recorded voice above mentioned."

[4] In said application dated 19.2.2015, it is alleged that there is recording of conversation between Sandeep Verma (father of the victim) and Saurabh (son of the accused) and Meena Kumari (wife of the accused). The application appears to have been opposed by the prosecution. Consequently, the trial court rejected the same vide order dated 21.2.2015 and the same was affirmed, vide impugned order passed by the High Court.

[5] Learned counsel for the appellant argued before us that the accused has a right to adduce the evidence in defence and the courts below have erred in law in denying the right of defence.

[6] On the other hand, learned counsel for the complainant and learned counsel for the State contended that it is a case of sexual abuse of a female child aged nine years by his uncle, and the accused/appellant is trying to linger the trial.

[7] In reply to this, learned counsel for the appellant pointed out that since the accused/appellant is in jail, as such, there is no question on his part to protract the trial. It is further submitted on behalf of the appellant that the appellant was initially detained on 24.10.2013 illegally by the police at the instance of the complainant, to settle the property dispute with the complainant and his brother. On this Writ Petition (Criminal) No. 1888 of 2013 was filed before the High Court for issuance of writ of habeas corpus. It is further pointed out that the High Court, vide its order dated 25.10.2013, appointed Warrant Officer, and the appellant was released on 25.10.2013 at 10.25 p.m. Immediately thereafter FIR No. 232 dated 25.10.2013 was registered at 10.35 p.m. regarding alleged molestation on the basis of which Sessions Case is proceeding. On behalf of the appellant it is also submitted that appellant's wife Meena is sister of Munish Verma (complainant) and Sandeep Verma (father of the victim), and there is property dispute between the parties due to which the appellant has been falsely implicated.

[8] Mrs. Mahalakshmi Pawani, learned senior counsel for the complainant vehemently argued that the alleged conversation among the father of the victim and son and wife of the appellant is subsequent to the incident of molestation and rape with a nine year old child, as such the trial court has rightly rejected the application dated 19.2.2015.

[9] However, at this stage we are not inclined to express any opinion as to the merits of the prosecution case or defence version. The only point of relevance at present is whether the accused has been denied right of defence or not.

[10] Section 294 CrPC reads as under: -

> "294. No formal proof of certain documents. - (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.
>
> (2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved."

[11] The object of Section 294 CrPC is to accelerate pace of trial by avoiding the time being wasted by the parties in recording the unnecessary evidence.

[12] Where genuineness of any document is admitted, or its formal proof is dispensed with, the same may be read in evidence. Word "document" is defined in Section 3 of the Indian Evidence Act, 1872, as under: -

" 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustration

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document."

In R.M. Malkani vs. State of Maharashtra, 1973 1 SCC 471 this Court has observed that

> tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record.

[13] In Ziyauddin Barhanuddin Bukhari vs. Brijmohan Ramdass Mehra and others, 1976 2 SCC 17 it was held by this Court that tape-records of speeches were 'documents', as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:

> "(a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.
>
> (c) The subject-matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

[14] In view of the definition of 'document' in Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document. It is not necessary for the court to obtain admission or denial on a document under sub-section (1) to Section 294 CrPC personally from the accused or complainant or the witness. The endorsement of admission or denial made by the counsel for defence, on the document filed by the prosecution or on the application/report with which same is filed, is sufficient compliance of Section 294 CrPC. Similarly on a document filed by the defence, endorsement of admission or denial by the public prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved, and can be read in evidence. In a complaint case such an endorsement can be made by the counsel for the complainant in respect of

document filed by the defence.

[15] On going through the order dated 21.2.2015, passed by the trial court, we find that all the prosecution witnesses, including the child victim, her mother Harjinder Kaur, maternal grandmother Parajit Kaur and Munish Verma have been examined. Sandeep Verma (father of the victim) appears to have been discharged by the prosecution, and the evidence was closed. From the copy of the statement of accused Shamsher Singh Verma recorded under Section 313 CrPC (annexed as Annexure P-11 to the petition), it is evident that in reply to second last question, the accused has alleged that he has been implicated due to property dispute. It is also stated that some conversation is in possession of his son. From the record it also reflects that Dhir Singh, Registration Clerk, Vipin Taneja, Document Writer, Praveen Kumar, Clerk-cum-Cashier, State Bank of Patiala, and Saurabh Verma, son of the appellant have been examined as defence witnesses and evidence in defence is in progress.

[16] We are not inclined to go into the truthfulness of the conversation sought to be proved by the defence but, in the facts and circumstances of the case, as discussed above, we are of the view that the courts below have erred in law in not allowing the application of the defence to get played the compact disc relating to conversation between father of the victim and son and wife of the appellant regarding alleged property dispute. In our opinion, the courts below have erred in law in rejecting the application to play the compact disc in question to enable the public prosecutor to admit or deny, and to get it sent to the Forensic Science Laboratory, by the defence. The appellant is in jail and there appears to be no intention on his part to unnecessarily linger the trial, particularly when the prosecution witnesses have been examined.

[17] Therefore, without expressing any opinion as to the final merits of the case, this appeal is allowed, and the orders passed by the courts below are set aside. The application dated 19.2.2015 shall stand allowed. However, in the facts and circumstances of the case, it is observed that the accused/appellant shall not be entitled to seek bail on the ground of delay of trial.

TELEGRAPH ACT, 1885

Sections 5(2) and 7 -- Telephone Taping is violative of Article 21 of the Constitution and will also infract Article 19(1)(a) unless it comes within the grounds of restrictions under Article 19(2). Section 5(2) permits interception of the messages in accordance with the provisions of the said section. The term "occurrence" of any public emergency" are or in the interest of public safety" or sine qua non for the application of the provisions of Section 5(2). Unless a public emergency has occurred or interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. In the absence of any provision for procedural safeguard in the act in the matter of telephone taping, the Supreme Court directed observance of procedure by way of safeguard before resorting to telephone taping. Guidelines issued by the Supreme Court.

PEOPLES UNION FOR CIVIL LIBERTIES

V/S

UNION OF INDIA 1997 AIR(SC) 568.

SUPREME COURT OF INDIA *(D.B.)*

PEOPLES UNION FOR CIVIL LIBERTIES
V/S
UNION OF INDIA

Date of Decision: 18 December 1996

Citation: 1996 LawSuit(SC) 2132

Hon'ble Judges: Kuldip Singh, S Saghir Ahmad

Case Type: Writ Petition (C)

Case No: 256 of 1991

Subject: Constitution, Press Media & Telecommunication

Head Note:

Constitution of India, 1950
Articles 13, 51, 32 and 226 -- Rule of Customary International Law is not contrary to Municipal Law -- Though the right to privacy by itself has not been identified under the Constitution, as a concept, it may be too broad and moralistic to define it judicially -- Whether right to privacy can be claimed or has been infringed in the given case will depend on the facts and circumstances of each case.
The right to privacy -- by itself- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important

facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

Articles 19(1)(a) and 21 -- Scope of right to life-Right to privacy is a part of right to life and the right to privacy would include telephone conversation in the privacy of home and office -- Therefore, telephone taping would be violative of Article 19(1)(a) unless it conies within the restrictions under Article 19(2).

Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the case. But the right to hold a telephone conversation in privacy can be claimed as right to privacy. Telephone conversation is an important facet of man's private life -- Right to privacy would certainly include telephone conversation and, therefore, telephone taping would include telephone conversation in the privacy. Therefore, the telephone would infract Article 21 of the Constitution.

Right to freedom of speech and expression is guaranteed. Unless it is permitted under the procedure established by law. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) and this freedom means the right to express. Telephone taping would be violative of Article 19(1)(a) of the Constitution.

Article 51 read with Article 21 -Article 21 is to be interpreted in conformity with the International laws, viz. Article 17 of International Covenant on Civil and Political Rights, 1966, Article 12 of Universal Declaration of Human Rights, 1948, etc. -- The right to transmit telephone message or hold telephone conversation in privacy forms part of right to privacy protected under Article 21 and also Article 17 of International Covenant on Civil and Political Rights. Held further that the International Law is not confined to relations between the State but extends to the matters of social concerns such as health, education, economics, as also human rights.

The International Law today is not confined to regulation of the relations between the States but its scope continues to extend and today matter of social concern like health, education, economics, apart from human rights fall within the ambit of International regulations. It is almost an accepted proposition of law that Rule of customary International Law not contrary to municipal law, are deemed to be incorporated in the domestic law. Article 51 of the Constitution directs that the State shall endeavour to inter alia foster respect for International Law and treaty

obligations in the dealing of organised people with one another.

Article 51 -- Ratification of International Convention/covenant, by the Government of India -Approval of such ratification by the Parliament whether could be termed as legislation or could be equated to legislation and would invest the convention with the sanctity of law made by the Parliament- Held, this aspect requires deeper scrutiny then has been possible in the present case -- However, for the present case, the provisions of convenants which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can be relied upon by the Court as facets of those fundamental rights and hence enforceable as such.

TELEGRAPH ACT, 1885
Sections 5(2) and 7 -- Telephone Taping is violative of Article 21 of the Constitution and will also infract Article 19(1)(a) unless it comes within the grounds of restrictions under Article 19(2).
Section 5(2) permits interception of the messages in accordance with the provisions of the said section. The term "occurrence" of any public emergency" are or in the interest of public safety" or sine qua non for the application of the provisions of Section 5(2). Unless a public emergency has occurred or interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. In the absence of any provision for procedural safeguard in the act in the matter of telephone taping, the Supreme Court directed observance of procedure by way of safeguard before resorting to telephone taping. Guidelines issued by the Supreme Court.

Acts Referred:
Constitution of India Art 19(2), Art 13, Art 226, Art 32, Art 21, Art 19(1)(a), Art 51, Art 14
Telegraph Act, 1885 Sec 5(2), Sec 7(2)(b)

Final Decision: Petition disposed

Eq. Citations: 1997 AIR(SCW) 113, 1997 (1) ApexCJ 397, 1997 (3) BCR 38, 1996 (4) CCC 277, 1997 (1) CutLT 345, 1996 (9) Scale 318, 1996 (Supp10) SCR 321, 1997 (1) UJ 187, 1997 (1) JT 288, 1997 (1) AD(Cri) 137, 1997 AIR(SC) 568, 1997 (1) ICC 682, 1997 (1) RCR(Civ) 720, 1997 (1) SCC 301, 1996 (8) Supreme 673

Advocates: Kapil Sibal, Rajinder Sachar, Rashmi Kapadia, Sanjay Parikh, P Parmeshwaran, Hemant Sharma, Anil Katiyar

Reference Cases:

Cases Cited in (+): **69**

Cases Referred in (+): **3**

Judgement Text:-

Kuldip Singh, J

[1] Telephone - Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day.

[2] This petition - public interest - under Article 32 of the Constitution of India has been filed by the People's Union of Civil Liberties, a voluntary organisation, highlighting the incidents of telephone tapping in the recent past. The petitioner has challenged the constitutional validity of Section 5 (2) of the Telegraph Act, 1885 (the Act), in the alternative it is contended that the said provisions be suitably read-down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping.

[3] The writ petition was filed in the wake of the report on "Tapping of politicians phones" by the Central Bureau of Investigation (CBI). Copy of the report as published in the "Mainstream" Volume XXIX, dated March 26, 1991 has been placed on record along with the rejoinder filed by the petitioner. The authenticity of the report has not been questioned by the learned counsel for the Union of India before us. Paras 21 and 22 of the report are as under:-

> "21. Investigation has revealed the following lapses on the part of MTNL.
>
> i) In respect of 4 telephone numbers though they were shown to be under interception in the statement supplied by MTNL, the authorisation for putting the number under interception could not be provided. This shows that

records have not been maintained properly.

ii) In respect of 279 telephone numbers, although authority letters from various authorised agencies were available, these numbers have not been shown in list supplied by MTNL showing interception of telephones to the corresponding period. This shows that lists supplied were incomplete.

iii) In respect of 133 cases, interception of the phones were done beyond the authorised part. The GM (O), MTNL in his explanation has said that this was done in good faith on oral requests of the representatives of the competent authorities and that instructions have now been issued that interception beyond authorised periods will be done only on receipt of written requests.

iv) In respect of 111 cases, interception of telephones have exceeded 180 days period and no permission of Government for keeping the telephone under interception beyond 180 days was taken.

v) The files pertaining to interception have not been maintained properly.

22. Investigation has also revealed that various authorised agencies are not maintaining the files regarding interception of telephones properly. One agency is not maintaining even the log books of interception. The reasons for keeping a telephone number on watch have also not been maintained properly. The effectiveness of the results of observation have to be reported to the Government in quarterly returns which is also not being sent in time and does not contain all the relevant information. In the case of agencies other than I. B., the returns are submitted to the MHA. The periodicity of maintenance of the records is not uniform. It has been found that whereas DRI keeps record for the last 5 years, in case of I. B., as soon as the new quarterly statement is prepared, the old returns are destroyed for reasons of secrecy. The desirability of maintenance of uni-(sic) return and periodicity of these documents needs to be examined.

[4] Section 5 (2) of the Act is as under:-

"5 (2) - On the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

[5] The above provisions clearly indicate that in the event of the occurrence of a public emergency or in the interest of public safety the Central Government or the State Government or any officer specially authorised in this behalf, can intercept messages if satisfied that it is necessary or expedient so to do in the interest of:-

(i) The sovereignty and integrity of India.

(ii) The security of the State.

(iii) Friendly relations with foreign States.

(iv) Public order.

(v) For preventing incitement to the commission of an offence.

[6] The CBI report indicates that under the above provisions of law Director, Intelligence

Bureau, Director General, Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director, Enforcement Directorate have been authorised by the Central Government to do interception for the purposes indicated above. In addition, the State Government generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act.

[7] The Assistant Director - General, Department of Telecom has filed counter-affidavit on behalf of the Union of India. The stand taken by the Union of India is as under:-

> "The allegation that the party in power at the Centre/State or officer authorised to tap the telephone by the Central/State Government could misuse this power is not correct. Tapping of telephone could be done only by the Central/State Government order by the Officer specifically authorised by the Central/State Government on their behalf and it could be done only under certain conditions such as National Emergency in the interest of public safety, security of State, public order etc. It is also necessary to record the reasons for tapping before tapping is resorted to. If the party, whose telephone is to be tapped is to be informed about this and also the reasons for tapping, it will defeat the very purpose of tapping of telephone. By the very sensitive nature of the work, it is absolutely necessary to maintain secrecy in the matter. In spite of safeguards, if there is alleged misuse of the powers regarding tapping of telephones by any authorised officer, the aggrieved party could represent to the State Government/Central Government and suitable action could be taken as may be necessary. Striking down the provision Section 5 (2) of the Indian Telegraph Act, is not desirable as it will jeopardise public interest and security of the State."

[8] Section 7 (2) (b) of the Act which gives rule-making power to the Central Government is as under:-

> "7. Power to make rules for the conduct of telegraphs - (1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs, established, maintained or worked by the Government or by persons licensed under this Act.
>
> (2) Rules under this section may provide for all or any of the following,

among other matters, that is to say:-

(a) xx xx

(b) the precautions to be taken of preventing the improper interception or disclosure of messages."

[9] No rules have been framed by the Central Government under the provisions quoted above.

[10] Mr. Rajinder Sachar, Sr. Advocate assisted by Mr. Sanjay Parikh vehemently contended that right to privacy is a fundamental right guaranteed under Article 19 (1) and Article 21 of the Constitution of India. According to Mr. Sachar to save Section 5 (2) of the Act from being declared unconstitutional it is necessary to read down the said provision to provide adequate machinery to safeguard the right to privacy. Prior judicial sanction - ex-parte in nature - according to Mr. Sachar, is the only safeguard, which can eliminate the element of arbitrariness or unreasonableness. Mr. Sachar contended that not only the substantive law but also the procedure provided therein has to be just, fair and reasonable.

[11] While hearing the arguments on September 26, 1995, this Court passed the following order:

"Mr. Parikh is on his legs. He has assisted us in this matter for about half an hour. At this stage, Mr. Kapil Sibal and Dr. Dhawan, who are present in Court, stated that according to them the matter is important and they being responsible members of the Bar, are duty bound to assist this Court in a matter like this. We appreciate the gesture. We permit them to intervene in this matter. They need a short adjournment to assist us.

The matter is adjourned to October 11, 1995".

[12] While assisting this Court Mr. Kapil Sibal at the outset stated that in the interest of the security and sovereignty of India and to deal with any other emergency situation for the protection of national interest, messages may indeed be intercepted. According to him the core question for determination is whether there are sufficient procedural

safeguards to rule out arbitrary exercise of power under the Act. Mr. Sibal contended that Section 5 (2) of the Act clearly lays down the conditions/situations which are sine qua non for the exercise of the power but the manner in which the said power can be exercised has not been provided. According to him procedural safeguards -short of prior judicial scrutiny - shall have to be read in Section 5 (2) of the Act to save it from the vice of arbitrariness.

[13] Both sides have relied upon the seven-Judge Bench judgment of this Court in Kharak Singh v. State of U. P. (1964) 1 SCR 332: (AIR 1963 SC 1295). The question for consideration before this Court was whether "surveillance" under Chapter XX of the U. P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by "domciliary visits at night" was held to be violative of Article 21 on the ground that there was no "law" under which the said regulation could be justified.

[14] The word "life" and the expression "personal liberty" in Article 21 were elaborately considered by this Court in Kharak Singhs's case (AIR 1963 SC 1295). The majority read "right to privacy" as part of the right to life under Article 21 of the Constitution on the following reasoning (at Pp. 1302-03):

> "We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois (1876) 94 US 113, 142, where the learned Judge pointed out that "life" in the 5th and 14th Amendments of the U. S. Constitution corresponding to Art. 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs - his arms and legs etc. We do not entertain any doubt that the word "life" in Art. 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer hee to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and, therefore, of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and

achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in Wolf v. Colorado (1948) 338 US 25 :

"The security of one's privacy against arbitrary intrusion by the police..... is basic to a free society. It is, therefore, implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a preclude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples..... We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment."

Murphy, J. considered that such invasion was against "the very essence of a scheme of ordered liberty."

It is true that in the decision of the U. S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle"

and in Semanyne's case (1604) 5 Co Rep 91a, where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne's case was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

In our view Cl. (b) of Regulation 236 is plainly violative of Art. 21 and as there is no "law" on which the same could be justified it must be struck down as unconstitutional."

[15] Subba Rao, J. (as the learned Judge then was) in his minority opinion also came to the conclusion that right to privacy was a part of Article 21 of the Constitution but went to step further and struck down Regulation 236 as a whole on the following reasoning (at P. 1306 of AIR) :

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house where he lives with his family, is his "castle" : it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado (1948) 338 US 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or

> indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution."

[16] Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh's case (AIR 1963 SC 1295) (majority and the minority opinions) to include that "right to privacy" is a part of the right to "protection of life and personal liberty" guaranteed under the said Article.

[17] In Govind. v. State of Madhya Pradesh (1975) 2 SCC 148: (AIR 1975 SC 1378), as three-Judge Bench of this Court considered the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided surveillance by way of several measures indicated in the said regulations. This Court upheld the validity of the regulations by holding that Article 21 was not violated because the impugned regulations were "procedure established by law" in terms of the said article.

> In R. Rajagopal alias R. R. Gopal v. State of Tamil Nadu, (1994) 6 SCC 632: (1994 AIR SCW 4420), Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The learned Judge referred to Kharak's case (AIR 1963 SC 1295), Govind's case (AIR 1975 SC 1378) and considered a large number of Americal and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, mother-hood, child-bearing and education among other matters."

[18] We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law."

[19] The right to privacy - by itself - has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations

on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one'' home or office. Telephone - tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

[20] Right to freedom of speech and expression is guaranteed under Article 19 (1) (a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19 (2) would infarct Article 19 (1)(a) of the Constitution.

[21] India is a signatory to the International Convenant on Civil and Political Rights, 1966. Article 17 of the said Covenant is as under:-

> "Article 17
>
> 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or corespondent, nor to lawful attacks on his honour and reputation.
>
> 2. Every one has the right to the protection of the law against such interference or attacks."
>
> Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.

[22] International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

[23] It is almost accepted proposition of law that the rules of customary international law

which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

[24] Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the said Article, Sikri, C.J. in Kesavananda Bharathi v. State of Kerala, 1973 Supp SCR 1: (AIR 1973 SC 1461) observed as under:-

> "it seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

In A. D. M. Jabalpur v. S. Shukla (AIR 1976 SC 1207), Khanna J. in his minority opinion observed as under (Para 169):-

> "Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the Courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law on treaty obligations. Every statute, according to this rule is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations on the established rules of international law, and the Court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language."

In Jolly George Varghese v. Bank of Cochin, AIR 1980 SC 470, Krishna Iyer, J. posed the following question (Para 2):-

> "From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads:

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."

The learned Judge interpreted Section 51 of the Code of Civil Procedure consistently with Article 11 of the International Convenant.

[25] Article 17 of the International Covenant - quoted above - does not go contrary to any part of our Municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law.

[26] Learned counsel assisting us in this case have not seriously challenged the constitutional vires of Section 5 (2) of the Act. In this respect it would be useful to refer to the observations of this Court in Hukam Chand Shyam Lal v. Union of India, (1976) 2 SCC 128: (AIR 1976 SC 789 at P. 793):-

"Section 5 (1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government/Specially authorised officer to take possession of any telegraph. Firstly, the occurrence of a "public emergency" is the sine qua non for the exercise of power under this section. As a preliminary step to the exercise of further jurisdiction under this section the Government or the authority concerned must record its satisfaction as to the existence of such an emergency. Further, the existence of the emergency which is a pre-requisite for the exercise of power under this Section, must be a "public emergency" and not any other kind of emergency. The expression 'public emergency' has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the section which has to be read as a whole. In sub-section (1) the phrase 'occurrence of any public emergency' is connected with and is immediately followed by the phrase "or in the interests of the public safety". These two phrases appear to take colour from each other. In the first part of sub-section (2) those two phrases again occur in association with each other, and the context further clarifies with amplification that a 'public emergency' within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity of India, the security of State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence. It is in the context of these matters that the appropriate authority has to form

an opinion with regard to the occurrence of a 'public emergency' with a view to taking further action under this section. Economic emergency is not one of those matters expressly mentioned in the statute. Mere 'economic emergency' - as the High Court calls it - may not necessarily amount to a 'public emergency' and justify action under this Section unless it raises problems relating to the matters indicated in the section."

[27] As mentioned above, the primary contention raised by the learned counsel is to lay-down necessary safeguards to rule-out the arbitrary exercise of power under the Act.

[28] Section 5 (2) of the Act permits the interception of messages in accordance with the provisions of the said Section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5 (2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have not jurisdiction to exercise the powers under the said Section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone tapping unless a public emergency has occurred or the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

[29] The first step under Section 5 (2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5 (2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the

competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

[30] The above analysis of Section 5 (2) of the Act shows that so far the power to intercept messages/conversations is concerned the Section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5 (2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (AIR 1978 SC 597), that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself". Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

[31] We are of the view that there is considerable force in the contention of Mr. Rajinder Sachar, Mr. Kapil Sibal and Dr. Rajiv Dhawan that no procedure has been prescribed for the exercise of the power under Section 5 (2) of the Act. It is not disputed that no rules have been framed under Section 7(2) (b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under Section 5 (2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19 (1) (a) and 21 of the Constitution of India. The CBI investigation has revealed several lapses in the execution of the orders passed under Section 5(2) of the Act. Paras 21 and 22 of the report have already been quoted in the earlier part of this judgment.

[32] The Second Press Commission in paras 164, 165 and 166 of its report has commented on the "tapping of telephones" as under:-

> "Tapping of Telephones
>
> 164. It is felt in some quarters, not without reason, that not infrequently the Press in general and its editorial echelons in particular have to suffer tapping of telephones.
>
> 165. Tapping of telephones is a serious invasion of privacy. It is a variety of

technological eavesdropping. Conversations on the telephone are often of an intimate and confidential character. The relevant statute, i.e., Indian Telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping. Tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy.

166. This is hardly satisfactory situation. There are instances where apprehensions of disclosure of sources of information as well as the character of information may result in constraints on freedom of information and consequential drying up of its source. We, therefore, recommend that telephones may not be tapped except in the interest of national security, public order, investigation of crime and similar objectives, under orders made in writing by the Minister concerned or an officer of rank to whom the power in that behalf is delegated. The order should disclose reasons. An order for tapping of telephones should expire after three months from the date of the order. Moreover, within a period of six weeks the order should come up for review before a Board constituted on the lines prescribed in statutes providing for preventive detention. It should be for the Board to decide whether tapping should continue any longer. The decision of the Board should be binding on the Government. It may be added that the Minister or his delegates will be competent to issue a fresh order for tapping of the telephone if circumstances call for it. The Telegraph Act should contain a clause to give effect to this recommendation."

[33] While dealing with Section 5 (2) of the Act, the Second Press Commission gave following suggestions regarding "public emergency" and "interest of public safety":

"160. It may be noticed that the public emergency mentioned in the sub-section is not an objective fact Some public functionary must determine its existence and it is on the basis of the existence of a public emergency that an authorised official should exercise the power of withholding transmission of telegrams. We think that the appropriate Government should declare the existence of the public emergency by a notification warranting the exercise of this power and it is only after the issue of such a notification that the power of withholding telegraphic messages should be exercised by the delegated authority. When such a notification is issued, the principal officer of the telegraph office can be required to submit to the District Magistrate,

whom we consider to be the proper person to be the delegate for exercising this power, such telegrams brought for transmission which are likely to be prejudicial to the interest sought to be protected by the sub-section. Thereupon the District Magistrate should pass an order in writing withholding or allowing the transmission of the telegram. We are suggesting the safeguard of a prior notification declaring the existence of a public emergency because the power of interception is a drastic power and we are loath to leave the determination of the existence of a public emergency in hands of a delegate."

"We are of the view that whenever the power is exercised in the interest of public safety, it should, as far as possible, be exercised by the concerned Minister of the appropriate Government for one month at a time extendible by Government if the emergency continues. However, in exceptional circumstances the power can be delegated to the District Magistrate.

163. We also think that as soon as an order is passed by the District Magistrate withholding the transmission of a telegraphic message, it should be communicated to the Central or State Government, as the case may be, and also to the sender and the addressee of the telegram. The text of the order should be placed on the table of the respective State Legislatures after three months. We recommend that, as suggested by the Press Council of India in its annual report covering 1969, the officer in charge of a telegraph office should maintain a register giving particulars of the time of receipt, the sender and addressee of every telegram which he refers to the District Magistrate with recommendation of its withholding. Similarly, the District Magistrate should maintain a register of the time receipt, content and addressee of each telegram and record his decision thereon, together with the time of the decision. Data of this nature will help Courts, if called upon, to determine the presence or absence of mala fide in the withholding of telegrams."

According to Mr. Sachar the only way to safeguard the right of privacy of an individual is that there should be prior judicial scrutiny before any order for telephone-tapping is passed under Section 5 (2) of the Act. He states that such judicial scrutiny may be ex parte. Mr. Sachar contended that the judicial

scrutiny alone would take away the apprehension of arbitrariness or unreasonableness of the action. Mr. Kapil Sibal, on the other hand, has suggested various other safeguards - short of prior judicial scrutiny - based on the law on the subject in England as enacted by the Interception of the Communications Act, 1985.

[34] We agree with Mr. Sibal that in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7 of the Act: Section 7 (2) (b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5 (2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time Central Government lays down just, fair and reasonable procedure under Section 7(2) (b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.

[35] We, therefore, order and direct as under :-

1. An order for telephone-tapping in terms of Section 5 (2) of the Act shall not be issued except by the Home Secretary of India (Central Government) and Home Secretaries of the State Government. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Government not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means (of) a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such person and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary under Section 5 (2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required under Section 5 (2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two months' period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:

(a) the intercepted communications,

(b) the extent to which the material is disclosed,

(c) the number of persons and their identity to whom any of the material is disclosed.

(d) the extent to which the material is copied,

and

(e) the number of copies made of any of the material

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9. There shall be a review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provision of Section 5(2) of the Act, it shall record the finding to that effect.

The writ petition is disposed of. No costs.

Order accordingly.

TELEGRAPH ACT, 1885

Sections 5(2) and 7 -- Telephone Taping is violative of Article 21 of the Constitution and will also infract Article 19(1)(a) unless it comes within the grounds of restrictions under Article 19(2). Section 5(2) permits interception of the messages in accordance with the provisions of the said section. The term "occurrence" of any public emergency" are or in the interest of public safety" or sine qua non for the application of the provisions of Section 5(2). Unless a public emergency has occurred or interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. In the absence of any provision for procedural safeguard in the act in the matter of telephone taping, the Supreme Court directed observance of procedure by way of safeguard before resorting to telephone taping. Guidelines issued by the Supreme Court.

PEOPLES UNION FOR CIVIL LIBERTIES

V/S

UNION OF INDIA 1997 AIR(SC) 568.

SUPREME COURT OF INDIA *(D.B.)*

PEOPLES UNION FOR CIVIL LIBERTIES
V/S
UNION OF INDIA

Date of Decision: 18 December 1996

Citation: 1996 LawSuit(SC) 2132

Hon'ble Judges: Kuldip Singh, S Saghir Ahmad

Case Type: Writ Petition (C)

Case No: 256 of 1991

Subject: Constitution, Press Media & Telecommunication

Head Note:

Constitution of India, 1950
Articles 13, 51, 32 and 226 -- Rule of Customary International Law is not contrary to Municipal Law -- Though the right to privacy by itself has not been identified under the Constitution, as a concept, it may be too broad and moralistic to define it judicially -- Whether right to privacy can be claimed or has been infringed in the given case will depend on the facts and circumstances of each case.
The right to privacy -- by itself- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as 'right to privacy'. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important

facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

Articles 19(1)(a) and 21 -- Scope of right to life-Right to privacy is a part of right to life and the right to privacy would include telephone conversation in the privacy of home and office -- Therefore, telephone taping would be violative of Article 19(1)(a) unless it conies within the restrictions under Article 19(2).

Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the case. But the right to hold a telephone conversation in privacy can be claimed as right to privacy. Telephone conversation is an important facet of man's private life -- Right to privacy would certainly include telephone conversation and, therefore, telephone taping would include telephone conversation in the privacy. Therefore, the telephone would infract Article 21 of the Constitution.

Right to freedom of speech and expression is guaranteed. Unless it is permitted under the procedure established by law. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) and this freedom means the right to express. Telephone taping would be violative of Article 19(1)(a) of the Constitution.

Article 51 read with Article 21 -Article 21 is to be interpreted in conformity with the International laws, viz. Article 17 of International Covenant on Civil and Political Rights, 1966, Article 12 of Universal Declaration of Human Rights, 1948, etc. -- The right to transmit telephone message or hold telephone conversation in privacy forms part of right to privacy protected under Article 21 and also Article 17 of International Covenant on Civil and Political Rights. Held further that the International Law is not confined to relations between the State but extends to the matters of social concerns such as health, education, economics, as also human rights.

The International Law today is not confined to regulation of the relations between the States but its scope continues to extend and today matter of social concern like health, education, economics, apart from human rights fall within the ambit of International regulations. It is almost an accepted proposition of law that Rule of customary International Law not contrary to municipal law, are deemed to be incorporated in the domestic law. Article 51 of the Constitution directs that the State shall endeavour to inter alia foster respect for International Law and treaty

obligations in the dealing of organised people with one another.

Article 51 -- Ratification of International Convention/covenant, by the Government of India -Approval of such ratification by the Parliament whether could be termed as legislation or could be equated to legislation and would invest the convention with the sanctity of law made by the Parliament- Held, this aspect requires deeper scrutiny then has been possible in the present case -- However, for the present case, the provisions of convenants which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution can be relied upon by the Court as facets of those fundamental rights and hence enforceable as such.

TELEGRAPH ACT, 1885
Sections 5(2) and 7 -- Telephone Taping is violative of Article 21 of the Constitution and will also infract Article 19(1)(a) unless it comes within the grounds of restrictions under Article 19(2).
Section 5(2) permits interception of the messages in accordance with the provisions of the said section. The term "occurrence" of any public emergency" are or in the interest of public safety" or sine qua non for the application of the provisions of Section 5(2). Unless a public emergency has occurred or interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. In the absence of any provision for procedural safeguard in the act in the matter of telephone taping, the Supreme Court directed observance of procedure by way of safeguard before resorting to telephone taping. Guidelines issued by the Supreme Court.

Acts Referred:
Constitution of India Art 19(2), Art 13, Art 226, Art 32, Art 21, Art 19(1)(a), Art 51, Art 14
Telegraph Act, 1885 Sec 5(2), Sec 7(2)(b)

Final Decision: Petition disposed

Eq. Citations: 1997 AIR(SCW) 113, 1997 (1) ApexCJ 397, 1997 (3) BCR 38, 1996 (4) CCC 277, 1997 (1) CutLT 345, 1996 (9) Scale 318, 1996 (Supp10) SCR 321, 1997 (1) UJ 187, 1997 (1) JT 288, 1997 (1) AD(Cri) 137, 1997 AIR(SC) 568, 1997 (1) ICC 682, 1997 (1) RCR(Civ) 720, 1997 (1) SCC 301, 1996 (8) Supreme 673

Advocates: Kapil Sibal, Rajinder Sachar, Rashmi Kapadia, Sanjay Parikh, P Parmeshwaran, Hemant Sharma, Anil Katiyar

Reference Cases:

Cases Cited in (+): **69**

Cases Referred in (+): **3**

Judgement Text:-

Kuldip Singh, J

[1] Telephone - Tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day.

[2] This petition - public interest - under Article 32 of the Constitution of India has been filed by the People's Union of Civil Liberties, a voluntary organisation, highlighting the incidents of telephone tapping in the recent past. The petitioner has challenged the constitutional validity of Section 5 (2) of the Telegraph Act, 1885 (the Act), in the alternative it is contended that the said provisions be suitably read-down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping.

[3] The writ petition was filed in the wake of the report on "Tapping of politicians phones" by the Central Bureau of Investigation (CBI). Copy of the report as published in the "Mainstream" Volume XXIX, dated March 26, 1991 has been placed on record along with the rejoinder filed by the petitioner. The authenticity of the report has not been questioned by the learned counsel for the Union of India before us. Paras 21 and 22 of the report are as under:-

> "21. Investigation has revealed the following lapses on the part of MTNL.
>
> i) In respect of 4 telephone numbers though they were shown to be under interception in the statement supplied by MTNL, the authorisation for putting the number under interception could not be provided. This shows that

records have not been maintained properly.

ii) In respect of 279 telephone numbers, although authority letters from various authorised agencies were available, these numbers have not been shown in list supplied by MTNL showing interception of telephones to the corresponding period. This shows that lists supplied were incomplete.

iii) In respect of 133 cases, interception of the phones were done beyond the authorised part. The GM (O), MTNL in his explanation has said that this was done in good faith on oral requests of the representatives of the competent authorities and that instructions have now been issued that interception beyond authorised periods will be done only on receipt of written requests.

iv) In respect of 111 cases, interception of telephones have exceeded 180 days period and no permission of Government for keeping the telephone under interception beyond 180 days was taken.

v) The files pertaining to interception have not been maintained properly.

22. Investigation has also revealed that various authorised agencies are not maintaining the files regarding interception of telephones properly. One agency is not maintaining even the log books of interception. The reasons for keeping a telephone number on watch have also not been maintained properly. The effectiveness of the results of observation have to be reported to the Government in quarterly returns which is also not being sent in time and does not contain all the relevant information. In the case of agencies other than I. B., the returns are submitted to the MHA. The periodicity of maintenance of the records is not uniform. It has been found that whereas DRI keeps record for the last 5 years, in case of I. B., as soon as the new quarterly statement is prepared, the old returns are destroyed for reasons of secrecy. The desirability of maintenance of uni-(sic) return and periodicity of these documents needs to be examined.

[4] Section 5 (2) of the Act is as under:-

"5 (2) - On the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

[5] The above provisions clearly indicate that in the event of the occurrence of a public emergency or in the interest of public safety the Central Government or the State Government or any officer specially authorised in this behalf, can intercept messages if satisfied that it is necessary or expedient so to do in the interest of:-

(i) The sovereignty and integrity of India.

(ii) The security of the State.

(iii) Friendly relations with foreign States.

(iv) Public order.

(v) For preventing incitement to the commission of an offence.

[6] The CBI report indicates that under the above provisions of law Director, Intelligence

Bureau, Director General, Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director, Enforcement Directorate have been authorised by the Central Government to do interception for the purposes indicated above. In addition, the State Government generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act.

[7] The Assistant Director - General, Department of Telecom has filed counter-affidavit on behalf of the Union of India. The stand taken by the Union of India is as under:-

> "The allegation that the party in power at the Centre/State or officer authorised to tap the telephone by the Central/State Government could misuse this power is not correct. Tapping of telephone could be done only by the Central/State Government order by the Officer specifically authorised by the Central/State Government on their behalf and it could be done only under certain conditions such as National Emergency in the interest of public safety, security of State, public order etc. It is also necessary to record the reasons for tapping before tapping is resorted to. If the party, whose telephone is to be tapped is to be informed about this and also the reasons for tapping, it will defeat the very purpose of tapping of telephone. By the very sensitive nature of the work, it is absolutely necessary to maintain secrecy in the matter. In spite of safeguards, if there is alleged misuse of the powers regarding tapping of telephones by any authorised officer, the aggrieved party could represent to the State Government/Central Government and suitable action could be taken as may be necessary. Striking down the provision Section 5 (2) of the Indian Telegraph Act, is not desirable as it will jeopardise public interest and security of the State."

[8] Section 7 (2) (b) of the Act which gives rule-making power to the Central Government is as under:-

> "7. Power to make rules for the conduct of telegraphs - (1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs, established, maintained or worked by the Government or by persons licensed under this Act.
>
> (2) Rules under this section may provide for all or any of the following,

among other matters, that is to say:-

(a) xx xx

(b) the precautions to be taken of preventing the improper interception or disclosure of messages."

[9] No rules have been framed by the Central Government under the provisions quoted above.

[10] Mr. Rajinder Sachar, Sr. Advocate assisted by Mr. Sanjay Parikh vehemently contended that right to privacy is a fundamental right guaranteed under Article 19 (1) and Article 21 of the Constitution of India. According to Mr. Sachar to save Section 5 (2) of the Act from being declared unconstitutional it is necessary to read down the said provision to provide adequate machinery to safeguard the right to privacy. Prior judicial sanction - ex-parte in nature - according to Mr. Sachar, is the only safeguard, which can eliminate the element of arbitrariness or unreasonableness. Mr. Sachar contended that not only the substantive law but also the procedure provided therein has to be just, fair and reasonable.

[11] While hearing the arguments on September 26, 1995, this Court passed the following order:

"Mr. Parikh is on his legs. He has assisted us in this matter for about half an hour. At this stage, Mr. Kapil Sibal and Dr. Dhawan, who are present in Court, stated that according to them the matter is important and they being responsible members of the Bar, are duty bound to assist this Court in a matter like this. We appreciate the gesture. We permit them to intervene in this matter. They need a short adjournment to assist us.

The matter is adjourned to October 11, 1995".

[12] While assisting this Court Mr. Kapil Sibal at the outset stated that in the interest of the security and sovereignty of India and to deal with any other emergency situation for the protection of national interest, messages may indeed be intercepted. According to him the core question for determination is whether there are sufficient procedural

safeguards to rule out arbitrary exercise of power under the Act. Mr. Sibal contended that Section 5 (2) of the Act clearly lays down the conditions/situations which are sine qua non for the exercise of the power but the manner in which the said power can be exercised has not been provided. According to him procedural safeguards -short of prior judicial scrutiny - shall have to be read in Section 5 (2) of the Act to save it from the vice of arbitrariness.

[13] Both sides have relied upon the seven-Judge Bench judgment of this Court in Kharak Singh v. State of U. P. (1964) 1 SCR 332: (AIR 1963 SC 1295). The question for consideration before this Court was whether "surveillance" under Chapter XX of the U. P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by "domciliary visits at night" was held to be violative of Article 21 on the ground that there was no "law" under which the said regulation could be justified.

[14] The word "life" and the expression "personal liberty" in Article 21 were elaborately considered by this Court in Kharak Singhs's case (AIR 1963 SC 1295). The majority read "right to privacy" as part of the right to life under Article 21 of the Constitution on the following reasoning (at Pp. 1302-03):

> "We have already extracted a passage from the judgment of Field, J. in Munn v. Illinois (1876) 94 US 113, 142, where the learned Judge pointed out that "life" in the 5th and 14th Amendments of the U. S. Constitution corresponding to Art. 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs - his arms and legs etc. We do not entertain any doubt that the word "life" in Art. 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer hee to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and, therefore, of those cherished human value as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and

achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in Wolf v. Colorado (1948) 338 US 25 :

"The security of one's privacy against arbitrary intrusion by the police..... is basic to a free society. It is, therefore, implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a preclude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples..... We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment."

Murphy, J. considered that such invasion was against "the very essence of a scheme of ordered liberty."

It is true that in the decision of the U. S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle"

and in Semanyne's case (1604) 5 Co Rep 91a, where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose". We are not unmindful of the fact that Semayne's case was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

In our view Cl. (b) of Regulation 236 is plainly violative of Art. 21 and as there is no "law" on which the same could be justified it must be struck down as unconstitutional."

[15] Subba Rao, J. (as the learned Judge then was) in his minority opinion also came to the conclusion that right to privacy was a part of Article 21 of the Constitution but went to step further and struck down Regulation 236 as a whole on the following reasoning (at P. 1306 of AIR) :

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house where he lives with his family, is his "castle" : it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in Wolf v. Colorado (1948) 338 US 25, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or

> indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution."

[16] Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in Kharak Singh's case (AIR 1963 SC 1295) (majority and the minority opinions) to include that "right to privacy" is a part of the right to "protection of life and personal liberty" guaranteed under the said Article.

[17] In Govind. v. State of Madhya Pradesh (1975) 2 SCC 148: (AIR 1975 SC 1378), as three-Judge Bench of this Court considered the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided surveillance by way of several measures indicated in the said regulations. This Court upheld the validity of the regulations by holding that Article 21 was not violated because the impugned regulations were "procedure established by law" in terms of the said article.

> In R. Rajagopal alias R. R. Gopal v. State of Tamil Nadu, (1994) 6 SCC 632: (1994 AIR SCW 4420), Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The learned Judge referred to Kharak's case (AIR 1963 SC 1295), Govind's case (AIR 1975 SC 1378) and considered a large number of Americal and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, mother-hood, child-bearing and education among other matters."

[18] We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law."

[19] The right to privacy - by itself - has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations

on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one'' home or office. Telephone - tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

[20] Right to freedom of speech and expression is guaranteed under Article 19 (1) (a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19 (2) would infarct Article 19 (1)(a) of the Constitution.

[21] India is a signatory to the International Convenant on Civil and Political Rights, 1966. Article 17 of the said Covenant is as under:-

> "Article 17
>
> 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, human or corespondent, nor to lawful attacks on his honour and reputation.
>
> 2. Every one has the right to the protection of the law against such interference or attacks."
>
> Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.

[22] International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

[23] It is almost accepted proposition of law that the rules of customary international law

which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

[24] Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the said Article, Sikri, C.J. in Kesavananda Bharathi v. State of Kerala, 1973 Supp SCR 1: (AIR 1973 SC 1461) observed as under:-

> "it seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

In A. D. M. Jabalpur v. S. Shukla (AIR 1976 SC 1207), Khanna J. in his minority opinion observed as under (Para 169):-

> "Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the Courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law on treaty obligations. Every statute, according to this rule is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations on the established rules of international law, and the Court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language."

In Jolly George Varghese v. Bank of Cochin, AIR 1980 SC 470, Krishna Iyer, J. posed the following question (Para 2):-

> "From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads:

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."

The learned Judge interpreted Section 51 of the Code of Civil Procedure consistently with Article 11 of the International Convenant.

[25] Article 17 of the International Covenant - quoted above - does not go contrary to any part of our Municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law.

[26] Learned counsel assisting us in this case have not seriously challenged the constitutional vires of Section 5 (2) of the Act. In this respect it would be useful to refer to the observations of this Court in Hukam Chand Shyam Lal v. Union of India, (1976) 2 SCC 128: (AIR 1976 SC 789 at P. 793):-

"Section 5 (1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government/Specially authorised officer to take possession of any telegraph. Firstly, the occurrence of a "public emergency" is the sine qua non for the exercise of power under this section. As a preliminary step to the exercise of further jurisdiction under this section the Government or the authority concerned must record its satisfaction as to the existence of such an emergency. Further, the existence of the emergency which is a pre-requisite for the exercise of power under this Section, must be a "public emergency" and not any other kind of emergency. The expression 'public emergency' has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the section which has to be read as a whole. In sub-section (1) the phrase 'occurrence of any public emergency' is connected with and is immediately followed by the phrase "or in the interests of the public safety". These two phrases appear to take colour from each other. In the first part of sub-section (2) those two phrases again occur in association with each other, and the context further clarifies with amplification that a 'public emergency' within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity of India, the security of State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence. It is in the context of these matters that the appropriate authority has to form

an opinion with regard to the occurrence of a 'public emergency' with a view to taking further action under this section. Economic emergency is not one of those matters expressly mentioned in the statute. Mere 'economic emergency' - as the High Court calls it - may not necessarily amount to a 'public emergency' and justify action under this Section unless it raises problems relating to the matters indicated in the section."

[27] As mentioned above, the primary contention raised by the learned counsel is to lay-down necessary safeguards to rule-out the arbitrary exercise of power under the Act.

[28] Section 5 (2) of the Act permits the interception of messages in accordance with the provisions of the said Section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5 (2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have not jurisdiction to exercise the powers under the said Section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone tapping unless a public emergency has occurred or the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

[29] The first step under Section 5 (2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5 (2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order, or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the

competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

[30] The above analysis of Section 5 (2) of the Act shows that so far the power to intercept messages/conversations is concerned the Section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5 (2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in Maneka Gandhi v. Union of India, (1978) 2 SCR 621: (AIR 1978 SC 597), that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself". Thus, understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes".

[31] We are of the view that there is considerable force in the contention of Mr. Rajinder Sachar, Mr. Kapil Sibal and Dr. Rajiv Dhawan that no procedure has been prescribed for the exercise of the power under Section 5 (2) of the Act. It is not disputed that no rules have been framed under Section 7(2) (b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under Section 5 (2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19 (1) (a) and 21 of the Constitution of India. The CBI investigation has revealed several lapses in the execution of the orders passed under Section 5(2) of the Act. Paras 21 and 22 of the report have already been quoted in the earlier part of this judgment.

[32] The Second Press Commission in paras 164, 165 and 166 of its report has commented on the "tapping of telephones" as under:-

> "Tapping of Telephones
>
> 164. It is felt in some quarters, not without reason, that not infrequently the Press in general and its editorial echelons in particular have to suffer tapping of telephones.
>
> 165. Tapping of telephones is a serious invasion of privacy. It is a variety of

technological eavesdropping. Conversations on the telephone are often of an intimate and confidential character. The relevant statute, i.e., Indian Telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping. Tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy.

166. This is hardly satisfactory situation. There are instances where apprehensions of disclosure of sources of information as well as the character of information may result in constraints on freedom of information and consequential drying up of its source. We, therefore, recommend that telephones may not be tapped except in the interest of national security, public order, investigation of crime and similar objectives, under orders made in writing by the Minister concerned or an officer of rank to whom the power in that behalf is delegated. The order should disclose reasons. An order for tapping of telephones should expire after three months from the date of the order. Moreover, within a period of six weeks the order should come up for review before a Board constituted on the lines prescribed in statutes providing for preventive detention. It should be for the Board to decide whether tapping should continue any longer. The decision of the Board should be binding on the Government. It may be added that the Minister or his delegates will be competent to issue a fresh order for tapping of the telephone if circumstances call for it. The Telegraph Act should contain a clause to give effect to this recommendation."

[33] While dealing with Section 5 (2) of the Act, the Second Press Commission gave following suggestions regarding "public emergency" and "interest of public safety":

"160. It may be noticed that the public emergency mentioned in the sub-section is not an objective fact Some public functionary must determine its existence and it is on the basis of the existence of a public emergency that an authorised official should exercise the power of withholding transmission of telegrams. We think that the appropriate Government should declare the existence of the public emergency by a notification warranting the exercise of this power and it is only after the issue of such a notification that the power of withholding telegraphic messages should be exercised by the delegated authority. When such a notification is issued, the principal officer of the telegraph office can be required to submit to the District Magistrate,

whom we consider to be the proper person to be the delegate for exercising this power, such telegrams brought for transmission which are likely to be prejudicial to the interest sought to be protected by the sub-section. Thereupon the District Magistrate should pass an order in writing withholding or allowing the transmission of the telegram. We are suggesting the safeguard of a prior notification declaring the existence of a public emergency because the power of interception is a drastic power and we are loath to leave the determination of the existence of a public emergency in hands of a delegate."

"We are of the view that whenever the power is exercised in the interest of public safety, it should, as far as possible, be exercised by the concerned Minister of the appropriate Government for one month at a time extendible by Government if the emergency continues. However, in exceptional circumstances the power can be delegated to the District Magistrate.

163. We also think that as soon as an order is passed by the District Magistrate withholding the transmission of a telegraphic message, it should be communicated to the Central or State Government, as the case may be, and also to the sender and the addressee of the telegram. The text of the order should be placed on the table of the respective State Legislatures after three months. We recommend that, as suggested by the Press Council of India in its annual report covering 1969, the officer in charge of a telegraph office should maintain a register giving particulars of the time of receipt, the sender and addressee of every telegram which he refers to the District Magistrate with recommendation of its withholding. Similarly, the District Magistrate should maintain a register of the time receipt, content and addressee of each telegram and record his decision thereon, together with the time of the decision. Data of this nature will help Courts, if called upon, to determine the presence or absence of mala fide in the withholding of telegrams."

According to Mr. Sachar the only way to safeguard the right of privacy of an individual is that there should be prior judicial scrutiny before any order for telephone-tapping is passed under Section 5 (2) of the Act. He states that such judicial scrutiny may be ex parte. Mr. Sachar contended that the judicial

scrutiny alone would take away the apprehension of arbitrariness or unreasonableness of the action. Mr. Kapil Sibal, on the other hand, has suggested various other safeguards - short of prior judicial scrutiny - based on the law on the subject in England as enacted by the Interception of the Communications Act, 1985.

[34] We agree with Mr. Sibal that in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7 of the Act: Section 7 (2) (b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5 (2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time Central Government lays down just, fair and reasonable procedure under Section 7(2) (b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.

[35] We, therefore, order and direct as under :-

1. An order for telephone-tapping in terms of Section 5 (2) of the Act shall not be issued except by the Home Secretary of India (Central Government) and Home Secretaries of the State Government. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Government not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.

2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means (of) a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such person and in such manner as are described in the order.

3. The matters to be taken into account in considering whether an order is necessary under Section 5 (2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.

4. The interception required under Section 5 (2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.

5. The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date of issue. The authority which issued the order may, at any time before the end of two months' period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months.

6. The authority which issued the order shall maintain the following records:

(a) the intercepted communications,

(b) the extent to which the material is disclosed,

(c) the number of persons and their identity to whom any of the material is disclosed.

(d) the extent to which the material is copied,

and

(e) the number of copies made of any of the material

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act.

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9. There shall be a review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government.

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order whether there has been any contravention of the provisions of Section 5(2) of the Act.

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material.

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provision of Section 5(2) of the Act, it shall record the finding to that effect.

The writ petition is disposed of. No costs.

Order accordingly.

SUPREME COURT OF INDIA (FROM BOMBAY) *(F.B.)*

STATE OF MAHARASHTRA
V/S
BHARAT SHANTI LAL SHAH

Date of Decision: 01 September 2008

Citation: 2008 LawSuit(SC) 1341

Hon'ble Judges: K G Balakrishnan, R V Raveendran, Mukundakam Sharma

Case Type: S L P (Criminal)

Case No: 753-756 of 2004

Subject: Constitution, Criminal, Press Media & Telecommunication

Head Note:

Maharashtra Control of organised Crime Act 1999 - constitutional validity of - on the ground that the State Legislature did not have the legislative competence to enact such a law and also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India.

Acts Referred:
Constitution Of India Art 254, Art 21, Art 14, Art 13(2)
Bombay Police Act, 1951 Sec 64
Telegraph Act, 1885 Sec 5(2)
Telegraph Rules, 1951 R 419A(5), R 419A(1)
Maharashtra Control Of Organised Crime Act, 1999 Sec 14, Sec 13, Sec 16, Sec 15, Sec 2, Sec 2(f), Sec 21(5), Sec 2(d), Sec 4, Sec 3, Sec 2(e)

Final Decision: Appeal allowed

Eq. Citations: 2009 (Supp) AIR(SC) 1135, 2009 (1) AWC 924, 2008 (13) SCC 5, 2008

(13) SCC 30, 2008 (8) Supreme 372, 2008 (2) BCR(Cri) 546, 2008 (9) AD(SC) 708, 2008 AIR(SCW) 6431, 2008 (6) AIRBomR 450, 2009 AllMR(Cri) 624, 2008 (10) JT 77, 2008 (5) LawHerald(SC) 3345, 2008 (12) Scale 167, 2009 (2) SCJ 55

Reference Cases:

Cases Cited in (+): **23**

Cases Referred in (+): **23**

Judgement Text:-

Mukundakam Sharma, J

[1] Leave granted.

[2] In all these appeals the issue that falls for our consideration is the constitutional validity of the Maharashtra Control of Organised Crime Act, 1999 (for short the 'MCOCA' or the 'Act') on the ground that the State Legislature did not have the legislative competence to enact such a law and also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India.

[3] Respondent Nos. 2 and 3 were arrested under the provisions of the MCOCA and cases were registered against them. Being aggrieved by the aforesaid arrest and registration of cases both of them filed separate writ petitions being Criminal Writ Petition No. 1738/2002 and Criminal Writ Petition No. 110/2003 respectively in the Bombay High Court challenging the constitutional validity of the MCOCA, particularly the provisions of Section 2(d), (e) and (f) and that of Sections 3, 4 and 13 to 16 and Section 21(5) of the MCOCA. Respondent no. 1 also filed a writ petition of similar nature being Criminal Writ Petition No. 27/2003. The Bombay High Court heard the above mentioned writ petitions together and passed a common judgment and order on 05.03.2003 whereby it upheld the constitutional validity of Section 2(d), (e) and (f) and also the provisions of Sections 3 and 4 but struck down Sections 13 to 16 as unconstitutional as being beyond the legislative competence of the State Legislature. The High Court held that the Parliament alone has the power to make law in that regard as provided for under Entry 31 of List I of Seventh Schedule to the Constitution and that already the Indian Telegraph Act, 1885, a Central Act was holding the field. The High Court also struck down sub-section (5) of Section 21 of the MCOCA holding that the same was violative of provisions of Article 14 of the Constitution of India. Being aggrieved by the

aforesaid common order the State of Maharashtra has filed the present appeals.

[4] Learned senior counsel appearing for the parties advanced elaborate arguments on the aforesaid issues, but before we deal with and discuss the same, it would be necessary for us to refer to the relevant provisions of the concerned Central and the State Legislations.

[5] The Indian Telegraph Act, 1885 (for short the 'Telegraph Act') was passed as a Central Act in 1885 and the said Act came into force on 1st October, 1885. The word 'telegraph' in the said Act is defined to mean any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other elector-magnetic emissions. By enacting Section 4 in the said Act the Central Government has been given exclusive privilege in establishing, maintaining and working telegraphs. The power to grant a licence on such conditions and in considerations of such payments as it thinks fit, to any person to establish, maintain or work a telegraph in any part within India is also vested with the Central Government. Section 5 of the said Act gives power to the Central Government as well as to the State Government or any officer specifically authorized in that behalf by the Central or the State Government to take temporary possession of any telegraph established, maintained or worked by any person, licensed under the Act, provided there is an occurrence of any public emergency or there is a case of public safety and when such authority is satisfied that one such pre-condition arises and that it is necessary to act in a case of public emergency or maintaining of public safety. Section 5(2) of the Act provides that on the occurrence of any public emergency, or in the interest of public safety the Central or the State Government or any officer specially authorized in that behalf by the Central or the State Government may, if satisfied that it is necessary or expedient to do so in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of offence and for the reasons to be recorded in writing by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraphs, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order.

[6] The Telegraph Act is an existing law (as defined in Article 366 (10) of the Constitution) with respect to the matters enumerated in Entry 31 of List I of the Seventh Schedule to the Constitution. Entry 31 empowers the Central Legislature to enact a law

in respect of posts and telegraph, telephones, wireless, broadcasting and other like forms of communication. The Telegraph Act, which is an enactment passed before the commencement of the Constitution, deals with the aforesaid subjects enumerated in Entry 31 of List I.

[7] The Maharashtra State Legislature enacted a State legislation under the name of Maharashtra Control of Organised Crime Act, 1999 which came into force on 24th February, 1999. The Statement of Objects and Reasons for enacting the said Act reads as under:

> "Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.
>
> It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.
>
> 2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime."

According to its preamble, the said Act was enacted to make specific

provisions for prevention and control of, and for coping with, criminal activity by organised crime syndicate or gang and for matters connected therewith or incidental thereto.

[8] Section 2 of the MCOCA contains the definitions. The word "abet" is defined in clause (a) of sub-Section (1) to mean and include the communication or association with any person with the actual knowledge or having reason to believe that such person is engaged in assisting in any manner, an organized crime syndicate, the passing on or publication of, without any lawful authority any information likely to assist the organized crime syndicate and the passing on or publication of or distribution of any document or matter obtained from the organized crime syndicate and also rendering of any assistance whether financial or otherwise, to the organised crime syndicate. Clause (d) of sub-Section (1) defines the expression "continuing unlawful activity" to mean an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years of more, undertaken either singly or jointly, as a member of an organized crime syndicate or on behalf of such syndicate in respect of which more than one charge sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. Clause (e) of sub-Section (1) defines the expression "organised crime" to mean any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. The term "organised crime syndicate" is defined under clause (f) of sub- Section (1) to mean a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime.

[9] Section 3 provides the punishment for organised crime. It states that (i) whoever commits an offence of organised crime, (ii) whoever conspires or attempts to commit or advocates, abets or knowingly facilitate the commission of an organised crime or any act preparatory to organised crime, (iii) whoever harbours or conceals or attempts to harbour or conceal any member of an organised crime syndicate, (iv) any person who is a member of an organised crime syndicate and (v) whoever holds any property derived or obtained from commission of an organised crime, shall be punished as provided in the said section. Section 4 provides punishment for possessing unaccountable wealth on behalf of a member of organised crime syndicate.

[10] Section 13 of the MCOCA deals with the power of the State Government to appoint the competent authority. As per the said section the State Government may appoint any of its officer, in Home Department, not below the rank of Secretary to the Government, to be the competent authority for the purposes of Section 14. Section 14 empowers a police officer not below the rank of the Superintendent of Police supervising the investigation of an organised crime under the aforesaid Act to submit an application in writing to the competent authority for an order authorizing or approving the interception of wire, electronic or oral communication by the investigating officer, when such interception may provide or has provided evidence of any offence involving an organised crime. Sub-Sections (2) to (13) of Section 14 lay down the detailed procedure therefore as also the requirements to be fulfilled before approval is granted. Section 14, therefore, authorizes the interception of wire, electronic or oral communication, subject to certain conditions and safeguards laid down therein. Section 15 requires constitution of a review committee to review every order passed by the competent authority under Section 14. Section 16 imposes certain restrictions regarding interception and disclosure of wire, electronic or oral communication. It prohibits the interception and also disclosure of wire, electronic or oral communication by any police officer except as otherwise specifically provided, and makes any violation of the provision punishable.

[11] There is a power of forfeiture and attachment of property of the person convicted under MCOCA under Section 20. Sub-section (1) of Section 21 of the MCOCA lays down that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (for short "the Code") or in any other law, every offence punishable under MCOCA shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and "cognizable case" as defined in that clause would be construed accordingly. Sub-section (2) of Section 21 provides that Section 167 of the Code shall apply in relation to a case involving an offence punishable under the Act subject to certain modifications. Sub- section (5) of Section 21 provides that notwithstanding anything contained in the Code, the accused would not be granted bail if it is noticed by the Court that he was on bail in an offence under the Act, or under any other Act, on the date of the offence in question.

[12] Mr. Shekhar Nafade, learned senior counsel appearing for the appellant -State of Maharashtra drew our attention to the abovementioned provisions of the Telegraph Act as also to the abovementioned provisions of the MCOCA in support of his submission that all the provisions of MCOCA, the constitutional validity of which is challenged are valid. It was submitted by him that the aforesaid provisions, namely, Section 2(d), (e)

and (f) and Sections 13 to 16 and sub-Section (5) of Section 21 constitutional validity of which was challenged are legal and valid as they are covered by Entry 1 and 2 of List II of the Seventh Schedule and also under Entry 1, 2 and 3 of List III of the Seventh Schedule, which read as under:

> Entry 1 List II: Public order (but not including the use of any naval, military or air force or any other armed force of the Union of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).
>
> Entry 2 List II: Police (including railway and village police) subject to the provisions of entry 2A of List I.
>
> Entry 1 List III: Criminal Law, including all matters included in the Indian Penal code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.
>
> Entry 2 List III: Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
>
> Entry 12 List III: Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

[13] It was submitted by him that the provisions of MCOCA create and define a new offence of organised crime under Section 2(1) (e) which is made punishable under Section 3 of the MCOCA and that to aid detection and investigation of such an offence and to provide evidence of any offence involving organised crime, interception of wire, electronic and oral communication is necessary. He submitted that the provisions of Sections 13 to 16, facilitate the detection and investigation of the offence of organised crime, and the State's legislative competence to enact such provisions was traceable to Entry 1 and 2 in List II and Entry 1, 2 and 12 in List III of Seventh Schedule of the Constitution. He pointed out that the duty of police officers is to collect intelligence regarding commission of cognizable offences or plans/designs to commit such offences,

to prevent the commission of offences, and to detect and apprehend offenders (See Section 23 of Police Act, 1861 and Section 64 of Bombay Police Act, 1951). He also submitted that the grounds for interception of the communication under the State Law are different from the grounds covered by Section 5(2) of the Telegraph Act, inasmuch as the State law authorizes the interception as it is intended to prevent the commission of an organised crime or to collect the evidence of such an organised crime. He, therefore, contented that the constitutional validity cannot be questioned on the ground of want of legislative competence of the State Legislature to enact such a provision.

[14] It was further submitted that Entries in List I, II and III must receive a broad and liberal construction. Reference to the doctrine of pith and substance was also made.

[15] It was also contended that the findings recorded by the High Court with regard to the repugnancy of provisions of Sections 13 to 16 of the MCOCA have been arrived at by misconstruing the provisions of the Central Act as also the State Act. The learned counsel for appellant drew our attention to the findings recorded in paragraph 48 of the impugned judgment of the High Court which contains a comparative chart on the basis of which the High Court has come to the conclusion that there was repugnancy. It was pointed out that the chart does not give a clear picture of the relevant statutory provisions and contained several flaws.

[16] Mr. Dushyant A. Dave, learned senior counsel appearing for Respondent No.1 and Mr. Manoj Goel, learned counsel appearing for Respondent No.3, however, refuted the aforesaid submissions while contending that the aforesaid provisions, namely Sections 13 to 16 and sub-Section (5) of Section 21 are ultra vires Article 246 of the Constitution of India. It was submitted by them that the subject and the area which is dealt by the MCOCA, enacted by the State Legislature are governed and covered exclusively by Entry 31 of List I in regard to which parliament alone has exclusive competence, and that being so, the said provisions enacted by a state legislature are ultra vires the Constitution. It was also submitted that the said provisions are not only beyond the legislative competence of the state legislature but they also infringe upon the fundamental rights guaranteed under Part III of the Constitution as the said provisions are violative of Articles 14 and 21 of the Constitution and, therefore, the said provisions are to be declared ultra vires the Constitution on both the counts.

[17] In addition, Mr. Manoj Goel Counsel for the Respondent No. 3 submitted that Section 2 (d), (e) and (f) and Sections 3 and 4 of the MCOCA are constitutionally invalid as they are ultra virus being violative of the provisions of Article 14 of the Constitution.

[18] But we find that no cross appeal was filed by any of the respondents against the order of the High Court upholding the constitutional validity of provisions of section 2(d), (e) and (f) and also that of Sections 3 and 4 of the MCOCA. During the course of hearing, Mr. Goel, the counsel appearing for one of the respondents herein tried to contend that the aforesaid provisions of Section 2(d), (e) and (f) of the MCOCA are unconstitutional on the ground that they violate the requirement of Article 13 (2) of the Constitution and that they make serious inroads into the fundamental rights by treating unequals as equals and are unsustainably vague. Since such issues were not specifically raised by filing an appeal and since only a passing reference is made on the said issue in the short three page affidavit filed by the respondent No. 3, it is not necessary for us to examine the said issue as it was sought to be raised more specifically in the argument stage only.

[19] Even otherwise when the said definitions as existing in Section 2 (d), (e) and (f) of the MCOCA are read and understood with the object and purpose of the Act which is to make special provisions for prevention and control of organised crime it is clear that they are worded to subserve and achieve the said object and purpose of the Act. There is no vagueness as the definitions defined with clarity what it meant by continuing unlawful activity, organised crime and also organised crime syndicate. As the provisions treat all those covered by it in a like manner and does not suffer from the vice of class legislation they cannot be said to be violative of Article 14 of the Constitution. With respect to Section 3 of MCOCA, even before the High Court the attack was in particular in respect of the provisions of Section 3 (3) and (5) on the ground that the requirement of mens rea is done away with, thus automatically rendering a person without any intention or knowledge liable for punishment. It is a well settled position of law insofar as criminal law is concerned that in such provisions mens rea is always presumed as integral part of penal offence or section unless it is specifically and expressly or by necessary intendment excluded by the legislature. No such exclusion is found in sub-sections (3) and (5) of Section 3. As held by the High Court, if the provisions are read in the following manner no injury, as alleged, would be caused:

> "3(3). Whoever (intentionally) harbours or conceals or attempts to harbor or conceal any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs."

3(5). Whoever (knowingly) holds any property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extent to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

As far as section 4 of MCOCA is concerned the challenge was made before the High Court on the ground that the words "at any time" in Section 4 makes an act which was not a crime prior to coming into force of the MCOCA, a crime, thus, making the provision retrospective, being violative of Article 20 of the Constitution. A Perusal of the enactment along with the object and purpose reveals that it is only prospective and not retrospective and as held by the High Court the words "at any time" should be read to mean at any time after coming into force of MCOCA, the section should be read as under:

"4. Punishment for possessing unaccountable wealth on behalf of member of organized syndicate.--If any person on behalf of a member of an organized crime syndicate is, or, at any time (after coming into force of this Act) has been, in possession of movable or immovable property which he can not satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years which may extent to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also be liable for attachment and forfeiture, as provided by Section 20."

[20] After examining the impugned judgment in depth on the issue of constitutional validity of Section 2 (d), (e) and (f) and also Section 3 and 4 of MCOCA we are in accord with the findings arrived at by the High Court that the aforesaid provisions cannot be said to be ultra vires the Constitution and we do not find any reason to take a different view that what is taken by the High Court while upholding the validity of the aforesaid provisions.

[21] In the light of the aforesaid, we are required to answer the issues which are specifically raised before us, relating to the constitutional validity of Sections 13 to 16 as also Section 21 (5) of MCOCA, on the ground of lack of legislative competence and also

being violative of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

[22] Before we proceed to record our findings and conclusions in relation to the contentions raised before us it would be necessary to survey and notice some of the provisions of Constitution and well established doctrine and principle which are relevant for the purpose of our decision.

[23] Chapter 1 of part XI of the Constitution deals with the subject of distribution of legislative powers of the Parliament and the legislature of the States. Article 245 of the Constitution provides that the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 of the Constitution relates to the subject matter of laws made by the Parliament and State Legislatures. It declares that the Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. The Legislature of any State would have powers to make laws with respect to any of the matters mentioned in List II, subject to the power of the parliament in regard to List I matters and the power of the Parliament and the State Legislature in respect of List III matters. List III enumerates the matters in respect of which both Parliament and State Legislatures have power to enact laws.

[24] It is a well established rule of interpretation that the entries in the list being fields of legislation must receive liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. Each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. In Navinchandra Mafatlal v. CIT reported in AIR 1955 SC 58 this Court observed as under:

> "6.....As pointed out by Gwyer, C.J. in United Provinces v. Atiqa Begum (1940) FC R 110 at p. 134 none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear -- and it is acknowledged by Chief Justice Chagla -- that in construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein.....The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power

the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

Similar were the observations of a five Judges' Bench of this Court in Godfrey Phillips India Ltd. v. State of U.P., reported in (2005) 2 SCC 515, which are as follows:

"49.....Where there is the possibility of legislative overlap, courts have resolved the issue according to settled principles of construction of entries in the legislative lists.

50. The first of such settled principles is that legislative entries should be liberally interpreted, that none of the items in the list is to be read in a narrow or restricted sense and that each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it (United Provinces v. Atiqa Begam (1940) FCR 110, Western India Theatres Ltd. v. Cantonment Board 1959 Supp (2) SCR 63, SCR at p. 69 and Elel Hotels & Investments Ltd. v. Union of India (1989) 3 SCC 698)."

[25] It is also a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statue and while construing such statue every legally permissible effort should be made to keep the statue within the competence of State legislature. In M/s Burrakur Coal Co. Ltd. v. The Union of India and others reported in 1962 (1) SCR 44 this Court held the same in the following manner:

"24.....Where the validity of a law made by a competent authority is challenged in a Court of law that court is bound to presume in favour of its validty. Further while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained....."

[26] In C S T v. Radhakrishnan (1979) 2 SCC 249 this Court while dealing with the question of constitutional validity of a statute held that the presumption is always on the

constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. It was held in that decision that for sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all other facts which are relevant and that it must always be presumed that the legislature understands and correctly appreciate the need of its own people and that discrimination, if any, is based on adequate grounds and considerations.

[27] In this regard we may also refer to a three Judges' Bench decision of this Court titled Greater Bombay Cooperative Bank Ltd. v. United Yarn Tex (P) Ltd. & Others reported in (2007) 6 SCC 236. In the said decision one of the issues that was raised was "whether the State Legislature is competent to enact legislation in respect of cooperative societies incidentally transacting business of banking, in the light of Entry 32, List II of the Seventh Schedule of the Constitution." While deciding the said issue reference was made and reliance was placed on the following passage contained in the earlier decision of this Court in State of Bihar v. Bihar Distillaries Limited reported in (1997) 2 SCC 453, about the nature of approach which the court should adopt while examining the constitutional validity of a provision (vide para 85) :

> "The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/ constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application....."
>
> "The court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution

> recognises and gives effect to the concept of equality between the three wings of the State and the concept of 'checks and balances' inherent in such scheme."

[28] One of the proven methods of examining the legislative competence of an enactment is by the application of doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the respective Legislature under the constitutional scheme. The said doctrine has come to be established in India and is recognized in various pronouncements of this Court as also of the High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on topics in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the topics in the Union List.

[29] A five Judges' Bench of this court in the case of A. S. Krishna v. State of Madras, reported in 1957 SCR 399, held as under:

> "8.....But then, it must be remembered that we are construing a federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had

time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within it competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment."

Again a five Judges' bench of this court while discussing the said doctrine in Kartar Singh v. State of Punjab (1994) 3 SCC 569 observed as under:

"60. This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden."

[30] Though it is true that the State Legislature would not have power to legislate upon any of the matters enumerated in the Union List but as per the doctrine of Pith and Substance there could not be any dispute with regard to the fact that if it could be shown that the area and subject of the legislation is also covered within the purview of the entry of the State List and the Concurrent List, in that event incidental encroachment to an entry in the Union List will not make a law invalid and such an incidental encroachment will not make the legislation ultra vires the Constitution.

[31] In Bharat Hydro Power Corpn. Ltd. v. State of Assam (2004) 2 SCC 553 the Doctrine of pith and substance came to be considered, when after referring to the catena of decisions of this Court on the doctrine it is laid down as under:

> "18. It is likely to happen from time to time that enactment though purporting to deal with a subject in one list touches also on a subject in another list and prima facie looks as if one legislature is impinging on the legislative field of another legislature. This may result in a large number of statutes being declared unconstitutional because the legislature enacting law may appear to have legislated in a field reserved for the other legislature. To examine whether a legislation has impinged on the field of other legislatures, in fact or in substance, or is incidental, keeping in view the true nature of the enactment, the courts have evolved the doctrine of "pith and substance" for the purpose of determining whether it is legislation with respect to matters in one list or the other. Where the question for determination is whether a particular law relates to a particular subject mentioned in one list or the other, the courts look into the substance of the enactment. Thus, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid. This principle came to be established by the Privy Council when it determined appeals from Canada or Australia involving the question of legislative competence of the federation or the States in those countries. This doctrine came to be established in India and derives its genesis from the approach adopted by the courts including the Privy Council in dealing with controversies arising in other federations. For applying the principle of "pith and substance" regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions. For this see Southern Pharmaceuticals & Chemicals v. State of Kerala (1981) 4 SCC 391, State of Rajasthan v. G. Chawla AIR 1959 SC 544, Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504, Delhi Cloth and General Mills Co. Ltd. v. Union of India (1983) 4 SCC 166 and Vijay Kumar Sharma v. State of Karnataka (1990) 2 SCC 562. In the last-mentioned case it was held: (SCC p. 576, para 15)
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> "15. (3) Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon

any of the entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.""

[32] Article 254 of the Constitution succinctly deals with the law relating to inconsistency between the laws made by the Parliament and the State Legislature. The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. In other words, the question of repugnancy arises only in connection with subjects enumerated in Concurrent List. In such situation the provisions enacted by Parliament and State Legislature cannot unitedly stand and the State law will have to make the way for the Union Law. Once it is proved and established that the State law is repugnant to the Union law, the State law would become void but only to the extent of repugnancy. At the same time it is to be noted that mere possibility of repugnancy will not make a State law invalid, for repugnancy has to exist in fact and it must be shown clearly and sufficiently that State law is repugnant to Union law.

[33] In the background of the aforesaid legal position we may now proceed to examine the question of competence of the State Legislature to enact a law of the nature of MCOCA.

[34] A perusal of the relevant provisions of MCOCA would indicate that the said law authorizes the interception of wire, electronic and oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organized crime. Interception of wire, electronic and oral communication with the said intent in case of urgency is also permitted under the State Act in which case it is to be approved by an officer not below the rank of Additional Director General of Police within 48 hours of occurrence of interception.

[35] The provisions of the MCOCA when read with the Statement of Objects and Reasons, which are already dealt with and referred to hereinbefore, would make it apparent and establish that the grounds for interception of the communication under MCOCA are distinct and different from the ground covered by Section 5(2) of the Telegraph Act. A comparative reading of the provisions of the Telegraph Act as also of

the MCOCA would establish that both the Acts deal with the subjects and areas which cannot be said to be identical and common.

[36] In paragraph 48 of the impugned judgment, the High Court has reproduced a comparative chart, which was filed before the High court by the respondents herein, to show that MCOCA had made inroads on the legislative power of the Parliament. Our attention was also drawn to the said chart and we find that the conclusion of the High Court that there is repugnancy in view of the statutory provisions contained therein do not appear to be sound. The High Court has recorded that under the Central Law the communication can be intercepted only if there was public emergency and interest of public safety was involved. The High Court did not find any such provision in MCOCA because the grounds for interception in the State law are totally different from the grounds covered under the Telegraph Act. State law authorizes interception only if it is intended to prevent the commission of an organized crime and/or if it is intended to collect evidence of such organized crime. The High Court thereafter proceeded to compare Rule 419A (1) and (5) of the Telegraph Rules with Section 14(4), (8) and (10) of MCOCA. On the basis of the aforesaid comparison it cannot be held that MCOCA had encroached upon the legislative power of the Parliament. The proviso to Rule 419A(1) deals with cases of emergency and provides that in cases of emergency the communication may be intercepted without the prior approval of the competent authority and the approval may be obtained within a period of 15 days. It was held by the High Court that no time limit is provided under Section 14(4) of the Act. But, the said finding appears to be erroneous as Section 14(10) and (11) deal with emergency situations and provide appropriate safeguards.

[37] It is now well settled that though the Statement of Objects and Reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, but it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. In this regard we may refer to the majority view (6:1) in the case of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, reported in (2005) 8 SCC 534, wherein it was observed as under:

> "Question 4. Statement of Objects and Reasons --
>
> Significance and role thereof

69. Reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs in relation to the statute, and the evil which the statute has sought to remedy. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004, at p. 218). In State of W. B. v. Subodh Gopal Bose AIR 1954 SC 92 the Constitution Bench was testing the constitutional validity of the legislation impugned therein. The Statement of Objects and Reasons was used by S.R. Das, J. for ascertaining the conditions prevalent at that time which led to the introduction of the Bill and the extent and urgency of the evil which was sought to be remedied, in addition to testing the reasonableness of the restrictions imposed by the impugned provision. In his opinion, it was indeed very unfortunate that the Statement of Objects and Reasons was not placed before the High Court which would have assisted the High Court in arriving at the right conclusion as to the reasonableness of the restriction imposed. State of W. B. v. Union of India (1964) 1 SCR 371, SCR at pp. 431-32 approved the use of Statement of Objects and Reasons for the purpose of understanding the background and the antecedent state of affairs leading up to the legislation.

70. In Quareshi-I 1959 SCR 629 itself, which has been very strongly relied upon by the learned counsel for the respondents before us, Chief Justice S.R. Das has held: (SCR pp. 652 & 661)

"The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be

conceived existing at the time of legislation. (AIR para 15)

... 'The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence...'. This should be the proper approach for the court but the ultimate responsibility for determining the validity of the law must rest with the court.... (AIR para 21, also see the several decisions referred to therein.)"

71. The facts stated in the preamble and the Statement of Objects and Reasons appended to any legislation are evidence of the legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst others will be taken into consideration by the court in judging the reasonableness of any restriction imposed on the fundamental rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved."

[38] The objects and reasons read with the contents of the Act would indicate that the subject matter of the Act is maintaining public order and prevention by police of commission of serious offences affecting public order and, therefore as submitted, it will be relatable to Entry 1 and 2 of List II. After enacting MCOCA, assent of the President was also obtained and received on 24.04.1999. That being the position if the subject matter and the field of legislation are found to be covered under any of the entries of the Concurrent List also, the constitutional validity will have to be upheld. Thus, Entry 1, 2 and 12 of the Concurrent List would and could also be brought into operation and aid can be taken from said entries also, for the Act deals with subject matters which are relatable as well to Entries 1, 2 and 12 of the Concurrent List.

[39] We are of the considered opinion that source of power to legislate the aforesaid Act can be derived by the State from the aforesaid entries of the State List and the Concurrent List and while enacting the aforesaid State Act the assent of the President was also taken. Therefore, the Act cannot be said to be beyond the legislative competence of the State Legislature. The content of the said Act might have

encroached upon the scope of Entry 31 of List I but the same is only an incidental encroachment. As the main purpose of the Act is within the parameter of Entry 1 and 2 of the State Legislature we find no reason to hold that the provisions of Sections 13 to 16 are constitutionally invalid because of legislative competence.

[40] Another ground on which challenge was made was that Section 13 to 16 violates the mandate of Article 21 of the constitution. It was submitted that provisions contained under Section 13 to 16 of the impugned act authorizing interception of communication violates the Right to Privacy, which is part of right to 'life' and 'personal liberty' enriched under Article 21. Article 21 of the Constitution reads as under:

> "Protection to Life and Personal Liberty
>
> 21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

[41] The Right to Privacy has been developed by the Supreme Court over a period of time and with the expansive interpretation of the phrase 'personal liberty', this right has been read into Article 21. It was stated in the case of Gobind v. State of M.P. reported in (1975) 2 SCC 148 that Right to Privacy is a 'right to be let alone' and a citizen has a right 'to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters'. The term privacy has not been defined and it was held in the case of People's Union for Civil Liberties (PUCL) v. Union of India, reported in (1997) 1 SCC 301 that as a concept it may be too broad and moralistic to define it judicially and whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case.

[42] The question whether interception of telephonic message/tapping of telephonic conversation constitutes a serious invasion of an individual right to privacy was considered by this court on two occasions. One in the year 1972 in the case of R. M. Malkani v. State of Maharashtra, reported in (1973) 1 SCC 471, wherein it was held as under:

> "31.....Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by tapping the conversation. The protection is not for the guilty

citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or even irregular method in obtaining the tape- recording of the conversation."

[43] The question posed above was considered again in detail by this Court in the case of People's Union (supra), wherein it was held as under:

"17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

18. The right to privacy -- by itself -- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy".

Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."

[44] The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable and non arbitrary, fanciful or oppressive.

[45] The object of the MCOCA is to prevent the organised crime and a perusal of the provisions of Act under challenge would indicate that the said law authorizes the interception of wire, electronic or oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organized crime. The procedures authorizing such interception are also provided therein with enough procedural safe guards, some of which are indicated and discussed hereinbefore. In addition under Section 16 of the MCOCA, provision for prohibiting and punishing the unauthorized user of information acquired by interception of wire, electronic or oral communication has been made. Thus as the Act under challenge contains sufficient safeguards and also satisfies the aforementioned mandate the contention of the respondents that provisions of Section 13 to 16 are violative of the Article 21 of the Constitution cannot also be accepted.

[46] Having recorded our finding in the aforesaid manner, we now proceed to decide the issue as to whether a person accused of an offence under MCOCA should be denied bail if on the date of the offence he is on bail for an offence under MCOCA or any other Act. Section 21 (5) of MCOCA reads as under:

> "Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question"

[47] As discussed above the object of the MCOCA is to prevent the organised crime and, therefore, there could be reason to deny consideration of grant of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence under some other act would not be in any case in consonance with the object of the act which is enacted in order to prevent only organised crime.

[48] We consider that a person who is on bail after being arrested for violation of law unconnected with MCOCA, should not be denied his right to seek bail if he is arrested under the MCOCA, for it cannot be said that he is a habitual offender. The provision of denying his right to seek bail, if he was arrested earlier and was on bail for commission of an offence under any other Act, suffers from the vice of unreasonable classification by placing in the same class, offences which may have nothing in common with those under MCOCA, for the purpose of denying consideration of bail. The aforesaid

expression and restriction on the right of seeking bail is not even in consonance with the object sought to be achieved by the Act and, therefore, on the face of the provisions this is an excessive restriction.

[49] The High Court found that the expression "or under any other Act" appearing in the section is arbitrary and discriminatory and accordingly struck down the said words from sub-Section (5) of Section 21 as being violative of Article 14 and 21 of the Constitution. We uphold the order of the High Court to the extent that the words "or under any other Act" should be struck down from Sub section (5) of Section 21.

[50] In view of the aforesaid discussions, we allow the appeals of the State Government, insofar as the constitutional validity of Sections 13 to 16 of MCOCA is concerned. We uphold the validity of the said provisions. The decision of the High Court striking down the words "or under any other Act" from sub-Section (5) of Section 21 of the Act is however upheld. The parties to bear their own cost.

[51] sConsequential orders, if any, in terms of the observations and directions passed in these appeals, may be passed by the concerned Court(s) where any proceeding under MCOCA is pending.

On tapping of telephone conversation, another judgement of Hon'ble Apex Court.

STATE OF MAHARASHTRA

V/S

BHARAT SHANTI LAL SHAH 2008 (13) SCC 5.

SUPREME COURT OF INDIA (FROM BOMBAY) *(F.B.)*

STATE OF MAHARASHTRA
V/S
BHARAT SHANTI LAL SHAH

Date of Decision: 01 September 2008

Citation: 2008 LawSuit(SC) 1341

Hon'ble Judges: K G Balakrishnan, R V Raveendran, Mukundakam Sharma

Case Type: S L P (Criminal)

Case No: 753-756 of 2004

Subject: Constitution, Criminal, Press Media & Telecommunication

Head Note:

Maharashtra Control of organised Crime Act 1999 - constitutional validity of - on the ground that the State Legislature did not have the legislative competence to enact such a law and also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India.

Acts Referred:
Constitution Of India Art 254, Art 21, Art 14, Art 13(2)
Bombay Police Act, 1951 Sec 64
Telegraph Act, 1885 Sec 5(2)
Telegraph Rules, 1951 R 419A(5), R 419A(1)
Maharashtra Control Of Organised Crime Act, 1999 Sec 14, Sec 13, Sec 16, Sec 15, Sec 2, Sec 2(f), Sec 21(5), Sec 2(d), Sec 4, Sec 3, Sec 2(e)

Final Decision: Appeal allowed

Eq. Citations: 2009 (Supp) AIR(SC) 1135, 2009 (1) AWC 924, 2008 (13) SCC 5, 2008

(13) SCC 30, 2008 (8) Supreme 372, 2008 (2) BCR(Cri) 546, 2008 (9) AD(SC) 708, 2008 AIR(SCW) 6431, 2008 (6) AIRBomR 450, 2009 AllMR(Cri) 624, 2008 (10) JT 77, 2008 (5) LawHerald(SC) 3345, 2008 (12) Scale 167, 2009 (2) SCJ 55

Reference Cases:

Cases Cited in (+): **23**

Cases Referred in (+): **23**

Judgement Text:-

Mukundakam Sharma, J

[1] Leave granted.

[2] In all these appeals the issue that falls for our consideration is the constitutional validity of the Maharashtra Control of Organised Crime Act, 1999 (for short the 'MCOCA' or the 'Act') on the ground that the State Legislature did not have the legislative competence to enact such a law and also that the aforesaid law is unreasonable and is violative of the provisions of Article 14 of the Constitution of India.

[3] Respondent Nos. 2 and 3 were arrested under the provisions of the MCOCA and cases were registered against them. Being aggrieved by the aforesaid arrest and registration of cases both of them filed separate writ petitions being Criminal Writ Petition No. 1738/2002 and Criminal Writ Petition No. 110/2003 respectively in the Bombay High Court challenging the constitutional validity of the MCOCA, particularly the provisions of Section 2(d), (e) and (f) and that of Sections 3, 4 and 13 to 16 and Section 21(5) of the MCOCA. Respondent no. 1 also filed a writ petition of similar nature being Criminal Writ Petition No. 27/2003. The Bombay High Court heard the above mentioned writ petitions together and passed a common judgment and order on 05.03.2003 whereby it upheld the constitutional validity of Section 2(d), (e) and (f) and also the provisions of Sections 3 and 4 but struck down Sections 13 to 16 as unconstitutional as being beyond the legislative competence of the State Legislature. The High Court held that the Parliament alone has the power to make law in that regard as provided for under Entry 31 of List I of Seventh Schedule to the Constitution and that already the Indian Telegraph Act, 1885, a Central Act was holding the field. The High Court also struck down sub-section (5) of Section 21 of the MCOCA holding that the same was violative of provisions of Article 14 of the Constitution of India. Being aggrieved by the

aforesaid common order the State of Maharashtra has filed the present appeals.

[4] Learned senior counsel appearing for the parties advanced elaborate arguments on the aforesaid issues, but before we deal with and discuss the same, it would be necessary for us to refer to the relevant provisions of the concerned Central and the State Legislations.

[5] The Indian Telegraph Act, 1885 (for short the 'Telegraph Act') was passed as a Central Act in 1885 and the said Act came into force on 1st October, 1885. The word 'telegraph' in the said Act is defined to mean any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other elector-magnetic emissions. By enacting Section 4 in the said Act the Central Government has been given exclusive privilege in establishing, maintaining and working telegraphs. The power to grant a licence on such conditions and in considerations of such payments as it thinks fit, to any person to establish, maintain or work a telegraph in any part within India is also vested with the Central Government. Section 5 of the said Act gives power to the Central Government as well as to the State Government or any officer specifically authorized in that behalf by the Central or the State Government to take temporary possession of any telegraph established, maintained or worked by any person, licensed under the Act, provided there is an occurrence of any public emergency or there is a case of public safety and when such authority is satisfied that one such pre-condition arises and that it is necessary to act in a case of public emergency or maintaining of public safety. Section 5(2) of the Act provides that on the occurrence of any public emergency, or in the interest of public safety the Central or the State Government or any officer specially authorized in that behalf by the Central or the State Government may, if satisfied that it is necessary or expedient to do so in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of offence and for the reasons to be recorded in writing by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraphs, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order.

[6] The Telegraph Act is an existing law (as defined in Article 366 (10) of the Constitution) with respect to the matters enumerated in Entry 31 of List I of the Seventh Schedule to the Constitution. Entry 31 empowers the Central Legislature to enact a law

in respect of posts and telegraph, telephones, wireless, broadcasting and other like forms of communication. The Telegraph Act, which is an enactment passed before the commencement of the Constitution, deals with the aforesaid subjects enumerated in Entry 31 of List I.

[7] The Maharashtra State Legislature enacted a State legislation under the name of Maharashtra Control of Organised Crime Act, 1999 which came into force on 24th February, 1999. The Statement of Objects and Reasons for enacting the said Act reads as under:

> "Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnapping for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.
>
> It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.
>
> 2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime."

According to its preamble, the said Act was enacted to make specific

provisions for prevention and control of, and for coping with, criminal activity by organised crime syndicate or gang and for matters connected therewith or incidental thereto.

[8] Section 2 of the MCOCA contains the definitions. The word "abet" is defined in clause (a) of sub-Section (1) to mean and include the communication or association with any person with the actual knowledge or having reason to believe that such person is engaged in assisting in any manner, an organized crime syndicate, the passing on or publication of, without any lawful authority any information likely to assist the organized crime syndicate and the passing on or publication of or distribution of any document or matter obtained from the organized crime syndicate and also rendering of any assistance whether financial or otherwise, to the organised crime syndicate. Clause (d) of sub-Section (1) defines the expression "continuing unlawful activity" to mean an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years of more, undertaken either singly or jointly, as a member of an organized crime syndicate or on behalf of such syndicate in respect of which more than one charge sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. Clause (e) of sub-Section (1) defines the expression "organised crime" to mean any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. The term "organised crime syndicate" is defined under clause (f) of sub- Section (1) to mean a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime.

[9] Section 3 provides the punishment for organised crime. It states that (i) whoever commits an offence of organised crime, (ii) whoever conspires or attempts to commit or advocates, abets or knowingly facilitate the commission of an organised crime or any act preparatory to organised crime, (iii) whoever harbours or conceals or attempts to harbour or conceal any member of an organised crime syndicate, (iv) any person who is a member of an organised crime syndicate and (v) whoever holds any property derived or obtained from commission of an organised crime, shall be punished as provided in the said section. Section 4 provides punishment for possessing unaccountable wealth on behalf of a member of organised crime syndicate.

[10] Section 13 of the MCOCA deals with the power of the State Government to appoint the competent authority. As per the said section the State Government may appoint any of its officer, in Home Department, not below the rank of Secretary to the Government, to be the competent authority for the purposes of Section 14. Section 14 empowers a police officer not below the rank of the Superintendent of Police supervising the investigation of an organised crime under the aforesaid Act to submit an application in writing to the competent authority for an order authorizing or approving the interception of wire, electronic or oral communication by the investigating officer, when such interception may provide or has provided evidence of any offence involving an organised crime. Sub-Sections (2) to (13) of Section 14 lay down the detailed procedure therefore as also the requirements to be fulfilled before approval is granted. Section 14, therefore, authorizes the interception of wire, electronic or oral communication, subject to certain conditions and safeguards laid down therein. Section 15 requires constitution of a review committee to review every order passed by the competent authority under Section 14. Section 16 imposes certain restrictions regarding interception and disclosure of wire, electronic or oral communication. It prohibits the interception and also disclosure of wire, electronic or oral communication by any police officer except as otherwise specifically provided, and makes any violation of the provision punishable.

[11] There is a power of forfeiture and attachment of property of the person convicted under MCOCA under Section 20. Sub-section (1) of Section 21 of the MCOCA lays down that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (for short "the Code") or in any other law, every offence punishable under MCOCA shall be deemed to be a cognizable offence within the meaning of clause (c) of Section 2 of the Code and "cognizable case" as defined in that clause would be construed accordingly. Sub-section (2) of Section 21 provides that Section 167 of the Code shall apply in relation to a case involving an offence punishable under the Act subject to certain modifications. Sub- section (5) of Section 21 provides that notwithstanding anything contained in the Code, the accused would not be granted bail if it is noticed by the Court that he was on bail in an offence under the Act, or under any other Act, on the date of the offence in question.

[12] Mr. Shekhar Nafade, learned senior counsel appearing for the appellant -State of Maharashtra drew our attention to the abovementioned provisions of the Telegraph Act as also to the abovementioned provisions of the MCOCA in support of his submission that all the provisions of MCOCA, the constitutional validity of which is challenged are valid. It was submitted by him that the aforesaid provisions, namely, Section 2(d), (e)

and (f) and Sections 13 to 16 and sub-Section (5) of Section 21 constitutional validity of which was challenged are legal and valid as they are covered by Entry 1 and 2 of List II of the Seventh Schedule and also under Entry 1, 2 and 3 of List III of the Seventh Schedule, which read as under:

> Entry 1 List II: Public order (but not including the use of any naval, military or air force or any other armed force of the Union of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).
>
> Entry 2 List II: Police (including railway and village police) subject to the provisions of entry 2A of List I.
>
> Entry 1 List III: Criminal Law, including all matters included in the Indian Penal code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.
>
> Entry 2 List III: Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
>
> Entry 12 List III: Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

[13] It was submitted by him that the provisions of MCOCA create and define a new offence of organised crime under Section 2(1) (e) which is made punishable under Section 3 of the MCOCA and that to aid detection and investigation of such an offence and to provide evidence of any offence involving organised crime, interception of wire, electronic and oral communication is necessary. He submitted that the provisions of Sections 13 to 16, facilitate the detection and investigation of the offence of organised crime, and the State's legislative competence to enact such provisions was traceable to Entry 1 and 2 in List II and Entry 1, 2 and 12 in List III of Seventh Schedule of the Constitution. He pointed out that the duty of police officers is to collect intelligence regarding commission of cognizable offences or plans/designs to commit such offences,

to prevent the commission of offences, and to detect and apprehend offenders (See Section 23 of Police Act, 1861 and Section 64 of Bombay Police Act, 1951). He also submitted that the grounds for interception of the communication under the State Law are different from the grounds covered by Section 5(2) of the Telegraph Act, inasmuch as the State law authorizes the interception as it is intended to prevent the commission of an organised crime or to collect the evidence of such an organised crime. He, therefore, contented that the constitutional validity cannot be questioned on the ground of want of legislative competence of the State Legislature to enact such a provision.

[14] It was further submitted that Entries in List I, II and III must receive a broad and liberal construction. Reference to the doctrine of pith and substance was also made.

[15] It was also contended that the findings recorded by the High Court with regard to the repugnancy of provisions of Sections 13 to 16 of the MCOCA have been arrived at by misconstruing the provisions of the Central Act as also the State Act. The learned counsel for appellant drew our attention to the findings recorded in paragraph 48 of the impugned judgment of the High Court which contains a comparative chart on the basis of which the High Court has come to the conclusion that there was repugnancy. It was pointed out that the chart does not give a clear picture of the relevant statutory provisions and contained several flaws.

[16] Mr. Dushyant A. Dave, learned senior counsel appearing for Respondent No.1 and Mr. Manoj Goel, learned counsel appearing for Respondent No.3, however, refuted the aforesaid submissions while contending that the aforesaid provisions, namely Sections 13 to 16 and sub-Section (5) of Section 21 are ultra vires Article 246 of the Constitution of India. It was submitted by them that the subject and the area which is dealt by the MCOCA, enacted by the State Legislature are governed and covered exclusively by Entry 31 of List I in regard to which parliament alone has exclusive competence, and that being so, the said provisions enacted by a state legislature are ultra vires the Constitution. It was also submitted that the said provisions are not only beyond the legislative competence of the state legislature but they also infringe upon the fundamental rights guaranteed under Part III of the Constitution as the said provisions are violative of Articles 14 and 21 of the Constitution and, therefore, the said provisions are to be declared ultra vires the Constitution on both the counts.

[17] In addition, Mr. Manoj Goel Counsel for the Respondent No. 3 submitted that Section 2 (d), (e) and (f) and Sections 3 and 4 of the MCOCA are constitutionally invalid as they are ultra virus being violative of the provisions of Article 14 of the Constitution.

[18] But we find that no cross appeal was filed by any of the respondents against the order of the High Court upholding the constitutional validity of provisions of section 2(d), (e) and (f) and also that of Sections 3 and 4 of the MCOCA. During the course of hearing, Mr. Goel, the counsel appearing for one of the respondents herein tried to contend that the aforesaid provisions of Section 2(d), (e) and (f) of the MCOCA are unconstitutional on the ground that they violate the requirement of Article 13 (2) of the Constitution and that they make serious inroads into the fundamental rights by treating unequals as equals and are unsustainably vague. Since such issues were not specifically raised by filing an appeal and since only a passing reference is made on the said issue in the short three page affidavit filed by the respondent No. 3, it is not necessary for us to examine the said issue as it was sought to be raised more specifically in the argument stage only.

[19] Even otherwise when the said definitions as existing in Section 2 (d), (e) and (f) of the MCOCA are read and understood with the object and purpose of the Act which is to make special provisions for prevention and control of organised crime it is clear that they are worded to subserve and achieve the said object and purpose of the Act. There is no vagueness as the definitions defined with clarity what it meant by continuing unlawful activity, organised crime and also organised crime syndicate. As the provisions treat all those covered by it in a like manner and does not suffer from the vice of class legislation they cannot be said to be violative of Article 14 of the Constitution. With respect to Section 3 of MCOCA, even before the High Court the attack was in particular in respect of the provisions of Section 3 (3) and (5) on the ground that the requirement of mens rea is done away with, thus automatically rendering a person without any intention or knowledge liable for punishment. It is a well settled position of law insofar as criminal law is concerned that in such provisions mens rea is always presumed as integral part of penal offence or section unless it is specifically and expressly or by necessary intendment excluded by the legislature. No such exclusion is found in sub-sections (3) and (5) of Section 3. As held by the High Court, if the provisions are read in the following manner no injury, as alleged, would be caused:

> "3(3). Whoever (intentionally) harbours or conceals or attempts to harbor or conceal any member of an organized crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs."

3(5). Whoever (knowingly) holds any property derived or obtained from commission of an organized crime or which has been acquired through the organized crime syndicate funds shall be punishable with a term which shall not be less than three years but which may extent to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

As far as section 4 of MCOCA is concerned the challenge was made before the High Court on the ground that the words "at any time" in Section 4 makes an act which was not a crime prior to coming into force of the MCOCA, a crime, thus, making the provision retrospective, being violative of Article 20 of the Constitution. A Perusal of the enactment along with the object and purpose reveals that it is only prospective and not retrospective and as held by the High Court the words "at any time" should be read to mean at any time after coming into force of MCOCA, the section should be read as under:

"4. Punishment for possessing unaccountable wealth on behalf of member of organized syndicate.--If any person on behalf of a member of an organized crime syndicate is, or, at any time (after coming into force of this Act) has been, in possession of movable or immovable property which he can not satisfactorily account for, he shall be punishable with imprisonment for a term which shall not be less than three years which may extent to ten years and shall also be liable to fine, subject to a minimum fine of rupees one lac and such property shall also be liable for attachment and forfeiture, as provided by Section 20."

[20] After examining the impugned judgment in depth on the issue of constitutional validity of Section 2 (d), (e) and (f) and also Section 3 and 4 of MCOCA we are in accord with the findings arrived at by the High Court that the aforesaid provisions cannot be said to be ultra vires the Constitution and we do not find any reason to take a different view that what is taken by the High Court while upholding the validity of the aforesaid provisions.

[21] In the light of the aforesaid, we are required to answer the issues which are specifically raised before us, relating to the constitutional validity of Sections 13 to 16 as also Section 21 (5) of MCOCA, on the ground of lack of legislative competence and also

being violative of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision.

[22] Before we proceed to record our findings and conclusions in relation to the contentions raised before us it would be necessary to survey and notice some of the provisions of Constitution and well established doctrine and principle which are relevant for the purpose of our decision.

[23] Chapter 1 of part XI of the Constitution deals with the subject of distribution of legislative powers of the Parliament and the legislature of the States. Article 245 of the Constitution provides that the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. Article 246 of the Constitution relates to the subject matter of laws made by the Parliament and State Legislatures. It declares that the Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. The Legislature of any State would have powers to make laws with respect to any of the matters mentioned in List II, subject to the power of the parliament in regard to List I matters and the power of the Parliament and the State Legislature in respect of List III matters. List III enumerates the matters in respect of which both Parliament and State Legislatures have power to enact laws.

[24] It is a well established rule of interpretation that the entries in the list being fields of legislation must receive liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. Each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. In Navinchandra Mafatlal v. CIT reported in AIR 1955 SC 58 this Court observed as under:

> "6.....As pointed out by Gwyer, C.J. in United Provinces v. Atiqa Begum (1940) FC R 110 at p. 134 none of the items in the Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. It is, therefore, clear -- and it is acknowledged by Chief Justice Chagla -- that in construing an entry in a List conferring legislative powers the widest possible construction according to their ordinary meaning must be put upon the words used therein.....The cardinal rule of interpretation, however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power

the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude."

Similar were the observations of a five Judges' Bench of this Court in Godfrey Phillips India Ltd. v. State of U.P., reported in (2005) 2 SCC 515, which are as follows:

"49.....Where there is the possibility of legislative overlap, courts have resolved the issue according to settled principles of construction of entries in the legislative lists.

50. The first of such settled principles is that legislative entries should be liberally interpreted, that none of the items in the list is to be read in a narrow or restricted sense and that each general word should be held to extend to ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it (United Provinces v. Atiqa Begam (1940) FCR 110, Western India Theatres Ltd. v. Cantonment Board 1959 Supp (2) SCR 63, SCR at p. 69 and Elel Hotels & Investments Ltd. v. Union of India (1989) 3 SCC 698)."

[25] It is also a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statue and while construing such statue every legally permissible effort should be made to keep the statue within the competence of State legislature. In M/s Burrakur Coal Co. Ltd. v. The Union of India and others reported in 1962 (1) SCR 44 this Court held the same in the following manner:

"24.....Where the validity of a law made by a competent authority is challenged in a Court of law that court is bound to presume in favour of its validty. Further while considering the validity of the law the court will not consider itself restricted to the pleadings of the State and would be free to satisfy itself whether under any provision of the Constitution the law can be sustained....."

[26] In C S T v. Radhakrishnan (1979) 2 SCC 249 this Court while dealing with the question of constitutional validity of a statute held that the presumption is always on the

constitutionality and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles. It was held in that decision that for sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, object of the legislation and all other facts which are relevant and that it must always be presumed that the legislature understands and correctly appreciate the need of its own people and that discrimination, if any, is based on adequate grounds and considerations.

[27] In this regard we may also refer to a three Judges' Bench decision of this Court titled Greater Bombay Cooperative Bank Ltd. v. United Yarn Tex (P) Ltd. & Others reported in (2007) 6 SCC 236. In the said decision one of the issues that was raised was "whether the State Legislature is competent to enact legislation in respect of cooperative societies incidentally transacting business of banking, in the light of Entry 32, List II of the Seventh Schedule of the Constitution." While deciding the said issue reference was made and reliance was placed on the following passage contained in the earlier decision of this Court in State of Bihar v. Bihar Distillaries Limited reported in (1997) 2 SCC 453, about the nature of approach which the court should adopt while examining the constitutional validity of a provision (vide para 85) :

> "The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/ constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application....."
>
> "The court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it, just as the legislature and the executive are expected to show due regard and deference to the judiciary. It cannot also be forgotten that our Constitution

> recognises and gives effect to the concept of equality between the three wings of the State and the concept of 'checks and balances' inherent in such scheme."

[28] One of the proven methods of examining the legislative competence of an enactment is by the application of doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the respective Legislature under the constitutional scheme. The said doctrine has come to be established in India and is recognized in various pronouncements of this Court as also of the High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on topics in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the topics in the Union List.

[29] A five Judges' Bench of this court in the case of A. S. Krishna v. State of Madras, reported in 1957 SCR 399, held as under:

> "8.....But then, it must be remembered that we are construing a federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had

time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within it competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment."

Again a five Judges' bench of this court while discussing the said doctrine in Kartar Singh v. State of Punjab (1994) 3 SCC 569 observed as under:

"60. This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden."

[30] Though it is true that the State Legislature would not have power to legislate upon any of the matters enumerated in the Union List but as per the doctrine of Pith and Substance there could not be any dispute with regard to the fact that if it could be shown that the area and subject of the legislation is also covered within the purview of the entry of the State List and the Concurrent List, in that event incidental encroachment to an entry in the Union List will not make a law invalid and such an incidental encroachment will not make the legislation ultra vires the Constitution.

[31] In Bharat Hydro Power Corpn. Ltd. v. State of Assam (2004) 2 SCC 553 the Doctrine of pith and substance came to be considered, when after referring to the catena of decisions of this Court on the doctrine it is laid down as under:

> "18. It is likely to happen from time to time that enactment though purporting to deal with a subject in one list touches also on a subject in another list and prima facie looks as if one legislature is impinging on the legislative field of another legislature. This may result in a large number of statutes being declared unconstitutional because the legislature enacting law may appear to have legislated in a field reserved for the other legislature. To examine whether a legislation has impinged on the field of other legislatures, in fact or in substance, or is incidental, keeping in view the true nature of the enactment, the courts have evolved the doctrine of "pith and substance" for the purpose of determining whether it is legislation with respect to matters in one list or the other. Where the question for determination is whether a particular law relates to a particular subject mentioned in one list or the other, the courts look into the substance of the enactment. Thus, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid. This principle came to be established by the Privy Council when it determined appeals from Canada or Australia involving the question of legislative competence of the federation or the States in those countries. This doctrine came to be established in India and derives its genesis from the approach adopted by the courts including the Privy Council in dealing with controversies arising in other federations. For applying the principle of "pith and substance" regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions. For this see Southern Pharmaceuticals & Chemicals v. State of Kerala (1981) 4 SCC 391, State of Rajasthan v. G. Chawla AIR 1959 SC 544, Thakur Amar Singhji v. State of Rajasthan AIR 1955 SC 504, Delhi Cloth and General Mills Co. Ltd. v. Union of India (1983) 4 SCC 166 and Vijay Kumar Sharma v. State of Karnataka (1990) 2 SCC 562. In the last-mentioned case it was held: (SCC p. 576, para 15)
>
> "15. (3) Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon

any of the entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.""

[32] Article 254 of the Constitution succinctly deals with the law relating to inconsistency between the laws made by the Parliament and the State Legislature. The question of repugnancy under Article 254 will arise when a law made by Parliament and a law made by State Legislature occupies the same field with respect to one of the matters enumerated in Concurrent List and there is a direct conflict in two laws. In other words, the question of repugnancy arises only in connection with subjects enumerated in Concurrent List. In such situation the provisions enacted by Parliament and State Legislature cannot unitedly stand and the State law will have to make the way for the Union Law. Once it is proved and established that the State law is repugnant to the Union law, the State law would become void but only to the extent of repugnancy. At the same time it is to be noted that mere possibility of repugnancy will not make a State law invalid, for repugnancy has to exist in fact and it must be shown clearly and sufficiently that State law is repugnant to Union law.

[33] In the background of the aforesaid legal position we may now proceed to examine the question of competence of the State Legislature to enact a law of the nature of MCOCA.

[34] A perusal of the relevant provisions of MCOCA would indicate that the said law authorizes the interception of wire, electronic and oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organized crime. Interception of wire, electronic and oral communication with the said intent in case of urgency is also permitted under the State Act in which case it is to be approved by an officer not below the rank of Additional Director General of Police within 48 hours of occurrence of interception.

[35] The provisions of the MCOCA when read with the Statement of Objects and Reasons, which are already dealt with and referred to hereinbefore, would make it apparent and establish that the grounds for interception of the communication under MCOCA are distinct and different from the ground covered by Section 5(2) of the Telegraph Act. A comparative reading of the provisions of the Telegraph Act as also of

the MCOCA would establish that both the Acts deal with the subjects and areas which cannot be said to be identical and common.

[36] In paragraph 48 of the impugned judgment, the High Court has reproduced a comparative chart, which was filed before the High court by the respondents herein, to show that MCOCA had made inroads on the legislative power of the Parliament. Our attention was also drawn to the said chart and we find that the conclusion of the High Court that there is repugnancy in view of the statutory provisions contained therein do not appear to be sound. The High Court has recorded that under the Central Law the communication can be intercepted only if there was public emergency and interest of public safety was involved. The High Court did not find any such provision in MCOCA because the grounds for interception in the State law are totally different from the grounds covered under the Telegraph Act. State law authorizes interception only if it is intended to prevent the commission of an organized crime and/or if it is intended to collect evidence of such organized crime. The High Court thereafter proceeded to compare Rule 419A (1) and (5) of the Telegraph Rules with Section 14(4), (8) and (10) of MCOCA. On the basis of the aforesaid comparison it cannot be held that MCOCA had encroached upon the legislative power of the Parliament. The proviso to Rule 419A(1) deals with cases of emergency and provides that in cases of emergency the communication may be intercepted without the prior approval of the competent authority and the approval may be obtained within a period of 15 days. It was held by the High Court that no time limit is provided under Section 14(4) of the Act. But, the said finding appears to be erroneous as Section 14(10) and (11) deal with emergency situations and provide appropriate safeguards.

[37] It is now well settled that though the Statement of Objects and Reasons accompanying a legislative Bill cannot be used to determine the true meaning and effect of the substantive provisions of a statute, but it is permissible to refer to the Statement of Objects and Reasons accompanying a Bill for the purpose of understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to the statute, and the evil which the statute sought to remedy. In this regard we may refer to the majority view (6:1) in the case of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, reported in (2005) 8 SCC 534, wherein it was observed as under:

"Question 4. Statement of Objects and Reasons --

Significance and role thereof

69. Reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs in relation to the statute, and the evil which the statute has sought to remedy. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004, at p. 218). In State of W. B. v. Subodh Gopal Bose AIR 1954 SC 92 the Constitution Bench was testing the constitutional validity of the legislation impugned therein. The Statement of Objects and Reasons was used by S.R. Das, J. for ascertaining the conditions prevalent at that time which led to the introduction of the Bill and the extent and urgency of the evil which was sought to be remedied, in addition to testing the reasonableness of the restrictions imposed by the impugned provision. In his opinion, it was indeed very unfortunate that the Statement of Objects and Reasons was not placed before the High Court which would have assisted the High Court in arriving at the right conclusion as to the reasonableness of the restriction imposed. State of W. B. v. Union of India (1964) 1 SCR 371, SCR at pp. 431-32 approved the use of Statement of Objects and Reasons for the purpose of understanding the background and the antecedent state of affairs leading up to the legislation.

70. In Quareshi-I 1959 SCR 629 itself, which has been very strongly relied upon by the learned counsel for the respondents before us, Chief Justice S.R. Das has held: (SCR pp. 652 & 661)

"The pronouncements of this Court further establish, amongst other things, that there is always a presumption in favour of the constitutionality of an enactment and that the burden is upon him, who attacks it, to show that there has been a clear violation of the constitutional principles. The courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be

conceived existing at the time of legislation. (AIR para 15)

... 'The legislature is the best judge of what is good for the community, by whose suffrage it comes into existence...'. This should be the proper approach for the court but the ultimate responsibility for determining the validity of the law must rest with the court.... (AIR para 21, also see the several decisions referred to therein.)"

71. The facts stated in the preamble and the Statement of Objects and Reasons appended to any legislation are evidence of the legislative judgment. They indicate the thought process of the elected representatives of the people and their cognizance of the prevalent state of affairs, impelling them to enact the law. These, therefore, constitute important factors which amongst others will be taken into consideration by the court in judging the reasonableness of any restriction imposed on the fundamental rights of the individuals. The Court would begin with a presumption of reasonability of the restriction, more so when the facts stated in the Statement of Objects and Reasons and the preamble are taken to be correct and they justify the enactment of law for the purpose sought to be achieved."

[38] The objects and reasons read with the contents of the Act would indicate that the subject matter of the Act is maintaining public order and prevention by police of commission of serious offences affecting public order and, therefore as submitted, it will be relatable to Entry 1 and 2 of List II. After enacting MCOCA, assent of the President was also obtained and received on 24.04.1999. That being the position if the subject matter and the field of legislation are found to be covered under any of the entries of the Concurrent List also, the constitutional validity will have to be upheld. Thus, Entry 1, 2 and 12 of the Concurrent List would and could also be brought into operation and aid can be taken from said entries also, for the Act deals with subject matters which are relatable as well to Entries 1, 2 and 12 of the Concurrent List.

[39] We are of the considered opinion that source of power to legislate the aforesaid Act can be derived by the State from the aforesaid entries of the State List and the Concurrent List and while enacting the aforesaid State Act the assent of the President was also taken. Therefore, the Act cannot be said to be beyond the legislative competence of the State Legislature. The content of the said Act might have

encroached upon the scope of Entry 31 of List I but the same is only an incidental encroachment. As the main purpose of the Act is within the parameter of Entry 1 and 2 of the State Legislature we find no reason to hold that the provisions of Sections 13 to 16 are constitutionally invalid because of legislative competence.

[40] Another ground on which challenge was made was that Section 13 to 16 violates the mandate of Article 21 of the constitution. It was submitted that provisions contained under Section 13 to 16 of the impugned act authorizing interception of communication violates the Right to Privacy, which is part of right to 'life' and 'personal liberty' enriched under Article 21. Article 21 of the Constitution reads as under:

> "Protection to Life and Personal Liberty
>
> 21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

[41] The Right to Privacy has been developed by the Supreme Court over a period of time and with the expansive interpretation of the phrase 'personal liberty', this right has been read into Article 21. It was stated in the case of Gobind v. State of M.P. reported in (1975) 2 SCC 148 that Right to Privacy is a 'right to be let alone' and a citizen has a right 'to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters'. The term privacy has not been defined and it was held in the case of People's Union for Civil Liberties (PUCL) v. Union of India, reported in (1997) 1 SCC 301 that as a concept it may be too broad and moralistic to define it judicially and whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case.

[42] The question whether interception of telephonic message/tapping of telephonic conversation constitutes a serious invasion of an individual right to privacy was considered by this court on two occasions. One in the year 1972 in the case of R. M. Malkani v. State of Maharashtra, reported in (1973) 1 SCC 471, wherein it was held as under:

> "31.....Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or highhanded interference by tapping the conversation. The protection is not for the guilty

citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or even irregular method in obtaining the tape- recording of the conversation."

[43] The question posed above was considered again in detail by this Court in the case of People's Union (supra), wherein it was held as under:

"17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

18. The right to privacy -- by itself -- has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy".

Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law."

[44] The interception of conversation though constitutes an invasion of an individual right to privacy but the said right can be curtailed in accordance to procedure validly established by law. Thus what the Court is required to see is that the procedure itself must be fair, just and reasonable and non arbitrary, fanciful or oppressive.

[45] The object of the MCOCA is to prevent the organised crime and a perusal of the provisions of Act under challenge would indicate that the said law authorizes the interception of wire, electronic or oral communication only if it is intended to prevent the commission of an organised crime or if it is intended to collect the evidence to the commission of such an organized crime. The procedures authorizing such interception are also provided therein with enough procedural safe guards, some of which are indicated and discussed hereinbefore. In addition under Section 16 of the MCOCA, provision for prohibiting and punishing the unauthorized user of information acquired by interception of wire, electronic or oral communication has been made. Thus as the Act under challenge contains sufficient safeguards and also satisfies the aforementioned mandate the contention of the respondents that provisions of Section 13 to 16 are violative of the Article 21 of the Constitution cannot also be accepted.

[46] Having recorded our finding in the aforesaid manner, we now proceed to decide the issue as to whether a person accused of an offence under MCOCA should be denied bail if on the date of the offence he is on bail for an offence under MCOCA or any other Act. Section 21 (5) of MCOCA reads as under:

> "Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question"

[47] As discussed above the object of the MCOCA is to prevent the organised crime and, therefore, there could be reason to deny consideration of grant of bail if one has committed a similar offence once again after being released on bail but the same consideration cannot be extended to a person who commits an offence under some other Act, for commission of an offence under some other act would not be in any case in consonance with the object of the act which is enacted in order to prevent only organised crime.

[48] We consider that a person who is on bail after being arrested for violation of law unconnected with MCOCA, should not be denied his right to seek bail if he is arrested under the MCOCA, for it cannot be said that he is a habitual offender. The provision of denying his right to seek bail, if he was arrested earlier and was on bail for commission of an offence under any other Act, suffers from the vice of unreasonable classification by placing in the same class, offences which may have nothing in common with those under MCOCA, for the purpose of denying consideration of bail. The aforesaid

expression and restriction on the right of seeking bail is not even in consonance with the object sought to be achieved by the Act and, therefore, on the face of the provisions this is an excessive restriction.

[49] The High Court found that the expression "or under any other Act" appearing in the section is arbitrary and discriminatory and accordingly struck down the said words from sub-Section (5) of Section 21 as being violative of Article 14 and 21 of the Constitution. We uphold the order of the High Court to the extent that the words "or under any other Act" should be struck down from Sub section (5) of Section 21.

[50] In view of the aforesaid discussions, we allow the appeals of the State Government, insofar as the constitutional validity of Sections 13 to 16 of MCOCA is concerned. We uphold the validity of the said provisions. The decision of the High Court striking down the words "or under any other Act" from sub-Section (5) of Section 21 of the Act is however upheld. The parties to bear their own cost.

[51] sConsequential orders, if any, in terms of the observations and directions passed in these appeals, may be passed by the concerned Court(s) where any proceeding under MCOCA is pending.

Telephone Conversation Admissibility and safe guards. Section 7 and 8--Tape recorded conversation--Admissibility--Conversation relevant to the matter and voice identified--Elimination of possibility of erasing--Tape recorded conversation is admissible.

R M MALKANI

V/S

STATE OF MAHARASHTRA 1973 CrLJ 228.

SUPREME COURT OF INDIA (FROM BOMBAY) *(D.B.)*

R M MALKANI
V/S
STATE OF MAHARASHTRA

Date of Decision: 22 September 1972

Citation: 1972 LawSuit(SC) 451

Hon'ble Judges: A N Ray, I D Dua

Case Type: Criminal Appeal

Case No: 229 of 1969

Subject: Constitution, Criminal, Press Media & Telecommunication

Head Note:

Section 7 and 8--Tape recorded conversation--Admissibility--Conversation relevant to the matter and voice identified--Elimination of possibility of erasing--Tape recorded conversation is admissible.

Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape?record. A contemporaneous tape?record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded

conversation. The tape recorded conversation is admissible in evidence.

Acts Referred:

Constitution of India Art 21, Art 20(3)

Evidence Act, 1872 Sec 7, Sec 8

Code of Criminal Procedure, 1898 Sec 162

Telegraph Act, 1885 Sec 25

Final Decision: Appeal dismissed

Eq. Citations: 1973 CrLJ 228, 1973 (1) SCC 471, 1973 (2) SCR 417, 1973 AIR(SC) 157, 1973 CriAppR 31, 1973 SCC(Cri) 399, 1973 MhLJ 92, 1973 MPLJ 224

Advocates: B M Mistry, Vineet Kumar, M C Bhandari, B D Sharma, S P Nair

Reference Cases:

Cases Cited in (+): **50**

Cases Referred in (+): **7**

Judgement Text:-

A N Ray, J

[1] This is an appeal by certificate from the judgment dated 8 and 9 October, 1969 of the High Court at Bombay convicting the appellant under Sections 161 and 385 of the Indian Penal Code. The High Court confirmed the substantive sentence to simple imprisonment for six months under Section 161 of the Indian Penal Code and simple imprisonment for three months under Section 385 of the Indian Penal Code. In addition, the High Court imposed on the appellant a fine of Rs. 10,000 and in default of payment of fine, further simple imprisonment for six months.

[2] The appellant was at the crucial time the Coroner of Bombay. The prosecution case was as follows. Jagdishprasad Ramnarayan Khandelwal was admitted to the nursing home of a Gynaecologist Dr. Adatia on 3 May, 1964. Dr. Adatia diagnosed the case as acute apendicitis. Dr. Adatia kept the patient under observation. After 24 hours the condition of the patient became serious. Dr. Shantilal J. Mehta was called. His diagnosis was acute appendicitis with "generalised peritonitis" and he advised immediate operation. Dr. Adatia performed the operation. The appendix, according to Dr. Adatia

had become gangrenous. The patient developed paralysis of the ileum. He was removed to Bombay Hospital on 10 May, 1964 to be under the treatment of Dr. Motwani. The patient died on 13 May, 1964. The Hospital issued a Death Intimation Card as "paralytic ileus and peritonitis following an operation for acute appendicitis".

[3] The appellant allowed the disposal of the dead body without ordering post-mortem. There was however a request for an inquest from the Police Station. The cause for the inquest was that this was a case of post operation death in a hospital. The Coroner's Court registered the inquest on 13 May, 1964. The dates for inquest were in the months of June, July, September and October, 1964. The appellant was on leave for some time in the months of June and July, 1964. This is said to delay the inquest.

[4] It was the practice of the Coroner's Court to send letters to professional people concerned in inquest to get the explanation of the Doctor who treated or operated upon the patient. The appellant on 3 October, 1964 made an order that Dr. Adatia be called. It is alleged that the appellant had told Dr. Adatia a few days earlier that though he might have operated satisfactorily the cause of death given by the hospital would give rise to a presumption of negligence on his part. Dr. Adatia was asked by the appellant to meet Dr. Motwani, so that the latter could get in touch with the appellant to resolve the technical difficulties. Dr. Motwani met the appellant on 3 October, 1964. The appellant told Dr. Motwani that Dr. Adatia was at fault but he might be cleared of the charge in the inquest. The appellant asked for a sum of Rs. 20,000. Dr. Motwani said that he would consult Dr. Adatia. Dr. Motwani conveyed the proposal to Dr. Adatia. The latter refused to pay any illegal gratification. Dr. Motwani intimated the same to the appellant. The appellant then reduced the demand to Rs. 10,000. Dr. Adatia also refused to pay the same.

[5] On 4 October the appellant got in touch with Dr. Jadhav, Superintendent of the Bombay Hospital to find out if the cause of death given in the Hospital Card could be substantiated. Dr. Motwani told Dr. Jadhav on the same day that incorrect cause of death was shows and great injustice was done to Dr. Adatia, Dr. Jadhav said that he would send an amended deposition to the Coroner, the appellant.

[6] On 5 October, 1964 Dr. Motwani and Dr. Adatia decided to lodge a complaint with the Anti Corruption Bureau. Dr. Adatia's Nursing Home got messages on the telephone to get in touch with the appellant. Dr. Adatia complained to Dr. Motwani of the harassment on the telephone. Dr. Motwani rang up the appellant. The appellant asked Dr. Motwani to intimate by 10 a.m. on 7 October whether Dr. Adatia was willing to pay

Rs. 10,000. Dr. Motwani rang up Mugwe, Director of the Anti Corruption Branch and complained that a higher Government official was demanding a heavy bribe from a Doctor. Mugwe then arranged for his staff to be present near Dr. Motwani's residence on the morning of 7 October with the tape recording equipment to record on the tape the telephonic conversation.

[7] On 7 October 1964 Mugwe and the Assistant Commissioner of Police Sawant went to Dr. Motwani's residence. They met Dr. Motwani and Dr. Adatia. When they commenced recording the First Information Report of Dr. Motwani, Dr. Adatia left for his Nursing Home. Mugwe then arranged for the tape recording equipment to be attached to the telephone of Dr. Motwani, Dr. Motwani was asked by Mugwe to ring up the appellant in the presence of Mugwe and other Police Officers about the appellant's demand for the money. Dr. Motwani rang up the appellant and spoke with him. Dr. Motwani reported the gist of the talk to Mugwe. Mugwe then asked Dr. Motwani to ring up Dr. Adatia to speak on certain special points. After the talk with Dr. Adatia Dr. Motwani was asked by Mugwe to ring up the appellant and asked for an appointment to discuss the matter further. Dr. Motwani rang up the appellant and an appointment was made to meet the appellant at 12 noon the same day. The conversation between Dr. Motwani and the appellant and the conversation between Dr. Motwani and Dr. Adatia are all recorded on the tape.

[8] The two Doctors Motwani and Adatia met the appellant in the Coroner's Chamber at 12 noon. The appellant raised the demand to Rupees 15,000 and said that Rs. 5,000 was to be paid to Coroner's Surgeon for giving an opinion in favour of Dr. Adatia. The appellant said that if the amount was not paid the police Surgeon's opinion would be incorporated in the case. The two Doctors went out of the Chamber for a while. Dr. Adatia then told the appellant that he would pay the appellant Rs. 15,000 on 9 October, 1964.

[9] Dr. Adatia paid Rs. 15,000 to Dr. Motwani, Dr. Motwani took the amount to his house. Dr. Motwani informed the appellant on the telephone that he had received the money from Dr. Adatia. The appellant asked Dr. Motwani to keep it. The appellant also told Dr. Motwani to bring the money to the appellant's house on 10 October, 1964. On 10 October the Assistant Commissioner Sawant came to Dr. Motwani's residence and asked him to go to the appellant's residence to fix up an appointment for payment of money. Dr. Motwani went to the appellant's house on 10 October, 1964 at 10 a.m. The appellant was not in the house. The appellant's wife was there. Dr. Motwani told her that he had come to pay the money. The appellant's wife said that he could pay her. Dr.

Motwani said that he had no instructions to pay. As Dr. Motwani was leaving the building Sawant, the Assistant Commissioner met him. Sawant asked Dr. Motwani to come to Dr. Adatia to ring up the appellant from there.

[10] The Police Officers and Dr. Motwani met at the residence of Dr. Adatia at about 4 p.m. The raiding party connected the tape recorder to the telephone mechanism of Dr. Motwani, Dr. Motwani dialled the appellant's residence and spoke with the appellant in the presence of the Police Officers. The conversation was also recorded on the tape. It was arranged at the talk that Dr. Motwani would pay the amount to the appellant's wife on 12 October 1964. Dr. Motwani was asked to take a letter addressed to the appellant stating that he was returning a loan of Rs. 15,000 which he had taken at the time of buying a flat.

[11] On 11 October, 1964 Dr. Motwani received a telephone call from the appellant asking Dr. Motwani to come to his residence to meet the person to whom the money was to be paid. Dr. Motwani declined to go then. On 12 October 1964 the appellant told Dr. Motwani that the appointment was cancelled because he had not come to the appellant's residence on 11 October, Dr. Motwani conveyed the news to the Assistant Commissioner.

[12] Mugwe then ordered an open investigation into the case.

[13] The appellant was charged under Sections 161, 385 and 420 read with Section 511 of the Indian Penal Code. Broadly stated, the charges against the appellant were these. He attempted to obtain from Dr. Adatia through Dr. Motwani a sum of Rupees 20,000 which was later reduced to Rs. 10,000 and which was then raised to Rs. 15,000 as gratification for doing or forbearing to do official acts. He put Dr. Adatia in fear of injury in body, mind, reputation and attempted dishonestly to induce Dr. Adatia and Dr. Motwani to pay the sum of money. The appellant was also charged with cheating for having falsely represented to Dr. Adatia and Dr. Motwani that Rs. 5,000 out of the amount of Rupees 10,000 was required to be paid to the Police Surgeon for obtaining his favourable opinion.

[14] The appellant denied that he demanded any amount through Dr. Motwani. He also denied that he threatened Dr. Adatia of the consequence of an inquest.

[15] Four questions were canvassed in this appeal. The first contention was that the trial Court and the High Court erred in admitting the evidence of the telephone conversation between Dr. Motwani and the appellant which was recorded on the tape. The evidence

was illegally obtained in contravention of Section 25 of the Indian Telegraph Act and therefore the evidence was inadmissible. Secondly, the conversation between Dr. Motwani and the appellant which was recorded on the tape took place during investigation inasmuch as Mugwe asked Dr. Motwani to talk and therefore the conversation was not admissible under Section 162 of the Code of Criminal Procedure. The third contention was that the appellant did not attempt to obtain gratification. Fourthly, it was said that the sentence of six months imprisonment should be interfered with because the appellant has already paid Rs. 10,000 as fine. The appellant suffered heart attacks and therefore the sentence should be modified.

[16] The trial Court as well as the High Court found that the evidence of Dr. Motwani and Dr. Adatia needed corroboration. The High Court found that the conversation recorded on the tape corroborated their evidence. The evidence of Dr. Motwani is that on 7 October, 1964 Mugwe accompanied by Sawant and members of the Police staff went to the residence of Dr. Motwani, Mugwe directed Sawant to record Dr. Motwani's statement. Mugwe had instructed his staff to bring a tape recording machine. After the statement of Dr. Motwani Mugwe connected the tape recording machine to Dr. Motwani's phone and asked Dr. Motwani to talk to any one he liked in order to test whether the tape recording machine was in order. Motwani was then asked to talk to the appellant. Motwani talked with the appellant. That conversation was recorded on the tape. This tape-recorded conversation is challenged by counsel for the appellant to be inadmissible because it infringes Articles 20 (3) and 21 of the Constitution and is an offence under S. 25 of the Indian Telegraph Act.

[17] Section 25 of the Indian Telegraph Act 1885 states that if any person intending (b) to intercept or to acquaint himself with the contents of any message damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in or about any telegraph or in the working thereof he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both. "Telegraph" is defined in the Indian Telegraph Act in section 3 to mean any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.

[18] Counsel for the appellant submitted that attaching the tape recording instrument to the telephone instrument of Dr. Motwani was an offence under Section 25 of the Indian Telegraph Act. It was also said that if a Police Officer intending to acquaint himself with

the contents of any message touched machinery or other thing whatever used in or about or telegraph or in the working thereof he was guilty of an offence under the Telegraph Act. Reliance was placed on rule 149 of the Telegraph Rules which states that it shall be lawful for the Telegraph Authority to monitor or intercept a message or messages transmitted through telephone, for the purpose of verification of any violation of these rules or for the maintenance of the equipment. This Rule was referred to for establishing that only the Telegraph Authorities could intercept message under the Act and Rules and a Police Officer could not.

[19] In the present case the High Court held that the telephone call put by Dr. Motwani to the appellant was tapped by the Police Officers, and, therefore, there was violation of Section 25 of the Indian Telegraph Act. But the High Court held that the tape recorded conversation was admissible in evidence in spite of the violation of the Telegraph Act.

[20] The Police Officer in the present case fixed the tape recording instrument to the telephone instrument with the authority of Dr. Motwanti. The Police Officer could not be said to intercept any message or damage or tamper or remove or touch any machinery within the meaning of S. 25 of the Indian Telegraph Act. The reason is that the Police Officer instead of hearing directly the oral conversation between Dr. Motwani and the appellant recorded the conversation with the devide of the tape recorder. The substance of the offence under Section 25 of the Indian Telegraph Act is damaging removing tampering, touching machinery battery line or post for interception or acquainting oneself with the contents of any message. Where a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so in damaging, removing, tampering, touching machinery battery line or post for intercepting or acquainting himself with the contents of any message. There was no element of coercion or compulsion in attaching the tape recorder to the telephone. There was no violation of the Indian Telegraph Act. The High Court is in error on that point.

[21] This Court in Shri N. Sri Rama Reddy v. Shri V. V. Giri, (1971) 1 SCR 399 = (AIR 1971 SC 1162), Yusufalli Esmail Nagree v. State of Maharashtra, (1967) 3 SCR 720 = (AIR 1968 SC 147) and S. Pratap Singh v. State of Punjab (1964) 4 SCR 733 = (AIR 1964 SC 72) accepted conversation or dialogue recorded on a tape recording machine as admissible evidence. In Nagree's case the conversation was between Nagree and Sheikh Nagore was accused of offering bribe to Sheikh.

[22] In the Presidential Election case, (1971) 1 SCR 399 = (AIR 1971 SC 1162) (supra)

questions were put to a witness Jagat Narain that he had tried to dissuade the petitioner from filing an election petition. The witness denied those suggestions. The election petitioner had recorded on tape the conversation that had taken place between the witness and the petitioner. Objection was taken to admissibility of tape recorded conversation. The Court admitted the tape recorded conversation. In the Presidential Election case, (1971) 1 SCR 399 = (AIR 1971 SC 1162) (supra) the denial of the witness was being controverted, challenged and confronted with his earlier statement. Under Section 146 of the Evidence Act questions might be put to the witness to test the veracity of the witness. Again under Section 153 of the Evidence Act a witness might be contradicted when he denied any question tending to impeach his impartiality. This is because the previous statement is furnished by the tape recorded conversation. The tape itself becomes the primary and direct evidence of what has been said and recorded.

[23] Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.

[24] It was said by counsel for the appellant that the tape recorded conversation was obtained by illegal means. The illegality was said to be contravention of Section 25 of the Indian Telegraph Act. There is no violation of section 25 of the Telegraph Act in the facts and circumstances of the present case. There is warrant for proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. See Jones v. Owen (1870) 34 J. P. 759. The Judicial Committee in Kuruma, Son of Kanju v. R. 1955 A.C. 197 dealt with the conviction of an accused of being in unlawful possession of ammunition whichh had

been discovered in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

[25] This Court in Magraj Patodia v. R. K. Birla, AIR 1971 SC 1295 dealt with the admissibility in evidence of two files containing numerous documents produced on behalf of the election petitioner. Those files contained correspondence relating to the election of respondent No. 1. The correspondence was between respondent No. 1 the elected candidate and various other persons. The witness who produced the file said that respondent No. 1 handed over the file to him for safe custody. The candidate had apprehended raid at his residence in connection with the evasion of taxes or duties. The version of the witness as to how he came to know about the file was not believed by this Court. This Court said that a document which was procured by improper or even by illegal means could not bar its admissibility provided its relevance and genuineness were proved.

[26] In Nagree's case, (1967) 3 SCR 720 = (AIR 1968 SC 147) (supra) the appellant offered bribe to Sheikh a Municipal Clerk. Sheikh informed the Police. The Police laid a trap. Sheikh called Nagree at the residence. The Police kept a tape recorder concealed in another room. The tape was kept in the custody of the police inspector. Sheikh gave evidence of the talk. The tape record corroborated his testimony. Just as a photograph taken without the knowledge of the person photorgraphed can become relevant and admissible so does a tape-record of a conversation unnoiticed by the talkers. The Court will take care in two directions in admitting such evidence. First, the Court will find out that it is genuine and free from tampering or mutilation. Secondly, the Court may also secure scrupulous conduct and behaviour on behalf of the Police. The reason is that the Police Officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. In every case the position of the accused the nature of the investigation and the gravity of the offence must be judged in the light of the material facts and the surrounding circumstances.

26A. The admissibility of evidence procured in consequence of illegal searches and other unlawful acts was applied in a recent English decision in R. v. Maqsud Ali, (1965) 2 All E.R. 464. In that case two persons suspected

> of murder went voluntarily with the Police Officers to a room in which, unknown to them, there was a microphone connected with a tape-recorder in another room. They were left alone in the room. They proceeded to have a conversation in which incriminating remarks were made. The conversation was recorded on the tape. The Court of Criminal Appeal held that the trial Judge had correctly admitted the tape-recording of the incriminating conversation in evidence. It was said "that the method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper". The Courts often say that detection by deception is a form of police procedure to be directed and used sparingly and with circumspection.

[27] When a Court permits a tape recording to be played over it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. The fact that tape recorded conversation can be altered is also borne in mind by the Court while admitting it in evidence.

[28] In the present case the recording of the conversation betwween Dr. Motwani and the appellant cannot be said to be illegal because Dr. Motwani allowed the tape recording instrument to be attached to his instrument. In fact, Dr. Motwanti permitted the Police Officers to here the conversation. If the conversation were relayed on a microphone or an amplifier from the telephone and the police officers heard the same they would be able to give direct evidence of what they heard. Here the police officers gave direct evidence of what they saw and what they did and what they recorded as a result of voluntary permission granted by Dr. Motwani. The tape recorded conversation is contemporaneous relevant evidence and therefore it is admissible. It is not tainted by coercion or unfairness. There is no reason to exclude this evidence.

[29] It was said that the admissibility of the tape recorded evidence offended Arts. 20 (3) and 21 of the Constitution. The submission was that the manner of acquiring the tape recorded conversation was not procedure established by law and the appellant was incriminated. The appellant's conversation was voluntary. There was no compulsion. The attaching of the tape recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant's conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In R. v. Leatham, (1861) 8 Cox C.C. 198 it was said "It matters not how

you get it if you steel it even it would be admissible in evidence", as long as it is not tainted by an inadmissible confession of guilt: evidence even if it is illegally obtained is admissible.

[30] There is no scope for holding that the appellant was made to incriminate himself. At the time of the conversation there was no case against the appellant. He was not compelled to speak or confess. Article 21 was invoked by submitting that the privacy of the appellant's conversation was invaded. Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephonic conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Courts will tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. In the present case there is no unlawful or irregular method in obtaining the tape recording of the conversation.

[31] The second contention on behalf of the appellant was that the entire tape recorded conversation is within the vice of Section 162 of the Criminald Procedure Code. In aid of that contention the oral evidence of Mugwe, the Director of Intelligence Bureau was relied on. Mugwe said that it was under his advice and instruction that Dr. Motwani started talking with the appellant and Dr. Adatia. Therefore, it was said that the tape recording was in the course of investigation. Sections 161 and 162 of the Criminal Procedure Code indicate that there is investigation when the Police Officer orally examines a person. The telephonic conversation was between Dr. Motwani and the appellant. Each spoke to the other. Neither made a statement to the Police Officer. There is no mischief of S. 162.

[32] The third contention was that the appellant did not attempt an offence. The conversation was said to show bargain. The evidence is that the patient died on 13 May, 1964. Dr. Motwani saw the appellant on 3 October, 1964. The appellant demanded Rupees 20,000. The appellant asked for payment of Rs. 20,000 in order that Dr. Adatia would avoid inconvenience and publicity in newspapers in case inquest was held. Dr. Motwani informed Dr. Adatia about the conversation with the appellant. On 4 October, 1964 the appellant rang up Dr. Motwani and said that he was willing to reduce the amount to Rs. 10,000. On 5 October, 1964 Dr. Adatia received calls from the appellant asking him to attend the Coroner's Court on 6 October, 1964. Dr. Adatia got in touch with Dr. Motwani on 6 October and gave him that message. Dr. Adatia rang up the

appellant on 6 October and asked for adjournment. The appellant granted the adjournment to 7 October. On 6 October there were two calls from the appellant asking Dr. Adatia to attend the Coroner's Court on 7 October and also that Dr. Adatia should contact the appellant on 6 October. Dr. Motwani rang up the appellant and told him that the telephonic conversation had upset Dr. Adatia. On 6 October Dr. Motwani conveyed to Mugwe, Director of Intelligence Bureau about the demand of bribe to the appellant. These are the facts found by the Court. These facts prove that the offence was committed.

[33] The last contention on behalf of the appellant was that the sentence of imprisonment should be set aside in view of the fact that that the appellant paid the fine of Rs. 10,000. In some cases the Courts have allowed the sentence undergone to be the sentence. That depends upon the fact as to what the term of the sentence is and what the period of sentence undergone is. In the present case, it cannot be said that the appellant had undergone any period of sentence. If it is said that the appellant had heart attacks and therefore the Court should take a lenient view about the sentence the gravity of the offence and the position held by the appellant at the relevant time do not merit such consideration.

[34] For these reasons, the appeal is dismissed. The appellant will surrender to his bail and serve out the sentence.

Appeal dismissed.

Supreme Court laid the condition for admissibility of a tape recorded statements as follows:

1. Voice of speaker must be duly identified by the maker of the record or by other persons.
2. Accuracy of the tape recorded statements have to be proved.
3. Every possibility or tempering with or erasure of a part of the tape recorded statement must be ruled out.
4. Statement must be relevant.
5. Recorded cassette must be carefully sealed and kept in safe custody.
6. The voice of the speaker should be clearly audible and not lost or distorted by other sound or disturbances. Where at number of places the sound was not clear and cassettee was not kept in proper custody after duly sealing the same and when the transcript of the tape recorded statement was being prepared, recorder was absent, witnesses denied the statement, neither the tape shows where it was recorded and when it was recorded etc. Tape recorded statements were wholly inadmissible in the evidence.

RAM SINGH

V/S

COL RAM SINGH 1986 AIR(SC) 3.

SUPREME COURT OF INDIA *(F.B.)*

RAM SINGH
V/S
COL RAM SINGH

Date of Decision: 07 August 1985

Citation: 1985 LawSuit(SC) 243

Hon'ble Judges: S Murtaza Fazal Ali, A Varadarajan, Sabyasachi Mukherjee

Case Type: Civil Appeal

Case No: 6623 of 1983

Subject: Civil, Election

Head Note:

CIVIL PROCEDURE CODE, 1908
Order 8, Rule 5--Election Petition--Specific allegation in the petition that certain persons involved in specific incident near a polling booth were relations of elected candidate.
No specific denial by the candidate in the written statement though it was a material fact--CPC being applicable, in view of Order 8, Rule 5, candidate must be deemed to have admitted it.

EVIDENCE ACT, 1872
Section 3--Statement of a witness stating that he witnessed altercation --between a voter and supporters of a candidate.He did not report to the Dupty Commissioner or S.D.O. of ASI who visited subsequently to the spot and kept quite--Statement cannot be relied upon.
Section 67--Documentary evidence--Admissibility--Maker of the complaint not examined--Documents containing complaint is clearly inadmissible.
Witness who is SDO relying in support of his testimony on complaint which was

handed over to him by the other witness--according to whom he merely handed over the complaint to the S D.O. but the complaint did not bear his signature--maker of the complaint not examined-r Admission shows that contents of complaint were not proved. Complaint is clearly inadmissible, as a person who hands over a complaint can not be said to be the author of the same.

REPRESENTATION OF THE PEOPLE ACT, 1950

Sections 3 and 123--Election Petition--Allegations of corrupt practice--specific allegations with facts and figures regarding such practice not mentioned in the main part of petition but in statement of petitioner only.

It is a relevent factor in Judging the truth of particulars mentioned in the Statement.

Clear and specific allegations of corrupt practice, with facts and figures regarding the corrupt practice indulged in by the respondents not alleged in the first part of the petition itself, however such allegations were detailed in the statement of particulars submitted by the appellants-Some definite allegations should be mentioned in petition itself.

Sections 86 and 87--Election petition--Tape recorded statement-- When are admissible--Conditions laid down.

Supreme Court laid the condition for admissibility of a tape recorded statements as follows:

1. Voice of speaker must be duly identified by the maker of the record or by other persons.

2. Accuracy of the tape recorded statements have to be proved.

3. Every possibility or tempering with or erasure of a part of the tape recorded statement must be ruled out.

4. Statement must be relevant.

5. Recorded cassette must be carefully sealed and kept in safe custody.

6. The voice of the speaker should be clearly audible and not lost or distorted by other sound or disturbances.

Where at number of places the sound was not clear and cassettee was not kept in proper custody after duly sealing the same and when the transcript of the tape recorded statement was being prepared, recorder was absent, witnesses denied the statement, neither the tape shows where it was recorded and when it was recorded etc. Tape recorded statements were wholly inadmissible in the evidence.

Sections 86 and 87--Corrupt practice--Statement of a voter that he witnessed the alteration between the supporters of a candidate and another voter near polling booth.

But he did not report the matter to the Deputy Commissioner or S.D.O. or ASI who had visited spot subsequently--Evidence of such witness

Acts Referred:

Code Of Civil Procedure, 1908 Or 8R 5

Evidence Act, 1872 Sec 6, Sec 61, Sec 67, Sec 7, Sec 8, Sec 3

Representation Of The People Act, 1951 Sec 116A, Sec 100, Sec 87, Sec 86, Sec 79(d), Sec 123, Sec 123(2), Sec 3

Final Decision: Appeal dismissed

Eq. Citations: 1986 AIR(SC) 3, 1985 (Supp1) SCC 611, 1985 (Supp2) SCR 399, 1985 (2) Scale 1142

Advocates: Kapil Sibal, Gopi Chand, K C Sharma, R Karanjwala, M Karanjawala, Madhu Tawetia, K G Bhagat, R Venkatraman, Ranbir Singh Yadav, P S Pradhan, C S Panda, A Mariaputham

Reference Cases:

Cases Cited in (+): **52**

Judgement Text:-

S Murtaza Fazal Ali, J

[1] The election process in our country has become anextremely complex and complicated system and indeed a very difficult anddelicate affair. Sometimes, the election-petitioner, who has lost the election from a particular constituency, makes out on the surface such a probablefeature and presents falsehood dextrously dressed in such a fashion as thetruth being buried somewhere deep into the roots of the case so as to beinvisible, looks like falsehood which is depicted in the garb of an attractive, imposing and charming dress as a result of which some courts are prone to fall into the trap and hold as true what is downright false. If, however, the lid is carefully opened, and the veil is lifted, the face of falsehood disappears and truth comes out victorious.

[2] In such cases the judicial process and the judicial approach has to be both pragmatic and progressive so that the deepest possible probe is made to get at the real truth out of a heap of dust and cloud. This is indeed a herculean task and unless the court is extremely careful and vigilant, the truth may be so completely camouflaged that falsehood may look like real truth.

[3] Of course, the advocacy of the counsel for the parties does play a very important role in unveiling the truth and in borderline cases the courts have to undertake the onerous task of, "disengaging the truth from falsehood, to separate the chaff from the grain". In our opinion, all said and done, if two views are reasonably possible-one in favour of the elected candidate and the other against him - courts should not interfere with the expensive electoral process and instead of setting at naught the election of the winning candidate should uphold his election giving him the benefit of the doubt. This is more so where allegations of fraud or undue influence are made.

[4] These observations have been made by us in order to decide election cases with the greatest amount of care and caution, consideration and circumspection because if- one false step is taken, it may cause havoc to the person who foses.

[5] It is not necessary for us to dwell on or narrate the facts of the case of the parties which have been detailed by the High court in very clear and unambiguous terms. To repeat the same all over again might frustrate the very object of deciding election petitions with utmost expedition. Even so, it may be necessary for us to give a bird's-eye view and a grotesque picture of the important and dominant elements of the controversy between the parties in order to understand which of the two cases presented before us is true.

[6] The evidence in the present case consists of-

(A) oral evidence of the witnesses of the parties,

(B) the documentary evidence,

(C) the evidence consisting of the tape-recorded statements of theconversation between the Deputy Commissioner and the respondent. Col. Ram Singh, corroborated by the respondent himself who was examined as a court witness by us in this court and both sides were given full

opportunity to cross-examine him,

(D) important points of law arising out of the arguments presentedbefore us, and

(E) authorities of this court or other courts cited before us.

[7] For the purpose of understanding the truth and the spirit of the matter a scientific dichotomy of the case has to be made which may include the following factors:

(A) time and manner of voting,

(B) allegation of booth capturing,

(C) role played by the electoral authorities who may have actedhonestly yet the possibility of their falling an easy prey to themachinations of one side or the other cannot be safely eliminatedwhich may lead to an error of judgment on their part. Thisshould be fully guarded against as also the possibility of theirbeing attracted by any false temptation,

(D) where the proof of a corrupt practice is the very cornerstone and the bedrock of the case set against the successful candidate, the court should be doubly sure that it is not lured to fall in the labyrinth of chaos and confusion by easily holding that the corrupt practice alleged has been proved.

[8] With this short prelude, we would now proceed to give an exhaustive glimpse of the contentions raised before us by the parties. Before, however, we do that we must record our appreciation and gratefulness to the counsel for both the partics who in a big case like this had been fair enough to confine their arguments only to two polling stations, viz. , Kalaka and Burthal Jat, which has rendered our task much easier besides saving a lot of time, labour and expense. We also feel indebted to the learned counsel for the parties for having argued the case with dexterity and brevity which, as it is said, is the "soul of wit".

[9] The present appeal arises out of an election held on 19/05/1982 to the Haryana Vidhan Sabha from Rewari constituency No. 86. In view of the concession made by the counsel for the partics, we are concerned in this appeal only with two polling booths, viz. , Kalaka and Burthal Jat. It appears that there were as many as five candidates and Col. Ram Singh (respondent) seems to have been pitted against the aforesaid candidates.

[10] The bedrock of the allegations made by the appellants against the respondent was that he has been painted to be a most ndependable and unreliable person from the moral point of view as having changed sides with one party or the other to suit his needs and divided his loyalties by playing a dirty game of politics in that he changed sides without any fixed ideology and the only principle which, according to the appellants, the respondent had, was lust for power. It may be pertinent to note here that the respondent had also alleged that Rao Birendra Singh, who, according to him, was the evil genius of the whole show, had set up his sister, Sumitra Bai, tocontest the election in order to get the respondent out of the way. However,we are not at all concerned with any of these matters or allegations whichappear to be foreign to the scope of the present appeals nor are thesematters of which any serious notice can be taken because as Shakespeare hassaid "everything is fair in war and love" and the respondent could not bepresumed to be as virtuous as Ceasar's wife so as to be completely above-board. So, we cannot blame the respondent if he changed sides to suit thetemper of the times. At any rate, this allegation has no relevance to thesetting aside of the election of the successful candidate. The law does notrecognise either political morality or personal loyalties so long as the candidate allows a fair game to be played without destroying the sanctity of the electoral process by indulging in undue influence or corrupt practices which must be proved satisfactorily beyond reasonable doubt.

[11] So far so good. A conspicuous fact may however be noticed here, viz. , that clear and specific allegations with facts and figures regarding the corrupt practices indulged in by the respondent have not been alleged in the first part of the election petition itself. The allegations, however, have been detailed in the statement of particulars submitted by the appellants, who were certainly entitled to do so but we should have expected some definitive and specific allegations regarding the nature of the fraud or the corrupt practices committed by the respondent as briefly as possible in the main part of the petition itself. Therefore, this is doubtless a relevant factor in judging the truth of the particulars mentioned in the statement more particularly when the onus of proving the corrupt practice lies entirely on the election petitioner who must demonstrably prove the same.

[12] And now a pointed peep into the salient features of the facts of the case. To begin with, the arguments of the appellants are confined only to the Kalaka and Burthal Jat polling booths. Before we proceed further we might at this stage briefly indicate, shorn of details, the nature, character and the extent of the allegations regarding the corrupt practices and booth capturing alleged to have been indulged in by the respondent on the basis of which the appellants seek to set aside the election of the respondent.

[13] As regards Kalaka, (1) it was alleged that the respondent appeared at the scene at about 10. 30 a. m. with 50-60 persons and was himself armed with a gun while his companions had guns, sticks and swords. By sheer show of force, the voters were threatened and pressurised as a result of which they ran away without exercising their votes. In other words, the allegation is that as a result of the serious threat held out by the respondent, the voters were deprived of their valuable right of franchise.

(2) The respondent along with his companions entered the booth andterrorised the polling officer as also the polling agents (Basti Ram and Ishwar) of the Congress (1) candidate who were assaulted by the respondent by the butt-end of the barrel of his gun.

(3) The respondent and others at gunpoint snatched away about 50ballot papers from the polling staff and after marking them in his (respondent) favour put them into the ballot box.

(4) The respondent and his companions at his (respondent) instancethumbmarked the counterfoils of the ballot papers also.

[14] As regards Burthal booth, (1) the appellants alleged that almost the same modus operandi was adopted by the respondent and he directed his supporters to prevent the voters from entering the booth, thereby depriving them of the opportunity of exercising their right to vote.

(2) Not content with this, the respondent left behind his relationsanil Kumar and Satbir Singh to carry on the aforesaid activities and gavefurther instructions that the maximum number of votes should be polled inhis favour.

[15] Thus, so far as Kalaka and Burthal polling booths are concerned, two important

corrupt practices have been alleged by the appellants:

(1) Forcible polling of votes, and

(2) Preventing the genuine voters from exercising their right to vote.

[16] It manifestly follows that once it is proved that the respondent was not present at the time of the incidents at Kalaka and Burthal, the case of the appellants falls like a pack of cards because it is well settled by several authorities of this court that the corrupt practice must be committed by the candidate or his polling agent or by others with the implicit or explicit consent of the candidate or his polling agent. Where, however, the supporters of a candidate indulge in a corrupt practice on their own without having been authorised by the candidate or his polling agent, the election of the returned candidate cannot be voided. We might mention here that the last factor indicated by us is conspicuously absent in this case taking ex facie the entire facts narrated by the appellants in their pleadings or in the evidence.

[17] Before, however, analysing and marshalling the evidence we would like to refer to the authorities of this court and other courts regarding the necessary precautions to be taken in approaching evidence in election cases and the principles laid down by us. We would also deal with the extent of the admissibility of the evidence of the tape-recorded statements alleged to have been made by some of the witnesses' in the tape recorder recorded by Public Witness 7, the Deputy Commissioner.

[18] As regards the principles enunciated by this court regarding the nature and the standard of proof of corrupt practice alleged by an election petitioner against the successful candidate, though it is not necessary for us to burden our judgment with multiplicity of authorities yet the ratio of some of the important decisions which are directly in point may be briefly stated.

[19] To begin with, as far back as 1959 in Ram Dial v. Sant Lal, this court observed thus :

> What is material under the Indian law, is not the actual effectproduced, but the doing of such acts as are calculated to interfere withthe free exercise of any electoral right. Decisions of the English courts,based on the words of the English statute,, which are not strictly inpari materia with the words of the Indian statute, cannot, therefore, beused as precedents in this country.

[20] In Samant N. Balakrishna v. George Fernandez, this court while dwelling on the principles to be followed in election cases pithily pointed out thus:

> The principle of law is settled that consent may be inferred fromcircumstantial evidence but the circumstances must point unerringly tothe conclusion and must not admit of any other explanation. Althoughthe trial of an election petition is made in accordance with the Code ofcivil Procedure, it has been laid down that a corrupt practice must beproved in the same way as a criminal charge is proved. In other words,the election petitioner must exclude every hypothesis except that of guilton the part of the returned candidate or his election agent.

[21] In Ch. Razik Ram v. Ch. Jaswant Singh Chouhan, this court laid down the following principles:

> Before considering as to whether the charges of corrupt practicewere established, it is important to remember the. standard of proofrequired in such cases. It is well settled that a charge of corruptpractice is substantially akin to a criminal charge. The commissionof a corrupt practice entails serious penal consequences. It not onlyvitiates the election of the candidate concerned but also disqualifieshim from taking part in elections for a considerably long time. Thus,the trial of an election petition being in the nature of an accusation,bearing the indelible stamp of quasi-criminal action, the standard ofproof is the same as in a criminal trial.
>
> Secondly, even if the nature of the trial of an election petition isnot the same in all respects as that of a criminal trial, the burden ofproving each and every ingredient of the charge in an election petitionremains on the petitioner. If a fact constituting or relevant to such aningredient is pre-eminently within the knowledge of the respondent, itmay affect the quantum of its proof but does not relieve the petitionerof his primary burden.

[22] In Balwan Singh v. Prakash Chand, Shinghal, J. made the following observations:

> Another argument of Mr Bindra was that the corrupt practice inquestion

should not have been found to have been committed as theelection petitioners did not examine themselves during the course of the621trial in the High court. There was however no such obligation onthem, and the evidence which the election petitioners we're able toproduce at the trial could not have been rejected for any such fancifulreason when there was nothing to show that the election petitioners wereable to give useful evidence to their personal knowledge but stayed awaypurposely.

[23] In the case of Sultan Salahuddin Owasi v. Mohd. Osman Shaheed, to which one of us (Fazal Ali, J.) was a party, this court observed thus: It is now well settled by a large catena of the authorities of thiscourt that a charge of corrupt practice must be proved to the hilt, thestandard of proof of such allegation is the same as a charge of fraudin a criminal case.

[24] In Ram Sharan Yadav v. Thakur Muneshwar Nath Singh, to which two of us were parties, this court observed thus:

> The sum and substance of these decisions is that a charge of corruptpractice has to be proved by convincing evidence and not merely bypreponderance of probabilities. As the charge of a corrupt practiceis in the nature of a criminal charge, it is for the party who sets upthe pica of 'undue influence' to prove it to the hilt beyond reasonabledoubt and the manner of proof should be the same as for an offencein a criminal case. This is more so because once it is proved to thesatisfaction of a court that a candidate has been guilty of 'undueinfluence' then he is likely to be disqualified for a period of six years orsuch other period as the authority concerned under S. 8-A of theact may think fit.
>
> By and large, the court in such cases while appreciating or analysingthe evidence must be guided by the following considerations:
>
> (1) The nature, character, respectability and credibility of theevidence,
>
> (2) The surrounding circumstances and the improbabilities appear-ing in the case,

(3) The slowness of the appellate court to disturb a finding of factarrived at by the trial court who had the initial advantage ofobserving the behaviour, character and demeanour of thewitnesses appearing before it, and

(4) The totality of the effect of the entire evidence which leaves alasting impression regarding the corrupt practices alleged.

[25] This, therefore, concludes the question regarding the standard of proof.

[26] As heavy reliance was placed by the appellants on Ex. P-1 (the tape-recorded statements of RWs 1 to 3) as also the statements recorded in the same tape recorder by Public Witness 7 which included the statement of therespondent, in order to allay all doubts and satisfy ourselves regarding thegenuineness of the statements made in the tape recorder we have examinedthe respondent as a court witness in this court and allowed him to be cross-examined by both sides. We would deal with the nature and the relevancyof the statements at a later part of our judgment. But before that we wouldlike to settle the controversy between counsel for the parties as to theextent of admissibility of evidence recorded on tape recorder or othermechanical process.

[27] It seems to us that the matter here is not free from difficulty but the preponderance of authorities - Indian and foreign - are in favour of admissibility of the statement provided certain conditions and safeguards are proved to the satisfaction of the court. We now proceed to discuss the various ramifications and the repercussions of this part of the case.

[28] This court had the occasion to go into this question in a few cases and it will be useful to cite some of the decisions. In Yusufalli Esmail Nagree v. State of Maharashtra, this court, speaking through Bachawat, J. , observed thus:

If a statement is relevant, an accurate tape record of the statementis also relevant and admissible. The time and place and accuracy of therecording must be proved by a rompetent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and reuse, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.

> The tape was not sealed and was kept in the custody of Mahajan. Theabsence of sealing naturally gives rise to the argument that the recording medium might have been tampered with before it was replayed,

[29] In the case of Sri Rama Reddy v. V. V Giri, the following observations were made :

> Having due regard to the decisions referred to above, it is clearthat a previous statement) made by a person and recorded on tape, canbe used not only to corroborate the evidence given by the witness incourt but also to contradict the evidence given before the court, as wellas to test the veracity of the witness and also to impeach his impartiality.

[30] In R. M. Malkani v. State of Maharashtra, this court laid down the essential conditions which, if fulfilled or satisfied, would make a taperecorded statement admissible otherwise not; and observed thus: Tape-recorded conversation is admissible provided first the conversa-tion is relevant to the matters in issue; secondly, there is identification of the voice , and, thirdly, the accuracy of the tape-recorded conversation is proved by eliminating the possibility of erasing the tape record, (emphasis supplied)

[31] In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, Beg, J. (as he then was) made the following observations:

> We think that the High court was quite right in holding that thetape-records of speeches were 'documents', as defined by S. 3 ofthe Evidence Act, which stood on no different footing than photographs,and that they were admissible in evidence on satisfying the followingconditions:
>
> (A) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (B) Accuracy of what was actually recorded had to be proved bythe maker of the record and satisfactory evidence, direct orcircumstantial, had to be there so as to rule out possibilities of tamperingwith the record.
>
> (C) The subject-matter recorded had to be shown to be relevantaccording to

rules of relevancy found in the Evidence Act.

[32] Thus, so far as this court is concerned the conditions for admissibility of a tape-recorded statement may be stated as follows :

(1) The voice of the speaker must be duly identified by the maker ofthe record or by others who recognise his voice. In other words,it manifestly follows as a logical corollary that the first conditionfor the admissibility of such a statement is to identify the voiceof the speaker. Where the voice has been denied by the makerit will require very strict proof to determine whether or not' it wasreally the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved bythe maker of the record by satisfactory evidence-direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of atape-recorded statement must be ruled out otherwise it mayrender the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant. according to the rules ofevidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lostor distorted by other sounds or disturbances.

[33] The view taken by this court on the question of admissibility of tape-recorded evidence finds full support from both English and American authorities. In R. v. Maqsud Ali Marshall, J. , observed thus:we can see no difference in principle between a tape-recordingand a photograph. In saying this we must not be taken as saying thatsuch recordings are admissible whatever the circumstances, but it doesappear to this court wrong to deny to the law of evidence advantagesto be gained by new techniques and new devices, provided the accuracyof the recording can be proved and the voices

recorded properlyidentified; provided also that the evidence is relevant and otherwiseadmissible, we are satisfied that a tape-recording is admissible inevidence. Such evidence should always be regarded with some cautionand assessed in the light of all the circumstances of each case. Therecan be no question of laying down any exhaustive set of rules by whichthe admissibility of such evidence should be judged.

[34] We find ourselves in complete agreement with the view taken by Marshall, J. , who was one of the celebrated Judges of the court of Criminal Appeal. To the same effect is another decision of the same court inr. v. Robson where Shaw, J. , delivering a judgment of the central Criminal court observed thus:

> The determination of the question is rendered more difficult becausetape-recordings may be altered by the transposition, excision andinsertion of words or phrases and such alterations may escape detectionand even elude it on examination by technical experts.
>
> During the course of the evidence and argument on the issue ofadmissibility the recordings were played back many times. In the end Icame to the view that in continuity, clarity and coherence their qualitywas, at the least, adequate to enable the jury to form a fair andreliable assessment of the conversations which were recorded and thatwith an appropriate warning the jury would not be led into an inter-pretation unjustifiably adverse to the accused. Accordingly, so far asthe matter was one of discretion, I was satisfied that no injustice couldarise from admitting the tapes in evidence and that they ought not tobe excluded on this basis.

[35] In American Jurisprudence 2d (Vol. 29) the learned author on a conspectus of the authorities referred to in the foot-note in regard to the admissibility of tape-recorded statements at page 494 observes thus :

> The cases are in general agreement as to what constitutes a properfoundation for the admission of a sound recording, and indicate areasonably strict adherence to the rules prescribed for testing the admis-sibility of recordings, which have been outlined as follows :
>
> (1) A showing that the recording device was capable of takingtestimony;

(2) A showing that the operator of the device was competent;

(3) Establishment of the authenticity and correctness of tfterecording;

(4) A showing that changes, additions, or deletions have notbeen made;

(5) A showing of the manner of the preservation of the recording;

(6) Identification of the speakers; and

(7) A showing that the testimony elicited was voluntarily madewithout any kind of inducement.

. . However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said.

[36] We would, therefore, have to test the admissibility of the taperecorded statements of the respondent, given in the High court as also in this court, in the light of the various tests and safeguards laid down by this court and other courts, referred to above. We shall give a detailed survey of the nature and the character of the statement of the respondent in a separate paragraph which we intend to devote to this part of the case, which is really an important feature and) if accepted, may clinch the issueand the controversy between the parties on the point of corrupt practice.

[37] This now brings us to a summary of the nature of the evidence produced by the parties. As already stated counsel for the parties confined their arguments only to the validity of the election relating to Kalaka and Burthal Jat polling booths.

[38] By virtue of a notification dated 17/04/1982 the governor of Haryana called upon the voters to elect Members to the Vidhan Sabha. The last date for filing the nomination papers was 24/04/1982, the date for scrutiny was 26/04/1982 and Ap 28/04/1982 was the last date for withdrawal of candidature. The polling was held on 19/05/1982 andthe counting of votes took place on 20/05/1982. It is the last date withwhich we are mainly concerned. To begin with, it appears that 24 personshad filed their nomination papers

out of which three were rejected by thereturning Officer and 16 persons withdrew their candidature, leaving fivepersons in the field. Smt. Sumitra Devi was a nominee of the Congress (1) Party and the respondent filed his nomination papers initially as an Independent candidate but later on joined Congress (J) Party. The respondent was first in the army but he resigned soon after the Indo-Pakistan war in 1971 and started doing business as a diesel dealer in partnership with others. On being elected to the Vidhan Sabha he became its Speaker as he enjoyed the confidence of the then Chief Minister, Ch. Devi Lal. As it happened, in the 1980 parliamentary elections the Congress (1) Party swept the polls and Shri Bhajan Lal, having left the Janata Party, joined the Congress (1) Party along with many of his supporters, including the respondent. But, we are concerned only with the 1982 Assembly elections to the Haryana Vidhan Sabha in which the main candidates were smt. Sumitra Devi and the respondent.

[39] We would first take up the allegations levelled by the appellants against the respondent regarding the corrupt practices relating to the Kalaka polling booth. According io the evidence of RW 1, the polling started at 7.30 a. m. and went off peacefully without any untoward incident till10. 30 a. m. Near about this time, according to the allegations of theappellants, the respondent arrived with a posse of 60-70 persons, includingdes Raj, Ram Kishan and others, to create disturbance in' the polling andto prevent the votes from being polled in favour of other parties. It is also alleged that a mob of 40-50 persons was variously armed with guns, lathis and swords, and the respondent himself was armed with a gun. As a result of the activities of the respondent, some of the voters like Shiv Charan, Gurdial and others were forced to run away without exercising their right to vote. It was further alleged that not to speak of the voters even the polling staff was not allowed to doits duty which resulted in the voting coming to a standstill. At this, one Mangal Singh raised serious protest and on the orders of the respondent he was assaulted. Ishwar (Lambardar) was also hit by the butt-end of the gun and despite the objections of Basti Ram he was also assaulted. The policemen were heavily outnumbered and had to stand as silent spectators to the whole show. Further details of the acts of omission and commission committed by the respondent have been given in the judgment of the High court as also on pages 10-12 of Vol. III of the Paperbooks. It is also alleged that the respondent with the aid of his companions snatched as many as 50 ballot papers from the polling staff and after marking them in his favour put them into the ballot box. Ultimately, on the arrival of the high officers the Presiding Officer lodged a detailed report giving his own version of the incident on the basis of which FIR was registered on 19/05/1982 itself. Public Witness 7, Mr N. Balabhaskar, the Deputy Commissioner of Mohindergarh District, who was the Returning Officer of the entire constituency also reached the spot and made enquiries in

the matter. As a result of the trouble created at the instance of the respondent, the polling had to be postponed as it was disrupted for more than an hour.

[40] These in short, are the allegations of the appellants against the respondent in respect of Kalaka polling booth. We shall now refer to the evidence led by both the parties on these particular points to show how far the allegations have been proved. To begin with, PWs 7,8,12 to 18 deposed in favour of the appellants in respect of this polling booth. In order to rebut the evidence led on behalf of the appellants, the respondentproduced Roop Chand (RW 1) , Deen Dayal (RW 2) , constable Mohindersingh (RW 3) , Dhani Ram (RW 4) , Ram Kishan (RW 5) and Suresh (RW 6) besides respondent himself (RW 22).

[41] Having gone through the evidence led on behalf of both theappellants and the respondent, we are clearly of the opinion that despitethe quantity of the appellants' witnesses, the quality of the respondent'switnesses appears to be much superior to that of the PWs in regard to therespective facts stated by them.

[42] We would like to discuss the evidence of the respondent witnesses by way of a comparative assessment in relation to the evidence led by the appellants so that a true picture of the cases of the parties may come outconspicuously which would throw a flood of light on the credibility of thewitnesses concerned.

[43] We shall now show that the statement of RW 1 seems to findintrinsic support from the star witness of the appellants, viz. , Public Witness 7, thedeputy Commissioner. Public Witness 7 is a high officer and, therefore, a respectablewitness though, with due respect, we might say that his performance in thiscase has not been very satisfactory and his conduct leaves much to bedesired. Without going into further details we might mention that his actionin recording the statement of the witnesses on a tape recorder without taking the necessary precautions and safeguards cannot be fully justified. We are not able to understand as to why should he have taken the risk of recording the statements on a tape recorder knowing full well that the evidentiary value of such a tape recorded statement depends on various factors. Since Public Witness 7 was accompanied by his stenographer, there could have been no difficulty in recording the statement of the persons concerned by dictating. their statements to him and after being typed, signed the same and taken the signatures of the deponents with a certificate "read over and accepted correct". If this was done nobody could doubt the authenticity of such statements. Public Witness 7 admits in his statement that he was not authorised or asked by any higher officer than him to record the statement at the spot in a tape

recorder which obviously he did at his own risk. Furthermore, even if he had recorded the statements on a tape recorder he ought not to have kept the cassette in his own custody but should have deposited it in the record room according to rules. By keeping the recorded cassette in his own custody, the possibility of tampering with or erasure of the recorded speech cannot be ruled out. Another serious defect in recording the statement on a tape recorder was that he had to take further care and precaution to sec that the voice of the person whose statement was recorded should be fully identified. Here again, he seems to have fallen into an error resulting in a very anomalous position as some of the witnesses particularly those appearing for the respondent, have clearly denied their voices in the cassette and refused to identify the same. Others have partly admitted and partly denied their voices alleged to be those of the witnesses for the respondent. Finally, he himself admits that there were a number of voices which led to some disturbance and difficulties in putting two and two together. All these manifest defects could have been avoided if in the usual course he would have administered oath to the witnesses, recorded their statements and got the same signed by them as also by himself. In a sanctimonious matter like this, it is extremely perilous to take a risk of this kind. Perhaps it may be said that by recording the statements on a tape recorder he saved time as he had to go to the other polling booths also. That, however, docs not solve the problem because even if the statements were recorded on a tape recorder they had to be transcribed and by the time the statements were ready the witnesses would not be available to append their signatures. Moreover, the direct method of recording the statement by dictating the same to the stenographer wouldhave been as expeditious as recording on a tape recorder and transcribingthe same thereafter. We might mention here that the recorded cassettewas replayed in this court and then transcribed and only the relevantstatements of the respondent took quite a few hours. Thus, by hisnegligence he allowed the recorded statements to suffer from a manifest defect.

[44] That there were some erasures and lot of other voices has been admitted by Public Witness 7 himself in his statement where he stated thus :

> Some gaps in Ex. P-1 have been left out, where the voice was notclear and audible.
>
> Many people were standing at the polling booth whose voices havebeen recorded in the tape.

> I cannot now identify the person whose voices I had recorded in the tape. I also cannot distinguish the name of person whose voice I had recorded after hearing the tape. . My stenographer had prepared the transcript Ex. P-1. It was prepared in-my office. Most of it was done under my supervision. I might have been temporarily absent to attend to Certain other work.

[45] Thus, even accepting the statement of Public Witness 7 at its face value it appears that the various safeguards and precautions which the law requires to be taken while recording the statement on a tape recorder were not observed by him. That by itself is sufficient to discard the statement of the respondent recorded on the tape recorder without going into the merits of the said statement. Even so, we shall deal with this matter in detail when we take up the recorded statements in the cassette in the light of the evidence of the respondent who had been examined by as a court witness to throw light on the subject.

[46] Another serious infirmity from which the evidence of this witness suffers is that while he himself admits that he was not in a position to identify the voices of the persons whose statements he had recorded, RW 1, who was an alternative Presiding Officer at Kalaka polling booth, has completely denied to have made any statement as recorded in the cassette and asserts that he had absolutely no talk with Public Witness 7. Similarly, RW 3 (constable) stated that Public Witness 7 had talked only to the Presiding Officer andto no other member of the polling staff. No evidence has been producedby the appellants to rebut this part of the evidence of RW 3. RW 3 says inunconditional terms as follows:

> I did not make any such statement which is recorded in the tape. The voice recorded in the tape is not my voice.
>
> The statement of the witness which is transcribed in Ex. P-1 was also put to the witness. After hearing the same, the witness stated :
>
> I did not make any such statement to the Deputy Commissionernor he interrogated me.

[47] It would thus appear that the two witnesses for the respondent, who were government servants and therefore official witnesses, clearly and categorically denied

having made any such statement in the cassette. Public Witness 7 himself has very fairly and frankly stated that he was not in a position to identify the voices cither of the respondent or of the witnesses for the respondent (RWs 1 and 3) at the time of giving his evidence. This, therefore, throws a considerable doubt on truth of the statement made by these witnesses in the cassette recorder. The law which has been analysed and examined by us is very clear that identification of the voices is very essential. In this view of the matter, the tape-recorded statements lose their authenticity apart from other infirmities which we shall give later while appreciating the evidence of the respondent in this court.

[48] Another circumstance that goes a long way off to demolish the edifice and the structure of the appellants' case regarding the Kalaka polling booth is the statement of Public Witness 7 himself. According to the consistentevidence of RWs 1-6, no incident had happened nor was any trouble createdby the respondent but instead the musclemen of the appellants led by Ajitsingh tried to create all sorts of trouble, information of which was sent tothe Deputy Commissioner. Here, we might notice the admission of Public Witness 7where he states as follows:

> At about 10. 30 a. m. , when I was between Mandola and Zainabadvillages in Jatsuaha constituency, I received a message on the wireless,the apparatus of which I was having in my motor car, that Col. Ramsingh had complained against the workers of Congress (1). Thecomplaint was that about 40 to 50 Congress (1) workers had attackedthe Congress (J) workers at village Kalaka.

[49] If the wireless message was sent to the D. C. at about 10. 30 a. m. there could be no question of the respondent or his people to have visited Kalaka polling booth in order to create disturbance. This, therefore, intrinsically supports the case of the respondent and demolishes the case of the appellants about the arrival of Col. Ram Singh and his relations, Satbir Singh and Anil Kumar.

[50] It was also in evidence that after the first incident of the morning (wireless message received by Public Witness 7) two motor cycles are said to have been left behind. It is manifest that if the persons who had committed the disturbances along with their companions did not belong to the party ofthe respondent, as the wireless message shows, then the only other irresistible conclusion, by the process of elimination, would be that the motor cycles must have belonged to Ajit Singh and his companions who were supporters of the Congress (1) candidate.

[51] Thus, this being the position and the real state of affairs at the spot, in a case like the present one involving high stakes and serious handicaps, we should have expected the conduct of the senior officers to have been completely above-board.

[52] Another reason which throws a considerable doubt on thetestimony of the witnesses of the appellants is that Public Witness 7 himself deposedthat he did not receive any written complaint from the polling officer or the Presiding Officer or from any other person at the time when he visited the Kalaka polling booth. The appellants tried to bring on file certaincomplaints made to Public Witness 7 by Suraj Bhan and others but as the originalcomplaint had not been filed the complaint produced by the appellants apartfrom being clearly inadmissible cannot be relied on particularly in face ofthe clear admission of the Deputy Commissioner (Public Witness 7) that he did notreceive any written complaint from the officers concerned.

[53] Another intrinsic circumstance which demolishes the case of the appellants about the presence of a mob headed by Satbir Singh and Anil Kumar (said to be relatives of respondent) is that Public Witness 10 (ASI) who wasaccompanying the D. C. said that he received the information that one ofthe candidates, viz. Col. Ram Singh, along with some persons had reachedkalaka polling booth and started intimidating the polling staff and thepublic. Here this witness is sadly contradicted by the 'statement of thedeputy Commissioner that the wireless message received by him was not inrespect of Col. Ram Singh and his men but the message which the D. C. actually received was that the disturbance was created by one Ajit Singh atthe instance of the Congress (1) candidate. It is, therefore, impossible toaccept the case of the appellants that the respondent and his companions onthe one hand and Ajit Singh with a posse of his own men on the other hadreached the Kalaka polling booth at almost the same time. Indeed, if thishad been so there should have been a huge riot and a pitched battle betweenthe two parties but no witness says so. The evidence merely shows thatcol. Ram Singh had reached the place just after Anil Kumar and Satbirsingh along with their men left and after the Presiding Officer had set thematters right. The ASI (Public Witness 10) also says that 3-4 persons had made acomplaint in writing to him but he had not seen those reports on the datewhen they were made to him but it must be on the file. The witness wasshown the file of complaints and he admits thus:

> I have seen the file of complaints which has been shown to me now. That complaint is not in this complaint file.

[54] What happened to the complaint received by the witness (Public Witness 10) is not known or can be any body's guess-perhaps the same vanished into thin air or may be was non-existent.

[55] The matter does not rest here but there is one more inherent circumstance which completely falsifies the case of the appellants. The Presiding Officer was shown Ex. P-5 and he stated that he had not mentioned anything in the said document about intimidation of the voters and other persons. He (Public Witness 8) categorically states thus:

> I have seen Ex. P-5. Column No. 20 (e) is to furnish informationabout "intimidation of voters and other persons". I have notmentioned anything in this column but have crossed it.

[56] Indeed, if there was any such intimidation, being the Presiding Officer he would not have crossed the column regarding the same. He admits that he had served in the Ahir High School which appears to havebeen patronized by Rao Birendra Singh and the possibility that this witnessconcealed the truth (as appears from his evidence) and made a statementregarding intimidation to oblige Rao Birendra Singh cannot be ruled out. This is because he merely denies knowledge that the Ahir School belongedto Rao Birendra Singh but he does not say affirmatively that Rao Birendrasingh had absolutely no connection with the said school.

[57] Coming now to the rest of the evidence of RW 1, he says that afterthe departure of Ajit Singh, Col. Ram Singh came to the Kalaka polling booth and he was alone at that time. The respondent in the presence of RW 1 told the Presiding Officer that he should not be partial to any party and complained to him about the beating up of his polling agent. Harisingh (PW 8) , the Presiding Officer assured the respondent that he wouldnot permit anything further to happen. Thereafter, a number of peoplecame there and stoned the polling booth and despite the protests of thewitness and the Presiding Officer they tried to snatch the ballot box whichwas, however, protected by the Presiding Officer. In the mean time, thepolice party arrived and the people who had gathered there sped away. Much was made by the counsel for the appellants regarding omission of thewitness to make any report to the police. But not much turns upon thisbecause the witness clearly admits that as the Presiding Officer was in-charge of the whole show) he had reported the matter to. him who had assured him that he would set things right. A number of questions were put to himwhich are of not-much significance because the answer of the witness wasthat whatever he had to say he had told his immediate

superior, thepresiding Officer. It is obvious that RW 1 was neither a police officer nora person holding any important job but was only a teacher in a school. Perhaps he thought that it was enough if he informed his superior (Presidingofficer) who would do the needful. The witness also admits that he hadtold the Presiding Officer about the visit of Ajit Singh and his companionsand the trouble created by them but he was told by the Presiding Officerthat he had recorded the same in the diary; though in the presence of thewitness he did not write any report nor did he hand over any report to thepolice in his presence. The witness then goes on to state that after a fewdays of the elections, the police had obtained an affidavit from him but noattempt was made by the appellants to get that affidavit summoned,produced and exhibited in the case and in the absence of that the court isentitled to presume that whatever the witne3s may have said to the Presidingofficer was contained in the affidavit also.

[58] Rw 2, Deen Dayal, who was a member of the polling staff, fully corroborates the evidence of RW 1 regarding the arrival of Ajit Singh armed with pistol and accompanied by a number of persons. He furthercorroborates that some of the companions of Ajit Singh removed the pollingagent of Col. Rain Singh and then asked the witness and others to handover the ballot papers but as the witness resisted he was beaten up by Ajitsingh and others but on the intervention of the Presiding Officer the matterrested there. Thereafter, Col. Ram Singh came who was also assured bythe Presiding Officer that needful would be done. A capital was made bythe appellants before the court below as also here regarding the veracity ofthis witness because he did not make any report to the D. C. or the S. D. O. about his being beaten up. As already mentioned, the witness was merelya teacher and he appears to have been satisfied by the assurance given to him by the Presiding Officer that necessary action would be taken. He further states that the D. G. only talked to the Presiding Officer and not to any other member of the polling staff. This shows that the evidence of this witness is true.

[59] The next witness on the point is RW 3 (Mohinder Singh) whowas a police constable deputed to the spot to maintain law and order. Thesequence of events that happened at the polling booth and which have beendeposed to by the witness may be summarised thus:

(1) While the polling was going on, between 7.30 and 8. 00 a. m. ,ajit Singh arrived with his companions and tried to create allsorts of trouble.

(2) After the departure of Ajit Singh, Col. Ram Singh came aloneand was

assured by the Presiding Officer that he would not allowany further trouble to take place.

(3) After Col. Ram Singh had left the place a number of people fromthe village came and wanted to poll forcibly, and 2-3 personscame out of the polling booth with a ballot box.

(4) He (RW 3) snatched the ballot box from the people and returnedthe same to Dhani Ram (RW 4).

[60] The witness states that after some time the S. D. O. came there and after having a talk with the Polling {sic Presiding) Officer he went away. After about half an hour or 45 minutes of the departure of the S. D. O. , the D. C. arrived and on his intervention the polling again started at about 12 midday. The witness vehemently denied that his statement was recorded by the D. G. in a tape recorder and said that the voice recorded in the tape recorder (which was played to him in court) was not his. He even goes to the extent of saying that he did not see any tape recorder with the D. C. nor did he have any talk with him.

[61] The following important points may be noted from his testimony :

(1) The sequence of events narrated by him gives sufficient strengthto the case of the respondent;

(2) His positive evidence that the voice in the cassette was not his.

[62] The witness was after all a police constable (a government official) and would not have the courage to make a false statement before the D. G. Moreover, even the D. G. in his statement has frankly admitted that he was not in a position to identify the voice of this witness or for that matter of others at the time of his deposition. Thus, in the eye of law, there is no legal evidence at all to prove that the voice recorded in the tape recorder was the voice of this particular witness.

[63] The next witness is RW 4 (Dhani Ram) who was also one of the members of the polling staff and a teacher in a government Primary School. He fully corroborates the story given by RWs 1 and 3 and also gives the sequence of events referred to above

while dealing with the evidence ofrw 3. His evidence does not appear to be of much consequence. At anyrate, the learned High court has fully discussed his evidence and we agreewith the conclusions arrived at by the High court in this respect.

[64] Rw 5 appears to be a voter of the Kalaka polling booth. He has been examined to prove the fact that when Ajit Singh and his party came to the booth, one Tula Ram who was a polling agent of Col. Ram Singh andreal brother of RW 5, was beaten up by Ajit Singh and his party and whenhe tried to rescue him he was also beaten up and their clothes were torn andit was with great difficulty that Mohinder Singh (RW 3) who was on dutyrescued him and his brother from the clutches of Ajit Singh and his party. He further states that he, alto Col. Ram Singh he did not think it necessaryto file any complaint with the police.

[65] Rw 6 (Suresh) was also a voter waiting in a queue to cast his vote when at about 8.30 a. m. Ajit Singh armed with a revolver, appeared on the scene and entered the booth. He heard hue and cry from inside the booth. He corroborates the evidence of RW 5 about the beating up of Tula Ramand Ram Kishan (RW 5). He goes on to state that after about half an hourof the departure of Ajit Singh and his party, Col. Ram Singh came andafter spending about 5-6 minutes inside the booth he drove away. Thewitness further says in cross-examination that the polling did not start after the departure of Ajit Singh in view of the commotion that took place there. After the departure of Col. Ram Singh the S. D. O. and the D. C. also came and ultimately the poing was continued. The witness finally says that he did not inform Col. Ram Singh about the incident nor did any body enquirefrom him anything about the same. In these circumstances, we do not thinkthat the evidence of this witness is creditworthy.

[66] The other witnesses examined by the respondent are not in respect of the Kalaka polling booth.

[67] The picture would not be complete unless we give the other version of the story put forward by the appellants who have also examined many witnesses.

[68] Public Witness 8 is the only witness who has identified his voice recorded in the tape recorder by the D. C. when other witnesses, including the D. C. , could not do so. That itself shows that he has leanings towards the appellants.

[69] Another important aspect which emerges from the evidence of Public Witness 8 is that, according to him, the total votes polled in the Kalaka polling booth were 573, the break-up of which is as follows :

[70] This means that if there was any disturbance it would have taken a very short time in view of the calculation given by this witness. If, however, it is a fact that both parties-one led by Ajit Singh and the other led by respondent-had a sort of a direct confrontation, it would have been extremely difficult for the polling to start only after an interval of an hour and a half. Moreover, no explanation has been given by this witness of the votes polled in between 8.45 to 10. 30 a. m. The tally of votes is not consistent with his evidence and is an intrinsic proof of the fact that his evidence is not true. The general impression which we gather after perusing his evidence 'is that he does not appear to be a witness of truth and, therefore, we find it difficult to rely on the evidence of this witness. Moreover, we shall have to say something more regarding the credibility of this witness when we deal with the documentary evidence.

[71] Public Witness 10 (Sri Krishan) was the S. D. O. and a Returning Officer forthe Rewari constituency. According to him, he remained in his office uplo 10. 00 a. m. and after that he started touring the various polling booths. He goes on to say that on 19/05/1982 he reached Kalaka at about 11. 00-11.30. a. m. onreceiptofa complaint to the effect that Col. Ram Singh,along with his companions, had tried to intimidate the polling staff and thevoters. When he arrived at the spot he found the polling at a standstill. This actually supports the case of the respondent that the polling went onsmoothly from 8. 00 a. m. to 11. 00 a. m. and the trouble must have beenstarted either by Ajit Singh or by his men. The poll could not have restartedbefore 1. 00 or 1. '30 p. m. because, according to the evidence of the D. C. ,the polling staff had been interrogated and their statements were tape-recorded which would have taken quite a lot of time. This fact intrinsicallyknocks the bottom out of the case made out by Public Witness 8 regarding timing of thevoting.

[72] Public Witness 14 (Puran) is the next witness who does not appear to be ofany importance because it is only a case of oath against oath. Moreover, aperusal of his evidence shows that this witness ran away after Col. Ramsingh is alleged to have threatened him. He then returned and cast his voteat about 3. 00 p. m. Not much turns upon his evidence. Rather his evidenceshows that he reached the spot near about 3. 00 p. m. when peace had beenrestored and the polling had restarted smoothly.

[73] More or less, to the same effect is the evidence of Public Witness 16 (Isharsingh) with the difference that this witness says that he was assaulted butthen except informing the S. I. about the injury he took no further steps. Ifhe was actually injured he would have made it a point to report the fact ofhis assault to the D. C. or the S. D. O. or other

officers who had assembledafter the miscreants had gone away. This obviously he did not do. Lastly,he admits that his family was supporting the Congress (1) candidate (Sumitrabai) and, therefore, he could not be said to be an independent witness.

[74] Pw17 (AMARSINGH) WAS admittedly a polling agent of Sumitrabai. The witness says that when the D. C. and S D. O. came he made acomplaint to them in writing which was also signed by Suraj Bhan, Mangalsingh, Basti Ram and others. He further says that he had verbally com-plained to Deep Chand, the ASI but he took no action. He states that thed. G. had however made an enquiry from him but the D. C. does not sayanything about this witness and being a most interested witness it is difficultfor us to rely on this witness when the High court which had the opportunityof watching the demeanour and behaviour of this witness placed no relianceon him.

[75] The evidence of Public Witness 18 is almost in the same terms. Like others,he also seems to have made a written report to the police station which has notbeen produced and no action seems to have been taken thereon. It is ratherstrange that a number of witnesses say that they had made an oral or writtencomplaint yet no action was taken thereon which shows that the statement ofthe witnesses is a purely cooked up story.

[76] This closes the evidence so far as the prosecution witnesses areconcerned. The learned Judge of the High court has taken great pains incarefully marshalling and analysing the evidence and so far as Kalaka pollingbooth is concerned, the findings of the High court may be extracted thus :

> The evidence of the PWs on this point is not corroborated. Theownership of the motor cycles abandoned by the party of the respondentwas not traced. The ownership could be established from their registra-tion books. No effort was made to connect those with the respondent orhis supporters. This shows that the PWs were drawing upon theirimagination to make out stories about the detention of the persons andthe forcible polling at that policing station by the respondent.
>
> When the evidence on the file of the case is given a close look itleads to an inference that the petitioners have failed to prove this part ofthe charge beyond reasonable doubt.
>
> Shri Sri Krishan, SDO (Civil) stated that 3/4 persons gave him acomplaint at

Kalaka about tlie incident. It was a signed complaint. That complaint is not traceable. It was not found in the complaint file. Nor was it entered in the complaint register. That complaint couldthrow light on the. incident if at all it had been produced. The oralevidence has failed to convincingly make out this allegation that the voterswere threatened at Kalaka.

From the overall assessment of the petitioners' evidence and thedetailed discussion in the previous paragraphs concerning this pollingstation it has left an impression in my mind that the role assigned to therespondent has not been proved beyond reasonable doubt. Lot of sus-picions which are indicated in the previous paragraph; attach io hisevidence and it is difficult to say that the inference in favour of thepetitioner's case is irresistible. The evidence of the petitioners is not ofthe type, which could persuade me to take a decision in their favour.

[77] After going through the evidence very carefully, we find ourselves in complete agreement with the conclusions arrived at by the learned Judge of the High court so far as Kalaka polling booth is concerned.

[78] This now brings us to the second and the last limb of the arguments advanced by counsel for the appellants - the evidence regarding the corrupt' practice in respect of Burthal Jat polling booth (for short, referred to as 'burthal booth'). To prove the allegations, the appellants produced PWs 6, 7, 10, 26 to 33 and in order to rebut the case the respondent examined RWs 11, 12, 13, 14, 20 and 22.

[79] We would first take up the evidence led by the appellants. Public Witness 6, Krishan Bihari, is merely a formal witness who has been examined with the complaint register of No. 86-Rewari constituency in which both Kalaka and Burlhal polling booths fell. His evidence, therefore, does not appear to be of any significance.

[80] The next important witness is Public Witness 7, the Deputy Commissioner ofmohindergarh District (N. Balabhaskar) , a major part of whose evidence hasalready been discussed by us while dealing with his evidence relating tokalaka polling booth. So far as Burlhal both is concerned, he states thathe had received a complaint that a worker of Corgress (J) candidate wasattacked by villagers of Burthal Jat and his main purpose to visit the villagewas to verify the truth or falsity of the complaint. But, when he went to theburthal booth, the polling officer expressly told him that nothing had hap-

pened inside the booth. Some of the polling officials who were there,however, told him that there was some incident outside the polling booth butthe identity of the persons responsible for tlie same had not been established. PW 7 further goes on to say that some villagers at that place told him thatthe workers of Congress (J) had come there in a jeep and tried to createtrouble and they were able to detain two persons and the third one had runaway. The D. C. interrogated those two persons who told him that they hadno connection with the jeep. He further admits that he did not interrogatethem as to which political parly they belonged-whether Congress (1) orcongress (J). He further testifies to the fact that a jeep was found at thespot with some sticks lying inside it but he did not see any motor cycle nearthe polling booth. The persons who were attacked at Burthal by the villa-gers and whom he did not interrogate, for reasons best known to him, weresatbir Singh and Anil Kumar. This part of the evidence, therefore, corro-borates the case of the respondent that assuming Satbir Singh and Anilkumar were companions of Col. Ram Singh but they had undoubtedly beenattacked at the village and the D. G. also admits that the Sarpanch of thevillage Burthal had complained to him regarding this matter when hereached Burthal booth. Public Witness 7 then says that at Burthal he recorded theconversation of the Presiding Officer in detail though he admits that someportion of the recorded conversation was erased indvertently due to his ownvoice being recorded there.

[81] This is all that this witness says in respect of Burthal booth. Accepting the entire testimony as it is without any further comment, it is not proved or established as to who was the person or persons at whose instance the corrupt practice was committed. There was, however, a clear admission by the D. C. that it was the respondent's party which had been aggrieved. It is rather surprising and intriguing that although the D. C. had gone to hold a regular inquiry into the irregularity committed at Burthal booth he did not care to interrogate Satbir Singh and Anil Kumar who were present there particularly when, as he himself says, the Sarpanch of the village had complained to him regarding some trouble. It seems that Public Witness 7 contented himself merely. by recording the statement of the Presiding Officer in the tape recorder which was really a dictaphone, as told by the witness himself.

[82] A very important admission has been made by the witness which completely nullifies the statements recorded in the tape recorder. In this connection, he states thus:

> I cannot now identify the person whose voices I had recorded in thetape. I also cannot distinguish the name of person whose voice I hadrecorded after hearing the tape.

[83] The witness was cross-examined regarding the cassette recorder and he has made the following admissions :

(A) that there were no instructions from the government for record-ing such conversations as he had done,

(B) that even if he was supplied a dictaphone, it had to be mainlyused by him for recording his own observations in his ownvoice,

(C) that the cassette and the dictaphone remained all the time withhim and were not deposited by him in the record room,

(D) even a copy of the transcript of the recorded statements pre-pared by his stenographer was not deposited in the officialrecord room, and

(C) that there were some gaps in the recorded tape (Ex. P-1) whichhad been left out and at some places the voice was not clearand audible.

[84] Public Witness 7 in his statement says that the statements of the witnessesrecorded by him were transcribed by his stenographer under his supervision inhis office but he may have temporarily gone out to attend to some otherwork. This is rather important because if the statements were typed outin his absence it would have been very difficult for his stenographer to findout whose statement he was transcribing which throws a considerable doubton the credibility of the recorded statement. To a direct question by thecourt - "can you rule out the possibility of tampering with the transcript"-his answer was -"i do not think if it was possible". ,the answer isself-evident and frightfully vague so as not to exclude the possibility oftampering. Ordinarily) the admissions made by Public Witness 7 would have beensufficient to discard the statements recorded in the tape recorder. We shall,however, develop this aspect of the matter when we deal with the statementsrecorded on the tape recorder.

[85] The next witness is Shri Krishan, S. D. O. , Public Witness 10. We havealready discussed a major part of his evidence while dealing with the Kalakapolling booth and pointed out the serious infirmities from which his evidencesuffers. Same comments

would naturally apply to his evidence relating toburthal booth to show that his evidence is not creditworthy. However) we shall briefly summarise what he had said about Burthal booth. In thefirst place, he states that when he reached Burthal, along with D. C. , he sawsatbir and Anil Kumar surrounded by the people of that village. He alsosaw a jeep containing some sticks parked there, which was, on the instructionsof the D. G. ,taken into custody by the police. Satbir and Anil Kumarwere also taken into custody under the orders of the D. G. In support of hisevidence he relies on Ex. P-9, the complaint which was handed over to himby one Mam Chand. The manner in which the complaint was handed over topw 10 and as to the author of the complaint are rather dubious particularlyin view of the evidence of Mam Ghand (Public Witness 35). Public Witness 35 was shownex. P-9 and after seeing the same he stated that the same did not bear hissignatures. He also deposed that there are two other persons by the name ofmam Chand, e. g. , there is one Mam Chand who is the son of Kehar Singhand the name of the father of the other Mam Chand was not known to him. It is, therefore, manifest from the admission of Public Witness 35 that the complaintex. P-9 was merely handed over to Public Witness 10 by Mam Chand but neither thecontents were proved nor the maker thereof had been examiner. Therefore,the complaint is clearly inadmissible) as the person who hands over acomplaint cannot be said to be the author of the same. We would, there-fore, have to exclude Ex. P-9 from the array of the documentary evidence. There is nothing further which this witness proves.

[86] Public Witness 26, Shri Mahabir Singh, is another witness who has beenexamined to prove the active participation of Anil Kumar and Satbir Singh. Far from supporting the case of the appellants he supports the case of therespondent. He states that he was a voter and had cast his vote. The learn-ed counsel for the appellants, however, did not choose to rely on this witness and made a prayer for cross-examining him. In cross-examination all that Public Witness 26 said was that he was on duty as an election agent of the respondent inside the booth and that he knew Satbir Singh previously but did not know to which place he belonged. Thus, the evidence of this witness is of no assistance to the appellants.

[87] Public Witness 27 (Dharam Vir) was a voter and, according to his evidence,he had gone to cast his vote at about 8. 00 a. m. when near about that timecol. Ram Singh accompanied by 50-60 persons came there and summonedmahabir and Udai Bhan who were his election agents and told them that hewas leaving some persons behind and that they should see to it that no oneshould be permitted to vote for the Congress (1) candidate. The witnessfurther states that Satbir Singh was amongst the 15-20 persons left behindby Col. Ram Singh. In cross-examination he admits that he cannot

identifysatbir Singh. It is, therefore, difficult to believe as to how he namedsatbir Singh as one of the persons left behind by Col. Ram Singh. Hisevidence on this point appears to be clearly false. The sequence of eventsmentioned by other witnesses shows that Col. Ram Singh had reached therenear about 9.30 a. m. and he had come alone which fact has been supportedby an overwhelming majority of witnesses for the respondent. Therefore, wefind it difficult to place any reliance on this witness and his evidence does not inspire any confidence and must be rejected.

[88] The next witness is Thaver Singh, Public Witness 28 who also speaks in thesame terms as Public Witness 27. We are unable to place any reliance on this witnessbecause he was the most interested witness being a polling agent of thecongress (1) candidate. During cross-examination he stated that he hadverbally complained to the Presiding Officer about the conduct of Col. Ram Singh but he did not make any complaint to any officer in writing. His evidence, therefore, carries no weight unless corroborated by someunimpeachable documentary evidence.

[89] Public Witness 29, Amir Chand, also repeats the same story as Public Witness 28but there is no evidence to corroborate him. Reading in betweenthe lines of his evidence it appears that he was a strong supporter ofrao Birendera Singh though he does not commit himself in so many words.

[90] Public Witness 30 (Surjit Singh) and Public Witness 31 (Raghubir Singh) have repeatedthe same parrot-like story as the preceding witnesses. In the absence of anydocumentary evidence to corroborate their testimony, we find it unsafe torely on their evidence.

[91] Public Witness 32, Shamsher Singh, is rather an important witness and accord-ing to his evidence he went to the Burthal booth at about 7.30 a. m. andreturned to his house at about 8.30. a. m. He then again went to thepolling booth at about 2.30 p. m. He admits that he was a polling agent ofsmt. Sumitra Bai, the Congress (1) candidate, and states that while he wason his way to the booth in the afternoon he met Satbir Singh andanil Kumar who asked him to support Col. Ram Singh and when he toldthem that it was one's own choice to support any candidate, an altercationtook place which was, however, stopped with the arrival of Mam Ghand, Ramsingh, Kishori and some other people. Thereafter, an ASI of police camethere in a jeep who intervened in the matter and in his presence also Satbirsingh started uttering abuses. He further says that he found a jeep parkedthere and people told him that it belonged to Col. Ram Singh, a statementwhich is clearly inadmissible. He finally says that when the D. C. and thes. D.

O. came there he informed them of the incident. In cross-examinationhe admits that he made no. report in writing to the police that he was beatenup nor did he get himself medically examined. He also did not file anycomplaint in any court against Satbir and Anil Kumar. In thesecircumstances, we find it difficult to rely on his evidence.

[92] Kishori Lal, Public Witness 33, says that he was a chowkidar of the villageburthal Jat. He says that when he had gone to the polling booth at about2.30/3. 00 p. m. to cast his vote he found Satbir Singh and Anil Kumar havingan altercation with Shamsher Singh, Public Witness 32. He rescued Shamsher Singhwith tlie help the of some other persons. The witness, being a chowkidar ofthe village, should have immediately reported the matter to the D. G. or thes. D. O. or the ASI, all of whom had come to the spot but he did not do soand kept quiet which speaks volumes against the credibility of his evidence.

[93] More or less to the same effect is the evidence of Public Witness 34 (Ramnarain) whois also a Lambardar of village Kakoria. He says thaton the day of the polling at about 2.30/3. 00 p. m. he had gone to the villageburthal Jat where he saw an altercation going on between Satbir Singh,anil Kumar on the one hand and Shamsher Singh on the other. An ASIhad also arrived there followed by the D. G. and the S. D. O. He admitsthat he had never met Anil Kumar and Satbir Singh nor did he know thembefore. Although he was an eye-witness to the incident of altercation yet hedoes not say that he had told anything to the various officers who werepresent at the spot. His evidence, therefore, does not inspire muchconfidence.

[94] The learned Judge of the High court who had fully considered theevidence of these witnesses observed thus :the time of their arrest as noticed makes the evidence of the peti-tioners' witnesses in regard to the incident at Burthal Jat very doubtful. The analysis of the evidence led by the petitioners reveals that they havefailed to prove this part of the charge of corrupt practice against therespondent.

[95] A bare perusal of the evidence of the witnesses for the appellants clearly reveals that they are not telling the truth and hence no implicit faith can be reposed on their testimony.

[96] This now brings us to the evidence led on behalf of the respondent. To begin with, RW 11) Ravi Datt Sharma, who was a lecturer in Govt. Higher Secondary School, Rewari, was a polling officer at Burthal booth. According to him, the polling went on smoothly from 7.30 a. m. to 4.30 p. m. without any untoward incident. He categorically states that he knew Col. Ram Singh and he (respondent) did not visit the polling booth

on the pollingday. He further goes on to state that at about 1. 00 p. m. , the D. G. ands. D. M. visited the polling booth. On their enquiry, the witness told themthat everything was going on smoothly. He clearly denies that the D. G. hadrecorded any conversation which he had with him in the tape recorder. His evidence, however, is confined only to the incident that had happenedinside the booth and not outside. We do not see any infirmity in his state-ment as he appears to be an' independent and truthful witness.

[97] Rw 12, Parbhati, was a voter of Burthal booth and he testifies tothe fact that he had cast his vote at 8. 00 a. m. though he had reached thebooth at 7.30 a. m. After casting his vote he came out and stayed with hisco-villagers and remained there till 1.30 or 2. 00 p. m. He further statesthat during this period Col. Ram Singh or anybody on his behalf did notcome to the booth nor did any quarrel or dispute take place inside or nearabout the polling booth. He further states that Shamsher Singh (Public Witness 32) ,sarpanch of the village was standing at a small distance with some peopleand he (RW 12) heard some altercation between them. During the courseof the said altercation the police arrived at the spot and removed two persons (meaning perhaps Anil Kumar and Satbir Singh) whom he did not know. Thereafter, Shamsher Siugh and other villagers returned to the pollingbooth. In cross-examination the only fact which he admits is that Mahabirand Udai Bhan were the polling agents of Col. Ram Singh andshamsher Singh and Thaver Singh were the polling agents of Smt. Sumitrabai. He categorically states that he did not know Satbir Singh oranil Kumar and therefore he was not in a position to say whether they werethere or not. He also states that at a distance of about 2 killas from thebooth a jeep was standing and he did not see any sticks in that jeep, andthat villagers were saying that B. D. O. and S. D. O. had come there. Sincehe did not know the D. C. be was not in a position to say whether the D. C. was also there. He stoutly denied the allegation that Col. Ram Singh hadcome to the polling booth in the morning soon after the start of the pollingand that he (respondent) had left 15-20 persons who had to be removed bythe police. It may be noticed at this stage that the suggestion in cross-examination itself presupposes and does not dispute the fact thatcol. Ram Singh had come to the booth only in the morning, that is to say,long before the arrival of the deceased. This is an important and intrinsiccircumstance to show that so far as Burthal booth is concerned, the statementrecorded on the tape recorder by Public Witness 7 could not have included the respon-dent and that was perhaps the initial case of the appellants themselves.

[98] Rw 13, Ami Lal, was also a voter of Burthal booth and he says that so long as he was there he did not see Col. Ram Singh nor did anydispute take place either within the polling station or outside. He admitsthat he saw Shamsher Singh, who was the polling

agent of Congress (1) candidate, altercating with two unknown persons at a distance of about100-120 karms. He categorically slates in cross-examination that he did notsee any candidate at the booth on that day. He also testifies that he knewcol. Ram Singh since the last election. He further denies the suggestionthat Anil and Satbir were threatening the voters. Nothing further of anyimportance seems to have been elicited from this witness.

[99] Rw 14, Sheo Chand, who was also a voter, fully supports the evidence of RW 13 and says that he knew Col. Ram Singh whom he did notsee passing through the approach road to Burthal Jat. A number of sugges-tions were made to him which were denied by him and which are hardly ofany importance.

[100] Rw 20, T. C. Singia, is more or less a formal witness whoproduced certain letters (dated 25/04/1982 and Ap 30/04/1982) writtenby Col. Ram Singh to the Chief Election Commissioner of India containingcertain complaints made by Col. Ram Singh about the irregularities in theelection which are not relevant for our purpose. .

[101] Rw 22, Col. Ram Singh, is the respondent himself. We shalldeal with his evidence relating to both Kalaka and Burthal booths. To beginwith, he clearly states that the D. G. (Public Witness 7) was not impartial and wasworking against his interests. Perhaps we may not go to the extent of accep-ing the apprehensions of the respondent but there is no doubt that theconduct of the D. C. , as revealed in this case, leaves much to be desired. According to the evidence of RW 22, at about 8.45 or 9. 00 a. m. two of hispersons from Kalaka polling booth came to him in a dishevelled condition :their clothes were torn and they appeared to have been badly beaten up. They informed him (RW 22) that Ajit Singh s/o Rao Birendra Singh,accompanied by 50-60 persons had entered the polling booth and beatenthem up and that they were indulging in forcible polling. The two personswho came to him in an injured condition were Ram Kishan and Tula Ram (both brothers) and Tula Ram was his polling agent. On receiving thisinformation, the witness rushed to Kalaka and reached there at about 9.15/9.30 a. m. and after leaving his car at some distance from the polling boothhe walked to the booth. He went inside the booth and protested to thepresiding Officer (Public Witness 8) and drew his attention to the complaint which hehad received from Tula Ram and Ram Kishan. The Presiding Officerverbally assured him that nothing untoward would be allowed to happen. The witness stayed there only for 7-8 minutes and returned to his house andtelephoned the police and also sent a written report to the police about theincident. He received a message from the police station at about 10. 30 a. m. that his complaint had been flashed to the D. C. to take appropriate action inthe matter. This

important part of his evidence is fully corroborated by thestatement of D. C. (Public Witness 7) that he had received a wireless message from thepolice, authorities to the effect that Ajit Singh and his party were creatingtrouble at Kalaka booth. The witness categorically states that he did notgo to village Burthal Jat nor did he send any of his workers there. This factis fully corroborated by the intrinsic evidence of the witness recorded by thed. C. at Burthal where the respondent does not appear to figure or, at anyrate, his statement was not recorded at Burthal which is clear from the taperecorded statement.

[102] The rest of his evidence is regarding a number of other factors which are not relevant for the purpose of this case. Reliance was, however, placed by the appellants that Satbir Singh, who was a leading figure at Burthal, was an adopted son of Jagmal Singh, who was father-in-law of Col. Ram Singh. The witness further clarifies that he had divorced his wife as far back as 1962. Thus, when the witness says that he had no relations with Satbir Singh, we dare say he is right. A number of questions regarding his domestic matters were put in cross-examination but they are not very relevant.

[103] As, however, this witness, who appeared before us, was examined by us at our instance and was subjected to cross-examination by both the parties, we shall discuss that part of his evidence a little later when we come to the statement of this witness recorded by Public Witness 7 in his tape recorder at Kalaka polling booth.

[104] Thus, leaving the tape-recorded statement for the time being, weadhere to our view expressed in the earlier part of this judgment that theevidence adduced by the respondent seems to be much superior in qualitythan that adduced by the appellants. The learned Judge of the High courtwas also of the same view and had rightly held that the allegations of corruptpractice or of capturing of booth had not been established by the appellantsbeyond reasonable doubt or, to be very accurate, by the standard of proofrequired to set aside the election of a successful candidate.

[105] We might now rush through the relevant documentary evidenceproduced in this case which has been fully dealt with by the learned trialjudge and we agree with his conclusions. To begin with. Ex. P-5 is the diaryof the Presiding Officer of the Kalaka booth. We have already discussed theeffect of this document and found that while in column No. 21 relating tointerruption or obstruction of poll, he (Public Witness 8) mentioned Col. Ram Singhputting pressure on polling party and getting bogus votes polled in his favouryet incolumn No. 20 (e) , relating to intimidation, etc. , he made no mentionof any such incident and crossed the same, meaning thereby that there wasno

intimidation of voters. The document. Ex. P-5, is therefore, self-con-tradictory and does not inspire any confidence. The explanation given bypw 8 in his evidence is that while he was filling up column No. 20 (e) he didnot mention anything as he was greatly perturbed at. that time. This is amost implausible and fantastic explanation which apart from being inherentlyimprobable appears to be absolutely absurd. The witness wants us tobelieve that at the time of filling up column No. 20 (e) he was perturbed butin a split second while filling up the very next column, i. e. , columnno. 21 (4) he suddenly gathered strength to compose himself and made theobservations contained in the said column. As the two entries were supposedto be filled up simultaneously it is impossible to believe that while filling up one entry he was perturbed and while filling up the next entry he was in a composed state of mind. In other words, the explanation comes to this; his mental state of mind by a miraculous process cooled down and led him to make the observations which he did in column No. 21 (4). It seems to us that what had really happened was that the plea of intimidation, as alleged by the appellants, is a cock and bull story and when the witness was confronted with a contradictory situation and found himself in a tight corner he invented this ridiculous explanation which has to be stated only to be rejected. This affords an intrinsic proof of the fact that no threat or intimidation was given by the respondent or his men during his presence and in order to save his skin the witness may have made the entry in columnno. 21 (4) subsequently as an afterthought. Thus, no reliance can be placedon a witness like Public Witness 8 for any purpose whatsoever.

[106] Ex. P-6 is a certified copy of the FIR (No. 103) lodged by the Presiding Officer implicating Col. Ram Singh and making some allega-tions. This document also appears to us to be a spurious one as discussed'by the High court.

[107] So far as the documents produced on behalf of the respondentare concerned, they are Ex R-1 to R-9 consisting of letters written bycol. Ram Singh to various authorities including the Chief Electioncommissioner of India complaining- about the misuse of powers by thepolling officials in the conduct of election.

[108] This is all the documentary evidence that matters and, in our opinion, nothing turns upon these documents.

[109] This now brings us to the last and inevitable step of the dramastarting with Public Witness 1 and ending with RW 22. In order to understand theadmissibility, credibility and the truth of the statements contained in thecassette, we might give a brief summary of the manifest defects and incurableinfirmities from which the statements recorded on

tape recorder suffer. Ourconclusion on this question. is arrived at not only after going through thetape-recorded statements but also hearing the cassette ourselves in thiscourt on big amplified speakers. The defects/infirmities may be pointedout thus:

(1) The voices recorded at a number of places are not very clearand there is tremendous noise while the statements were being recordedby the D. C. (Public Witness 7)

(2) A good part of the statements recorded on the cassette has beendenied not only by the respondent but also by RWs 1 and 3. No otherwitness has come forward to depose to the identification of the voice of therespondent or those of RWs 1 and 3.

(3) There are erasures here and there in the tape and besides thevoice recorded being not very clear, it is extremely hazardous to base ourdecision on such an evidence.

(4) One of the important infirmities from which the tape-recordedstatements suffer is the question of custody. Public Witness 7, the D. G. hasclearly admitted in his evidence that though he was supplied with atape recorder or a dictaphone but he was not asked by the governmentto record the statements on the tape recorder which was really meantfor recording his own impressions and not those of the witnesses. How-ever, even though Public Witness 7 violated the instructions of the governmenthe gravely erred in not placing the recorded cassette in proper custody,that is to say, in the official record room after duly sealing the same,and instead keeping the same with himself without any authority.

Thus, the possibility of tampering with the tape-recorded statementscannot be ruled out and this is almost a fatal defect which renders thetape-recorded statements wholly inadmissible.

(5) Public Witness 7 himself admits that the transcript of the tape-recordedstatements was prepared in his office under his supervision by hisstenographer. He further admits that when the transcript was

beingprepared he was temporarily absent from his office to attend to certainother works. This appears to us to be a very serious matter becausehe had no legal authority to leave the recorded cassette with his steno-grapher, who was transcribing the same, even for a single momentas the possibility of its being tampered with by his stenographer or byanybody else cannot be safely ruled out. He further admits that evena copy of the transcript was not deposited in the official record room.

(6) One important aspect as part of the manifest defects may now bementioned. RWs 1 and 3 have denied the identity of their voices in thecassette and, therefore, that part of the evidence becomes clearly inadmissible. The respondent. Col. Ram Singh, however, appears to us to be a truthful,upright and straightforward person because while he chose to admit someparts of the tape-recorded statement to be in his voice and as being correctbut denied the rest: he could have, if he wanted, denied the whole of it. It seems to us that as the respondent was a trained and disciplined soldier he646 told the truth as far as appeared to him. In fact, if he had failed to identify his voice, then nothing could have been done and his statement would have been per se inadmissible.

(7) As it is, the statements on the tape recorder seem to have beenrecorded in a most haphazard and unsystematic manner without followingany logical or scientific method. This will be clear from the fact that thetape-recorded statements do not indicate the polling booth where it wasrecorded, the name of the person whose statement was recorded, the time ofrecording, etc.

[110] A proper methodology which the D. C. should have followedwas to first indicate the place, time and name of the person by himselfspeaking and then record the statement. No such scheme was followedand the court is left to chance and conjecture to find out as to when andwhere and whose statement was recorded. As it is, we can only say thatthe statement of the respondent was recorded only at Kalaka and thisfact seems to be admitted by the appellants in their written submissions (Vol. III, p. 59) thus:

It is not the petitioners" case that Col. Ram Singh came to thepolling station or polling booth. The petitioners' witnesses (Public Witness 27,pw 28 and Public Witness 29) have only stated that Col. Ram Singh came toburthal Jat

at 8. 00 a. m. , instructed his supporters not to allow anyvoters to vote for Congress (1) candidate and thereafter left the place.

[111] It is, therefore, clear that if at all Col. Ram Singh visited Burthai booth, he did it only at 8. 00 a. m. when the D. C. had noteven reached there and, therefore, the question of recording his statementat Burthai Jat does not arise.

[112] In our opinion, the best course of action for the D. C. shouldhave been to record the statements of the respondent and other personshimself in writing instead of recording the same on a tape recorder whichhas led to so many complications. And, if he wanted to use a tape recorderhe should have taken the necessary precautions to see that too many voices,interruptions, disturbances are completely excluded. He ought not to haveallowed any person to speak while be was recording the statements. Unfortunately, this confusion has resulted from his conduct in flouting theinstructions of the government by not using the dictaphone only forrecording his own impressions but instead recording the statements of thepersons concerned.

[113] Thus, in short, the manner and method of recording thestatements in the tape recorder by the D. C. has resulted in a total messmaking confusion worse confounded. Public Witness 7 has not given the details tocomplete the picture as to what the respondent had done. Therefore,the evidence of the D. C. on this point is conspicuous by the absence ofany such description or comments. Indeed, the D. C. has just acted asa silent machine to whatever was recorded instead of applying his mindas to at what stage the respondent denied his voice and where he admittedthe same. We should have at least expected the D. C. to give betterdetails in a case like the present one which, as already mentioned, entailsserious consequences for the respondent if his election were to be setaside.

[114] Having regard to the reasons mentioned above, we are absolutely satisfied that the tape-recorded statements of the witnesses are wholly inadmissible in evidence and, at any rate, they do not have any probative value so as to inspire any confidence. Hence, it is extremely unsafe to rely on such tape-recorded statements apart from the legal infirmities pointed out above.

[115] That should have closed the whole Ch. as far as the taperecorded statement of the respondent is concerned. We shall; however,mention below a few glaring defects, omissions and imperfections :

(1) Some statements said to have been recorded by Public Witness 7 havebeen flatly denied by RWs 1 and 3, one of whom was a polling officerand the other a constable.

(2) A good part of the tape-recorded statement has been vehementlyand persistently denied by him (respondent) -rightly or wrongly.

(3) It is true that the searching and gruelling cross-examinationof the respondent in this court by Mr Sibal, counsel for the appellants,seems to have forced the respondent to admit certain innocuous factsthough he might just as well have admitted those facts which causedno harm to him.

[116] We might mention here that our object in examining the respondent as a court witness in this court and subjecting him to cross-examination by both the parties was not to fish out technicalities by putting ail sorts of querries and questions, relevant or irrelevant. In such a complex state of affairs) the statement of the respondent, torn from the context, cannot form the basis of a judicial decision. Take for instance, one statement of the respondent which was repeated to him by Mr Sibal several times in different forms. The occasion was-if the respondent had sent Ram Kishan and Tula Ram or other persons to the police station or he himself had gone there along with them. The respondent admitted that thesepersons along with others had come to his house and complained thatthey had been beaten up and harassed by the members of the Congress (1) candidate and also showed injuries on their persons. He repeatedly saidthat he himself did not go to the police station but sent them there. Perhaps in view of the serious situation arising from the severe altercation that took place between the supporters of Col. Ram Singh and those of theother party, it is quite possible that on humanitarian grounds he mayhave personally gone to the police station with the injured persons but asat the time of his deposition he happened to be the Speaker of thevidhan Sabha he may have felt that his vanity would be injured ifhe admitted that he himself had gone to the police station. Even if hehad given this reply, it would not have improved the case of the appellants. This is just a sample of the questions put by the counsel to him.

[117] Another important feature of his evidence is that he tacitlyadmits at various places that while his statement was being recorded, anumber of gaps were there, a number of other people were speakingtogether, leading to. great confusion which must have made

him lose hiswits. On hearing the entire conversation ourselves, we are of the opinionthat the statement of the respondent is not coherent particularly becauseof gaps, noises, sounds, and that the statement was recorded in an atmos-phere surcharged with emotions.

[118] In this view of the matter, we do not consider it necessary todelve deeper into the various statements made by the respondent. It issufficient to indicate that on the appellants' own case he had not gone toburthal booth after 8. 00 a. m. and, therefore, the D. O. who reachedthere at 12 noon could not have recorded his statement. We are, therefore,not in a position to hold that implicit reliance should be placed on theevidence led by the appellants. Even if the respondent made some admis-sions in his unguarded moments that would not strengthen the case of theappellants in view of the standard of proof required in an election matterwhere the allegations of corrupt practice have to be proved beyondreasonable doubt almost just like a criminal case.

[119] It was strongly urged by Mr Sibal that in view of our recent decision in Ram Sharan Yadav case the impact of the evidence on the court would show that the respondent was lying and that was sufficient to prove the appellants' case. We are unable to agree with the broad interpretation put by the learned counsel on our decision.

[120] In fact, if we apply the principles laid down in Ram Sharan Yadav case, the appellants' case must fail at the threshold.

[121] Lastly, we might consider the argument advanced before usby the learned counsel for the respondent who submitted that even if the case of capturing of booths as alleged by the appellants against the espond- dent is made out that would at best be an electoral offence and not a corrupt practice within the meaning of the provisions of the Representationof the People Act, 1951. We are, however, not called upon to go into this question as no clear case of capturing of booths has been made out. The learned Judge of the High court has dealt with the case of capturing of booths very extensively and has written a very well reasoned judgment annotated with convincing reasons and conclusions. It would indeed be extremely difficult to displace the judgment of the High court on the ground sought by the appellants. The High court has considered even theminutest details so as not to invite any comment that the Judge has notapplied his mind. Even as regards the tape-recorded statements thelearned Judge has pointed out several infirmities and defects which despitethe ingenious and charming arguments of Mr Sibal have not been rebutted.

[122] On a careful consideration, therefore, of the evidence, circumstances, documents

and probabilities of the case, we are fully satisfied that the appellants have failed to prove their case that the respondent was guilty of indulging in corrupt practices. We therefore, affirm the judgment of the High court and dismiss the appeal but in the circumstances without any order as to costs.

[123] This appeal under S. 116-A of therepresentation the of People Act, 1951 , hereinafter referred to as 'the Act', is directed against the dismissal of Election Petition 13 of 1982 on the file of the Punjab and Haryana High court.

[124] The appellants are registered electors of Rewari constituency No. 86 of the Haryana Legislative Assembly. In the election held fur that constituency on 19/05/1982 Col. Ram Singh, hereinafter referred to as 'the respondent' who contested as the Congress (J) candidate was declared elected on 21/05/1982 after the counting was over on 20/05/1982, defeating his nearest rival, Sumitra Devi who is said to be the sister of Rao Birendra Singh and had contested in that constituency as the Congress (1) candidate. Sumitra Devi lost by a margin of 8760 votes. The appellantssought in the election petition a declaration that the respondent's election is void under S. 100 of the Act. They alleged that there was direct andindirect interference and attempt to interfere on the part of the respondentand his agents and other persons with his consent with the free exercise ofthe electoral right of the electors. The respondent stoutly opposed theelection petition. After considering the evidence and hearing the counselof both the parties the learned Judge who tried the election petition foundthat the appellants failed to prove their case beyond all reasonable doubtand dismissed the petition with costs of Rs. 2,000. 00.

[125] Mr Kapil Sibal, learned counsel for the appellants confined his arguments in this court to the instances of corrupt practice alleged in respect of only two polling stations- Kalaka and Burthal Jat. It is, therefore, necessary to confine our attention to the case of the parties in regard to only those instances.

[126] The appellants' case in regard to the Kalaka polling station is this: The polling in Kalaka polling station started and continued smoothly until 10. 30 a. m. on 19/05/1982. But at about 10. 30 a. m. the respondent came there along with 60 or 70 persons including Desh Raj, Ramkrishan and Krishan Lal of Kalaka and Sheo Lal Gujar, Rishi Dakot, Umrao Singh, Raghubir Singh, Balbir Singh Gujar, Abhey Singh Gujar and Suresh of Rewari. The respondent was carrying a gun while some of those who accompanied him were armed with guns, lathis and swords. The respondent, and his companions threatened with arms and terrorisedthe electors who were waiting outside

the polling station to exercise theirright to vote as a result of which Sheo Chand, Gurdial, Puran, Mangal,basti Ram, Ishwar and Amar Singh ran away without exercising their rightto vote. The respondent and some other armed persons amongst hiscompanions entered the polling station and brandished their guns towardsthe Presiding Officer and other members of the polling staff as well as thepolling agents of the various candidates and ordered everyone to stand still. They threatened the voters who were in the polling station when theyraised objections to their conduct and made them quit as also the pollingagents Ainar Singh and Suraj Bhan. The respondent directed a Sikh amongst one of his companions carrying a sword to hit Mangal Singh who strongly objected to the respondent's behaviour and he was accordingly assaulted and injured. One Basti Rani who too objected to the respondent's behaviour was hit by one of the companions of the respondent with the butt of a rifle. Ishwar, a Lambardar was also hit by the barrel of a gun. The respondent and his companions snatched about 50 ballot papers from the polling staff at gunpoint and they were marked in favour of the respondent and put into the ballot boxes after one of the respondent's companions thumb-marked the counterfoils of the ballot papers as directed by the respondent. Tula Ram, Desh Raj, Ram Krishan and Krishan Lal and others helped the respondent in marking the ballot papers. The police at the polling station was outnumbered and remained as silent spectators. But when a number of people of the village came and additional police arrived the respondent and his companions made good their escape leaving behind two motor cycles bearing registration Nos. ASW 5785 and HRP 534. Two of the respondent's companions were caught by the public and handed over to the police. Suraj Bhan, Amar Singh, Ishwar Singh and Basti Ram made a report about the incident to the Returning Officer, Rewari constituency at about 12 noon on the same day. On the arrival of the police the Presiding Officer of the polling station lodged a detailed report, giving his version of the incident' and thereupon FIR No. 103 of 1982 dated 19/05/1982 was registered by the police. The Deputy Commissioner of the District and the Returning Officer of the constituency also came to the polling station and made enquiries and tape-recorded the statements of some of the concerned persons. The process of polling got disrupted for over one hour and a number of voters had to refrain from voting. It is clear from these facts that the respondent and his companions with his consent attempted to interfere with the free exercise of the electoral right of a large number of electors and the respondent succeeded in his plan to scare away and compel some of the electors to refrain from voting at the election.

[127] As regards tlie incident at Burthal Jat polling station the appellants' case is this: As per his pre-planned strategy the respondent visited Burthal Jat village at about 8 a. m. on 19/05/1982, accompanied by 50or 60 persons including Anil Kumar, Satbir Singh,

Raghubir, Sheo Lalgujar, Rishi Dakot, Umrao Singh, and Balbir Singh Gujar. Many personsincluding Mahabir Singh, Hira Singh, Mam Chand, Dharam Vir, Thaversingh and Amar Chand gathered there. The respondent told his supportersto ensure that electors who were likely to vote for the Congress (1) candidateare not allowed to go into the polling station and that he was leaving behindanil Kumar and Satbir Singh with 10 or 15 musclemen to help them inpreventing electors of the Congress (1) candidate. A jeep containing lathisand other weapons was left at the disposal,of those persons. While leavingthe place the respondent told Anil Kumar and Satbir Singh who were ontheir motor cycle that he was depending upon them and they should ensurethat no votes are cast in favour of the Congress (1) candidate and maximumvotes are polled in his favour. Those persons kept on obstructing andthreatening the voters who were coming to the polling station to exercisetheir electoral right. Some of the persons who were thus terrorised weresurjit, Raghubir Singh and Lal Singh. When the Sarpanch Shamsher Singhwho came to vote was about to reach the polling station. Anil Kumar andsatbir Singh came by the motor cycle and told him that he must vote forthe respondent and otherwise he will not be allowed to proceed further. When Shamsher Singh said that he would vote freely according to his choiceanil Kumar and Satbir Singh assaulted him with sticks and gave him slapsand fist blows. Some respectable persons of the village including Kishori,ram Narain and Lambardar Mam Chand who were present nearby rescuedshamsher Singh. The Assistant Sub-Inspector Kalyan Singh who was onelection duty came there by a jeep and seeing the fight arrested Anil Kumarand Satbir Singh. The Deputy Commissioner of the District and thereturning Officer (Sub-Divisional Magistrate) also came there and tookthe jeep along with lathis and other weapons into their custody. Thus itis clear that Anil Kumar and Satbir Singh who are related to the respondentcommitted the aforesaid corrupt practice at the instance of and with theconsent of the respondent.

[128] The defence of the respondent as regards the incident in and atthe Kalaka polling station is one of complete denial and he contended thatif there is any report lodged by Suraj Bhan, Amar Singh, Ishwar Singh andbasti Ram it must be a manoeuvred affair to create evidence in the electionpetition and that the report of the Presiding Officer is not his own versionbut a false document prepared at the instance of the respondent's politicalopponent Rao Birendra Singh and other State agencies on whom he exercisedpowerful influence. The FIR No. 103 of 1982 dated 19/05/1982 doesnot support the appellants' case of any interference or attempt to interferewith the free exercise of the electoral right of any elector on the part ofthe respondent or anyone else with his consent and does not directly disclosethe commission of any corrupt practice of

undue influence. On the otherhand, the truth is that the men of Rao Birendra Singh captured the boothat Kalaka and the supporters and voters of the respondent were badly out-manoeuvred which could be gathered from the fact that whereas Sumitradevi obtained 484 votes the respondent obtained only 53 votes in that polling station.

[129] The allegation that the respondent and some of his com-panions entered the polling station and brandished their guns at thepresiding Officer and ordered the other polling staff and polling agents ofthe various candidates to stand still does not attract any provision of theact regarding the commission of corrupt practice. The allegation that thepolling agents Suraj Bhan and Amar Singh were threatened and turnedout of the polling station does not constitute corrupt practice as they are notalleged in the election petition to be electors. Mangal Singh, Balbir Singhand Ishwar who are alleged to have been assaulted and injured are notalleged in the election petition to be electors of the constituency and there-fore that allegation does not constitute corrupt practice. The allegationthat 50 ballot papers were snatched from the polling staff and polled infavour of the respondent does not constitute corrupt practice.

[130] The respondent's defence regarding the incident at Burthal Jatis one of complete denial of the allegations in the election petition in regardto that incident but there is no denial of the allegation that Anil Kumarand Satbir Singh are related to him. He has contended that it is whollyincorrect to allege that any jeep with which he had any connection wascarrying lathis and other weapons and that it was taken into custody bythe officials. The allegation that Anil Kumar and Satbir Singh committedany corrupt practice with or without the consent of the respondent is false,malicious and mischievous. Those two persons were falsely implicated inthe case under S. 107 and 151 of the Code of Criminal Procedureand a clumsy attempt was made to implicate them by the subordinate policeofficials who were under the powerful influence of Rao Birendra Singh whosesister Sumitra Devi was losing and has ultimately been defeated by therespondent. Two independent alleged corrupt practices, one by the respon-dent and the other by the others, have been clubbed together in the electionpetition.

[131] It is necessary to note all the issues framed by the tribunal. They are: (1) Whether the allegations of corrupt practice alleged in the electionpetition have not been supported by an affidavit? If so, what isits effect? (2) Whether petitioners 2 to 5 have not deposited the security undersection 117 of the Representation of the People Act, 1951? If so,what is its effect? (3) Whether petitioners 2 to 5 have not complied with S. 81 (3) of the Representation of the People Act by not attesting the copy ofthe election petition to be true copy under their own signatures?if so, what is its effect?

(4) Whether petitioners 2 to 5 have not verified the election petition? If so, what is its effect?

(5) Whether allegations of corrupt practice alleged in the petitionlack material facts/legal ingredients and do not disclose completecause of action? If so, what is its effect?

(6) Whether the allegations of corrupt practice alleged in the election petition are vague and lack full particulars? If so, what is itseffect?

(7) Whether the averments in paragraph 7 of the petition areunnecessary, scandalous, frivolous or vexatious and calculatedto prejudice a fair trial? If so, whether the same are liable tobe struck out under Rule 6, Order 16 Civil Procedure Code?

(8) Whether the respondent himself and/or through his agents andother persons, with his consent, committed corrupt practice ofundue influence, as alleged in paras 9 to 13 of the electionpetition or not? If so what is its effect?

[132] The learned Judge of the High court took up for trial issues 1to 7 as preliminary issues. By order dated 10/12/1982 he foundissues 2 to 6 in favour of the appellants and issue 1 against them butpermitted them to carry out certain amendments and remove the defectspointed in his order. He declined to consider issue 7 as a -preliminary issue on the ground that evidence is necessary to record any finding on that issue. On the question whether the allegations in paras 9 to 12 of the election petition constitute corrupt practice he held that prima facie they do not disclose any defect in form or substance but they contain material facts and allegations of corrupt practice. It may be noticed that the allegations relating to the incidents at Kalaka and Burthal Jat polling stations are contained in paragraphs 9 to 11 of the election petition.

[133] On the issue regarding the corrupt practice alleged in relation tokalaka polling station the learned Judge held that the Presiding Officer's diaryex. P-5 appears to have been prepared by the Presiding Officer, Hari Singh (PW 8) later under the pressure and influence of the defeated candidate,sumitra Devi through her brother Rao Birendra Singh and that FIRNo. 103 of 1982 dated 19/05/1982 contained in Ex. P-6 is

inadmissible inevidence to corroborate the evidence of Public Witness 8 about the incident in Kalakapolling station on the ground that the original report of Public Witness 8 to the policehad not been summoned by the appellants. He found that the tape recordex. Public Witness 7/1 prepared by the Deputy Commissioner of Mohindergarhdistrict, (Public Witness 7) has been tampered with later, disbelieving the evidence ofpw 7 that a portion of what he had recorded at the Burthal Jat pollingstation was erased by his own voice inadvertently on the same day. He alsofound that the authenticity of the transcription of the tape record in Ex. P-1 is not proved with definiteness. He relied upon the evidence adduced on theside of the respondent in preference to that of the other side and held thatthe appellants have failed to prove this item of corrupt practice beyondreasonable doubt.

[134] Regarding the incident at the Burthal Jat polling station thelearned Judge found that the appellants have failed. to prove that Anil Kumarand Satbir Singh are related to the respondent. For coming to this conclu-sion he relied upon Ex. P-9 which purports to be a report of Mam Ghand (PW 35) who has, however, disowned it while holding that Anil Kumar andsatbir Singh were canvassing for their candidate at Burthal Jat as stated bymahabir Singh (Public Witness 26) but it is not made out who their candidate was. He found that the appellants have failed to prove this item of corruptpractice. On the findings recorded by him in regard to these and the otheritems of corrupt practice alleged by the appellants he dismissed the election petition with costs as stated above.

[135] 135. The points arising for consideration in this appeal are : (1) Whether the incident in and at the Kalaka polling station alleged by the appellants is true and has been proved beyond reasonable doubt? (2) Whether the incident alleged in and at the Kalaka polling station does not constitute corrupt practice within the meaning of the Act? and (3) Whether the incident at Burthal Jat polling station alleged by the appellants is true and has been proved beyond reasonable doubt?

[136] Before considering the evidence on record in regard to the incidents at Kalaka and Burthal Jat polling stations it is desirable to note certain provisions in the Act and certain decisions to which the Courts attention was drawn by Mr Kapil Sibal, learned counsel appearing for the appellants and Mr P. P. Rao, learned counsel appearing for the respondent.

[137] S. 87 of the Act relates to the procedure before the High court and clause (1) thereof reads thus :

> Subject to the provisions of this Act and of any rules made there-under,

every election petition shall be tried by the High court, as nearlyas may be, in accordance with the procedure applicable under the Codeof Civil Procedure, 1908 (5 of 1908) to the trialf suits. Order 8 Rules 1 to 3 and 5 of the Code of Civil Procedure relating to writtenstatement read thus:

1. (1) The defendant shall, at or before the first hearing or withinsuch time as the court may permit, present a written statement of hisdefence.

2. The defendant must raise by his pleading all matters whichshow the suit not to be maintainable, or that the transaction is eithervoid or voidable in point of law, and all such grounds of defence as, if655not raised, would be likely to take the opposite party by surprise, orwould raise issues of fact not arising out of the plaint, as, for instance,fraud, limitation, release, payment, performance, or facts showingillegality.

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

5. (1) Every allegation of fact in the plaint, if not denied specifi-cally or by necessary implication, or stated to be not admitted in thepleading of the defendant, shall be taken to be admitted except asagainst a person under disability :

Provided that the court may in its discretion require any fact soadmitted to be proved otherwise than by such admission.

[138] S. 116-A of the Act relating to appeal against certain orders of the High court lays down inter alia that an appeal shall lie to the Supreme court against the dismissal of an election petition under S. 98 of the Act. In the present case the election petition has been dismissed by the High court under that section.

[139] S. 116-C of the Act relates to procedure in the appeal. Ss. (1) of that S. reads thus :

116-C. (1) Subject to the provisions of this Act and of the rules,if any, made thereunder, every appeal shall be heard and determined bythe Supreme court as nearly as may be in accordance with theprocedure applicable to the hearing and determination of an appealfrom any final order passed by a High court in the exercise of itsoriginal civil jurisdiction; and all the provisions of the Code of Civilprocedure, 1908 (5 of 1908) and the Rules of the court (includingprovisions as to the furnishing of security and the execution of any orderof the court) shall, so far as may be, apply in relation to such appeal. Section 100 of the Act mentions the grounds for declaring an election to bevoid. S. 100 (1) (b) reads thus:

Subject to the provisions of Ss. (2) if the High court is ofopinion-

(B) that any corrupt practice has been committed by a returnedcandidate or his election agent or by any other person with theconsent of a returned candidate or his election agent-the High court shall declare the election of the returned candidate to bevoid.

[140] S. 123 of the Act lays down that what are corrupt practicesand Ss. (2) thereof reads thus :

123 (2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person with the consent of the candidate or his election agent, with the free exercise of any electoral right.

[141] Instruction 71 of the Instructions. to Presiding Officers issued bythe Election Commission of India reads thus :

74. Preparation ofthe diary-You should draw up the proceedingsconnected with the taking of the poll in the polling station in the diaryto be maintained for the purpose. You should go on recording the rele-vant events as and when they occur and. should not postpone thecompletion and filling of all entries in the diary till the completion of the poll. You should mention therein all important events particularly. . in the form given which is the same as the

one in which Ex. P-5 in thiscase has been recorded.

[142] Mr Kapil Sibal, learned counsel for the appellants) relied uponcertain decisions of the English courts and of this court in regard to theadmissibility of tape-recorded evidence. I shall refer to them.

[143] In R. v. Maqsud Ali the following observation has been made :the position on the evidence was that a very important part of that 'evidence was made up by a tape recording taken in circumstances thati must now indicate. . On 29/04/1964, the two appellants wereat the Town Hall at Bradford and they were taken there into a room. . There is no reason to suppose that both of the appellants were not thereon this occasion voluntarily;. . In that room there had been set upa microphone behind a waste paper basket which was connected to arecorder in another room. . it is almost unnecessary to saythat none but tlie police knew of the presence of the microphone inposition. . so it ran for just one minute over the hour. . Thetape, after it had been recorded, remained in the custody of the policeand there is no suggestion that it was in any way interfered with. Theconversation that took place between the two appellants was of course intheir native tongue. . and the tape, it should now be stated, had anumber of imperfections. . If the jury could come to the conclusionthat here was something which amounted to a confession that they wereboth involved in the murder, it can be seen that this tape-recording wasa matter of the utmost importance. It was, indeed) highly importantevidence and the defence sought strenuously to keep it out. . Thisis not the first time that the question of admissibility of tape recordingsas evidence has come before the courts of this country. In 1956, in trialat Wiltshire Assizes Hilbery, J. , admitted as evidence a tape recording ofa conversation in Salisbury Police Station and further admitted atranscript of the recording to assist the jury. . We can see nodifference in principle between a tape recording and a photograph. Insaying this we must not be taken as saying that such recordings areadmissible whatever the circumstances, but it does appear to this courtwrong to deny to the law of evidence advantages to be gained by newtechniques and new devices, provided the accuracy of recording can beproved and the voices recorded properly identified ; provided also thatevidence is relevant and otherwise admissible, we are satisfied that atape recording is admissible in evidence. Such evidence should alwaysbe regarded with some caution and assessed in the light of all thecircumstances of each case.

[144] In R. v. Robson which arose out of a case where the accused was charged with corruption the prosecution sought to put in evidence certain tape recordings. The

defence contended that they were inadmissiblein evidence as inter alia they were in many places unintelligible. Itwas however not contended that the tape recordings were inadmissibleevidence of what are recorded in them. The originality and authenticityof the tape were left to the jury in that case.

[145] In Yusufalli Esmail Nagree v. State of Maharashtra this court hasobserved:

> Like a photograph of a relevant incident a contemporaneousdialogue of a relevant conversation is a relevant fact and is admissibleunder S. 7 of the Indian Evidence Act.

[146] Reference has been made in that case to Rup Chand v. Mahabirparshad, Manindra Nath v. Biswanath Kundu, Pratap Singh v. State of Punjaband R. v. Maqsud Ali.

[147] In N. Sri Rama Reddy v. V. V. Giri a decision of five learnedjudges of this court the following observation made in Yusufalli case hasbeen quoted with approval:

> The contemporaneous dialogue between them formed part of theres gestae and is relevant and admissible under S. 8 of the Indianevidence Act. The dialogue is proved by Shaikh. The tape record ofthe dialogue corroborates his testimony. The process of tape-recordingoffers an accurate method of storing and later reproducing sounds. Theimprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape recordof a relevant conversation is a relevant fact and is admissible undersection 7 of the Indian Evidence Act.

[148] In R. M. Malkani v. State of Maharashtra this court observed:

> Tape-recorded conversation is admissible provided first that theconversation is relevant to the matters in issue; secondly, there is identi-fication of the voice; and thirdly, the accuracy of the tape-recordedconversation is proved by eliminating the possibility of erasing the taperecord. A contemporaneous tape record of a relevant conversation isa relevant fact and is admissible under S. 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevantincident. The tape-recorded conversation is therefore a relevant factand is admissible under S. 7 of the Evidence Act.

[149] In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, this court approved the High court relying upon the tape-recorded reproduction of the successful candidate's speeches to voters for holding that he had appealed to them in the name of religion.

[150] Mr Rao learned counsel for the respondent relied upon thefollowing four decisions in regard to the proof required in cases where eleclion-of returned candidates is alleged to be void on the ground of corruptpractice. .

[151] In M. Chenna Reddy v. R. C. Rao this court observed :this court has held in a number of cases that the trial of anelection petition on the charge of the commission of a corrupt practicepartakes of the nature of a criminal trial in that the finding must bebased not on the balance of probabilities but on direct and cogent evi-dence to support it. In this connection, the inherent difference betweenthe trial of an election petition and a criminal trial may also be noted. At a criminal trial the accused need not lead any evidence and ordinarilyhe does not do so unless his case is to be established by positive evidenceon his side, namely, his insanity or his acting in self-defence to protecthimself or a plea of alibi to show that he could not have committed thecrime with which he was charged. The trial of an election petition onthe charge of commission of corrupt practice is somewhat different. . the procedure before the the High court is to be in accordance with thatapplicable under the Code of Civil Procedure to the trial of suits withthe aid of the provisions of the Indian Evidence Act. Inferences cantherefore be drawn against a party who does not call evidence whichshould he available in support of his version.

[152] In Balakrishna v. Fernandez this court observed: (SCG p. 262,para 47)

> Although the trial of an election petition is made in accordance withthe Code of Civil Procedure, it has been laid down that a corrupt prac-tice must be proved in the same way as a criminal charge is proved. Inother words, the election petitioner must exclude every hypothesis exceptthat of guilt on the part of the returned candidate or his election agent.

[153] In Sultan Salahuddin Owasi v. Mohd. Osman Shaheed this courtobserved :

> It is now well settled by a large catena of the authorities of thiscourt that a charge of corrupt practice must be proved to the hilt, thestandard of proof of such allegation is the same as a charge of fraud ina criminal case.

[154] In Ram Sharan Yadav v. Thakur Muneshwar Nath Singh this courtobserved As the charge of a corrupt practice is in the nature of a criminalcharge, it is for the party who sets up the plea of "undue influence" toprove it to the hilt beyond reasonable doubt and the manner of proofshould be the same as for an offence in a criminal case. This is moreso because once it is proved to the satisfaction of a court that acandidate has been guilty of "undue influence" then he is likely to bedisqualified for a period of six years or such other period as theauthority concerned under S. 8-A of the Act may think fit. . While insisting on standard of strict proof, the court should not extendor stretch this doctrine to such an extreme extent as to make it well-nighimpossible to prove an allegation of corrupt practice. Such an approachwould defeat and frustrate the very laudable and sacrosanct objectof the Act in maintaining purity of the electoral process.

[155] In regard to what constitute election offences Mr Rao invited attention to the decision of Ramaswami, J, in Magendra Alahto v. State where it was stated in the complaint that the criminal revision petitioner before the High court insisted upon going inio the room where the ballot papers were kept though he Presiding Officer had warned him to go out of the room and also the petitioner himself attempted to put the ballot papers into the box of one Nitai Singh Sardar and it has been held that there was proper evidence to record a finding of guilt and sufficient to sustain the conviction under S. 131 (1) (b) and S. 136 (1) (f) of the Act.

[156] On the other hand, Mr Sibal invited attention to this court's decision in Ram Dial v. Sant Lal in support of his contention about what is required to be proved in regard to an alleged corrupt practice. After quoting the provisions of S. 2 of 46 and 47, Victoriac. 51 three learned Judges of this court have observed :

> The words of the English statute, quoted above, lay emphasis uponthe individual aspect of the exercise of undue influence. It was withreference to the words of that statute that Bramwell, B. , made thefollowing observations in North Durham :
>
> "When the language of the Act is examined it will be found thatintimidation to be within the statute must be intimidation practised uponan individual. " The Indian Law, on the other hand, docs not empha-sise the individual aspect of the exercise of such influence, but paysregard to the use of such influence as has the tendency to bring aboutthe result contemplated in the clause.

What is material under tlieindian Law, is not the actual effect produced, but the doing of such actsas are calculated to interfere with the free exercise of any electoral right. Decisions of the English courts, based on the words of the Englishstatute, which are not strictly in pari materia with the words of theindian statute, cannot, therefore, be used as precedents in this country.

In the present case, we are not concerned with the threat oftemporal injury, damage or harm. On the pleadings and on thefindings of the tribunal and of the High court, we are concernedwith the undue exercise of spiritual influence which has been foundby the High court to have been such a potent influence as toinduce in the electors the belief that they will be rendered objects ofdivine displeasure or spiritual censure if they did not carry out the command of their spiritual head.

[157] I shall now consider the evidence relating to the incidents at Kalaka and Burthal Jat polling stations one after the another. The incident in and at the Kalaka polling station consists of two parts, namely, (1) alleged booth-capturing by the respondent and his companions, all of them armed with deadly weapons like pistol and sword or kirpan and the polling of bogusvotes marked in favour of the respondent after threatening the polling officersand polling agents who were in the polling station with violence and makingthem to stand still, and (2) the respondent scaring away electors who werestanding in the queue outside the polling station awaiting their turn forcasting their votes. Regarding the first part of the incident at Kalaka there is the evidence of PWs 7 to 10, 12, 14) 17 and 18 on the side of the appellants and of RWs 1 to 6 and 22 on the side of the respondent. PWs 7 to 10 are official witnesses while PWs 12, 14, 17 and 18 are private individuals. Similarly, RWs 1 to 4 are official witnesses while RWs 5, 6 and 22 are private individuals.

[158] Tara Chand (Public Witness 12) is one of the appellants. He was thepolling agent of the Congress (I) candidate, Sumitra Devi who has beenreferred to at some places in the evidence as Sumitra Bai, along with Amarsingh (PW17). His evidence is that he retired as polling agent after onehour and Public Witness 17 took over as polling agent and thereafter he was arrangingthe voters in the queue. He has stated that the respondent and 5 or 7 ofhis companions, all of them armed, entered the polling station when he wasstanding at the gate and they threatened the polling staff at gunpoint andasked them to stand aside. Thereafter the respondent asked his companionsto do their work and they tore off the ballot papers from the bundle andaffixed the seal in

favour of the respondent and put those ballot papers intothe ballot box. The respondent's companions, Tula Ram who was hispolling agent, Ram Krishan (RW 5) , Desh Raj and Krishan Lal put the sealson the counterfoils and the thumb impressions on the counterfoils of theballot papers. Amar Singh (Public Witness 17) , appellants" polling agent, Mangalsingh (Public Witness 18) and Basti Ram were present. When Mangal Singh (Public Witness 18) protested, the respondent's Sikh companion caused injury to him with hissword at the respondent's instance. When Basti Ram raised objection to thebehaviour of the respondent and his companions he was injured with the buttof a gun. The policemen who were present in the polling station did notintervene but some time later the people of Kalaka village and some otherpolice personnel arrived. Then the respondent and his companions fledaway, abandoning two motor vehicles at the spot. The Deputy Commis-sioner (Public Witness 7) and the Returning Officer (Public Witness 10) came there one hour later. PW 7 interrogated the polling staff and tape-recorded their conversation. The polling was stopped for over one hour and many people got frightenedand went away from the polling station without casting their votes. Public Witness 12has admitted in his cross-examination that he had canvassed for the Congress (1) candidate for five to ten days prior to the date of poll and had worked aspolling agent of Congress (1) candidates even earlier. He claims to havereported to the police after the completion of the poll and has stated that thepolice did not send for anybody. He has also stated that he did not see Ajitsingh son of Rao Birendra Singh at Kalaka during the poll. He has deniedthe suggestion that the Congress (1) workers beat the respondent's pollingagent, Tula Ram and drove him out of the polling station about one hour ofthe commencement of the poll.

[159] Amar Singh (Public Witness 17) of Kalaka was the polling agent of Sumitradevi along with Public Witness 12. He claims to have taken over as polling agent fromtara Chand (Public Witness 12) one hour after the commencement of the poll. He hasstated that at about 10. 30 a. m. the respondent came inside the polling stationaccompanied by 3 or 4 persons. The respondent was armed with a riflewhile one of his companions had a sword and the other had a pistol and therest sticks. The respondent asked Public Witness 17 and the polling staff to stand asideand directed his companions to poll votes. Thereupon the respondent'scompanions took the ballot papers and affixed thumb impressions and markedthe ballot papers and put them into the ballot box. When Public Witness 18 objectedto the high-handed behaviour of the respondent his Sikh companion thrustthe sword at Mangal Singh (Public Witness 18). When Basti Ram also raised objectionthe respondent gave him a thrust with the butt of a rifle. Public Witness 17 and otherswho were in the polling station were pushed outside. The policemen whowere

inside the polling station did not interfere. Some time later the peoplefrom Kalaka village and some police personnel arrived and thereupon therespondent and his companions left the place. PW17 and others detainedtwo motor cycles of the respondent's party and caught hold of two of the fleeingpersons and produced the motor cycles before Public Witness 7 who came there alongwith Public Witness 10. Public Witness 17 has denied in his cross-examination that Ajit Singh sonof Rao Birendra Singh visited the Kalaka polling station. He has denied thesuggestion that he and. other Congress (1) supporters beat Tula Ram anddrove him out of the polling station and that he has given false evidencebeing a sympathiser of the Congress (1) Party.

[160] Mangal Singh (Public Witness 18) of Kalaka has stated in his evidencethat when he was in the polling station and his particulars were being checkedbefore he could cast his vote the respondent armed with a gun and accom-panied by 3 or 4 persons, one of them armed with a pistol and the otherwith a sword and the rest with lathis came inside the polling station. Therespondent asked Public Witness 18 and others who were in the polling station tostand aside under threat of being killed otherwise. When Public Witness 18 objectedto the respondent's behaviour the respondent asked his men to beat him andturn him out of the polling station. Thereupon the respondent's Sikhcompanion thrust the tip of his sword near his right foot. When Basti Ramwho was behind RW 18 protested against the behaviour of the respondentand his companions the respondent caused an injury to him with the buttof a rifle. Later the people of Kalaka village and some police personnelarrived and the respondent and his companions ran away. Public Witness 18 andothers informed Public Witness 10 and the police about what happened. Public Witness 18 hasadmitted in his cross-examination that he had canvassed for the Congress (1) candidate but he has denied the suggestion that he has always been helpingthe Congress (1) Party and has therefore given false evidence.

[161] Hari Singh (Public Witness 8) who was a teacher in one of the Ahireducational institutions was the Presiding Officer at the Kalaka pollingstation. He has stated that at about 10. 30 a. m. until which time the pollingwent on smoothly) the respondent accompanied by some other personsreached the polling station and came into the polling station along withfour or five persons, carrying a small gun with him while one of his com-panions was carrying a pistol and another a sword and the others sticks. The respondent who appeared to be in a rage pointed the gun towardspw 8 and others saying that the remaining votes should be polled. Therespondent's companions snatched ballot papers from the officials in thepolling station and tore off about 25 or 26 ballot papers and marked themin favour of the respondent and put them into the ballot box. They puttheir thumb impressions on the counterfoils of the ballot papers. There

washoise outside when the respondent and his companions were inside the pollingstation. The respondent and his companions went out of the polling stationafter 25 or 26 ballot papers had been put into the ballot box as stated above. Soon after the respondent and his companions left the place a 'sub-Inspectorof Police came t here. Public Witness 8 was writing the report when PWs 7 and 10accompanied by the Superintendent of Police arrived. After completinghis report Public Witness 8 got it signed by all the polling staff and handed it overto Public Witness 7 and he recorded his statement. Ex. P-5 is the diary prepared bypw 8 in accordance with Instruction-74 of the Instructions to Pollingofficers given by the Election Commission of India. Public Witness 8 had depositedex. P-5 along with the other records in the Election Office. He has statedthe Ex. P-5 was prepared by him and that it is correct. In his cross-examination he has stated that he does not know if tlie High School run bythe Ahir Education Board wheie he was employed since 1972 does or doesnot belong to Rao Birendra Singh. He has denied that he and the membersof his family Had been supporting Rao Birendra Singh in the elections. Hehas admitted that he has not mentioned anything in column 20-E of Ex. P-5relating to intimidation of voters and other persons except crossing it andhas stated that it is because he was very much perturbed at that time. Reference will be made in detail later to the contents of the Presidingofficer's diary Ex. P-5 and the , report of Public Witness 8 to the police contained inex. P-6 on the basis of which FIR No. 103 of 1982 dated 19/05/1982had been registered by Dharam Pal (Public Witness 9) Assistant Sub-Inspector ofpolice on 19/05/1982. Suffice it to say at present that reference has beenmade in Ex. P-5 to the respondent putting pressure on the polling staff andgetting 25 or 26 bogus votes polled in his favour when there was a lot of noiseand commotion in the polling station from 10. 30 to 11.30 a. m. as a resultof which the polling had stopped. In his report to the police also PW8has stated that the respondent armed with a pistol came inside the pollingstation along with four or five of his companions armed, one of them witha sword and the others with sticks and hurled abuses and forcibly polledabout 25 or 26 ballot papers at gunpoint on account of which he could notstop them from doing so. The Assistant Sub-Inspector of Police (Public Witness 9) who had been posted at Sadar Rewari police station on 19/05/1982 hasdeposed about the registration of FIR No. 103 of 1982 on that day on thereceipt of a rukka from Sub-Inspector, Deep Chand. He has stated thatthe FIR Ex. P-6 is in his handwriting and that it is correct according to thematerial on the basis of which it has been registered. He has not beencross-examined about the registration of FIR No. 103 of 1982 dated 19/05/1982.

[162] Bala Bhaskar (Public Witness 7) , the Deputy Commissioner of Mohindergarhwas District Election Officer for the election to the Haryana Legislativeassembly held in May

1982. He has stated that when he was travellingby car at about 10. 30 a. m. between Monodola and Zainabad villages inthe course of his visits to some of the polling stations in the Rewari consti-tuency on 19/05/1982 he received a wireless message to the effect thatthe respondent had complained against Congress (1) workers saying that40 or 50 of them had attacked Congress (J) workers at Kalaka. Public Witness 7reached Kalaka polling station at 12.30 p. m. after instructing the policeover the wireless to take action on that complaint of the respondent. Whenhe reached Kalaka polling station he received oral complaints about thedetention of a motor cycle belonging to the workers of the Congress (J) Party. He went inside the polling station and tape-recorded the conversa-tions with the officers in Ex. Public Witness 7/1 of which Ex. P-1 is the transcriptprepared under his supervison. He has stated that he compared theex. P-l with the original tape record and found it to be correct and thatit bears his signature by way of authentication. He has admittedthat there are some gaps in Ex. P-1 as the voices in the tape were not clearand audible. He has stated that the tape record remained in his custodythroughout and was not tampered with either by himself or by anyone elseand that it contains the voices of the Presiding Officer (Public Witness 8) , the pollingofficer Roop Chand (RW 7) and the police constable, Mohinder Singh (RW 3) whose number is 498. Reference will be made later to the contentsof the tape record and to the report Ex. P-2 submitted by Public Witness 7 to thegovernment about the incident which took place on 19/05/1982 duringthe elections as it had come to his notice. In his cross-examination Public Witness 7has admitted that he could pot now identify the persons whose voices wererecorded in the tape and that the tape is government property which hadbeen issued to him by the government and that the tape recorder remainedwith him all the time and the tape recorder and tape record and the trans-cript Ex. P-1 had not been placed in the record room. It has to be noticedthat the respondent (RW 22) has admitted in his evidence that though hehad made several reports to the Election Commission and other electionauthorities before and after the election with which we are concerned inthis appeal he had not made any report against Public Witness 7.

[163] Shri Krishan (Public Witness 10) was the Sub-Divisional Officer, Rewariand Returning Officer for the Rewari constituency in the election held tothe Haryana Legislative Assembly in May 1982. In the course of his tourof the constituency after 10 a. m. on 19/05/1982 he reached Kalaka pollingstation at about 11 or 11.30 a. m. on receipt of a complaint from the pollingstation to the effect that the respondent along with some other personsintimidated the polling staff and the public at that polling station. He waswith Public Witness 7 when he reached Kalaka polling station and he found thepolling at a standstill at that time. When he reached Kalaka pollingstation the Station

House Officer of Sadar Rewari was present there alongwith a head constable and some other police personnel. The Deputycommissioner (Public Witness 7) conducted an enquiry and interrogated the pollingstaff and the police personnel and tape-recorded their conversation. Oneof the polling officers told Public Witness 10 that the polling agents were turnedout by the respondent and his companions and that a bundle of ballot paperswas taken away and the ballot papers were marked and put into the ballotboxes and that the voters who were in the polling booth were turned out. He found two motor cycles stranded near the polling station. It is seenfrom his evidence that he was transferred from the Rewari Sub-Divisionon 1/06/1982 and that a file had been handled in a way different fromthe one in which it had been handled until he handed over charge of hisoffice. He has denied the suggestion that the file was created in a particularmanner by insertion of some papers for fabricating evidence in favour ofthe appellants. It has to be noticed in this connection that the respondenthad complained (Ex. R-7 dated 4/05/1982) that Public Witness 10 is married in thelocality and was interfering with the election.

[164] On the other hand, it is the evidence of Roop Chand (RW 1) who was steno-typist in the Office of the Project Officer, Agricultural Department in Haryana and the alternate Presiding Officer in Kalaka pollingstation on 19/05/1982 that after the polling started at 7.30 a. m. Ajit Singh son of Rao Birendra Singh came to the polling station at about 8.30 a. m. armed with a rifle and accompanied by 15 or 20 persons and asked for therespondent's polling agent Tula Ram and that Ajit Singh's companionspushed Tula Ram out of the polling station. Ajit Singh remarked that thepolling at the Kalaka polling station had always been one sided and directedhis companions to poll votes. When the polling staff resisted, Ajit Singhabused RW 1 and others and asked his companions to beat them and theyslapped the polling staff. Ajit Singh's companions picked up some ballotpapers and tore them off from their counterfoils and put them into,theballot box for about one hour and left the polling station thereafter. Therespondent came to the polling station about one hour later and told thepresiding Officer (Public Witness 8) that he should not be partial to any party andhe came to know that his polling agent had been beaten and that bogusvotes had been polled in the polling station. Thereupon Public Witness 8 assured therespondent that he would not permit anything of that sort to be repeated. About half an hour after the departure of the respondent from the pollingstation many people of Kalaka village gathered at the polling station andproclaimed that they would poll votes forcibly. When RW 1 and othersresisted and collected the voting material those persons beat the polling staffand snatched the voting material and in the struggle which ensued Public Witness 8was dragged up to the door of the polling station and was rescued by thepoliceman on duty. Since the police

present in the polling station couldnot pursuade the crowd to disperse polling was stopped at about 10. 15 a. m. and PWs 7 and 10 arrived there subsequently and arranged for the pollingto restart after making the electors to stand in a queue. He has deniedthat Public Witness 7 asked for his name and profession and that he told him thathe was Roop Chand and a stenographer. He has stated that he asked Public Witness 8to record the visit of Ajit Singh and his companions into the polling stationand that Public Witness 8 told him that he has recorded it in his diary. The appellants'case regarding forcible polling by the respondent's companions at his instanceand the tape record was put to P-W 1 and has been denied by him. Hehas admitted that a few days after the election the police obtained an affi-davit from him on judicial stamp paper but he has denied that it was doneunder pressure of the respondent.

[165] Deen Dayal (RW 2) , a teacher was the polling officer along withdhani Ram (RW 4) who is also a teacher. He has stated that after thepolling at the Kalaka polling station went on peacefully for about an hourajit Singh, armed with apistol, came with 15 or 20 persons at about8.30 a. m. and entered Kalaka polling station forcibly and asked for thepolling agent of the respondent and told his companions to remove thatpolling agent out of the polling station whereupon two of his companionsforcibly removed him from there. Ajit Singh asked his companions to beatrw 2 and others and they were accordingly beaten, and Public Witness 8 told themto allow Ajit Singh's companions to do whatever they liked and thus avoidbeing beaten saying that he would make a complaint about the matter. Ajitsingh and his companions polled bogus votes for about half an hour andleft the polling station. The respondent came there half an hour later andtold RW 8 that he had been informed that his polling agent had been beatenand that bogus votes had been polled and protested against it to Public Witness 8. PW 8 told the respondent that whatever had happened had happened andthat he would conduct the poll in a proper manner thereafter. About halfan hour after the respondent left the place the people of Kalaka village camein a crowd and entered the polling station and told the polling staff that theywould poll votes forcibly in favour of Sumitra Devi. When the pollingstaff refused to act according to their desire they beat them and tried tosnatch the ballot box from RW 4. Meanwhile, constable Mohinder Singh, (RW 3) came inside the polling station and wrested the ballot box from thecrowd and placed it at its original place. Soon thereafter a Sub-Inspectorof Police and some other constables came and tried to remove the crowdfrom the polling station. About half an hour later Public Witness 10 came there andleft the place after talking with Public Witness 8. Public Witness 7 came there about half an hourthereafter and directed Public Witness 8 and the polling staff to conduct the pollingproperly and the polling started again at about 12

noon. He has stated inhis cross-examination that he did not make any report either to the police orto PWs 7 and 10 though slaps and fist blows had been given to him by themiscreants but he asked Public Witness 8 after PWs 7 and 10 left the place as to whe-ther he had reported about the maltreatment meted out to polling officersand he answered in the affirmative. He has stated that Public Witness 7 talked onlyto Public Witness 8 and to no other polling staff and did not tape-record any conversa-tion in his presence and that he does not know if Public Witness 7 had talked with thepolice constable who was posted at the polling station. He has denied thatajit Singh had not come to the polling station at all and that no incidentof the kind stated by him took place in the polling station.

[166] Mohinder Singh (RW 3) who was on duty as a police constableat Kalaka polling station on 19/05/1982 has stated that "bout half anhour after the polling started at 7.30 a. m. he heard shouts that Ajit Singhhad come and saw Ajit Singh, armed with a pistol, coming into the pollingstation along with 15 or 20 persons and that in spite of the fact that heobstructed 2 or 3 companions of Ajit Singh, pushed the respondent's pollingagent out of the polling station and started beating him and he rescued him. He has also stated that he does not know what Ajit Singh and his companionsdid inside the polling station where they remained for about 30 to 45minutes and that the respondent came there by a motor car with 2 or 3persons about half an hour after Ajit Singh and his companions left theplace and left the place 2 or 3 minutes later after going inside the pollingstation. He has further stated that about half an hour thereafter about 50to 60 persons came from Kalaka village and entered the polling stationforcibly and snatched the ballot boxes after beating the polling staff andthey were turned out of the polling station by Sub-Inspector, Deep Chandand some police constables who arrived there some time later. He has statedthat Public Witness 10 came there about 30 or 45 minutes thereafter and left the placeafter talking with Public Witness 8 and that Public Witness 7 arrived there about 30 to 45 minutesafter Public Witness 10 left the place and talked to the polling staff and arranged for thepolling starting again at about 12 noon. He has denied in his cross-examina-tion that Public Witness 7 had any talk with him in the polling station and has statedthat he did not make any report about the incident or the treatment metedout to him by Ajit Singh and his companions though the respondent's pollingagent was bleeding and his clothes were torn. He has denied that thevoice recorded in the tape (Ex. Public Witness 7/1) put to him is his voice and alsothat Public Witness 7 interrogated him and he made a statement. The appellants'case of forcible polling by the respondent's men was put to RW 3 and hasbeen denied by him.

[167] The evidence of RW 4 is more or less the same as that of RWs 1to 3 as regards

the alleged forcible polling of bogus votes by Ajit Singh andhis companions. He too has stated that at the instance of Public Witness 7 who arrivedthere about half an hour after Public Witness 10 left the place after talking to Public Witness 8the polling started again. He has admitted in his cross-examination thatpw 8 had some conversation with PWs 7 and 10 but he has denied thatthe respondent came to the polling station armed with a revolver and accom-panied by 15 to 20 persons and got some votes polled at gunpoint and ranaway along with his companions on the arrival of the police and thevillagers.

[168] Ram Krishan (RW 5) , the brother of the respondent's pollingagent Tula Ram who has not been called as a witness admittedly supportedthe respondent in the election held in May 1982. He has stated that hewent to the polling station for casting his vote at about 7.30 a. m. when thepolling started and that Ajit Singh, armed with a pistol, came to the pollingstation at about 8.30 a. m. accompanied by 40 or 50 persons and entered thepolling station with 15 or 20 persons. Some persons who entered the pollingstation along with Ajit Singh dragged Tula Ram out of the polling stationand beat him and when he intervened they started beating him also as aresult of which his clothes got torn and he was rescued by the police con-stable (RW 3). He went with his brother by his scooter to Rewari andreported to the respondent about the incident and leaving Tula Ramat Rewari he came along with the respondent and 2 or 3 other persons bya motor car to Kalaka village where the respondent went into the pollingstation and left the place 5 or 7 minutes later for Rewari. He has statedin his cross-examination that both himself and his brother Tula Ram bledfrom different parts of the bodies because of the injuries sustained by themand that they did not however get themselves medically examined or makeany complaint to any authority because there were only abrasions fromwhich there was some bleeding. It is seen from his evidence that Tula Ramwho has not been examined is alive and is in service as a clerk in somedepartment at Chandigarh where the election petition was tried.

[169] Suresh (RW 6) has stated that when he reached Kalaka pollingstation at 8.30 a. m. in May 1982 Ajit Singh, armed with a revolver, camethere with 40 to 50 persons and went inside the polling station with about15 to 20 persons. The respondent's polling agent Tula Ram was draggedout of the polling station and beaten. When RW 5 rushed for his help hetoo was beaten and was rescued,by a police constable who was on duty atthe polling station. The respondent came there by a car about half an hourafter Ajit Singh and his companions left the place and went away afterremaining in the polling station for about 5 or 6 minutes. The appellants'case of forcible polling by the respondent's men had been put to RW 6and denied by him. He too has stated in his cross-examination that PWs 7and 10 came to the polling station after the respondent

left the place andthat on their intervention polling restarted and the people started forminga queue and he himself cast his vote thereafter.

[170] The respondent RW 22 has stated that when he was in his houseat Rewari on 19/05/1982 after deciding not to go out of the house onthat day RW 5 and his polling agent Tula Ram came there at 8.45 a. m. from Kalaka polling station with their clothes torn and appearing to havebeen beaten badly and told him that Ajit Singh accompanied by 50 or 60persons entered the polling station and beat them and indulged in forciblepolling and that he thereupon went by a car to Kalaka village along withrw 5 at about 9.15 or 9.30 a. m. on that day. Leaving his car at somedistance he walked to the polling station and found 50 or 60 villagerscollected there and he entered the polling station and protested to Public Witness 8and brought the complaint given to him by RW 5 and Tula Ram to hisnotice. After Public Witness 8 assured him that nothing of that sort will be allowed tohappen in the remaining part of the day he returned from Kalaka 7 or 8minutes later and sent a written report to the police about the incident withcopies to Public Witness 7 and the election authorities and received a message fromthe police station at 10. 30 a. m. that his complaint had been flashed topw 7 by wireless message and that appropriate action was expected to betaken soon. He has further stated that in his letter Ex. R-7 dated 4/05/1982 he requested for the appointment of an observer because of officialinterference and had stated that Public Witness 10 was married in that area and wasinterfering in the election. He has stated in his cross-examination that FIRNo. 103 of 1982 was concocted at a later stage at the instance of Rao Birendrasingh. He was the Speaker of Haryana Legislative Assembly until thethe first meeting of the newly constituted Legislative Assembly was heldafter the election held on 19/05/1982 and after having succeeded in theelection as a Congress (J) candidate he joined the Congress (I) Party andis now the Transport Minister. He has admitted that he has not made anymention in any of his complaints sent to the Chief Election Commissionerand other election authorities prior to 19/05/1982 that Public Witness 7 was actingin any way against him in a prejudicial manner. He has admitted that hehas not stated in his written statement that he complained to the police inwriting about the incident in Kalaka polling station and had sent copiesthereof to the Election Commissioner and Public Witness 7. He has stated that hedid not make any complaint naming Ajit Singh specifically about the incidentat Kalaka because the picture was not clear to him at that time and notbecause such an incident never happened. The appellants' case of booth-capturing and bogus polling by the respondent in Kalaka polling stationhad been put to RW 22 and denied by him. The tape record (Ex. Public Witness 7/1) was played before him and he has stated that it does not contain his voiceand that it is rather the voice of Rao Birendra Singh.

[171] The oral evidence of RWs 1 to 6 that Ajit Singh came alongwith some of his companions and dragged out Tula Ram from Kalaka pollingstation and beat him and that they snatched ballot papers and ballot boxesand got bogus votes polled in that polling station and the evidence ofrw 22 that RW 5 and Tula Ram came and told him that Ajit Singhaccompanied by 50 or 60 persons entered the polling station and beat themand indulged in forcible polling cannot be accepted for two importantreasons, namely, that no such plea has been put forward in the writtenstatement of the respondent where no doubt he has stated vaguely that themen of Rao Birendra Singh captured the booth at Kaiaka and the suppor-ters and voters of the respondent were badly out-manoeuvred and it couldbe gathered from the fact that whereas Sumitra Devi had obtained 484 voteshe had obtained only 53 votes in that polling station and not that Ajit Singhand his companions came to Kalaka polling station and indulged in forciblevoting or that they beat RW 5 and his brother Tula Ram. The respondenthas denied in his written statement that the process of polling got disruptedfor over an hour at Kalaka polling station and that a number of voters hadto refrain from casting their votes; but, as mentioned above it has beenadmitted by RWs 1 to 4 that the polling was suspended at Kalaka pollingstation on 19/05/1982 and that it restarted after the arrival of PWs 7 and10 at the polling station some time after the departure of the respondent andhis companions. Though the case of the respondent that there was forciblepolling at the Kalaka polling station by Ajit Singh and his men cannot beaccepted for want of any such plea in the written statement Mr Sibal wasjustified in requesting the court to accept the admission on the part of therespondent's witnesses that there was forcible polling at the Kalaka pollingstation in the morning of 19/05/1982 and that the polling got disruptedas a consequence thereof and that it was recommenced after the arrival ofpws 7 and 10 and to reject their evidence that Ajit Singh and his men werethe cause.

[172] Under Instruction 74 of Instructions to Presiding Officers issuedby the Election Commission of India, extracted above, the Presiding Officeris bound to draw up the proceedings connected with the taking of the pollin the polling station in the diary to be maintained for the purpose in theform in which Ex. P-5 had been filled up by the Presiding Officer (Public Witness 8). The Presiding Officer is directed by the instruction to go on recording therelevant events as and when they occur and not to postpone the completionand filling of all the entries in the diary to the completion of the poll and hehas to mention therein all the important events. Even the alternatepresiding Officer (Public Witness 1) has stated in his evidence that the Presiding Officer (PW 8) told him that it was his duty to report about the incident and hewould do so. It is seen from column 18 of Ex. P-5 relating to the numberof votes polled that 195 votes were polled from 8 a. m.

to 10 a. m. , 205 from12 noon to 2 p. m. , 106+3 from 2 p. m. to 4 p. m. and so on up to 4.30 p. m. and that in the disputed period from 10 a. m. to 12 noon only 51 votes werepolled. In column 21 it is Stated that the polling was interrupted anddisrupted by rioting and open violence and that from 10. 30 a. m. to 11.30 a. m. the respondent put pressure on the polling party and got 25/26 bogus votespolled in his favour and there was a lot of noise and commotion outside. In column 22 relating to the question whether the poll was vitiated by anyballot paper being unlawfully marked by any person and deposited in theballot box it is stated that 4 or 5 persons who came with the respondentsnatched ballot papers and forcibly put them into the ballot boxes. Thepresiding Officer (Public Witness 8) who has deposed about the incident has stated inhis evidence that Ex. P-5 is the diary which he submitted after the poll,that it was prepared and signed by him and is correct and that he depositedit along with the other records in the election office. As stated earlier, whathas been elicited in his cross-examination is that apart from crossing column20 (E) relating to intimidation of voters and other persons he has not men-tioned anything in that -column and that he failed to fill up that column infull because he was very much perturbed, at that time. It has not beensuggested to Public Witness 8 that he had prepared Ex. P-5 later under the pressure andinfluence of the defeated candidate Sumitra Devi through her brotherrao Birendra Singh. Nor is there any positive evidence to that effect onthe side of the respondent. Therefore, it is not known on what basis thelearned trial Judge has observed in his judgment that Ex. P-5 appears tohave been made up by Public Witness 8 under the pressure and influence of the defeatedcandidate Sumitra Devi through her brother Rao Birendra Singh. In theabsence of any material on record or even a suggestion to that effect to thepresiding Officer (Public Witness 8) who has stated that he filled it up correctly anddeposited it along with the other records in the election office it is notpossible to agree with the view of the learned trial Judge that Ex. P-5 hasbeen got up later by Public Witness 8 under the pressure and influence of the defeatedcandidate Sumitra Devi through her brother Rao Birendra Singh. Ex. P-5,a contemporaneous document prepared by the Presiding Officer (Public Witness 8) asrequired by Instruction 74 (supra) and deposited by him in the electionoffice after the poll was over along with the other records is a very valuablepiece of documentary evidence corroborating the oral evidence of thepresiding Officer (Public Witness 8) and other witnesses examined on the side of theappellants who have deposed about the first part of the incident in thekalaka polling station.

[173] The next contemporaneous document corroborating the oralevidence of Public Witness 8 is the copy of the report of Public Witness 8 to the police appendedto FIR No.

103 of 1982, Ex. P-6 dated 19/05/1982, prepared by theassistant Sub-Inspector of Police, Public Witness 9 on receipt of a rukka from the Sub-Inspector of Police, Deep Chand. Public Witness 9 has stated that it is in his hand-writing and correct according to the material on the basis of which it wasregistered. As stated earlier, Public Witness 9 has not been cross-examined as reward'sthe FIR contained in Ex. P-6. The learned trial Judge has rejected Ex. P-6as being inadmissible in evidence for corroborating the evidence of Public Witness 8about the incident in Kalaka polling station on the ground that the originalreport of Public Witness 8 to the police had not been summoned by the appellants. It is no doubt true that the original had not been summoned by the appel-lants before PWs 8 and 9 deposed about Ex. P-6 in their evidence. Public Witness 8has stated in his evidence that when he was writing the report soon afterthe Sub-Inspector of Police came to the polling station after the respondentand his companions had left the place, PWs 7 and 10 accompanied bysuperintendent of Police came there and that after completing that reporthe got it signed by the polling officials and handed it over the police officerand he recorded his statement. It is stated in the copy of Public Witness 8's complaintto the police appended to Ex. P-6 that at about 10. 30 a. m. when the pollingwas going on smoothly the respondent came into the polling station, armedwith a small pistol and accompanied by 4 or 5 persons, one of them armedwith a sword and the others with sticks, and buried abuses and forciblypolled about 25/26 ballot papers at gunpoint on account of which Public Witness 8could not stop them from doing so. He also stated that the polling staffwas threatened with danger to their lives and, therefore, they kept standingthere for some time and that the companions of the respondent draggedthe polling agent (Public Witness 17) of Sumitra Devi and appropriate action may betaken by the police. It is seen from tlie record that the appellants hadtaken steps to summon FIR No. 103 of 1982 dated 19/05/1982 and thehead constable of Sadar Rewari police station to prove the incident atkalaka. The record further shows that the respondent also had applied forsummoning the orders of court disposing of FIR No. 103 of 1982 as alsofir No. 104 of 1982 to which reference will be made in the course of thediscussion relating to the incident at Burthal Jat polling station. The res-pondent had also applied for summoning the Inspector of Police, Kedarsingh to appear with the relevant records showing the disposal of the abovetwo FIRs. But subsequently he filed CMP31 (E) of 1983 for substitutinganother person in the place of Inspector Kedar Singh and though thatpetition was opposed by the appellants the trial court allowed the petitionon the same day i. e. 21/02/1983 itself. The appellants also hadfiled CMP 41 (E) of 1983 for summoning the file relating 'to those two FIRsfrom Sadar Rewari police station. That application was dismissed by thelearned trial Judge on 2/02/1983. Thus it is seen that the appel-lants who had no doubt not taken steps for summoning the

original com-plaint given by Public Witness 8 to the police at the Kalaka polling station in the firstinstance, probably because the respondent himself had originally sought theproduction of the relative records from the police station had later takennecessary steps to summon the original complaint as also to recall Public Witness 6 fordeposing about that fact. In these circumstances, I find that the necessaryfoundation must be held to have been laid for adducing secondary evidenceby way of the copy appended to FIR No. 103 of 1982 (Ex. P-6) and thatthe appellants are therefore entitled to adduce secondary evidence of thecontents of that complaint. The complaint of Public Witness 8 to the police givenimmediately after the incident was over and soon after, the arrival of thepolice personnel and the officials PWs 7 and 10 and the Superintendent ofpolice is another contemporaneous document and a valuable piece ofdocumentary evidence corroborating the evidence of Public Witness 8 and otherwitnesses examined on the side of the appellants to prove the first part ofthe incident in the Kalaka polling station.

[174] The third piece of documentary evidence let in by the appellantsfor proving the first part of the incident in the Kalaka polling station is thetape record (Ex. Public Witness 7/1) of which Ex. P-1 is a transcript prepared underthe instructions and mostly in the presence of Public Witness 7 by his stenographer. PW 7 has stated in his evidence that inside the polling station at Kalaka hetape-recorded the version given by the officers. about the incident in thatpolling station in Ex. Public Witness 7/1, and he compared the transcript (Ex. P-1) prepared by his stenographer with the original and found it to be a correctreproduction of the original, and he has authenticated it by signing it andthat there are some gaps in Ex. P-1 as the voices in the tape were not clearand audible. He has also stated that the tape recorder which had beensupplied to him by the government, the tape Ex. Public Witness 7/1 and the transcriptex. P-l remained in his custody throughout and had not been deposited byhim in the election office. He has not been questioned as to why he retainedthe tape, the tape recorder and the transcript in his custody without depositing them in the election office. Therefore, no adverse inference can bedrawn against Public Witness 7 or the appellants from the fact that the tape, the taperecorder and the transcript had not been deposited by PW. 7 in the electionoffice. No suggestion has been made to Public Witness 7 in cross-examination that hehad in any way tampered with the tape record (Ex. Public Witness 7/1) and he hasstated in his examination in chief that a portion of the tape relating to theincident at Burthal Jat polling station has been erased inadvertently byhis own voice. The learned trial Judge has rejected the tape record (Ex. Public Witness 7/1) holding (1) that it is tampered with later, disbelieving theevidence of Public Witness 7 that a portion of what he had recorded at the Burthaljat polling station was erased by his own voice inadvertently on the sameday and (2) that the authenticity of the transcript (Ex. P-1) has

not beenproved with definiteness. It is not reasonable to reject the tape merelybecause some portions thereof could not be made out on account of noiseand interference not only outside but also inside the polling station whenwhat was being elicited by Public Witness 7 from the polling officers and the policeman (RW 3) was being recorded. In R. v. Maqsud Ali tape-recorded conversation of the two accused in a murder case has been held to be admissible inevidence for the purpose of proving the guilt of the accused and it has beenobserved that the tape-recording was a matter of the utmost importance andthat it is indeed the highly important piece of evidence which the defencestrenuously sought to keep out. In R. v. Robson in which reference hasbeen made to R. v. Maqsud Ali tape-recording had been held to be admissible in the case in which the accused was charged with corruption, rejectingthe plea of the defence that it was inadmissible inter alia because in manyplaces it was unintelligible though It was however not contended that thetape-recording was as such inadmissible in evidence of what was recordedon it.

[175] It is clear from these and the other decisions of this court referredto supra that tape-recorded evidence is admissible provided that the originalityand the authenticity of the tape are free from doubt. In the present casethere is no valid reason to doubt them. In N. Sri Rama Reddy v. V. V. Girireferred to above a bench of five learned Judges of this court has held thatthe contemporaneous dialogue tape-recorded in that case formed part of resgestae and that it is relevant and admissible under S. 7 and 8 of theevidence Act. If it is res gestae it is admissible, in evidence even undersection 6 of the Evidence Act Illustration (a) whereof reads thus :a is accused of the murder of B by beating him. Whatever wassaid or done by A or B or the bystanders at the beating, or so shortlybefore or after it as to form part of the transaction, is a relevantfact.

[176] The following passage in regard to incidents forming part of theres gestae is found in para 509 of Halsbury's Laws of England :

> There are many incidents, however, which, though not strictlyconstituting a fact in issue, may yet be regarded as forming a part of it,in the sense that they closely accompany and explain that fact. Intestifying to tlie matters in issue, therefore, witnesses must state themnot in their barest possible form, but with a reasonable fulness of detailand circumstance. These constituent or accompanying incidents aresaid to be admissible as forming part of the res gestae. When theyconsist of declarations accompanying an act they are subject to threequalifications: (1) they must be contemporaneous or almost contem-poraneous with the fact in issue and must not be made at such an

inter-val as to allow of fabrication or to reduce them to the mere narrativeof a past event though this is subject to apparent exceptions in the caseof continuing "facts; (2) they must relate to and explain the act theyaccompany, and not independent facts prior or subsequent thereto;and (3) though admissible to explain, they are not always taken asproof of the truth of the matters stated, that is, as hearsay.

[177] Public Witness 7 has stated in his evidence that the voice of Public Witness 8 whowas the Presiding Officer at Kalaka polling station is recorded in the tape,that the tape contains also the conversation of the alternate Presidingofficer, Roop Chand (RW 1) and that the voice of the constable Mohindersingh (RW 3) who was on duty at the polling station and had made acomplaint to him is also recorded in the tape. It is true that he hasadmitted in his cross-examination that he cannot identify the voice withany of the persons mentioned by him. The transcript of the tape Ex. (PW 7/1) after it had been re-recorded in a larger tape with the help ofa more sophisticated instrument in this court was prepared by this courtand some portions thereof has been admitted by RW 22 to be in his voiceand he has recognised in the larger iape the voice of even Public Witness 7 in someportions of the conversation which admittedly took place between himand Public Witness 7 in the office of RW 10 at about 7.30 p. m. on 19/05/1982. Itis seen from the transcript that someone had anwsered the question aboutwhat his name and number were and that one Mohinder Singh hadanswered saying that his name and number were Mohinder Singh and 498which tally with those of RW 3. In the answer to question as to howmany persons came inside the polling station Mohinder Singh had statedthat four persons came inside and 20 to 30 persons were remaining outsideand there were also 5 or 6 vehicles. In answer to the question whether hehad seen arms or ammunitions in the hands of those persons who stood outsideand of those four persons who entered the polling station Mohinder Singh hadstated that perhaps Colonel Sahib, referring to the respondent, was armed witha gun while some persons were armed with swords and some 2 or 3 personswere armed with lathis. It is further seen that in answer to the question as towhat he was and what was his name one Rup Chand had informed the ques-tioner that he was Roop Chand and a stenographer in the Project Office of theagricultural Department in Haryana. These particulars tally with thoseof RW 1. It is seen from the tape that Public Witness 17 had also answered certainquestions saying inter alia that he was Amar Singh, polling agent of thecongress (1) candidate and that there were 5 or 6 vehicles with a numberof persons in them. It is also seen from the tape that during the courseof conversation between the respondent and Public Witness 7 at the office of Public Witness 10the fact that Public Witness 7 had gone to Kalaka

polling station immediately afterthe respondent and others left the place and that he got the statementstape-recorded there was mentioned by Public Witness 7 to the respondent. In thesecircumstances great reliance has to be placed on the tape (Ex. Public Witness 7/1) and its contents not only for corroborating the evidence of PWs 7 and 8to the extent they go but also as res gestae evidence of the first part of theincident. The learned trial Judge was not justified in rejecting thetape record (Ex. Public Witness 7/1) and the transcript (Ex. P-1). It must beremembered that the respondent who had openly disowned any partof the tape as containing his voice and had, on the other hand, goneto the extent of saying in the trial court that it rather contained the voiceof Rao Birendra Singh has admitted in this court portions of that tapeas being in his voice and that he has stated that he cannot identify anyvoice other than those of himself and Public Witness 7.

[178] Coming now to Ex. P-2, Public Witness 7 has stated in that report thataround 10. 30 a. m. when he was proceeding by his car between Manodolaand Zainabad villages lie received a message on the police wireless that inrewari constituency the Congress (J) candidate had complained thatabout 50 to 60 Congress (1) workers had attacked his workers in Kalakavillage. He immediately directed the Station House Officer of Sadarrewari to rush to the village. At 1 1.35 a. m. he received a message on thepolice wireless that villagers had refused to vote in Kalaka alleging thatcongress (J) workers had polled some bogus votes in Kalaka pollingstation. Therefore, he proceeded to Kalaka polling station and interrogatedthe Presiding Officer and the polling officers of the polling station andrecorded the conversation in his tape recorder. When he was told thatcongress (J) workers came into the polling station and snatched ballotpapers from the polling staff and polled them in favour of the respondent,he advised the polling officer to accept tendered votes from the electors ifthey came to the polling station for voting and he thereafter went to Burthaljat. This report submitted by Public Witness 7 some lime after the results of thepoll were announced corroborates the evidence of Public Witness 7 about what he didat the polling station soon after he went there ,on receipt of a wirelessmessage about the polling of bogus votes in favour of tlie respondent.

[179] With respect to the office which lie holds, the respondent, as aparty and his own witness, is wholly unreliable. In his written statementhe had vaguely alleged that the men of Rao Birendra Singh capturedthe booth at Kalaka and the supporters and voters of the respondentwere badly out-manoeuvred and that the said fact could be gathered fromthe fact that whereas Sumitra Devi had obtained 484 votes he had obtainedonly 53 votes in that polling station. The only suggestion made to PWs12 and 17 who have

denied it is that Ajit Singh visited the Kaiaka pollingstation. No suggestion was made to any of the witnesses examined on theside of the appellants in the cross-examination that Ajit Singh camearmed with some armed companions and beat RW 5 and Tula Ram anddragged them out and that they forcibly polled bogus votes. Such a casewas projected by the respondent only after the respondent started to letin oral evidence on his side after the appellants had closed their evidence. In these circumstances, when questioned as to why he had not made anycomplaint naming Ajit Singh specifically for the incident at Kaiaka RW 22has stated in his evidence that it is not because such an incident neverhappened but because the picture was not clear at that time. It is impossibleto accept this explanation of RW 22, for the polling took place on 19/05/1982 and the respondent filed his written statement in the election petitionlong thereafter on 14/09/1932. If, as the respondent would haveit, Tula Ram and RW 5 came to his residence at Rewari in the morningof 19/05/1982 and informed him about the incident at the Kaiakapolling station and thereafter he went there and complained to Public Witness 8 aboutit, he should have come to know about the details of the incident beforehe filed his written statement long thereafter on 14/09/1982. Ifby 14/09/1982 the picture of what happened at the Kalaka pollingstation on 19/05/1982 was not clear it is not known how it would havebecome clear only after appellants had closed their evidence and justbefore the respondent began to let in oral evidence on his side. Therefore,the explanation of RW 22 that he had not named Ajit Singh specificallyin relation to the incident at the Kaiaka polling station not because itnever happened in the manner stated by his witnesses but because tliepicture was not clear at that time cannot be accepted at all.

[180] Rw 22 had stoutly denied in the trial court that the tape record (Ex. Public Witness 7/1) contained his voice but added that it is rather the voice of Rao Birendra Singh. But after the tape was re-recorded with the aid of a more sophisticated instrument by playing it in this court in the presenceof the respondent in the office and also in the open court, RW 22 hasadmitted some portions of his conversation with RW 7 in the office ofpw 10 at about 7 or 7.30 a. m. on 19/05/1982. In the cross-examinationmade in this court after RW 22 had heard the re-recorded larger tapebeing played in the court RW 22 has stated that he could not recognisethe voice of any person in the tape other than those of himself and Public Witness 7. If the tape used by Public Witness 7 for recording the conversation could not befollowed and understood clearly when it was played in the trial courtwith the very same instrument by which it was recorded what RW 22could have said was that he cannot say whether it contains his voice buthe could not have gone to the extent of saying that it does not contain hisvoice but it rather contains the voice of Rao Birendra Singh. This alsoshows that the evidence of RW 22 is not reliable.

[181] In his cross-examination in this court RW 22 has stated thathe was the Speaker of the Haryana Legislative Assembly until the newlegislative Assembly met after the elections in May 1982 and could thereforehave summoned any officer to his office and he did not go to the police stationon 19/05/1982 and he is quite positive about it. But in the later portionof his evidence in this court he has stated that not only his admissionof the transcript of the tape (Ex. P-1) to the effect that he went to the policestation but also his written statement that he did not go to the police stationon 19/05/1982 are both correct and that he would emphasize that he didnot go to the police station at all on that day. He has also stated thatalthough the voice in the tape says that he went to the police station andthat voice appears to be his own voice he did not go to the police stationbecause he was the Speaker of the Haryana Legislative Assembly on thatday and could have summoned any police officer to his office. However,it is his own evidence that he did go to the office of Public Witness 10 to meet Public Witness 7at about 7 or 7.30 p. m. on 19/05/1982. This also shows that the evidenceof RW 22 is not reliable.

[182] Rw 22 has admitted the voice in the tape that when Public Witness 7 askedhim about when he received the message about the incident at Kalakapolling station he answered by saying that it was about 11.30 a. m. and thatit is correctly recorded in the tape. It is seen from the transcript that therespondent had stated in that conversation that he thereafter went to thekalaka polling station and questioned his men as to whether they were notashamed that two or three 'chaps' belonging to the same village had beenbeaten. However, he would say in his evidence that he went to Kalakaonly once on 19/05/1982 and that it was about 9 or 9.30 a. m. There isabundant unimpeachable evidence on the side of the appellants to show thatthe respondent, armed with a rifle, visited Kalaka polling station accom-panied by some armed persons at about 11.30 a. m. or 12 noon, and indulgedin the polling of bogus votes. Public Witness 7 had stated in the course of his tape-recorded conversation with the respondent in the office of Public Witness 10 at about 7or 7.30 p. m. on 19/05/1982 that he visited Kalaka polling station soonafter the respondent had left that place. RW 22 has adnutted in his cross-examination in this court that the statement of Public Witness 7 that he was there atabout 12 noon or 12. 05 p. m. refers to Kalaka polling station and thatpw 7 told him that the Presiding Officer told him a different story about theincident which took place in that polling station. It is, therefore, clearthat the respondent has attempted to make a futile effort to show that hevisited the Kalaka polling station with RW 5 and others only at about 9 or9.30 a. m. on 19/05/1982 and not at the time of the first part of theincident alleged by the appellants.

[183] The written statement is silent on the question whether therespondent visited Kalaka polling station on 19/05/1982 except a meredenial. The respondent unsuccessfully attempted to file an additional oramended written statement to the effect inter alia that he had decided notto move out of his house and had not gone out of his house on 19/05/1982. This portion of the additional or amended written statement which had notbeen received by the court was put to him in cross-examination by Mr Sibal. RW 22 had stated that there appears to be a typing error in that statementthat he did not move out of his house on that day and that what he meantto say was that as a consequence of the assurance of his supporters that hewas going to succeed he acceded to their wish and had decided not to moveout of his house on that day. He would say that he did not read thatamended written statement and had no sufficient time to read it properlybut that he did not give specific instructions to his counsel on that matterand was told by his supporters not to move out of his house on 19/05/1982and that the fact that he went to Kalaka village on 19/05/1982 is notmentioned in that amended written statement though in spite of deciding notto move out of his house on that day he did go to Kalaka village on thatday. This also shows that the evidence of RW 22 is not reliable.

[184] In the election petition it is alleged in relation to the incident at the Burthal Jat polling station that Anil Kamar and Satbir Singh are the relatives of the respondent. There is no denial much less any specific denial of this allegation in the written statement of the respondent though it is a material fact which ought to have been denied specifically if it was not admitted. Therefore, under Order 8 Rule 5 of the Code of Civil Procedure which applies to proceedings in election petitions it must be deemed to have been admitted by the respondent. Order 8 Rule 5 reads :

> Every allegation of fact in the plaint, if not denied specifically orby necessary implication, or stated to be not admitted in the pleading ofthe defendant, shall be taken to be admitted except as against a personunder disability:
>
> Provided that the court may in its discretion require any fact soadmitted to be proved otherwise than by such admission. But during the trial RW 22 had repeatedly denied that Anil Kumar andsatbir Singh were in any way related to him though in a portion of hisevidence he would say that Satbir Singh is the adopted son of Jagmal Singh,father of his wife who was divorced in 1962 and that lie does not know ifanil Kumar is the brother of his brother-in-law, Surinder Kumar and hecould not deny or admit that he is the brother of his

brother-in-law,surinder Kumar as Surinder Kumar has 6 or 7 brothers. He has statedthat he does not know whether Anil Kumar and Satbir Singh are the twopersons who were arrested in Burthaljat,village on 19/05/1982 for offencesunder S. 107 and 151 of the Code of Criminal Procedure and that hehad not exhibited grave concern about Anil Kumar and Satbir Singh in thecourse of his conversation with Public Witness 7 in the office of Public Witness 10 at 7 or 7.30 p. m. on 19/05/1982 or told Public Witness 7 that they were his relatives. But in his cross-examination in this court he has admitted that Anil Kumar and Satbirsingh had been arrested by the police at the instance of Public Witness 7 at the Burthaljat polling station on 19/05/1982 and that he had referred to them as hisrelations only because Public Witness 7 had not taken any steps in spite of his repeatedrepresentation in regard to the arrest of those two persons. It is not possibleto accept the evidence of RW 22 that because no steps were taken by Public Witness 7on his repeated requests for the release of Anil Kumar and Satbir Singh hetold Public Witness 7 that they were his close relatives, for he had admitted in hisevidence in this court that lie would have left no stone unturned if hispartymen and workers were harassed even though they may not be hisrelatives. It appears from this portion of the evidence of RW 22 that itwould have been unnecessary for him to claim Anil Kumar and Satbir Singhto be his close relatives merely to prevent them from being harassed by thepolice after their arrest on 19/05/1982. He has stated in his evidence inthis court that because he was told by his workers that two of his relativeshad been arrested and their identity was not clear to him when he had theconversation with Public Witness 7 in the office of Public Witness 10 on 19/05/1982 he referredto them in the course of his conversation as his relatives. He has also slatedthat it is only after Public Witness 7 mentioned their names and identity that he knewthat they were Anil Kumar and Satbir Singh and that they were not hisrelatives. In the subsequent portion of his evidence, he has stated that hehad never deposed in this court that Public Witness 7 mentioned the name of Anilkumar to him. In another portion of his evidence in cross-examination inthis court he has admitted that the statement in that conversation that hetold Public Witness 7 that Anil Kumar and Satbir Singh were his relatives is correct. Thus, it is seen that RW 22 has given varying versions on the questionwhether Anil Kumar and Satbir Singh were his relatives or not though hehad admittedly informed Public Witness 7 in the course of his conversation with him inthe office Public

Witness 10 on 19/05/1982 'that they were his close relatives. Thisalso shows that the evidence of RW 22 is not reliable.

[185] The evidence of the private witnesses examined by the appellantsto depose about the first part of the incident in the Kalaka polling station isfully corroborated by the evidence of the Presiding Officer (PW 8) andreceives ample corroboration from the evidence of PWs 7 and 10. Theirevidence is corroborated by the reliable and contemporaneous documentaryevidence by way ofe\\s. P-5, P-6 and the the tape record Ex. Public Witness 7/1 whichare unimpeachable and also by what has been stated by Public Witness 7 in his report (Ex. P-2) submitted by him to the government some time after the resultsof the election held in May 1982 were announced. Therefore, I reject theevidence of the respondent and the other witnesses who have deposed on hisside in regard to this part of the incident in the Kalaka polling station andaccept the evidence of Public Witness 8 and other witnesses who have deposedabout the same on the side of the appellants-election petitionersand hold that the appellants have proved satisfactorily and beyondreasonable doubt the first part of the incident in Kalaka pollingstation, namely, that the respondent went armed with a rifle with25 or 30 companions and entered the polling station with 4 or 5 armedcompanions and threatened the Presiding Officer (Public Witness 8) and othersincluding the polling agents who were present in the polling station with theuse of force and got some ballot papers marked in favour of the respondentpolled forcibly by his companions in the ballot box and that they left thepolling station on seeing the villagers of Kalaka and police personnel comingtowards the Kalaka polling station. There is no doubt that there issome discrepancy in the evidence regarding the time of the incident. But itis not a material discrepancy.

[186] I shall now consider the evidence relating to the second part of the incident at the Kalaka polling station.

[187] Mr Sibal did not press the case of the appellants regarding thesecond part of the. incident at the Kalaka polling station in his principalargument but he pressed that portion of the appellants' case after Mr Raocontended in the course of his argument that what is alleged to have happenedinside the polling station, even if true, will not constitute any corruptpractice but would amount only to an electoral offence. Regarding this partof the case there is the evidence of Tara Chand (Public Witness 12) , Sheo Ghand (PW 13) , Puran (Public Witness 14) , Inder Singh (Public Witness 16) and Mangal Singh (Public Witness 18) on the side of the appellants. Gur Dial who has been referred to in theelection petition in this connection was tendered as Public Witness 15 for cross-

examination but he has not been cross-examined by the learned counsel for therespondent. Public Witness 12 who was one of the electors and the polling agent ofsumitra Bai in the election with which we are concerned at the Kalakapolling station has stated that when he was arranging the electors to stand ina queue for the purpose of voting, the respondent came there with 60 or 70persons at about 10. 30 a. m. , the respondent armed with a gun while some ofhis companions were armed with swords, pistols and sticks. The respondentand his companions threatened PWs 14, 15, 17 and others including Kesarlal who had come to the polling station for the purpose of casting theirvotes and asked them to go away from there and they consequently ran awayfrom the polling station. Amongst the respondent's companions who did sopw 12 knows only Desh Raj, Krishan Lal and Ram Krishan (RW 5) ofkalaka and Balbir Singh, Raghubir Singh and Umrao Singh. Public Witness 12 hasnot been seriously examined on this portion of his evidence. What has beenelicited in his cross-examination is that he was the polling agent of Congress (1) candidates even in the earlier elections and he had canvassed for thecongress (1) candidate in the election with which we are concerned for 5 or10 days and that he reported to the police after the completion of the pollbut the police did not send for anybody on that complaint.

[188] Public Witness 13 has stated that when he was standing in the queue await-ing his turn for castiag his vote after reaching Kalaka polling station atabout 10 a. m. the respondent came there at about 10 a. m. along with 50 or60 persons in two or three vehicles namely, a truck and two motor cycles. The respondent was -armed with a gun while his companions includingdesh Raj, Krishan Lal and Ram Krishan (RW 5) were armed with swords,rifles and lathis. Lambardar Ishwar (Public Witness 16) , Puran (Public Witness 14) , Ram Singhand others were. standing in the queue at that time. The respondentthreatened Public Witness 13 and others saying that they cannot cast their votes and heasked them to go away under threat of being beaten and shot, and out offear Public Witness 13 and others who were standing in the queue ran away. It hasbeen elicited in his cross-examination that he came back and cast his vote at2 p. m. and that he cannot say whether the others who were in the queue andhad run away had come again or not for casting their votes.

[189] Public Witness 14 has stated that he had gone to the polling station atabout 10 or 11 a. in. for casting his vote and was standing in the queue alongwith others. The respondent came there armed with a gun, accompaniedby 50 or 60 persons including Desh Raj, Krishan Lal, Balbir Singh,ram Krishan (RW 5) and a Sikh armed with a kirpan. The respondent'scompanions created a commotion and the respondent threatened Public Witness 17 andothers who were in the queue to run away on pain of being killed

otherwiseand out of fear all the persons who were in the queue ran away. In hiscross-examination he has stated that about 15 or 20 persons were standing inthe queue when the respondent and his companions arrived at the pollingstation and that he cast his vote later at about 3 p. m. after calm prevailedall around. He has denied the suggestion that he had given false evidencebeing a Congress (1) worker.

[190] Ishwar Singh (Public Witness 16) the Lambardar of Kalaka village hasstated that when he was standing in the queue along with 14 or 15 personsat about 10 or 10. 30 a. m. awaiting his turn for casting his vote therespondent came there, accompanied by 3 or 4 persons including Desh Rajand Krishan Lal (RW 6) of his village and threatened to kill him and hewas hit with the butt of a gun by one of the companions of the respondent andhe ran away. He has also stated that PWs l3, 14, 15 and 17 were alsostanding in the queue along with him and that after he informed the peopleof the village that the respondent had come and threatened him the people ofthe village collected and came towards the polling station whereupon respon-dent and his companions ran away leaving behind two motor cycles by whichrespondent's companions had come there. There is abundant evidence onthe side of the appellants, referred to above, to show that when Public Witness 7 andother officials arrived after the incident in and at the Kalaka polling station they found two motor cycles abandoned at that place. Public Witness 16 has denied the suggestion that he has deposed falsely being the supporter of the Congress (1) Party.

[191] Public Witness 18 has stated that when he was inside Kalaka polling stationand his particulars were being checked before he could be allowed to vote therespondent came there and that 20 or 25 persons who were standing in thequeue ran away. He has admitted in his cross-examination that he hadcanvassed for the Congress (1) Party but has denied the suggestion that hehas always been helping the Congress (1) candidates and has given falseevidence on account of that reason.

[192] This is all the oral evidence on the side of the appellants regardingthe respondent threatening electors who were standing in the queue at thekalaka polling station awaiting their turn for casting their votes in themorning of 19/05/1982 and scaring them away under threat of violenceagainst their person and thereby preventing them from exercising theirelectoral right. The evidence on the side of the respondent has beenreferred to above in the discussion relating to the first part of the incident atthe Kalaka polling station and has been found to be not reliable. It hasbeen found earlier that the evidence of RW 22 and his witnesses that RW 22went to Kalaka polling station by a car with some of his men only atabout 9 or 9.30 a. m. on 19/05/1982 could not be

accepted and that therespondent had received information at about 10. 30 a. m. about somecongress (J) workers having been beaten by Congress (1) workers in Kalaka, which message had been flashed by the police wireless and received by Public Witness 7and he went there only thereafter. There is unimpeachable evidence on theside of the appellants to show that when the respondent went inside Kalakapolling station he was in a rage. In these circumstances, it is probable thatwhile in such a mood after receipt of some report that his workers werebeaten by Congress (1) workers he went there and asked his men whetherthey were not ashamed about 2 or 3 of their men of the same village havingbeen beaten and that he thereafter indulged in the acts alleged in theelection petition both outside and inside the polling station at Kalaka. PW 7 who reached Kalaka polling station soon thereafter received oral reportabout the detention of a motor cycle belonging to Congress (J) workers. Inthese circumstances, I accept the evidence of PWs 12, 13, 16 and 18 referredto above and find that the respondent came to the Kalaka polling stationat about 10. 30 a. m. on 19/05/1985, armed with a rifle andaccompanied by his companions some of whom were armed with deadlyweapons and that he threatened the electors who were standing in the queueawaiting their turn for casting their votes on account of which they ranaway and he had thus interfered with the exercise of the electoral right ofthose persons. There is some discrepancy in the evidence about the time ofarrival of the respondent and his men. It is not a material discrepancy.

[193] About the incident at Burthal Jat polling station there is theevidence of PWs 7, 9 and 10 who are official witnesses and of Mahabir Singh (PW 26,) Dharam Vir (Public Witness 27) , Thaver Singh (Public Witness 28) , Amir Chand (PW 29) , Surjit Singh (Public Witness 30) , Raghubir Singh (Public Witness 31) , Shamsher Singh (PW 32) , Kishori Lal (Public Witness 33) , Ram Narain (Public Witness 34) and Mam Chand (PW 35) on the side of the appellants. There is evidence of Ravi Dattsharma (RW 11) , Parbhati (RW 12) , Ami Lal (RW 13) ,sheochand (RW 14) and the respondent (RW 22) on the side of the respondent.

[194] Public Witness 26 of Burthal Jat village was the polling agent of the respondent himself and he had filed the form (Ex. P-16) dated 18/05/1982 forthe same. He has stated in his evidence that he had gone to the pollingstation at 7 a. m. and had not seen any incident at that place. It is clearthat Public Witness 26 was not prepared to go the whole hog to support the Case of theappellants as regards the incident at the Burthal Jat polling station but hehas stated in his cross-examination that when he went to the polling stationhe saw Anil Kumar and Satbir Singh canvassing votes for their candidateand that he also saw a jeep with sticks. The learned trial Judge has statedin

his judgment that though the evidence establishes that Anil Kumar andsatbir Singh were canvassing votes for their candidate it is not known fromthe evidence as to who their candidate was. But it is clear from theevidence referred to already showing the concern of the respondent foranil Kumar and Satbir Singh who had been arrested by the police at theburthal Jat polling station that the candidate for whom they were canvassingcould not have been any other than the respondent. Public Witness 26 has admitted inhis cross-examination that Satbir Singh was known to him previously andthat he (Public Witness 26) was on duty inside the polling station.

[195] Public Witness 27 of Burthal Jat village has stated in his evidence that hehad gone to Burthal Jat polling station at 8 a. m. for casting his vote in theelection held in May 1982. The respondent came there at about 8 a. m. accompanied by 50 or 60 persons and told his polling agents, Mahabir andudhey Bhan that he was leaving some persons behind and he asked them tosee that no one is permitted to vote for the Congress (1) candidate and thatthey should ensure to have maximum votes polled in his favour in thatpolling station. The respondent left behind 15 or 16 persons includinganil Kumar and Satbir Singh, one of them a Sikh armed with a sword andthe others with pistol and sticks and the other persons who came with therespondent went away with him. In his cross-examination he has statedthat the respondent came to Burthal Jat polling station in a car while hiscompanions came by a motor cycle, a jeep and a truck. No doubt he isunable to mention the numbers or colour of the vehicles or the colour of theturban of the respondent's Sikh companion and he has stated that he cannotidentify Satbir Singh. He has denied the suggestion that he is a supporterof Rao Birendra Singh and his sister and that the respondent did not cometo Burthal Jat polling station at all on that day.

[196] Public Witness 28 who belongs to Burthal Jat village has stated in hisevidence that after he went to the polling station the respondent came thereaccompanied by 50 or 60 persons at about 8 a. m. The respondent wasarmed with a small gun while his companions were armed with rifles, ballasand sticks. The respondent called his polling agents Mahabir and Udheybhan and told them that they should not permit even a single vote to becast in favour of the Congress (1) candidate and he was leaving bebindanil Kumar and Satbir Singh along with 15 or 20 persons for their help. The other people left behind by the respondent were armed with lathis. Hehas admitted in his cross-examination that he was the polling agent ofsumitra Devi but he has denied the suggestion that the respondent did not goto the polling station at all on that day and that he has given false evidence.

[197] Public Witness 29 who belongs to Burthal Jat village has stated in hisevidence that he went to the polling station at about 8 a. m. for casting hisvote in the election with which we are concerned. The respondentaccompanied by 50 or 60 persons came there at about 8 a. m. and sent forhis polling agents Mahabir and Udhey Bhan and told them that they shouldnot permit anyone to vote in favour of the Congress (1) candidate. PWs 27 and 20 and many other persons were present when the respondentsaid so. The respondent told Mahabir and Udhey Bhan that he was leavingbehind Anil Kumar and Satbir Singh for their help along with 15 or 20persons who were found by Public Witness 29 to be armed with sticks. Public Witness 29 was notpermitted to cast his vote earlier and he therefore came again and cast hisvote at 3 p. m. He has stated in his cross-examination that he returned tohis house after 8 a. m. out of fear and went back to the polling station at3 p. m. for casting his vote and stayed there till the afternoon. He hasdenied the suggestion that the respondent did not visit Burthal Jat pollingstation on that day.

[198] Public Witness 30 who belongs to Burthal Jat village has stated in hisevidence that he started to go to the polling station at about 10. 30 a. m. forcasting his vote in the election with which we are concerned. When heemerged from his village to proceed to the rolling station for casting his voteanil Kumar and Satbir Singh met him and asked him as to whom heintended to cast his vote and they insisted that he should vote for therespondent. On his refusal to do so Anil Kumar and Satbir Singhthreatened Public Witness 30 when 2 or 3 persons armed with sticks were present withthose two persons and he therefore returned to his house. He went to thepolling station at about 3.30 p. m. for casting his vote and learnt that Anilkumar and Satbir Singh had been arrested by the police. He has statedin his cross-examination that he docs not know to which place Anil Kumarand Satbir Singh belong and that when he came to the polling station laterat about 3 p. m. he was told that those two persons were Anil Kumar andsatbir Singh. He has denied the suggestion that he had been a supporter ofrao Birendra Singh in all the elections and that he has given false evidence.

[199] Public Witness 31 who belo'ngs to Burthal Jat village has stated in hisevidence that when he went to the polling station at 11 a. m. for casting hisvote in the election with which we are concerned he was accosted by Anilkumar and Satbir Singh who were present there along with 20 or 30 personsarmed with sticks about 25 yards away from the boundary of the pollingstation and they asked him as to the person for whom he was going to casthis vote and they insisted that he should vote for the respondent andthreatened him when he replied that he would vote for the candidate of hisown choice. In view of the threat he went back to the village and camelater for casting his

vote at about 3 p. m. and learnt that Anil Kumar andsatbir Singh had been taken into custody by the police. He has admitted inhis cross-examination that he did not complain to anybody about the threatbut he has denied the suggestion that he has given false evidence.

[200] Public Witness 32 is the Sarpanch of Burthal Jat village. He was admittedlythe polling agent of Sumitra Devi. He has stated in his evidence that hewent to Burthal Jat polling station for the second time at 2.30 p. m. When heapproached the main gate of the polling station he met Anil Kumar andsatbir Singh and they asked him to support the respondent and when he toldthem that it was open to him to vote for the candidate of his own choicethere was an altercation and they started beating him and he was rescued bypws 33, 35 and others of his village. Meanwhile, an Assistant Sub-Inspectorof Police came there by jeep and they buried abuses at him even in thepresence of the Assistant Sub-Inspector of Police and thereupon that policeofficer arrested Anil Kumar and Satbir Singh. He saw a jeep containingsticks parked there, and the people who were in the jeep ran away when thepolice arrived. He brought these facts to the notice of PWs 7 and 10 whenthey came there and they took the jeep and the sticks into their custody. Anil Kumar was sitting on the motor cycle while Satbir Singh was standingon the roadside when they confronted him as stated above and their motorcycle was taken into custody by the police. In his cross-examination it hasbeen elicited that he did not report in writing to PWs 7 and 10 or get himselfmedically examined or file any complaint in any court against Anil Kumarand Satbir Singh. He has denied the suggestion that he had strainedrelations with Satbir Singh because of his election to a cooperative societyand that he has given false evidence because he was the polling agent ofsumitra Devi. .

[201] Public Witness 33 who is the chowkidar of Burthal Jat village has stated inhis evidence that when he went to the polling station at about 2.30 or 3 p. m. during the last-election. to the Haryana Legislative Assembly he saw Anilkumar and Satbir Singh abusing and beating Public Witness 32. Public Witness 33 and Lambardarmam Chand (Public Witness 35) and another Lambardar Ram Singh and others ofburthal Jat village separated Public Witness 32 from Anil Kumar and Satbir Singh. Meanwhile, an Assistant Sub-Inspector of Police came there, and about 10or 15 other persons who were with Anil Kumar and Satbir Singh ran awayon seeing the police after leaving behind a jeep and a motor cycle which weretaken into custody by the police. Public Witness 32 informed PWs 7 and 10 aboutwhat happend when they came there some time later. In his cross-examination he has denied that Public Witness 32 was not present at all at the Burthaljat polling station but was in his village at the time of the poll.

He hasdenied that he was appointed as chowkidar by Public Witness 32 and has stated that heis Chowkidar of the village since 1982 and that Public Witness 32 became Sarpanch ofburthal Jat village only recently. He has denied the suggestion that noincident at all took place in the village and that he had given false evidenceunder the influence of Public Witness 32.

[202] Public Witness 34, the Lambardar of Kakoria village situate close to Burthaljat village, has stated in his evidence that he went to Burthal Jat pollingstation at about 2.30 or 3 p. m. for casting his vote in the last election to theharyana Legislative Assembly and saw Anil Kumar and Satbir Singhslapping and fisting Public Witness 32. He and Public Witness 35 and others intervened and sepa-rated them. Some time thereafter a Sub-Inspector of Police came and sawanil Kumar and Satbir Singh exchanging abuses with Public Witness 32 and hearrested those two persons. PWs 7 and 10 who came there later talked withanil Kumar and Satbir Singh. The police took a motor cycle and a jeepwhich was with Anil Kumar and Satbir Singh into their custody. In hi?cross-examination he has stated that he had not met Anil Kumar and Satbirsingh previously and that he does not know the numbers of the jeep and themotor cycle. He has denied the suggestion that he had supported Raobirendra Singh in the election to Parliament in 1980 and did not go toburthal Jat village at all during the election in question and has deposedfalsely under the influence of the appellants.

[203] Public Witness 35 son of Umrao Singh and Lambardar of Burthal Jat village wasthe polling agent of the Bhartiya Janata Party candidate in the last electionto the Haryana Legislative Assembly. He has stated that after he reachedburthal Jat polling station at 7 a. m. the respondent came there at about 8a. m. accompanied by 50 or 60 persons and called his polling agents and toldthem that they should see to it that the Congress- (1) candidate does not getvotes and he added that he was leaving Anil Kumar and Satbir Singh and 15other persons for their help. At about 2.30 p. m. Public Witness 35 saw Anil Kumarand Satbir Singh beating Public Witness 32 of las village and thereupon he and PWs 33and 34 separated them. Meanwhile, an Assistant Sub-Inspector of Policecame there and those two persons beat Public Witness 32 even in his presence whereuponthe Assistant Sub-Inspector of Police took Anil Kumar and Satbir Singh intocustody, and 10 or 15 persons who were left behind by the respondent fled onseeing the police leaving behind a motor cycle and a jeep containing sticksand other weapons. PWs 7 and 10 came there some time later and themotor cycle and the jeep were taken into custody by the police. In his cross-examination he has denied that Ex. P-9 to which reference would be madea little later contains his signature and he has siated that there are two otherpersons of his name and one of them is the son of Umrao

Singh. He hasfurther stated in his cross-examination that the respondent told Anil Kumarand Satbir Singh that they should sec to it that no other candidate excepthimself gets votes in that polling station. He has denied that he had madea false statement before PWs 7 and 10 and that he has given a false evidencebeing a member of the opposite faction.

[204] The Deputy Commissioner and District Election Officer (Public Witness 7) has stated in his evidence that on the day of poll he proceeded from Kalakapolling station to Burthal Jat polling station pursuant to the receipt of acomplaint that a Congress (J) worker was attacked by the villagers of Burthaljat. The polling officer of Burthal Jat polling station told him when hevisited that place that nothing had happened inside the polling station butsome of the officers in the polling station told him that there were some inci-dents outside the polling station though they were not sure about identity of thepersons responsible for the same. Some villagers told Public Witness 7 that Congress (J) workers had come in a jeep and tried to create trouble and that one ofthem ran away while the police had detained two of those persons. Public Witness 7interrogated those two persons and they then told him that they had nothingto do with the jeep whose number he has recorded in the tape Ex. Public Witness 7/1. PW 7 found some sticks in the jeep and he asked the police to take the jeepand the sticks into their custody. Anil Kumar and Satbir Singh who hadbeen attacked by the villagers were found detained by the police. Thesarpanch of Burthal Jat village (Public Witness 32) made a complaint to him outsidethe Burthal Jat polling station. Public Witness 7 recorded the conversation which hehad with the Presiding Officer at the Burthal Jat polling station but someportion thereof was erased by his own voice by inadvertence. The respon-dent met Public Witness 7 at about 7 p. m. in the office of Public Witness 10 and informed Public Witness 7about some incidents which had taken place during the day and complainedto him about them. The conversation which he had with the respondent atthat time was recorded simultaneously in the tape (Ex. Public Witness 7/1) and helater reported to the secretary to the government about the complaint whichthe respondent made to him against the Superintendent of Police. Hisstenographer prepared the transcript Ex. P-1 in his office, most of it underhis supervision and he was temporarily absent to attend to some other work,and he compared it with the original tape and found it to be correct. Thetape, tape recorder and transcript remained with him throughout and werenot deposited by him in the record room and there was no possibility oftampering. He' had not created evidence in the form of the tape at theinstance of Rao Birendra Singh to harm the respondent. Ex. P-2 is the copyof the report which he submitted about the incidents which took place on 19/05/1982 as had come to his notice. In his report Ex. P-2 sent to thesecretary to the government, Public

Witness 7 has stated inter alia that when hewent to Burthal Jat polling station from Kalaka polling station hewas told that a few workers of the Congress (J) candidate had beendetained by the villagers and he had conversation with the Presiding Officerand the villagers and found a jeep with about 15 or 20 lathis in it anddirected the police to take the jeep with the lathis as also the two workersof the Congress (J) candidate who were standing near the jeep into custody.

[205] The Returning Officer and Sub-Divisional Officer, Rewari (PW 10) who went to Burthal Jat polling station along with Public Witness 7 has statedin his evidence that he saw Anil Kumar and Satbir Singh surrounded by thepeople of that village and a jeep containing some sticks parked there andthat Anil Kumar and Satbir Singh and the jeep were taken into custody bythe police under the orders of Public Witness 7. He has further stated that Ex. P-9was handed over to him by one Mam Chand of Burthal Jat village on thatday. As stated earlier Public Witness 35 who is Mam Chand son of Umrao Singh ofburthal Jat village has disowned Ex. P-9. In his cross-examination Public Witness 10has denied that he had discriminated between the candidates while disposingof the complaints about Kalaka and Burthal Jat polling stations. Ex. P-9addressed by Mam Chand to Public Witness 10 is to the effect that the respondentpointed out his gun at the Presiding Officer and other persons in Burthal Jatpolling station after he came there at about 1.30 p. m. along with 65 or 70persons and he ordered for the ballot papers being marked with the symbolof scales and put into ballot boxes and to finish off anybody who interferesand that the whole village was terrorised and they were thereby preventedfrom exercising their electoral right. There is no specific reference in thisreport to Anil Kumar and Satbir Singh or to their arrest by the police at theinstance of Public Witness 7. Ex. P-9 which was found in the file summoned from theoffice of the Sub-Divisional Officer, Rewari had been marked only throughpw 10 and has been disowned by Public Witness 35 who is no doubt Mam Chand sonof Umrao Singh. For want of proof Ex. P-9 could not be taken intoconsideration, but the learned trial Judge has relied very heavily upon thatdocument for disbelieving the appellants' case regarding the incident atburthal Jat polling station. He was not justified in doing so.

[206] The Assistant Sub-Inspector of Police (Public Witness 9) who had beenposted at Sadar Rewari police station has stated in his evidence that at theinstance of Assistant Sub-Inspector Jagan Nath who returned to the policestation at 3.30 p. m. on 19/05/1982 he recorded a Daily Diary Report ofwhich Ex. P-8 is a copy and that Ex. P-8 is acorrect copy of the original report. It is mentioned in Ex. P-8 that Anil Kumar and Satbir Singh of Kutubpurand Dulana respectively were abusing and beating Sarpanch Shamshersingh

(Public Witness 32) whereupon an Assistant Sub-Inspector of Police along withothers intervened and separated them, that Anil Kumar and Satbir Singhwere creating a situation of breach of peace and were therefore taken intopolice custody and that the jeep bearing registration number DED/3203 wasalso taken into police custody. Public Witness 9 has not been cross-examined regardingex. P-8. Ex. P-28 is a copy of the judgment in the case registered in theconcerned FIR No. 104 of 1982 dated 19/05/1982 under S. 107 and151 of Code of Criminal Procedure against Anil Kumar and Satbir Singh. It is seen from that judgment that the Magistrate after considering thecircumstances of the case and hearing Anil Kumar and Satbir Singh hadcome to the conclusion that the fight took place between those two accusedand the Sarpanch Shamsher Singh in connection with polling of votes andthat the incident pursuant: to which the fight took place was over and theaccused persons belonged to different villages and there is no likelihood ofbreach of the peace and therefore there is no necessity to take any furtheraction against them and he accordingly discharged them. Ex. P-27 is acertified copy of the calendar dated 19/05/1982 relating to that criminalcase registered by -the police. Exs. P-27 and P-28 were tendered by thelearned counsel who appeared for the respondent in the trial court. Thatcalendar contains allegations to the effect that the Assistant Sub-Inspector ofpolice with the help of Kalyan Singh separated Public Witness 32 from Anil Kumarand Satbir Singh and slopped the fighting, that the complaint of Public Witness 32 wasthat when he was going to cast his vote two persons riding on a motor cyclecame there and asked him to vote in favour of the respondent, that when hetold them that he would cast his vote for the candidate of his own choicethey assaulted him with danda and gave him slaps, and that during theinvestigation the Assistant Sub-Inspector of Police found that those twopersons were present there for procuring votes for the respondent. It was notdisputed by Mr Rao in this court that though the complaint on the basis ofwhich FIR No. 104 of 1982 had been registered may not be admissible inevidence in the absence of any foundation for letting in secondary evidencefir No. 104 of 1982 registered by Public Witness 9 would be admissible in evidence. It shows that on the complaint to the effect that Anil Kumar and Satbir Singhwere abusing and beating Public Witness 32 and they were separated from Public Witness 32 by anassistant Sub-Inspector of Police and others a case under S. 107 and151 of the Code of Criminal Procedure was registered against them and ajeep bearing number DED/3203 was also taken into custody by the police on 19/05/1982, and it is admissible in evidence. The FIR corroborates theevidence of Public Witness 32 and of some of the other witnesses referred to above whohave deposed about this incident.

[207] On the other hand, RW 11, a lecturer in a Higher Secondaryschool at Rewari who was a polling officer at Burthal Jat polling stationduring the election with which we are concerned has stated in his evidencethat no untoward incident of any type took place and that the respondent didnot visit that polling station on that day. In view of the documentaryevidence and the other oral evidence referred to above which show that anincident did take place outside Burthal Jat polling station and that a jeepcontaining some lathis as also Anil Kumar and Satbir Sii"gh were taken intocustody and those two persons were prosecuted in a case registered againstthem under S. 107 and 151 of the Code of Criminal Procedure it is notpossible to accept the evidence of RW 11 that no incident took place andthat the respondent did not go to Burthal Jat polling station at all on 19/05/1982. It must also be noted that RW 11 has admitted in his cross-examination that he could not have known what happened outside the polling stationbecause he was inside. RW 12 who cast his vote in Burthal Jat pollingstation at 8 a. m. claims to have remained at the polling station till about1.30 or 2 p. m. and he has stated that neither the respondent nor anyone onhis behalf came to the polling station and there was no quarrel inside or nearthe polling station so long as he remained there. But in his examination-in-chief itself he has admitted that Public Witness 32 was standing about 80 kadams awayfrom the polling station with some people and he heard some altercationbetween them and that while the altercation was going on some policepersonnel arrived at the spot and removed two persons who were not knownto him. He has further stated in his cross-examination that there was a jeepat some distance away from where the Sarpanch (Public Witness 32) and the otherpersons had altercation. He has no doubt denied the suggestion that 10 or15 other persons were with those two unknown persons and they were armedwith sticks, that the respondent came there and left those 15 or 20 personsalong with those two unknown persons and that those two unknown personsthreatened many people as a result of which they could not cast their votes. RW 13 who went to Burthal Jat polling station at about 10. 45 a. m. forcasting his vote and cast his vote at that time claims to have stayed therealong with some villagers until about 4 p. m. Though he has stated in aportion of his examination-in-chief that 'no incident took place within oroutside the polling station so long as he remained there he has admitted inhis examination-in chief itself that he saw Public Witness 32 having a dispute with twounknown persons about 120 kadams away as also ajeep parked 80 kadamsaway from the polling station and that he heard people saying that thesuperintendent of Police removed those two unknown persons. No doubt,he has denied that Anil Kumar and Satbir Singh were threatening theelectors in the village and that he has given false evidence on account ofpressure from the respondent. RW 14 who cast his vote at Burthal Jatpolling station at 7.30 a. m. claims to have thereafter sat

under a tree by theroadside about half a furlong away from the polling station. He has stated-that he did not see the respondent passing by that road in the direction ofburthal Jat village. His evidence is not helpful to either of the partiesas he has merely stated that. he had not seen the respondent passing bythat road in the direction of Burthal Jat village. It is not possible thathe would have closely looked into each and every vehicle which passedby that road to notice the respondent who appears to have been movingon that day by his car. RW 22 has staled that he did not go to Burthaljat village or send anyone of his workers to that village on 19/05/1982but he remained in his house throughout after he returned from Kalakaon that day. It is not possible to accept his evidence that he had notsent any of his workers to Burthal Jat village on the date of poll as it isunlikely that the candidate contesting in the election would not have sentany of his workers to that polling station. It is seen from the aforesaidtape-recorded conversation between Public Witness 7 and RW 22 in the office ofpw 10 at about 7 or 7.30 p. m. on 19/05/1982 that the respondentexpressed his anxiety to get his relatives Anil Kumar and Satbir Singh whohad been arrested on that day by the police released and that his evidencethat Anil Kumar and Satbir Singh were not his relatives at all is totallyunreliable for reasons mentioned above in the discussion of the evidencerelating to the incident at Kalaka polling station. The evidence of RW 22as a whole is unreliable for the reasons already mentioned above.

[208] Mr Sibal did not rely upon any portion of the tape relating tothe conversation in Burthal Jat polling station but he has relied forthe purpose of the appellants' case in relation to Burthal Jat polling stationupon that portion of the tape which relates to the conversation betweenpw 7 and RW 22 in the office of Public Witness 10 at about 7 or 7.30 p. m. on 19/05/1982. The fact that a portion of the tape-recorded conversationin Burthal Jat polling station got erased by Public Witness 7's own voice due toinadvertence is no reason for rejecting the remaining portion of the tape. Itwas demonstrated in this court that the tape recorder has only one knobfor operating the recorder for three purposes, namely, recording, playingand rewinding. If by mistake the knob is pushed for rewinding andthereafter for recording at a particular point it is probable that what hadbeen recorded earlier gets erased by the time the mistake in operating theknob is noticed. Therefore, there is no reason to reject the evidence ofpw 7 that a portion of the tape-recorded conversation in Burthal Jat pollingstation got erased by his own voice due to inadvertence.

[209] The oral and documentary evidence regarding the incident atburthal Jat polling station let in by the appellants receives corroborationto a certain extent from the evidence of some of the respondent's ownwitnesses. As stated earlier, RW 12 has

admitted that Public Witness 32 who wasstanding about 80 kadams away from the polling station was having analtercation with some people and that even when the altercation wasgoing on some police personnel arrived there and they took into custodytwo persons and there was also a jeep at some distance away from theplace where Public Witness 32 and others were having an altercation. Even RW 13has stated that Public Witness 32 was having a dispute with two unknown personsabout 120 kadams away from the polling station and soon thereafter heheard people saying that the Superintendent of Police took away thosetwo unknown persons. The names of Anil Kumar and Satbir Singh hadbeen specifically and clearly mentioned in the election petition in regardto the incident at the Burthal Jat polling station and they have beenalleged to be the relatives of the respondent. The respondent has notspecifically denied the said allegation in his written statement but duringthe trial he attempted to make it appear that they were not related tohim. However, it has been found above that they are related to him. Stillthe respondent who had shown his serious concern to get them releasedfrom police custody on 19/05/1982 has not called those two personsas his witnesses to rebut the case of the appellants. Therefore, as observedin Chenna Reddy v. R. C. Rao in these circumstances an adverse inferencehas to be drawn against the respondent who has not called those two personsas his witnesses though their evidence should be available to him in supportof his contention regarding the incident at Burthal Jat polling station. Therefore, I accept the oral and documentary evidence let in by theappellants as referred to above as being reliable and reject the evidence"f the respondent and his witnesses in regard to the incident at Bunhaljat polling station and find that at the instance of the respondent hisrelatives Anil Kumar and Satbir Singh who were left behind by him alongwith 15 or 20 persons with a jeep containing sticks interfered with theexercise of the electoral right of Public Witness 32 and others as alleged in theelection petition as a result of which they had to go away from the queuein which they were standing awaiting their turn for casting their votesthough they had subsequently come to the polling station and cast theirvotes.

[210] Now I shall consider the respondent's contention raised in thewritten statement that the allegation that the respondent and some of hisarmed companions entered the polling station and brandished their gunsat the Presiding Officer, and ordered the other polling staff and pollingagents of various candidates to stand still does not constitute any corruptpractice and that the allegation that the polling agents Amar Singh andsuraj Bhan were threatened and turned out of the polling station does notconstitute corrupt practice as they are not alleged to be electors of Kalakavillage. Mr Rao submitted that these acts, even if proved, would amountto only electoral offences under S. 136 (b) , (f) and (g) read withsection 8 and would not constitute corrupt practice under S. 123 (2) read

with S. 79 (d) of the Act. In support of his contention Mr Raoinvited this court's attention to the decision in Nagendra Mahto v. Statewhere it has been held, asstated earlier, that the criminal revision petitionerbefore the High court who had insisted upon going into the room wherethe ballot papers were kept though the Presiding Officer had warned himto go out of the room and also attempted to put some ballot papers intothe box of one Nital Singh Sardar was rightly convicted under S. 131 (1) (b) and S. 136 (1) (f) of the Act. On the other hand, Mr Sibalsubmitted that casting bogus votes forcibly would amount to corruptpractice as it would indirectly interfere with the electoral right of thevoters whose ballot papers have been so polled, whether they had intendedto come to the polling station and exercise their right to vote or had intendedotherwise. In this connection, he invited this court's attention to the decisionin Ram Dial v. Sant Lal where, as extracted above, this court has heldthat while the law in England laid emphasis on the usual aspect of theexercise of undue influence, under the Indian law what is material wasnot the actual effect produced but the doing of such acts as were calculatedto interfere with the free exercise of any electoral right. According tosection 79 (d) of the Act "electoral right" means the right of a person tostand or not to stand as, or to withdraw or not to. withdraw from being acandidate, or to vote or refrain from voting at an election. S. 123 (2) of the Act lays down that "undue influence, that is to say, any direct orindirect interference or attempt to interfere on the part of the candidate orhis agent, or of any other person with the consent of the candidate or hiselection agent, with the free exercise of any electoral right. . shall bedeemed to be corrupt practice for the purpose of the Act".

[211] What constitute electoral offences are detailed in S. 125to 136 which fall under Ch. III of the Act. S. 125 relates topromoting enmity between classes in connection with election. S. 126relates to prohibition of public meetings on the day preceding, the election dayand on the election day. S. 127 relates to disturbances at electionmeetings. S. 127-A relates to restrictions on the printing of pamphlets,posters etc. S. 128 relates to maintenance of secrecy of voting. Sec-tion 129 relates to prohibition of Officers, etc. , at elections acting forcandidates or to influence voting. S. 130 relates to prohibition ofcanvassing in or near polling stations. S. 131 provides for penalty fordisorderly conduct in or near polling stations. S. 132 provides forpenalty for misconduct at the polling stations. S. 133 provides forpenalty for illegal hiring or procuring of conveyances at elections. Sec-tion 134 relates to breaches of official duty in connection with elections. Section 134-A prohibits government servants from acting as election agent, polling agent or counting agent. S. 135 relates to removal of ballotpapers from polling station. S. 136 relates to other offences andpenalties therefor, namely, fraudulent

defacement or fraudulent destructionof any nomination paper; fraudulent defacement, destruction or removal ofany list, notice or other document affixed by or under the authority of thereturning officer ; fraudulent defacement or fraudulent destruction of any ballotpaper or the official mark of any ballot paper or any declaration of identity orofficial envelope used in connection with voting by postal ballot ; supply of anyballot paper to any person or being in possession of any ballot paper withoutdue authority, fraudulently putting into any ballot box anything other thanthe ballot paper which the person putting the same is authorised to put in;destroying, opening or otherwise' interfering with any ballot paper; andfraudulently or without due authority attempting to do any of the foregoingads or wilfully aiding and abetting the doing of any such acts. It wouldappear that forcible marking of ballot papers removed from polling officersin the polling station, marking the same in favour of any candidate andputting them in the ballot box is not one of the offences mentioned in them. Therefore, as rightly submitted by Mr Sibal it cannot be contended thatin this country forcible polling of bogus votes, as mentioned above, is neithera corrupt practice nor an electoral offence. I agree with Mr Sibal and holdthat forcible polling of bogus votes in the circumstances and manner foundin this case would constitute indirect interference with the electoral right ofthe concerned electors, whether they be persons who had decided io casttheir votes in that election or those who had decided not to do so. It issignificant, in this connection, to note that after having been informedabout the forcible polling of bogus votes by the respondent's men at thekalaka polling station Public Witness 7 had instructed the polling staff to issue tenderedballot papers to any elector whose ballot paper had already been forciblypolled who might come for the purpose of exercising his right.

[212] I have referred to and discussed the evidence somewhat in detailin view of the fact that I have disagreed not only with the learned trial Judgebut also with respect with my learned brother Fazal Ali, J. with whommy learned brother Mukharji, J. has agreed. The respondent in this casehad managed to keep away from the court material evidence by wayof the original report of the Presiding Officer, a copy of which iscontained in Ex. P-6, by filing CMP31 (E) of 1983 in the trial court. He had cited the Observer (RW 20) as his witness to depose abouthis case regarding the allegations made by the appellants in paras 9 to12 of the election petition regarding the corrupt practices. But he did notexamine RW 20 for. that purpose and had called him only for the purpose ofproduction of some record without any oath being administered to himthough in his tape-recorded conversation with Public Witness 7 in the office ofpw 10on 19/05/1982, referred to above, he had admittedly asked Public Witness 7 to geteverything noted by Public Witness 20, who was present there at that time. He hadthus denied to the appellants the opportunity to cross-examine RW 20.

Therespondent had come forward with a new case of alleged booth-capturing andforcible polling of bogus votes by Ajit Singh in the Kalaka polling stationafter the appellants had completed the examination of their witnesses towhom no such suggestion was made in the cross-examination. He hadrepeatedly denied in his evidence that Anil Kumar and Satbir Singh whohad been arrested by the police at the Burthal Jat polling station on 19/05/1982 were his relatives though in his tape-recorded conversation, referred toabove, he had informed Public Witness 7 that they were his close relatives and he hadshown his anxiety to get them released from police custody forthwith. Hehad neither cited them nor called them as his witnesses though they wouldhave been material witnesses in regard to the incident at the Burthal Jatpolling station. The respondent's evidence as RW 22 has been found to bewholly unreliable for reasons already mentioned. In these circumstances'what my learned brother Fazal Ali, J. has mentioned in the first para of hisjudgment barring the first sentence in that para would apply to the respon-dent alone. An election petition seeking a declaration that the election ofthe returned candidate is void under S. 100 (1) (b) on account of corruptpractice as per S. 123 (2) of the Act, as in the present case, is a civilproceeding though the standard or degree of proof required is as in acriminal case. In any case, two views are not possible in the present casewhere the appellants have proved beyond all reasonable doubt that therespondent has committed the corrupt practices alleged in/at the Kalaka andburthal Jat polling stations. No lenient view can be taken in this case merelybecause the election petition is directed against the returned candidate, for,only in the case of a returned candidate Parliament has provided, in theinterest of purity in elections, for serious consequences of not only (1) declaring the election void under S. 100 (1) (b) but also (2) disqualifica-tion under S. 8-A of the Act by the President for aperiod not exceedingsix years when a finding of corrupt practice is recorded against a returnedcandidate. For all the reasons mentioned above I hold that the appellantshave succeeded in proving the two instances of corrupt practice pressed inthis court and are entitled to succeed in this appeal. The appeal is accord-ingly allowed with costs of Rs. 5,000. 00 payable by the respondent-returnedcandidate.

[213] Having had the advantage ofreading the judgment of my learned brother Fazal Ali, J. , I agree with thereasoning and the conclusions arrived at by my learned brother. I would,however, like to express my views on following four points involved in theappeal : firstly, this being appeal under S. 116-A of the Representationof the People Act, 1951 which is in the nature of first appeal to this court,how should the appraisement of evidence by the trial court be reviewed bythis court in this appeal, secondly, subject to what safeguards the tape-recorded evidence should be accepted, thirdly, this being

election petitioninvolving corrupt practice, the nature of evidence required. o be provedby a contesting party in order to succeed, and fourthly, whether bogus votesor booth capturing itself is a corrupt practice because it deprives othergenuine voters in general of the right to vote or the right to abstain fromvoting.

[214] In this case, evidence of tape-recording made by the Deputycommissioner, Shri Bhaskaran, was produced before the High court. Inthis tape-recorded evidence the Deputy Commissioner has recorded theincidents on the date of polling at several booths but reliance was placedonly on the evidence relating to two booths namely Kalaka and Burthal Jat. For the reasons recorded in his judgment, the learned trial Judge has notaccepted the tape-recorded evidence. The tape record purports to recordstatements made by some persons including polling agent, pollingofficer, Col. Ram Singh and Deputy Commissioner himself. About theacceptance and reliability of evidence on tape-recording, one should proceedvery cautiously. In this connection on the analogy of mutilated documentif the tape-recording is not coherent or distinct or clear, this should not berelied upon. See in this connection the observations in American Jurisprudence.

[215] In the case of R v. Maqsud Ali, in respect of criminal trial, thequestion was considered by the court of Appeal in England. A tape-recording, it was held, was admissible in evidence provided the accuracy ofthe recording can be proved and the voices recorded can be properly identi-fied and that the evidence is, relevant and otherwise admissible. The court,however, observed that such evidence should always be regarded with somecaution and assessed in the light of all the circumstances of each case. Therecannot, however, be any question of laying down any exhaustive set of rulesby which the admissibility of such evidence should be judged. It was furtherobserved that provided the jury was guided by what they hear themselvesfrom the tape-recording and on that they base their ultimate decision, thereis no objection to a copy of the transcript of a tape-recording, properlyproved, being put before them. It is not necessary to set out the particularfacts of that case. It may be noted, however, that Marshall, J. had observedof the report as follows :

> It is next said that the recording was a bad one, overlaid in placesby street and other noises. This obviously was so and, as a result, muchof the conversation was inaudible or undecipherable. Insofar as thatwas so; much of the conversation was never transcribed, but there stillremained much that was transcribed, and the learned Judge after fullargument ruled that what was deciphered should be left for the jury toassess. We think that he was right. Lastly, it was said that the diffi-culties of language were such as to

make any transcription unreliableand misleading. This argument the learned Judge treated with greatcare and circumspection. The recorded conversation was in Punjabidialect confined to a particular area of Pakistan. He was told thatthere were many such dialects in which similar words differed in or hadmore than one meaning, that the meaning of sentences often dependedon the order of the words, that pronouns were matters of inference andnot represented by actual words. Often only parts of sentences weredecipherable owing to the other extraneous noises. He decided, beforeadmitting the evidence, to have a trial within a trial in which translatorswere called by both sides which, I think I am right in saying, lasted2 1/2 days. All matters were canvassed in very great detail. He discovered that there were certain passages common to translations and, inthe end, he decided that it was a question which should be left to thejury, but he did not think "this evidence was so unsatisfactory that Ishould withdraw it from the jury".

[216] It has to be borne in mind that in England and in America, themechanism of tape-recording is well-advanced. In this country, it is not soas yet. Furthermore the infirmities, some of which have been noted bymarshall, J. of tape-recording, are more evident in the instant case before us.

[217] In R. v. Robson, the accused was charged, inter alia, with corrup-tion. The prosecution sought to put in evidence certain tape-recordings. The defence contended that these were not admissible because (i) it had notbeen shown that these were the originals or in the absence of the originalstrue copies of them, and (ii) they were misleading and should not be reliedon because in many places these were unintelligible and of poor quality andtheir potential prejudicial effect would therefore outweigh the evidentiaryvalue claimed for these. It was held by the court as follows : The recordings were admissible for the following reasons-

(I) the court was required to do no more than satisfy itself that aprima facie case of originality had been made out by evidencewhich delined and described the provenance and history of therecordings up to the moment of production in court and hadnot been disturbed on cross-examination ; in the circumstancesthat requirement had been fulfilled.

(Ii) the court was satisfied, on the balance of probabilities, that therecordings

were original and authentic and their quality wasadequate to enable the jury to form a fair assessment of theconversations recorded in them and should not be excludedon that account.

[218] In the instant case, the tape-recordings) as we have heard, weremisleading and could not be relied on because in most places they wereunintelligible and of poor quality and of no use, therefore their potentialprejudicial effect outweighs the evidentiary value of these recordings.

[219] This court had also considered this question in N. Sri Rama Reddyv. V. V. Giri. There in case of an election trial, it was held by this courtthat the previous statement made by a person and recorded on tape, couldbe used not only to corroborate the evidence given by the witness in court butalso to contradict his evidence given before the court, as well as to test theveracity of the witness and also to impeach his impartiality. Apart frombeing used for corroboration) the evidence was admissible in respect of theother three matters under S. 146 (1) , 153, Exception (2) and Section155 (3) of the Evidence Act. This court observed after referring to somecases that two propositions are clear that (1) tape-recorded conversation isadmissible in evidence (2) if it contains the previous statement made by awitness, it may be used to contradict his evidence given before the court. But the court cautioned itself that though tape-recording may beadmissible what weight it has to be put to such evidence depended upon thefacts and circumstances and other relevant factors.

[220] Ln the case of R. M. Malkani v. State of Maharashtra, this courtobserved that tape-recorded conversation was admissible provided firstly thatthe conversation was relevant to the matters in issue, secondly, there wasidentification of the voice and thirdly, the accuracy of tape-recorded conversation has to be proved by eliminating the possibility of erasing the tape.

[221] In the facts of the present case, however, the dangers noted by this court were present. So therefore though in an appropriate case it may be po". ,lble to rely upon tape-recorded conversation, in the facts of this case and for the infirmities in the tape-recorded evidence as pointed out before, this cannot be relied in the instant case.

[222] On the aspect of the nature of evidence, the question here is notwho is a saint or who is a sinner. It has to be borne in mind that this is aquasi-criminal proceeding. It has been so held in numerous decisions. 'quasi means 'as if, 'similar to'. The question of nature of evidence wasrather exhaustively examined by a decision of this court in M.

Chenna Reddy v. V. Ramachandra Rao. There after discussing the evidence, G. K. Mitter, J. speaking for this court reiterated the nature of evidence thus :

> This court has held in a number of cases that the trial of an electionpetition on the charge of the commission of a corrupt practice partakesof the nature of a criminal trial in that the finding must be based not onthe balance of probabilities but on direct and cogent evidence to supportit. In this connection, the inherent difference between the trial of anelection petition and a criminal trial may also be noted. At a criminaltrial the accused need not lead any evidence and ordinarily he does notdo so unless his case is to be established by positive evidence on hisside, namely, his insanity or his acting in self-defence to protect himself ora plea of alibi to show that he could not have committed the crime withwhich he was charged. The trial of an election petition on the charge ofcommission of corrupt practice is somewhat different. More often thannot proof of such corrupt practices depends on the oral testimony ofwitnesses. The candidate charged with such corrupt practice invariablyleads evidence to prove his denial; it becomes the duty of the court toweigh the two versions and come to a conclusion as to whether notwith-standing the denial and the evidence in rebuttal, a reasonable person canform the opinion that on the evidence the charge is satisfactorilyestablished. We cannot also lose sight of the fact that quite apart fromthe nature of the charge the trial itself goes on as if the issues in a civilsuit were being investigated into. The petitioner has to give particularsof the corrupt practice with details in default whereof the allegations maybe ignored; the petitioner has to ask for certain declarations and theprocedure before the High court is to be in accordance with that applica-ble under the Code of Civil Procedure to the trial of suits with the aidof the provisions of the Indian Evidence Act. Inferences can thereforebe drawn against a party who does not call evidence which should beavailable in support of his version.

[223] In the case of Ram Sharan Yadav v. Thakur Muneshwar Nath Singh,this court observed that the charge of a corrupt practice is in the nature of acriminal charge which if proved, entails a very heavy penalty in the 'form ofdisqualification. Therefore, a very cautious approach must be made inorder to prove the charge of undue influence levelled by the defeated candi-date. It is for the party who sets up the plea of "undue influence" to proveit to the hilt beyond reasonable doubt and the manner of proof should

be thesame as for an offence in a criminal case. However, while insisting onstandard of strict proof, the court should not extend or stretch this doctrineto such an extreme extent as to make it well nigh impossible to prove anallegation of corrupt practice, See also in this connection the observationsin the case of Sardar Harcharan Singh v. Sardar Sajjan Singh.

[224] Judged by the aforesaid standard, for the infirmities mentioned inthe judgment of my learned brother, it cannot be said that the appellantshave proved their case to the extent required to succeed.

[225] While in a first appeal, the entire evidence can be reviewed bythe appellate court, and this being the first appeal under S. 116-A of therepresentation of the People Act, one must, however, always bear in mindthat where the question is whether the oral testimony should be believed ornot, the views of the trial Judge should not be lightly brushed aside wherethe trial Judge has the advantage of judging the manner and demeanour ofthe witness which advantage the appellate court does not enjoy. This is alimitation on all appellate courts whether be it the first appeal or secondappeal. In believing the oral testimony of a witness, the views of the Judgewho has the advantage of watching the demeanour and the conduct of thewitness cannot be lost sight of. See the observations of this court in Motilal v. Chandra Pratap Tiwari. See also the observations of this court in Raghuvir Singh v. Raghubir Singh Kushwaha. In view of the nature of the evidence on record, we find no reason to disagree with the appraisement of the evidence by the learned trial Judge.

[226] Last point indicated above is interesting as was sought to be raisedby Mr Sibal, because preventing a person from casting his vote or causinga bogus vote purporting to be the vote of someone other than the genuinevoter would be a serious interference with the electoral process, as grave aspreventing a person from voting. Right to abstain from voting is recognisedin our system of election. But in view of the evidence in this case, the pointneed not be pursued further.

[227] For the reasons mentioned before, I agree that the appeal bedismissed.

[228] In accordance with the decision of the majority, the appeal is dismissed without any order as to costs.

Whether provision thereof, which protects a person accused of offence from being compelled to be witness against himself, extends to protecting such accused from being compelled to give his voice sample during course of investigation into offence - held, conflicting views - matter directed to CJI.

RITESH SINHA

V/S

STATE OF UTTAR PRADESH AND ANR 2013 AIR(SC) 1132.

Application of Ritesh Kumar's case. Observations of Hon'ble High Court of Judicature of Hyderabad.

"5) The law is well settled no doubt that even a minority view of the Apex Court not in conflict to the majority view of the Apex Court, when that applicable to the lis is binding precedent under Article 141 of the Constitution of India. However, when there is difference of opinion between each of the two Judge bench of the Apex Court, High Court and subordinate Courts can follow which view among the two is sound to follow, but for to say if the view of first Judge is considered and differed by the second Judge, the High Court and Subordinate Courts cannot sit against the wisdom of the second Judge of the Apex Court. Hence, among the conflicting opinions of the two Judges expressed in Ritesh Sinha V. State [7] the view expressed by Hon’ble Justice Aftab Alam is not only a later one after going through the views expressed by Hon’ble Justice R.P.Desai; but also areasoned one to follow and accordingly relied up."

SUPREME COURT OF INDIA (FROM ALLAHABAD) *(D.B.)*

RITESH SINHA
V/S
STATE OF UTTAR PRADESH AND ANR

Date of Decision: 07 December 2012

Citation: 2012 LawSuit(SC) 807

Hon'ble Judges: Ranjana Prakash Desai, Aftab Alam

Case Type: Criminal Appeal

Case No: 2003 of 2012

Subject: Constitution, Criminal

Head Note:

Constitution of India - Article 20(3) - recording of voice sample - whether provision thereof, which protects a person accused of offence from being compelled to be witness against himself, extends to protecting such accused from being compelled to give his voice sample during course of investigation into offence - held, conflicting views - matter directed to CJI.

Per Ranjana Prakash Desai J.,

I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during course of investigation of an offence, there is no violation of his right under Article 20(3) of Constitution. Voice sample is like finger print impression, signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by accused for purposes of investigation, giving of a voice sample for purpose of investigation cannot be included in expression to be a witness . By giving voice sample accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it

with tape recorded conversation, investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any testimony of nature of a personal testimony. When compared with recorded conversation with help of mechanical process, it may throw light on points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, accused conveyed any information based upon his personal knowledge and became a witness against himself. accused by giving voice sample merely gives 'identification data' to investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by police during investigation is not hit by Article 20(3) of Constitution.

Per Aftab Alam J.,

it has recognition that there is no provision in Criminal Procedure Code to compel accused to give his voice sample. That being position, to my mind answer to question can only be in negative, regardless of constitutional guarantee against self-incrimination and assuming that in case a provision in that regard is made in law that would not offend Article 20 (3) of Constitution.

Code of Criminal Procedure, 1973 - Sec 53, 157 - Constitution of India - Article 20(3) - recording of voice sample - consideration as to even on assuming that there is no violation of Article 20(3) of Constitution, whether in absence of any provision in Code, can Magistrate authorize investigating agency to record voice sample of person accused of offence - held, conflicting views - matter directed to CJI.

Per Ranjana Prakash Desai J.,

Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of speech-sound waves falls within ambit of inclusive definition of term 'measurement' appearing in Prisoners Act.

Thus, my conclusion that voice sample can be included in inclusive definition of term measurements appearing in Section 2(a) of Prisoners Act is supported by above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by term 'measurements'. I must note that Law Commission of India in its 87th Report referred to book Law Enforcement and Criminal Justice an introduction . Law commission observed that voice prints resemble finger prints and made a recommendation that Prisoners Act needs to be amended. I am, therefore, of opinion that a Magistrate

acting under Section 5 of Prisoners Act can give a direction to any person to give his voice sample for purposes of any investigation or proceeding under Code. Voice emanates from human body. human body determines its volume and distinctiveness. Though it cannot be touched or seen like a bodily substance, being a bodily emanation, it could be treated as a part of human body and thus could be called a bodily substance. But, I feel that there is no need to stretch meaning of term bodily substance in this case. I have already expressed my opinion that voice sample is physical non-testimonial evidence. It does not communicate to investigator any information based on personal knowledge of accused which can incriminate him. Voice sample cannot be held to be conceptually different from physical non-testimonial evidence like blood, semen, sputum, hair etc. Taking of voice sample does not involve any testimonial responses. observation of this Court in Selvi that it would not be prudent to read Explanation (a) to Section 53 of Code in an expansive manner is qualified by words so as to include impugned techniques . What must be borne in mind is that impugned techniques were held to be testimonial and hit by Article 20(3) of Constitution. This Court emphasized that Explanation (a) to Section 53 does not enumerate certain other kinds of medical examination that involve testimonial acts, such as psychiatric examination among others and this demonstrates that amendment made to this provision was informed by a rational distinction between examination of physical substances and testimonial acts. If this Court wanted to interpret Explanation (a) as referring only to bodily substances there was no reason for it to draw such distinction. Pertinently, this distinction was employed while applying doctrine of 'ejusdem generis' to Section 53. tenor of this judgment makes it clear that tests pertaining to physical non-testimonial evidence can be included in purview of words and such other tests with aid of doctrine of ejusdem generis'. In my opinion, Selvi primarily rests on distinction between physical evidence of non-testimonial character as against evidence involving testimonial compulsions. tests mentioned in Explanation (a) are of bodily substances, which are examples of physical evidence. Even if voice sample is not treated as a bodily substance, it is still physical evidence involving no transmission of personal knowledge. On reasoning of Selvi which is based on Kathi Kalu Oghad, I find no difficulty in including voice sample test in phrase such other tests appearing in Explanation (a) to Section 53 by applying doctrine of ejusdem generis as it is a test pertaining to physical non-testimonial evidence like blood, sputum etc. In my opinion, such interpretation of Selvi would be in tune with general scheme of Code which contains provisions for collection of

evidence for comparison or identification at investigation stage in order to strengthen hands of investigating agency.

Per Aftab Alam J.,

It is to be noted that expression measurements occurs not only in Section 5 but also in Sections 3 and 4. Thus, if term measurements is to be read to include voice sample then on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards (and voice sample would normally be required only in cases in which punishment is one year or upward!) it would be open to police officer (of any rank) to require arrested person to give his/her voice sample on his own and without seeking any direction from Magistrate under Section 5. Further, applying same parameters, not only voice sample but many other medical tests, for instance, blood tests such as lipid profile, kidney function test, liver function test, thyroid function test etc., brain scanning etc. would equally qualify as measurements within meaning of Identification of Prisoners Act. In other words on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards it would be possible for police officer (of any rank) to obtain not only voice sample but full medical profile of arrested person without seeking any direction from magistrate under Section 5 of Identification of Prisoners Act or taking recourse to provisions of Section 53 or 53A of Code of Criminal Procedure. I find it impossible to extend provisions of Identification of Prisoners Act to that extent

Acts Referred:

Constitution Of India Art 20(3)
Indian Penal Code, 1860 Sec 186
Code Of Criminal Procedure, 1973 Sec 53A, Sec 482, Sec 54A, Sec 53, Sec 311A, Sec 2(h), Sec 54
Evidence Act, 1872 Sec 139, Sec 7, Sec 73
Code Of Criminal Procedure, 1898 Sec 118
Medical Council Act, 1956 Sec 2
Identification Of Prisoners Act, 1920 Sec 6, Sec 2(a), Sec 5, Sec 8

Final Decision: Appeal dismissed

Eq. Citations: 2013 AIR(SC)(Cri) 625, 2012 (11) SCR 683, 2013 AIR(SCW) 894, 2013 (2) AllLJ 435, 2013 (2) SCC(Cri) 748, 2013 (1) AD(SC) 109, 2013 AIR(SC) 1132, 2013 CrLJ 1301, 2013 (1) MadLJ 30, 2012 (12) JT 258, 2012 (12) Scale 10, 2013 (2) SCC

357, 2013 (1) LawHerald(SC) 123, 2013 (3) ALT(Cri)(SC) 233, 2013 (5) SCJ 304

Advocates: Aman Ahluwalia, Siddhartha Dave, Jemtiben Ao, Vibha Datta, Makhija, R K Dash, Atif Suhrawardy, Abhisth Kumar

Reference Cases:
Cases Cited in (+): **1**
Cases Referred in (+): **29**

Judgement Text:-

Ranjana Prakash Desai, J

[1] Leave granted.

[2] On 7/12/2009, one Prashant Kapil, In-charge, Electronics Cell, P.S. Sadar Bazar, District Saharanpur lodged a First Information Report alleging that one Dhoom Singh in connivance with the appellant was collecting money from people on the pretext that he would get them recruited in the police department. After his arrest, one mobile phone was seized from Dhoom Singh. As the police wanted to verify whether the recorded conversation, which is in their possession, is between accused Dhoom Singh and the appellant, they needed voice sample of the appellant. The police, therefore, filed an application before learned Chief Judicial Magistrate, Janpad Saharanpur, praying that the appellant be summoned to the court for recording the sample of his voice. On 8/1/2010, learned Chief Judicial Magistrate, Saharanpur issued summons to the appellant to appear before the investigating officer and give his voice sample. The appellant approached the Allahabad High Court under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") for quashing of the said order. The High Court by the impugned order dated 9/7/2010 rejected the said application, hence, this appeal by special leave.

[3] In my view, two important questions of law raised in this appeal, which we need to address, are as under:

> "(i) Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his

voice sample during the course of investigation into an offence?

ii) Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

[4] We have heard, at considerable length, Mr. Siddhartha Dave, learned counsel for the appellant, Mr. Aman Ahluwalia, learned amicus curiae and Mr. R.K. Dash, learned counsel for the respondent State of Uttar Pradesh. We have also perused the written submissions filed by them.

[5] Mr. Dave, learned counsel for the appellant, at the outset, made it clear that he was not pressing the challenge that the order passed by the Magistrate violates the appellant's fundamental right of protection from self-incrimination as guaranteed under Article 20(3) of the Constitution. Counsel submitted, however, that there is no provision in the Code or in any other law which authorizes the police to make an application for an order directing the accused to permit recording of his voice for voice sample test. Counsel submitted that a Magistrate has no inherent powers and, therefore, learned Magistrate could not have given such a direction Adalat Prasad v. Rooplal Jindal, 2004 7 SCC 338. Counsel submitted that because there is no other provision providing for a power, it ought not to be read in any other provision State of U.P. v. Ram Babu Misra, 1980 2 SCC 343S.N. Sharma v. Bipen Kumar Tiwari, 1970 1 SCC 653. Counsel pointed out that in Ram Babu Misra, this Court restricted the scope of Section 73 of the Indian Evidence Act and took-out from the purview of Section 5 of the Identification of Prisoners Act, 1920 (for short, "the Prisoners Act), handwritings and signatures. As suggested by this Court, therefore, the Code was amended and Section 311A was inserted. Counsel submitted that Section 5 of the Prisoners Act is inapplicable to the present case because it is enacted only for the purpose of keeping a record of the prisoners and other convicts and not for collection of evidence Balraj Bhalla v. Sri Ramesh Chandra Nigam, 1960 AIR(All) 157. Counsel submitted that this is supported by Section 7 of the Prisoners Act, which provides for destruction of photographs and records of measurement on acquittal. The term "measurement" defined in Section 2(a) of the Prisoners Act covers only those things which could be physically measured. Counsel submitted that the Prisoners Act, being a penal statute, the term measurement appearing therein must be given a restricted meaning Regional Provident Fund Commissioner v. Hooghly Mills Co. Ltd. and others, 2012 2 SCC 489. Counsel submitted

that investigation has to be conducted within the parameters of the Code. It is not uncontrolled and unfettered State of West Bengal v. Swapan Guha, 1982 1 SCC 561. Counsel submitted that the High Court judgments, where unamended Section 53 of the Code is involved, are not relevant. Counsel submitted that Explanation (a) to Section 53 of the Code was introduced in 2005 and, therefore, those judgments cannot be relied upon for interpreting the said Section as it stands today. Counsel submitted that various examinations listed in the said Explanation are the ones for which the police can have the accused examined by a medical practitioner. These tests are all of physical attributes present in the body of a person like blood, nail, hair etc., which once taken can be examined by modern and scientific techniques. Voice sample specifically has not been included as one of the tests in the said Explanation even though the amendment was made in 2005 when Parliament was well aware of such test being available and, has, therefore, been intentionally omitted. Counsel submitted that the words "such other tests" mentioned in the said Explanation are controlled by the words "which the registered medical practitioner thinks necessary". Therefore, the discretion, as to the choice of the test, does not vest in the police but it vests in the medical practitioner. This would clearly exclude voice test on the principle of ejusdem generis. Counsel submitted that in Selvi and others v. State of Karnataka, 2010 7 SCC 263 this Court has held that Section 53 of the Code has to be given a restrictive interpretation and not an expansive one. Counsel submitted that the decision of this Court in Sakiri Vasu v. State of Uttar Pradesh, 2009 2 SCC 409 is inapplicable since to do an act under ancillary power the main power has to be conferred, which has not been conferred in this case. Therefore, there is no question of resorting to ancillary power. Counsel submitted that the High Court fell into a grave error in refusing to quash the order passed by learned Magistrate summoning the appellant for the purpose of giving sample of his voice to the investigating officer.

[6] Mr. Aman Ahluwalia, learned Amicus Curiae has submitted a very detailed and informative note on the issues involved in this case. Gist of his submissions could be stated. Counsel submitted that voice sample is only a material for comparison with something that is already in possession of the investigating agency. Relying on 11 Judges' Bench decision of this court in State of Bombay v. Kathi Kalu Oghad & Ors., 1962 3 SCR 10 counsel submitted that evidence for such identification purposes would not attract the privilege under Article 20(3) of the Constitution. According to learned counsel, there is no specific provision enabling the Magistrate to direct an accused to give his voice sample. There are certain provisions of the Code in which such power can be read into by the process of implication viz. Section 2(h), Section 53, Section

311A and Section 54A. So far as Section 311A of the Code is concerned, counsel however, fairly pointed out that in Rakesh Bisht v. C.B.I.,2007 1 JCC(Del) 482 the Delhi High Court has held that with the aid of Section 311A of the Code the accused cannot be compelled to give voice sample. Counsel also relied on Section 5 of the Prisoners Act and submitted that it expressly confers power on the Magistrate to direct collection of demonstrative evidence during investigation. Counsel submitted that in Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others, 2005 CrLJ 2868 the Bombay High Court has interpreted the term "measurement" appearing in Section 5 of the Prisoners Act expansively and purposefully to include measurement of voice i.e. speech sound waves. Counsel submitted that Section 53 of the Code could be construed expansively on the basis of presumption that an updating construction can be given to the statute Bennion on Statutory Interpretation 5th Edition at P. 516. Relying on Selvi, counsel submitted that for the purpose of Section 53 of the Code, persons on anticipatory bail would be deemed to be arrested persons. It is, therefore, reasonable to assume that where the person is not actually in the physical custody of the police, the investigating agency could approach the Magistrate for an order directing the person to submit himself for examination under Section 53 of the Code. Counsel also submitted that in Sakiri Vasu, this Court has referred to the incidental and implied powers of a Magistrate during investigation. Counsel submitted that in Selvi, Explanation to Section 53 has been given a restrictive meaning to include physical evidence. Since voice is physical evidence, it would fall within the ambit of Section 53 of the Code. The Magistrate has, therefore, ancillary or implied powers under Section 53 of the Code to direct a person to give voice sample in order to aid investigation. Counsel submitted that the most natural construction of the various statutes may lead to the conclusion that there is no power to compel a person to give voice sample. However, the administration of justice and the need to control crime effectively require the strengthening of the investigative machinery. While considering various provisions of law this angle may be kept in mind.

[7] Mr. Dash, learned counsel for the State of Uttar Pradesh submitted that the definition of the term 'investigation' appearing in the Code is inclusive. It means collection of evidence for proving a particular fact. A conjoint reading of the definition of the term 'investigation' and Sections 156 and 157 of the Code would show that while investigating a crime, the police have to take various steps H.N. Rishbud & Anr. v. State of Delhi, 1955 AIR(SC) 196. Counsel pointed out that in Selvi, meaning and scope of the term 'investigation' has been held to include measures that had not been enumerated in the statutory provisions. In this connection, in Selvi, this Court took note of Rajasthan High Court judgment in Mahipal Maderna & Anr. v. State of

Rajasthan, 1971 CrLJ 1405 and Allahabad High Court judgment in Jamshed v. State of U.P., 1976 CrLJ 1680 Relying on Kathi Kalu Oghad & Ors., counsel submitted that taking of thumb impressions, impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification is not furnishing evidence in the larger sense because Constitution makers never intended to put obstacles in the way of effective investigation. Counsel also relied on State of U.P. v. Boota Singh, 1979 1 SCC 31 where the contention that taking specimen signatures of the respondents by police during investigation was hit by Section 162 of the Code was rejected. Counsel submitted that the question of admissibility of tape recorded conversation is relevant for the present controversy. In this connection, he relied on R.M. Malkani v. State of Maharashtra, 1973 1 SCC 471. Counsel submitted that under Section 5 of the Prisoners Act, a person can be directed to give voice sample. In this connection, he relied on the Bombay High Court's judgment in Telgi. Counsel submitted that a purposive interpretation needs to be put on the relevant sections to strengthen the hands of the investigating agency to deal with the modern crimes where tape recorded conversations are often very crucial.

[8] Though, Mr. Dave, learned counsel for the appellant has not pressed the submission relating to infringement of guarantee enshrined in Article 20(3) of the Constitution, since extensive arguments have been advanced on Article 20(3) and since the right against self-incrimination enshrined therein is of great importance to criminal justice system, I deem it appropriate to deal with the said question also to make the legal position clear.

[9] Article 20(3) of the Constitution reads thus:

> "Article 20: Protection in respect of conviction for offences.
>
> (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) No person accused of any offence shall be compelled to be a witness against himself."

[10] In M.P. Sharma v. Satish Chandra & Ors., 1954 SCR 1077, a seven Judges Bench of this court did not accept the contention that the guarantee against testimonial

compulsion is to be confined to oral testimony while facing trial in the court. The guarantee was held to include not only oral testimony given in the court or out of court, but also the statements in writing which incriminated the maker when figuring as an accused person.

[11] In Kathi Kalu Oghad, this court agreed with the above conclusion drawn in M.P. Sharma. This court, however, did not agree with the observation made therein that "to be a witness" may be equivalent to "furnishing evidence" in larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for the purpose of identification. This court expressed that the observations in M.P. Sharma that Section 139 of the Evidence Act which says that a person producing a document on summons is not a witness, has no bearing on the connotation of the word "witness" is not entirely well-founded in law. It is necessary to have a look at Kathi Kalu Oghad.

[12] In Kathi Kalu Oghad, the prosecution adduced in evidence a chit stated to be in the handwriting of the accused. In order to prove that the chit was in the handwriting of the accused, the police had taken specimen signatures of the accused while he was in police custody. Handwriting expert opined that the chit was in the handwriting of the accused. Question was raised as to the admissibility of the specimen writings in view of Article 20(3) of the Constitution. The High Court had acquitted the accused after excluding the specimen writings from consideration. The questions of constitutional importance which this court considered and which have relevance to the case on hand are as under:

> a) Whether by production of the specimen handwriting, the accused could be said to have been a witness against himself within the meaning of Article 20(3) of the Constitution?
>
> b) Whether the mere fact that when those specimen handwritings had been given, the accused was in police custody, could by itself amount to compulsion, apart from any other circumstances which could be urged as vitiating the consent of the accused in giving these specimen handwritings?
>
> c) Whether a direction given by a court to an accused present in court to give his specimen writing and signature for the purpose of comparison under Section 73 of the Indian Evidence Act infringes the fundamental right

enshrined in Article 20(3) of the Constitution?

[13] While departing from the view taken in M.P. Sharma that "to be witness is nothing more than to furnish evidence" and such evidence can be furnished through lips or by production of a thing or of a document or in other modes, in Kathi Kalu Oghad this Court was alive to the fact that the investigating agencies cannot be denied their legitimate power to investigate a case properly and on a proper analysis of relevant legal provisions it gave a restricted meaning to the term "to be witness". The relevant observations may be quoted.

> "'To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that thought they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."

[14] In support of the above assertion, this court referred to Section 5 of the Prisoners Act which allows measurements and photographs of an accused to be taken and Section 6 thereof which states that if anyone resists taking of measurements and photographs, all necessary means to secure the taking of the same could be used. This court also referred to Section 73 of the Indian Evidence Act which authorizes the court to permit the taking of finger impression or specimen handwriting or signature of a person present in the court, if necessary for the purpose of comparison. This court observed that self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based

on his personal knowledge. Example was cited of an accused who may be in possession of a document which is in his writing or which contains his signature or his thumb impression. It was observed that production of such document with a view to comparison of the writing or the signature or the impression of the accused is not the statement of an accused person, which can be said to be of the nature of a personal testimony. I may quote another relevant observation of this court:

> "When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness."

[15] Four of the conclusions drawn by this court, which are relevant for our purpose, could be quoted:

> "(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.
>
> (4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.
>
> (5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.
>
> (6) 'To be a witness' in its ordinary grammatical sense means giving oral

testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing."

[16] Before I proceed further, it is necessary to state that our attention was drawn to the judgment of this Court in Shyamlal Mohanlal v. State of Gujarat, 1965 2 SCR 457. It was pointed out that, there is some conflict between observations of this Court in M.P. Sharma as reconsidered in Kathi Kalu Oghad and, Shyamlal Mohanlal and this is noted by this Court in V.S. Kuttan Pillai v. Ramakrishnan & Anr., 1980 1 SCC 264. I, however, find that in V.S. Kuttan Pillai, this Court has not specifically given the nature of the conflict. Having gone through Shyamlal Mohanlal v. State of Gujarat, 1965 2 SCR 457, I find that in that case, the Constitution Bench was considering the question whether Section 94 of the Code of Criminal Procedure (Act 5 of 1898) (Section 91(1) of the Code) applies to accused persons. The Constitution Bench observed that in Kathi Kalu Oghad it has been held that an accused person cannot be compelled to disclose documents which are incriminatory and based on his own knowledge. Section 94 of the Code of Criminal Procedure (Act 5 of 1898) permits the production of all documents including the documents which are incriminatory and based on the personal knowledge of the accused person. The Constitution Bench observed that if Section 94 is construed to include an accused person, some unfortunate consequences follow. If the police officer directs an accused to attend and produce a document, the court may have to hear arguments to determine whether the document is prohibited under Article 20 (3). The order of the trial court will be final under the Code for no appeal or revision would lie against that order. Therefore, if Section 94 is construed to include an accused person, it would lead to grave hardship to the accused and make investigation unfair to him. The Constitution Bench concluded that Section 94 does not apply to an accused person. Though there is reference to M.P. Sharma as a judgment stating that calling an accused to produce a document does amount to compelling him to give evidence against himself, the observations cannot be read as taking a view contrary to Kathi Kalu Oghad, because they were made in different context. As I have already noted, the conclusion drawn in Kathi Kalu Oghad that the accused cannot be compelled to produce documents which are incriminatory and based on his own knowledge has been restated. I, therefore, feel that it is not necessary to go into the question of alleged conflict.

[17] In Selvi a three Judge Bench of this Court was considering whether involuntary administration of certain scientific techniques like narco- analysis, polygraph

examination and the Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. This Court considered the protective scope of right against self-incrimination, that is whether it extends to the investigation stage and came to the conclusion that even the investigation at the police level is embraced by Article 20(3). After quoting extensively from Kathi Kalu Oghad, it was observed that the scope of 'testimonial compulsion' is made clear by two premises. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to 'personal testimony' thereby coming within the prohibition contemplated by Article 20(3). In most cases, such 'personal testimony' can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the chain of evidence. It was held that all the three techniques involve testimonial responses. They impede the subject's right to remain silent. The subject is compelled to convey personal knowledge irrespective of his/her own volition. The results of these tests cannot be likened to physical evidence so as to exclude them from the protective scope of Article 20(3). This Court concluded that compulsory administration of the impugned techniques violates the right against self-incrimination. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects.

[18] Applying the test laid down by this court in Kathi Kalu Oghad which is relied upon in Selvi, I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like finger print impression, signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any

testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution.

[19] The next question which needs to be answered is whether there is any provision in the Code, or in any other law under which a Magistrate can authorize the investigating agency to record voice sample of a person accused of an offence. Counsel are ad idem on the point that there is no specific provision either in the Code or in any other law in that behalf. In its 87th Report, the Law Commission suggested that the Prisoners Act should be amended inter alia to include voice sample within the ambit of Section 5 thereof. Parliament however has not amended the Prisoners Act in pursuance to the recommendation of the Law Commission nor is the Code amended to add any such provision therein. Resultantly, there is no specific legal provision under which such a direction can be given. It is therefore, necessary to see whether such power can be read into in any of the available provisions of law.

[20] A careful study of the relevant provisions of the Code and other relevant statutes discloses a scheme which aims at strengthening the hands of the investigator. Section 53, Section 54A, Section 311A of the Code, Section 73 of the Evidence Act and the Prisoners Act to which I shall soon refer reflect Parliament's efforts in that behalf. I have already noted that in Kathi Kalu Oghad, while considering the expressions "to be a witness" and "furnishing evidence", this Court clarified that "to be a witness" is not equivalent to "furnishing evidence" in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification because such interpretation would not have been within the contemplation of the Constitution makers for the simple reason that though they may have intended to protect an accused person from the hazards of self-incrimination, they could not have intended to put obstacles in the way of efficient and effective investigation into crime and bringing criminal to justice. Such steps often become necessary to help the investigation of crime. This Court expressed that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and law courts with legitimate powers to bring offenders to justice. This, in my opinion, is the

basic theme and, the controversy regarding taking of voice sample involved in this case will have to be dealt with keeping this theme in mind and by striking a balance between Article 20(3) and societal interest in having a legal framework in place which brings to book criminals.

[21] Since we are concerned with the stage of investigation, it is necessary to see how the Code defines 'investigation'. Section 2 (h) of the Code is material. It reads thus:

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

[22] It is the duty of a Police Officer or any person (other than a Magistrate) authorized by a Magistrate to collect evidence and proceedings under the Code for the collection of evidence are included in 'Investigation'. Collection of voice sample of an accused is a step in investigation. It was argued by learned counsel for the State that various steps which the police take during investigation are not specifically provided in the Code, yet they fall within the wider definition of the term 'investigation' and investigation has been held to include measures that had not been enumerated in statutory provisions and the decisions to that effect of the Rajasthan High Court in Mahipal Maderna and Allahabad High Court in Jamshed have been noticed by this Court in Selvi and, therefore, no legal provision need be located under which voice sample can be taken. I find it difficult to accept this submission. In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. (State of West Bengal v. Swapan Guha). The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 20(3), the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction. In Bindeshwari Prasad Singh v. Kali Singh, 1977 1 SCC 57this Court has clarified that

subordinate criminal courts have no inherent powers. Similar view has been taken by this court in Adalat Prasad. Our attention was drawn to Sakiri Vasu in support of the submission that the Magistrate has implied or incidental powers. In that case, this Court was dealing with the Magistrate's powers under Section 156(3) of the Code. It is observed that Section 156(3) includes all such powers as are necessary for ensuring a proper investigation. It is further observed that when a power is given to an authority to do something, it includes such incidental or implied powers which would ensure proper doing of that thing. It is further added that where an Act confers jurisdiction, it impliedly also grants power of doing all such acts or employ such means as are essentially necessary for execution. If we read Bindeshwar Prasad, Adalat Prasad and Sakiri Vasu together, it becomes clear that the subordinate criminal courts do not have inherent powers. They can exercise such incidental powers as are necessary to ensure proper investigation. Against this background, it is necessary to find out whether power of a Magistrate to issue direction to a police officer to take voice sample of the accused during investigation can be read into in any provisions of the Code or any other law. It is necessary to find out whether a Magistrate has implied or ancillary power under any provisions of the Code to pass such order for the purpose of proper investigation of the case.

[23] In search for such a power, I shall first deal with the Prisoners Act. As its short title and preamble suggests it is aimed at securing identification of the accused. It is an Act to authorize the taking of measurements and photographs of convicts and others. Section 2(a) defines the term 'measurements' to include finger-impressions and foot-print impressions. Section 3 provides for taking of measurements, etc., of convicted persons and Section 4 provides for taking of measurements, etc., of non-convicted persons. Section 5 provides for power of a Magistrate to order a person to be measured or photographed. Section 6 permits the police officer to use all means necessary to secure measurements etc. if such person puts up resistance. Section 7 states that all measurements and photographs taken of a person who has not been previously convicted shall be destroyed unless the court directs otherwise, if such person is acquitted or discharged. In Kathi Kalu Oghad, this Court referred to the Prisoners Act as a statute empowering the law courts with legitimate powers to bring offenders to justice.

[24] In Amrit Singh v. State of Punjab, 2006 12 SCC 79 the appellant was charged for offences under Sections 376 and 302 of the Indian Penal Code (for short "the IPC") and an application was filed by the investigating officer for obtaining the appellant's hair sample. He refused to give hair sample. It was argued that hair sample can be taken under the provisions of the Prisoners Act. This Court held that the Prisoners Act may not

be ultra vires the Constitution, but it will have no application to the case before it because it cannot be said to be an area contemplated under it.

[25] In Telgi, the Bombay High Court was dealing with a challenge to the order passed by the Special Judge, Pune, rejecting application filed by the investigating agency praying that it may be permitted to record the voice samples of the accused. The High Court relying on Kathi Kalu Oghad rejected the contention that requiring the accused to lend their voice sample to the investigating officer amounts to testimonial compulsion and results in infringement of the accused's right under Article 20(3) of the Constitution. The High Court held that measuring frequency or intensity of the speech sound waves falls within the ambit of the scope of the term "measurement" as defined in Section 2(a) of the Prisoners Act. The High Court also relied on Sections 5 and 6 of the Prisoners Act as provisions enabling the court to pass such orders.

[26] In Rakesh Bisht, the Delhi High Court disagreed with the view taken by the Bombay High Court in Telgi. The Delhi High Court held that if after investigation, charges are framed and in the proceedings before the court, the court feels that voice sample ought to be taken for the purposes of establishing identity, then such a direction may be given provided the voice sample is taken only for the purposes of identification and it does not contain inculpatory statement so as to be hit by Article 20(3) of the Constitution.

[27] Having carefully perused the provisions of the Prisoners Act, I am inclined to accept the view taken by the Bombay High Court in Telgi as against the view taken by the Delhi High Court in Rakesh Bisht. Voice sample stands on a different footing from hair sample with which this Court was concerned in Amrit Singh because there is no provision express or implied in the Prisoners Act under which such a hair sample can be taken. That is not so with voice sample.

[28] The purpose of taking voice sample which is non-testimonial physical evidence is to compare it with tape recorded conversation. It is a physical characteristic of the accused. It is identificatory evidence. In R.M. Malkani, this Court has taken a view that tape recorded conversation is admissible provided the conversation is relevant to the matters in issue; there is identification of the voice and the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorded conversation. It is a relevant fact and is admissible under Section 7 of the Evidence Act. In view of this legal position, to make the tape recorded conversation admissible in evidence, there must be provision under which the police can get it identified. For that purpose, the police must get the voice sample of the accused.

[29] The dictionary meaning of the term 'measurement' is the act or process of measuring. The voice sample is analysed or measured on the basis of time, frequency and intensity of the speech-sound waves. A voice print is a visual recording of voice. Spectrographic Voice Identification is described in Chapter 12 of the Book "Scientific Evidence in Criminal Cases" written by Andre A. Moenssens, Ray Edward Moses and Fred E. Inbau. The relevant extracts of this chapter could be advantageously quoted.

> "Voiceprint identification requires (1) a recording of the questioned voice, (2) a recording of known origin for comparison, and (3) a sound spectrograph machine adapted for 'voiceprint' studies."
>
> 12.02 Sound and Speech
>
> In order to properly understand the voiceprint technique, it is necessary to briefly review some elementary concepts of sound and speech.
>
> Sound, like heat, can be defined as a vibration of air molecules or described as energy in the form of waves or pulses, caused by vibrations. In the speech process, the initial wave producing vibrations originate in the vocal cords. Each vibration causes a compression and corresponding rarefications of the air, which in turn form the aforementioned wave or pulse. The time interval between each pulse is called the frequency of sound; it is expressed generally in hertz, abbreviated as hz., or sometimes also in cycles-per-second, abbreviated as cps. It is this frequency which determines the pitch of the sound. The higher the frequency, the higher the pitch, and vice versa.
>
> Intensity is another characteristic of sound. In speech, intensity is the characteristic of loudness. Intensity is a function of the amount of energy in the sound wave or pulse. To perceive the difference between frequency and intensity, two activities of air molecules in an atmosphere must be considered. The speed at which an individual vibrating molecule bounces back and forth between the other air molecules surrounding it is the frequency. Intensity, on the other hand, may be measured by the number of air molecules that are being caused to vibrate at a given frequency."

"12.03 The Sound Spectrograph

> The sound spectrograph is an electromagnetic instrument which produces a graphic display of speech in the parameters of time, frequency and intensity. The display is called a sound spectrogram."

[30] Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act.

[31] There is another angle of looking at this issue. Voice prints are like finger prints. Each person has a distinctive voice with characteristic features. Voice print experts have to compare spectrographic prints to arrive at an identification. In this connection, it would be useful to read following paragraphs from the book "Law Enforcement and Criminal Justice an introduction" by Bennett-Sandler, Frazier, Torres, Waldron.

> "Voiceprints. The voiceprint method of speaker identification involves the aural and visual comparison of one or more identified voice patterns with a questioned or unknown voice. Factors such as pitch, rate of speech, accent, articulation, and other items are evaluated and identified, even though a speaker may attempt to disguise his or her voice. Through means of a sound spectrograph, voice signals can be recorded magnetically to produce a permanent image on electrically sensitive paper. This visual recording is called a voiceprint.
>
> A voiceprint indicates resonance bars of a person's voice (called formants), along with the spoken word and how it is articulated. Figure 9.7 is an actual voiceprint sample. The loudness of a voice is indicated by the density of lines; the darker the lines on the print, the greater the volume of the sound. When voiceprints are being identified, the frequency and pitch of the voice are indicated on the vertical axis; the time factor is indicated on the horizontal axis. At least ten matching sounds are needed to make a positive identification, while fewer factors lead to a probable or highly probable conclusion.

> Voiceprints are like fingerprints in that each person has a distinctive voice with characteristic features dictated by vocal cavities and articulators. Oral and nasal cavities act as resonators for energy expended by the vocal cords. Articulators are generated by the lips, teeth, tongue, soft palate, and jaw muscles. Voiceprint experts must compare spectrographic prints or phonetic elements to arrive at an identification. These expert laboratory technicians are trained to make subjective conclusions, much as fingerprint or criminalistic experts must make determinations on the basis of evidence."

Thus, my conclusion that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term 'measurements'. I must note that the Law Commission of India in its 87th Report referred to the book "Law Enforcement and Criminal Justice an introduction". The Law commission observed that voice prints resemble finger prints and made a recommendation that the Prisoners Act needs to be amended. I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code.

[32] I shall now turn to Section 73 of the Indian Evidence Act to see whether it empowers the court to give such a direction. It reads thus:

> "Section 73 - Comparison of signature, writing or seal with others admitted or proved.
>
> In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

> The Court may direct any person present in court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."
>
> [This section applies also, with any necessary modifications, to finger-impressions.]

[33] In Ram Babu Misra, the investigating officer made an application to the Chief Judicial Magistrate, Lucknow seeking a direction to the accused to give his specimen writing for the purpose of comparison with certain disputed writings. Learned Magistrate held that he had no power to do so when the case was still under investigation. His view was upheld by the High Court. This Court held that the second paragraph of Section 73 enables the court to direct any person present in court to give specimen writings "for the purpose of enabling the court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the court to compare" is that there is some proceeding before the court in which or as a consequence of which it might be necessary for the court to compare such writings. This Court further observed that the direction is to be given "for the purpose of enabling the court to compare" and not for the purpose of enabling the investigating or other agency to compare. While dismissing the appeal, this Court expressed that a suitable legislation may be made on the analogy of Section 5 of the Prisoners Act to provide for the investiture of Magistrates with the power to issue directions to any person including an accused person to give specimen signatures and writings. Thus Section 73 of the Evidence Act does not empower the court to direct the accused to give his specimen writings during the course of investigation. Obviously, Section 73 applies to proceedings pending before the court. They could be civil or criminal. In view of the suggestion made by this Court by Act 25 of 2005 with effect from 23.6.2006, Section 311A was added in the Code empowering the Magistrate to order a person to give specimen signature or handwriting during the course of investigation or proceeding under the Code.

[34] Section 311A of the Code reads thus:

> "311A. Power of Magistrate to order person to give specimen signatures or handwriting:

If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

A bare reading of this Section makes it clear that Section 311A cannot be used for obtaining a direction from a Magistrate for taking voice sample.

[35] Section 53 of the Code pertains to examination of the accused by medical practitioner at the request of a police officer. Section 53A refers to examination of person accused of rape by medical practitioner and section 54 refers to examination of arrested person by a medical officer. Section 53 is material. It reads as under:

"Section 53 - Examination of accused by medical practitioner at the request of police officer

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section,

the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation:-

In this section and in sections 53A and 54,

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956(102 of 1956) and whose name has been entered in a State Medical Register.

1. Substituted by The Code of Criminal Procedure (Amendment) Act, 2005. Earlier the text was as under:

Explanation.-In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register."

[36] In short, this section states that if a police officer feels that there are reasonable grounds for believing that an examination of the person of the accused will afford evidence as to commission of the offence, he may request a registered medical practitioner to make such examination of his person as is reasonably necessary. For such examination, it is permissible to use such force as may be reasonably necessary. Explanation (a) to Section 53 states what is 'examination'. It is an inclusive definition. It states that the examination shall include the examination of blood, blood stains, semen,

swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case. This explanation was substituted by the Code of Criminal Procedure (Amendment) Act, 2005. The question is whether with the aid of the doctrine 'ejusdem generis' voice sample test could be included within the scope of the term 'examination'.

[37] I am not impressed by the submission that the term "such other tests" mentioned in Explanation (a) is controlled by the words "which the registered medical practitioner thinks necessary". It is not possible to hold that Explanation (a) vests the discretion to conduct examination of the accused in the registered medical practitioner and not in the investigating officer and therefore the doctrine of 'ejusdem generis' cannot be pressed into service. Under Section 53(1) the registered medical practitioner can act only at the request of a police officer. Obviously, he can have no say in the process of investigation. The decision to get the accused examined is to be taken by the investigating officer and not by the medical practitioner. It is the expertise of the medical practitioner which the investigator uses to decide the method of the test. It would be wrong, therefore, to state that the discretion to get the accused examined vests in the medical practitioner. This submission must, therefore, be rejected.

[38] It is argued that voice sample test cannot be included in the definition of 'examination' because in Selvi, this Court has held that Section 53 needs to be given a restrictive interpretation. I must, therefore, revisit Selvi.

[39] In Selvi, it was contended that the phrase "modern and scientific techniques including DNA profiling and such other tests" should be liberally construed to include narco-analysis test, polygraph examination and the BEAP test. These tests could be read in with the help of the words "and such other tests", because the list of "modern and scientific techniques" contemplated was illustrative and not exhaustive. This Court observed that it was inclined to take the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination and, therefore, it would be prudent to state that the phrase "and such other tests" appearing in Explanation (a) to Section 53 of the Code should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. This Court accepted the submission that while bodily substances such as blood, semen, sputum, sweat, hair and finger nail clippings can be characterized as physical evidence, the same cannot be said about the techniques in question. This Court reiterated the distinction between physical evidence and testimonial acts and

accepted the submission that the doctrine of 'ejusdem generis' entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of commonality between those specific words. This Court acknowledged that the substances mentioned in Explanation (a) to Section 53 are examples of physical evidence and, hence, the words "and such other tests" mentioned therein should be construed to include the examination of physical evidence but not that of testimonial acts. This Court made it clear that it was not examining what was the legislative intent in not including the tests impugned before it in the Explanation.

[40] Our attention was drawn to the observation of this Court in Selvi that the dynamic interpretation of the amended Explanation to Section 53 is obstructed because the general words "and such other tests" should ordinarily be read to include tests which are of the same genus as the other forms of medical examination which are examinations of bodily substances. It is argued that voice sample is not a bodily substance like blood, sputum, finger nail clippings etc.

[41] Voice emanates from the human body. The human body determines its volume and distinctiveness. Though it cannot be touched or seen like a bodily substance, being a bodily emanation, it could be treated as a part of human body and thus could be called a bodily substance. But, I feel that there is no need to stretch the meaning of the term 'bodily substance' in this case. I have already expressed my opinion that voice sample is physical non-testimonial evidence. It does not communicate to the investigator any information based on personal knowledge of the accused which can incriminate him. Voice sample cannot be held to be conceptually different from physical non-testimonial evidence like blood, semen, sputum, hair etc. Taking of voice sample does not involve any testimonial responses. The observation of this Court in Selvi that it would not be prudent to read Explanation (a) to Section 53 of the Code in an expansive manner is qualified by the words "so as to include the impugned techniques". What must be borne in mind is that the impugned techniques were held to be testimonial and hit by Article 20(3) of the Constitution. This Court emphasized that Explanation (a) to Section 53 does not enumerate certain other kinds of medical examination that involve testimonial acts, such as psychiatric examination among others and this demonstrates that the amendment made to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts. If this Court wanted to interpret Explanation (a) as referring only to bodily substances there was no reason for it to draw such distinction. Pertinently, this distinction was employed while applying the doctrine of 'ejusdem generis' to Section 53. The tenor of this judgment makes it clear that tests pertaining to physical non-testimonial evidence can be included in the purview

of the words "and such other tests" with the aid of the doctrine of 'ejusdem generis'. In my opinion, Selvi primarily rests on the distinction between physical evidence of non-testimonial character as against evidence involving testimonial compulsions. The tests mentioned in Explanation (a) are of bodily substances, which are examples of physical evidence. Even if voice sample is not treated as a bodily substance, it is still physical evidence involving no transmission of personal knowledge. On the reasoning of Selvi which is based on Kathi Kalu Oghad, I find no difficulty in including voice sample test in the phrase "such other tests" appearing in Explanation (a) to Section 53 by applying the doctrine of 'ejusdem generis' as it is a test pertaining to physical non-testimonial evidence like blood, sputum etc. In my opinion, such interpretation of Selvi would be in tune with the general scheme of the Code which contains provisions for collection of evidence for comparison or identification at the investigation stage in order to strengthen the hands of the investigating agency.

[42] It was argued that Section 53 of the Code only contemplates medical examination and taking of voice sample is not a medical examination. Section 53 talks of examination by registered medical practitioner of the person of the accused but, does not use the words "medical examination". Similarly, Explanation (a) to Section 53 does not use the words "medical examination". In my opinion, Section 53 need not be confined to medical examination. It is pertinent to note that in Selvi, this court was considering whether narco-analysis, polygraph examination and the BEAP tests violate Article 20(3) of the Constitution. While examining this question, this Court analyzed Section 53 and stated that because those tests are testimonial in nature, they do not fall within the ambit of Section 53 of the Code but this Court did not restrict examination of person contemplated in Section 53 to medical examination by a medical practitioner even though the tests impugned therein were tests that were clearly not to be conducted by the medical practitioner. It must be remembered that Section 53 is primarily meant to serve as aid in the investigation. Examination of the accused is to be conducted by a medical practitioner at the instance of the police officer, who is in charge of the investigation. On a fair reading of Section 53 of the Code, I am of the opinion that under that Section, the medical practitioner can conduct the examination or suggest the method of examination.

[43] I must also deal with the submission of learned counsel for the appellant that non-inclusion of voice sample in Explanation (a) displays legislative intent not to include it though legislature was aware of such test. In Selvi, this court has made it clear that it was not examining the question regarding legislative intent in not including the test impugned before it in Explanation (a). Therefore, Selvi does not help the appellant on

this point. On the contrary, in my opinion, by adding the words 'and such other tests' in the definition of term contained in Explanation (a) to Section 53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of expanding to legally permissible limits with the aid of the doctrine of 'ejusdem generis'. I, therefore, reject this submission.

[44] Section 54A of the Code makes provision for identification of arrested persons. It states that where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the court having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit. Identification of the voice is precondition for admission of tape recorded conversation in evidence (R.M. Malkani). Since Section 54A of the Code uses the words "the Court, . may direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit", voice sample can be identified by means of voice identification parade under Section 54A or by some other person familiar with the voice.

[45] I may usefully refer to the judgment of this Court in Nilesh Paradkar v. State of Maharashtra, 2011 4 SCC 143 where the voice test identification was conducted by playing cassette in the presence of panchas, police officers and prosecution witnesses. This Court rejected the voice identification evidence because precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses were not taken. But this court did not reject the evidence on the ground that voice identification parade is not contemplated under Section 54A of the Code. It is important to note that in Mohan Singh v. State of Bihar, 2011 9 SCC 272after noticing Nilesh Paradkar, this Court held that where the witnesses identifying the voice had previous acquaintance with the caller i.e. the accused, such identification of voice can be relied upon; but identification by voice has to be considered carefully by the court. This, however, is no answer to the question of availability of a legal provision to pass an order directing the accused to give voice sample during investigation. The legal provision, in my opinion, can be traced to the Prisoners Act and Section 53 of the Code.

[46] I am mindful of the fact that foreign decisions are not binding on our courts. But, I must refer to the judgment of the Supreme Court of Appeal of South Africa in Levack,

Hamilton Caesar & Ors. v. Regional Magistrate, Wynberg & Anr.,2003 1 AllSA 22 because it throws some light on the issue involved in the case. In that case, the Magistrate had granted an order under Section 37(3) of the Criminal Procedure Act 51 of 1977 (for short, "South African Act") directing the accused to give voice samples as specified by a named 'voice expert' in the presence of the legal representatives of the accused. The object was to compare the samples with tape recordings of telephone conversations in the State's possession, for possible later use during the trial. The accused were unsuccessful in the High Court in their challenge to the said order of the lower court. Hence, they appealed to the Supreme Court of South Africa. Under Section 37(1) of the South African Act, any police officer may take the fingerprints, palm-prints and foot-prints or may cause any such prints to be taken, inter alia, of any person arrested upon any charge. Sections 37(1)(a)(i) and (ii) and Section 37(1)(c) of the South African Act read thus:

> "37. Powers in respect of prints and bodily appearance of accused. (1) Any police official may
>
> (a) take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken
>
> (i) of any person arrested upon any charge;
>
> (ii) of any such person released on bail or on warning under section 72;
>
> (iii) xxx xxx xxx
>
> (iv) xxx xxx xxx
>
> (v) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark,

characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female;"

The first question which fell for consideration was whether voice of a person is a characteristic or distinguishing feature of the body. The Supreme Court of South Africa considered the Oxford Dictionary meaning of 'voice' as '1. Sound formed in larynx etc. and uttered by mouth, especially human utterance in speaking, shouting, singing, etc. 2. Use of voice, utterance. 3. (Phonetic) Sound uttered with resonance of vocal chords, not with mere breath'. It observed that voice is thus a sound formed in the larynx and uttered by the mouth and emanates from and is formed by the body. Therefore, there can be no doubt that it is a 'characteristic' (in the sense of a distinctive trait or quality) of the human body. Though voice sample was not specifically mentioned in Section 37, it was held that it fell within the scope of Section 37. It was observed that Section 37 does not expressly mention the voice because it is one of the 'innumerable' bodily features that the wording expressly contemplates. Section 37 merely contemplates bodily appearance of the accused. It was further observed that it is true that the voice, unlike palm or other prints, is not itself part of the body. It is a sound. But, the sound is a bodily emanation. And the body from which it emanates determines its timbre, volume and distinctive modulations. It was further observed that nothing in the provision suggests that the 'distinguishing features' it envisages should be limited to those capable of apprehension through the senses of touch and sight (or even taste or smell). Relevant observation of the Supreme Court of South Africa could be quoted.

"14. Hearing is as much a mode of physical apprehension as feeling or seeing. For the sight-impaired it is indeed the most important means of distinguishing between people. It would therefore be counter- literal to interpret the section as though the ways of 'ascertaining' bodily features it contemplates extend only to what is visible or tangible."

The Supreme Court of South Africa then considered the question of self-

> incrimination. It observed that it is wrong to suppose that requiring the accused to submit voice samples infringes their right either to remain silent in the court proceedings against them or not to give self- incriminating evidence. It was further observed that voice falls within the same category as complexion, stature, mutilations, marks and prints i.e. 'autoptic evidence' evidence derived from the accused's own bodily features. It was held that there is no difference in principle between the visibly discernible physical traits and features of an accused and those that under law can be extracted from him through syringe and vial or through the compelled provision of a voice sample. In neither case is the accused required to provide evidence of a testimonial or communicative nature, and in neither case is any constitutional right violated. The Supreme Court of South Africa then examined as to under which provision a Magistrate could issue a direction to the accused to supply his voice samples. It observed that Section 37(1)(a)(i) and (ii) permit any police officer to take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken of any person arrested upon any charge. Section 37(1)(c) states that any police officer may take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance. Though 'voice sample' was not specifically mentioned anywhere, on a conjoint reading of the two provisions, the Supreme Court of South Africa held that the police retained the power under Section 37(1)(c) to take steps as they might deem necessary to ascertain the characteristic or distinguishing features of the accused's voice. That included the power to request the accused to supply voice samples. The court further observed that this power, in turn, could properly be supplemented by a court order requiring the accused to do so.

[47] In the ultimate analysis, therefore, I am of the opinion that the Magistrate's power to authorize the investigating agency to record voice sample of the person accused of an offence can be traced to Section 5 of the Prisoners Act and Section 53 of the Code. The Magistrate has an ancillary or implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid investigation. This conclusion of mine is based on the interpretation of relevant sections of the Prisoners Act and Section 53 of the Code and also is in tune with the concern expressed by this court in Kathi Kalu Oghad that it is as much necessary to protect an accused person against being

compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

[48] The principle that a penal statute should be strictly construed is not of universal application. In Murlidhar Meghraj Loya v. State of Maharashtra, 1976 AIR(SC) 1929this court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this court, Krishna Iyer, J. held that any narrow and pedantic, literal and lexical construction of Food Laws is likely to leave loopholes for the offender to sneak out of the meshes of law and should be discouraged and criminal jurisprudence must depart from old canons defeating criminal statutes calculated to protect the public health and the nation's wealth. Similar view was taken in Kisan Trimbak Kothula & Ors. v. State of Maharashtra, 1977 AIR(SC) 435. In State of Maharashtra v. Natwarlal Damodardas Soni, 1980 AIR(SC) 593while dealing with Section 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules, a narrow construction given by the High Court was rejected on the ground that that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view. Therefore, whether the penal statute should be given strict interpretation or not will depend on facts of each case. Considerations of public health, preservation of nation's wealth, public safety may weigh with the court in a given case and persuade it not to give a narrow construction to a penal statute. In the facts of this case, I am not inclined to give a narrow construction to the provisions of the Prisoners Act and Section 53 of the Code. Judicial note can be taken of the fact that there is a great deal of technological advance in means of communication. Criminals are using new methodology in committing crimes. Use of landlines, mobile phones and voice over internet protocol (VoIP) in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist activities is rampant. Therefore, in order to strengthen the hands of investigating agencies, I am inclined to give purposive interpretation to the provisions of the Prisoners Act and Section 53 of the Code instead of giving a narrow interpretation to them. I, however, feel that Parliament needs to bring in more clarity and precision by amending the Prisoners Act. The Code also needs to be suitably amended. Crime has changed its face. There are new challenges faced by the investigating agency. It is necessary to note that many local amendments have been made in the Prisoners Act by several States. Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to strike a balance between the need to preserve the right against self incrimination guaranteed under Article 20(3) of the Constitution and the need to strengthen the hands of the investigating agency to bring

criminals to book.

[49] In the view that I have taken, I find no infirmity in the impugned order passed by the High Court confirming the order passed by learned Chief Judicial Magistrate, Saharanpur summoning the appellant to the court for recording the sample of his voice. The appeal is dismissed.

[50] Before I part with this judgment, I must express my sincere thanks to learned counsel Mr. Siddhartha Dave, Mr. Aman Ahluwalia and Mr. R.K. Dash, who have very ably assisted the court.

Aftab Alam, J.

[51] Leave granted.

> In to-day's world when terrorism is a hard reality and terrorist violence is a common phenomenon, the police needs all the forensic aids from science and technology. The technology is in position to-day to say whether two voice-recordings are of the same person or of two different people and, thus, to provide valuable aid in investigation. But, the question is whether the law has any provision under which a person, suspected of having committed an offence, may be compelled to give his voice sample to aid the police in investigation of the case. The next and the more important question is, in case there is no express or evidently applicable provision in law in that regard, should the court invent one by the process of interpretation. My sister Desai J. seems to think that the gap in the law is so vital that the court must step in to bridge the gap. I hesitate to do so.

[52] There are, indeed, precedents where the court by the interpretative process has evolved old laws to meet cotemporary challenges and has planted into them contents to deal with the demands and the needs of the present that could not be envisaged at the time of the making of the law. But, on the question of compelling the accused to give voice sample, the law must come from the legislature and not through the court process. First, because the compulsion to give voice sample does in some way involve an invasion of the rights of the individual and to bring it within the ambit of the existing law would require more than reasonable bending and stretching of the principles of interpretation. Secondly, if the legislature even while making amendments in the Criminal Procedure Code, aimed at strengthening the investigation, as late as in 2005,

is oblivious to something as obvious as this and despite express reminders chooses not to include voice sample either in the newly introduced explanation to section 53 or in sections 53A, and 311A, then it may even be contended that in the larger schemes of things the legislature is able to see something which perhaps the Court is missing.

[53] Coming now to the specifics, I would briefly record my reasons for not being able to share the view taken by Desai J.

[54] At the beginning of her judgment Desai J. has framed two questions that the Court is called upon to answer in this case. These are:

> "(i) Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?
>
> (ii) Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

[55] As regards the first question, relying primarily on the eleven (11) Judges' Bench decision of this Court in State of Bombay v. Kathi Kalu Oghad & Others, 1962 3 SCR 10 which was followed in the more recent decision in Selvi and others v. State of Karnataka, 2010 7 SCC 263 she held that "taking voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution."

[56] I am broadly in agreement with the view taken by her on Article 20 (3) but, since I differ with her on the second question, I think the issue of constitutional validity in compelling the accused to give his/her voice sample does not really arise in this case.

[57] Coming to the second question, as may be seen, it has the recognition that there is no provision in the Criminal Procedure Code to compel the accused to give his voice sample. That being the position, to my mind the answer to the question can only be in the negative, regardless of the constitutional guarantee against self-incrimination and assuming that in case a provision in that regard is made in the law that would not offend Article 20 (3) of the Constitution.

[58] Desai J., however, answers the question in the affirmative by means of a learned and elaborate discourse. She has navigated the arduous course to the conclusion at which she arrived very painstakingly and skillfully.

[59] First, she firmly rejects the submission advanced on behalf of the State that in the absence of any express provision in that regard, it was within the inherent and implied powers of the Magistrate to direct the accused to give his/her voice sample to ensure a proper investigation. In this regard, she observes as follows:-

> "In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. (State of West Bengal v. Swapan Guha). The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 20(3), the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction."

[60] I am fully in agreement with what is said above.

[61] However, having rejected the submission based on the inherent and implied powers of the Magistrate she makes a "search" for the power of the Magistrate to ask the accused to give his/her voice sample. She shortlists for that purpose (i) the provisions of the Identification of Prisoners Act, 1920, (ii) Section 73 of the Evidence Act and (iii) Sections 311A and 53 of the Code of Criminal Procedure.

[62] She finds and holds that Section 73 of the Evidence Act and Section 311A of the Code of Criminal Procedure are of no help and those two provisions cannot be used for obtaining a direction from the Magistrate for taking voice sample and finally rests her

conclusion on the provisions of The Identification of Prisoners Act, 1920 and Section 53 of the Code of Criminal Procedure.

[63] Section 53 of the Code of Criminal Procedure originally read as under:-

> "53. Examination of accused by medical practitioner at the request of police officer. (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
>
> (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

[64] In the year 2005, a number of amendments were made in the Criminal Procedure Code by Act 25 of 2005. Those amendments included the addition of an explanation to Section 53 and insertion of Sections 53-A and 311-A. The explanation added to Section 53 reads as under:-

> "[Explanation. In this section and in sections 53A and 54, -
>
> a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;
>
> b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the

Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.]"

[65] Desai J. rejects the submission made on behalf of the appellant that "the term 'such other tests' mentioned in Explanation (a) is controlled by the words 'which the registered medical practitioner thinks necessary'" and relying heavily upon the decision of this Court in Selvi holds:

> " by adding the words 'and such other tests' in the definition of term contained in Explanation (a) to Section 53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of expanding to legally permissible limits with the aid of the doctrine of 'ejusdem generis'."

[66] I am completely unable to see how Explanation (a) to Section 53 can be said to include voice sample and to my mind the ratio of the decision in Selvi does not enlarge but restricts the ambit of the expressions 'such other tests' occurring in the Explanation.

[67] In my opinion the Explanation in question deals with material and tangible things related to the human body and not to something disembodied as voice.

[68] Section 53 applies to a situation where the examination of the person of the accused is likely to provide evidence as to the commission of an offence. Whether or not the examination of the person of the accused would afford evidence as to the commission of the offence undoubtedly rests on the satisfaction of the police officer not below the rank of sub-inspector. But, once the police officer makes a request to the registered medical practitioner for the examination of the person of the accused, what other tests (apart from those expressly enumerated) might be necessary in a particular case can only be decided by the medical practitioner and not the police officer referring the accused to him. In my view, therefore, Mr. Dave, learned counsel for the appellant, is right in his submission that any tests other than those expressly mentioned in the Explanation can only be those which the registered medical practitioner would think necessary in a particular case. And further that in any event a registered medical practitioner cannot take a voice sample.

[69] Apart from Section 53 of the Code of Criminal Procedure, Desai J. finds another source for the power of the Magistrate in Section 5 of the Identification of Prisoners Act, 1920. Referring to some technical literature on voice print identification, she holds:

> "Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act"

And further:

> "Thus, my conclusion that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term 'measurements'."

She finally concludes:

> "I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code."

[70] I am unable to agree.

[71] In order to clearly state my views on the provisions of the Identification of Prisoners Act, I may refer to the object and the scheme of the Act. The principal object of the Act is to sanction certain coercive measures (which would otherwise invite criminal or tortuous liability) in order to facilitate the identification of (i) convicts, (ii) persons arrested in connection with certain offences, and (iii) persons ordered to give security in certain cases. The scheme of the Act is as follows. The first section relates to the short title and the extent of the Act. The second section has the definition clauses and defines 'measurements' and 'prescribed' in clauses (a) and (c) respectively which are as under:

"2. Definitions. (1) In this Act, unless there is anything repugnant in the subject or context, -

iii) "measurements" include finger impressions and foot-print impressions;

iv) xxx xxx xxx

(c) "prescribed" means prescribed by rules made under this Act."

[72] Then there are the three substantive provisions of the Act. Section 3 deals with taking of measurements, etc of convicted persons. It is as under:

"3. Taking of measurements, etc., of convicted persons. Every person who has been

a) convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him liable to enhanced punishment on a subsequent conviction; or

b) ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1898 (5 of 1898),

shall, if so required, allow his measurements and photograph to be taken by a police officer in the prescribed manner."

[73] Section 4 deals with taking of measurement, etc. of non-convicted persons. It is as under:

"4. Taking of measurements, etc., of non-convicted persons. Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner."

[74] Section 5 deals with the power of Magistrate to order a person to be measured or photographed. It is as under:

> "5. Power of Magistrate to order a person to be measured or photographed. If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:
>
> Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class:
>
> Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

[75] The rest of the provisions from Section 6 to Section 9 deal with incidental or consequential matters. Section 6 deals with resistance to the taking of measurements, etc. and it is as under:

> "6. Resistance to the taking of measurements, etc. (1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.
>
> (2) Resistance to or refusal to allow the taking of measurements or photograph under this Act shall be deemed to be an offence under section 186 of the Indian Penal Code (45 of 1860)."

[76] Section 7 deals with destruction of photographs and records of measurements, etc., on acquittal and it is as under:

> "Destruction of photographs and records of measurements, etc., on

acquittal. Where any person who, not having been previously convicted of an offence punishable with rigorous imprisonment for a term of one year or upwards, has had his measurements taken or has been photographed in accordance with the provisions of this Act is released without trial or discharged or acquitted by any court, all measurements and all photographs (both negatives and copies) so taken shall, unless the court or (in a case where such person is released without trial) the District Magistrate or Sub-Divisional Officer for reasons to be recorded in writing otherwise directs, be destroyed or made over to him."

[77] Section 8 gives the State Governments the power to make rules and it is as under:

"8. Power to make rules. (1) The State Government may, [by notification in the Official Gazette,] make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, such rules may provide for

a) restrictions on the taking of photographs of persons under section 5;

b) the places at which measurements and photographs may be taken;

c) the nature of the measurements that may be taken;

d) the method in which any class or classes of measurements shall be taken;

e) the dress to be worn by a person when being photographed under section 3; and

f) the preservation, safe custody, destruction and disposal of records of measurements and photographs.

[(3) Every rule made under this section shall be laid, as soon as may be after it is made, before State Legislature.]"

[78] Section 9 finally lays down the bar of suits.

[79] A careful reading of Sections 3, 4 and 5 would make it clear that the three provisions relate to three categories of persons. Section 3 relates to a convicted person. Section 4 relates to a person who has been arrested in connection with an offence punishable with rigorous imprisonment for term of 1 year or upwards. Section 5 is far wider in amplitude than Sections 3 and 4 and it relates to any person, the taking of whose measurements or photographs might be expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure. In the case of the first two categories of persons, the authority to take measurements vests in a police officer but in the case of Section 5, having regard to its much wider amplitude, the power vests in a Magistrate and not in any police officer.

[80] It is to be noted that the expression "measurements" occurs not only in Section 5 but also in Sections 3 and 4. Thus, if the term "measurements" is to be read to include voice sample then on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards (and voice sample would normally be required only in cases in which the punishment is one year or upward!) it would be open to the police officer (of any rank) to require the arrested person to give his/her voice sample on his own and without seeking any direction from the Magistrate under Section 5. Further, applying the same parameters, not only voice sample but many other medical tests, for instance, blood tests such as lipid profile, kidney function test, liver function test, thyroid function test etc., brain scanning etc. would equally qualify as "measurements" within the meaning of the Identification of Prisoners Act. In other words on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards it would be possible for the police officer (of any rank) to obtain not only the voice sample but the full medical profile of the arrested person without seeking any direction from the magistrate under Section 5 of the Identification of Prisoners Act or taking recourse to the provisions of Section 53 or 53A of the Code of Criminal Procedure.

[81] I find it impossible to extend the provisions of the Identification of Prisoners Act to that extent.

[82] It may not be inappropriate here to point out that in exercise of the rule-making

powers under Section 8 of the Identification of Prisoners Act some of the State Governments have framed rules. I have examined the rules framed by the States of Maharashtra, Madhya Pradesh, Orissa, Pondicherry and Jammu & Kashmir. From a perusal of those rules it would appear that all the State Governments understood "measurements" to mean the physical measurements of the body or parts of the body. The framing of the rules by the State Government would not be binding on this Court in interpreting a provision in the rules. But it needs to be borne in mind that unless the provision are incorporated in the Act in regard to the manner of taking voice sample and the person competent to take voice sample etc. there may be difficulty in carrying out the direction of the Court.

[83] For arriving at her conclusion regarding the scope of Section 5 of the Identification of Prisoners Act, Desai J. has considered two High Court judgments. One is of the Bombay High Court in Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others, 2005 CrLJ 2868 and the other by the Delhi High Court in Rakesh Bisht v. Central Bureau of Investigation, 2007 CrLJ 1530 she has approved the Bombay High Court decision in Telgi's case and disapproved the Delhi High Court decision in Bisht's case. The Bombay decision is based on exactly the same reasoning as adopted by Desai J that the definition of "measurements" in Section 2(a) is wide enough to include voice sample and hence a Magistrate is competent to order a person to give his voice sample. The relevant passage in the decision is as under:-

> "Be that as it may, the expression "measurements" occurring in Section 5 has been defined in Section 2(a), which reads thus:
>
> 2. Definitions. - In that Act ..
>
> (a) "measurements include finger-impressions and foot-print impressions".
>
> The said expression is an inclusive term, which also includes finger-impressions and foot-print impressions. Besides, the term measurement, as per the dictionary meaning is the act or an instance of measuring; an amount determined by measuring; detailed dimensions. With the development of Science and Technology, the voice sample can be analysed or measured on the basis of time, frequency, and intensity of the speech-sound waves so as to compare and identify the voice of the person who must have spoken or

participated in recorded telephonic conversation. The expression "measurements" occurring in Section 5, to my mind, can be construed to encompass even the act undertaken for the purpose of identification of the voice in the tape-recorded conversation. Such construction will be purposive one without causing any violence to the said enactment, the purpose of which was to record or make note of the identity of specified persons."

[84] For the reasons discussed above, I am unable to accept the views taken in the Bombay decision and to my mind the decision in Telgi is not the correct enunciation of law.

[85] The Delhi High Court decision in the case of Bisht pertains to the period prior to June 23, 2006, when the amendments made in the Code of Criminal Procedure by Act 25 of 2005 came into effect. It, therefore, did not advert to Sections 53 or 311A and considered the issue of taking voice sample of the accused compulsorily, primarily in light of Section 73 of the Indian Evidence Act, 1872. Though the decision does not refer to the provisions of the Criminal Procedure Code that came into force on June 23, 2006, in my view, it arrives at the correct conclusions.

[86] At this stage, I may also refer to the decision of this Court in State of Uttar Pradesh v. Ram Babu Misra, 1980 2 SCC 343 where the Court considered the issue whether the Magistrate had the authority to direct the accused to give his specimen writing during the course of investigation. The first thing to note in regard to this decision is that it was rendered long before the introduction of Section 311A in the Code of Criminal Procedure which now expressly empowers the Magistrate to order a person to give specimen signature or handwriting for the purposes of any investigation or any proceeding under the Code. In Ram Babu Misra the Court noted that signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act, though finger impression was included therein. In that decision the Court made a suggestion to make a suitable law to provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings. The suggestions made by the Court materialized 25 years later when Section 311A was introduced in the Code of Criminal Procedure.

[87] The decision in Ram Babu Misra was rendered by this Court on February 19, 1980 and on August 27, the same year, the Law Commission of India submitted its 87th Report which was aimed at a complete revamp of the Identification of Prisoners Act, 1920 and to update it by including the scientific advances in the aid of investigation. In

Paragraph 3.16 of the Report it was observed as under:

> "3.16 Often, it becomes desirable to have an accused person speak for the purposes of giving to the police an opportunity to hear his voice and try to identify it as that of the criminal offender However, if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so, and the use of force for that purpose would be illegal."

[88] Further, in Paragraph 5.26 it was stated as under:

> "5.26 The scope of section 5 needs to be expanded in another respect. The general power of investigation given to the police under the Criminal Procedure Code may not imply the power to require the accused to furnish a specimen of his voice. Cases in which the voice of the accused was obtained for comparison with the voice of the criminal offender are known but the question whether the accused can be compelled to do so does not seem to have been debated so far in India.
>
> There is no specific statutory provision in India which expressly gives power to a police officer or a court to require an accused person to furnish a specimen of his voice."

[89] I am not suggesting for a moment that the above extracts are in any way binding upon the Court but they do indicate the response of a judicial mind while reading the provisions of the Indian Prisoners Act normally, without any urge to give the expression 'measurements' any stretched meaning.

[90] The Report then discussed where a provision for taking voice sample can be appropriately included; whether in the Identification of Prisoners Act or in the Evidence Act or in the Code of Criminal Procedure. It concluded that it would be appropriate to incorporate the provision by amending Section 5 of the Identification of Prisoners Act as follows:

> "(1) If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1973, it is expedient to direct any person

a) to allow his measurements or photograph to be taken, or

b) to furnish a specimen of his signature or writing, or

c) to furnish a specimen of his voice by uttering the specified words or making the specified sounds.

the Magistrate may make an order to that effect, recording his reasons for such an order.

(2) The person to whom the order relates

a) shall be produced or shall attend at the time and place specified in the order, and

b) shall allow his measurements or photograph to be taken by a police officer, or furnish the specimen signature or writing or furnish a specimen of his voice, as the case may be in conformity with the orders of the Magistrate before a police officer.

3) No order directing any person to be photographed shall be made except by a metropolitan Magistrate or a Magistrate of the first class.

4) No order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

5) Where a court has taken cognizance of an offence a Magistrate shall not under this section, give to the person accused of the offence any direction which could, under section 73 of the Indian Evidence Act 1872, be given by such Magistrate."

[91] The Report as noted was submitted in 1980. The Code of Criminal Procedure was

amended in 2005 when the Explanation was added to Section 53 and Sections 53A and 311A were inserted into the Code. Voice sample was not included either in the Explanation to Section 53 or Section 311A.

[92] Should the Court still insist that voice sample is included in the definition of "measurements" under the Identification of Prisoners Act and in the Explanation to Section 53 of the Code of Criminal Procedure? I would answer in the negative.

[93] In light of the above discussion, I respectfully differ from the judgment proposed by my sister Desai J. I would allow the appeal and set aside the order passed by the Magistrate and affirmed by the High Court.

[94] Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

[95] In view of the difference of opinion between us, let this case be listed for hearing before a bench of three Judges after obtaining the necessary direction from the Honourable the Chief Justice of India.

HIGH COURT OF TELANGANA AND ANDHRA PRADESH (AT HYDERABAD)

AMIT KHETAWAT
V/S
STATE OF TELANGANA

Date of Decision: 20 February 2017

Citation: 2017 LawSuit(Hyd) 101

Hon'ble Judges: B Siva Sankara Rao

Eq. Citations: 2017 (3) ALT(Cri) 2

Case Type: Criminal Revision Case

Case No: 3208 of 2016

Subject: Constitution, Criminal

Acts Referred:
Constitution Of India Art 20, Art 21, Art 20(3)
Indian Penal Code, 1860 Sec 34, Sec 120(b), Sec 468, Sec 471
Code Of Criminal Procedure, 1973 Sec 53A, Sec 53, Sec 311A, Sec 2(h), Sec 54, Sec 2(y), Sec 397, Sec 2(i), Sec 401
Evidence Act, 1872 Sec 165, Sec 114, Sec 73
Prevention Of Corruption Act, 1988 Sec 9, Sec 10
Identification Of Prisoners Act, 1920 Sec 2(III), Sec 2(i), Sec 5

Final Decision: Revision allowed

Advocates: B Chandrasen Reddy, V Ravi Kiran Rao

Reference Cases:
Cases Referred in (+): **19**

Judgement Text:-

B Siva Sankara Rao, J

[1] The present Criminal Revision Case, under Sections 397 and 401 of Cr.P.C., is filed by the petitioner-AO.No.1 of Crime No.7/ACB-CIU-Hyd/2015, dated 02.12.2015, aggrieved by the order dated 05.12.2016 in Crl.M.P.No.50 of 2016 in Crime No.7/ACB-CIU-Hyd/2015 passed by the learned I Additional Special Judge for SPE and ACB Cases-cum-V Additional Chief Judge, City Civil Court, Hyderabad, allowing the petition/Memo filed by the Prosecution under Sections 9 and 10 of Prevention of Corruption Act, 1988 and Sections 468, 471 and 120(B) r/w. Section 34 of IPC, seeking permission to record the voice samples of A.1, in directing to submit voice samples of A.1 so as to enable the Investigating Agency to send the same to the Forensic Science Laboratory, Hyderabad, for comparison to determine the voice of A.1.

[2] The contentions in the grounds of revision vis-a-vis the oral submissions in the course of hearing by the learned counsel for revision petitioner-A.1 are that the impugned order of the Court below is contrary to law, with no requirement of such a test and that too for no enabling provision and also for no reason or just cause much less to intrude into the personal liberty and to compel petitioner-A.1 against his will by testimonial compulsion and thereby sought for setting aside the impugned order of the Court below.

[3] Whereas, it is the contention of the learned Standing Counsel for SPE and ACB Cases representing the respondent- State in support of the impugned order of the Court below that the same does not amount to testimonial compulsion to stand as a witness against himself, but only comes within the broader meaning of furnishing of information other than within the exclusive knowledge of accused for same is only a voice sampling for comparision and opinion and comes within the meaning of such other tests mentioned in Explanation (a) of Section 53 of Cr.P.C., and thus, the same is well within its scope contemplated by law and also necessary for the effective adjudication of the criminal lis and once it is a procedure established by law and will not come within the purview of testimonial compulsion of 'to be a witness against himself', but for furnishing evidence in larger sense, there is nothing to interfere with the impugned order of the Court below. It is also submitted that it cannot be stated as intruding into the privacy or affecting the qualified Fundamental Right of Right to Life, that too the same when

subject to due process of law to obey the orders of the Court below in submitting to the requirement of voice sample for analysis and hence to dismiss the revision.

[4] Heard the submissions of both sides, at length, in the course of hearing referred above, which no way require repetition herein and also perused the material on record with reference to the provisions and propositions.

[5] Now, in deciding the revision lis on the correctness of the impugned order of the Court below, the factual background necessary to mention, in nutshell, is that the petitioner-A.1 along with A.2 was arrested and subsequently enlarged on bail. During the course of investigation, it is revealed that A.1 rang up from his phone to the defacto-complainant - Sri R.G. Bhaskar Reddy, District Inspector, Legal Metrology; and one Sri Uppala Nagarjuna, Commercial Tax Officer, O/o. C.T.O., Special Commodities Circle, Saroornagar Division, demanding money on the name of ACB and the said conversation was recorded by them in their respective phones and the same were handed over to the Investigating Officer for further action. Basing on the same, pending investigation of Crime No.7/ACB-CIU-Hyd/2015, the Prosecution has filed the aforesaid Memo/Petition in Crl.M.P.No.50 of 2016 seeking the aforesaid relief and the same was allowed by the Court below by order dated 05.12.2016. It is impugning the same with the contentions referred supra, the revision is maintained.

[6] Coming to the provisions relevant for the purpose, Sections 53, 53A, 54 and Section 2(h), (i) & (y) of the Code of Criminal Procedure, 1973, as amended from time to time, and Articles 20 and 21 of the Constitution of India read as under:-

> (a). 53. Examination of accused by medical practitioner at the request of police officer. -
>
> (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary

for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

{N.B: In the year 2005, a number of amendments were made in the Criminal Procedure Code by Act 25 of 2005. Those amendments included the addition of an explanation to Section 53 and insertion of Sections 53-A and 311-A.}

The explanation added to Section 53 reads as under:-

"[Explanation. - In this section and in sections 53A and 54, -

a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.]"

(b). 53A. Examination of person accused of rape by medical practitioner.-

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in

the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:--

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at shall also be noted in the report,

(4) The exact time of commencement and completion of the examination shall also be noted in the report,

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(c). 54. Examination of arrested person by medical officer:--

(1) When a person is arrested, he shall be examined by a medical officer in the service of Central or State Governments and in case the medical officer is not available by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.

(d). Section 2(h), (i) and (y) of Cr.P.C.:

In this Code, unless the context otherwise requires,

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

(i) "judicial proceeding" includes any proceeding in the course of which

evidence is or may be legally taken on oath;

(y) words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.

(e) Article 20: Protection in respect of conviction for offences:--

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

(f) Article 21: Protection of life and personal liberty:--

No person shall be deprived of his life or personal liberty except according to procedure established by law.

[7] Coming to the propositions, on the scope of Article 20 of the Constitution of India, the Eleven Judges Bench of the Supreme Court in the majority expression in STATE OF BOMBAY v. KATHI KALU OGHAD, 1961 AIR(SC) 1808 clearly held that "to be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification.

It is further observed that "the giving of fingers impression or of specified

signature or of handwriting etc., strictly speaking, is not "to be a witness". The expression "to be a witness" was held to mean imparting knowledge in respect of the relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation.

It is further observed that "person is said 'to be a witness' to a certain state of facts, which has to be determined by a Court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the Rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy".

The Supreme Court further observed that "clause 3 of Article 20 of the Constitution is directed against selfincrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in Court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge".

[8] No doubt, in RAKESH BISHT ETC. v. CENTRAL BUREAU OF INVESTIGATION, 2007 CRLJ 1530, a learned single Judge of Delhi High Court vide order dated 03.01.2007 in Criminal Revision Petition Nos.461 and 462 of 2006, observed that by virtue of Section 73 of the Indian Evidence Act, at the stage of investigation, the accused cannot be compelled to give his voice sample and there is no such provision in the Evidence Act to deal with taking of voice sample, however, if investigation is completed and charges framed, the Court may allow voice sample to be taken, provided it is only for the purpose of identification and does not contain any inculpatory statement. The learned single Judge further referred the expression in KATHI KALU and the judgment of the Apex Court in R.M. MALKANI v. STATE OF MAHARASHTRA, 1973 CrLJ 228 for the proposition that tape recorded conversation is admissible in evidence, if it is relevant to the matters in issue, and the other expression of the Apex Court in STATE OF UTTAR PRADESH v. RAM BABU MISRA, 1980 AIR(SC) 791 on the scope of Section 73 of the Indian Evidence Act of Court has no power during investigation, but for during trial, to direct the accused to subscribe the specimen

handwriting or signature or thumb impression etc., and the other judgment of the Apex Court in UNION OF INDIA v. PRAKASH P. HINDUJA, 2003 6 SCC 195, particularly para-20, "that the legal position is absolutely clear and also settled by Judicial authorities that the Court would not interfere with the investigation or during course of investigation, which would mean from the time of lodging of the FIR till submission of final report by the Officer incharge of Police Station in Court, under Section 173(2) Cr.P.C., this field being exclusively reserved for the Investigating Agency", and the other expression of the Apex Court in STATE OF HARYANA v. JAGBIR SINGH AND ANOTHER, 2003 CrLJ 5054, which relied upon RAM BABU MISRA on the scope of Section 73 of the Evidence Act and also referred Section 311-A of Cr.P.C. and observed that by virtue of Section 311-A of Cr.P.C., amended provision came into force with effect from 23.06.2006 and not prior to that when the impugned order passed by the trial Magistrate, apart from the same only refers to the handwriting and no reference to voice samples or voice recording as a bar, it cannot be urged that the specimen signatures or handwriting should also include voice samples, because the Legislature when it introduced this provision was well aware of the technology of tape recording and taking of voice samples, no doubt, the said amendment is pursuant to the recommendations of the Apex Court in RAM BABU MISRA and thereby permitting of voice sample during investigation held unsustainable and set aside.

[9] Though, the learned counsel for petitioner-A.1 relied on the observation of, at a post-cognizance stage Court can take, it is not by referring any provision and it is not a clear finding, but for a contextual reference on the scope of Section 73 of Evidence Act, from the law and what more observed is, the Bombay High Court in CENTRAL BUREAU OF INVESTIGATION v. ABDUL KARIM LADSAB TELGI AND OTEHRS, 2005 CrLJ 2868, at paras-11 and 12 directed for taking of voice samples referring to some English expressions. Even the Bombay High Court did not refer to any of the enabling provisions either in the Evidence Act or under Cr.P.C. A learned single Judge of Gujarat High Court in the very latest expression in NATVARLAL AMARSHIBHAI DEVANI v. STATE OF GUJARAT in Special Criminal Application (Direction) No.5226 of 2015, dated 18.01.2017, observed that there is no provision in the Cr.P.C. to authorise any Investigating Agency to record voice sample of any person accused of an offence, though spectrographic analysis is the available technique of voice identification or elimination by means of voice prints and the voice print may be defined as a pictorial representation of the acoustical energy output of a speaker, as a function of time, frequency and amplitude and spectrographic voice identification requires nothing of the support beyond the furnishing of a voice sample, either in the presence of a tape

recorder or depending on the circumstances, over telephone line to which a recording device has been connected. The suspect is required to repeat the sentence by sentence, perhaps, several times the words that have been transcribed from the recording of the known voice with which his or her voice is to be compared. It is also observed that spectrographic test will not fall within the ambit of psychiatric treatment and the principles explained in SELVI's case would not apply to the spectrographic test. However, there is no provision in the Code or any other law, which empowers the police or a Criminal Court, to subject the accused to the test, either from the provisions of the Act of 1920 or Section 53 Cr.P.C. or Sections 73 and 165 of the Evidence Act to compel the accused to give his voice sample for the purpose of spectrographs test. For that conclusion, it referred the expression in RITESH SINHA VS. STATE OF U.P., 2013 AIR(SC) 1132 In RITESH SINHA , the different opinions expressed by the Hon'ble 2-Judges Bench of the Apex Court and the matter is pending on reference for majority opinion before Larger Bench of the Apex Court. However, there is no legal bar therefrom in deciding the matter from the view expressed by the Apex Court in ASHOK SADARANGANI AND ANOTHER v. UNION OF INDIA AND OTHERS, 2012 11 SCC 321 of pendency of a reference to a Larger Bench does not mean all other proceedings involving the same issue remains stayed till a decision is rendered in the reference, by referring to earlier expressions of the Apex Court, in this regard.

[10] In RITESH SINHA' case , the Apex Court by referring to KATHI KALU among other expressions, observed that:

> "21. While departing from the view taken in M.P. Sharma that "to be witness is nothing more than to furnish evidence" and such evidence can be furnished through lips or by production of a thing or of a document or in other modes, in Kathi Kalu Oghad this Court was alive to the fact that the investigating agencies cannot be denied their legitimate power to investigate a case properly and on a proper analysis of relevant legal provisions it gave a restricted meaning to the term "to be witness". The relevant observations may be quoted: (KATHI KALU OGHAD's case - AIR - p-1814 - para-10)
>
> '"To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the

contemplation of the Constitutionmakers for the simple reason that - thought they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."

24. Four of the conclusions drawn by this court, which are relevant for our purpose, could be quoted:

"(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing."

26. In SELVI's case, a three Judge Bench of this Court was considering

whether involuntary administration of certain scientific techniques like narco-analysis, polygraph-examination and the BrainElectrical-Activation-Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. This Court considered the protective scope of right against self-incrimination, that is whether it extends to the investigation stage and came to the conclusion that even the investigation at the police level is embraced by Article 20(3). After quoting extensively from Kathi Kalu Oghad, it was observed that the scope of 'testimonial compulsion' is made clear by two premises. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to 'personal testimony' thereby coming within the prohibition contemplated by Article 20(3). In most cases, such 'personal testimony' can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the chain of evidence. It was held that all the three techniques involve testimonial responses. They impede the subject's right to remain silent. The subject is compelled to convey personal knowledge irrespective of his/her own volition. The results of these tests cannot be likened to physical evidence so as to exclude them from the protective scope of Article 20(3). This Court concluded that compulsory administration of the impugned techniques violates the right against self-incrimination. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects.

[11] In DIPANWITA ROY v. RONOBROTO ROY, 2015 1 SCC 365 referring to the earlier expressions in BHABANI PRASAD JENA ETC. v. CONVENER, SEC. ORISSA S.COMN., 2010 8 SCC 633, and NANDLAL WASUDEO BADWAIK VS. LATA NANDLAL BADWAIK AND ANOTHER, 2014 2 SCC 576, while holding that there is no conflict in the two decisions of this Court, namely, GOUTAM KUNDU VS. STATE OF

WEST BENGAL, 1993 3 SCC 418 and SHARDA VS. DHARMPAL, 2003 4 SCC 493, it was held that:

> "It is borne from the decisions rendered by this Court in BHABANI PRASAD JENA , and NANDLAL WASUDEO BADWAIK , that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril."

[12] In fact, even from these expressions, even against the will, the DNA test can be ordered to provide sperm, blood or other samples to be extracted from the body of the person for such examination and what is observed to avoid where it can be avoided is, in the interest of the child cannot be put to peril and not in considering any direction tantamount to testimonial compulsion of the same.

[13] In the latest 3-Judges Bench expression of the Apex Court in SUDHIR CHAUDHARY VS. STATE (NCT of Delhi), 2016 8 SCC 307 , it was observed, no doubt from the consent of accused to the voice sampling, that:

> "In the submissions which have been urged in these proceedings, learned counsel has specifically stated that the Appellants would abide by the consent which they had furnished to their voice samples being drawn. That being the position, the only surviving issue for this Court is to ensure that the underlying process for drawing the voice samples is fair and reasonable, having due regard to the mandate of Article 21. On the one hand, it is not open to the accused to dictate the course of investigation."

[14] From the above, it is clear that the process of collecting samples for conducting tests should be fair and reasonable, having regard to the mandate of Article 21 of the Constitution of India. But, it is not open to the accused to dictate the course of investigation. The conclusion therein is practically from the consent to give voice sample and not against the consent, it's ordering and the expression in RITESH SINHA's case

not referred therein. However, it is observed that giving of voice sample is not evidence, since it's purpose is only to compare it with the questioned test, since consented to furnish.

[15] From the above, covering the scope of admissibility and relevancy of an expert opinion on voice sampling and the same can be obtained from the accused against his will, either during investigation or at post-cognizance stage by the Court or to direct the police to so obtain/take either at request of police or other investigating agency or at request of the defacto-complainant or victim of a criminal proceeding, this Court in Crl.P.No.2119 of 2015, dated 23.06.2015, at paras-3 to 5, held as follows:

> "3. Though the Eleven Judges Constitutional Bench expression of the Apex Court in KATHIKALU is clear that once accused is arrested in connection with investigation or other proceeding under Section 5 of the Identification of Prisoners Act, 1920, a Magistrate of the First Class, where satisfied that, for purpose of said investigation or proceeding under the Criminal Procedure Code, it is expedient to direct the person to allow his photographs or measurements (which include finger impressions or foot print impressions as per Section 2(i)(iii) of the Act, 1920 (that may extends to signatures even) for purpose of comparison with any disputed finger impressions or the like, that does not hit by Article 20(3) of the Constitution of India as not within the meaning of 'to be a witness' but for 'furnishing' evidence in the larger sense and what is protected an accused is from hazards of self incrimination, the bar under Article 20(3) of the Constitution of India can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the claim of evidence.
>
> 4. The law is very clear by interpretation of scope of Section 73 of the Indian Evidence Act that the Court has no power to ask for writing or thumb impression of an accused of a crime before commencement of enquiry or trial. Such obtaining by the Magistrate is besides unwarranted and even so taken and used for comparison during investigation, it is inadmissible in evidence, but for the same obtained during enquiry or trial to admit in evidence, vide expressions of the Apex Court in RAM BABU MISHRA relied upon later in SUKHVINDER SINGH & ORS. v. STATE OF PUNJAB, 1994 SCC(Cri) 1376, AJITH SAVANTH MAJAGAVI v. STATE OF KARNATAKA, 1997 7 SCC 110, AMRITH SINGH v. STATE OF PUNJAB,

2006 12 SCC 79, B.MALLESAM v. STATE OF A.P., 1997 1 ALT(Cri) 719 No doubt, Section 311-A Cr.P.C is introduced by amended Act 25 of 2005 with effect from 23.06.2006, where under the investigating officer can ask during investigation for purpose of the investigation to provide for specimen signature or hand-writing of an arrested accused. Even this provision no way speaks giving of voice sampling but for confining at best to set at knot the impact of the expression of RAMBABU MISHRA (and the later expressions relied on it) on the scope of Section 73 of the Indian Evidence Act. It is needless to say even the law commission (pursuant to the observation in RAMBABU MISHRA in its 87th report of August, 1980 suggested the amendments to Sections 3 to 5 of the Act, 1920 to update it by including the scientific advances in the aid of investigation, including at para 3.16 of the report, for voice identification to furnish voice of the accused, same not materialized for none of the provisions of the Act, 1920 amended. Section 311-A Cr.P.C inserted is only for the limited area of arrested accused specimen writings and even explanation to Section 53 of Cr.P.C besides Section 53-A inserted by inclusion of D.N.A profiling and such other tests which the registered medical practitioner thinks necessary in a particular case; thus when registered medical practitioner cannot take a voice sample, Section 53 or 53-A or Section 311-A Cr.P.C or Section 73 of Indian Evidence Act or Sections 3 to 5 of the Act, 1920 have no application for taking voice sampling. Further when accused not arrested and brought before Court none of the provisions even enable to ask the accused or suspect to undergo any medical tests even muchless to subscribe handwriting or signature or thumb or palm impressions or foot prints.

5. The law is well settled no doubt that even a minority view of the Apex Court not in conflict to the majority view of the Apex Court, when that applicable to the lis is binding precedent under Article 141 of the Constitution of India. However, when there is difference of opinion between each of the two Judge bench of the Apex Court, High Court and subordinate Courts can follow which view among the two is sound to follow, but for to say if the view of first Judge is considered and differed by the second Judge, the High Court and Subordinate Courts cannot sit against the wisdom of the second Judge of the Apex Court. Hence, among the conflicting opinions of the two Judges expressed in RITESH SINHA , the view expressed by Hon'ble Justice Aftab

Alam is not only a later one after going through the views expressed by Hon'ble Justice R.P.Desai; but also a reasoned one to follow and accordingly relied upon."

[16] From the above, coming back to the decision of the 3-Judge Bench of the Apex Court in SELVI AND OTHERS v. STATE OF KARNATAKA, 2010 7 SCC 263, it is clearly observed that --

-- The rule under Article 20(3) of the Constitution of India against the testimonial compulsion, however, does not prohibit collection of material evidence, such as bodily substances and other physical objects and the statement used for comparison with facts already known to investigators. To ascertain whether the statement is incriminatory, depends upon the use to which it is put. The distinction, whether the statement is inculpatory or exculpatory is to decide at the stage of trial, whereas the Right to remain Silence is available even at the stage of investigation in a criminal case.

In the conclusion para, it was observed:

"In our considered opinion, the compulsory administration of the impugned techniques violates the 'right against self- incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence.

We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of 'ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms.

Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'.

In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872. The National Human Rights Commission had published 'Guidelines for the

Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

(i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record."

[17] From the above, covering the scope of 'Expert Opinion', admissibility and relevancy, now coming to the opinion as to voice sampling can be obtained from the accused against his will, either during investigation or at post-cognizance stage by the Court or to direct police to so obtain/take either at request of police or other investigating agency or at request of defacto-complainant or victim of a criminal proceeding, this Court in Crl.P.No.2119 of 2015, dated 23.06.2015, at para-3, held as follows:

> "3) Though the Eleven Judges Constitutional Bench expression of the Apex Court in State of Bombay V. Kathikalu Oghad [1] is clear that once accused is arrested in connection with investigation or other proceeding under Section 5 of the Identification of Prisoners Act, 1920, a Magistrate of the First Class, where satisfied that, for purpose of said investigation or proceeding under the Criminal Procedure Code, it is expedient to direct the person to allow his photographs or measurements (which include finger impressions or foot print impressions as per Section 2(i)(iii) of the Act, 1920 (that may extends to signatures even) for purpose of comparison with any disputed finger impressions or the like, that does not hit by Article 20(3) of the Constitution of India as not within the meaning of 'to be a witness' but for 'furnishing' evidence in the larger sense and what is protected an accused is from hazards of self incrimination, the bar under Article 20(3) of the Constitution of India can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the claim of evidence."

[18] No doubt, in DIPANWITA ROY , it was observed at para-18, upholding of the order of the High Court directing for DNA examination by giving liberty to the wife to comply with and if she declines, the allegation would be determined by the Court concerned by drawing a presumption of the nature contemplated by Section 114, particularly from illustration (h) (adverse inference) of the Evidence Act.

[19] This decision, no doubt, shows that despite direction, if a party failed to obey the same, the Court is entitled to draw an adverse inference.

[20] Thus, asking or directing an accused or suspect and even during investigation to give his/her/ their voice samples is not a testimonial compulsion "to be a witness" in the sense of making any oral or written statements against himself within the meaning of self-incrimination of conveying information based upon the personal knowledge of the person giving the information, but it is only in the larger sense of the expression to

include giving of thumb impression or impression of palm or foot or fingers or specimen writing or voice sample or exposing a part of the body by an accused or suspect for purpose of identification; particularly in case of voice samples, its' purpose is only to compare them with the disputed ones, which are to be analysed though the available spectrographic technique of voice identification or elimination by means of voice prints by pictorial representation of the acoustical energy output of a speaker, as a function of time, frequency and amplitude, which may either in the presence of a tape recorder or depending on the circumstances, over telephone line to which a recording device has been connected in its submission of any similarity in repeating of sentences that are to be compared, by such mechanical process.

[21] It is needless to say that spectrographic test will not fall within the ambit of psychiatric treatment and the principles explained in SELVI's case would not apply to the spectrographic test. It is no doubt to ensure that the underlying process for drawing the voice samples must be fair and reasonable, having due regard to the mandate of Article 21, which does not mean, it is open to the accused to dictate the course of investigation or terms of the test of voice sample, but for any objection for same words.

[22] However, the fact remains that there is no specific and enabling provision in the Code or any other law, which empowers the police or Court to subject the accused/suspect to such test, either from the provisions of the Act of 1920 or Sections 53, 53-A, 54, 311-A Cr.P.C. or Sections 73 and 165 of the Evidence Act, to compel the accused to give his voice sample for the purpose of spectrographic test within the meaning of procedure established by law, for the reason that specimen signatures or handwriting or finger prints or thumb impressions etc., should also include voice samples, nor it comes within such other tests contemplated by any of the provisions and, in particular, from the wording of Section 53 CrPC, apart from the fact that the Legislature, when it introduced Section 311-A Cr.P.C., was well aware of the said difference in the technology of tape recording and taking of voice samples.

[23] In fact, in RITESH SINHA , among the conflicting opinions of the two Hon'ble Judges, the views expressed by Hon'ble Justice Aftab Alam, which is a later one, after going through the views expressed by Hon'ble Justice R.P.Desai; by assigning reasons to the conclusion are as follows:

> "For the reasons discussed above, I am unable to accept the views taken in the Bombay decision and to my mind the decision in Telgi is not the correct enunciation of law.

The Delhi High Court decision in the case of Bisht pertains to the period prior to June 23, 2006, when the amendments made in the Code of Criminal Procedure by Act 25 of 2005 came into effect. It, therefore, did not advert to Sections 53 or 311A and considered the issue of taking voice sample of the accused compulsorily, primarily in light of Section 73 of the Indian Evidence Act, 1872. Though the decision does not refer to the provisions of the Criminal Procedure Code that came into force on June 23, 2006, in my view, it arrives at the correct conclusions.

At this stage, I may also refer to the decision of this Court in State of Uttar Pradesh v. Ram Babu Misra[34] where the Court considered the issue whether the Magistrate had the authority to direct the accused to give his specimen writing during the course of investigation. The first thing to note in regard to this decision is that it was rendered long before the introduction of Section 311A in the Code of Criminal Procedure which now expressly empowers the Magistrate to order a person to give specimen signature or handwriting for the purposes of any investigation or any proceeding under the Code. In Ram Babu Misra the Court noted that signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act, though finger impression was included therein. In that decision the Court made a suggestion to make a suitable law to provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings. The suggestions made by the Court materialized 25 years later when Section 311A was introduced in the Code of Criminal Procedure.

The decision in Ram Babu Misra was rendered by this Court on February 19, 1980 and on August 27, the same year, the Law Commission of India submitted its 87th Report which was aimed at a complete revamp of the Identification of Prisoners Act, 1920 and to update it by including the scientific advances in the aid of investigation. In Paragraph 3.16 of the Report it was observed as under:

"3.16 Often, it becomes desirable to have an accused person speak for the

purposes of giving to the police an opportunity to hear his voice and try to identify it as that of the criminal offender However, if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so, and the use of force for that purpose would be illegal."

Further, in Paragraph 5.26 it was stated as under:

"5.26 The scope of section 5 needs to be expanded in another respect. The general power of investigation given to the police under the Criminal Procedure Code may not imply the power to require the accused to furnish a specimen of his voice. Cases in which the voice of the accused was obtained for comparison with the voice of the criminal offender are known but the question whether the accused can be compelled to do so does not seem to have been debated so far in India.

There is no specific statutory provision in India which expressly gives power to a police officer or a court to require an accused person to furnish a specimen of his voice."

I am not suggesting for a moment that the above extracts are in any way binding upon the Court but they do indicate the response of a judicial mind while reading the provisions of the Indian Prisoners Act normally, without any urge to give the expression 'measurements' any stretched meaning.

The Report then discussed where a provision for taking voice sample can be appropriately included; whether in the Identification of Prisoners Act or in the Evidence Act or in the Code of Criminal Procedure. It concluded that it would be appropriate to incorporate the provision by amending Section 5 of the Identification of Prisoners Act as follows:

"(1) If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1973, it is expedient to direct any person -

a) to allow his measurements or photograph to be taken, or

b) to furnish a specimen of his signature or writing, or

c) to furnish a specimen of his voice by uttering the specified words or making the specified sounds. the Magistrate may make an order to that effect, recording his reasons for such an order.

(2) The person to whom the order relates -

a) shall be produced or shall attend at the time and place specified in the order, and

b) shall allow his measurements or photograph to be taken by a police officer, or furnish the specimen signature or writing or furnish a specimen of his voice, as the case may be in conformity with the orders of the Magistrate before a police officer.

3) No order directing any person to be photographed shall be made except by a metropolitan Magistrate or a Magistrate of the first class.

4) No order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

5) Where a court has taken cognizance of an offence a Magistrate shall not under this section, give to the person accused of the offence any direction which could, under section 73 of the Indian Evidence Act 1872, be given by such Magistrate."

The Report as noted was submitted in 1980. The Code of Criminal Procedure was amended in 2005 when the Explanation was added to Section 53 and Sections 53A and 311A were inserted into the Code. Voice

sample was not included either in the Explanation to Section 53 or Section 311A.

Should the Court still insist that voice sample is included in the definition of "measurements" under the Identification of Prisoners Act and in the Explanation to Section 53 of the Code of Criminal Procedure? I would answer in the negative.

In light of the above discussion, I respectfully differ from the judgment proposed by my sister Desai J. I would allow the appeal and set aside the order passed by the Magistrate and affirmed by the High Court.

Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

In view of the difference of opinion between us, let this case be listed for hearing before a bench of three Judges after obtaining the necessary direction from the Honourable the Chief Justice of India."

[24] Having regard to the above and by reiterating the conclusion arrived at by this Court earlier in Crl.P.No.2119 of 2015, dated 23.06.2015, at paras-3 to 5 reproduced above, this Criminal Revision Case is allowed by setting aside the order dated 05.12.2016 in Crl.M.P.No.50 of 2016 in Crime No.7/ACB-CIUHyd/2015 passed by the learned I Additional Special Judge for SPE and ACB Cases-cum-V Additional Chief Judge, City Civil Court, Hyderabad, holding that the same is unsustainable and without jurisdiction conferred by law.

[25] As a sequel, miscellaneous petitions pending, if any, in this revision shall stand closed.

CCTV footage.

"CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case."

TOMASO BRUNO & ANR

V/S

STATE OF U P.015 CrLJ 1690.[

SUPREME COURT OF INDIA (FROM ALLAHABAD) *(F.B.)*

TOMASO BRUNO & ANR
V/S
STATE OF U P

Date of Decision: 20 January 2015

Citation: 2015 LawSuit(SC) 54

Hon'ble Judges: Anil R Dave, Kurian Joseph, R Banumathi

Case Type: Criminal Appeal

Case No: 142 of 2015

Subject: Constitution, Criminal

Head Note:

A. Indian Penal Code, 1860 - Sec.302 & 34 - Conviction - Three Italian nationals came to India from London via Mumbai to Varanasi for stay and Visit - 2 days Stayed in Hotel and went around the city/Varanasi - On 4.2.2010 Accused-2 informed Ram Singh (PW-1), the Manager of hotel Buddha, Varanasi, that the condition of the deceased was not fine, after which the accused, PW-1 and others took the deceased to Hospital for treatment, where the doctors declared the deceased 'brought dead' - The cause of death was asphyxia due to strangulation - The High Court confirmed the sentence of the Trial Court(Para 5,7)

B. Appreciation of circumstantial evidence - No eye-witness and the prosecution case is based on circumstantial evidence - Evidence Act, 1872 - Sec. 106 - Burden to establish those facts - "Plea of alibi" - The Indian Evidence Act in 2000, Sections 65A and 65B - No CCTV Footage - Sec.144 (g) - The court may or may not raise presumption on the proof of certain facts - Proof of Motive - The evidence has not been properly appreciated, material aspects have been ignored and the findings are perverse under Article 136 of the Constitution of India, 1950 - The prosecution

do not form a complete chain pointing to the guilt of the accused - The benefit of doubt is to be given to the accused and the conviction of the appellants is liable to be set aside - Appeal allowed. (Para 28, 33, 34, 42)

Acts Referred:

CONSTITUTION OF INDIA ART 136

INDIAN PENAL CODE, 1860 SEC 34, SEC 302

CODE OF CRIMINAL PROCEDURE, 1973 SEC 161, SEC 233, SEC 313

EVIDENCE ACT, 1872 SEC 65B, SEC 65A, SEC 114, SEC 106, SEC 114(G), SEC 65, SEC 65B(1), SEC 65B(2)

NEGOTIABLE INSTRUMENTS ACT, 1881 SEC 139

Final Decision: Appeal allowed

Eq. Citations: 2015 (1) Scale 498, 2015 AIR(SCW) 890, 2015 (1) Crimes(SC) 105, 2015 (1) RCR(Cri) 678, 2015 (1) JT 389, 2015 CrLJ 1690, 2015 (88) AllCriC 978, 2015 (4) AD(SC) 1, 2015 (1) ALD(Cri) 663, 2015 (2) AllLJ 578, 2015 (2) JLJR 145, 2015 (2) JCC 884, 2015 (2) SCJ 328, 2015 (2) ALT(Cri)(SC) 6, 2015 (1) UC 371, 2015 (2) WLN(SC) 45, 2015 (7) SCC 178, 2015 (2) AllCriR 1747

Advocates: Harin P Raval, Ranjeeta Rohtagi, Nikhil Rohatgi, Anando Mukherjee, Anirush Sharma, Divya Anand, Nipun Saxena, Jaya Khanna, Irshad Ahmed, M R Shamshad, Shashank Singh, Aditya Samaddar, Anurag Rawat

Reference Cases:

Cases Referred in (+): **19**

Judgement Text:-

R Banumathi, J

[1] Leave granted.

[2] This appeal is directed against the judgment dated 4.10.2012 passed by Allahabad High Court in Criminal Appeal No.5043 of 2011 in which the High Court confirmed the conviction of the appellants under Section 302 read with Section 34 IPC and the sentence of life imprisonment and fine of Rs. 25,000/- imposed on each of them.

[3] Briefly stated, case of the prosecution is that three Italian nationals namely Tomaso Bruno (Accused No.1), Elisa Betta Bon Compagni (Accused No. 2) and Francesco Montis (Deceased) came as tourists to India from London and reached Mumbai on 28.12.2009. After visiting several places of interest together, these persons arrived at Varanasi on 31.1.2010 and they checked in at Hotel Buddha, Ram Katora, Varanasi. The hotel management, after checking all the relevant identity proofs, allotted Room No. 459 in the hotel to them at about 5.00 p.m. For two days the accused and deceased went around the city. On 3.2.2010, the deceased complained of a mild headache on account of which, they went out late and returned early and thereafter, stayed in the room for the entire evening as they had planned to see the 'Subahe Banaras' the next morning. On 4.2.2010 at about 8.00 a.m. A-2 informed Ram Singh (PW-1), the Manager of hotel Buddha, Varanasi, that the condition of the deceased was not fine, after which the accused, PW-1 and others took the deceased to S.S.P.G. Hospital, Varanasi for treatment, where the doctors declared the ailing tourist as 'brought dead'.

[4] Ram Singh (PW-1) filed a complaint regarding death of deceased Francesco Montis in the police station. Additionally, Awadhesh Kumar Choubey, Home Guard also submitted a memo informing death of Francesco Montis which was transmitted to P.S. Chetganj, Varanasi. An inquest was conducted by Sagir Ahmad-SI (PW-12) regarding death of deceased Francesco Montis and Ex. P12 is the inquest report. After inquest, the body was handed over for conducting post mortem. Dr. R.K. Singh (PW-10) conducted autopsy and issued Ex. Ka-10, opining that the cause of death was asphyxia due to strangulation. In pursuance of order of District Magistrate, by an order of Chief Medical Officer, a second post mortem was conducted on 6.02.2010 by the panel of doctors headed by Dr. A.K. Pradhan (PW-11) which is marked as Ex. Ka-11 wherein the doctors reaffirmed the cause of death of deceased Francesco Montis.

[5] On the basis of the postmortem report and other materials, First Information Report in Case No. 34 of 2010 was registered on 5.2.2010. PW-12-Sagir Ahmad (SI) had taken up the investigation and proceeded to the place of occurrence i.e. hotel Buddha. During the spot-investigation, PW- 12 collected bed-sheet, pillow, a towel and other material objects. The bed-sheet contained marks of urine and stools and a black brown stain of the size of lip was found on the pillow cover. PW-12 also collected other articles from the room and also prepared Ex. P18-site plan at the place of occurrence. On 5.2.2010, further investigation was taken over by Shri Dharambir Singh (PW-13) who recorded the statement of the waiters in the hotel and also recorded the statement of the accused persons. The accused stated that on 4.2.2010 morning they went out at 4.00 a.m. for 'Subhae Banaras', but deceased was not well, so he was left sleeping in the room and

when they came back they found Francesco in a serious condition. On the basis of material collected during investigation, PW-13 arrested the accused persons after appraising them with the grounds of arrest. After completion of investigation, chargesheet under Section 302 read with Section 34 IPC was filed by the police in the court against accused Nos. 1 and 2.

[6] To substantiate the charges against the accused, prosecution has examined thirteen witnesses and exhibited material documents and objects. The accused were questioned under Section 313 Cr.P.C. about the incriminating evidence and the accused denied all of them. The accused reiterated whatever was earlier stated before I.O., that on the fateful night of 3.2.2010, they ordered two plates of fried rice and all three of them dined together. Next day morning they went out at 4.00 a.m. for 'Subhae Banaras', but deceased was not well and so he was left sleeping in the room. When they returned to the hotel at 8.00 a.m., Francesco Montis was lying on the bed in an unconscious condition. The second accused stated that she had informed the hotel manager that Francesco Montis was very serious and all the staff, PW-1 manager and accused persons took Montis to the hospital where he was declared 'brought dead'. The second accused clarified that the marks of lip on the cover were not hers.

[7] Upon consideration of evidence, trial court convicted the accused persons under Section 302 read with Section 34 IPC and sentenced them to undergo life imprisonment, imposed a fine of Rs.25,000/- each with a default clause. Aggrieved by the same, the appellants preferred appeal before the High Court wherein by the impugned judgment, High Court confirmed the conviction and the sentence. Assailing the verdict of conviction and sentence of life imprisonment, the appellants have preferred this appeal by way of special leave.

[8] Mr. Harin P. Raval, learned senior counsel appearing for the appellants contended that all the circumstances relied upon by the prosecution ought to be firmly established by evidence and the circumstances must be of such nature as to form a complete chain pointing to the guilt of the accused and the courts below ignored the conditions that are required to be satisfied in a case based on circumstantial evidence. Learned counsel contended that non-production of CCTV footage being an important piece of evidence casts a serious doubt in the prosecution case and non-production of such best possible evidence is fatal to the prosecution case. It was further submitted that the courts below ought to have noticed the faulty investigation and non-collection of CCTV footage, sim details and lapses in the investigation. It was urged that the opinion of the doctors that the cause of death was asphyxia due to strangulation is not

supported by materials and this vital aspect has been ignored by the courts below.

[9] Mr. Irshad Ahmad, learned Additional Advocate General appearing for the respondent-State submitted that without evidence of their complicity in the crime, there is no reason as to why PW-1 Ram Singh, the hotel manager or the police personnel would implicate two foreign nationals who came to India as tourists. It was further contended that inside the hotel room, the appellants were admittedly with the deceased and the appellants failed to account for the manner and time of death of the deceased inside the room. It was held that the defence set up by the accused persons that they had gone on sight seeing and 'Subahe Banaras' at the wee hours on 4.2.2010 and returned to hotel room at about 8.00 A.M. cannot be subscribed or relied upon. The learned counsel vehemently contended that the medical evidence, inquest report and the presence of stool, urine stain on the bed sheet and black brown discharge from the mouth narrated in the inquest and brown black lip mark on pillow cover clearly lead to the inference of the guilt of the accused persons and upon appreciation of circumstances and the evidence adduced by the prosecution, courts below rightly convicted the appellants and the concurrent findings recorded by the courts below cannot be interfered with.

[10] We have carefully considered the evidence, materials on record and the rival contentions and gone through the judgments of the courts below.

[11] Admittedly, there is no eye-witness and the prosecution case is based on circumstantial evidence. The circumstances as can be culled out from the judgment of the courts below relied upon by the prosecution and accepted by the courts below to convict the appellants are:-

(i) from the fateful night of 3.2.2010 till the morning of 4.2.2010, when the incident is alleged to have taken place inside the privacy of the hotel room and in such circumstances the accused had all the opportunity to commit the offence;

(ii) the accused had no plausible explanation to offer as to the injuries on the deceased and the death of the deceased;

(iii) the accused failed to prove the defence plea of alibi that in the wee hours of 4.2.2010, they had gone outside the hotel for sight seeing and after

returning to the hotel room, they saw the deceased unconscious;

(iv) the intimacy developed between the accused alienated them from the deceased and as a love triangle was formed and prompted by this motive, the accused eliminated Francesco Montis on the fateful day; and

(v) medical evidence supports prosecution version that the death was homicidal and deceased was strangulated to death.

[12] Upon consideration of evidence adduced by the prosecution on the above circumstances and after referring to various judgments on circumstantial evidence, the trial court as affirmed by the High Court, found that all the circumstances suggested by the prosecution against the appellants are proved beyond reasonable doubt and form a complete chain pointing to the guilt of the accused beyond any reasonable doubt and on those findings, convicted the appellants for the charge under Section 302 IPC read with Section 34 IPC.

[13] In every case based upon circumstantial evidence, in this case as well, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstance are complete so as to rule out the possibility of innocence of the accused.

[14] There is no doubt that conviction can be based solely on the circumstantial evidence. But it should be tested on the touchstone of the law relating to circumstantial evidence. This Court in C. Chenga Reddy & Ors. vs. State of A.P., 1996 10 SCC 193, para (21) held as under :-

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of

proof besides relying upon some inadmissible evidence."

[15] After referring to a catena of cases based on circumstantial evidence in Shivu and Anr. vs. Registrar General, High Court of Karnataka & Anr., 2007 4 SCC 713, this Court held as under:-

> "12. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. {See Hukam Singh v. State of Rajasthan, 1977 2 SCC 99; Eradu v. State of Hyderabad, 1956 AIR(SC) 316, Earabhadrappa v. State of Karnataka, 1983 2 SCC 330, State of U. P. v. Sukhbasi, 1985 Supp1 SCC 79, Balwinder Singh v. State of Punjab, 1987 1 SCC 1 and Ashok Kumar Chatterjee v. State of M. P., 1989 Supp1 SCC 560) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab, 1954 AIR(SC) 621, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt."

[16] In Padala Veera Reddy v. State of A. P. and Ors., 1989 Supp2 SCC 706, it was laid down that in a case of circumstantial evidence such evidence must satisfy the following test:-

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability

the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, 1982 2 SCC 351."

[17] Adverting to the case in hand, it emerges from the evidence that the accused and deceased reached Varanasi on 31.1.2010 and checked in at hotel Buddha. On 1.2.2010 and 2.2.2010, the tourists went around to explore the city and visited important places. On 3.2.2010, since the deceased complained of mild headache, the accused and the deceased went out late at 11.00 A.M. and returned back to the hotel at 2.30 P.M. as they planned to see famous 'Subahe Bararas' the next morning. In his evidence, PW-2 Ajit Kumar stated that on the night of 3.2.2010, on order from the tourists, PW-2 served two plates of vegetable fried rice in the room. PW-2 further stated that after serving two plates of vegetable fried rice, while he was getting out of the room, second appellant Elisa Betta Bon asked him 'not to disturb till next morning' and thereafter the second appellant bolted the door from inside and thereafter no person ever visited their room. The trial court and the High Court have taken this as one of the important links of evidence to conclude that from the night of 3.2.2010, till next day morning 8.00 A.M., the accused-appellants remained inside the hotel room. Be it noted, this vital evidence that the second appellant asked PW-2 Ajit Kumar-Waiter, 'not to disturb them till next day morning' was not stated by PW-2 before the Investigating Officer, when the Investigating Officer recorded PW-2's statement under Section 161 Cr.P.C., which in our view, seriously affects the credibility of PW-2. The courts below ignored this vital aspect observing that it is only an explanation or introduction to the testimony of PW-2.

[18] Be that as it may, an important circumstance relied upon by the prosecution and accepted by the courts below is that the offence had taken place inside the privacy of the hotel room in which the accused and the deceased were staying together and only the accused had the opportunity to commit the offence. Prosecution mainly relied upon Section 106 of Indian Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Prosecution mainly relied upon the circumstance that the occurrence was inside the hotel room and

that death had occurred in the privacy of the hotel room and that the appellants have no plausible explanation for the death of Francesco Montis and the absence of explanation or untrue explanation offered by the accused point to their guilt.

[19] The principle underlying Section 106 of the Evidence Act is that the burden to establish those facts, which are within his personal knowledge is cast on the person concerned, and if he fails to establish or explain those facts, an adverse inference may be drawn against him. Explaining the death of deceased Francesco Montis, the appellants have stated that in the wee hours of 4.2.2010 at 4.00 A.M., they had gone to see the famous 'Subahe Banaras' and returned back to the hotel room at 8.00 A.M. and found the condition of Francesco Montis very serious and immediately informed PW-1 about the condition of their friend and then with the assistance of the hotel staff, Francesco Montis was taken to the hospital.

[20] Learned counsel for the respondent-State contended that when the appellants have pleaded that they had gone out of the hotel room in the wee hours of 4.2.2010 and having taken plea of alibi, the burden is cast upon the accused to prove the defence plea of alibi and the accused had not adduced any evidence to show that they had gone out and visited 'Subahe Banaras' in the early hours of 4.2.2010. Learned counsel submitted that the plea of alibi was rejected by the concurrent findings of the courts below and the same cannot lightly be interfered with by this Court. In support of his contention, learned counsel for the respondent-State relied upon the judgment of this Court in Gosu Jayarami Reddy and Anr. vs. State of Andhra Pradesh, 2011 11 SCC 766 wherein it was observed as under:-

> "52. We may at the threshold say that a finding of fact concurrently recorded on the question of alibi is not disturbed by this Court in an appeal by special leave. The legal position in this regard is settled by the decision of this Court in Thakur Prasad v. State of M. P., 1954 AIR(SC) 30)
>
> "2. The plea of alibi involves a question of fact and both the courts below have concurrently found that fact against the appellant Thakur Prasad. This Court, therefore, cannot, on an appeal by special leave, go behind that concurrent finding of fact."
>
> For the same proposition, reliance was also placed upon the judgment of this Court in Munshi Prasad & Ors. vs. State of Bihar, 2002 1 SCC 351.

[21] The defence plea offered by the appellants was that in the wee hours of 4.2.2010, they had gone out and returned to the hotel only to find out the serious condition of Francesco Montis. The appellants being foreign nationals who visited India as tourists, it would not have been possible for them to examine any witness either from the hotel or from the place which they are said to have visited as they were tourists in India. In the facts and circumstances of the case and in the light of the statement-explanation offered by the accused that in the wee hours of 4.2.2010 they had gone out to see 'Subahe Banaras', in our considered view, the burden was for the prosecution to establish that they remained inside the hotel room from 3.2.2010 till the next day morning 8.00 A.M. in the hotel.

[22] To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. PW-1 Ram Singh-Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been best evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of a crime. It would have also shown whether or not the accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case.

[23] In his evidence, PW-1 has stated that he monitors the affairs of the hotel on CCTV while sitting in reception. PW-1 further stated that he saw the CCTV footage at the relevant time and on the fateful night no person was having ingress or egress to the said room. PW-13-Dharambir Singh, investigating officer, also stated that he saw the full video recording of the fateful night on CCTV but he has not recorded the same in his case diary as nothing substantial emerged from the same.

[24] The trial court as well as the High Court ignored this crucial aspect of non-production of CCTV footage. The trial court as well as the High Court relied on the oral testimony of PW-1-Ram Singh, hotel manager, that no one entered Room No. 459 between the relevant period on the intervening night of 3.2.2010 and 4.2.2010 which is based on the CCTV footage. Courts below accepted the version of PW-1 and PW-13 to

hold that there was no relevant material in the CCTV footage to suggest that a third person entered the hotel room. The trial court and the High Court, in our view, erred in relying upon the oral evidence of PW-1 and PW-13 who claim to have seen the CCTV footage and they did not find anything which may be of relevance in the case.

[25] With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfilment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

[26] Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra, 2012 9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru, 2005 11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

[27] The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non- production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be

mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made.

[28] As per Section 114 (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under Section 114 (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of Negotiable Instruments Act, where the court has no option but to draw statutory presumption under Section 114 of the Evidence Act. Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.

[29] The High Court held that even though the appellants alleged that the footage of CCTV is being concealed by the prosecution for the reasons best known to the prosecution, the accused did not invoke Section 233 Cr.P.C. and they did not make any application for production of CCTV camera footage. The High Court further observed that the accused were not able to discredit the testimony of PW-1, PW-12 and PW-13 qua there being no relevant material in the CCTV camera footage. Notwithstanding the fact that the burden lies upon the accused to establish the defence plea of alibi in the facts and circumstances of the case, in our view, prosecution in possession of the best evidence-CCTV footage ought to have produced the same. In our considered view, it is a fit case to draw an adverse inference against the prosecution under Section 114 (g) of the Evidence Act that the prosecution withheld the same as it would be unfavourable to them had it been produced.

[30] Yet another important piece of evidence which was not produced by the prosecution is relevant to be noted. On 4.2.2010, second appellant-Elisa Betta Bon informed PW-1 Ram Singh, hotel Manager that the condition of Francesco Montis is very serious. On hearing this, PW-1 immediately went to room No. 459 where he saw the appellants were sitting and the deceased was lying unconscious. Thereafter, he immediately came down to the reception and along with hotel staff went back to the room and then they

lifted Francesco Montis by wrapping him in a blanket and took him to the hospital. PW-6-Uma Shankar had driven the car and Francesco Montis was taken to the emergency ward. PW-1 and other witnesses have stated that on examination of Francesco Montis, doctor declared him 'dead'. Prosecution has neither examined the doctor nor produced the report that was prepared in the emergency ward of the hospital. Likewise, the death intimation sent to the police was also not produced. The report prepared by the doctor who examined Francesco Montis and declared him dead would have been yet another important piece of evidence which would have contained earliest version of the accused and other relevant details.

[31] Motive for the crime suggested by the prosecution is that physical intimacy and expression of love between the appellants had caused depression in the mind of Francesco Montis which led to the animosity which prompted the appellants to commit the murder of deceased Francesco Montis. In this regard, reliance is placed upon statement of PW-3 Sunder (Waiter) who stated that on 3.2.2010, tourists of Room No. 459 ordered two cups of tea in the restaurant. He served two cups of tea to the occupants of Room No. 459 at the hotel restaurant and he noticed A-1 and A-2 were sitting on one side of the table hugging, kissing and cuddling each other whereas the deceased who was sitting on the other side of the table looked gloomy and depressed. Reliance is also placed on evidence of PW-2 Ajit Kumar (Waiter) who stated that on the night of 3.2.2010, when PW-2 served vegetable fried rice, A-2 told him 'not to disturb them till tomorrow morning'.

[32] On behalf of the appellants, it was submitted that there was nothing like a love triangle between them and the deceased and they are foreigners and their social values are substantially different from the Indians. It was submitted that merely because Francesco Montis and Tomaso Bruno (first appellant) were accompanied by Elisa Betta Bon (second appellant) and all three were staying in the room, it cannot be inferred that intimacy developed between appellants to the annoyance of the deceased which created a motive in the long run for commission of the alleged crime by the appellants. It was submitted that prosecution has failed to establish the motive propounded against the accused persons which is an important circumstance in a criminal case based on circumstantial evidence.

[33] There is, in our view, merit in the submission of the learned senior counsel for the appellants. Prosecution tried to establish the case against the accused by making improvements at various stages. The version of PW-3 that he saw A-1 and A-2 hugging, kissing and cuddling each other and that Francesco Montis was sitting on the other side

of the table appearing depressed was not stated to the investigating officer PW-13 when he recorded PW-3's statement under Section 161 Cr.P.C. Likewise, version of PW-2-Ajit Kumar that on the night of 3.2.2010, the second accused asked him 'not to disturb till tomorrow morning' was also not mentioned in his statement recorded by the investigating officer under Section 161 Cr.P.C.

[34] Where the case is based on circumstantial evidence, proof of motive will be an important corroborative piece of evidence. If motive is indicated and proved, it strengthens the probability of the commission of the offence. In the case at hand, evidence adduced by the prosecution suggesting motive is only by way of improvement at the stage of trial which, in our view, does not inspire confidence of the court.

[35] Yet another circumstance relied upon by the prosecution is that the death is homicidal i.e. death is due to asphyxia as a result of strangulation as stated in Exs. Ka-10 and Ka-11 post-mortem reports. The first post-mortem on the body of Francesco Montis was done on 5.2.2010 by PW-10-Dr. R.K. Singh. Then in pursuance to the direction issued by the District Magistrate as per the order of Chief Medical Officer, second post- mortem was performed on 6.2.2010 by a panel of doctors and the second post- mortem report is Ext. Ka-11. The first post-mortem report discloses the following injuries:-

> "Ante-Mortem Injury:
>
> On opening scalp, contusions 2 cm x 2 cm on the mid of forehead 3 cm above root of nose.
>
> On opening scalp, contusion 4 cm x 3 cm on left side head 2 cm above left ear.
>
> Abraded contusion (multiple) in area of 5 cm x 3 cm on right side neck 5 cm outer of mid line 8 cm below right ear.
>
> Multiple abraded contusion an area of 5 cm x 4 cm on left side neck 6 cm outer to mid line & 7 cm below left ear.

Lacerated wound 2 cm x 1 cm x muscle deep on front of mid line of lower lip.

Abraded contusion 2 cm x 2 cm on outer aspect of left knee joint.

Internal Examination:

Membranes of head congested. Sub arachnoid Haematoma present, Spinal cord not opened, Pleura congested, Trachea contused, no abnormality detected in larynx, both the lungs congested, Pericardium congested.

Chambers of heart full, peritoneum congested, 100 Gms digested food was found in stomach, small intestine contained digested food and gas and large intestine contained faecal matter and gas, pancreas, spleen, kidneys congested, bladder was empty. In the opinion of the doctor, cause of death was asphyxia as result of strangulation. However, viscera preserved for chemical analysis to exclude poisoning."

In the second post-mortem Ext. Ka-11, substantially there were no changes except signs of decomposition. Second post-mortem reiterates that cause of death is "asphyxia as a result of strangulation". According to the medical opinion, a hard blunt substance appears to have been used to cause strangulation leading to the death on account of asphyxia. However, no such hard or blunt substance was found or seized from the room. Doctors have not found any physical signs of internal injuries viz. any extravasation of blood in the tissue or any laceration in the underlying muscles.

Considering postmortem reports Exts Ka-10 and Ka-11 and the evidence of PWs 10 and 11, in our view, reasonable doubts arise as to the cause of death due to asphyxia as a result of strangulation.

[36] Let us consider the injuries found on the body of deceased Francesco Montis vis--vis symptoms of strangulation. As per Modi's Medical Jurisprudence And Toxicology 24th Edition. 2011, page No.453 the symptoms of strangulation are stated as under:-

(b) Appearances due to Asphyxia.-The face is puffy and cyanosed, and marked with petechiae. The eyes are prominent and open. In some cases, they may be closed. The conjunctivae are congested and the pupils are dilated. Petechiae are seen in the eyelids and the conjunctivae. The lips are blue. Bloody foam escapes from the mouth and nostrils, and sometimes, pure blood issues from the mouth, nose and ears, especially if great violence has been used. The tongue is often swollen, bruised, protruding and dark in colour, showing patches of extravasation and occasionally bitten by the teeth. There may be evidence of bruising at the back of the neck. The hands are usually clenched. The genital organs may be congested and there may be discharge of urine, faeces and seminal fluid.

(ii) Internal Appearance.- The neck and its structures should be examined after removing the brain and the chest organs, thus allowing blood to drain from the neck to the blood vessels. There is extravasation of blood into the sub-cuataneous tissues under the ligature mark or finger marks, as well as in the adjacent muscles of the neck, which are usually lacerated. Sometimes, there is laceration of the sheath of the carotid arteries, as also their internal coats with effusion of blood into their walls. The cornua of the hyoid bone may be fractured also the superior cornua of thyroid cartilage but fracture of the cervical vertebrae is extremely rare. These should be carefully dissected in situ as they are difficult to distinguish from dissection artefacts in the neck....."

[37] PW-10 Dr. R.K. Singh was subjected to lengthy cross-examination in the trial court which appears to have spread over a number of days. When PW-10 was confronted with the injuries found on the body of Francesco, he has stated that there was no injury found in the Superior Cornua of Thyroid bone and no frothy mucous was found in the larynx and trachea. By going through the evidence of PW-10, it is seen that it was elicited from PW-10 that the prominent symptoms of strangulation were conspicuously absent. It is apposite to refer to two questions and answers elicited from PW-10 which are extracted hereunder:-

QUESTION: Is it correct that in the present case that none of the external appearances in cases of death by strangulation viz. the petechiae in the eye, the puffiness and swollen face and protruding out of tongue and petechiae in tongue and bloody foam from the mouth and bulging out of eyes, swelling in

tongue, bruising and the base of the neck, nails and finger marks on the neck and hands are clenched were present in this case?

ANSWER: As I said earlier all these signs depend on mode of death and it varies from person to person and time of the post mortem, time of death and how death was caused. I agree that all the above signs mentioned in this question were not present in present case. It may be present in death by asphyxia due to strangulation. But it is not necessary that all these signs must be present in every case of asphyxial death by strangulation.

QUESTION: Is it correct that all the internal appearances in death by strangulation were not present in this case viz.

(i) subcutaneous tissues and----------muscles are lacerated,

(ii) extravasation of blood into subcutaneous tissues,

(iii) fracture of cornia of hyoid bone,

(iv) non fracture of superior cornia of hyoid bone,

(v) non fracture or rupture in cartilage rings

(vi) non rupture or fracture of trachea

(vii) edema in the brain,

(viii) petechial haemorrhage,

(ix) petechiae in the lungs,

(x) laceration in sheath of carotid arteries

(xi) compression in the arteries and bones

(xii) larynx and trachea containing frothy mucous were absent in present case?

ANSWER As per ecchymosis around injury 3-4, it was present at the time of Post-Mortem, hence I have written injury No. 3 and 4 as ante mortem injuries. Rest of findings depend on mode of death and timing of Post Mortem since death and manner of causing injuries. The aforesaid symptoms suggested in the question were not present in this case. It is not necessary that these symptoms must be present in every case of death by strangulation."

[38] Of course PW-10 has explained that by and large the above symptoms of strangulation as put up to him in the questions would be present in cases of strangulation. PW-10 further stated that those symptoms need not necessarily be so in all cases of strangulation. In our considered view, the conspicuous absence of symptoms of strangulation coupled with other circumstances militates against the case of the prosecution.

[39] It is a settled proposition of law recently reiterated in the following cases viz. Dayal Singh And Ors. vs. State of Uttaranchal, 2012 7 Scale 165, Radhakrishna Nagesh vs. State of Andhra Pradesh, 2013 11 SCC 688, Umesh Singh vs. State of Bihar, 2013 4 SCC 360 that there is possibility of some variations in the exhibits, medical and ocular evidence and it cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused.

[40] The courts, normally would look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory and unsustainable. We agree that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion but such report is not a conclusive one. This Court is expected to analyse

the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. As discussed earlier, serious doubts arise about the cause of death stated in the post-mortem reports.

[41] Even if we were to accept that the death was due to strangulation which was caused by an object, the non-recovery of alleged object weakens the prosecution case. Furthermore, it has to be pointed out that it has come in evidence that the deceased was a strongly built man and in the circumstances, it is rather strange that no external marks were found on the body which could demonstrate that there had been a struggle.

> The absence of struggle and the corresponding external injuries is yet another vital aspect which had gone unnoticed by the courts below.

[42] By and large, this Court will not interfere with the concurrent findings recorded by the courts below. But where the evidence has not been properly appreciated, material aspects have been ignored and the findings are perverse under Article 136 of the Constitution, this Court would certainly interfere with the findings of the courts below though concurrent. In a case based on circumstantial evidence, circumstances from which inference of guilt is sought to be drawn should be fully proved and such circumstances must be of conclusive nature pointing to the guilt of accused. There shall be no gap in such chain of circumstances. In the present case, the courts below have not properly appreciated the evidence and the gap in the chain of circumstances sought to be established by the prosecution. The courts below have ignored the importance of best evidence i.e. CCTV camera in the instant case and also have not noticed the absence of symptoms of strangulation in the medical reports. Upon consideration of the facts and circumstances of the case, we are of the view that the circumstances and the evidence adduced by the prosecution do not form a complete chain pointing to the guilt of the accused and the benefit of doubt is to be given to the accused and the conviction of the appellants is liable to be set aside.

[43] In the result, conviction of the appellants under Section 302/34 IPC is set aside and the appeal is allowed. Appellants be released forthwith.

On function of CCTV and preservation evidence in Courts.

K RAMAJAYAM @ APPU

V/S

INSPECTOR OF POLICE 2016 LawSuit(Mad) 136.

HIGH COURT OF MADRAS *(D.B.)*

K RAMAJAYAM @ APPU
V/S
INSPECTOR OF POLICE

Date of Decision: 27 January 2016

Citation: 2016 LawSuit(Mad) 136

Hon'ble Judges: R Sudhakar, P N Prakash

Case Type: Referred Trial; Criminal Appeal

Case No: 1 of 2015; 110 of 2015

Subject: Criminal

Acts Referred:
Indian Penal Code, 1860 Sec 380, Sec 392, Sec 393, Sec 404, Sec 449, Sec 302, Sec 307, Sec 397, Sec 450
Code Of Criminal Procedure, 1973 Sec 391, Sec 366, Sec 313, Sec 207, Sec 367
Evidence Act, 1872 Sec 45A, Sec 65B, Sec 114, Sec 7, Sec 45, Sec 27, Sec 25, Sec 76, Sec 3
Information Technology Act, 2000 Sec 2, Sec 79A, Sec 2(t)

Final Decision: Appeal dismissed

Advocates: M Jagadeesan, B Ramprabu, S Shunmugavelayutham, V M R Rajendran

Reference Cases:
Cases Referred in (+): **14**

Judgement Text:-

P N Prakash, J

[1] The Reference, R.T.No.1 of 2015 is made by the learned III Additional District and Sessions Judge, Tiruvallur @ Poonamallee, under Section 366 of the Code of Criminal Procedure, seeking confirmation of the capital punishment imposed upon K.Ramajayam @ Appu, the sole accused, by Judgment dated 21.1.2015 in S.C.No.142 of 2013. The accused has independently preferred Crl.A.No.110 of 2015, challenging the conviction and sentence.

[2] The case of the Prosecution culled out from the materials on record is as follows:

(a) Dhanaram (PW-1) and his deceased younger brother Gunaram were running a Pawn Broking & Jewellery Shop in the name and style of 'Balaji Pawn Brokers' at No.1, 13th Street, Sakthi Nagar, the place of occurrence.

(b) On 14.4.2012, the deceased Gunaram opened the shop around 8.00 a.m. At about 9.00 a.m. Dhanaram (PW-1) came there and after being there for some time, he left for other work. When he returned to the shop around 12.00 noon, he was shocked to see his younger brother Gunaram lying dead in a pool of blood. PW-1 raised an alarm, hearing which Sahadev Prohit (PW-2), Varadarajan (PW-3) and Selvi (PW-4), who are all adjacent shop owners, came to the spot. On information, the Police also arrived soon.

(c) On the complaint (Ex.P-1) given by Dhanaram (PW-1), John Arumairaj, (PW-28) Inspector of Police, T-4 Maduravoyal Police Station registered a case in Cr.No.491 of 2012 at 2.00 p.m on 14.4.2012 for the offences under Section 302 read with 380 IPC. The complaint (Ex.P-1) and the FIR (Ex.P-17) reached the jurisdictional Magistrate on 14.4.2012 at 7.00 p.m., as could be seen from the endorsement made therein.

(d) In the complaint (Ex.P-1) given to the Police, Dhanaram (PW-1) has stated that on 23.10.2011 when Gunaram was in the shop, someone had sprayed an anaesthetic substance, and had burgled around 935 grams of jewellery in connection with which a case in Maduravoyal Police Station Cr.No.986 of 2011 has been registered. The lost jewellery belonged to one Kalyanmal Ranka (PW-15), and he (PW-15) suspected some foulplay by

Gunaram and that he must have hired a killer to do the job.

(e) Dhanaram (PW-1) was in such a state of shock that he was unable to give the details of the lost jewels to the Police. Hence, Bawarlal (PW-11), who also has a Pawn shop nearby, and is known to Dhanaram (PW-1), took stock of the items and reported that seven items weighing 48 grams were missing. When Bawarlal (PW-11) informed this, Dhanaram (PW-1) told him that from the Video recordings shown to him by the Police, it appears that the intruder has taken only the covering jewellery.

(f) John Arumairaj (PW-28) went to the scene of occurrence and in the presence of witnesses Vimal (not examined) and Muthu (PW-8), prepared an Observation Mahazar (Ex.P-18) and a Rough Sketch (Ex.P-19). Luckily for the Police, but unfortunately for the accused, CCTV cameras were installed in the shop, the presence of which has been referred to in the Observation Mahazar (Ex.P-18).

(g) PW-28 requisitioned the services of the Forensic Expert from the mobile unit of the Tamil Nadu Forensic Science Department for collection of clue materials from the scene of occurrence, namely, fresh blood collected with sponge; blood stained Bed-sheet (MO-12); yellow colour Hair Comb (MO-13); and blood stained Spectacle (MO-14) under the cover of the mahazar (Ex.P-20) in the presence of Muthu (PW-8) and Vimal (not examined). The Inspector (PW-28) noticed that the body of Gunaram was with cut injuries around his neck and the locker in the shop was found opened.

(h) Ramajayam, the Finger Print Expert came to the place of occurrence, but was not able to lift any chance finger prints therefrom. The Inspector (PW-28) requisitioned the services of Balakumar (PW-9) CCTV Camara Technician and Lingesh (PW-10), who had installed the CCTV cameras in the shop, with whose help the Digital Video Recorder with remote Connector (MO-2) was recovered under the cover of mahazar (Ex.P-2). The CCTV footages were viewed, which clearly showed that when Gunaram was alone in the shop, an intruder entered into the shop and after committing the

murder, walked out with the jewels in the display panel. Though the face of the assailant was identifiable from the CCTV footages, yet his name and other particulars were not known to anyone. The Digital Video Recorder (MO-2) was sent to the Court of Judicial Magistrate No.II, Poonamallee and the same was forwarded to the Tamil Nadu Forensic Science Department on 7.5.2012.

(i) The Inspector (PW-28) despatched the body through Ansari (PW-19), Police Constable to the Kilpauk Medical College Hospital, where Dr.Rathinamalini (PW-16) examined the body and made entries in the Accident Register (Ex.P-6) and sent the body to the mortuary.

(j) At the mortuary, the Inspector (PW-28) conducted an inquest over the body of the deceased Gunaram and prepared the Inquest report (Ex.P-21).

(k) On the requisition of the Police, Dr.Selvakumar (PW-21) conducted autopsy on the body of the deceased Gunaram. In his evidence and in the Postmortem Certificate (Ex.P-7) he has stated as follows:

"INJURIES:

(1) Oblique incised wound seen over lower part of front and side of the neck measuring 11 x 3 cm., the left side end of the incised wound is acute and lies 1.5 cm to the left of midline. The incised wound extends to the right side of the neck crossing the midline below the thyroid cartilage to a point 6 cm below the right side mastoid process. Tailing seen at this point to a length of 3.5 cm. The margins of the wound are clean cut. On front the lower end of the Incised wound lies 4 cm above the suprasternal notch. The upper border of the incised wound lies 6.5 cm below the chin.

On dissection:- The anterior neck muscles on the lower part found severed on both sides and exposed outside. The superficial blood vessels of the left side of the neck found severed. The left carotid artery found cut partially. Extravasation of blood seen in the left sideclavicular region and lower part of left side of neck. The wound enters the left side thoracic cavity through the

upper part of front of chest in thecavicluar region. Cutting through the muscles over the left side supraclavicular region.

On dissection of Chest:- The left end of the incised wound over neck communicates with the upper part of left thoracic cavity. Lung shows a cut injury measuring 1 x 0.5 x 0.5 cm in the upper part of apical area of left lung. Left lung found collapsed. Left thoracic cavity contains 220 ml of fluid blood and 5 grms of clotted blood.

(2) Stab wound on back of outer aspect of upper part of chest. Obliquely placed; close to the posterior axillary line measuring 2 x 1 x 6 cm. The margins are clean cut and the ends are acute. The wound enters the left thoracic cavity through a stab wound measuring 1 x 0.3 cm in the intercostal space of the upper part of outer aspect of left side of chest. The stab wound communicates with the thoracic cavity in the second intercostal space. The depth of the wound is 6 cm. The direction of the wound is inwards, forwards and medially. The measurements of the wound reduces from above downwards.

(3) Incised wound obliquely placed 1.5 x 0.5 cm x Skin deep on left side of chin 2.5 cm from the midline.

(4) Incised wound obliquely placed measuring 2 x 1.2 cm x muscle deep on front of left shoulder.

(5) Incised 2.5 cm x 0.5 cm x skin deep onthe left side of lower part of neck in the supraclavicular region.

(6) Incised wound 1.3 x 0.3 cm x skin deep on the left side of lower part of neck 1 cm above previous injury with tailing anteriorly.

(7) Oblique Incised wound 3 x 0.5 x 0.5 cm on left side of back of head 2 cm behind left mastoid process.

(8) Incised wound 2.5 x 1 x 0.5 cm on the back of outer aspect of left hand below the webspace of left thumb and left index finger 2 cm below the wrist.

(9) Oblique incised wound 1.5 x 0.3 x 0.5 cm on outer aspect of left thumb in the back of proximal phalynx.

(10) Incised wound 1 x 0.3 x 0.3 cm on back of left wrist.

(11) Incised wounds 2 x 0.4 x skin deep over front of right index finger in proximal phalynx

(12) Incised wound 0.5 x 0.3 x skin deep over front of middle of right middle finger

(13) Scratch abrasions 4 x 0.2 cm seen on front of upper part of neck.

(14) Scratch abrasions 3 x 0.3 cm seen on front of upper part of neck.

(15) Scratch abrasions 0.5 x 0.3 cm seen in left side of chin.

(16) On dissection on the head; Dark Red contusion 5 x 4 cm x 0.5 cm on back of head in the occipital region."

As to the cause of death, which is relevant under Section 7 of the Evidence Act, Dr.Selvakumar (PW-21) has stated that 'the deceased would appear to have died of shock and haemorrhage due to cut injury to the neck.'.

(l) After postmortem, Ansari (PW-19) handed over the body of the deceased Gunaram to relatives and collected the blood stained cloths worn by the deceased viz., blood stained white pant (MO-7); blood stained white colour banian (MO-8); blood stained underwear (MO-9); rose colour half shirt (MO-19) from the Postmortem Doctor (PW-21) and handed them over to the

Inspector (PW-28), to send the same to the Tamil Nadu Forensic Sciences Department through Court for examination and report.

(m) While the investigation was in progress, breakthrough in the case came when Ramajayam @ Appu (accused/appellant) was apprehended by the Public when he attacked one Chandraprabha and attempted to snatch her Gold Chain, and was thereafter handed over to S-10 Pallikaranai Police, who registered a case in Cr.No.925 of 2012 on 12.5.2012 at 17.00 hours under sections 393, 397, 450 and 307 IPC.

(n) Sahadevan (PW-27), Inspector of Police, Pallikaranai Police Station (hereinafter referred to as 'Pallikkaranai Inspector') took up the investigation in Cr.No.925 of 2012 and during interrogation, the accused disclosed about his involvement in this case. His confession statement was recorded and based on the disclosure made by him, in the presence of Chittibabu (not examined) and Balaji (PW-22), Pallikkaranai Inspector (PW-27) recovered 32 pieces of Gold Covering Chains (MO-1 series) and a T-Shirt with blue and ash colour horizontal stripes (MO-4) from the residence of Jaishankar (PW-13), a Police Constable, whose sister-in-law (wife's sister) was in love with the accused and was slated to marry him shortly.

(o) The accused was produced before the jurisdictional Magistrate by Pallikaranai Police in Cr.N.925 of 2012 and was remanded to judicial custody on 14.5.2012. The Gold Covering Chains (MO-1 series) and T-Shirt (MO-4) were handed over by the Pallaikarai Inspector (PW-27) to John Arumairaj (PW-28), Maduravoyal Inspector on 14.5.2012 itself under Form-95.

(p) On 15.5.2012 John Arumairaj (PW-28) made necessary application before the Judicial Magistrate No.II, Poonamalee and took police custody of the accused for seven days and interrogated him. He recorded the confession statement of the accused and the admissible portion is marked as Ex.P-4. Based on the disclosure of the accused, the Inspector (PW-28) took the accused to the house of Jaishankar (PW-13) and in the presence of Mareeswaran (PW-14) and Manoharan (not examined), recovered a blue

colour jeans pant (MO-3), said to have been worn by the accused at the time of the incident and a knife (MO-5), said to have been used for the commission of the offence, under the cover of Mahazar (Ex.P-5). He also seized the slippers (MO-6) worn by the accused under the cover of the mahazar (Ex.P-3).

(q) PW-28 requisitioned the services of Bala Arumugam (PW-20) to take photographs of the accused (MO-11 series). On 23.5.2012, the photographs that were taken were sent to the Tamil Nadu Forensic Science Department through the Court for comparison with the CCTV footage recorded in the shop. After expiry of the period of police custody, the accused was sent back to judicial custody.

(r) Kala (PW-23), Scientific Officer, Tamil Nadu Forensic Science Department examined the CCTV footages recorded in the Digital Video Recorder (MO-2) and submitted a detailed report dated 23.7.2012, which is marked as Ex.P-10. Kala (PW-23) in her evidence and report (Ex.P-10), has stated as follows:

"c) On playing back the recording continuously on the incident date 14/04/2012, the sequence of events that transpired (murder incident) are tabulated sequentially:

Time in Hours on 14.4.2012	Events that transpired as observed from the video footage/recordings through channels	Display/ Channel number
11:19:57	A stranger is seen entering the shop	CH3
11:20:01	The stranger is seen conversing with the shop owner inside the shop	CH2
11:20:01 to 11:20:57	Conversation between the two goes on	CH1 and CH2
11:20:57	Shop owner displays a catalogue	CH2 and CH1
11:24:43	The shop owner is seen entering the safety locker room for the first time	CH2, CH1
11:24:47	The shop owner seen inside the safety locker room	CH4

11:24:51	Shop owner is seen opening the safety locker viewing the jewels taken from the safety locker	CH4
11:24:55	The stranger is seen waiting outside	CH2
11:25:18	The stranger is seen placing his bag on the desk	CH2
11:25:22	Shop owner is seen viewing the jewels taken from inside the locker	CH4
11:25:40	Shop owner is seen coming out of the safety locker room and again has conversation with stranger till about 11:38:17	CH2
11:38:21	The shop owner is seen re-entering the safety locker room for the second time	CH2
11:38:23	The shop owner is seen inside the safety locker room and once again is viewing the jewels taken from the safety locker room	CH4
11:38:51	The stranger is seen waiting outside	CH1
11:38:55	Stranger is seen suddenly barging in and entering the safety locker room	CH1
11:38:59	Stranger is seen entering the safety locker room	CH2
11:38:59 to 11:39.40	The stranger is seen inside the safety locker room, cuts/stabs several times the shop owner with a knife	CH4
11:40:16	The stranger is seen wiping the knife	CH4
11:40:23	The stranger is seen placing the knife inside pant pocket	CH4
11:40:26	The stranger is seen closing the safety locker room leaving the shop owner in a pool of blood	CH4
11:40:29	The stranger is seen coming out of the safety locker room	CH1
11:40:29	The stranger is seen locks the door of the safety locker room from outside	CH1
11:40:34	The stranger is seen picking his bag from the desk where he left it	CH2
11:40:39 to 11:41:18	The stranger is seen entering the inside shop owners area and picking the jewels from the display panel and putting some of the jewels from display in his bag	CH2
11:41:23	The stranger is seen walking out of the shop after picking the jewels	CH2
11:41:27	The stranger is seen walking out of the shop after picking and packing the jewels	CH1
11:40:36 to 11:53:15	The shop owner/victim attempts to knock the door from inside the safety locker with pool of blood several times and finally collapses at 11:53:15	CH4

d) it was also observed that no voice/audio had been recorded in this

incident

e) The recording continuously goes on till the arrival of the police and thereafter (13:30 Hrs)."

(s) Pushparani (PW-24), Scientific Officer, Anthropology Division of Tamil Nadu Forensic Science Department compared the images in the CCTV footages with the photographs of the accused taken by Bala Arumugam (PW-20) and gave her report (Ex.P-12). Pushparani (PW-24) in her evidence and report (Ex.P-12) has stated as follows:

"Item 5

We have carefully examined the face of the male individual wearing the T-Shirt in the Video footage (Item-5) at the time between 11.20 and 11.41 with a male individual seen in items 1, 2 and 3 using morphological study.

OBSERVATION

The asymmetric eye brows, the deep root of the nose and the broad bridge of the nose seen in the face of the male individual in items 1, 2 and 3 are well correlated with the corresponding features seen in the face of the male individual in item 5.

OPINION

The male individual seen in items 1, 2 and 3 could possibly have belonged to the male individual seen in item 5."

(t) John Arumairaj (PW-28) examined the experts and other witnesses and on his transfer, Kannan (PW-29), Inspector of Police proceeded with further investigation and filed Final Report before the jurisdictional Magistrate for the offences under Sections 404, 302 and 449 IPC.

[3] On appearance of the accused before the trial Court, provisions of Section 207 Cr.P.C. were complied with and the case was committed to the Court of Sessions in S.C.No.142 of 2013 and was made over to the III Additional District and Sessions Court, Tiruvallur @ Poonamallee, where charges for the offences under Sections 449, 302, 392 and 404 IPC were framed. When questioned, the accused pleaded "Not Guilty".

[4] To prove the charges, the Prosecution has examined 30 witnesses; marked 22 exhibits; and produced 15 material objects.

[5] The accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances and he denied the same. No witness was examined, nor any exhibit was marked on the side of the accused/appellant.

[6] After hearing both sides and appraising the evidence on record, the trial Court has convicted the accused and sentenced him as follows:

Conviction u/s	Sentence imposed
449 IPC	10 years R.I.
392 IPC	10 years R.I.
404 IPC	3 years R.I.
302 IPC	Death Sentence

The sentences of imprisonment imposed for the offences under Sections 449, 392 and 404 IPC were ordered to run concurrently.

[7] We have heard Mr.S.Shanmugavelayutham, learned Public Prosecutor for the State and Mr.M.Jagadeesan, learned Counsel appearing for the accused/appellant.

[8] During the hearing of the case, we noticed that the trial Court had not played the DVR (MO-2) and seen the CCTV footages in the presence of the accused. In this regard we propose to dispel misgivings, if any, in the mind of trial Judges about their power to view such evidences. There will be instances where, by the time the case comes up for trial in one court, the electronic record would have had a natural death for want of proper storage facilities in the Court property room. To obviate these difficulties, we direct that, on a petition filed by the prosecution, the Judicial Magistrate, who receives

the electronic record, may himself view it and take a back up, without disturbing the integrity of the source, in a CD or Pendrive or any other gadget, by drawing proceedings. The back up can be kept in safe custody by wrapping it in anti static cover and should be sent to the Sessions Court at the time of committal. The present generation of Magistrates are computer savvy and they only require legal sanction for taking a back up. They can avail the service of an expert to assist them in their endeavour. Recently the Supreme Court in Shamsher Singh Verma v. State of Haryana, 2015 12 Scale 597, has held that CD is a 'document' within the meaning of Section 3 of the Indian Evidence Act, 1872. In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, 1976 2 SCC 17, the Supreme Court has held that tape records of speeches are 'documents' as defined in Section 3 of the Indian Evidence Act, 1872. This Judgment has been relied upon in Shamsher Singh Verma's case. Therefore, we hold that articles like Memory Card, Hard Disc, CD, Pen-drive, etc., containing relevant data in electronic form are 'documents' as defined under Section 3 of the Indian Evidence Act, 1872, albeit, marking them as material objects. After all, nomenclature cannot have the effect of altering the characteristics of an object. The words 'proved' and 'disproved' in section 3 of the Evidence Act have the following common denominator;

> "A fact is said to be proved/disproved when, after considering the matters before it ....."
>
> Without viewing the CCTV footage, how can any Court, "consider the matter before it " to conclude that a fact has been 'proved' or 'disproved' ? That apart, Section 62 of the Indian Evidence Act, 1872 states,
>
> "Primary evidence means the document itself produced for the inspection of the Court."
>
> This does not mean that, if a secondary evidence of a document is admitted lawfully, the Court is denuded of the power to inspect it. Such an inference will lead to absurdity. Therefore, we hold that a Court has the power to view CCTV footage and video recordings, be it primary or legally admissible secondary evidence, in the presence of the accused for satisfying itself as to whether the individual seen in the footage is the accused in the dock. The trial Court should also specifically put questions to the accused when he is

examined under Section 313 Cr.P.C. about his overt acts appearing in the footage and record his answers.

[9] Bhudharam (PW-6) in his evidence has stated that, in and around that time, he came to the shop of the deceased and saw the accused there. He identified the accused for the first time in the dock as the person whom he saw in the shop on that fateful day. Therefore, we decided to view the DVR proceedings (MO-2) in the presence of the accused and Budharam (PW-6) for satisfying ourselves about the assertion of Bhudharam (PW-6) that he saw the accused in the shop of the deceased. As stated above, we also wanted to view the video footage to see whether the accused is seen therein. Hence, on 22.12.2015, we passed orders under Section 367 and 391 Cr.P.C. for summoning Bhudharam (PW-6) and for production of the accused on 12.1.2016.

[10] On 12.1.2016, the accused was produced under escort and Bhudharam (PW-6) was also present. In the presence of the accused, his advocates, the Public Prosecutor, Investigating Officers, and officials of the Registry, we viewed the DVR (MO-2) recordings in open Court. After viewing the footage, Bhudharam (PW-6) was examined in chief by the Public Prosecutor, and cross-examined by Mr.M.Jagadeesan, the learned Counsel for the accused. Thereafter, we questioned the accused under Section 313 Cr.P.C. on the incriminating evidences in the DVR recordings and also on the evidence given by Bhudharam (PW-6). The reply of the accused was a wholesale denial. After hearing the argument of either side, we reserved orders.

Discussion of Evidence

[11] Dhanaram (PW-1) deposed that his deceased brother Gunaram and he were into Pawn Broking and Jewellery business and were running 'Balaji Pawn Broking' at No.1, 13th Street, Sakthi Nagar; that on 14.4.2012 the deceased Gunaram opened the shop around 8.00 a.m. and around 9.00 a.m. he went to the shop and was there for some time, and later went to Sriram Finance, Virugambakkam; and that when he returned back to the shop, he found his brother on the floor in a pool of blood. When he raised an alarm, people from the neighbouring shop viz., Sahadev Prohith (PW-2), Varadarajan (PW-3), Selvi (PW-4), Kumar (PW-5) and Ashok (PW-7) gathered. It is not the case of the Prosecution that these witnesses had seen the assailant. PW-1 Dhanaram has further stated that the Police immediately played the Video Recorder and in the footage played he saw the accused. He also identified the 32 pieces of Gold Covering Chains (MO-1 Series) while in the witness box.

[12] The fact that Gunaram's death was homicidal has been proved beyond any pale of doubt by the Prosecution, and that is also not seriously disputed by the defence.The only question that requires to be decided is, whether the accused was the perpetrator of the crime ?

[13] The Prosecution heavily relied upon the evidence of Budharam (PW-6), who is said to have seen the accused in the shop of the deceased in and around the time of occurrence. Budharam (PW-6) in his evidence before the trial Court has stated that he is working in Chethan Fancy Store, owned by his brother and also doing chit business; that on 14.4.2012 in the afternoon he came to the shop of the deceased for collecting chit amount from Dhanaram (PW-1), who is said to be a subscriber; that at that time one customer wearing blue colour jeans and T-Shirt was in the shop, whom he identified as the accused in the dock. In the Digital Video Recording (MO-2) that was viewed by us on 12.1.2016, we saw Budharam (PW-6) entering the shop while the accused was talking to the deceased. After talking to the deceased for a few minutes Budharam (PW-6) is seen leaving the shop. Therefore, it cannot be contended that he was a witness planted by the Police.

[14] Mr.M.Jagadeesan, learned counsel for the accused submitted that the evidence of Budharam (PW-6) lacks credibility because the Digital Video Recording shows Budharam (PW-6) entering the shop at 11:36:08 hours and leaving the shop at 11:37:15 hours, and in that short time he could not have registered the face of the accused in his mind. If the recording between 11:36:08 and 11.37:15 hours is analyzed in isolation, the argument of Mr.M.Jagadeesan may appear convincing. In reality, when we viewed the recordings, one minute comprising sixty seconds does not pass in a wink. In our opinion, being with a person for one full minute is sufficient to register his face and remember it. We have no material to infer that Budharam (PW-6) is a person of very poor memory. In the cross examination, his capability to remember the face of a person if seen once was not challenged. Therefore, we reject this argument and accept the evidence of Budharam (PW-6) that he saw the accused in the shop of the deceased on that fateful day. The CCTV footage corroborates his evidence to the hilt.

[15] Apart from the CCTV recordings, there are two other powerful incriminating circumstances that stares at the face of the accused.

(a) The fact that the accused was apprehended by the public on 12.5.2012 when he attempted to rob one Chandraprabha and was handed over to the Police has been established through the evidence of Sahadevan (PW-27),

Inspector of Police, Pallikaranai Police Station. During interrogation by Sahadevan (PW-27), the accused spilled the beans and disclosed his involvement in the present case. This is a fact which was hitherto unknown to Sahadevan (PW-27), and therefore, the discovery of the fact that a murder case is under investigation by the Maduravoyal Police, based on the information provided by the accused, is relevant and admissible under Section 27 of the Indian Evidence Act, 1872, though the confession is, perse, hit by Section 25 of the Indian Evidence Act,1872.

(b) The next incriminating circumstance is the recovery of 32 pieces of Gold Covering Chains (MO-1 series) and horizontally striped T-Shirt (MO-4) by PW-27 from the residence of Jaishankar (PW-13) at the instance of the accused. At this juncture it may be relevant to discuss the evidence of Jaishankar (PW-13). PW-13 has deposed that he is a Police Constable in Nungambakkam Police Station and is living with his wife Kavitha and two children in the Police Quarters in the Thousandlights area; that his wife's sister Anjali was in love with the accused and wanted to marry him; that the accused would frequently come to his house and stay with them; that the accused told them that he needs money to go to Canada for higher studies, for which Jaishankar (PW-13) pledged his wife's jewellery and gave him Rs.9 lakhs on loan. Whileso, on 13.5.2012, Pallikaranai Police brought the accused to his house and seized 400 grams of jewellery and a T-Shirt; that he identified the covering jewellery as MO-1 Series and T-Shirt as MO-4; and that, on 18.5.2012 the Inspector of Police Maduravoyal Police Station brought the accused to his house and recovered a Jeans Pant (MO-3) and a knife (MO-5) in the presence of Mareeswaran (PW-14) and Manoharan (not examined).

[16] Mr.M.Jagadeesan, learned Counsel appearing for the accused/appellant seriously attacked this evidence by pointing out certain discrepancies. He submitted that Jaishankar (PW-13) had deposed in the Chief Examination that Pallikaranai Police had recovered 400 grams of covering jewellery (MO-1 series) and T.Shirt (MO-4), but in the cross-examination he has stated that on 13.5.2012 the Pallikaranai Police have recovered a knife (MO-5) and on 18.5.2012 the Maduravoyal Police had recovered a T-Shirt (MO-4). Though his submission was little attractive, yet on a closer scrutiny of the evidence of Jaishankar (PW-13) it is seen that he was examined in chief on 12.2.2014

and he was not cross-examined immediately. He was recalled and examined only on 2.9.2014 nearly eight months later. The Supreme Court has deprecated this practice of defence counsel not cross-examining the prosecution witnesses immediately and recalling them months later for the purpose of cross-examination (See: Vinod Kumar v. State of Punjab, 2015 1 Scale 542). We are conscious of the fact that such techniques are adopted with impunity either to win-over the witness by intimidation or bribery or to take advantage of his memory lapse. We find, except confusing him on the aspect of recovery, the defence was unable to make any serious dent in the kernel of his evidence, viz., that the accused was permitted to live in the house as his sister-in-law was to marry him; and that the Police came twice to his house and recovered jewels, T-Shirts, Jeans pant and knife. Therefore, we do not find his evidence to be unworthy of acceptance.

[17] That apart, the seizure of the Gold Covering Chains (MO-1 series) and T-Shirt (MO-4) has been established through the evidence of Sahadevan (PW-27), Inspector of Police Pallikkaranai Police Station corroborated by the independent witness Balaji (PW-22). The gold covering chain (MO-1) was identified by Dhanaram (PW-1). It may be necessary to recall the evidence of Bawarlal (PW-11) who helped a distraught Dhanaram (PW-1) for stock taking. After viewing the CCTV recordings, Dhanaram (PW-1) had told Bawarlal (PW-11) that the assailant had taken away only the gold covering jewellery. As to the shortage of 48 grams of gold jewellery, he has told PW-11 that he has no idea and that only his deceased brother knew about all this.

[18] It is trite that the disclosure leading to discovery of a fact in one case is relevant under Section 27 of the Indian Evidence Act, 1872 and admissible, even though it has been made during the investigation in another case (See: State of Rajasthan v. Bhup Ram, 1997 1 Supreme 405). Hence, the disclosure statement and recovery of the covering jewellery (MO-1) and the horizontally striped T-Shirt (MO-4) by Pallikkaranai Police is relevant and admissible in this case.

[19] Mr.M.Jagadeesan, learned Counsel submitted that Sahadevan (PW-27), Inspector of Police, Pallikaranai Police Station ought to have sent the Gold Covering Chains (MO-1 series) and T-Shirt (MO-4) to the Court and should not have handed them over to the Maduravoyal Police. We are unable to countenance this submission for the simple reason that these articles that were seized by the Inspector of Police, Pallikaranai Police had nothing to do with the offence under investigation by them in Cr.No.925 of 2012 and it had everything to do with the investigation by the Maduravoyal Police in the present case. Therefore, we find no irregularity in this.

[20] The learned Counsel further contended that the Inspector of Police, Maduravoyal Police Station (PW-28) ought not to have received these articles under Form-95 from the Pallikkaranai Police, because the said form is used only for despatch of seized articles to the Court. Procedural irregularity, even if there is any, cannot vitiate the search and seizure, unless it is shown that some prejudice has been caused to the accused. In this case after receiving the materials from the Pallikaranai Police, Maduravoyal Police have despatched it to the Court, and therefore we have no hesitation in rejecting this argument.

CCTV Recordings

[21] The most powerful evidence against the accused is the CCTV recordings. The presence of CCTV Digital Video Recorder (DVR)(MO-2) has been noted in the Observation Mahazar (Ex.P-18). The DVR (MO-2) was recovered by the Police immediately after the occurrence, with the help of Balakumar (PW-9) under the cover of mahazar (Ex.P-2). MO-2 was sent by the Court to the Forensic Sciences Department and the evidence of Mrs.Kala (PW-23), Scientific Officer and her report (Ex.P.10) graphically explains the concatenation of events that took place in the shop on the fateful day. Together with the report, individual snapshots of the footage are also annexed. On a mere perusal of the snapshots it can been seen that a person wearing horizontally striped T-Shirt is found talking to the person in the counter; attacking him; and leaving the shop. The T-Shirt worn by the assailant, which is visible in the snapshots matches with the T-Shirt (MO-4) recovered at the instance of the accused. After the arrest of the accused, Bala Arumugam (PW-20) took photographs of the accused and the same were sent to the Tamil Nadu Forensic Sciences Department through the Court, which were scientifically compared with the images of the assailant in the CCTV recordings by Pushparani (PW-24), Scientific Officer, Anthropology Division.

[22] Mr.M.Jagadeesan, learned Counsel submitted that the Police have violated various provisions of the Police Standing Orders while taking photographs of the accused in custody, and therefore no reliance should be placed on the report of the experts.

[23] Assuming for a moment that the photographs were taken in breach of certain procedural law, can it in any way vitiate the action ? In American jurisprudence, illegally collected evidence is best described as "fruit of the poisonous tree" and American Courts frown upon them (See: Nardone v. United States, 60 S.Ct. 266). The 94th Law Commission Report suggested to the Parliament to bring in similar provisions into our

Legal System, which was not accepted by the Parliament. In State of M.P. through CBI, V. Paltan Mallah, 2005 3 SCC 169, the Supreme Court has discussed the 94th Law Commission Report and has categorically held that the evidence collected illegally or in violation of the procedural law will not become inadmissible. Very recently in Umesh Kumar v. State of A.P., 2013 10 SCC 591, the aforesaid principle was reiterated in connection with photographs and tape-recordings. Of course, it would have been an ideal situation had the Police adhered to PSO 646 or the provisions of Identification of Prisoners Act, 1920, but the ground reality is, Police in India do not work in ideal situations. In K.Ramaraj v. State by Inspector of Police, CBCID, Chennai, 2014 2 MadLJ(Cri) 41, a Division Bench of this Court to which one of us (PNPJ) was a party, deprecated the practice of Police taking photographs of the accused in the Police Station. The Court however did not hold that the photographs so taken becomes incapable of being used by the Experts for their analysis and opinion.

[24] The evidence of Pushparani (PW-24), Scientific Officer, Anthropology Division and her report (Ex.P-12) clinches the issue. She has stated in her evidence that she received a CD containing photographs of a person from the Court of Judicial Magistrate No.II, Poonamallee. She then called for the CCTV footage in this case that was already sent through Court to the Computer Wing of the Department and compared them morphologically. The reasons given by her which has been extracted above were reiterated in the witness box, and the defence was unable to demolish her evidence in any manner, except making a suggestion that she has not properly conducted the test.

[25] In fine, we approve the method adopted by the Police in sending the Digital Video Recording (MO-2) itself to the Tamil Nadu Forensic Sciences Laboratory for the computer experts to view the recordings and give a report of the events in the nature of Ex.P-10. Similarly, the morphological study of the photographs of the accused that has been obtained by the Police from two sources, by Pushparani (PW-24), Scientific Officer, and her Report (Ex.P-12) stands accepted by us to infer that the assailant seen in the CCTV footage is the accused. It is axiomatic that the opinion of an expert, which is relevant under Section 45 of the Indian Evidence Act, 1872, when accepted by the Court graduates into the opinion of the Court. The Central Government has not yet issued notification under Section 79A of the Information Technology Act, 2000 on account of which Section 45A of the Indian Evidence Act, 1872 remains mute. Therefore, the methods evolved by Kala (PW-23) and Pushparani (PW-24), Scientific Officers of the Tamil Nadu Forensic Sciences Department to analyze and give their opinions on the electronic data, are correct and cannot be faulted.

[26] As a prelude, we feel it will be appropriate to quote the following passage from the book "Law of Evidence" by the celebrated author Vepa P.Sarathi (6th Edition, page 208). We quote,

> "The law, it is said, walks a respectable distance behind science, but courts try to keep abreast. The criminal is quick to use science to commit ingenious crimes, and so the police and the courts should be no less innovative; and courts should always encourage the police to do so and admit the evidence collected by any innovative method. The law courts can play an important role by (1) taking expert evidence to see whether the best scientific methods have been used, (2) by the Judge scrutinising the evidence carefully, and (3) encouraging the scientists, when the evidence is reliable, by giving judicial recognition to his methods."

[27] Criminal Justice Delivery System is built upon the episodic memory of witnesses and their capacity to translate the data stored in their memory into human language, for the purpose of communication and understanding by the Judge for rendering justice. Episodic memory is broadly described by Prof.Sen Cheng from RUHR University, Bosch, Germany as "fairly accurate representation of personally experienced episodes." To put it in short, the opthalmic and auditory senses in human beings capture events and store them as memory in the brain. Thereafter the events can be narrated orally via a language. That is why, perhaps Jeremy Benthem called Witnesses as "eyes and ears of Justice" (See: State of M.P. v. Dharkole, 2004 AIR(SCW) 6241).

[28] The capability of the human mind to give its own interpretation to what the eyes saw and what the ears heard while narrating, cannot be discounted. Universally, Courts have recognized the fact that there are bound to be exaggerations and embellishments in oral accounts. If five people are asked to see an event and give an account of it individually, there will not be unanimity in their versions. This has been scientifically tested and the following passage from Laxman v. State of Maharashtra, 1974 3 SCC 704 may be worth extracting,

> "13. Before we discuss the evidence further, we may observe that Professor Munsterberg, in a book called On the Witness Stand (p. 51) cited by Judge Jerome Frank in his Law and the Modern Mind (1949 ed. p. 106), gives

instances of experiments conducted by enacting sudden unexpected preplanned episodes before persons who were then asked to write down, soon afterwards, what they had seen and heard. The astounding result was:

"Words were put into the mouths of men who had been silent spectators during the whole short episode; actions were attributed to the chief participants of which not the slightest trace existed; and essential parts of the tragi-comedy were completely eliminated from the memory of a number of witnesses."

Hence, the Professor concluded: "We never know whether we remember, perceive, or imagine"."

It is axiomatic that CCTV footage does not suffer such ills and human frailities, and they are indubitably superior to human testimony of facts.

[29] Confession of the accused, which is generally called the "Queen of Evidence" is kept out of judicial reach in India, if it has been given to a Police Officer, because our Police have still not come out of their colonial mind set. Therefore, Indian Police have to perforce search for evidence, other than Police confession, for bringing the guilty to justice. Fortunately today, Police will soon be relieved of hunting for other materials on account of the Information Technology revolution and the free availability of gadgets like CCTV cameras, pen cameras, mobile phone cameras, et.al, in the hands of common citizen. The Government of Tamil Nadu by G.O.Ms.No.113 Municipal Administration and Water Supply (MA-1) Department, dated 14.12.2012 has framed rules titled The Tamil Nadu Urban Local Bodies (Installation of Closed Circuit Television Units in Public Buildings) Rules, 2012, the preamble of which reads as under:

"As a measure of crime control, the Government felt that Closed Circuit Television Units (CCTV) should be installed in all public buildings, commercial establishments and places where large gatherings of public congregate, which will be made mandatory as a condition for issuing licence under relevant provisions of Municipal Corporation/ Municipal Rules."

By virtue of these Rules, now it has become mandatory for Public Buildings

to install CCTV cameras. Apart from the law's compulsion, presence of lensmen with sophisticated cameras is ubiquitous. We also have in abundance camera buffs who love recording anything and everything for posting in Facebook and Whatsapp. The Police cannot afford to lose these evidences collected by individuals and instead, rely upon archaic method of collecting evidence. Very recently in Tomaso Bruno v. State of U.P., 2015 7 SCC 178, the Supreme Court acquitted the accused for the failure of the Police to produce the CCTV recordings, that being the best evidence. It may be necessary here to quote the relevant paragraph from the said judgment, which reads thus,

"28. ..... Notwithstanding the fact that the burden lies upon the accused to establish the defence plea of alibi in the facts and circumstances of the case, in our view, the prosecution in possession of the best evidence, CCTV footage ought to have produced the same. In our considered view, it is a fit case to draw an adverse inference against the prosecution under Section 114 Illustration (g) of the Evidence Act that the prosecution withheld the same as it would be unfavourable to them had it been produced."

[30] At this juncture, we feel that it may be appropriate to discuss yet another issue that is likely to crop up when the Police seek to seize equipment like Digital Video Recorder of a third party, who is unconnected with the offence. Let us take for example a case where a private individual's CCTV has captured a scene of crime taking place on the road. Can the police seize the DVR and deprive him of it ? The owner may permit the police to transfer the data, but he may not be willing to give possession of his gadget, free of cost. We are aware that under the Tamil Nadu Financial Code there are provisions for defraying expenses incurred during investigation under the following heads of account:

Investigation Charges Head of Account:

For Districts: "2055-00-Police-109 District Police-1 Non Plan AA -

District Police, 05 Office Expenses, 06 Investigation Charges, (DP Code 2055 00-109AA 0565)"

For Chennai City:"2055-00 - Police-108 State Head Quarters Police-1

Non Plan AA - Commissioner of Police, 05 Office Expenses 06 Investigation Charges, (DP Code 2055 00-108AA 0565)"

G.O.Ms.No.633, Home (Police-I) Department, dated 29.7.2003 has empowered the Superintendents of Police to disburse Rs.500/- and the Zonal Inspectors General of Police to disburse Rs.2,000/- towards Investigation Charges. In our opinion, this is pittance of an amount and requires an immediate revision. We direct the Home Secretary and Finance Secretary of the State of Tamilnadu, and the Director General of Police to pass appropriate orders within two months from the date of receipt of copy of this Judgment to increase the disbursal powers of the Superintendents of Police to Rs.5,000/- and that of the Zonal Inspectors General of Police to Rs.15,000/- towards investigation charges. It is the sovereign duty of the State to protect the life and property of the citizens and also to bring the guilty to justice. The property of a total stranger cannot be taken away by the Police without paying reasonable compensation on the premise that they need it for investigation purposes. Hence, whenever the police seek to take away the gadgets and equipment belonging to a third party, they shall pay the cost without demur to the person from whom the property is taken away. Only then, will people come forward to assist the Police in the investigation of an offence. It is time we usher in a fair, ethical and moral procedure in policing vis-a-vis the common man.

[31] One has to understand the science of CCTV Recordings in the light of the Information and Technology Act, 2000, for the purpose of its optimum usage as evidence in the Court of Law. Gone are the days when Hindustan Photo Films produced film rolls for loading in the camera and on the click of the button the image gets imprinted on the film. The imprint is called the negative, which is the primary evidence, and the positive developed therefrom is considered as the secondary evidence. That technique has now become defunct. Today, the physical images captured by the camera is converted by a computer software into information, capable of being stored as data in electronic form and the stored data is electronic record. Section 3 of the Indian Evidence Act, 1872 as amended by the Information and Technology Act, 2000

reads as follows:

"the expressions "Certifying Authority", "electronic signature", "Electronic signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure electronic signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000."

The terms 'computer', 'data', 'electronic form' and 'electronic record' are defined under Section 2 of the Information Technology Act, 2000, as follows:

"2(i) "computer" means any electronic, magnetic, optical or other highspeed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network."

2(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer".

"2(r) "electronic form", with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device."

"2(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

[32] In this case, in the shop of the deceased Ganaram, four CCTV cameras were

installed at vantage positions, viz., one at the entrance; two inside the shop at different angles; and one inside the locker room, which has a huge safe vault. The images captured by the four cameras were transferred to a Digital Video Recorder (DVR) (MO-2), which is a rectangular box, through wires. DVR has a computer programmed circuit to receive the images from the four cameras and convert them into electronic form in binary and store them in the hard disk. The software is so programmed that it can not only receive and store, but also play back the images on a screen, be it a monitor, Television screen, or Cinema Screen. The information so stored are not tangible information for the Court to inspect and see with its naked eyes. The DVR is an electronic record within the meaning of Section 2(t) of the Information Technology Act, 2000, as it stores data in electronic form and is also capable of output. Since the gadget was small, the Police seized the DVR under the cover of mahazar and with the help of a Technician, they played it to the witnesses for the purpose of identifying the accused. By no stretch of imagination can this be faulted, because the police should have to act with alacrity to nab the criminal.

[33] Strong reliance was placed by the learned Counsel appearing for the appellant/accused on the judgment of the Supreme Court in P.V.Anvar vs. P.K.Basheer, 2014 10 SCC 473, where interpretation of Section 65A and 65B of the Indian Evidence Act came up for consideration and the Supreme Court held that an electronic evidence recorded in the CD, bereft of a certification under Section 65B is inadmissible in evidence. In para 24 of the said ruling it is held as follows,

> "24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the

Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."

The above decision does not in any way enhance the case of the defence inasmuch as, in the last line, the Supreme Court has stated that, if an electronic record as such is used as primary evidence under Section 62 of the Indian Evidence Act, 1872 the same is admissible in evidence, without compliance with the conditions in Section 65B of the Evidence Act. In this case, DVR (MO-2) which contains the information is before the Court. There may be occasions when in large establishments like Railways, Airports where large number of cameras are installed and the information is stored digitally in huge servers, it may not be possible for the Police to seize the server and send them either to the Forensic Science Department or produce them before the Court. Only to obviate this difficulty and to satisfactorily meet the objections relating to admissibility of secondary evidence in electronic form, the Parliament thought it fit to provide a certification under Section 65B. Even if the certification is not obtained at the time of collection of evidence, yet, at the time of trial, evidence aliunde can be given through the person who was in charge of the Server, in terms of Section 65B of the Act, as held by a Division Bench of the Delhi High Court in Kundan Singh v. State. The Police can also requisition the services of Computer Experts and Experts from the Forensic Sciences Department to retrieve data from a huge server through USB drive or CD drive or any other gadget for the purpose of investigation and production of the same before the Court without disturbing the integrity of the original source. If we fail to provide this facility to the Police, the Criminal Justice Delivery System will become a lame duck.

[34] The question of copy as it is normally understood in physical data may not be applicable for electronic data. While retrieving the data from a huge Server it would suffice if certification under Section 65B is obtained from the person, who is incharge of the Server. After so obtaining the information in a USB drive or CD or any other gadget, the expert can feed the data into his computer and take printouts in tangible form with his certification stating as to how he had collected the data from the Server and fed them into his computer and produced the outputs. These two certifications, in our opinion, will satisfy the requirements of Section 65B of the Indian Evidence Act, 1872 in all fours.

[35] We are aware that in many public and private offices, though computers are operated by their staff, yet the manning and maintenance of servers, where the data is actually stored, is outsourced to private players like TCS, WIPRO, etc. Under those circumstances, it would suffice if Section 65B certificate is obtained from the person who is in charge of the server albeit the fact that he is not a staff of the parent organization. Section 65B does not require certification by a public authority unlike cases of issuance of certified copy of public document under section 76 of the Indian Evidence Act, 1872. It is not necessary in every case to examine the person who had given the 65B certificate as witness before the trial Court, unless the Court suspects the integrity of the electronic record that is produced as evidence. One should bear in mind that a digital image cannot be manipulated easily. Every digital image has a meta data stored in it. The meta data are structured as coded data, which gives every image its own character. It should be remembered that the certification under Section 65B is not for the truthfulness of the content of the computer generated record, but is essentially related to the working condition of the computer from where the stored record is produced in a tangible form for the Court to inspect.

> Defence will always complain of manipulation, but Courts can reject fanciful objections bearing in mind the principle underlined in Section 114 of the Indian Evidence Act, 1872. De omnibus dubitandum (doubt everything) philosophy may be a road to scientific discoveries, but not for judicial enquiries, where perfect proof is utopion. The celebrated Jurist late lamented Nani Palkhivala commented,
>
> "Our Legal System has made life too easy for criminals and too difficult for law abiding citizens. A touch here and push there and India may become ungovernable under the present Constitutional Set up."
>
> It is time that we come out of anachronistic mind set of suspecting and doubting every act of the Police, lest the justice delivery system should become a mockery.

[36] The CCTV recordings show the accused wearing a horizontally striped T-Shirt (MO-4) entering the shop at 11 hours 19 minutes and 57 seconds (11:19:57 hours) and is talking to the deceased Ganaram. While the accused and the deceased are seriously discussing, at 11:36:08 hours Budharam (PW-6) enters the shop and after talking to the

deceased, he leaves the shop at 11:37:15 hours. Thereafter the accused and the deceased resume their discussion. At 11:38:21 hours the deceased enters the Locker room and is taking some jewels from the vault. At 11:38:59 hours the accused enters the Locker room; takes out a knife from his pant pocket; pounces upon the deceased, who is squatting on the floor; holds him tight by his neck; saws his neck with the knife and stabs him repeatedly until he is satisfied that the man is dead. At 11:40:16 hours the accused wipes the knife and keeps it in his pant pocket. He comes out of the Locker room and picks up the jewels from the display desk and puts it in his bag. At 11:41:27 hours, the accused walks out of the shop.

[37] The entry of Budharam (PW-6) at 11:36:08 hours has not been noted by Kala (PW-23) in her report Ex.P-10 and that was also one of the reasons for us to summon Budharam (PW-6). In Ex.P-10 report Kala (PW-23) has recorded as follows:

> "On playing back the recording continuously on the incident date 14.4.2012, the sequence of events that transpired (murder incident) are tabulated sequentially."

> From the above it appears that the expert had concentrated only on the murder incident and had not thought fit to record the entry of Budharam (PW-6) into the shop. Hence the failure to refer to the entry and exit of Budharam (PW-6) by Kala (PW-23) in Ex.P-10 is not fatal to the case of the prosecution.

[38] After playing the video and examining PW-6 the accused was questioned under Section 313 Cr.P.C. with respect to the evidence of PW-6 before us and the incident seen in the video recording, to which he gave standard replies, 'Lie'.

[39] Even to our naked eyes it was crystal clear that it was the accused, wearing the horizontally striped T-Shirt (MO-4) and jeans pant (MO-6) entering the shop of the deceased; talking to him; and after entry and exit of Budharam (PW-6), when the deceased goes into the Locker room, the accused enters the Locker room and indiscriminately cuts and stabs the deceased. Thereafter the accused comes out of the Locker room and gathers the jewels from the display panel and walks out of the shop. We are of the opinion that there is no further proof required in this case to hold the accused guilty of the offence.

[40] Coming to the offence under Section 404 IPC, we are afraid that we cannot sustain the conviction. Section 404 IPC reads as follows:

> "404. Dishonest misappropriation of property possessed by deceased person at the time of his death.-Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years."

Section 404 IPC falls within the sub-Chapter 'Of Criminal misappropriation of property' under the main Chapter XVII - 'Of Offences against Property'. From a reading of Section 404 IPC, it is clear that the ingredients of it cannot fit within the definition of the word "theft" or "robbery". This section applies to a situation where a person in a sly manner appropriates to himself a property in the possession of the deceased person at the time of his death. We are fortified in our view by the Division Bench Judgment of the Madhya Pradesh High Court in Jamnadas Parashram v. State of M.P., 1963 AIR(MP) 106, wherein in paragraph 34 it is held thus,

> "34. An argument arose during the course of the hearing whether the facts constituted an offence under Section 392 or under Section 404, Indian Penal Code. The basis for the argument was that in order to constitute 'robbery' all the elements of theft must exist and one of the ingredients of that offence, as defined in Sec.378 of the Penal Code is that the property stolen must have been in the possession of a "person". Now, in a case such as the one at hand it is difficult to hold precisely whether the articles were stolen before the murder or after it. In case the properties were taken by Jamnadas only after Mr.Raghuram breathed his last and was a dead body, could it be said that the offence committed was theft ? This argument at first appeared attractive (and we may also say that in another set of circumstances it may possibly be given effect to) but on a little reflection we find that where murder and robbery are committed in the course of the same transaction by the same person, the offence would fall under Sec.392 and not under Sec.404. In that

context, the word "person" cannot be so narrowly construed as to exclude the dead body of a human being who was killed in the course of the same transaction in which theft was committed. The matter would be different if a thing is stolen from a dead body apart from the transaction in which death occurred. In our opinion, therefore, the offence committed by Jamnadas is punishable under Section 392, Indian Penal Code, and not under Section 404 of the Code."

Hence, the conviction of the appellant/accused under section 404 IPC and the sentence imposed thereon cannot be sustained and the same are liable to be set aside.

[41] Now we have to address the unenviable aspect of the case viz., the sentence. Mr.M.Jagadeesan, learned Counsel appearing for the appellant/accused fervently and passionately submitted that the accused is an engineering graduate and there are possibilities of reformation. He also submitted that this is not "Rarest of Rare case" for sentencing the accused to gallows.

[42] Per contra, Mr.S.Shunmugavelayutham, learned Public Prosecutor submitted that the diabolic manner in which the accused had committed the offence requires no mercy. He submitted that the accused has come armed with a weapon, which shows his pre-determination to commit the offence of murder. He also submitted that, had the accused committed the offence of murder while committing robbery, the situation would have been different. In this case, the accused was talking with the deceased for a very long time in the shop and when the deceased went into the locker room, he followed suit and pounced upon the unwary victim and started cutting his neck and stabbing, after tightly holding him. The victim was not even in a position to resist or struggle as he was a small man, when compared to the accused, whose frame is gigantic. The accused could have caused injuries and left the deceased at that, but instead, he started sawing his neck and stabbing him till the deceased fell motionless. If robbery had been the intention, the accused could have easily bolted the locker room from the outside and decamped with the jewellery from the show case of the shop. The manner in which the offence was committed shows the blood thirst in the accused. He also submitted that the accused was again caught when he made a similar attempt on another lady and only during investigation of that case his involvement in this case came to light. Therefore the accused will be a menace to the society.

[43] We have carefully considered the rival submissions. We have no doubt in our mind that all forms of homicide is abhorring because it stifles the life span of an individual artificially against the law of nature. In this case, fortunately for the State and unfortunately for the accused the entire occurrence has been captured by the CCTV cameras installed in the shop and recorded in the DVR (MO-2) on account of which we were able to view it. Normally a scene of crime is re-created in the Court by the oral account of witnesses and the Court draws necessary inferences by a process of deduction from proved facts. Very rarely the Courts get the opportunity to view the actual commission of an offence as in this case.

[44] We asked the following question to ourselves:- Had we not viewed the video recordings but proceeded to decide the case with other evidence, would we have suffered the same impact ? The obvious answer is in the negative. Therefore, we are of the opinion that the sentence should not be decided based on the impact the video recordings had on us. Sans the video recordings, we are afraid we would have treated this case as another case of murder for gain, not warranting death penalty. In Sangeeth v. State of Haryana, 2013 2 SCC 452, the Supreme Court has discussed the cases in which death penalty was confirmed/reversed and has held that sentencing should be based on the crime and the criminal. In this case, the manner in which the crime was committed may shake our conscience. But there is no material produced by the prosecution to show that the criminal is a menace to the Society. The learned Public Prosecutor contended that the accused was caught subsequently by the Public when he attempted to do similar offence and that is sufficient to show that he is a menace to the Society. In B.A.Umesh v. High Court of Karnataka, almost a similar situation arose where the accused was found guilty of rape, murder and robbery. Two days after the incident in that case, the local public caught him while he was attempting to escape from the house where he made a similar attempt to rob and assault a lady. The accused in that case was sentenced to death by the Supreme Court. This case has been discussed in Sangeeth v. State of Haryana at para 40 and the Supreme Court has doubted the procedure of relying upon a subsequent incident which has not been proved. So to in this case, though we have relied upon the evidence of the Inspector of Police, Pallikkaranai to the effect that the accused was caught by the Public and handed over to him, the trial in the later case is still pending and therefore we cannot come to the conclusion that he will be a menace to the Society in the absence of any other material and therefore we hold that the death sentence imposed cannot be sustained.

[45] However, we find sufficient force in the submission of the learned Public Prosecutor that the offence has been committed in a cool, calculated and gruesome manner. The

accused could have easily bolted the vault room from outside when Gunaram was inside and taken away as much as he could. There was no necessity to take away the life of Gunaram, if robbery had been the motive. Keeping in mind the macabre nature of the crime, we are of the view that the sentences imposed on the accused should run consecutively and not concurrently. Recently, the Constitution Bench of the Supreme Court in Union of India v. Sriharan @ Murugan,2015 13 Scale 165 has held that the Court, while sentencing an accused to imprisonment, can direct that he should suffer incarceration for a minimum period without statutory remission or commutation.

[46] In the result,

(a) The conviction of the appellant/accused under Section 404 IPC and the sentence imposed thereon are set aside.

(b) The conviction of the appellant/accused under Sections 449, 392 and 302 IPC is confirmed.

(c) The sentence imposed for the offences under Sections 449 and 392 IPC are also confirmed.

(d) The death sentence imposed for the offence under Section 302 IPC is set aside. Instead, the appellant/accused is sentenced to life imprisonment. We direct that the accused should serve a minimum period of 25 years in prison during which period he will not be entitled to any statutory remission or commutation.

(e) We specifically hold that the sentences imposed for the offences under Sections 449, 392 and 302 IPC shall run consecutively and not concurrently. The appellant/accused shall first undergo the sentence for the offence under Section 449 IPC and on expiry of the said period, he shall serve the sentence imposed for the offence under Section 392 IPC and on expiry of the same, he shall serve the life imprisonment.

(f) With regard to the disposal of Digital Video Recorder (MO-2), which contains the entire occurrence in this case, we are of the view that it should

be handed over to the Tamil Nadu State Police Museum for preserving it as an artifact. It will also help the Police to conduct case study and hone their investigation skills. Therefore, we direct the Director General of Police to depute an Officer of the rank of Superintendent of Police from the Police Training College to collect the DVR (MO-2) from the trial Court and preserve the same in an anti-static cover in the Police Museum at Ashok Nagar, Chennai. If any appeal is preferred against this judgment and the Supreme Court calls for the DVR (MO-2), the same shall be sent forthwith.

With the above modification in sentence and directions, Crl.A.No.110 of 2015 is dismissed and R.T.No.1 of 2015 is answered accordingly.

[47] Before parting with this case, we direct the Home Secretary, Finance Secretary of the State of Tamilnadu and the Director General of Police to ensure that the disbursal power of the investigation charges of the Superintendents of Police and that of the Zonal Inspectors General of Police stipulated in G.O.Ms.No.633 Home (Police-I) Department, dated 29.7.2003, is enhanced from Rs.500/- to Rs.5,000/-, and from 2,000/- to Rs.15,000/- respectively. The Government Order enhancing the disbursal powers as aforesaid, shall be passed within a period of two months from the date of receipt of copy of this Judgment.

Daubert principles.

- whether the theory or technique in question can be and has been tested
- whether it has been subjected to peer review and publication
- its known or potential error rate
- the existence and maintenance of standards controlling its operation
- whether it has attracted widespread acceptance within the scientific community.

Smt. Selvi and Ors.

Vs.

State of Karnataka AIR2010SC1974.

MANU/SC/0325/2010

Equivalent Citation: AIR2010SC1974, 2010(2)ALD(Cri)401, 2010(2)Crimes241(SC), 2010GLH (2)357, JT2010(5)SC11, 2010 (2) KHC 412, RLW2010(2)SC1688, 2010(4)SCALE690, (2010) 7SCC263, 2010(4)UJ2128

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 1267 of 2004, 54, 55, 56, 57, 58 and 59 of 2005, 1199 of 2006, 1471 of 2007, 987 and 990 of 2010 (Arising out of SLP (Crl.) Nos. 10 of 2006 and 6711 of 2007)

Decided On: 05.05.2010

Appellants: Smt. Selvi and Ors.
Vs.
Respondent: State of Karnataka

Hon'ble Judges/Coram:
K.G. Balakrishnan, C.J., R.V. Raveendran and J.M. Panchal, JJ.

Counsels:
For Appearing Parties: Goolam E. Vahanvati, SG, Dushyant Dave, A.V., Anoop G. Chaudhari, June Chaudhari, R.R. Andhyarujina and Harish N. Salve, Sr. Advs., Rajesh Mahale, A.S. Bhasme, Santosh Paul, Aanchal Jain, M.J. Paul, Priyank Adhyaru and Manoj Goel, Advs. for Shivaji M. Jadhav, S.S. Shinde, Ravindra Keshavrao Adsure, Bina Madhavan, S.U.K. Sagar and Minakshi Grover, Advs. for Lawyers Knit and Co., A. Sumathi, Sanjay R. Hegde, Amit Kr. Chawla, S. J. Aristotle and Devvrat, Advs. for P. Parmeswaran, A. Subba Rao, T. Srinivasa Murthy, Devdatt Kamat, Sushma Suri, Manjula Gupta, D.M. Nargolkar, Saurav Kirpal, Hemantika Wahi, Jesal, Pinky, Devendra Kr. Singh, D. Bharathi Reddy, Ajit S. Bhasme, Hage Lampu, Raghavendra Srivastava, Mukta Gupta, Vibhor Garg, Mukul Gupta, Sangeeta Singh, Tushar Mehta and Venayagam, Advs. for Lawyers Knit and Co. and Altaf Fathima, Adv.

Subject: Criminal

Subject: Law of Evidence

Acts/Rules/Orders:
Code of Criminal Procedure, 1973 (CrPC) - Section 39, Code of Criminal Procedure, 1973 (CrPC) - Section 53, Code of Criminal Procedure, 1973 (CrPC) - Section 53A, Code of Criminal Procedure, 1973 (CrPC) - Section 54, Code of Criminal Procedure, 1973 (CrPC) - Section 156(1), Code of Criminal Procedure, 1973 (CrPC) - Section 160; Indian Evidence Act, 1872 - Section 19, Indian Evidence Act, 1872 - Section 24, Indian Evidence Act, 1872 - Section 25, Indian Evidence Act, 1872 - Section 26, Indian Evidence Act, 1872 - Section 27, Indian Evidence Act, 1872 - Section 47, Indian Evidence Act, 1872 - Section 119, Indian Evidence Act, 1872 - Section 132, Indian Evidence Act, 1872 - Section 253; Employee Polygraph Protection Act, 1998; Constitution of India (Fourty-Fourth Amendment) Act, 1978; Constitution of India - Article 20(3), Constitution of India - Article 20, Constitution of India - Article 21, Constitution of India - Article 22(1), Constitution of India - Article 359(1); Companies Act, 1923; Sea Customs Act; Railway Property (Unlawful Possession) Act, 1996; Motor Vehicles Act - Section 185, Motor Vehicles Act - Section 202, Motor Vehicles Act - Section 203, Motor Vehicles Act - Section 204; Indian Medical Council Act, 1956; Identification of Prisoners Act, 1920; Police and Criminal Evidence Act, 1984; Code of Civil Procedure (CPC) - Section 75, Code of Civil Procedure (CPC) - Section 151; Code of Criminal Procedure, 1898 (CrPC) - Section 342(2); Bombay Prohibition Act, 1949; Indian Penal Code (IPC) - Section 44, Indian Penal Code (IPC) - Section 269, Indian Penal Code (IPC) - Section 270, Indian Penal Code (IPC) - Section 319

Cases Referred:
Frye v. United States (1923) 54 App DC 46; Daubert v. Merrell Dow Pharmaceuticals Inc. 509 US 579 (1993); United States v. Piccinonna 885 F.2d 1529 (11th Circ. 1989); United States v.

Posado 57 F.3d 428 (5th Circ. 1995); Frye v. United States; United States v. Galbreth 908 F. Supp 877 (D.N.M. 1995); United States v. Cordoba, 104 F.3d 225 (9th Circ. 1997); Brown v. Darcy, 783 F.2d 1389 (9th Circ. 1986); United States v. Scheffer, 523 US 303 (1998); R v. Beland, [1987] 36 C.C.C. (3d) 481; State v. Hudson 314 Mo. 599 (1926); State v. Lindemuth 56 N.M. 237 (1952); People v. Jones 42 Cal. 2d 219 (1954); Lindsey v. United States 237 F. 2d 893 (9th Circ. 1956); Lawrence M. Dugan v. Commonwealth of Kentucky, 333 S.W.2d. 755 (1960); Townsend v. Sain 372 US 293 (1963); United States v. Swanson, 572 F.2d 523 (5th Circ. 1978); United States v. Adams, 581 F.2d 193, 198-199 (9th Cir. 1978); State of New Jersey v. Daryll Pitts 56 A.2d 1320 (N.J. 1989); State v. Levitt 36 N.J. 266, 275 (1961); Horvath v. R [1979] 44 C.C.C. (2d) 385; Ibrahim v. R, [1914] A.C. 599 (P.C.); Rock v. Arkansas 483 US 44 (1987); United States v. Solomon 753 F. 2d 1522 (9th Circ. 1985); Slaughter v. Oklahoma, 105 P. 3d 832 (2005); Harrington v. State, 659 N.W.2d 509 (Iowa 2003); Nandini Satpathy v. P.L. Dani MANU/SC/0139/1978 : (1978) 2 SCC 424; Brown v. Walker, 161 US 591 (1896)

Reference Alert:
On the issue of Provisions of Section 27 of the Evidence Act are not within the prohibition under Article 20(3) of Constitution of India unless compulsion has been used in obtaining the information (Section 27 of the Indian Evidence Act, 1872 and Article 20(3) of Constitution of India - This case may be considered as a good law on the present issue

Prior History / High Court Status:
From the Judgment and Order dated 10.09.2004 of the High Court of Karnataka at Bangalore in Criminal Petition No. 1964 of 2004 (MANU/KA/0588/2004)

Authorities Referred:
American Jurisprudence

Citing Reference:

Discussed	55
Mentioned	18

Case Note:
Constitution - Right against self-incrimination - Constitutionality of Involuntary administration of Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) - Article 20(3) of Constitution of India, 1950 - Whether the involuntary administration of the Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) violates the 'right against self-incrimination' enumerated in Article 20(3) of the Constitution - Held, circumstances that could 'expose a person to criminal charges' amounts to incrimination' for the purpose of Article 20(3) - Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue' - Protective scope of Article 20(3) extends to the investigative stage in criminal cases - Since, the underlying rationale of the 'right against self-incrimination' is to ensure the reliability as well as voluntariness of statements that are admitted as evidence, the compulsory administration of the impugned techniques violates the 'right against self-incrimination - Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory Results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence Hence, test results cannot be admitted in evidence if they have been obtained through the use of compulsion - Appeal Disposed of

Constitution - Right against self-incrimination' - Who can avail Right against self-incrimination - Held - 'Right against self-incrimination ' available to persons who have been formally accused as well as those who are examined as suspects in criminal

cases Extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated - Appeal Disposed of

Constitution - 'Testimonial Compulsion' - Whether the results derived from the impugned techniques amount to 'testimonial compulsion' thereby attracting the bar of Article 20(3) of the Constitution of India, 1950 - Held, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators not barred - Narcoanalysis technique involves testimonial act as the subject is encouraged to speak in a drug-induced state such Hence, compulsory administration of the narcoanalysis technique amounts to 'testimonial compulsion' and thereby triggers the protection of Article 20(3) - Appeal Disposed of

Constitution - Inter-relation between Right to fair trial and 'personal liberty' - Article 21 of the Constitution of India,1950 - Whether the involuntary administration of the impugned techniques a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution - Held, inter-relationship between the `right against self- incrimination' and the `right to fair trial' has been recognised under Article 21 - Forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty - Compulsory administration of these techniques an unjustified intrusion into the mental privacy of an individual which amount to `cruel, inhuman or degrading treatment' Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination Thus, no individual to be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise - Appeal Disposed of

Criminal - Derivative evidence - Admissibility of - Section 27 Evidence Act, 1872 and Article 20(3) of Constitution of India, 1950 - Permissibility of extracting statements which may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges - Whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3) - Held, Section 27 of Evidence Act, permits the derivative use of custodial statements in the ordinary course of events - Provisions of Section 27 of the Evidence Act are not within the prohibition under Article 20(3) unless compulsion has been used in obtaining the information - Thus, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act - Appeal Disposed of

Ratio Decidendi:
"Compulsory involuntary administration of the Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution as the subject does not exercise conscious control over the responses during the administration of the test."

"Article 20(3) not only a trial right but its protection extends to the stage of investigation also."

"Provisions of Section 27 of the Evidence Act are not within the prohibition under Article 20(3) unless compulsion has been used in obtaining the information and any information or material that is subsequently discovered with the help of voluntary administered test results to be admitted."

JUDGMENT

K.G. Balakrishnan, C.J.

1. Leave granted in SLP (Crl.) Nos. 10 of 2006 and 6711 of 2007. 1. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques,

namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tensions between the desirability of efficient investigation and the preservation of individual liberties. Ordinarily the judicial task is that of evaluating the rival contentions in order to arrive at a sound conclusion. However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

2. Objections have been raised in respect of instances where individuals who are the accused, suspects or witnesses in an investigation have been subjected to these tests without their consent. Such measures have been defended by citing the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means. In some of the impugned judgments, reliance has been placed on certain provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 to refer back to the responsibilities placed on citizens to fully co-operate with investigation agencies. It has also been urged that administering these techniques does not cause any bodily harm and that the extracted information will be used only for strengthening investigation efforts and will not be admitted as evidence during the trial stage. The assertion is that improvements in fact-finding during the investigation stage will consequently help to increase the rate of prosecution as well as the rate of acquittal. Yet another line of reasoning is that these scientific techniques are a softer alternative to the regrettable and allegedly widespread use of `third degree methods' by investigators.

3. The involuntary administration of the impugned techniques prompts questions about the protective scope of the `right against self-incrimination' which finds place in Article 20(3) of our Constitution. In one of the impugned judgments, it has been held that the information extracted through methods such as `polygraph examination' and the `Brain Electrical Activation Profile (BEAP) test' cannot be equated with `testimonial compulsion' because the test subject is not required to give verbal answers, thereby falling outside the protective scope of Article 20(3). It was further ruled that the verbal revelations made during a narcoanalysis test do not attract the bar of Article 20(3) since the inculpatory or exculpatory nature of these revelations is not known at the time of conducting the test. To address these questions among others, it is necessary to inquire into the historical origins and rationale behind the `right against self-incrimination'. The principal questions are whether this right extends to the investigation stage and whether the test results are of a `testimonial' character, thereby attracting the protection of Article 20(3). Furthermore, we must examine whether relying on the test results or materials discovered with the help of the same creates a reasonable likelihood of incrimination for the test subject.

4. We must also deal with arguments invoking the guarantee of `substantive due process' which is part and parcel of the idea of `personal liberty' protected by Article 21 of the Constitution. The first question in this regard is whether the provisions in the Code of Criminal Procedure, 1973 that provide for `medical examination' during the course of investigation can be read expansively to include the impugned techniques, even though the latter are not explicitly enumerated. To answer this question, it will be necessary to discuss the principles governing the interpretation of statutes in light of scientific advancements. Questions have also been raised with respect to the professional ethics of medical personnel involved in the administration of these techniques. Furthermore, Article 21 has been judicially expanded to include a `right against cruel, inhuman or degrading treatment', which requires us to determine whether the involuntary administration of the impugned techniques violates this right whose scope corresponds with evolving international human rights norms. We must also consider contentions that have invoked the test subject's `right to privacy', both in a physical and mental sense.

5. The scientific validity of the impugned techniques has been questioned and it is argued that their results are not entirely reliable. For instance, the narcoanalysis technique involves the intravenous administration of sodium pentothal, a drug which lowers inhibitions on part of the subject and induces the person to talk freely. However, empirical studies suggest that the drug-induced revelations need not necessarily be true. Polygraph examination and the BEAP test are methods which serve the respective purposes of lie-detection and gauging the subject's familiarity with information related to the crime. These techniques are essentially confirmatory in

nature, wherein inferences are drawn from the physiological responses of the subject. However, the reliability of these methods has been repeatedly questioned in empirical studies. In the context of criminal cases, the reliability of scientific evidence bears a causal link with several dimensions of the right to a fair trial such as the requisite standard of proving guilt beyond reasonable doubt and the right of the accused to present a defence. We must be mindful of the fact that these requirements have long been recognised as components of `personal liberty' under Article 21 of the Constitution. Hence it will be instructive to gather some insights about the admissibility of scientific evidence.

6. In the course of the proceedings before this Court, oral submissions were made by Mr. Rajesh Mahale, Adv. (Crl. App. No. 1267 of 2004), Mr. Manoj Goel, Adv. (Crl. App. Nos. 56-57 of 2005), Mr. Santosh Paul, Adv. (Crl. App. No. 54 of 2005) and Mr. Harish Salve, Sr. Adv. (Crl. App. Nos. 1199 of 2006 and No. 1471 of 2007) - all of whom argued against the involuntary administration of the impugned techniques. Arguments defending the compulsory administration of these techniques were presented by Mr. Goolam E. Vahanvati, Solicitor General of India [now Attorney General for India] and Mr. Anoop G. Choudhari, Sr. Adv. who appeared on behalf of the Union of India. These were further supported by Mr. T.R. Andhyarujina, Sr. Adv. who appeared on behalf of the Central Bureau of Investigation (CBI) and Mr. Sanjay Hegde, Adv. who represented the State of Karnataka. Mr. Dushyant Dave, Sr. Adv., rendered assistance as *amicus curiae* in this matter.

7. At this stage, it will be useful to frame the questions of law and outline the relevant sub-questions in the following manner:

> I. Whether the involuntary administration of the impugned techniques violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution? I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?
>
> I-B. Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar of Article 20(3)?
>
> II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?

8. Before answering these questions, it is necessary to examine the evolution and specific uses of the impugned techniques. Hence, a description of each of the test procedures is followed by an overview of their possible uses, both within and outside the criminal justice system. It is also necessary to gauge the limitations of these techniques. Owing to the dearth of Indian decisions on this subject, we must look to precedents from foreign jurisdictions which deal with the application of these techniques in the area of criminal justice.

DESCRIPTIONS OF TESTS - USES, LIMITATIONS AND PRECEDENTS

Polygraph Examination

9. The origins of polygraph examination have been traced back to the efforts of Lombroso, a criminologist who experimented with a machine that measured blood pressure and pulse to assess the honesty of persons suspected of criminal conduct. His device was called a hydrosphygmograph. A similar device was used by psychologist William Marston during World War I in espionage cases, which proved to be a precursor to its use in the criminal justice system. In 1921, John Larson incorporated the measurement of respiration rate and by 1939 Leonard Keeler added skin conductance and an amplifier to the parameters examined by a polygraph machine.

10. The theory behind polygraph tests is that when a subject is lying in response to a question, he/she will produce physiological responses that are different from those that arise in the normal course. During the polygraph examination, several instruments are attached to the subject for

measuring and recording the physiological responses. The examiner then reads these results, analyzes them and proceeds to gauge the credibility of the subject's answers. Instruments such as cardiographs, pneumographs, cardio-cuffs and sensitive electrodes are used in the course of polygraph examinations. They measure changes in aspects such as respiration, blood pressure, blood flow, pulse and galvanic skin resistance. The truthfulness or falsity on part of the subject is assessed by relying on the records of the physiological responses. [See: *Laboratory Procedure Manual - Polygraph Examination* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi - 2005)]

11. There are three prominent polygraph examination techniques:

i. The relevant-irrelevant (R-I) technique

ii. The control question (CQ) technique

iii. Directed Lie-Control (DLC) technique

Each of these techniques includes a pre-test interview during which the subject is acquainted with the test procedure and the examiner gathers the information which is needed to finalize the questions that are to be asked. An important objective of this exercise is to mitigate the possibility of a feeling of surprise on part of the subject which could be triggered by unexpected questions. This is significant because an expression of surprise could be mistaken for physiological responses that are similar to those associated with deception. [Refer: David Gallai, `Polygraph evidence in federal courts: Should it be admissible?' 36 *American Criminal Law Review* 87-116 (Winter 1999) at p. 91]. Needless to say, the polygraph examiner should be familiar with the details of the ongoing investigation. To meet this end the investigators are required to share copies of documents such as the First Information Report (FIR), Medico-Legal Reports (MLR) and Post-Mortem Reports (PMR) depending on the nature of the facts being investigated.

12. The control-question (CQ) technique is the most commonly used one and its procedure as well as scoring system has been described in the materials submitted on behalf of CBI. The test consists of control questions and relevant questions. The control questions are irrelevant to the facts being investigated but they are intended to provoke distinct physiological responses, as well as false denials. These responses are compared with the responses triggered by the relevant questions. Theoretically, a truthful subject will show greater physiological responses to the control questions which he/she has reluctantly answered falsely, than to the relevant questions, which the subject can easily answer truthfully. Conversely, a deceptive subject will show greater physiological responses while giving false answers to relevant questions in comparison to the responses triggered by false answers to control questions. In other words, a guilty subject is more likely to be concerned with lying about the relevant facts as opposed to lying about other facts in general. An innocent subject will have no trouble in truthfully answering the relevant questions but will have trouble in giving false answers to control questions. The scoring of the tests is done by assigning a numerical value, positive or negative, to each response given by the subject. After accounting for all the numbers, the result is compared to a standard numerical value to indicate the overall level of deception. The net conclusion may indicate truth, deception or uncertainty.

13. The use of polygraph examinations in the criminal justice system has been contentious. In this case, we are mainly considered with situations when investigators seek reliance on these tests to detect deception or to verify the truth of previous testimonies. Furthermore, litigation related to polygraph tests has also involved situations where suspects and defendants in criminal cases have sought reliance on them to demonstrate their innocence. It is also conceivable that witnesses can be compelled to undergo polygraph tests in order to test the credibility of their testimonies or to question their mental capacity or to even attack their character.

14. Another controversial use of polygraph tests has been on victims of sexual offences for testing the veracity of their allegations. While several states in the U.S.A. have enacted provisions to prohibit such use, the text of the *Laboratory Procedure Manual for Polygraph*

Examination [supra.] indicates that this is an acceptable use. In this regard, Para 3.4 (v) of the said Manual reads as follows:

> (v) In cases of alleged sex offences such as intercourse with a female child, forcible rape, indecent liberties or perversion, it is important that the victim, as well as the accused, be made available for interview and polygraph examination. It is essential that the polygraph examiner get a first hand detailed statement from the victim, and the interview of the victim precede that of the suspect or witnesses....

[The following article includes a table which lists out the statutorily permissible uses of polygraph examination in the different state jurisdictions of the United States of America: Henry T. Greely and Judy Illes, `Neuroscience based lie- detection: The urgent need for regulation', 33 *American Journal of Law and Medicine*, 377-421 (2007)]

15. The propriety of compelling the victims of sexual offences to undergo a polygraph examination certainly merits consideration in the present case. It must also be noted that in some jurisdictions polygraph tests have been permitted for the purpose of screening public employees, both at the stage of recruitment and at regular intervals during the service-period. In the U.S.A., the widespread acceptance of polygraph tests for checking the antecedents and monitoring the conduct of public employees has encouraged private employers to resort to the same. In fact the Employee Polygraph Protection Act, 1998 was designed to restrict their use for employee screening. This development must be noted because the unqualified acceptance of `Lie-detector tests' in India's criminal justice system could have the unintended consequence of encouraging their use by private parties.

16. Polygraph tests have several limitations and therefore a margin for errors. The premise behind these tests is questionable because the measured changes in physiological responses are not necessarily triggered by lying or deception. Instead, they could be triggered by nervousness, anxiety, fear, confusion or other emotions. Furthermore, the physical conditions in the polygraph examination room can also create distortions in the recorded responses. The test is best administered in comfortable surroundings where there are no potential distractions for the subject and complete privacy is maintained. The mental state of the subject is also vital since a person in a state of depression or hyperactivity is likely to offer highly disparate physiological responses which could mislead the examiner. In some cases the subject may have suffered from loss of memory in the intervening time-period between the relevant act and the conduct of the test. When the subject does not remember the facts in question, there will be no self-awareness of truth or deception and hence the recording of the physiological responses will not be helpful. Errors may also result from `memory-hardening', i.e. a process by which the subject has created and consolidated false memories about a particular incident. This commonly occurs in respect of recollections of traumatic events and the subject may not be aware of the fact that he/she is lying.

17. The errors associated with polygraph tests are broadly grouped into two categories, i.e., `false positives' and `false negatives'. A `false positive' occurs when the results indicate that a person has been deceitful even though he/she answered truthfully. Conversely a `false negative' occurs when a set of deceptive responses is reported as truthful. On account of such inherent complexities, the qualifications and competence of the polygraph examiner are of the utmost importance. The examiner needs to be thorough in preparing the questionnaire and must also have the expertise to account for extraneous conditions that could lead to erroneous inferences.

18. However, the biggest concern about polygraph tests is that an examiner may not be able to recognise deliberate attempts on part of the subject to manipulate the test results. Such `countermeasures' are techniques which are deliberately used by the subject to create certain physiological responses in order to deceive the examiner. The intention is that by deliberately enhancing one's reaction to the control questions, the examiner will incorrectly score the test in favour of truthfulness rather than deception. The most commonly used `countermeasures' are those of creating a false sense of mental anxiety and stress at the time of the interview, so that the responses triggered by lying cannot be readily distinguished.

19. Since polygraph tests have come to be widely relied upon for employee screening in the U.S.A., the U.S. Department of Energy had requested the National Research Council of the National Academies (NRC) to review their use for different purposes. The following conclusion was stated in its report, i.e. *The Polygraph and Lie-Detection: Committee to Review the scientific evidence on the Polygraph* (Washington D.C.: National Academies Press, 2003) at pp. 212-213:

> Polygraph Accuracy: Almost a century of research in scientific psychology and physiology provides little basis for the expectation that a polygraph test could have extremely high accuracy. The physiological responses measured by the polygraph are not uniquely related to deception. That is, the responses measured by the polygraph do not all reflect a single underlying process: a variety of psychological and physiological processes, including some that can be consciously controlled, can affect polygraph measures and test results. Moreover, most polygraph testing procedures allow for uncontrolled variation in test administration (e.g., creation of the emotional climate, selecting questions) that can be expected to result in variations in accuracy and that limit the level of accuracy that can be consistently achieved.
>
> Theoretical Basis: The theoretical rationale for the polygraph is quite weak, especially in terms of differential fear, arousal, or other emotional states that are triggered in response to relevant or comparison questions. We have not found any serious effort at construct validation of polygraph testing.
>
> Research Progress: Research on the polygraph has not progressed over time in the manner of a typical scientific field. It has not accumulated knowledge or strengthened its scientific underpinnings in any significant manner.
>
> Polygraph research has proceeded in relative isolation from related fields of basic science and has benefited little from conceptual, theoretical, and technological advances in those fields that are relevant to the psychophysiological detection of deception.
>
> Future Potential: The inherent ambiguity of the physiological measures used in the polygraph suggests that further investments in improving polygraph technique and interpretation will bring only modest improvements in accuracy.

20. A Working Party of the British Psychological Society (BPS) also came to a similar conclusion in a study published in 2004. The key finding is reproduced below, [Cited from: *A Review of the current scientific status and fields of application of polygraph deception detection* - Final Report (6 October, 2004) from The British Psychological Society (BPS) Working Party at p. 10]:

> A polygraph is sometimes called a lie detector, but this term is misleading. A polygraph does not detect lies, but only arousal which is assumed to accompany telling a lie. Polygraph examiners have no other option than to measure deception in such an indirect way, as a pattern of physiological activity directly related to lying does not exist (Saxe, 1991). Three of the four most popular lie detection procedures using the polygraph (Relevant/Irrelevant Test, Control Question Test and Directed Lie Test, ...) are built upon the premise that, while answering so-called `relevant' questions, liars will be more aroused than while answering so-called `control' questions, due to a fear of detection (fear of getting caught lying). This premise is somewhat naive as truth tellers may also be more aroused when answering the relevant questions, particularly: (i) when these relevant questions are emotion evoking questions (e.g. when an innocent man, suspected of murdering his beloved wife, is asked questions about his wife in a polygraph test, the memory of his late wife might re-awaken his strong feelings about her); and (ii) when the innocent examinee experiences fear, which may occur, for example, when the person is afraid that his or her honest answers will not be believed by the polygraph examiner. The other popular test (Guilty Knowledge Test, ...) is built upon the premise that guilty examinees will be more aroused concerning certain information due to different

> orienting reactions, that is, they will show enhanced orienting responses when recognising crucial details of a crime. This premise has strong support in psychophysiological research (Fiedler, Schmidt & Stahl, 2002).

21. Coming to judicial precedents, a decision reported as *Frye* v. *United States* (1923) 54 App DC 46, dealt with a precursor to the polygraph which detected deception by measuring changes in systolic blood pressure. In that case the defendant was subjected to this test before the trial and his counsel had requested the court that the scientist who had conducted the same should be allowed to give expert testimony about the results. Both the trial court and the appellate court rejected the request for admitting such testimony. The appellate court identified the considerations that would govern the admissibility of expert testimony based on scientific insights. It was held, *Id.* at p. 47:

> ...Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

22. The standard of `general acceptance in the particular field' governed the admissibility of scientific evidence for several decades. It was changed much later by the U.S. Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals Inc.* 509 US 579 (1993). In that case the petitioners had instituted proceedings against a pharmaceutical company which had marketed `Bendectin', a prescription drug. They had alleged that the ingestion of this drug by expecting mothers had caused birth defects in the children born to them. To contest these allegations, the pharmaceutical company had submitted an affidavit authored by an epidemiologist. The petitioners had also submitted expert opinion testimony in support of their contentions. The District Court had ruled in favour of the company by ruling that their scientific evidence met the standard of `general acceptance in the particular field' whereas the expert opinion testimony produced on behalf of the petitioners did not meet the said standard. The Court of Appeals for the Ninth Circuit upheld the judgment and the case reached the U.S. Supreme Court which vacated the appellate court's judgment and remanded the case back to the trial court. It was unanimously held that the `general acceptance' standard articulated in *Frye* (supra.) had since been displaced by the enactment of the Federal Rules of Evidence in 1975, wherein Rule 702 governed the admissibility of expert opinion testimony that was based on scientific findings. This rule provided that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

23. It was held that the trial court should have evaluated the scientific evidence as per Rule 702 of the Federal Rules of Evidence which mandates an inquiry into the relevance as well as the reliability of the scientific technique in question. The majority opinion (Blackmun, J.) noted that the trial judge's first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and whether it can be properly applied to the facts in issue. Several other considerations will be applicable, such as:

- whether the theory or technique in question can be and has been tested
- whether it has been subjected to peer review and publication

- its known or potential error rate
- the existence and maintenance of standards controlling its operation
- whether it has attracted widespread acceptance within the scientific community

24. It was further observed that such an inquiry should be a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. It was reasoned that instead of the wholesale exclusion of scientific evidence on account of the high threshold of proving `general acceptance in the particular field', the same could be admitted and then challenged through conventional methods such as cross-examination, presentation of contrary evidence and careful instructions to juries about the burden of proof. In this regard, the trial judge is expected to perform a `gate-keeping' role to decide on the admission of expert testimony based on scientific techniques. It should also be kept in mind that Rule 403 of the Federal Rules of Evidence, 1975 empowers a trial judge to exclude any form of evidence if it is found that its probative value will be outweighed by its prejudicial effect.

25. Prior to the *Daubert* decision (supra.), most jurisdictions in the U.S.A. had disapproved of the use of polygraph tests in criminal cases. Some State jurisdictions had absolutely prohibited the admission of polygraph test results, while a few had allowed consideration of the same if certain conditions were met. These conditions included a prior stipulation between the parties to undergo these tests with procedural safeguards such as the involvement of experienced examiners, presence of counsel and proper recording to enable subsequent scrutiny. A dissonance had also emerged in the treatment of polygraph test results in the different Circuit jurisdictions, with some jurisdictions giving trial judges the discretion to enquire into the reliability of polygraph test results on a case-by-case basis.

26. For example, in *United States* v. *Piccinonna* 885 F.2d 1529 (11th Circ. 1989), it was noted that in some instances polygraphy satisfied the standard of `general acceptance in the particular field' as required by *Frye* (supra.). It was held that polygraph testimony could be admissible under two situations, namely when the parties themselves agree on a stipulation to this effect or for the purpose of impeaching and corroborating the testimony of witnesses. It was clarified that polygraph examination results could not be directly used to bolster the testimony of a witness. However, they could be used to attack the credibility of a witness or even to rehabilitate one after his/her credibility has been attacked by the other side. Despite these observations, the trial court did not admit the polygraph results on remand in this particular case.

27. However, after *Daubert* (supra.) prescribed a more liberal criterion for determining the admissibility of scientific evidence, some Courts ruled that weightage could be given to polygraph results. For instance in *United States* v. *Posado* 57 F.3d 428 (5th Circ. 1995), the facts related to a pre-trial evidentiary hearing where the defendants had asked for the exclusion of forty-four kilograms of cocaine that had been recovered from their luggage at an airport. The District Court had refused to consider polygraph evidence given by the defendants in support of their version of events leading up to the seizure of the drugs and their arrest. On appeal, the Fifth Circuit Court held that the rationale for disregarding polygraph evidence did not survive the *Daubert* decision. The Court proceeded to remand the case to the trial court and directed that the admissibility of the polygraph results should be assessed as per the factors enumerated in *Daubert* (supra.). It was held, *Id.* at p. 434:

> There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since Frye. The test at issue in Frye measured only changes in the subject's systolic blood pressure in response to test questions. [*Frye* v. *United States* ...] Modern instrumentation detects changes in the subject's blood pressure, pulse, thoracic and abdominal respiration, and galvanic skin response. Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. Such variation also exists in

> many of the disciplines and for much of the scientific evidence we routinely find admissible under Rule 702. [See *McCormick on Evidence* 206 at 915 & n. 57] Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. In addition, polygraph technique has been and continues to be subjected to extensive study and publication. Finally, polygraph is now so widely used by employers and government agencies alike.
>
> To iterate, we do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.
>
> (internal citations omitted)

28. Despite these favourable observations, the polygraph results were excluded by the District Court on remand. However, we have come across at least one case decided after ***Daubert*** (supra.) where a trial court had admitted expert opinion testimony about polygraph results. In ***United States*** v. ***Galbreth*** 908 F. Supp 877 (D.N.M. 1995), the District Court took note of New Mexico Rule of Evidence 11-707 which established standards for the admission of polygraph evidence. The said provision laid down that polygraph evidence would be admissible only when the following conditions are met: the examiner must have had at least 5 years experience in conducting polygraph tests and 20 hours of continuing education within the past year; the polygraph examination must be tape recorded in its entirety; the polygraph charts must be scored quantitatively in a manner generally accepted as reliable by polygraph experts; all polygraph materials must be provided to the opposing party at least 10 days before trial; and all polygraph examinations conducted on the subject must be disclosed. It was found that all of these requirements had been complied with in the facts at hand. The District Court concluded with these words, *Id.* at p. 896:

> ...the Court finds that the expert opinion testimony regarding the polygraph results of defendant Galbreth is admissible. However, because the evidentiary reliability of opinion testimony regarding the results of a particular polygraph test is dependent upon a properly conducted examination by a highly qualified, experienced and skilful examiner, nothing in this opinion is intended to reflect the judgment that polygraph results are per se admissible. Rather, in the context of the polygraph technique, trial courts must engage upon a case specific inquiry to determine the admissibility of such testimony.

29. We were also alerted to the decision in ***United States*** v. ***Cordoba***, 104 F.3d 225 (9th. Circ. 1997). In that case, the Ninth Circuit Court concluded that the position favouring absolute exclusion of unstipulated polygraph evidence had effectively been overruled in ***Daubert*** (supra.). The defendant had been convicted for the possession and distribution of cocaine since the drugs had been recovered from a van which he had been driving. However, when he took an unstipulated polygraph test, the results suggested that he was not aware of the presence of drugs in the van. At the trial stage, the prosecution had moved to suppress the test results and the District Court had accordingly excluded the polygraph evidence. However, the Ninth Circuit Court remanded the case back after finding that the trial judge should have adopted the parameters enumerated in ***Daubert*** (supra.) to decide on the admissibility of the polygraph test results. It was observed, *Id.* at p. 228:

> With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such evidence remains. As we noted in *Brown*, polygraph evidence has grave potential for interfering with the deliberative process. [*Brown* v. *Darcy* 783 F.2d 1389 (9th Circ. 1986) at 1396-1397] However, these matters are for determination by the trial judge who must not only evaluate the evidence under Rule 702, but consider admission under Rule 403. Thus, we adopt the view of Judge Jameson's dissent in

Brown that these are matters which must be left to the sound discretion of the trial court, consistent with Daubert standards.

30. The decisions cited above had led to some uncertainty about the admissibility of polygraph test results. However, this uncertainty was laid to rest by an authoritative ruling of the U.S. Supreme Court in *United States* v. *Scheffer* 523 US 303 (1998). In that case, an eight judge majority decided that Military Rule of Evidence 707 (which made polygraph results inadmissible in court-martial proceedings) did not violate an accused person's Sixth Amendment right to present a defence. The relevant part of the provision follows:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

31. The facts were that Scheffer, a U.S. Air Force serviceman had faced court-martial proceedings because a routine urinalysis showed that he had consumed methamphetamines. However, a polygraph test suggested that he had been truthful in denying the intentional consumption of the drugs. His defence of `innocent ingestion' was not accepted during the court-martial proceedings and the polygraph results were not admitted in evidence. The Air Force Court of Criminal Appeals affirmed the decision given in the court-martial proceedings but the Court of Appeals for the Armed Forces reversed the same by holding that an absolute exclusion of polygraph evidence (offered to rebut an attack on the credibility of the accused) would violate Scheffer's Sixth Amendment right to present a defence. Hence, the matter reached the Supreme Court which decided that the exclusion of polygraph evidence did not violate the said constitutional right.

32. Eight judges agreed that testimony about polygraph test results should not be admissible on account of the inherent unreliability of the results obtained. Four judges agreed that reliance on polygraph results would displace the fact-finding role of the jury and lead to collateral litigation. In the words of Clarence Thomas, J., *Id.* at p. 309:

> Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the jury's role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial. The rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.

33. On the issue of reliability, the Court took note of some Circuit Court decisions which had permitted trial courts to consider polygraph results in accordance with the *Daubert* factors. However, the following stance was adopted, *Id.* at p. 312:

> ...Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence.

34. Since a trial by jury is an essential feature of the criminal justice system in the U.S.A., concerns were expressed about preserving the jury's core function of determining the credibility of testimony. It was observed, *Id.* at p. 314:

> ...Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition

> to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt....

35. On the issue of encouraging litigation that is collateral to the primary purpose of a trial, it was held, *Id.* at p. 314:

> ...Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case. It thus offends no constitutional principle for the President to conclude that a per se rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph evidence is by its very nature collateral, a per se rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it.

36. In the same case, Kennedy, J. filed an opinion which was joined by four judges. While there was agreement on the questionable reliability of polygraph results, a different stand was taken on the issues pertaining to the role of the jury and the concerns about collateral litigation. It was observed that the inherent reliability of the test results is a sufficient ground to exclude the polygraph test results and expert testimony related to them. Stevens, J. filed a dissenting opinion in this case.

37. We have also come across a decision of the Canadian Supreme Court in *R* v. *Beland* [1987] 36 C.C.C. (3d) 481. In that case the respondents had been charged with conspiracy to commit robbery. During their trial, one of their accomplices had given testimony which directly implicated them. The respondents contested this testimony and after the completion of the evidentiary phase of the trial, they moved an application to re-open their defence while seeking permission for each of them to undergo a polygraph examination and produce the results in evidence. The trial judge denied this motion and the respondents were convicted. However, the appellate court allowed their appeal from conviction and granted an order to re-open the trial and directed that the polygraph results be considered. On further appeal, the Supreme Court of Canada held that the results of a polygraph examination are not admissible as evidence. The majority opinion explained that the admission of polygraph test results would offend some well established rules of evidence. It examined the `rule against oath-helping' which prohibits a party from presenting evidence solely for the purpose of bolstering the credibility of a witness. Consideration was also given to the `rule against admission of past or out-of-court statements by a witness' as well as the restrictions on producing `character evidence'. The discussion also concluded that polygraph evidence is inadmissible as `expert evidence'.

38. With regard to the `rule against admission of past or out- of-court statements by a witness', McIntyre, J. observed (in Para. 11):

> ...In my view, the rule against admission of consistent out-of-court statements is soundly based and particularly apposite to questions raised in connection with the use of the polygraph. Polygraph evidence when tendered would be entirely self-serving and would shed no light on the real issues before the court. Assuming, as in the case at bar, that the evidence sought to be adduced would not fall within any of the well recognized exceptions to the operation of the rule - where it is permitted to rebut the allegation of a recent fabrication or to show physical, mental or emotional condition - it should be rejected. To do otherwise is to open the trial process to the time-consuming and confusing consideration of collateral issues and to deflect the focus of the proceedings from their fundamental issue of guilt or innocence. This

view is summarized by D.W. Elliott in `Lie-Detector Evidence: Lessons from the American Experience' in *Well and Truly Tried* (Law Book Co., 1982), at pp. 129-30:

> A defendant who attempts to put in the results of a test showing this truthfulness on the matters in issue is bound to fall foul of the rule against self- serving statements or, as it is sometimes called, the rule that a party cannot manufacture evidence for himself, and the falling foul will not be in any mere technical sense. The rule is sometimes applied in a mechanical unintelligent way to exclude evidence about which no realistic objection could be raised, as the leading case, *Gillie v. Posho* shows; but striking down defence polygraph evidence on this ground would be no mere technical reflex action of legal obscurantists. The policy behind the doctrine is a fundamental one, and defence polygraph evidence usually offends it fundamentally. As some judges have pointed out, only those defendants who successfully take examinations are likely to want the results admitted. There is no compulsion to put in the first test results obtained. A defendant can take the test many times, if necessary "examiner- shopping", until he gets a result which suits him. Even stipulated tests are not free of this taint, because of course his lawyers will advise him to have several secret trial runs before the prosecution is approached. If nothing else, the dry runs will habituate him to the process and to the expected relevant questions.

39. On the possibility of using polygraph test results as character evidence, it was observed (Para. 14):

> ...What is the consequence of this rule in relation to polygraph evidence? Where such evidence is sought to be introduced it is the operator who would be called as the witness and it is clear, of course, that the purpose of his evidence would be to bolster the credibility of the accused and, in effect, to show him to be of good character by inviting the inference that he did not lie during the test. In other words, it is evidence not of general reputation but of a specific incident and its admission would be precluded under the rule. It would follow, then, that the introduction of evidence of the polygraph tests would violate the character evidence rule.

40. Mcintyre, J. offered the following conclusions (at Paras. 18, 19 and 20):

> 18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important task. This argument has a superficial appeal, but, in my view, it cannot prevail in the face of realities of court procedures.
>
> 19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is two-fold. First, the admission of polygraph evidence would run counter to the well established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already

served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.

20. Since litigation replaced trial by combat, the determination of fact, including the veracity of parties and their witnesses, has been the duty of judges or juries upon an evaluation of the statements of witnesses. This approach has led to the development of a body of rules relating to the giving and reception of evidence and we have developed methods which have served well and have gained a wide measure of approval. They have facilitated the orderly conduct of judicial proceedings and are designed to keep the focus of the proceedings on the principal issue, in a criminal case, the guilt or innocence of the accused. What would be served by the introduction of evidence of polygraph readings into the judicial process? To begin with, it must be remembered that however scientific it may be, its use in court depends on the human intervention of the operator. Whatever results are recorded by the polygraph instrument, their nature and significance reach the trier of fact through the mouth of the operator. Human fallibility is therefore present as before, but now it may be said to be fortified with the mystique of science....

Narcoanalysis technique

41. This test involves the intravenous administration of a drug that causes the subject to enter into a hypnotic trance and become less inhibited. The drug-induced hypnotic stage is useful for investigators since it makes the subject more likely to divulge information. The drug used for this test is sodium pentothal, higher quantities of which are routinely used for inducing general anaesthesia in surgical procedures. This drug is also used in the field of psychiatry since the revelations can enable the diagnosis of mental disorders. However, we have to decide on the permissibility of resorting to this technique during a criminal investigation, despite its' established uses in the medical field. The use of `truth-serums' and hypnosis is not a recent development. Earlier versions of the narcoanalysis technique utilised substances such as scopolamine and sodium amytal. The following extracts from an article trace the evolution of this technique, [Cited from: C.W. Muehlberger, `Interrogation under Drug-influence: The so-called Truth serum technique', 42(4) *The Journal of Criminal Law, Criminology and Police Science* 513-528 (Nov- Dec. 1951) at pp. 513-514]:

With the advent of anaesthesia about a century ago, it was observed that during the induction period and particularly during the recovery interval, patients were prone to make extremely naive remarks about personal matters, which, in their normal state, would never have revealed.

Probably the earliest direct attempt to utilize this phenomenon in criminal interrogation stemmed from observations of a mild type of anaesthesia commonly used in obstetrical practice during the period of about 1903-1915 and known as `Twilight sleep'. This anaesthesia was obtained by hypodermic injection of solutions of morphine and scopolamine (also called `hyoscine') followed by intermittent chloroform inhalations if needed. The pain relieving qualities of morphine are well known. Scopolamine appears to have the added property of blocking out memories of recent events. By the combination of these drugs in suitable dosage, morphine dulled labor pains without materially interfering with the muscular contractions of labor, while scopolamine wiped out subsequent memories of the delivery room ordeal. The technique was widely used in Europe but soon fell into disrepute among obstetricians of this country, largely due to overdosage.

During the period of extensive use of `twilight sleep' it was a common experience that women who were under drug influence, were extremely candid and uninhibited in their statements. They often made remarks which obviously would never have been uttered when in their normal state. Dr. Robert E. House, an observant physician practising in Ferris, Texas, believed that a drug combination which was so effective in the removal of ordinary restraints and which produced such utter candor,

> might be of value in obtaining factual information from persons who were thought to be lying. Dr. House's first paper presented in 1922 suggested drug administration quite similar to the standard `twilight sleep' procedure: an initial dose of grain of morphine sulphate together with 1/100 grain of scopolamine hydrobromide, followed at 20-30 minute intervals with smaller (1/200 - 1/400 grain) doses of scopolamine and periods of light chloroform anaesthesia. Subjects were questioned as they recovered from the light chloroform anaesthesia and gave answers which subsequently proved to be true. Altogether, Dr. House reported about half-a-dozen cases, several of which were instrumental in securing the release of convicts from State prisons, he also observed that, after returning to their normal state, these subjects had little or no recollection of what had transpired during the period of interrogation. They could not remember what questions had been asked, nor by whom; neither could they recall any answers which they had made.

42. The use of the `Scopolamine' technique led to the coining of the expression `truth serum'. With the passage of time, injections of sodium amytal came to be used for inducing subjects to talk freely, primarily in the field of psychiatry. The author cited above has further observed, *Id.* at p. 522:

> During World War II, this general technique of delving into a subject's inner consciousness through the instrumentality of narcotic drugs was widely used in the treatment of war neuroses (sometimes called `Battle shock' or `shell shock'). Fighting men who had been through terrifically disturbing experiences often times developed symptoms of amnesia, mental withdrawal, negativity, paralyses, or many other mental, nervous, and physical derangements. In most instances, these patients refused to talk about the experiences which gave rise to the difficulty, and psychiatrists were at a loss to discover the crux of the problem. To intelligently counteract such a force, it was first necessary to identify it. Thus, the use of sedative drugs, first to analyze the source of disturbance (narcoanalysis) and later to obtain the proper frame of mind in which the patient could and would `talk out' his difficulties, and, as they say `get them off his chest' - and thus relieve himself (narco-synthesis or narco-therapy) - was employed with signal success.
>
> In the narcoanalysis of war neuroses a very light narcosis is most desirable. With small doses of injectable barbiturates (sodium amytal or sodium pentothal) or with light inhalations of nitrous oxide or somnoform, the subject pours out his pent-up emotions without much prodding by the interrogator.

43. It has been shown that the Central Investigation Agency (C.I.A.) in the U.S.A. had conducted research on the use of sodium pentothal for aiding interrogations in intelligence and counter-terrorism operations, as early as the 1950's [See `Project MKULTRA - The CIA's program of research in behavioral modification', On file with *Schaffer Library of Drug Policy*, Text available from . In recent years, the debate over the use of `truth-serums' has been revived with demands for their use on persons suspected of involvement in terrorist activities. Coming to the test procedure, when the drug (sodium pentothal) is administered intravenously, the subject ordinarily descends into anaesthesia in four stages, namely:

(i) Awake stage

(ii) Hypnotic stage

(iii) Sedative stage

(iv) Anaesthetic stage

44. A relatively lighter dose of sodium pentothal is injected to induce the `hypnotic stage' and the questioning is conducted during the same. The hypnotic stage is maintained for the required period by controlling the rate of administration of the drug. As per the materials submitted before us, the behaviour exhibited by the subject during this stage has certain specific

characteristics, namely:

• It facilitates handling of negative emotional responses (i.e. guilt, avoidance, aggression, frustration, non-responsiveness etc.) in a positive manner.

• It helps in rapid exploration and identification of underlying conflicts in the subject's mind and unresolved feelings about past events.

• It induces the subject to divulge information which would usually not be revealed in conscious awareness and it is difficult for the person to lie at this stage

• The reversal from this stage occurs immediately when the administration of the drug is discontinued.

[Refer: *Laboratory Procedure Manual - Forensic Narco-Analysis* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi - 2005); Also see John M. Macdonald, `Truth Serum', 46(2) *The Journal of Criminal Law, Criminology and Police Science* 259-263 (Jul.-Aug. 1955)]

45. The personnel involved in conducting a `narcoanalysis' interview include a forensic psychologist, an anaesthesiologist, a psychiatrist, a general physician or other medical staff and a language interpreter if needed. Additionally a videographer is required to create video-recordings of the test for subsequent scrutiny. In India, this technique has been administered either inside forensic science laboratories or in the operation theatres of recognised hospitals. While a psychiatrist and general physician perform the preliminary function of gauging whether the subject is mentally and physically fit to undergo the test, the anaesthesiologist supervises the intravenous administration of the drug. It is the forensic psychologist who actually conducts the questioning. Since the tests are meant to aid investigation efforts, the forensic psychologist needs to closely co-operate with the investigators in order to frame appropriate questions.

46. This technique can serve several ends. The revelations could help investigators to uncover vital evidence or to corroborate pre-existing testimonies and prosecution theories. Narcoanalysis tests have also been used to detect `malingering' (faking of amnesia). The premise is that during the `hypnotic stage' the subject is unable to wilfully suppress the memories associated with the relevant facts. Thus, it has been urged that drug-induced revelations can help to narrow down investigation efforts, thereby saving public resources. There is of course a very real possibility that information extracted through such interviews can lead to the uncovering of independent evidence which may be relevant. Hence, we must consider the implications of such derivative use of the drug- induced revelations, even if such revelations are not admissible as evidence. We must also account for the uses of this technique by persons other than investigators and prosecutors. Narcoanalysis tests could be requested by defendants who want to prove their innocence. Demands for this test could also be made for purposes such as gauging the credibility of testimony, to refresh the memory of witnesses or to ascertain the mental capacity of persons to stand trial. Such uses can have a direct impact on the efficiency of investigations as well as the fairness of criminal trials. [See generally: George H. Dession, Lawrence Z. Freedman, Richard C. Donnelly and Frederick G. Redlich, `Drug-Induced revelation and criminal investigation', 62 *Yale Law Journal* 315-347 (February 1953)]

47. It is also important to be aware of the limitations of the `narcoanalysis' technique. It does not have an absolute success rate and there is always the possibility that the subject will not reveal any relevant information. Some studies have shown that most of the drug-induced revelations are not related to the relevant facts and they are more likely to be in the nature of inconsequential information about the subjects' personal lives. It takes great skill on part of the interrogators to extract and identify information which could eventually prove to be useful. While some persons are able to retain their ability to deceive even in the hypnotic state, others can become extremely suggestible to questioning. This is especially worrying, since investigators who are under pressure to deliver results could frame questions in a manner that prompts incriminatory responses. Subjects could also concoct fanciful stories in the course of the `hypnotic stage'. Since the responses of different individuals are bound to vary, there is no

uniform criteria for evaluating the efficacy of the `narcoanalysis' technique.

48. In an article published in 1951, C.W. Muehlberger (supra.) had described a French case which attracted controversy in 1948. Raymond Cens, who had been accused of being a Nazi collaborator, appeared to have suffered an apoplectic stroke which also caused memory loss. The French Court trying the case had authorised a board of psychiatrists to conduct an examination for ascertaining the defendant's amnesia. The narcoanalysis technique was used in the course of the examination and the defendant did not object to the same. However, the test results showed that the subject's memory was not impaired and that he had been faking amnesia. At the trial, testimony about these findings was admitted, thereby leading to a conviction. Subsequently, Raymond Cens filed a civil suit against the psychiatrists alleging assault and illegal search. However, it was decided that the board had used routine psychiatric procedures and since the actual physical damage to the defendant was nominal, the psychiatrists were acquitted. At the time, this case created quite a stir and the Council of the Paris Bar Association had passed a resolution against the use of drugs during interrogation. [Refer C.W. Muehlberger (1951) at p. 527; The Raymond Cens case has also been discussed in the following article: J.P. Gagnieur, `The Judicial use of Psychonarcosis in France', 40(3) *Journal of Criminal Law and Criminology* 370-380 (Sept.-Oct. 1949)]

49. An article published in 1961 [Andre A. Moenssens, `Narcoanalysis in Law Enforcement', 52 (4) *The Journal of Criminal Law, Criminology and Police Science* 453-458 (Nov.- Dec. 1961)] had surveyed some judicial precedents from the U.S.A. which dealt with the forensic uses of the narcoanalysis technique. The first reference is to a decision from the State of Missouri reported as *State* v. *Hudson* 314 Mo. 599 (1926). In that case, the defence lawyer in a prosecution for rape attempted to rely on the expert testimony of a doctor. The doctor in turn declared that he had questioned the defendant after injecting a truth-serum and the defendant had denied his guilt while in a drug-induced state. The trial court had refused to admit the doctor's testimony by finding it to be completely unreliable from a scientific viewpoint. The appellate court upheld the finding and made the following observation, *Id.* at p. 602:

> Testimony of this character - barring the sufficient fact that it cannot be classified otherwise than a self-serving declaration - is, in the present state of human knowledge, unworthy of serious consideration. We are not told from what well this serum is drawn or in what alembic its alleged truth compelling powers are distilled. Its origin is as nebulous as its effect is uncertain....

50. In *State* v. *Lindemuth* 56 N.M. 237 (1952) the testimony of a psychiatrist was not admitted when he wanted to show that the answers given by a defendant while under the influence of sodium pentothal supported the defendant's plea of innocence in a murder case. The trial court's refusal to admit such testimony was endorsed by the appellate court, and it was noted, *Id.* at p. 243:

> Until the use of the drug as a means of procuring the truth from people under its influence is accorded general scientific recognition, we are unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposed views on the same facts and conditions, to the despair of the court reporter and the bewilderment of the fact- finder.

51. However, Andre Moenssens (1961) also took note of a case which appeared to endorse an opposing view. In *People* v. *Jones* 42 Cal. 2d 219 (1954), the trial court overruled the prosecution's objection to the introduction of a psychiatrist's testimony on behalf of the defendant. The psychiatrist had conducted several tests on the defendant which included a sodium pentothal induced interview. The Court found that this was not sufficient to exclude the psychiatrist's testimony in its entirety. It was observed that even though the truth of statements revealed under narcoanalysis remains uncertain, the results of the same could be clearly distinguished from the psychiatrist's overall conclusions which were based on the results of all the tests considered together.

52. At the federal level, the U.S. Court of Appeals for the Ninth Circuit dealt with a similar issue

in *Lindsey* v. *United States* 237 F. 2d 893 (9th Circ. 1956). In that case, the trial court had admitted a psychiatrist's opinion testimony which was based on a clinical examination that included psychological tests and a sodium pentothal induced interview. The subject of the interview was a fifteen-year old girl who had been sexually assaulted and had subsequently testified in a prosecution for rape. On cross-examination, the credibility of the victim's testimony had been doubted and in an attempt to rebut the same, the prosecution had called on the psychiatrist. On the basis of the results of the clinical examination, the psychiatrist offered his professional opinion that the victim had been telling the truth when she had repeated the charges that were previously made to the police. This testimony was admitted as a prior consistent statement to rehabilitate the witness but not considered as substantive evidence. Furthermore, a tape recording of the psychiatrist's interview with the girl, while she was under narcosis, was also considered as evidence. The jury went on to record a finding of guilt. When the case was brought in appeal before the Ninth Circuit Court, the conviction was reversed on the ground that the defendant had been denied the `due process of law'. It was held that before a prior consistent statement made under the influence of a sodium pentothal injection could be admitted as evidence, it should be scientifically established that the test is absolutely accurate and reliable in all cases. Although the value of the test in psychiatric examinations was recognised, it was pointed out that the reliability of sodium pentothal tests had not been sufficiently established to warrant admission of its results in evidence. It was stated that "Scientific tests reveal that people thus prompted to speak freely do not always tell the truth". [Cited from Andre A. Moenssens (1961) at pp. 455- 456]

53. In *Lawrence M. Dugan* v. *Commonwealth of Kentucky* 333 S.W.2d. 755 (1960), the defendant had been given a truth serum test by a psychiatrist employed by him. The trial court refused to admit the psychiatrist's testimony which supported the truthfulness of the defendant's statement. The defendant had pleaded innocence by saying that a shooting which had resulted in the death of another person had been an accident. The trial court's decision was affirmed on appeal and is was reasoned that no court of last resort has recognised the admissibility of the results of truth serum tests, the principal ground being that such tests have not attained sufficient recognition of dependability and reliability.

54. The U.S. Supreme Court has also disapproved of the forensic uses of truth-inducing drugs in *Townsend* v. *Sain* 372 US 293 (1963). In that case a heroin addict was arrested on the suspicion of having committed robbery and murder. While in custody he began to show severe withdrawal symptoms, following which the police officials obtained the services of a physician. In order to treat these withdrawal symptoms, the physician injected a combined dosage of 1/8 grain of Phenobarbital and 1/230 grain of Hyoscine. Hyoscine is the same as `Scopolamine' which has been described earlier. This dosage appeared to have a calming effect on Townsend and after the physician's departure he promptly responded to questioning by the police and eventually made some confessional statements. The petitioner's statements were duly recorded by a court reporter. The next day he was taken to the office of the prosecutor where he signed the transcriptions of the statements made by him on the previous day. [The facts of this case have also been discussed in: Charles E. Sheedy, `Narco-interrogation of a Criminal Suspect', 50 (2) *The Journal of Criminal Law, Criminology and Police Science* 118-123 (July- Aug 1959) at pp. 118-119]

55. When the case came up for trial, the counsel for the petitioner brought a motion to exclude the transcripts of the statements from the evidence. However, the trial judge denied this motion and admitted the court reporter's transcription of the confessional statements into evidence. Subsequently, a jury found Townsend to be guilty, thereby leading to his conviction. When the petitioner made a *habeas corpus* application before a Federal District Court, one of the main arguments advanced was that the fact of Scopolamine's character as a truth-serum had not been brought out at the time of the motion to suppress the statements or even at the trial before the State Court. The Federal District Court denied the habeas corpus petition without a plenary evidentiary hearing, and this decision was affirmed by the Court of Appeals. Hence, the matter came before the U.S. Supreme Court. In an opinion authored by Earl Warren, C.J. the Supreme Court held that the Federal District Court had erred in denying a writ of habeas corpus without giving a plenary evidentiary hearing to examine the voluntariness of the confessional statements. Both the majority opinion as well as the dissenting opinion (Stewart, J.) concurred on the finding that a confession induced by the administration of drugs is constitutionally

inadmissible in a criminal trial. On this issue, Warren, C.J. observed, 372 US 293 (1963), at pp. 307-308:

> Numerous decisions of this Court have established the standards governing the admissibility of confessions into evidence. If an individual's `will was overborne' or if his confession was not `the product of a rational intellect and a free will', his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement. It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a `truth serum'. It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a `truth serum', if these properties exist. Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders that confession inadmissible.
>
> (internal citations omitted)

56. In *United States* v. *Swanson* 572 F.2d 523 (5th Circ. 1978), two individuals had been convicted for conspiracy and extortion through the acts of sending threatening letters. At the trial stage, one of the defendants testified that he suffered from amnesia and therefore he could not recall his alleged acts of telephoning the co-defendant and mailing threatening letters. In order to prove such amnesia his counsel sought the admission of a taped interview between the defendant and a psychiatrist which had been conducted while the defendant was under the influence of sodium amytal. The drug-induced statements supposedly showed that the scheme was a joke or a prank. The trial court refused to admit the contents of this sodium amytal induced interview and the Fifth Circuit Court upheld this decision. In holding the same, it was also observed, *Id.* at p. 528:

> ...Moreover, no drug-induced recall of past events which the subject is otherwise unable to recall is any more reliable than the procedure for inducing recall. Here both psychiatrists testified that sodium amytal does not ensure truthful statements. No re-creation or recall, by photograph, demonstration, drug-stimulated recall, or otherwise, would be admissible with so tenuous a predicate.

57. A decision given by the Ninth Circuit Court in *United States* v. *Solomon* 753 F. 2d 1522 (9th Circ. 1985), has been cited by the respondents to support the forensic uses of the narcoanalysis technique. However, a perusal of that judgment shows that neither the actual statements made during narcoanalysis interviews nor the expert testimony relating to the same were given any weightage. The facts were that three individuals, namely Solomon, Wesley and George (a minor at the time of the crime) were accused of having committed robbery and murder by arson. After their arrest, they had changed their statements about the events relating to the alleged offences. Subsequently, Wesley gave his consent for a sodium amytal induced interview and the same was administered by a psychiatrist named Dr. Montgomery. The same psychiatrist also conducted a sodium amytal interview with George, at the request of the investigators.

58. At the trial stage, George gave testimony which proved to be incriminatory for Solomon and Wesley. However, the statements made by Wesley during the narcoanalysis interview were not admitted as evidence and even the expert testimony about the same was excluded. On appeal, the Ninth Circuit Court held that there had been no abuse of discretion by the trial court in considering the evidence before it. Solomon and Wesley had contended that the trial court should have excluded the testimony given by George before the trial judge, since the same was based on the results of the sodium amytal interview and was hence unreliable. The Court drew a distinction between the statements made during the narcoanalysis interview and the subsequent statements made before the trial court. It was observed that it was open to the defendants to show that George's testimony during trial had been bolstered by the previous revelations made during the narcoanalysis interview. However, the connection between the drug-induced

revelations and the testimony given before the trial court could not be presumed. It was further noted, *Id.* at p. 1525:

> The only Ninth Circuit case addressing narcoanalysis excluded a recording of and psychiatric testimony supporting an interview conducted under the influence of sodium pentothal, a precursor of sodium amytal. [*Lindsey* v. *United States* 237 F.2d 893 (9th Cir. 1956) ...] The case at bar is distinguishable because no testimony concerning the narcoanalysis was offered at trial. Only George's current recollection of events was presented.
>
> In an analogous situation, this circuit has held that the current recollections of witnesses whose memories have been refreshed by hypnosis are admissible, with the fact of hypnosis relevant to credibility only [*United States* v. *Adams* 581 F.2d 193, 198-199 (9th Cir. 1978) ...], *cert. denied.* We have cautioned, however, that "great care must be exercised to insure" that statements after hypnosis are not the product of hypnotic suggestion. *Id.*
>
> We find no abuse of discretion in the trial court's ruling to admit the testimony of the witness George. The court's order denying Solomon's Motion to Suppress reflects a careful balancing of reliability against prejudicial dangers:

59. However, Wesley wanted to introduce expert testimony by Dr. Montgomery which would explain the effects of sodium amytal as well as the statements made during his own drug-induced interview. The intent was to rehabilitate Wesley's credibility after the prosecution had impeached it with an earlier confession. The trial court had held that even though narcoanalysis was not reliable enough to admit into evidence, Dr. Montgomery could testify about the statements made to him by Wesley, however without an explanation of the circumstances. On this issue, the Ninth Circuit Court referred to the *Frye* standard for the admissibility of scientific evidence. It was also noted that the trial court had the discretion to draw the necessary balance between the probative value of the evidence and its prejudicial effect. It again took note of the decision in *Lindsey* v. *United States* 237 F. 2d 893 (1956), where the admission of a tape recording of a narcoanalysis interview along with an expert's explanation of the technique was held to be a prejudicial error. The following conclusion was stated, 753 F.2d 1522, at p. 1526:

> Dr. Montgomery testified also that narcoanalysis is useful as a source of information that can be valuable if verified through other sources. At one point he testified that it would elicit an accurate statement of subjective memory, but later said that the subject could fabricate memories. He refused to agree that the subject would be more likely to tell the truth under narcoanalysis than if not so treated.
>
> Wesley wanted to use the psychiatric testimony to bolster the credibility of his trial testimony that George started the fatal fire. Wesley's statement shortly after the fire was that he himself set the fire. The probative value of the statement while under narcoanalysis that George was responsible, was the drug's tendency to induce truthful statements.
>
> Montgomery admitted that narcoanalysis does not reliably induce truthful statements. The judge's exclusion of the evidence concerning narcoanalysis was not an abuse of discretion. The prejudicial effect of an aura of scientific respectability outweighed the slight probative value of the evidence.

60. In *State of New Jersey* v. *Daryll Pitts* 56 A.2d 1320 (N.J. 1989), the trial court had refused to admit a part of a psychiatrist's testimony which was based on the results of the defendant's sodium-amytal induced interview. The defendant had been charged with murder and had sought reliance on the testimony to show his unstable state of mind at the time of the homicides. Reliance on the psychiatrist's testimony was requested during the sentencing phase of the trial in order to show a mitigating factor. On appeal, the Supreme Court of New Jersey upheld the trial court's decision to exclude that part of the testimony which was derived from the results of the sodium-amytal interview. Reference was made to the *Frye* standard while

observing that "in determining the admissibility of evidence derived from scientific procedures, a court must first ascertain the extent to which the reliability of such procedures has attained general acceptance within the relevant scientific community." (*Id.* at p. 1344) Furthermore, the expert witnesses who had appeared at the trial had given conflicting accounts about the utility of a sodium-amytal induced interview for ascertaining the mental state of a subject with regard to past events. It was stated, *Id.* at p. 1348:

> On the two occasions that this Court has considered the questions, we have concluded, based on the then-existing state of scientific knowledge, that testimony derived from a sodium-amytal induced interview is inadmissible to prove the truth of the facts asserted. [See *State* v. *Levitt* 36 N.J. 266, 275 (1961)...; *State* v. *Sinnott* ...132 A.2d 298 (1957)] Our rule is consistent with the views expressed by other courts that have addressed the issue.
>
> ...The expert testimony adduced at the Rule 8 hearing indicated that the scientific community continues to view testimony induced by sodium amytal as unreliable to ascertain truth. Thus, the trial court's ruling excluding Dr. Sadoff's testimony in the guilt phase was consistent with our precedents, with the weight of authority throughout the country, and also with contemporary scientific knowledge as reflected by the expert testimony....
>
> (internal citations omitted)

61. Since a person subjected to the narcoanalysis technique is in a half-conscious state and loses awareness of time and place, this condition can be compared to that of a person who is in a hypnotic state. In ***Horvath*** v. ***R*** [1979] 44 C.C.C. (2d) 385, the Supreme Court of Canada held that statements made in a hypnotic state were not voluntary and hence they cannot be admitted as evidence. It was also decided that if the post- hypnotic statements relate back to the contents of what was said during the hypnotic state, the subsequent statements would be inadmissible. In that case a 17 year old boy suspected for the murder of his mother had been questioned by a police officer who had training in the use of hypnotic methods. During the deliberate interruptions in the interrogation sessions, the boy had fallen into a mild hypnotic state and had eventually confessed to the commission of the murder. He later repeated the admissions before the investigating officers and signed a confessional statement. The trial judge had found all of these statements to be inadmissible, thereby leading to an acquittal. The Court of Appeal had reversed this decision, and hence an appeal was made before the Supreme Court.

62. Notably, the appellant had refused to undergo a narcoanalysis interview or a polygraph test. It was also evident that he had not consented to the hypnosis. The multiple opinions delivered in the case examined the criterion for deciding the voluntariness of a statement. Reference was made to the well-known statement of Lord Summer in ***Ibrahim*** v. ***R*** [1914] A.C. 599 (P.C.), at p. 609:

> It has long been established as a positive rule of English criminal law that no statement made by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

63. In ***Horvath*** v. ***R*** (supra.), the question was whether statements made under a hypnotic state could be equated with those obtained by `fear of prejudice' or `hope of advantage'. The Court ruled that the inquiry into the voluntariness of a statement should not be literally confined to these expressions. After examining several precedents, Spence J. held that the total circumstances surrounding the interrogation should be considered, with no particular emphasis placed on the hypnosis. It was observed that in this particular case the interrogation of the accused had resulted in his complete emotional disintegration, and hence the statements given were inadmissible. It was also held that the rule in ***Ibrahim*** v. ***R*** (supra.) that a statement must be induced by `fear of prejudice' or `hope of advantage' in order to be considered involuntary was not a comprehensive test. The word `voluntary' should be given its ordinary and natural

meaning so that the circumstances which existed in the present case could also be described as those which resulted in involuntary statements.

64. In a concurring opinion, Beetz., J. drew a comparison between statements made during hypnosis and those made under the influence of a sodium-amytal injection. It was observed, at Para. 91:

> 91. Finally, voluntariness is incompatible not only with promises and threats but actual violence. Had Horvath made a statement while under the influence of an amytal injection administered without his consent, the statement would have been inadmissible because of the assault, and presumably because also of the effect of the injection on his mind. There was no physical violence in the case at bar. There is not even any evidence of bodily contact between Horvath and Sergeant Proke, but through the use of an interrogation technique involving certain physical elements such as a hypnotic quality of voice and manner, a police officer has gained unconsented access to what in a human being is of the utmost privacy, the privacy of his own mind. As I have already indicated, it is my view that this was a form of violence or intrusion of a moral or mental nature, more subtle than visible violence but not less efficient in the result than an amytal injection administered by force.

65. In this regard, the following observations are instructive for the deciding the questions before us, at Paras. 117,118:

> 117. It would appear that hypnosis and narcoanalysis are used on a consensual basis by certain police forces as well as by the defence, and it has been argued that they can serve useful purposes.
>
> 118. I refrain from commenting on such practices, short of noting that even the consensual use of hypnosis and narcoanalysis for evidentiary purposes may present problems. Under normal police interrogation, a suspect has the opportunity to renew or deny his consent to answer each question, which is no longer the case once he is, although by consent, in a state of hypnosis or under the influence of a `truth serum'.
>
> (internal citation omitted)

66. Our attention has also been drawn to the decision reported as *Rock* v. *Arkansas* 483 US 44 (1987), in which the U.S. Supreme Court ruled that hypnotically-refreshed testimony could be admitted as evidence. The constitutional basis for admitting such testimony was the Sixth Amendment which gives every person a right to present a defence in criminal cases. However, the crucial aspect was that the trial court had admitted the oral testimony given during the trial stage rather than the actual statements made during the hypnosis session conducted earlier during the investigation stage. It was found that such hypnotically-refreshed testimony was the only defence available to the defendant in the circumstances. In such circumstances, it would of course be open to the prosecution to contest the reliability of the testimony given during the trial stage by showing that it had been bolstered by the statements made during hypnosis. It may be recalled that a similar line of reasoning had been adopted in *United States* v. *Solomon* 753 F. 2d 1522 (9th Circ. 1985), where for the purpose of admissibility of testimony, a distinction had been drawn between the statements made during a narcoanalysis interview and the oral testimony given during the trial stage which was allegedly based on the drug-induced statements. Hence, the weight of precedents indicates that both the statements made during narcoanalysis interviews as well as expert testimony relating to the same have not been given weightage in criminal trials.

Brain Electrical Activation Profile (BEAP) test

67. The third technique in question is the `Brain Electrical Activation Profile test', also known as the `P300 Waves test'. It is a process of detecting whether an individual is familiar with certain information by way of measuring activity in the brain that is triggered by exposure to selected stimuli. This test consists of examining and measuring `event-related potentials' (ERP) i.e.

electrical wave forms emitted by the brain after it has absorbed an external event. An ERP measurement is the recognition of specific patterns of electrical brain activity in a subject that are indicative of certain cognitive mental activities that occur when a person is exposed to a stimulus in the form of an image or a concept expressed in words. The measurement of the cognitive brain activity allows the examiner to ascertain whether the subject recognised stimuli to which he/she was exposed. [Cited from: Andre A Moenssens, `Brain Fingerprinting - Can it be used to detect the innocence of persons charged with a crime?' 70 *University of Missouri at Kansas City Law Review* 891-920 (Summer 2002) at p. 893]

68. By the late 19th century it had been established that the brain functioned by emitting electrical impulses and the technology to measure them was developed in the form of the electroencephalograph (EEG) which is now commonly used in the medical field. Brain wave patterns observed through an EEG scan are fairly crude and may reflect a variety of unrelated brain activity functions. It was only with the development of computers that it became possible to sort out specific wave components on an EEG and identify the correlation between the waves and specific stimuli. The P300 wave is one such component that was discovered by Dr. Samuel Sutton in 1965. It is a specific event-related brain potential (ERP) which is triggered when information relating to a specific event is recognised by the brain as being significant or surprising.

69. The P300 waves test is conducted by attaching electrodes to the scalp of the subject, which measure the emission of the said wave components. The test needs to be conducted in an insulated and air-conditioned room in order to prevent distortions arising out of weather conditions. Much like the narcoanalysis technique and polygraph examination, this test also requires effective collaboration between the investigators and the examiner, most importantly for designing the stimuli which are called `probes'. Ascertaining the subject's familiarity with the `probes' can help in detecting deception or to gather useful information. The test subject is exposed to auditory or visual stimuli (words, sounds, pictures, videos) that are relevant to the facts being investigated alongside other irrelevant words and pictures. Such stimuli can be broadly classified as material `probes' and neutral `probes'. The underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by the instruments. By examining the records of these wave components the examiner can make inferences about the individual's familiarity with the information related to the crime. [Refer: *Laboratory Procedure Manual - Brain Electrical Activation Profile* (Directorate of Forensic Science, Ministry of Home Affairs, Government of India, New Delhi - 2005)]

70. The P300 wave test was the precursor to other neuroscientific techniques such as `Brain Fingerprinting' developed by Dr. Lawrence Farwell. The latter technique has been promoted in the context of criminal justice and has already been the subject of litigation. There is an important difference between the `P300 waves test' that has been used by Forensic Science Laboratories in India and the `Brain Fingerprinting' technique. Dr. Lawrence Farwell has argued that the P300 wave component is not an isolated sensory brain effect but it is part of a longer response that continues to take place after the initial P300 stimulus has occurred. This extended response bears a correlation with the cognitive processing that takes place slightly beyond the P300 wave and continues in the range of 300-800 milliseconds after the exposure to the stimulus. This extended brain wave component has been named as the MERMER (Memory-and-Encoding-Related-Multifaceted-Electroencephalographic Response) effect. [See generally: Lawrence A. Farwell, `Brain Fingerprinting: A new paradigm in criminal investigations and counter-terrorism', (2001) Text can be downloaded from

71. Functional Magnetic Resonance Imaging (FMRI) is another neuroscientific technique whose application in the forensic setting has been contentious. It involves the use of MRI scans for measuring blood flow between different parts of the brain which bears a correlation to the subject's truthfulness or deception. FMRI-based lie-detection has also been advocated as an aid to interrogations in the context of counter-terrorism and intelligence operations, but it prompts the same legal questions that can be raised with respect to all of the techniques mentioned above. Even though these are non- invasive techniques the concern is not so much with the manner in which they are conducted but the consequences for the individuals who undergo the same. The use of techniques such as `Brain Fingerprinting' and `FMRI-based Lie-Detection' raise

numerous concerns such as those of protecting mental privacy and the harms that may arise from inferences made about the subject's truthfulness or familiarity with the facts of a crime. [See generally: Michael S. Pardo, `Neuroscience evidence, legal culture and criminal procedure', 33 *American Journal of Criminal Law* 301-337 (Summer 2006); Sarah E. Stoller and Paul Root Wolpe, `Emerging neurotechnologies for lie detection and the fifth amendment', 33 *American Journal of Law and Medicine* 359-375 (2007)]

72. These neuroscientific techniques could also find application outside the criminal justice setting. For instance, Henry T. Greely (2005, Cited below) has argued that technologies that may enable a precise identification of the subject's mental responses to specific stimuli could potentially be used for market-research by business concerns for surveying customer preferences and developing targeted advertising schemes. They could also be used to judge mental skills in the educational and employment-related settings since cognitive responses are often perceived to be linked to academic and professional competence. One can foresee the potential use of this technique to distinguish between students and employees on the basis of their cognitive responses. There are several other concerns with the development of these `mind-reading' technologies especially those relating to the privacy of individuals. [Refer: Henry T. Greely, `Chapter 17: The social effects of advances in neuroscience: Legal problems, legal perspectives', in Judy Illes (ed.), *Neuroethics - Defining the issues in theory, practice and policy* (Oxford University Press, 2005) at pp. 245-263]

73. Even though the P300 Wave component has been the subject of considerable research, its uses in the criminal justice system have not received much scholarly attention. Dr. Lawrence Farwell's `Brain Fingerprinting' technique has attracted considerable publicity but has not been the subject of any rigorous independent study. Besides this preliminary doubt, an important objection is centred on the inherent difficulty of designing the appropriate `probes' for the test. Even if the `probes' are prepared by an examiner who is thoroughly familiar with all aspects of the facts being investigated, there is always a chance that a subject may have had prior exposure to the material probes. In case of such prior exposure, even if the subject is found to be familiar with the probes, the same will be meaningless in the overall context of the investigation. For example, in the aftermath of crimes that receive considerable media-attention the subject can be exposed to the test stimuli in many ways. Such exposure could occur by way of reading about the crime in newspapers or magazines, watching television, listening to the radio or by word of mouth. A possibility of prior exposure to the stimuli may also arise if the investigators unintentionally reveal crucial facts about the crime to the subject before conducting the test. The subject could also be familiar with the content of the material probes for several other reasons.

74. Another significant limitation is that even if the tests demonstrate familiarity with the material probes, there is no conclusive guidance about the actual nature of the subject's involvement in the crime being investigated. For instance a by- stander who witnessed a murder or robbery could potentially be implicated as an accused if the test reveals that the said person was familiar with the information related to the same. Furthermore, in cases of amnesia or `memory-hardening' on part of the subject, the tests could be blatantly misleading. Even if the inferences drawn from the `P300 wave test' are used for corroborating other evidence, they could have a material bearing on a finding of guilt or innocence despite being based on an uncertain premise. [For an overview of the limitations of these neuroscientific techniques, see: John G. New, `If you could read my mind - Implications of neurological evidence for twenty-first century criminal jurisprudence', 29 *Journal of Legal Medicine* 179-197 (April-June 2008)]

75. We have come across two precedents relatable to the use of `Brain Fingerprinting' tests in criminal cases. Since this technique is considered to be an advanced version of the P300 Waves test, it will be instructive to examine these precedents. In *Harrington* v. *Iowa* 659 N.W.2d 509 (2003), Terry J. Harrington (appellant) had been convicted for murder in 1978 and the same had allegedly been committed in the course of an attempted robbery. A crucial component of the incriminating materials was the testimony of his accomplice. However, many years later it emerged that the accomplice's testimony was prompted by an offer of leniency from the investigating police and doubts were raised about the credibility of other witnesses as well. Subsequently it was learnt that at the time of the trial, the police had not shared with the defence some investigative reports that indicated the possible involvement of another individual

in the said crime. Harrington had also undergone a `Brain Fingerprinting' test under the supervision of Dr. Lawrence Farwell. The test results showed that he had no memories of the `probes' relating to the act of murder. Hence, Harrington approached the District Court seeking the vacation of his conviction and an order for a new trial. Post-conviction relief was sought on grounds of newly discovered evidence which included recantation by the prosecution's primary witness, the past suppression of police investigative reports which implicated another suspect and the results of the `Brain Fingerprinting' tests. However, the District Court denied this application for post-conviction relief. This was followed by an appeal before the Supreme Court of Iowa.

76. The appellate court concluded that Harrington's appeal was timely and his action was not time barred. The appellant was granted relief in light of a `due process' violation, i.e. the failure on part of the prosecution at the time of the original trial to share the investigative reports with the defence. It was observed that the defendant's right to a fair trial had been violated because the prosecution had suppressed evidence which was favourable to the defendant and clearly material to the issue of guilt. Hence the case was remanded back to the District Court. However, the Supreme Court of Iowa gave no weightage to the results of the `Brain Fingerprinting' test and did not even inquire into their relevance or reliability. In fact it was stated: "Because the scientific testing evidence is not necessary to a resolution of this appeal, we give it no further consideration." [659 N.W.2d 509, at p. 516]

77. The second decision brought to our attention is *Slaughter* v. *Oklahoma* 105 P. 3d 832 (2005). In that case, Jimmy Ray Slaughter had been convicted for two murders and sentenced to death. Subsequently, he filed an application for post- conviction relief before the Court of Criminal Appeals of Oklahoma which attempted to introduce in evidence an affidavit and evidentiary materials relating to a `Brain Fingerprinting' test. This test had been conducted by Dr. Lawrence Farwell whose opinion was that the petitioner did not have knowledge of the `salient features of the crime scene'. Slaughter also sought a review of the evidence gathered through DNA testing and challenged the bullet composition analysis pertaining to the crime scene. However, the appellate court denied the application for post-conviction relief as well as the motion for an evidentiary hearing. With regard to the affidavits based on the `Brain Fingerprinting' test, it was held, *Id.* at p. 834:

> 10. Dr. Farwell makes certain claims about the Brain Fingerprinting test that are not supported by anything other than his bare affidavit. He claims the technique has been extensively tested, has been presented and analyzed in numerous peer-review articles in recognized scientific publications, has a very low rate of error, has objective standards to control its operation, and is generally accepted within the `relevant scientific community'. These bare claims, however, without any form of corroboration, are unconvincing and, more importantly, legally insufficient to establish Petitioner's post-conviction request for relief. Petitioner cites one published opinion, *Harrington* v. *State* 659 N.W.2d 509 (Iowa 2003), in which a brain fingerprinting test result was raised as error and discussed by the Iowa Supreme Court (`a novel computer-based brain testing'). However, while the lower court in Iowa appears to have admitted the evidence under non-Daubert circumstances, the test did not ultimately factor into the Iowa Supreme Court's published decision in any way.

Accordingly, the following conclusion was stated, *Id.* at p. 836:

> 18. Therefore, based upon the evidence presented, we find the Brain Fingerprinting evidence is procedurally barred under the Act and our prior cases, as it could have been raised in Petitioner's direct appeal and, indeed, in his first application for post-conviction relief. We further find a lack of sufficient evidence that would support a conclusion that Petitioner is factually innocent or that Brain Fingerprinting, based solely upon the MERMER effect, would survive a *Daubert* analysis.

CONTENTIOUS ISSUES IN THE PRESENT CASE

78. As per the Laboratory Procedure manuals, the impugned tests are being conducted at the direction of jurisdictional courts even without obtaining the consent of the intended test subjects. In most cases these tests are conducted conjunctively wherein the veracity of the information revealed through narcoanalysis is subsequently tested through a polygraph examination or the BEAP test. In some cases the investigators could first want to ascertain the capacity of the subject to deceive (through polygraph examination) or his/her familiarity with the relevant facts (through BEAP test) before conducting a narcoanalysis interview. Irrespective of the sequence in which these techniques are administered, we have to decide on their permissibility in circumstances where any of these tests are compulsorily administered, either independently or conjunctively.

79. It is plausible that investigators could obtain statements from individuals by threatening them with the possibility of administering either of these tests. The person being interrogated could possibly make self-incriminating statements on account of apprehensions that these techniques will extract the truth. Such behaviour on part of investigators is more likely to occur when the person being interrogated is unaware of his/her legal rights or is intimidated for any other reason. It is a settled principle that a statement obtained through coercion, threat or inducement is involuntary and hence inadmissible as evidence during trial. However, it is not settled whether a statement made on account of the apprehension of being forcibly subjected to the impugned tests will be involuntary and hence inadmissible. This aspect merits consideration. It is also conceivable that an individual who has undergone either of these tests would be more likely to make self-incriminating statements when he/she is later confronted with the results. The question in that regard is whether the statements that are made subsequently should be admissible as evidence. The answers to these questions rest on the permissibility of subjecting individuals to these tests without their consent.

I. Whether the involuntary administration of the impugned techniques violates the `right against self- incrimination' enumerated in Article 20(3) of the Constitution?

80. Investigators could seek reliance on the impugned tests to extract information from a person who is suspected or accused of having committed a crime. Alternatively these tests could be conducted on witnesses to aid investigative efforts. As mentioned earlier, this could serve several objectives, namely those of gathering clues which could lead to the discovery of relevant evidence, to assess the credibility of previous testimony or even to ascertain the mental state of an individual. With these uses in mind, we have to decide whether the compulsory administration of these tests violates the `right against self-incrimination' which finds place in Article 20(3) of the Constitution of India. Along with the `rule against double-jeopardy' and the `rule against retrospective criminalisation' enumerated in Article 20, it is one of the fundamental protections that controls interactions between individuals and the criminal justice system. Article 20(3) reads as follows:

> No person accused of any offence shall be compelled to be a witness against himself.

81. The interrelationship between the `right against self- incrimination' and the `right to fair trial' has been recognised in most jurisdictions as well as international human rights instruments. For example, the U.S. Constitution incorporates the `privilege against self-incrimination' in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by recognising it's interrelationship with other constitutional rights such as the protection against `unreasonable search and seizure' (Fourth amendment) and the guarantee of `due process of law' (Fourteenth amendment). In the International Covenant on Civil and Political Rights (ICCPR), Article 14(3)(g) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that `Everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law'. The guarantee of `presumption of innocence' bears a direct link to the `right against self- incrimination' since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

82. In the Indian context, Article 20(3) should be construed with due regard for the inter-relationship between rights, since this approach was recognised in *Maneka Gandhi's* case, (1978) 1 SCC 248. Hence, we must examine the `right against self-incrimination' in respect of its relationship with the multiple dimensions of `personal liberty' under Article 21, which include guarantees such as the `right to fair trial' and `substantive due process'. It must also be emphasized that Articles 20 and 21 have a non-derogable status within Part III of our Constitution because the Constitution (Fourty-Fourth amendment) Act, 1978 mandated that the right to move any court for the enforcement of these rights cannot be suspended even during the operation of a proclamation of emergency. In this regard, Article 359(1) of the Constitution of India reads as follows:

> 359. Suspension of the enforcement of the rights conferred by Part III during emergencies. - (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order....

83. Undoubtedly, Article 20(3) has an exalted status in our Constitution and questions about its meaning and scope deserve thorough scrutiny. In one of the impugned judgments, it was reasoned that all citizens have an obligation to co- operate with ongoing investigations. For instance reliance has been placed on Section 39, CrPC which places a duty on citizens to inform the nearest magistrate or police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of Section 156(1), CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional magistrate. Likewise, our attention was drawn to Section 161(1), CrPC which empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. While the overall intent of these provisions is to ensure the citizens' cooperation during the course of investigation, they cannot override the constitutional protections given to accused persons. The scheme of the CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard. For instance, Section 161(2), CrPC prescribes that when a person is being examined by a police officer, he is not bound to answer such questions, the answers of which would have a tendency to expose him to a criminal charge or a penalty or forfeiture.

84. Not only does an accused person have the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence. At the trial stage, Section 313(3) of the CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, Proviso (b) to Section 315(1) of CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the trial. It is evident that Section 161(2), CrPC enables a person to choose silence in response to questioning by a police officer during the stage of investigation, and as per the scheme of Section 313(3) and Proviso (b) to Section 315(1) of the same code, adverse inferences cannot be drawn on account of the accused person's silence during the trial stage.

Historical origins of the `right against self-incrimination'

85. The right of refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law and bears a close relation to the `right to fair trial'. There are competing versions about the historical origins of this concept. Some scholars have identified the origins of this right in the medieval period. In that account, it was a response to the procedure followed by English judicial bodies such as the Star Chamber and High Commissions which required defendants and suspects to take ex officio oaths. These bodies

mainly decided cases involving religious non-conformism in a Protestant dominated society, as well as offences like treason and sedition. Under an ex officio oath the defendant was required to answer all questions posed by the judges and prosecutors during the trial and the failure to do so would attract punishments that often involved physical torture. It was the resistance to this practice of compelling the accused to speak which led to demands for a `right to silence'.

86. In an academic commentary, Leonard Levy (1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced back to the Latin maxim `*Nemo tenetur seipsum prodere'* (i.e. no one is bound to accuse himself) and the evolution of the concept of `due process of law' enumerated in the Magna Carta. [Refer: Leonard Levy, `The right against self-incrimination: history and judicial history', 84(1) *Political Science Quarterly* 1-29 (March 1969)] The use of the *ex officio* oath by the ecclesiastical courts in medieval England had come under criticism from time to time, and the most prominent cause for discontentment came with its use in the Star Chamber and the High Commissions. Most scholarship has focussed on the sedition trial of John Lilburne (a vocal critic of Charles I, the then monarch) in 1637, when he refused to answer questions put to him on the ground that he had not been informed of the contents of the written complaint against him. John Lilburne went on to vehemently oppose the use of ex-officio oaths, and the Parliament of the time relented by abolishing the Star Chamber and the High Commission in 1641. This event is regarded as an important landmark in the evolution of the `right to silence'.

87. However, in 1648 a special committee of Parliament conducted an investigation into the loyalty of members whose opinions were offensive to the army leaders. The committee's inquisitional conduct and its requirement that witnesses take an oath to tell the truth provoked opponents to condemn what they regarded as a revival of Star Chamber tactics. John Lilburne was once again tried for treason before this committee, this time for his outspoken criticism of the leaders who had prevailed in the struggle between the supporters of the monarch and those of the Parliament in the English civil war. John Lilburne invoked the spirit of the Magna Carta as well as the 1628 Petition of Right to argue that even after common-law indictment and without oath, he did not have to answer questions against or concerning himself. He drew a connection between the right against self-incrimination and the guarantee of a fair trial by invoking the idea of `due process of law' which had been stated in the Magna Carta.

88. John H. Langbein (1994) has offered more historical insights into the emergence of the `right to silence'. [John H. Langbein, `The historical origins of the privilege against self-incrimination at common law', 92(5) *Michigan Law Review* 1047-1085 (March 1994)] He draws attention to the fact that even though *ex officio* oaths were abolished in 1641, the practice of requiring defendants to present their own defence in criminal proceedings continued for a long time thereafter. The Star Chamber and the High Commissions had mostly tried cases involving religious non-conformists and political dissenters, thereby attracting considerable criticism. Even after their abolition, the defendants in criminal courts did not have the right to be represented by a lawyer (`right to counsel') or the right to request the presence of defence witnesses (`right of compulsory process'). Hence, defendants were more or less compelled to testify on their own behalf. Even though the threat of physical torture on account of remaining silent had been removed, the defendant would face a high risk of conviction if he/she did not respond to the charges by answering the material questions posed by the judge and the prosecutor. In presenting his/her own defence during the trial, there was a strong likelihood that the contents of such testimony could strengthen the case of the prosecution and lead to conviction. With the passage of time, the right of a criminal defendant to be represented by a lawyer eventually emerged in the common law tradition. A watershed in this regard was the Treason Act of 1696 which provided for a `right to counsel' as well as `compulsory process' in cases involving offences such as treason. Gradually, the right to be defended by a counsel was extended to more offences, but the role of the counsel was limited in the early years. For instance defence lawyers could only help their clients with questions of law and could not make submissions related to the facts.

89. The practice of requiring the accused persons to narrate or contest the facts on their own corresponds to a prominent feature of an inquisitorial system, i.e. the testimony of the accused is viewed as the `best evidence' that can be gathered. The premise behind this is that innocent persons should not be reluctant to testify on their own behalf. This approach was followed in the

inquisitional procedure of the ecclesiastical courts and had thus been followed in other courts as well. The obvious problem with compelling the accused to testify on his own behalf is that an ordinary person lacks the legal training to effectively respond to suggestive and misleading questioning, which could come from the prosecutor or the judge. Furthermore, even an innocent person is at an inherent disadvantage in an environment where there may be unintentional irregularities in the testimony. Most importantly the burden of proving innocence by refuting the charges was placed on the defendant himself. In the present day, the inquisitorial conception of the defendant being the best source of evidence has long been displaced with the evolution of adversarial procedure in the common law tradition. Criminal defendants have been given protections such as the presumption of innocence, right to counsel, the right to be informed of charges, the right of compulsory process and the standard of proving guilt beyond reasonable doubt among others. It can hence be stated that it was only with the subsequent emergence of the `right to counsel' that the accused's `right to silence' became meaningful. With the consolidation of the role of defence lawyers in criminal trials, a clear segregation emerged between the testimonial function performed by the accused and the defensive function performed by the lawyer. This segregation between the testimonial and defensive functions is now accepted as an essential feature of a fair trial so as to ensure a level-playing field between the prosecution and the defence. In addition to a defendant's `right to silence' during the trial stage, the protections were extended to the stage of pre-trial inquiry as well. With the enactment of the Sir John Jervis Act of 1848, provisions were made to advise the accused that he might decline to answer questions put to him in the pre-trial inquiry and to caution him that his answers to pre-trial interrogation might be used as evidence against him during the trial stage.

90. The judgment in *Nandini Satpathy* v. *P.L. Dani* MANU/SC/0139/1978 : (1978) 2 SCC 424, at pp. 438-439, referred to the following extract from a decision of the US Supreme Court in *Brown* v. *Walker* 161 US 591 (1896), which had later been approvingly cited by Warren, C.J. in *Miranda* v. *Arizona* 384 US 436 (1966):

> The *maxim nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which have long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, were not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the State, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.

Underlying rationale of the right against self-incrimination

91. As mentioned earlier, `the right against self-incrimination' is now viewed as an essential safeguard in criminal procedure. Its underlying rationale broadly corresponds with two objectives - firstly, that of ensuring reliability of the statements made by an accused, and secondly, ensuring that such statements are made voluntarily. It is quite possible that a person suspected or accused of a crime may have been compelled to testify through methods involving coercion,

threats or inducements during the investigative stage. When a person is compelled to testify on his/her own behalf, there is a higher likelihood of such testimony being false. False testimony is undesirable since it impedes the integrity of the trial and the subsequent verdict. Therefore, the purpose of the `rule against involuntary confessions' is to ensure that the testimony considered during trial is reliable. The premise is that involuntary statements are more likely to mislead the judge and the prosecutor, thereby resulting in a miscarriage of justice. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigation efforts.

92. The concerns about the `voluntariness' of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements - often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, `the right against self-incrimination' is a vital safeguard against torture and other `third-degree methods' that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important, otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such `short-cuts' will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the `right against self- incrimination' is a vital protection to ensure that the prosecution discharges the said onus.

93. These concerns have been recognised in Indian as well as foreign judicial precedents. For instance, Das Gupta, J. had observed in *State of Bombay* v. *Kathi Kalu Oghad* MANU/SC/0134/1961 : [1962] 3 SCR 10, at pp. 43-44:

> ...for long it has been generally agreed among those who have devoted serious thought to these problems that few things could be more harmful to the detection of crime or conviction of the real culprit, few things more likely to hamper the disclosure of truth than to allow investigators or prosecutors to slide down the easy path of producing by compulsion, evidence, whether oral or documentary, from an accused person. It has been felt that the existence of such an easy way would tend to dissuade persons in charge of investigation or prosecution from conducting diligent search for reliable independent evidence and from sifting of available materials with the care necessary for ascertainment of truth. If it is permissible in law to obtain evidence from the accused person by compulsion, why tread the hard path of laborious investigation and prolonged examination of other men, materials and documents? It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law `to sit comfortably in the shade rubbing red pepper into a poor devils' eyes rather than to go about in the sun hunting up evidence.' [Sir James Fitzjames Stephen, History of Criminal Law, p. 442] No less serious is the danger that some accused persons at least, may be induced to furnish evidence against themselves which is totally false - out of sheer despair and an anxiety to avoid an unpleasant present. Of all these dangers the Constitution makers were clearly well aware and it was to avoid them that Article 20(3) was put in the Constitution.

94. The rationale behind the Fifth Amendment in the U.S. Constitution was eloquently explained by Goldberg. J. in *Murphy* v. *Waterfront Commission* 378 US 52 (1964), at p. 55:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state- individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contests with the individual to shoulder the entire load; our

> respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

A similar view was articulated by Lord Hailsham of St. Marylebone in *Wong Kam-ming* v. *R* [1979] 1 All ER 939, at p. 946:

> ...any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.

95. V.R. Krishna Iyer, J. echoed similar concerns in *Nandini Satpathy's* case MANU/SC/0139/1978 : (1978) 2 SCC 424, at p. 442:

> ...And Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy.

96. In spite of the constitutionally entrenched status of the right against self-incrimination, there have been some criticisms of the policy underlying the same. John Wigmore (1960) argued against a broad view of the privilege which extended the same to the investigative stage. [Refer: John Wigmore, `The privilege against self-incrimination, its constitutional affectation, raison d'etre and miscellaneous implications', 51 *Journal of Criminal Law, Criminology and Police Science* 138 (1960)] He has asserted that the doctrinal origins of the `rule against involuntary confessions' in evidence law and those of the `right to self-incrimination' were entirely different and catered to different objectives. In the learned author's opinion, the `rule against involuntary confessions' evolved on account of the distrust of statements made in custody. The objective was to prevent these involuntary statements from being considered as evidence during trial but there was no prohibition against relying on statements made involuntarily during investigation. Wigmore argued that the privilege against self-incrimination should be viewed as a right that was confined to the trial stage, since the judge can intervene to prevent an accused from revealing incriminating information at that stage, while similar oversight is not always possible during the pre-trial stage.

97. In recent years, scholars such as David Dolinko (1986), Akhil Reed Amar (1997) and Mike Redmayne (2007) among others have encapsulated the objections to the scope of this right. [See: David Dolinko, `Is There a Rationale for the Privilege Against Self-Incrimination?', 33 *University of California Los Angeles Law Review* 1063 (1986); Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven: Yale University Press, 1997) at pp. 65-70; Mike Redmayne, `Re-thinking the Privilege against Self- incrimination', 27 *Oxford Journal of Legal Studies* 209-232 (Summer 2007)] It is argued that in aiming to create a fair state-individual balance in criminal cases, the task of the investigators and prosecutors is made unduly difficult by allowing the accused to remain silent. If the overall intent of the criminal justice system is to ensure public safety through expediency in investigations and prosecutions, it is urged that the privilege against self-incrimination protects the guilty at the cost of such utilitarian objectives. Another criticism is that adopting a broad view of this right does not deter improper practices during investigation and it instead encourages investigators to make false

representations to courts about the voluntary or involuntary nature of custodial statements. It is reasoned that when investigators are under pressure to deliver results there is an inadvertent tendency to rely on methods involving coercion, threats, inducement or deception in spite of the legal prohibitions against them. Questions have also been raised about conceptual inconsistencies in the way that courts have expanded the scope of this right. One such objection is that if the legal system is obliged to respect the mental privacy of individuals, then why is there no prohibition against compelled testimony in civil cases which could expose parties to adverse consequences. Furthermore, questions have also been asked about the scope of the privilege being restricted to testimonial acts while excluding physical evidence which can be extracted through compulsion.

98. In response to John Wigmore's thesis about the separate foundations of the `rule against involuntary confessions', we must recognise the infusion of constitutional values into all branches of law, including procedural areas such as the law of evidence. While the above-mentioned criticisms have been made in academic commentaries, we must defer to the judicial precedents that control the scope of Article 20(3). For instance, the interrelationship between the privilege against self- incrimination and the requirements of observing due process of law were emphasized by William Douglas, J. in *Rochin* v. *California* 342 US 166 (1951), at p. 178:

> As an original matter it might be debatable whether the provision in the Fifth Amendment that no person `shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse.

I-A. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject?

99. The respondents have submitted that the compulsory administration of the impugned tests will only be sought to boost investigation efforts and that the test results by themselves will not be admissible as evidence. The next prong of this position is that if the test results enable the investigators to discover independent materials that are relevant to the case, such subsequently discovered materials should be admissible during trial. In order to evaluate this position, we must answer the following questions:

> • Firstly, we should clarify the scope of the `right against self-incrimination' - i.e. whether it should be construed as a broad protection that extends to the investigation stage or should it be viewed as a narrower right confined to the trial stage?
>
> • Secondly, we must examine the ambit of the words `accused of any offence' in Article 20(3) - i.e. whether the protection is available only to persons who are formally accused in criminal cases, or does it extend to include suspects and witnesses as well as those who apprehend incrimination in cases other than the one being investigated?
>
> • Thirdly, we must evaluate the evidentiary value of independent materials that are subsequently discovered with the help of the test results. In light of the `theory of confirmation by subsequent facts' incorporated in Section 27 of the Indian Evidence Act, 1872 we need to examine the compatibility between this section and Article 20 (3). Of special concern are situations when persons could be compelled to reveal information which leads to the discovery of independent materials. To answer this question, we must clarify what constitutes `incrimination' for the purpose of invoking Article 20(3).

Applicability of Article 20(3) to the stage of investigation

100. The question of whether Article 20(3) should be narrowly construed as a trial right or a broad protection that extends to the stage of investigation has been conclusively answered by our Courts. In *M.P. Sharma* v. *Satish Chandra* MANU/SC/0018/1954 : [1954] SCR 1077, it was held by Jagannadhadas, J. at pp. 1087-1088:

> Broadly stated, the guarantee in Article 20(3) is against `testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions...."
>
> "Indeed, every positive volitional act which furnished evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in Article 20(3) is `to be a witness' and not to `appear as a witness': It follows that the protection afforded to an accused in so far as it is related to the phrase `to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case."

101. These observations were cited with approval by B.P. Sinha, C.J. in *State of Bombay* v. *Kathi Kalu Oghad and Ors.* MANU/SC/0134/1961 : [1962] 3 SCR 10, at pp. 26-28. In the minority opinion, Das Gupta, J. affirmed the same position, *Id.* at p. 40:

> ...If the protection was intended to be confined to being a witness in Court then really it would have been an idle protection. It would be completely defeated by compelling a person to give all the evidence outside court and then, having what he was so compelled to do proved in court through other witnesses. An interpretation which so completely defeats the constitutional guarantee cannot, of course, be correct. The contention that the protection afforded by Article 20(3) is limited to the stage of trial must therefore be rejected.

102. The broader view of Article 20(3) was consolidated in *Nandini Satpathy* v. *P.L. Dani* MANU/SC/0139/1978 : (1978) 2 SCC 424:

> ...Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being a witness against oneself. Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3).This is precisely what Section 161(2) means. That Sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are coterminous in the protective area. While the code may be changed, the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3)." (at p. 435)
>
> "If the police can interrogate to the point of self- accusation, the subsequent exclusion of that evidence at the trial hardly helps because the harm has already been done. The police will prove through other evidence what they have procured through forced confession. So it is that the foresight of the framers has pre-empted self- incrimination at the incipient stages by not expressly restricting it to the trial

> stage in court. True, compelled testimony previously obtained is excluded. But the preventive blow falls also on pre-court testimonial compulsion. The condition, as the decisions now go, is that the person compelled must be an accused. Both precedent procurement and subsequent exhibition of self-incriminating testimony are obviated by intelligent constitutional anticipation. (at p. 449)

103. In upholding this broad view of Article 20(3), V.R. Krishna Iyer, J. relied heavily on the decision of the US Supreme Court in *Ernesto Miranda* v. *Arizona* 384 US 436 (1966). The majority opinion (by Earl Warren, C.J.) laid down that custodial statements could not be used as evidence unless the police officers had administered warnings about the accused's right to remain silent. The decision also recognised the right to consult a lawyer prior to and during the course of custodial interrogations. The practice promoted by this case is that it is only after a person has `knowingly and intelligently' waived of these rights after receiving a warning that the statements made thereafter can be admitted as evidence. The safeguards were prescribed in the following manner, *Id.* at pp. 444-445:

> ...the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [...] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

104. These safeguards were designed to mitigate the disadvantages faced by a suspect in a custodial environment. This was done in recognition of the fact that methods involving deception and psychological pressure were routinely used and often encouraged in police interrogations. Emphasis was placed on the ability of the person being questioned to fully comprehend and understand the content of the stipulated warning. It was held, *Id.* at pp. 457-458:

> In these cases, we might not find the defendant's statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect the precious Fifth Amendment right is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.... It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carried its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Professor Sutherland, `Crime and Confessions', 79 *Harvard Law Review* 21, 37 (1965)] The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles - that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

105. The opinion also explained the significance of having a counsel present during a custodial interrogation. It was noted, *Id.* at pp. 469-470:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more `will benefit only the recidivist and the professional.' [Brief for the *National District Attorneys Association* as amicus curiae, p. 14] Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. [Cited from *Escobedo* v. *State of Illinois* 378 U.S. 478, 485 ...] Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

106. The majority decision in *Miranda* (supra.) was not a sudden development in U.S. constitutional law. The scope of the privilege against self-incrimination had been progressively expanded in several prior decisions. The notable feature was the recognition of the interrelationship between the Fifth Amendment and the Fourteenth Amendment's guarantee that the government must observe the `due process of law' as well as the Fourth Amendment's protection against `unreasonable search and seizure'. While it is not necessary for us to survey these decisions, it will suffice to say that after *Miranda* (supra.), administering a warning about a person's right to silence during custodial interrogations as well as obtaining a voluntary waiver of the prescribed rights has become a ubiquitous feature in the U.S. criminal justice system. In the absence of such a warning and voluntary waiver, there is a presumption of compulsion with regard to the custodial statements, thereby rendering them inadmissible as evidence. The position in India is different since there is no automatic presumption of compulsion in respect of custodial statements. However, if the fact of compulsion is proved then the resulting statements are rendered inadmissible as evidence.

Who can invoke the protection of Article 20(3)?

107. The decision in *Nandini Satpathy's* case, (supra.) also touched on the question of who is an `accused' for the purpose of invoking Article 20(3). This question had been left open in *M.P. Sharma's* case (supra.). Subsequently, it was addressed in *Kathi Kalu Oghad* (supra.), at p. 37:

> To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, anytime after the statement has been made.

108. While there is a requirement of formal accusation for a person to invoke Article 20(3) it must be noted that the protection contemplated by Section 161(2), CrPC is wider. Section 161 (2) read with 161(1) protects `any person supposed to be acquainted with the facts and circumstances of the case' in the course of examination by the police. The language of this provision is as follows:

> 161. Examination of witnesses by police.
>
> (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

> (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
>
> (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

109. Therefore the `right against self-incrimination' protects persons who have been formally accused as well as those who are examined as suspects in criminal cases. It also extends to cover witnesses who apprehend that their answers could expose them to criminal charges in the ongoing investigation or even in cases other than the one being investigated. Krishna Iyer, J. clarified this position MANU/SC/0139/1978 : (1978) 2 SCC 424, at p. 435:

> The learned Advocate General, influenced by American decisions rightly agreed that in expression Section 161(2) of the Code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression `expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges.

It was further observed, *Id.* at pp. 451-452 (Para. 50):

> ...`To be a witness against oneself' is not confined to the particular offence regarding which the questioning is made but extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from `tendency to be exposed to a criminal charge'. A `criminal charge' covers any criminal charge then under investigation or trial or which imminently threatens the accused.

110. Even though Section 161(2) of the CrPC casts a wide protective net to protect the formally accused persons as well as suspects and witnesses during the investigative stage, Section 132 of the Evidence Act limits the applicability of this protection to witnesses during the trial stage. The latter provision provides that witnesses cannot refuse to answer questions during a trial on the ground that the answers could incriminate them. However, the proviso to this section stipulates that the content of such answers cannot expose the witness to arrest or prosecution, except for a prosecution for giving false evidence. Therefore, the protection accorded to witnesses at the stage of trial is not as wide as the one accorded to the accused, suspects and witnesses during investigation [under Section 161(2), CrPC]. Furthermore, it is narrower than the protection given to the accused during the trial stage [under Section 313(3) and Proviso (b) to Section 315(1), CrPC]. The legislative intent is to preserve the fact- finding function of a criminal trial. Section 132 of the Evidence Act reads:

> 132. Witness not excused from answering on ground that answer will criminate. - A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.
>
> Proviso. - Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

111. Since the extension of the `right against self- incrimination' to suspects and witnesses has its basis in Section 161(2), CrPC it is not readily available to persons who are examined during proceedings that are not governed by the code. There is a distinction between proceedings of a purely criminal nature and those proceedings which can culminate in punitive remedies and yet cannot be characterised as criminal proceedings. The consistent position has been that ordinarily Article 20(3) cannot be invoked by witnesses during proceedings that cannot be characterised as criminal proceedings. In administrative and quasi-criminal proceedings, the protection of Article 20(3) becomes available only after a person has been formally accused of committing an offence. For instance in *Raja Narayanlal Bansilal* v. *Maneck Phiroz Mistry* MANU/SC/0016/1960 : [1961] 1 SCR 417, the contention related to the admissibility of a statement made before an inspector who was appointed under the Companies Act, 1923to investigate the affairs of a company and report thereon. It had to be decided whether the persons who were examined by the concerned inspector could claim the protection of Article 20 (3). The question was answered, *Id.* at p. 438:

> The scheme of the relevant sections is that the investigation begins broadly with a view to examine the management of the affairs of the company to find out whether any irregularities have been committed or not. In such a case there is no accusation, either formal or otherwise, against any specified individual; there may be a general allegation that the affairs are irregularly, improperly or illegally managed ; but who would be responsible for the affairs which are reported to be irregularly managed is a matter which would be determined at the end of the enquiry. At the commencement of the enquiry and indeed throughout its proceedings there is no accused person, no accuser, and no accusation against anyone that he has committed an offence. In our opinion a general enquiry and investigation into the affairs of the company thus contemplated cannot be regarded as an investigation which starts with an accusation contemplated in Article 20(3) of the Constitution....

112. A similar issue arose for consideration in *Romesh Chandra Mehta* v. *State of West Bengal* MANU/SC/0282/1968 : [1969] 2 SCR 461, wherein it was held, at p. 472:

> Normally a person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence before a Magistrate competent to try or send to another Magistrate for trial of the offence. Where a Customs Officer arrests a person and informs that person of the grounds of his arrest, [which he is bound to do under Article 22(1) of the Constitution] for the purpose of holding an inquiry into the infringement of the provisions of the Sea Customs Act which he has reason to believe has taken place, there is no formal accusation of an offence. In the case of an offence by infringement of the Sea Customs Act which is punishable at the trial before a Magistrate, there is an accusation when a complaint is lodged by an officer competent in that behalf before the Magistrate.

113. In *Balkishan A. Devidayal* v. *State of Maharashtra* MANU/SC/0112/1980 : (1980) 4 SCC 600, one of the contentious issues was whether the statements recorded by a Railway Police Force (RPF) officer during an inquiry under the Railway Property (Unlawful Possession) Act, 1996 would attract the protection of Article 20(3). Sarkaria, J. held that such an inquiry was substantially different from an investigation contemplated under the CrPC, and therefore formal accusation was a necessary condition for a person to claim the protection of Article 20(3). It was observed, *Id.* at p. 623:

> To sum up, only a person against whom a formal accusation of the commission of an offence has been made can be a person `accused of an offence' within the meaning of Article 20(3). Such formal accusation may be specifically made against him in an FIR or a formal complaint or any other formal document or notice served on that person, which ordinarily results in his prosecution in court. In the instant case no such formal accusation has been made against the appellant when his statements in question were recorded by the RPF Officer.

What constitutes `incrimination' for the purpose of Article 20(3)?

114. We can now examine the various circumstances that could `expose a person to criminal charges'. The scenario under consideration is one where a person in custody is compelled to reveal information which aids the investigation efforts. The information so revealed can prove to be incriminatory in the following ways:

> • The statements made in custody could be directly relied upon by the prosecution to strengthen their case. However, if it is shown that such statements were made under circumstances of compulsion, they will be excluded from the evidence.
>
> • Another possibility is that of `derivative use', i.e. when information revealed during questioning leads to the discovery of independent materials, thereby furnishing a link in the chain of evidence gathered by the investigators.
>
> • Yet another possibility is that of `transactional use', i.e. when the information revealed can prove to be helpful for the investigation and prosecution in cases other than the one being investigated.
>
> • A common practice is that of extracting materials or information, which are then compared with materials that are already in the possession of the investigators. For instance, handwriting samples and specimen signatures are routinely obtained for the purpose of identification or corroboration.

115. The decision in *Nandini Satpathy's* case (supra.) sheds light on what constitutes incrimination for the purpose of Article 20(3). Krishna Iyer, J. observed, at pp. 449-450:

> In this sense, answers that would in themselves support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime become incriminatory and offend Article 20(3) if elicited by pressure from the mouth of the accused....
>
> An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self- incriminations but leaves untouched other relevant facts.

116. Reliance was also placed on the decision of the US Supreme Court in *Samuel Hoffman* v. *United States* 341 US 479 (1951). The controversy therein was whether the privilege against self-incrimination was available to a person who was called on to testify as a witness in a grand-jury investigation. Clark, J. answered the question in the affirmative, at p. 486:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. [...]
>
> But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. [...]
>
> (internal citations omitted)
>
> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure may result." (at p. 487)

117. However, Krishna Iyer, J. also cautioned against including in the prohibition even those answers which might be used as a step towards obtaining evidence against the accused. It was stated MANU/SC/0139/1978 : (1978) 2 SCC 424, at p. 451:

> The policy behind the privilege, under our scheme, does not swing so wide as to sweep out of admissibility statements neither confessional per se nor guilty in tendency but merely relevant facts which, viewed in any setting, does not have a sinister import. To spread the net so wide is to make a mockery of the examination of the suspect, so necessitous in the search for truth. Over breadth undermines, and we demur to such morbid exaggeration of a wholesome protection....
>
> In *Kathi Kalu Oghad's* case, this Court authoritatively observed, on the bounds between constitutional proscription and testimonial permission:
>
> > 'In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused at least probable, considered by itself.' MANU/SC/0134/1961 : [1962] 3 SCR 10, 32
>
> Again the Court indicated that Article 20(3) could be invoked only against statements which `had a material bearing on the criminality of the maker of the statement'. `By itself' does not exclude the setting or other integral circumstances but means something in the fact disclosed a guilt element. Blood on clothes, gold bars with notorious marks and presence on the scene or possession of the lethal weapon or corrupt currency have a tale to tell, beyond red fluid, precious metal, gazing at the stars or testing sharpness or value of the rupee. The setting of the case is an implied component of the statement.

118. In light of these observations, we must examine the permissibility of extracting statements which may furnish a link in the chain of evidence and hence create a risk of exposure to criminal charges. The crucial question is whether such derivative use of information extracted in a custodial environment is compatible with Article 20(3). It is a settled principle that statements made in custody are considered to be unreliable unless they have been subjected to cross-examination or judicial scrutiny. The scheme created by the Code of Criminal Procedure and the Indian Evidence Act also mandates that confessions made before police officers are ordinarily not admissible as evidence and it is only the statements made in the presence of a judicial magistrate which can be given weightage. The doctrine of excluding the `fruits of a poisonous tree' has been incorporated in Sections 24, 25 and 26 of the Indian Evidence Act, 1872 which read as follows:

> 24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding. - A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.
>
> 25. Confession to police officer not proved. - No confession made to a police officer shall be proved as against a person accused of any offence.
>
> 26. Confession by accused while in custody of police not to be proved against him. - No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

119. We have already referred to the language of Section 161, CrPC which protects the accused as well as suspects and witnesses who are examined during the course of investigation in a criminal case. It would also be useful to refer to Sections 162, 163 and 164 of the CrPC which lay down procedural safeguards in respect of statements made by persons during the course of investigation. However, Section 27 of the Evidence Act incorporates the `theory of confirmation by subsequent facts' - i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those which `furnish a link in the chain of evidence' needed for a successful prosecution. This provision reads as follows:

> 27. How much of information received from accused may be proved. - Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

120. This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3). The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *Kathi Kalu Oghad* (supra.). It was observed in the majority opinion by Jagannadhadas, J., at pp. 33-34:

> The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that Section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of Clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion has been used in obtaining the information.
>
> (emphasis supplied)

This position was made amply clear at pp. 35-36:

> Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it.

121. The minority opinion also agreed with the majority's conclusion on this point since Das Gupta, J., held at p. 47:

> Section 27 provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of the information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. It cannot be

> disputed that by giving such information the accused furnishes evidence, and therefore is a `witness' during the investigation. Unless, however he is `compelled' to give the information he cannot be said to be `compelled' to be a witness; and so Article 20(3) is not infringed. Compulsion is not however inherent in the receipt of information from an accused person in the custody of a police officer. There may be cases where an accused in custody is compelled to give the information later on sought to be proved under Section 27. There will be other cases where the accused gives the information without any compulsion. Where the accused is compelled to give information it will be an infringement of Article 20(3); but there is no such infringement where he gives the information without any compulsion....

122. We must also address another line of reasoning which was adopted in one of the impugned judgments. It was stated that the exclusionary rule in evidence law is applicable to statements that are inculpatory in nature. Based on this premise, it was observed that at the time of administering the impugned tests, it cannot be ascertained whether the resulting revelations or inferences will prove to be inculpatory or exculpatory in due course. Taking this reasoning forward, it was held that the compulsory administration of the impugned tests should be permissible since the same does not necessarily lead to the extraction of inculpatory evidence. We are unable to agree with this reasoning.

123. The distinction between inculpatory and exculpatory evidence gathered during investigation is relevant for deciding what will be admissible as evidence during the trial stage. The exclusionary rule in evidence law mandates that if inculpatory evidence has been gathered through improper methods (involving coercion, threat or inducement among others) then the same should be excluded from the trial, while there is no such prohibition on the consideration of exculpatory evidence. However, this distinction between the treatment of inculpatory and exculpatory evidence is made retrospectively at the trial stage and it cannot be extended back to the stage of investigation. If we were to permit the admission of involuntary statement on the ground that at the time of asking a question it is not known whether the answer will be inculpatory or exculpatory, the `right against self-incrimination' will be rendered meaningless. The law confers on `any person' who is examined during an investigation, an effective choice between speaking and remaining silent. This implies that it is for the person being examined to decide whether the answer to a particular question will eventually prove to be inculpatory or exculpatory. Furthermore, it is also likely that the information or materials collected at an earlier stage of investigation can prove to be inculpatory in due course.

124. However, it is conceivable that in some circumstances the testimony extracted through compulsion may not actually lead to exposure to criminal charges or penalties. For example this is a possibility when the investigators make an offer of immunity against the direct use, derivative use or transactional use of the testimony. Immunity against direct use entails that a witness will not be prosecuted on the basis of the statements made to the investigators. A protection against derivative use implies that a person will not be prosecuted on the basis of the fruits of such testimony. Immunity against transactional use will shield a witness from criminal charges in cases other than the one being investigated. It is of course entirely up to the investigating agencies to decide whether to offer immunity and in what form. Even though this is distinctly possible, it is difficult to conceive of such a situation in the context of the present case. A person who is given an offer of immunity against prosecution is far more likely to voluntarily cooperate with the investigation efforts. This could be in the form of giving testimony or helping in the discovery of material evidence. If a person is freely willing to cooperate with the investigation efforts, it would be redundant to compel such a person to undergo the impugned tests. If reliance on such tests is sought for refreshing a cooperating witness' memory, the person will in all probability give his/her consent to undergo these tests.

125. It could be argued that the compulsory administration of the impugned tests can prove to be useful in instances where the cooperating witness has difficulty in remembering the relevant facts or is wilfully concealing crucial details. Such situations could very well arise when a person who is a co- accused is offered immunity from prosecution in return for cooperating with the investigators. Even though the right against self-incrimination is not directly applicable in such situations, the relevant legal inquiry is whether the compulsory administration of the impugned tests meets the requisite standard of `substantive due process' for placing restraints on personal

liberty.

126. At this juncture, it must be reiterated that Indian law incorporates the `rule against adverse inferences from silence' which is operative at the trial stage. As mentioned earlier, this position is embodied in a conjunctive reading of Article 20(3) of the Constitution and Sections 161(2), 313(3) and Proviso (b) of Section 315(1) of the CrPC. The gist of this position is that even though an accused is a competent witness in his/her own trial, he/she cannot be compelled to answer questions that could expose him/her to incrimination and the trial judge cannot draw adverse inferences from the refusal to do so. This position is cemented by prohibiting any of the parties from commenting on the failure of the accused to give evidence. This rule was lucidly explained in the English case of *Woolmington* v. *DPP* (1935) AC 462, at p. 481:

> The `right to silence' is a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court.

127. The *180th Report* of the Law Commission of India (May 2002) dealt with this very issue. It considered arguments for diluting the `rule against adverse inferences from silence'. Apart from surveying several foreign statutes and decisions, the report took note of the fact that Section 342(2) of the erstwhile Code of Criminal Procedure, 1898 permitted the trial judge to draw an inference from the silence of the accused. However, this position was changed with the enactment of the new Code of Criminal Procedure in 1973, thereby prohibiting the making of comments as well as the drawing of inferences from the fact of an accused's silence. In light of this, the report concluded:

> ...We have reviewed the law in other countries as well as in India for the purpose of examining whether any amendments are necessary in the Code of Criminal Procedure, 1973. On a review, we find that no changes in the law relating to silence of the accused are necessary and if made, they will be ultra vires of Article 20(3) and Article 21 of the Constitution of India. We recommend accordingly.

128. Some commentators have argued that the `rule against adverse inferences from silence' should be broadly construed in order to give protection against non-penal consequences. It is reasoned that the fact of a person's refusal to answer questions should not be held against him/her in a wide variety of settings, including those outside the context of criminal trials. A hypothetical illustration of such a setting is a deportation hearing where an illegal immigrant could be deported following a refusal to answer questions or furnish materials required by the concerned authorities. This question is relevant for the present case because a person who refuses to undergo the impugned tests during the investigative stage could face non-penal consequences which lie outside the protective scope of Article 20(3). For example, a person who refuses to undergo these tests could face the risk of custodial violence, increased police surveillance or harassment thereafter. Even a person who is compelled to undergo these tests could face such adverse consequences on account of the contents of the test results if they heighten the investigators' suspicions. Each of these consequences, though condemnable, fall short of the requisite standard of `exposure to criminal charges and penalties' that has been enumerated in Section 161(2) of the CrPC. Even though Article 20(3) will not be applicable in such circumstances, reliance can be placed on Article 21 if such non-penal consequences amount to a violation of `personal liberty' as contemplated under the Constitution. In the past, this Court has recognised the rights of prisoners (undertrials as well as convicts) as well as individuals in other custodial environments to receive `fair, just and equitable' treatment. For instance in *Sunil Batra* v. *Delhi Administration* MANU/SC/0184/1978 : (1978) 4 SCC 494, it was decided that practices such as `solitary confinement' and the use of bar- fetters in jails were violative of Article 21. Hence, in circumstances where persons who refuse to answer questions during the investigative stage are exposed to adverse consequences of a non-penal nature, the inquiry should account for the expansive scope of Article 21 rather than the right contemplated by Article 20(3).

I-B. Whether the results derived from the impugned techniques amount to

`testimonial compulsion' thereby attracting the bar of Article 20(3)?

129. The next issue is whether the results gathered from the impugned tests amount to `testimonial compulsion', thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes `testimonial compulsion' and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or `furnish a link in the chain of evidence' which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.

130. It is quite evident that the narcoanalysis technique involves a testimonial act. A subject is encouraged to speak in a drug-induced state, and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation. In one of the impugned judgments, the compulsory administration of the narcoanalysis technique was defended on the ground that at the time of conducting the test, it is not known whether the results will eventually prove to be inculpatory or exculpatory. We have already rejected this reasoning. We see no other obstruction to the proposition that the compulsory administration of the narcoanalysis technique amounts to `testimonial compulsion' and thereby triggers the protection of Article 20(3).

131. However, an unresolved question is whether the results obtained through polygraph examination and the BEAP test are of a testimonial nature. In both these tests, inferences are drawn from the physiological responses of the subject and no direct reliance is placed on verbal responses. In some forms of polygraph examination, the subject may be required to offer verbal answers such as `Yes' or `No', but the results are based on the measurement of changes in several physiological characteristics rather than these verbal responses. In the BEAP test, the subject is not required to give any verbal responses at all and inferences are drawn from the measurement of electrical activity in the brain. In the impugned judgments, it has been held that the results obtained from both the Polygraph examination and the BEAP test do not amount to `testimony' thereby lying outside the protective scope of Article 20(3). The same assertion has been reiterated before us by the counsel for the respondents. In order to evaluate this position, we must examine the contours of the expression `testimonial compulsion'.

132. The question of what constitutes `testimonial compulsion' for the purpose of Article 20(3) was addressed in *M.P. Sharma's* case (supra.). In that case, the Court considered whether the issuance of search warrants in the course of an investigation into the affairs of a company (following allegations of misappropriation and embezzlement) amounted to an infringement of Article 20(3). The search warrants issued under Section 96 of the erstwhile Code of Criminal Procedure, 1898 authorised the investigating agencies to search the premises and seize the documents maintained by the said company. The relevant observations were made by Jagannadhadas, J., at pp. 1087-1088:

> ...The phrase used in Article 20(3) is `to be a witness'. A person can `be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness [see Section 119 of the Evidence Act or the like]. `To be a witness' is nothing more than `to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes....
>
> Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or

submission on his part....

133. These observations suggest that the phrase `to be a witness' is not confined to oral testimony for the purpose of invoking Article 20(3) and that it includes certain non-verbal forms of conduct such as the production of documents and the making of intelligible gestures. However, in *Kathi Kalu Oghad* (supra.), there was a disagreement between the majority and minority opinions on whether the expression `to be a witness' was the same as `to furnish evidence'. In that case, this Court had examined whether certain statutory provisions, namely - Section 73 of the Evidence Act, Sections 5 and 6 of the Identification of Prisoners Act, 1920 and Section 27 of the Evidence Act were compatible with Article 20(3). Section 73 of the Evidence Act empowered courts to obtain specimen handwriting or signatures and finger impressions of an accused person for purposes of comparison. Sections 5 and 6 of the Identification of Prisoners Act empowered a Magistrate to obtain the photograph or measurements of an accused person. In respect of Section 27 of the Evidence Act, there was an agreement between the majority and the minority opinions that the use of compulsion to extract custodial statements amounts to an exception to the `theory of confirmation by subsequent facts'. We have already referred to the relevant observations in an earlier part of this opinion. Both the majority and minority opinions ruled that the other statutory provisions mentioned above were compatible with Article 20(3), but adopted different approaches to arrive at this conclusion. In the majority opinion it was held that the ambit of the expression `to be a witness' was narrower than that of `furnishing evidence'. B.P. Sinha, C.J. observed, MANU/SC/0134/1961 : [1962] 3 SCR 10, at pp. 29-32:

> `To be a witness' may be equivalent to `furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. `Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution- makers were aware of the existing law, for example, Section 73 of the Evidence Act or Section 5 and 6 of the Identification of Prisoners Act (XXXIII of 1920).
>
> ...The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not `to be a witness'. `To be a witness' means imparting knowledge in respect of relevant fact, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said `to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay or giving his opinion, as an expert, in respect of matters in controversy. Evidence has been classified by text writers into three categories, namely, (1) oral testimony; (2) evidence furnished by documents; and (3) material evidence. We have already indicated that we are in agreement with the Full Court decision in Sharma's case MANU/SC/0018/1954 : [1954] SCR 1077, that the prohibition in Clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him....
>
> ...Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any

> of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a `personal testimony'. The giving of a `personal testimony' must depend on his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to `furnishing evidence' in the larger sense, is not included within the expression `to be a witness'.
>
> In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person atleast probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of `testimony'.

134. Hence, B.P. Sinha, C.J. construed the expression `to be a witness' as one that was limited to oral or documentary evidence, while further confining the same to statements that could lead to incrimination by themselves, as opposed to those used for the purpose of identification or comparison with facts already known to the investigators. The minority opinion authored by Das Gupta, J. (3 judges) took a different approach, which is evident from the following extracts, *Id.* at pp. 40-43:

> That brings us to the suggestion that the expression `to be a witness' must be limited to a statement whether oral or in writing by an accused person imparting knowledge of relevant facts; but that mere production of some material evidence, whether documentary or otherwise would not come within the ambit of this expression. This suggestion has found favour with the majority of the Bench, we think however that this is an unduly narrow interpretation. We have to remind ourselves that while on the one hand we should bear in mind that the Constitution-makers could not have intended to stifle legitimate modes of investigation we have to remember further that quite clearly they thought that certain things should not be allowed to be done, during the investigation, or trial, however helpful they might seem to be to the unfolding of truth and an unnecessary apprehension of disaster to the police system and the administration of justice, should not deter us from giving the words their proper meaning. It appears to us that to limit the meaning of the words `to be a witness' in Article 20(3) in the manner suggested would result in allowing compulsion to be used in procuring the production from the accused of a large number of documents, which are of evidentiary value, sometimes even more so than any oral statement of a witness might be....
>
> ...There can be no doubt that to the ordinary user of English words, the word `witness' is always associated with evidence, so that to say that `to be a witness' is to `furnish evidence' is really to keep to the natural meaning of the words....
>
> ...It is clear from the scheme of the various provisions, dealing with the matter that

> the governing idea is that to be evidence, the oral statement or a statement contained in a document, shall have a tendency to prove a fact - whether it be a fact in issue or a relevant fact - which is sought to be proved. Though this definition of evidence is in respect of proceedings in Court it will be proper, once we have come to the conclusion, that the protection of Article 20(3) is available even at the stage of investigation, to hold that at that stage also the purpose of having a witness is to obtain evidence and the purpose of evidence is to prove a fact.
>
> The illustrations we have given above show clearly that it is not only by imparting of his knowledge that an accused person assists the proving of a fact; he can do so even by other means, such as the production of documents which though not containing his own knowledge would have a tendency to make probable the existence of a fact in issue or a relevant fact.

135. Even though Das Gupta, J. saw no difference between the scope of the expressions `to be a witness' and `to furnish evidence', the learned judge agreed with the majority's conclusion that for the purpose of invoking Article 20(3) the evidence must be incriminating by itself. This entailed that evidence could be relied upon if it is used only for the purpose of identification or comparison with information and materials that are already in the possession of the investigators. The following observations were made at pp. 45-46:

> ...But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself....
>
> ...This view, it may be pointed out does not in any way militate against the policy underlying the rule against `testimonial compulsion' we have already discussed above. There is little risk, if at all, in the investigator or the prosecutor being induced to lethargy or inaction because he can get such handwriting or impressions from an accused person. For, by themselves they are of little or of no assistance to bring home the guilt of an accused. Nor is there any chance of the accused to mislead the investigator into wrong channels by furnishing false evidence. For, it is beyond his power to alter the ridges or other characteristics of his hand, palm or finger or to alter the characteristics of his handwriting.
>
> We agree therefore with the conclusion reached by the majority of the Bench that there is no infringement of Article 20(3) of the Constitution by compelling an accused person to give his specimen handwriting or signature; or impressions of his fingers, palm or foot to the investigating officer or under orders of a court for the purpose of comparison under the provisions of Section 73 of the Indian Evidence Act; though we have not been able to agree with the view of our learned brethren that `to be a witness' in Article 20(3) should be equated with the imparting of personal knowledge or that an accused does not become a witness when he produces some document not in his own handwriting even though it may tend to prove facts in issue or relevant facts against him.

136. Since the majority decision in *Kathi Kalu Oghad* (supra.) is the controlling precedent, it will be useful to re- state the two main premises for understanding the scope of `testimonial compulsion'. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to `personal testimony' thereby coming within the prohibition contemplated by Article 20(3). In most cases, such `personal testimony' can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can

be invoked when the statements are likely to lead to incrimination by themselves or `furnish a link in the chain of evidence' needed to do so. We must emphasize that a situation where a testimonial response is used for comparison with facts already known to investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.

137. The recognition of the distinction between testimonial acts and physical evidence for the purpose of invoking Article 20(3) of the Constitution finds a close parallel in some foreign decisions. In *Armando Schmerber* v. *California* 384 US 757 (1966), the U.S. Supreme Court had to determine whether an involuntary blood test of a defendant had violated the Fifth Amendment. The defendant was undergoing treatment at a hospital following an automobile accident. A blood sample was taken against his will at the direction of a police officer. Analysis of the same revealed that Schmerber had been intoxicated and these results were admitted into evidence, thereby leading to his conviction for drunk driving. An objection was raised on the basis of the Fifth Amendment and the majority opinion (Brennan, J.) relied on a distinction between evidence of a `testimonial' or `communicative' nature as opposed to evidence of a `physical' or `real nature', concluding that the privilege against self-incrimination applied to the former but not to the latter. In arriving at this decision, reference was made to several precedents with a prominent one being *United States* v. *Holt* 218 US 245 (1910). In that case, a defendant was forced to try on an article of clothing during the course of investigation. It had been ruled that the privilege against self-incrimination prohibited the use of compulsion to `extort communications' from the defendant, but not the use of the defendant's body as evidence.

138. In addition to citing John Wigmore's position that `the privilege is limited to testimonial disclosures' the Court in *Schmerber* also took note of other examples where it had been held that the privilege did not apply to physical evidence, which included `compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.' However, it was cautioned that the privilege applied to testimonial communications, irrespective of what form they might take. Hence it was recognised that the privilege not only extended to verbal communications, but also to written words as well as gestures intended to communicate [for, e.g., pointing or nodding]. This line of thinking becomes clear because the majority opinion indicated that the distinction between testimonial and physical acts may not be readily applicable in the case of Lie-Detector tests. Brennan, J. had noted, 384 US 757 (1966), at p. 764:

> Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain `physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege `is as broad as the mischief against which it seeks to guard.' [...]

In a recently published paper, Michael S. Pardo (2008) has made the following observation in respect of this judgment [Cited from: Michael S. Pardo, `Self-Incrimination and the Epistemology of Testimony', 30 *Cardozo Law Review* 1023-1046 (December 2008) at pp. 1027-1028]:

> the Court notes that even the physical-testimonial distinction may break down when physical evidence is meant to compel `responses which are essentially testimonial' such as a lie-detector test measuring physiological responses during interrogation.

139. Following the *Schmerber* decision (supra.), the distinction between physical and testimonial evidence has been applied in several cases. However, some complexities have also

arisen in the application of the testimonial-physical distinction to various fact-situations. While we do not need to discuss these cases to decide the question before us, we must take note of the fact that the application of the testimonial- physical distinction can be highly ambiguous in relation to non-verbal forms of conduct which nevertheless convey relevant information. Among other jurisdictions, the European Court of Human Rights (ECtHR) has also taken note of the distinction between testimonial and physical acts for the purpose of invoking the privilege against self-incrimination. In *Saunders* v. *United Kingdom* (1997) 23 EHRR 313, it was explained:

> ...The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence... The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.

Evolution of the law on `medical examination'

140. With respect to the testimonial-physical distinction, an important statutory development in our legal system was the introduction of provisions for medical examination with the overhauling of the Code of Criminal Procedure in 1973. Sections 53 and 54 of the CrPC contemplate the medical examination of a person who has been arrested, either at the instance of the investigating officer or even the arrested person himself. The same can also be done at the direction of the jurisdictional court.

141. However, there were no provisions for authorising such a medical examination in the erstwhile Code of Criminal Procedure, 1898. The absence of a statutory basis for the same had led courts to hold that a medical examination could not be conducted without the prior consent of the person who was to be subjected to the same. For example in *Bhondar* v. *Emperor* MANU/WB/0223/1931 : AIR 1931 Cal 601, Lord Williams, J. held, at p. 602:

> If it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop.
>
> ...Any such examination without the consent of the accused would amount to an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assaults upon prisoners for the purpose of procuring evidence against them. If the legislature desires that evidence of this kind should be given, it will be quite simple to add a short section to the Code of Criminal Procedure expressly giving power to order such a medical examination."
>
> S.K. Ghose, J. concurred, at p. 604:
>
> > Nevertheless the examination of an arrested person in hospital by a doctor, not for the benefit of the prisoner's health, but simply by way of a second search, is not provided for by Code, and is such a case the doctor may not examine the prisoner without his consent. It would be a rule of caution to have such consent noted in the medical report, so that the doctor would be in a position to testify to such consent if called upon to do so.

> A similar conclusion was arrived at by Tarkunde, J. in *Deomam Shamji Patel* v. *State of Maharashtra* MANU/MH/0088/1959 : AIR 1959 Bom 284, who held that a person suspected or accused of having committed an offence cannot be forcibly subjected to a medical examination. It was also held that if police officers use force for this purpose, then a person can lawfully exercise the right of private defence to offer resistance.

142. It was the 37th and 41st Reports of the Law Commission of India which recommended the insertion of a provision in the Code of Criminal Procedure to enable medical examination without the consent of an accused. These recommendations proved to be the precursor for the inclusion of Sections 53 and 54 in the Code of Criminal Procedure, 1973. It was observed in the *37th Report (December 1967)*, at pp. 205-206:

> ...It will suffice to refer to the decision of the Supreme Court in Kathi Kalu MANU/SC/0134/1961 : AIR 1961 SC 1808 which has the effect of confining the privilege under Article 20(3) to testimony - written or oral. [Fn ...] The Supreme Court's judgment in Kathi Kalu should be taken as overruling the view taken in some earlier decisions, [Fn 6, 7 ...] invalidating provisions similar to Section 5, Identification of Prisoners Act, 1920.
>
> The position in the U.S.A. has been summarised [Fn 8 - Emerson G., `Due Process and the American Criminal Trial', 33 *Australian Law Journal* 223, 231 (1964)]
>
> `Less certain is the protection accorded to the defendant with regard to non-testimonial physical evidence other than personal papers. Can the accused be forced to supply a sample of his blood or urine if the resultant tests are likely to further the prosecution's case? Can he be forced to give his finger prints to wear a disguise or certain clothing, to supply a pair of shoes which might match footprints at the scene of the crime, to stand in a line-up, to submit to a hair cut or to having his hair dyed, or to have his stomach pumped or a fluoroscopic examination of the contents of his intestines? The literature on this aspect of self- incrimination is voluminous. [Fn...]
>
> The short and reasonably accurate answer to the question posed is that almost all such physical acts can be required. [Fn...] Influenced by the historical development of the doctrine, its purpose, and the need to balance the conflicting interests of the individual and society, the courts have generally restricted the protection of the Fifth Amendment to situations where the defendant would be required to convey ideas, or where the physical acts would offend the decencies of civilized conduct.
>
> (some internal citations omitted)

Taking note of *Kathi Kalu Oghad* (supra.) and the distinction drawn between testimonial and physical acts in American cases, the Law Commission observed that a provision for examination of the body would reveal valuable evidence. This view was taken forward in the *41st Report* which recommended the inclusion of a specific provision to enable medical examination during the course of investigation, irrespective of the subject's consent. [See: *41st* Report of the Law Commission of India, Vol. I (September 1969), Para 5.1 at p. 37]

143. We were also alerted to some High Court decisions which have relied on *Kathi Kalu Oghad* (supra.) to approve the taking of physical evidence such as blood and hair samples in the course of investigation. Following the overhaul of the Code of Criminal Procedure in 1973, the position became amply clear. In recent years, the judicial power to order a medical examination, albeit in a different context, has been discussed by this Court in *Sharda* v. *Dharampal* MANU/SC/0260/2003 : (2003) 4 SCC 493. In that case, the contention related to the validity of a civil court's direction for conducting a medical examination to ascertain the mental state of a party in a divorce proceeding. Needless to say, the mental state of a party was a relevant issue before the trial court, since insanity is a statutory ground for obtaining divorce under the Hindu Marriage Act, 1955. S.B. Sinha, J. held that Article 20(3) was anyway not applicable in a civil proceeding and that the civil court could direct the medical examination in exercise of its

inherent powers under Section 151 of the Code of Civil Procedure, since there was no ordinary statutory basis for the same. It was observed, *Id.* at p. 508:

> Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.
>
> Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so. In matrimonial disputes, the court also has a conciliatory role to play - even for the said purpose it may require expert advice.
>
> Under Section 75(e) of the Code of Civil Procedure and Order 26, Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.

144. The decision had also cited some foreign precedents dealing with the authority of investigators and courts to require the collection of DNA samples for the purpose of comparison. In that case the discussion centered on the `right to privacy'. So far, the authority of investigators and courts to compel the production of DNA samples has been approved by the Orissa High Court in *Thogorani* v. *State of Orissa* 2004 Cri L J 4003 (Ori).

145. At this juncture, it should be noted that the Explanation to Sections 53, 53A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical examination, especially with regard to the extraction of bodily substances. The amended provision reads:

53. Examination of accused by medical practitioner at the request of police officer.-

> (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
>
> (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.
>
> Explanation. - In this section and in Sections 53A and 54, -
>
> > (a) `examination' shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b)`registered medical practitioner' means a medical practitioner who possesses any medical qualification as defined in Clause (h) of Section 2 of the Indian Medical Council Act , 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

(emphasis supplied)

146. The respondents have urged that the impugned techniques should be read into the relevant provisions - i.e. Sections 53 and 54 of CrPC. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation, either at the instance of the investigating officer or the arrested person. It has also been clarified that it is within the powers of a court to direct such a medical examination on its own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Furthermore, Section 53 contemplates the use of `force as is reasonably necessary' for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

147. The contentious provision is the Explanation to Sections 53, 53A and 54 of the CrPC (amended in 2005) which has been reproduced above. It has been contended that the phrase `modern and scientific techniques including DNA profiling and such other tests' should be liberally construed to include the impugned techniques. It was argued that even though the narcoanalysis technique, polygraph examination and the BEAP test have not been expressly enumerated, they could be read in by examining the legislative intent. Emphasis was placed on the phrase `and such other tests' to argue that the Parliament had chosen an approach where the list of `modern and scientific techniques' contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in light of scientific advancements. With the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes.

148. On the other hand, the counsel for the appellants have contended that the Parliament was well aware of the impugned techniques at the time of the 2005 amendment and consciously chose not to include them in the amended Explanation to Sections 53, 53A and 54 of the CrPC. It was reasoned that this choice recognised the distinction between testimonial acts and physical evidence. While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings can be readily characterised as physical evidence, the same cannot be said for the techniques in question. This argument was supported by invoking the rule of `ejusdem generis' which is used in the interpretation of statutes. This rule entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of the commonality between those specific words. In the present case, the substances enumerated are all examples of physical evidence. Hence the words `and such other tests' which appear in the Explanation to Sections 53, 53A and 54 of the CrPC should be construed to include the examination of physical evidence but not that of testimonial acts.

149. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase `and such other tests' [which appears in the Explanation to Sections 53, 53A and 54 of the CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of `ejusdem generis'. It should also be noted that the Explanation to Sections 53, 53A and 54 of the CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts.

150. However, the submissions touching on the legislative intent require some reflection. While

it is most likely that the Parliament was well aware of the impugned techniques at the time of the 2005 amendment to the CrPC and deliberately chose not to enumerate them, we cannot arrive at a conclusive finding on this issue. While it is open to courts to examine the legislative history of a statutory provision, it is not proper for us to try and conclusively ascertain the legislative intent. Such an inquiry is impractical since we do not have access to all the materials which would have been considered by the Parliament. In such a scenario, we must address the respondent's arguments about the interpretation of statutes with regard to scientific advancements. To address this aspect, we can refer to some extracts from a leading commentary on the interpretation of statutes [See: Justice G.P. Singh, *Principles of Statutory Interpretation, 10th edn.* (New Delhi: Wadhwa & Co. Nagpur, 2006) at pp. 239-247]. The learned author has noted, at pp. 240-241:

> Reference to the circumstances existing at the time of the passing of the statute does not, therefore, mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute.... The question again is as to what was the intention of the law makers: Did they intend as originalists may argue, that the words of the statute be given the meaning they would have received immediately after the statute's enactment or did they intend as dynamists may contend that it would be proper for the court to adopt the current meaning of the words? The courts have now generally leaned in favour of dynamic construction. [...] But the doctrine has also its limitations. For example it does not mean that the language of an old statute can be construed to embrace something conceptually different.
>
> The guidance on the question as to when an old statute can apply to new state of affairs not in contemplation when the statute was enacted was furnished by Lord Wilberforce in his dissenting speech in *Royal College of Nursing of the U.K.* v. *Dept. of Health and Social Security* (1981) 1 All ER 545, which is now treated as authoritative. (...) Lord Wilberforce said, at pp. 564-565:
>
> In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question, `What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.
>
> (internal citations omitted)

151. The learned author has further taken note of several decisions where general words appearing in statutory provisions have been liberally interpreted to include newer scientific inventions and technologies. [Id. at pp. 244-246] The relevant portion of the commentary quotes Subbarao, J. in *Senior Electric Inspector* v. *Laxminarayan Chopra*

MANU/SC/0221/1961 : AIR 1962 SC 159, at p. 163:

> It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them.

152. In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Sections 53, 53A and 54 of the CrPC. Firstly, the general words in question, i.e. `and such other tests' should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified. Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses. Secondly, the compulsory administration of the impugned techniques is not the only means for ensuring an expeditious investigation. Furthermore, there is also a safe presumption that Parliament was well aware of the existence of the impugned techniques but deliberately chose not to enumerate them. Hence, on an aggregate understanding of the materials produced before us we lean towards the view that the impugned tests, i.e. the narcoanalysis technique, polygraph examination and the BEAP test should not be read into the provisions for `medical examination' under the Code of Criminal Procedure, 1973.

153. However, it must be borne in mind that even though the impugned techniques have not been expressly enumerated in the CrPC, there is no statutory prohibition against them either. It is a clear case of silence in the law. Furthermore, in circumstances where an individual consents to undergo these tests, there is no dilution of Article 20(3). In the past, the meaning and scope of the term `investigation' has been held to include measures that had not been enumerated in statutory provisions. For example, prior to the enactment of an express provision for medical examination in the CrPC, it was observed in *Mahipal Maderna* v. *State of Maharashtra* 1971 Cri L J 1405 (Bom), that an order requiring the production of a hair sample comes within the ordinary understanding of `investigation' (at pp. 1409-1410, Para. 17). We must also take note of the decision in *Jamshed* v. *State of Uttar Pradesh* 1976 Cri L J 1680 (All), wherein it was held that a blood sample can be compulsorily extracted during a `medical examination' conducted under Section 53 of the CrPC. At that time, the collection of blood samples was not expressly contemplated in the said provision. Nevertheless, the Court had ruled that the phrase `examination of a person' should be read liberally so as to include an examination of what is externally visible on a body as well as the examination of an organ inside the body. [See p. 1689, Para 13]

154. We must also refer back to the substance of the decision in *Sharda* v. *Dharampal*, (supra.) which upheld the authority of a civil court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the Code of Civil Procedure, 1908. The same reasoning cannot be readily applied in the criminal context. Despite the absence of a statutory basis, it is tenable to hold that criminal courts should be allowed to direct the impugned tests with the subject's consent, keeping in mind that there is no statutory prohibition against them either.

155. Another pertinent contention raised by the appellants is that the involvement of medical personnel in the compulsory administration of the impugned tests is violative of their professional ethics. In particular, criticism was directed against the involvement of doctors in the narcoanalysis technique and it was urged that since the content of the drug- induced revelations were shared with investigators, this technique breaches the duty of confidentiality which should

be ordinarily maintained by medical practitioners. [See generally: Amar Jesani, `Willing participants and tolerant profession: Medical ethics and human rights in narco-analysis', *Indian Journal of Medical Ethics*, Vol. 16(3), July-Sept. 2008] The counsel have also cited the text of the `*Principles of Medical Ethics'* adopted by the United Nations General Assembly [GA Res. 37/194, 111th Plenary Meeting] on December 18, 1982. This document enumerates some `*Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture, and other cruel, inhuman or degrading treatment of punishment'*. Emphasis was placed on Principle 4 which reads:

> Principle 4
>
> It is a contravention of medical ethics for health personnel, particularly physicians:
>
> To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;

156. Being a court of law, we do not have the expertise to mould the specifics of professional ethics for the medical profession. Furthermore, the involvement of doctors in the course of investigation in criminal cases has long been recognised as an exception to the physician-patient privilege. In the Indian context, the statutory provisions for directing a medical examination are an example of the same. Fields such as forensic toxicology have become important in criminal-justice systems all over the world and doctors are frequently called on to examine bodily substances such as samples of blood, hair, semen, saliva, sweat, sputum and fingernail clippings as well as marks, wounds and other physical characteristics. A reasonable limitation on the forensic uses of medical expertise is the fact that testimonial acts such as the results of a psychiatric examination cannot be used as evidence without the subject's informed consent.

Results of impugned tests should be treated as `personal testimony'

157. We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely oral testimony, documents and material evidence. The protective scope of Article 20(3) read with Section 161(2), CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of identification or comparison with materials and information that is already in the possession of investigators.

158. We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the `right against self-incrimination'. The crucial test laid down in *Kathi Kalu Oghad*, (supra.) is that of `imparting knowledge in respect of relevant fact by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation' [*Id.* at p. 30]. The difficulty arises since the majority opinion in that case appears to confine the understanding of `personal testimony' to the conveyance of personal knowledge through oral statements or statements in writing. The results obtained from polygraph examination or a BEAP test are not in the nature of oral or written statements. Instead, inferences are drawn from the measurement of physiological responses recorded during the performance of these tests. It could also be argued that tests such as polygraph examination and the BEAP test do not involve a `positive volitional act' on part of the test subject and hence their results should not be treated as testimony. However, this does not entail that the results of these two tests should be likened to physical evidence and thereby excluded from the protective scope of Article 20(3). We must refer back to the substance of the decision in *Kathi Kalu Oghad* (supra.) which equated a testimonial act with

the imparting of knowledge by a person who has personal knowledge of the facts that are in issue. It has been recognised in other decisions that such personal knowledge about relevant facts can also be communicated through means other than oral or written statements. For example in *M.P. Sharma's* case (supra.), it was noted that "...evidence can be furnished through the lips or by production of a thing or of a document or in other modes" [*Id.* at p. 1087]. Furthermore, common sense dictates that certain communicative gestures such as pointing or nodding can also convey personal knowledge about a relevant fact, without offering a verbal response. It is quite foreseeable that such a communicative gesture may by itself expose a person to `criminal charges or penalties' or furnish a link in the chain of evidence needed for prosecution.

159. We must also highlight that there is nothing to show that the learned judges in *Kathi Kalu Oghad* (supra.) had contemplated the impugned techniques while discussing the scope of the phrase `to be a witness' for the purpose of Article 20(3). At that time, the transmission of knowledge through means other than speech or writing was not something that could have been easily conceived of. Techniques such as polygraph examination were fairly obscure and were the subject of experimentation in some Western nations while the BEAP technique was developed several years later. Just as the interpretation of statutes has to be often re-examined in light of scientific advancements, we should also be willing to re-examine judicial observations with a progressive lens. An explicit reference to the Lie-Detector tests was of course made by the U.S. Supreme Court in the *Schmerber* decision, 384 US 757 (1966), wherein Brennan, J. had observed, at p. 764:

> To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

160. Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie-detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly-strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of `personal knowledge' through such means.

161. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject. In any case, the compulsory administration of the impugned tests impedes the subject's right to choose between remaining silent and offering substantive information. The requirement of a `positive volitional act' becomes irrelevant since the subject is compelled to convey personal knowledge irrespective of his/her own volition.

162. Some academics have also argued that the results obtained from tests such as polygraph examination are `testimonial' acts that should come within the prohibition of the right against self-incrimination. For instance, Michael S. Pardo (2008) has observed [Cited from: Michael S. Pardo, `Self- Incrimination and the Epistemology of Testimony', 30 *Cardozo Law Review* 1023-1046 (December 2008) at p. 1046]:

> The results of polygraphs and other lie-detection tests, whether they call for a voluntary response or not, are testimonial because the tests are just inductive evidence of the defendant's epistemic state. They are evidence that purports to tell

> us either: (1) that we can or cannot rely on the assertions made by the defendant and for which he has represented himself to be an authority, or (2) what propositions the defendant would assume authority for and would invite reliance upon, were he to testify truthfully.

163. Ronald J. Allen and M. Kristin Mace (2004) have offered a theory that the right against self-incrimination is meant to protect an individual in a situation where the State places reliance on the `substantive results of cognition'. The following definition of `cognition' has been articulated to explain this position [Cited from: Ronald J. Allen and M. Kristin Mace, `The Self-Incrimination Clause explained and its future predicted', 94 *Journal of Criminal Law and Criminology* 243-293 (2004), Fn. 16 at p. 247]:

> ...`Cognition' is used herein to refer to these intellectual processes that allow one to gain and make use of substantive knowledge and to compare one's `inner world' (previous knowledge) with the `outside world' (stimuli such as questions from an interrogator). Excluded are simple psychological responses to stimuli such as fear, warmness, and hunger: the mental processes that produce muscular movements; and one's will or faculty for choice....
>
> (internal citations omitted)

164. The above-mentioned authors have taken a hypothetical example where the inferences drawn from an involuntary polygraph test that did not require verbal answers, led to the discovery of incriminating evidence. They have argued that if the scope of the Fifth Amendment extends to protecting the subject in respect of `substantive results of cognition', then reliance on polygraph test results would violate the said right. A similar conclusion has also been made by the National Human Rights Commission, as evident from the following extract in the *Guidelines Relating to Administration of Polygraph Test [Lie Detector Test] on an Accused (2000):*

> The extent and nature of the `self-incrimination' is wide enough to cover the kinds of statements that were sought to be induced. In M.P. Sharma MANU/SC/0018/1954 : AIR 1954 SC 300, the Supreme Court included within the protection of the self-incrimination rule all positive volitional acts which furnish evidence. This by itself would have made all or any interrogation impossible. The test - as stated in Kathi Kalu Oghad MANU/SC/0134/1961 : AIR 1961 SC 1808 - retains the requirement of personal volition and states that `self- incrimination' must mean conveying information based upon the personal knowledge of the person giving information. By either test, the information sought to be elicited in a Lie Detector Test is information in the personal knowledge of the accused.

165. In light of the preceding discussion, we are of the view that the results obtained from tests such as polygraph examination and the BEAP test should also be treated as `personal testimony', since they are a means for `imparting personal knowledge about relevant facts'. Hence, our conclusion is that the results obtained through the involuntary administration of either of the impugned tests (i.e. the narcoanalysis technique, polygraph examination and the BEAP test) come within the scope of `testimonial compulsion', thereby attracting the protective shield of Article 20(3).

II. Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?

166. The preceding discussion does not conclusively address the contentions before us. Article 20(3) protects a person who is `formally accused' of having committed an offence or even a suspect or a witness who is questioned during an investigation in a criminal case. However, Article 20(3) is not applicable when a person gives his/her informed consent to undergo any of the impugned tests. It has also been described earlier that the `right against self-incrimination' does not protect persons who may be compelled to undergo the tests in the course of

administrative proceedings or any other proceedings which may result in civil liability. It is also conceivable that a person who is forced to undergo these tests may not subsequently face criminal charges. In this context, Article 20(3) will not apply in situations where the test results could become the basis of non-penal consequences for the subject such as custodial abuse, police surveillance and harassment among others.

167. In order to account for these possibilities, we must examine whether the involuntary administration of any of these tests is compatible with the constitutional guarantee of `substantive due process'. The standard of `substantive due process' is of course the threshold for examining the validity of all categories of governmental action that tend to infringe upon the idea of `personal liberty. We will proceed with this inquiry with regard to the various dimensions of `personal liberty' as understood in the context of Article 21 of the Constitution, which lays down that:

> `No person shall be deprived of his life and liberty except according to procedure established by law'.

168. Since administering the impugned tests entails the physical confinement of the subject, it is important to consider whether they can be read into an existing statutory provision. This is so because any form of restraint on personal liberty, howsoever slight it may be, must have a basis in law. However, we have already explained how it would not be prudent to read the explanation to Sections 53, 53A and 54 of the CrPC in an expansive manner so as to include the impugned techniques. The second line of inquiry is whether the involuntary administration of these tests offends certain rights that have been read into Article 21 by way of judicial precedents. The contentions before us have touched on aspects such as the `right to privacy' and the `right against cruel, inhuman and degrading treatment'. The third line of inquiry is structured around the right to fair trial which is an essential component of `personal liberty'.

169. There are several ways in which the involuntary administration of either of the impugned tests could be viewed as a restraint on `personal liberty'. The most obvious indicator of restraint is the use of physical force to ensure that an unwilling person is confined to the premises where the tests are to be conducted. Furthermore, the drug-induced revelations or the substantive inferences drawn from the measurement of the subject's physiological responses can be described as an intrusion into the subject's mental privacy. It is also quite conceivable that a person could make an incriminating statement on being threatened with the prospective administration of any of these techniques. Conversely, a person who has been forcibly subjected to these techniques could be confronted with the results in a subsequent interrogation, thereby eliciting incriminating statements.

170. We must also account for circumstances where a person who undergoes the said tests is subsequently exposed to harmful consequences, though not of a penal nature. We have already expressed our concern with situations where the contents of the test results could prompt investigators to engage in custodial abuse, surveillance or undue harassment. We have also been apprised of some instances where the investigation agencies have leaked the video-recordings of narcoanalysis interviews to media organisations. This is an especially worrisome practice since the public distribution of these recordings can expose the subject to undue social stigma and specific risks. It may even encourage acts of vigilantism in addition to a `trial by media'.

171. We must remember that the law does provide for some restrictions on `personal liberty' in the routine exercise of police powers. For instance, the CrPC incorporates an elaborate scheme prescribing the powers of arrest, detention, interrogation, search and seizure. A fundamental premise of the criminal justice system is that the police and the judiciary are empowered to exercise a reasonable degree of coercive powers. Hence, the provision that enables Courts to order a person who is under arrest to undergo a medical examination also provides for the use of `force as is reasonably necessary' for this purpose. It is evident that the notion of `personal liberty' does not grant rights in the absolute sense and the validity of restrictions placed on the same needs to be evaluated on the basis of criterion such as `fairness, non- arbitrariness, and reasonableness'.

172. Both the appellants and the respondents have cited cases involving the compelled extraction of blood samples in a variety of settings. An analogy has been drawn between the pin-prick of a needle for extracting a blood sample and the intravenous administration of drugs such as sodium pentothal. Even though the extracted sample of blood is purely physical evidence as opposed to a narcoanalysis interview where the test subject offers testimonial responses, the comparison can be sustained to examine whether puncturing the skin with a needle or an injection is an unreasonable restraint on `personal liberty'.

173. The decision given by the U.S. Supreme Court in *Rochin* v. *California* 342 US 165 (1952), recognised the threshold of `conduct that shocks the conscience' for deciding when the extraction of physical evidence offends the guarantee of `due process of law'. With regard to the facts in that case, Felix Frankfurter, J. had decided that the extraction of evidence had indeed violated the same, *Id.* at pp. 172-173:

> ...we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.
>
> ...Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.

174. Coming to the cases cited before us, in *State of Maharashtra* v. *Sheshappa Dudhappa Tambade* AIR 1964 Bom 253, the Bombay High Court had upheld the constitutionality of Section 129A of the Bombay Prohibition Act, 1949. This provision empowered prohibition officers and police personnel to produce a person for `medical examination', which could include the collection of a blood sample. The said provision authorised the use of `all means reasonably necessary to secure the production of such person or the examination of his body or the collection of blood necessary for the test'. Evidently, the intent behind this provision was to enforce the policy of prohibition on the consumption of intoxicating liquors. Among other questions, the Court also ruled that this provision did not violate Article 21. Reliance was placed on a decision of the U.S. Supreme Court in *Paul H. Breithaupt* v. *Morris Abram* 352 US 432 (1957), wherein the contentious issue was whether a conviction on the basis of an involuntary blood-test violated the guarantee of `due process of law'. In deciding that the involuntary extraction of the blood sample did not violate the guarantee of `Due Process of Law', Clark, J. observed, at pp. 435-437:

> ...there is nothing `brutal' or `offensive' in the taking of a blood sample when done as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right and certainly the test administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of `decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the

> same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such `conduct that shocks the conscience' [*Rochin* v. *California* 342 US 165, 172 (1952)], nor such a method of obtaining evidence that it offends a `sense of justice' [*Brown* v. *Mississippi* 297 US 278, 285 (1936)]...

175. In *Jamshed* v. *State of Uttar Pradesh* 1976 Cri L J 1680 (All), the following observations were made in respect of a compulsory extraction of blood samples during a medical examination (in Para 12):

> We are therefore of the view that there is nothing repulsive or shocking to the conscience in taking the blood of the appellant in the instant case in order to establish his guilt. So far as the question of causing hurt is concerned, even causing of some pain may technically amount to hurt as defined by Section 319 of the Indian Penal Code. But pain might be caused even if the accused is subjected to a forcible medical examination. For example, in cases of rape it may be necessary to examine the private parts of the culprit. If a culprit is suspected to have swallowed some stolen article, an emetic may be used and X-ray examination may also be necessary. For such purposes the law permits the use of necessary force. It cannot, therefore, be said that merely because some pain is caused, such a procedure should not be permitted.

A similar view was taken in *Ananth Kumar Naik* v. *State of Andhra Pradesh* 1977 Cri L J 1797 (A.P.), where it was held (in Para. 20):

> ...In fact Section 53 provides that while making such an examination such force as is reasonably necessary for that purpose may be used. Therefore, whatever discomfort that may be caused when samples of blood and semen are taken from an arrested person, it is justified by the provisions of Sections 53 and 54, CrPC.

We can also refer to the following observations in *Anil Anantrao Lokhande* v. *State of Maharashtra* 1981 Cri L J 125 (Bom), (in Para. 30):

> ...Once it is held that Section 53 of the Code of Criminal Procedure does confer a right upon the investigating machinery to get the arrested persons medically examined by the medical practitioner and the expression used in Section 53 includes in its import the taking of sample of the blood for analysis, then obviously the said provision is not violative of the guarantee incorporated in Article 21 of the Constitution of India.

176. This line of precedents shows that the compelled extraction of blood samples in the course of a medical examination does not amount to `conduct that shocks the conscience'. There is also an endorsement of the view that the use of `force as may be reasonably necessary' is mandated by law and hence it meets the threshold of `procedure established by law'. In this light, we must restate two crucial considerations that are relevant for the case before us. Firstly, the restrictions placed on `personal liberty' in the course of administering the impugned techniques are not limited to physical confinement and the extraction of bodily substances. All the three techniques in question also involve testimonial responses. Secondly, most of the above-mentioned cases were decided in accordance with the threshold of `procedure established by law' for restraining `personal liberty'. However, in this case we must use a broader standard of reasonableness to evaluate the validity of the techniques in question. This wider inquiry calls for deciding whether they are compatible with the various judicially-recognised dimensions of `personal liberty' such as the right to privacy, the right against cruel, inhuman or degrading treatment and the right to fair trial.

Applicability of the `right to privacy'

177. In *Sharda* v. *Dharampal*, (supra.) this Court had upheld the power of a civil court to order the medical examination of a party to a divorce proceeding. In that case, the medical examination was considered necessary for ascertaining the mental condition of one of the parties and it was held that a civil court could direct the same in the exercise of its inherent powers, despite the absence of an enabling provision. In arriving at this decision it was also considered whether subjecting a person to a medical examination would violate Article 21. We must highlight the fact that a medical test for ascertaining the mental condition of a person is most likely to be in the nature of a psychiatric evaluation which usually includes testimonial responses. Accordingly, a significant part of that judgment dealt with the `right to privacy'. It would be appropriate to structure the present discussion around extracts from that opinion.

178. In *M.P. Sharma* (supra.), it had been noted that the Indian Constitution did not explicitly include a `right to privacy' in a manner akin to the Fourth Amendment of the U.S. Constitution. In that case, this distinction was one of the reasons for upholding the validity of search warrants issued for documents required to investigate charges of misappropriation and embezzlement. Similar issues were discussed in *Kharak Singh* v. *State of Uttar Pradesh* MANU/SC/0085/1962 : AIR 1963 SC 1295, where the Court considered the validity of police-regulations that authorised police personnel to maintain lists of `history-sheeters' in addition to conducting surveillance activities, domiciliary visits and periodic inquiries about such persons. The intention was to monitor persons suspected or charged with offences in the past, with the aim of preventing criminal acts in the future. At the time, there was no statutory basis for these regulations and they had been framed in the exercise of administrative functions. The majority opinion (Ayyangar, J.) held that these regulations did not violate `personal liberty', except for those which permitted domiciliary visits. The other restraints such as surveillance activities and periodic inquiries about `history-sheeters' were justified by observing, at Para. 20:

> ...the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

179. Ayyangar, J. distinguished between surveillance activities conducted in the routine exercise of police powers and the specific act of unauthorised intrusion into a person's home which violated `personal liberty'. However, the minority opinion (Subba Rao, J.) in *Kharak Singh* took a different approach by recognising the interrelationship between Article 21 and 19, thereby requiring the State to demonstrate the `reasonableness' of placing such restrictions on `personal liberty' [This approach was later endorsed by Bhagwati, J. in *Maneka Gandhi* v. *Union of India* MANU/SC/0133/1978 : AIR 1978 SC 597, see p. 622]. Subba Rao, J. held that the right to privacy `is an essential ingredient of personal liberty' and that the right to `personal liberty is `a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.' [MANU/SC/0085/1962 : AIR 1963 SC 1295, at p. 1306]

180. In *Gobind* v. *State of Madhya Pradesh* MANU/SC/0119/1975 : (1975) 2 SCC 148, the Supreme Court approved of some police-regulations that provided for surveillance activities, but this time the decision pointed out a clear statutory basis for these regulations. However, it was also ruled that the `right to privacy' was not an absolute right. It was held, at Para. 28:

> "The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."
>
> ...Assuming that the fundamental right explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. (at p. 157, Para. 31)

181. Following the judicial expansion of the idea of `personal liberty', the status of the `right to privacy' as a component of Article 21 has been recognised and re-inforced. In *R. Raj Gopal* v. *State of Tamil Nadu* MANU/SC/0056/1995 : (1994) 6 SCC 632, this Court dealt with a fact-situation where a convict intended to publish his autobiography which described the involvement of some politicians and businessmen in illegal activities. Since the publication of this work was challenged on grounds such as the invasion of privacy among others, the Court ruled on the said issue. It was held that the right to privacy could be described as the `right to be let alone and a citizen has the right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among others. No one can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical'. However, it was also ruled that exceptions may be made if a person voluntarily thrusts himself into a controversy or any of these matters becomes part of public records or relates to an action of a public official concerning the discharge of his official duties.

182. In *People's Union for Civil Liberties* v. *Union of India* MANU/SC/0149/1997 : AIR 1997 SC 568, it was held that the unauthorised tapping of telephones by police personnel violated the `right to privacy' as contemplated under Article 21. However, it was not stated that telephone-tapping by the police was absolutely prohibited, presumably because the same may be necessary in some circumstances to prevent criminal acts and in the course of investigation. Hence, such intrusive practices are permissible if done under a proper legislative mandate that regulates their use. This intended balance between an individual's `right to privacy' and `compelling public interest' has frequently occupied judicial attention. Such a compelling public interest can be identified with the need to prevent crimes and expedite investigations or to protect public health or morality.

183. For example, in *X* v. *Hospital Z* MANU/SC/0733/1998 : (1998) 8 SCC 296, it was held that a person could not invoke his `right to privacy' to prevent a doctor from disclosing his HIV-positive status to others. It was ruled that in respect of HIV-positive persons, the duty of confidentiality between the doctor and patient could be compromised in order to protect the health of other individuals. With respect to the facts in that case, Saghir Ahmad, J. held, at Para. 26-28:

> ...When a patient was found to be HIV (+), its disclosure by the Doctor could not be violative of either the rule of confidentiality or the patient's right of privacy as the lady with whom the patient was likely to be married was saved in time by such disclosure, or else, she too would have been infected with a dreadful disease if marriage had taken place and been consummated.

184. However, a three judge bench partly overruled this decision in a review petition. In *X* v. *Hospital Z* MANU/SC/1121/2002 : (2003) 1 SCC 500, it was held that if an HIV-positive person contracted marriage with a willing partner, then the same would not constitute the offences defined by Sections 269 and 270 of the Indian Penal Code. [Section 269 of the IPC defines the offence of a `Negligent act likely to spread infection of disease dangerous to life' and Section 270 contemplates a `Malignant act likely to spread infection of disease dangerous to life'.] A similar question was addressed by the Andhra Pradesh High Court in *M. Vijaya* v. *Chairman and Managing Director, Singareni Collieries Co. Ltd.* MANU/AP/0574/2001 : AIR 2001 AP 502, at pp. 513- 514:

> There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV-infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV-positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion, will not be in breach of Article 21 of the Constitution of India....

185. The discussion on the `right to privacy' in *Sharda* v. *Dharampal*, (supra.) also cited a

decision of the Court of Appeal (in the U.K.) in *R (on the application of S)* v. *Chief Constable of South Yorkshire* (2003) 1 All ER 148 (CA). The contentious issues arose in respect of the retention of fingerprints and DNA samples taken from persons who had been suspected of having committed offences in the past but were not convicted for them. It was argued that this policy violated Articles 8 and 14 of the European Convention on Human Rights and Fundamental Freedoms, 1950 [Hereinafter `ECtHR]. Article 8 deals with the `Right to respect for private and family life' while Article 14 lays down the scope of the `Prohibition Against Discrimination'. For the present discussion, it will be useful to examine the language of Article 8 of the ECtHR:

> Article 8 - Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

186. In that case, a distinction was drawn between the `taking', `retention' and `use' of fingerprints and DNA samples. While the `taking' of such samples from individual suspects could be described as a reasonable measure in the course of routine police functions, the controversy arose with respect to the `retention' of samples taken from individuals who had been suspected of having committing offences in the past but had not been convicted for them. The statutory basis for the retention of physical samples taken from suspects was Section 64(1A) of the Police and Criminal Evidence Act, 1984. This provision also laid down that these samples could only be used for purposes related to the `prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'. This section had been amended to alter the older position which provided that physical samples taken from suspects were meant to be destroyed once the suspect was cleared of the charges or acquitted. As per the older position, it was only the physical samples taken from convicted persons which could be retained by the police authorities. It was contended that the amended provision was incompatible with Articles 8 and 14 of the ECtHR and hence the relief sought was that the fingerprints and DNA samples of the concerned parties should be destroyed.

187. In response to these contentions, the majority (Lord Woolf, C.J.) held that although the retention of such material interfered with the Article 8(1) rights of the individuals (`right to respect for private and family life') from whom it had been taken, that interference was justified by Article 8(2). It was further reasoned that the purpose of the impugned amendment, the language of which was very similar to Article 8(2), was obvious and lawful. Nor were the adverse consequences to the individual disproportionate to the benefit to the public. It was held, at Para. 17:

> So far as the prevention and detection of crime is concerned, it is obvious the larger the databank of fingerprints and DNA samples available to the police, the greater the value of the databank will be in preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and a DNA sample this would make a dramatic contribution to the prevention and detection of crime. To take but one example, the great majority of rapists who are not known already to their victim would be able to be identified. However, the 1984 Act does not contain blanket provisions either as to the taking, the retention, or the use of fingerprints or samples; Parliament has decided upon a balanced approach.

Lord Woolf, C.J. also referred to the following observations made by Lord Steyn in an earlier decision of the House of Lords, which was reported as *Attorney General's Reference (No. 3 of 1999)* (2001) 1 All ER 577, at p. 584:

> ...It must be borne in mind that respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.

On the question of whether the retention of material samples collected from suspects who had not been convicted was violative of the `Prohibition against Discrimination' under Article 14 of the ECtHR, it was observed, (2003) 1 All ER 148 (CA), at p. 162:

> In the present circumstances when an offence is being investigated or is the subject of a charge it is accepted that fingerprints and samples may be taken. Where they have not been taken before any question of the retention arises, they have to be taken so there would be the additional interference with their rights which the taking involves. As no harmful consequences will flow from the retention unless the fingerprints or sample match those of someone alleged to be responsible for an offence, the different treatment is fully justified.

188. In the present case, written submissions made on behalf of the respondents have tried to liken the compulsory administration of the impugned techniques with the DNA profiling technique. In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended explanation to Sections 53, 53A and 54 of the CrPC. It must also be clarified that a `DNA profile' is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts. It may also be recalled that the as per the majority decision in *Kathi Kalu Oghad*, (supra.) the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to a testimonial act for the purpose of Article 20 (3). Hence, the taking and retention of DNA samples which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain.

189. The judgment delivered in *Sharda* v. *Dharampal*, (supra.) had surveyed the above-mentioned decisions to conclude that a person's right to privacy could be justifiably curtailed if it was done in light of competing interests. Reference was also made to some statutes that permitted the compulsory administration of medical tests. For instance, it was observed, at Para. 61-62:

> Having outlined the law relating to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian Parliament where the accused may be subjected to certain medical or other tests.
>
> By way of example, we may refer to Sections 185, 202, 203 and 204 of the Motor Vehicles Act, Sections 53 and 54 of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Indian Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld.

190. However, it is important for us to distinguish between the considerations that occupied this Court's attention in *Sharda* v. *Dharampal*, (supra.) and the ones that we are facing in the present case. It is self-evident that the decision did not to dwell on the distinction between medical tests whose results are based on testimonial responses and those tests whose results are based on the analysis of physical characteristics and bodily substances. It can be safely

stated that the Court did not touch on the distinction between testimonial acts and physical evidence, simply because Article 20(3) is not applicable to a proceeding of a civil nature.

191. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the `right to privacy' we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

192. So far, the judicial understanding of privacy in our country has mostly stressed on the protection of the body and physical spaces from intrusive actions by the State. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact'. The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of `personal liberty' under Article 21. Hence, our understanding of the `right to privacy' should account for its intersection with Article 20(3). Furthermore, the `rule against involuntary confessions' as embodied in Sections 24, 25, 26 and 27 of the Evidence Act, 1872 seeks to serve both the objectives of reliability as well as voluntariness of testimony given in a custodial setting. A conjunctive reading of Articles 20(3) and 21 of the Constitution along with the principles of evidence law leads us to a clear answer. We must recognise the importance of personal autonomy in aspects such as the choice between remaining silent and speaking. An individual's decision to make a statement is the product of a private choice and there should be no scope for any other individual to interfere with such autonomy, especially in circumstances where the person faces exposure to criminal charges or penalties.

193. Therefore, it is our considered opinion that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy. Forcible interference with a person's mental processes is not provided for under any statute and it most certainly comes into conflict with the `right against self-incrimination'. However, this determination does not account for circumstances where a person could be subjected to any of the impugned tests but not exposed to criminal charges and the possibility of conviction. In such cases, he/she could still face adverse consequences such as custodial abuse, surveillance, undue harassment and social stigma among others. In order to address such circumstances, it is important to examine some other dimensions of Article 21.

Safeguarding the `right against cruel, inhuman or degrading treatment'

194. We will now examine whether the act of forcibly subjecting a person to any of the impugned techniques constitutes `cruel, inhuman or degrading treatment', when considered by itself. This inquiry will account for the permissibility of these techniques in all settings, including those where a person may not be subsequently prosecuted but could face adverse consequences of a non-penal nature. The appellants have contended that the use of the impugned techniques amounts to `cruel, inhuman or degrading treatment'. Even though the Indian Constitution does not explicitly enumerate a protection against `cruel, inhuman or degrading punishment or treatment' in a manner akin to the Eighth Amendment of the U.S. Constitution, this Court has discussed this aspect in several cases. For example, in *Sunil Batra* v. *Delhi Administration* MANU/SC/0184/1978 : (1978) 4 SCC 494, V.R. Krishna Iyer, J. observed at pp. 518-519:

> True, our Constitution has no `due process' clause or the VIII Amendment; but, in this branch of law, after *Cooper* MANU/SC/0011/1970 : (1970) 1 SCC 248 and *Maneka Gandhi* MANU/SC/0133/1978 : (1978) 1 SCC 248 the consequence is the same. For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Article 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at

> the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under death sentence or undertrial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap. Judges, even within a prison setting, are the real, though restricted, ombudsmen empowered to proscribe and prescribe, humanize and civilize the life- style within the caceres. The operation of Articles 14, 19 and 21 may be pared down for a prisoner but not puffed out altogether....

195. In the above-mentioned case, this Court had disapproved of practices such as solitary-confinement and the use of bar- fetters in prisons. It was held that prisoners were also entitled to `personal liberty' though in a limited sense, and hence judges could enquire into the reasonableness of their treatment by prison-authorities. Even though `the right against cruel, inhuman and degrading punishment' cannot be asserted in an absolute sense, there is a sufficient basis to show that Article 21 can be invoked to protect the `bodily integrity and dignity' of persons who are in custodial environments. This protection extends not only to prisoners who are convicts and under-trials, but also to those persons who may be arrested or detained in the course of investigations in criminal cases. Judgments such as *D.K. Basu* v. *State of West Bengal* MANU/SC/0157/1997 : AIR 1997 SC 610, have stressed upon the importance of preventing the `cruel, inhuman or degrading treatment' of any person who is taken into custody. In respect of the present case, any person who is forcibly subjected to the impugned tests in the environs of a forensic laboratory or a hospital would be effectively in a custodial environment for the same. The presumption of the person being in a custodial environment will apply irrespective of whether he/she has been formally accused or is a suspect or a witness. Even if there is no overbearing police presence, the fact of physical confinement and the involuntary administration of the tests is sufficient to constitute a custodial environment for the purpose of attracting Article 20(3) and Article 21. It was necessary to clarify this aspect because we are aware of certain instances where persons are questioned in the course of investigations without being brought on the record as witnesses. Such omissions on part of investigating agencies should not be allowed to become a ground for denying the protections that are available to a person in custody.

196. The appellants have also drawn our attention to some international conventions and declarations. For instance in the *Universal Declaration of Human Rights* [GA Res. 217 A (III) of December 10 1948], Article 5 states that:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) [GA Res. 2200A (XXI), entered into force March 23, 1976] also touches on the same aspect. It reads as follows:

> ...No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Special emphasis was placed on the definitions of `torture' as well as `cruel, inhuman or degrading treatment or punishment' in Articles 1 and 16 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.*

> Article 1
>
> 1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any

reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Article 10, 11 , 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

197. We were also alerted to the *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment* [GA Res. 43/173, 76th plenary meeting, 9 December 1988] which have been adopted by the United Nations General Assembly. Principles 1, 6 and 21 hold relevance for us:

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

The term `cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or judgment.

198. It was shown that protections against torture and `cruel, inhuman or degrading treatment or punishment' are accorded to persons who are arrested or detained in the course of armed conflicts between nations. In the *Geneva Convention relative to the Treatment of Prisoners of*

War (entry into force 21 October 1950) the relevant extract reads:

> Article 17
>
> ...No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind....

199. Having surveyed these materials, it is necessary to clarify that we are not absolutely bound by the contents of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)* [Hereinafter `Torture Convention'] This is so because even though India is a signatory to this Convention, it has not been ratified by Parliament in the manner provided under Article 253 of the Constitution and neither do we have a national legislation which has provisions analogous to those of the Torture Convention. However, these materials do hold significant persuasive value since they represent an evolving international consensus on the nature and specific contents of human rights norms.

200. The definition of torture indicates that the threshold for the same is the intentional infliction of physical or mental pain and suffering, by or at the instance of a public official for the purpose of extracting information or confessions. `Cruel, Inhuman or Degrading Treatment' has been defined as conduct that does not amount to torture but is wide enough to cover all kinds of abuses. Hence, proving the occurrence of `cruel, inhuman or degrading treatment' would require a lower threshold than that of torture. In addition to highlighting these definitions, the counsel for the appellants have submitted that causing physical pain by injecting a drug can amount to `Injury' as defined by Section 44 of the IPC or `Hurt' as defined in Section 319 of the same Code.

201. In response, the counsel for the respondents have drawn our attention to literature which suggests that in the case of the impugned techniques, the intention on part of the investigators is to extract information and not to inflict any pain or suffering. Furthermore, it has been contended that the actual administration of either the narcoanalysis technique, polygraph examination or the BEAP test does not involve a condemnable degree of `physical pain or suffering'. Even though some physical force may be used or threats may be given to compel a person to undergo the tests, it was argued that the administration of these tests ordinarily does not result in physical injuries. [See: Linda M. Keller, `Is Truth Serum Torture?' 20 *American University International Law Review* 521-612 (2005)] However, it is quite conceivable that the administration of any of these techniques could involve the infliction of `mental pain or suffering' and the contents of their results could expose the subject to physical abuse. When a person undergoes a narcoanalysis test, he/she is in a half- conscious state and subsequently does not remember the revelations made in a drug-induced state. In the case of polygraph examination and the BEAP test, the test subject remains fully conscious during the tests but does not immediately know the nature and implications of the results derived from the same. However, when he/she later learns about the contents of the revelations, they may prove to be incriminatory or be in the nature of testimony that can be used to prosecute other individuals. We have also highlighted the likelihood of a person making incriminatory statements when he/she is subsequently confronted with the test results. The realisation of such consequences can indeed cause `mental pain or suffering' for the person who was subjected to these tests. The test results could also support the theories or suspicions of the investigators in a particular case. These results could very well confirm suspicions about a person's involvement in a criminal act. For a person in custody, such confirmations could lead to specifically targeted behaviour such as physical abuse. In this regard, we have repeatedly expressed our concern with situations where the test results could trigger undesirable behaviour.

202. We must also contemplate situations where a threat given by the investigators to conduct any of the impugned tests could prompt a person to make incriminatory statements or to undergo some mental trauma. Especially in cases of individuals from weaker sections of society who are unaware of their fundamental rights and unable to afford legal advice, the mere apprehension of undergoing scientific tests that supposedly reveal the truth could push them to

make confessional statements. Hence, the act of threatening to administer the impugned tests could also elicit testimony. It is also quite conceivable that an individual may give his/her consent to undergo the said tests on account of threats, false promises or deception by the investigators. For example, a person may be convinced to give his/her consent after being promised that this would lead to an early release from custody or dropping of charges. However, after the administration of the tests the investigators may renege on such promises. In such a case the relevant inquiry is not confined to the apparent voluntariness of the act of undergoing the tests, but also includes an examination of the totality of circumstances.

203. Such a possibility had been outlined by the National Human Rights Commission which had published `*Guidelines relating to administration of Polygraph test (Lie Detector test) on an accused (2000)'*. The relevant extract has been reproduced below:

> ...The lie detector test is much too invasive to admit of the argument that the authority for Lie Detector tests comes from the general power to interrogate and answer questions or make statements. (Sections 160-167 CrPC) However, in India we must proceed on the assumption of constitutional invasiveness and evidentiary impermissiveness to take the view that such holding of tests is a prerogative of the individual, not an empowerment of the police. In as much as this invasive test is not authorised by law, it must perforce be regarded as illegal and unconstitutional unless it is voluntarily undertaken under non-coercive circumstances. If the police action of conducting a lie detector test is not authorised by law and impermissible, the only basis on which it could be justified is, if it is volunteered. There is a distinction between: (a) volunteering, and (b) being asked to volunteer. This distinction is of some significance in the light of the statutory and constitutional protections available to any person. There is a vast difference between a person saying, `I wish to take a lie detector test because I wish to clear my name', and when a person is told by the police, `If you want to clear your name, take a lie detector test'. A still worse situation would be where the police say, `Take a lie detector test, and we will let you go'. In the first example, the person voluntarily wants to take the test. It would still have to be examined whether such volunteering was under coercive circumstances or not. In the second and third examples, the police implicitly (in the second example) and explicitly (in the third example) link up the taking of the lie detector test to allowing the accused to go free.

204. We can also contemplate a possibility that even when an individual freely consents to undergo the tests in question, the resulting testimony cannot be readily characterised as voluntary in nature. This is attributable to the differences between the manner in which the impugned tests are conducted and an ordinary interrogation. In an ordinary interrogation, the investigator asks questions one by one and the subject has the choice of remaining silent or answering each of these questions. This choice is repeatedly exercised after each question is asked and the subject decides the nature and content of each testimonial response. On account of the continuous exercise of such a choice, the subject's verbal responses can be described as voluntary in nature. However, in the context of the impugned techniques the test subject does not exercise such a choice in a continuous manner. After the initial consent is given, the subject has no conscious control over the subsequent responses given during the test. In case of the narcoanalysis technique, the subject speaks in a drug-induced state and is clearly not aware of his/her own responses at the time. In the context of polygraph examination and the BEAP tests, the subject cannot anticipate the contents of the `relevant questions' that will be asked or the `probes' that will be shown. Furthermore, the results are derived from the measurement of physiological responses and hence the subject cannot exercise an effective choice between remaining silent and imparting personal knowledge. In light of these facts, it was contended that a presumption cannot be made about the voluntariness of the test results even if the subject had given prior consent. In this respect, we can re-emphasize Principle 6 and 21 of the *Body of Principles for the Protection of all persons under any form of Detention or Imprisonment (1988)*. The explanation to Principle 6 provides that:

> The term `cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in

> conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

Furthermore, Principle 21(2) lays down that:

> No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity of decision or judgment.

205. It is undeniable that during a narcoanalysis interview, the test subject does lose `awareness of place and passing of time'. It is also quite evident that all the three impugned techniques can be described as methods of interrogation which impair the test subject's `capacity of decision or judgment'. Going by the language of these principles, we hold that the compulsory administration of the impugned techniques constitutes `cruel, inhuman or degrading treatment' in the context of Article 21. It must be remembered that the law disapproves of involuntary testimony, irrespective of the nature and degree of coercion, threats, fraud or inducement used to elicit the same. The popular perceptions of terms such as `torture' and `cruel, inhuman or degrading treatment' are associated with gory images of blood-letting and broken bones. However, we must recognise that a forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences. [A similar conclusion has been made in the following paper: Marcy Strauss, `Criminal Defence in the Age of Terrorism - Torture', 48 *New York Law School Law Review* 201-274 (2003/2004)]

206. It would also be wrong to sustain a comparison between the forensic uses of these techniques and the practice of medicine. It has been suggested that patients undergo a certain degree of `physical or mental pain and suffering' on account of medical interventions such as surgeries and drug- treatments. However, such interventions are acceptable since the objective is to ultimately cure or prevent a disease or disorder. So it is argued that if the infliction of some `pain and suffering' is permitted in the medical field, it should also be tolerated for the purpose of expediting investigations in criminal cases. This is the point where our constitutional values step in. A society governed by rules and liberal values makes a rational distinction between the various circumstances where individuals face pain and suffering. While the infliction of a certain degree of pain and suffering is mandated by law in the form of punishments for various offences, the same cannot be extended to all those who are questioned during the course of an investigation. Allowing the same would vest unlimited discretion and lead to the disproportionate exercise of police powers.

Incompatibility with the `Right to fair trial'

207. The respondents' position is that the compulsory administration of the impugned techniques should be permitted at least for investigative purposes, and if the test results lead to the discovery of fresh evidence, then these fruits should be admissible. We have already explained in light of the conjunctive reading of Article 20(3) of the Constitution and Section 27 of the Evidence Act, that if the fact of compulsion is proved, the test results will not be admissible as evidence. However, for the sake of argument, if we were to agree with the respondents and allow investigators to compel individuals to undergo these tests, it would also affect some of the key components of the `right to fair trial'.

208. The decision of this Court in *D.K. Basu* v. *State of West Bengal* MANU/SC/0157/1997 : AIR 1997 SC 610, had stressed upon the entitlement of a person in custody to consult a lawyer. Access to legal advice is an essential safeguard so that an individual can be adequately apprised of his constitutional and statutory rights. This is also a measure which checks custodial abuses. However, the involuntary administration of any of the impugned tests can lead to a situation where such legal advice becomes ineffective. For instance even if a person receives the best of legal advice before undergoing any of these tests, it cannot prevent the extraction of information which may prove to be inculpatory by itself or lead to the subsequent discovery of incriminating materials. Since the subject has no conscious control over the drug-induced revelations or substantive inferences, the objective of providing access to legal advice are frustrated.

209. Since the subject is not immediately aware of the contents of the drug-induced revelations or substantive inferences, it also conceivable that the investigators may chose not to communicate them to the subject even after completing the tests. In fact statements may be recorded or charges framed without the knowledge of the test subject. At the stage of trial, the prosecution is obliged to supply copies of all incriminating materials to the defendant but reliance on the impugned tests could curtail the opportunity of presenting a meaningful and wholesome defence. If the contents of the revelations or inferences are communicated much later to the defendant, there may not be sufficient time to prepare an adequate defence.

210. Earlier in this judgment, we had surveyed some foreign judicial precedents dealing with each of the tests in question. A common concern expressed with regard to each of these techniques was the questionable reliability of the results generated by them. In respect of the narcoanalysis technique, it was observed that there is no guarantee that the drug- induced revelations will be truthful. Furthermore, empirical studies have shown that during the hypnotic stage, individuals are prone to suggestibility and there is a good chance that false results could lead to a finding of guilt or innocence. As far as polygraph examination is concerned, though there are some studies showing improvements in the accuracy of results with advancement in technology, there is always scope for error on account of several factors. Objections can be raised about the qualifications of the examiner, the physical conditions under which the test was conducted, the manner in which questions were framed and the possible use of `countermeasures' by the test subject. A significant criticism of polygraphy is that sometimes the physiological responses triggered by feelings such as anxiety and fear could be misread as those triggered by deception. Similarly, with the P300 Waves test there are inherent limitations such as the subject having had `prior exposure' to the `probes' which are used as stimuli. Furthermore, this technique has not been the focus of rigorous independent studies. The questionable scientific reliability of these techniques comes into conflict with the standard of proof `beyond reasonable doubt' which is an essential feature of criminal trials.

211. Another factor that merits attention is the role of the experts who administer these tests. While the consideration of expert opinion testimony has become a mainstay in our criminal justice system with the advancement of fields such as forensic toxicology, questions have been raised about the credibility of experts who are involved in administering the impugned techniques. It is a widely accepted principle for evaluating the validity of any scientific technique that it should have been subjected to rigorous independent studies and peer review. This is so because the persons who are involved in the invention and development of certain techniques are perceived to have an interest in their promotion. Hence, it is quite likely that such persons may give unduly favourable responses about the reliability of the techniques in question.

212. Even though India does not have a jury system, the use of the impugned techniques could impede the fact-finding role of a trial judge. This is a special concern in our legal system, since the same judge presides over the evidentiary phase of the trial as well as the guilt phase. The consideration of the test results or their fruits for the purpose of deciding on their admissibility could have a prejudicial effect on the judge's mind even if the same are not eventually admitted as evidence. Furthermore, we echo the concerns expressed by the Supreme Court of Canada in *R* v. *Beland* [1987] 36 C.C.C. (3d) 481, where it was observed that reliance on scientific techniques could cloud human judgment on account of an `aura of infallibility'. While judges are expected to be impartial and objective in their evaluation of evidence, one can never discount the possibility of undue public pressure in some cases, especially when the test results appear to be inculpatory. We have already expressed concerns with situations where media organisations have either circulated the video-recordings of narcoanalysis interviews or broadcasted dramatized re-constructions, especially in sensational criminal cases.

213. Another important consideration is that of ensuring parity between the procedural safeguards that are available to the prosecution and the defence. If we were to permit the compulsory administration of any of the impugned techniques at the behest of investigators, there would be no principled basis to deny the same opportunity to defendants as well as witnesses. If the investigators could justify reliance on these techniques, there would be an equally compelling reason to allow the indiscrete administration of these tests at the request of convicts who want re-opening of their cases or even for the purpose of attacking and rehabilitating the credibility of witnesses during a trial. The decision in *United States* v.

Scheffer 523 US 303 (1998), has highlighted the concerns with encouraging litigation that is collateral to the main facts in issue. We are of the view that an untrammelled right of resorting to the techniques in question will lead to an unnecessary rise in the volume of frivolous litigation before our Courts.

214. Lastly, we must consider the possibility that the victims of offences could be forcibly subjected to any of these techniques during the course of investigation. We have already highlighted a provision in the *Laboratory Procedure Manual* for Polygraph tests which contemplates the same for ascertaining the testimony of victims of sexual offences. In light of the preceding discussion, it is our view that irrespective of the need to expedite investigations in such cases, no person who is a victim of an offence can be compelled to undergo any of the tests in question. Such a forcible administration would be an unjustified intrusion into mental privacy and could lead to further stigma for the victim.

Examining the `compelling public interest'

215. The respondents have contended that even if the compulsory administration of the impugned techniques amounts to a seemingly disproportionate intrusion into personal liberty, their investigative use is justifiable since there is a compelling public interest in eliciting information that could help in preventing criminal activities in the future. Such utilitarian considerations hold some significance in light of the need to combat terrorist activities, insurgencies and organised crime. It has been argued that such exigencies justify some intrusions into civil liberties. The textual basis for these restraints could be grounds such as preserving the `sovereignty and integrity of India', `the security of the state' and `public order' among others. It was suggested that if investigators are allowed to rely on these tests, the results could help in uncovering plots, apprehending suspects and preventing armed attacks as well as the commission of offences. Reference was also made to the frequently discussed `Ticking Bomb' scenario. This hypothetical situation examines the choices available to investigators when they have reason to believe that the person whom they are interrogating is aware of the location of a bomb. The dilemma is whether it is justifiable to use torture or other improper means for eliciting information which could help in saving the lives of ordinary citizens. [The arguments for the use of `truth serums' in such situations have been examined in the following articles: Jason R. Odeshoo, `Truth or Dare?: Terrorism and Truth Serum in the Post-9/11 World, 57 *Stanford Law Review* 209-255 (October 2004); Kenneth Lasson, `Torture, Truth Serum, and Ticking Bombs: Toward a pragmatic perspective on coercive interrogation', 39 *Loyola University Chicago Law Journal* 329-360 (Winter 2008)]

216. While these arguments merit consideration, it must be noted that ordinarily it is the task of the legislature to arrive at a pragmatic balance between the often competing interests of `personal liberty' and public safety. In our capacity as a constitutional court, we can only seek to preserve the balance between these competing interests as reflected in the text of the Constitution and its subsequent interpretation. There is absolutely no ambiguity on the status of principles such as the `right against self-incrimination' and the various dimensions of `personal liberty'. We have already pointed out that the rights guaranteed in Articles 20 and 21 of the Constitution of India have been given a non-derogable status and they are available to citizens as well as foreigners. It is not within the competence of the judiciary to create exceptions and limitations on the availability of these rights.

217. Even though the main task of constitutional adjudication is to safeguard the core organising principles of our polity, we must also highlight some practical concerns that strengthen the case against the involuntary administration of the tests in question. Firstly, the claim that the results obtained from these techniques will help in extraordinary situations is questionable. All of the tests in question are those which need to be patiently administered and the forensic psychologist or the examiner has to be very skilful and thorough while interpreting the results. In a narcoanalysis test the subject is likely to divulge a lot of irrelevant and incoherent information. The subject is as likely to divulge false information as he/she is likely to reveal useful facts. Sometimes the revelations may begin to make sense only when compared with the testimony of several other individuals or through the discovery of fresh materials. In a polygraph test, interpreting the results is a complex process that involves accounting for distortions such as `countermeasures' used by the subject and weather conditions among others. In a BEAP test,

there is always the possibility of the subject having had prior exposure to the `probes' that are used as stimuli. All of this is a gradually unfolding process and it is not appropriate to argue that the test results will always prove to be crucial in times of exigency. It is evident that both the tasks of preparing for these tests and interpreting their results need considerable time and expertise.

218. Secondly, if we were to permit the forcible administration of these techniques, it could be the first step on a very slippery-slope as far as the standards of police behaviour are concerned. In some of the impugned judgments, it has been suggested that the promotion of these techniques could reduce the regrettably high incidence of `third degree methods' that are being used by policemen all over the country. This is a circular line of reasoning since one form of improper behaviour is sought to be replaced by another. What this will result in is that investigators will increasingly seek reliance on the impugned techniques rather than engaging in a thorough investigation. The widespread use of `third-degree' interrogation methods so as to speak is a separate problem and needs to be tackled through long-term solutions such as more emphasis on the protection of human rights during police training, providing adequate resources for investigators and stronger accountability measures when such abuses do take place.

219. Thirdly, the claim that the use of these techniques will only be sought in cases involving heinous offences rings hollow since there will no principled basis for restricting their use once the investigators are given the discretion to do so. From the statistics presented before us as well as the charges filed against the parties in the impugned judgments, it is obvious that investigators have sought reliance on the impugned tests to expedite investigations, unmindful of the nature of offences involved. In this regard, we do not have the authority to permit the qualified use of these techniques by way of enumerating the offences which warrant their use. By itself, permitting such qualified use would amount to a law- making function which is clearly outside the judicial domain.

220. One of the main functions of constitutionally prescribed rights is to safeguard the interests of citizens in their interactions with the government. As the guardians of these rights, we will be failing in our duty if we permit any citizen to be forcibly subjected to the tests in question. One could argue that some of the parties who will benefit from this decision are hardened criminals who have no regard for societal values. However, it must be borne in mind that in constitutional adjudication our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generations. Sometimes there are apprehensions about judges imposing their personal sensibilities through broadly worded terms such as `substantive due process', but in this case our inquiry has been based on a faithful understanding of principles entrenched in our Constitution. In this context it would be useful to refer to some observations made by the Supreme Court of Israel in *Public Committee Against Torture in Israel* v. *State of Israel* H.C. 5100/94 (1999), where it was held that the use of physical means (such as shaking the suspect, sleep-deprivation and enforcing uncomfortable positions for prolonged periods) during interrogation of terrorism suspects was illegal. Among other questions raised in that case, it was also held that the `necessity' defence could be used only as a *post factum* justification for past conduct and that it could not be the basis of a blanket pre-emptive permission for coercive interrogation practices in the future. Ruling against such methods, Aharon Barak, J. held at p. 26:

> ...This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the `Rule of Law' and recognition of an individual's liberty constitutes an important component in its understanding of security.

CONCLUSION

221. In our considered opinion, the compulsory administration of the impugned techniques violates the `right against self- incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the

investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible `conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a `testimonial' character and they cannot be categorised as material evidence.

222. We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of `ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to `cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the `right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination'.

223. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872. The National Human Rights Commission had published `*Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused'* in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the `Narcoanalysis technique' and the `Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

> (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
>
> (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
>
> (iii) The consent should be recorded before a Judicial Magistrate.
>
> (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
>
> (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a `confessional' statement to the Magistrate but will have the status of a statement made to the police.
>
> (vi) The Magistrate shall consider all factors relating to the detention including the

length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the information received must be taken on record.

224. The present batch of appeals is disposed of accordingly.

Form of 65 B In emails

ARK SHIPPING CO LTD

V/S

GRT SHIPMANAGEMENT PVT LTD. 2007

LawSuit(Bom) 454.

HIGH COURT OF BOMBAY

ARK SHIPPING CO LTD
V/S
GRT SHIPMANAGEMENT PVT LTD

Date of Decision: 26 July 2007

Citation: 2007 LawSuit(Bom) 454

Hon'ble Judges: Anoop V Mohta

Case Type: Arbitration Petition

Case No: 25 of 2007

Subject: Arbitration, Civil

Acts Referred:
Evidence Act, 1872 Sec 65(b)
Arbitration and Conciliation Act, 1996 Sec 49, Sec 34, Sec 48, Sec 45, Sec 47

Final Decision: Petition allowed

Eq. Citations: 2007 (5) AllMR 516, 2008 (1) ArbLR 317, 2007 (6) BCR 311

Advocates: Vishal Sheth, R A Fernandes, Kamal Khata, Kaniz Munji, Motivalla & Co

Judgement Text:-

Anoop V Mohta, J

[1] The petitioners have invoked Part II and specially Section 45 to 48 of the Arbitration and Conciliation Act-1996, (for short, "Arbitration Act-1996) to enforce the foreign award dated 29th August, 2005 and 9th October, 2006 made and published in Singapore.

[2] The respondents, some time in February, 2004, entered into negotiations with the petitioners through broker for the purposes of chartering a vessel for carriage of cargo in several shipments from ports in Indonesia to ports in India.

[3] A signed recap dated 22nd March, 2004 executed by the parties containing main terms of the contract. However, it was conditional upon lifting of "subjects". The respondents on 22nd March, 2004 lift all subjects and thereby confirm the fixtures/ contract. Between 22nd to 25th March, 2004, various emails were exchanged between the parties through brokers to confirm the terms of the contract in accordance with the proforma charter party.

[4] Some time in March, 2004, the respondents attempted to back out of their contractual obligations. The petitioners on account of the breach committed by the respondents, suffer losses. The petitioners, therefore, on 5th May, 2004 invoked the arbitration in Singapore and appointed Mr.Andrew Bicknell, as an Arbitrator for resolution of disputes arising out of the contract. The preliminary award was made and published by the Arbitrator on 29th August, 2005. The final award has been made and published by the Arbitrator on 9th October, 2006, of US$ 580294.69, together with interest thereon at the rate of 6% and costs.

[5] The petitioners, thereafter, by invoking the Arbitration Act, have filed the present petition on 8th December, 2006, based upon the print outs taken out from the computer being the original agreement for Arbitration as contemplated under Section 47 of the Arbitration Act, 1996 and Rule 803(C) of the High Court of Judicature at Bombay, Original Side Rules-1980. Those print outs are nothing but the xerox copies of the email exchanged between the parties based upon which all the terms and conditions of agreement have been finalized and accepted by the parties.

[6] The learned counsel appearing for the respondents, therefore, initially raised objection that such petition is not maintainable for want of original or certified copy of the agreement for Arbitration. At that time, there was no original agreement and or certified copy of the agreement for Arbitration was filed, alongwith the petition. The office of the High Court has also not treated Exhibit A to A4 as originals as those are the copies of the print outs. Therefore, by order dated 20th April, 2007, this Court has granted the petitioners time to remove the objection and to file certified copy of the original agreement for Arbitration or certified copy of the agreement as contemplated.

[7] The petitioners, therefore, have filed an affidavit dated 3rd May, 2007 alongwith

hard printed copies of the print outs/ emails duly certified by the concerned officer/employees, which read as under:-

"1. I state that I was employed in the chartering division of Sahi Oretrans (Pvt) Ltd. (hereinafter for the sake of brevity referred to as Sahi), a company having its office at 30 Western India House, 3rd Floor, Sir. P.M.Road, Mumbai 400 001. I state that Sahi acted as the ship broker in respect of the charter-party concluded between the petitioners and respondents, abovenamed.

2. I state that being employed in the chartering division of Sahi, I was personally involved in the transaction. I state that being ship brokers all emails were forwarded to the petitioners and the respondents through computer terminals in Sahi's office, by me. In fact, my name appears in almost all the email correspondence.

3. I state that by virtue of my employment I was authorized to use the computer terminals in Sahi's office. Further, the computer terminals used by me were functioning normally at all times. Further, since I was personally involved in the transaction, I in fact personally authored/saw the email correspondence exchanged between the petitioners and the respondents.

4. I hereby produce hard copies of the emails which represent the contract entered into between the parties. The said emails are annexed hereto as Exhibit "A". I crave leave to refer to and rely upon typed/clear copies of the same at the time of hearing, if necessary.

5. I confirm that the contents of the hard copies of the emails are identical to the emails exchanged through the computer terminals operated by me. I further state and confirm that the contents of the hard copies of the emails at Exhibit "A" are identical to the hard copies of the emails filed before the arbitrator, a compilation of which I have perused.

6. Accordingly, I am making this present affidavit to certify that the hard copies of the emails annexed at Exhibit "A" to "A4" hereto are a "true copy"/

> reproduction of the electronic record which was regularly fed into/transmitted through my computer terminal in Sahi's office in the ordinary course of activities. I further state that at all times the computer terminals utilized by me were operating properly and there is no distortion in the accuracy of the contents of the hard copies of the emails."

[8] The above affidavit, therefore, in the facts and circumstances of the case, is sufficient compliance of Section 65-B of the Evidence Act. The above hard copies/ print outs as taken out from the computer, therefore, can be treated as certified copy of agreement for Arbitration, as contemplated under the Arbitration Act-1996. These correspondence/ documents, therefore, as contended by the petitioners, and as also relied by the Tribunal at Singapore, while passing interim final award arising out of the disputes based upon this agreement, therefore, are in compliance of the provisions. The office has also endorsed the remark "as Certified original print out" as stated on oath may be treated as original after obtaining directions from the Court".

[9] The learned counsel appearing for the respondents have also no objection and conceded that these are the certified hard copies of the emails, based upon which the Tribunal at Singapore has passed the impugned awards.

[10] The respondents have filed reply and have opposed the present petition mainly on the ground that; there is no concluded contract or agreement between the parties. Based upon above documents A to A4 as relied by the petitioners, there was no question of settlement of disputes through the Arbitral Tribunal in question. He further contended that such foreign award based on such emails/ print outs are unenforceable in India. The petition, therefore, liable to be rejected for want of basic concluded contract or agreement, apart from the agreement for Arbitration.

[11] Admittedly, there is a clause for arbitration as reproduced on page 16 of the petition. It is also on page 5 of the affidavit dated 04/05/2007 filed by the petitioners which reads as under:-

> "GENERAL AVERAGE/ ARBITRATION SHALL BE ADJUSTED/ SETTLED IN INDIA AND ENGLISH LAW TO APPLY."

[12] The parties have appeared before the Tribunal and have raised the preliminary issues about the jurisdiction to entertain and to try the dispute between the parties. The

preliminary issues were:-

1. Whether the Arbitral Tribunal has substantive jurisdiction in the above matter?

2. Whether the concluded agreement was made between the claimants and the respondents and it is so?

3. Whether the concluded agreement contained a valid agreement to arbitrate disputes in Singapore pursuing to English Law on LMAA terms or alternatively, or whether title 9 of the United States Code applies?

4. Whether the Tribunals appointed as sole arbitrator is valid?

[13] The Tribunal, thereafter, considering the rival contentions as raised by the parties based upon the material available on the record, held all the issues as referred above in the affirmative by order dated 29th August, 2005. By further order dated 9th October, 2006, the Tribunal has passed the final award. This final award is the subject matter of the present petition.

[14] There is nothing on record to show that against these orders/ awards dated 29th August, 2005 and 9th October, 2006, the respondents have preferred any appeal and/or any appeal is still pending. On the contrary, there is a clear affidavit filed on record, that as the respondents failed to file appeal against those orders within 28 days and, therefore, as required and which expired on 26th September, 2005 and 30th November, 2006 respectively, these awards as made and published became final and unappealable under the laws of Republic of Singapore. There is no dispute that the said Arbitration was conducted in Singapore and is also governed by the provisions of the Arbitration Act (Chapter 10) of the Republic of Singapore. The respondents, in their reply also not controverted these facts about the finality of above two awards. Therefore, the fact remains that these two awards have attained finality.

[15] The basic submission, therefore, that there was no contract between the parties and no agreement for Arbitration. Having once rejected by the Tribunal and as respondents failed to challenge those findings, I am of the view that, the respondents cannot re-agitate such issues in reply in this petition, filed by the petitioner under the

Arbitration Act-1996, for enforcement of such Foreign Awards.

[16] As noted above, though grounds as raised in the present petition based on Section 48 are similar to the grounds of Section 34 of the Arbitration Act, in my view, in the facts and circumstances of the present case, where the grounds specially in reference to the existence of Arbitration agreement and their clauses have already been decided by the Tribunal and against which no appeal is preferred by the respondents allowing the respondents to re-agitate the same issue and to challenge the said foreign award as contemplated under Section 34 of the Arbitration Act, as contended by the learned counsel appearing for the petitioners is impermissible.

[17] Considering the reasoning given by the Tribunal I find that the impugned award as passed by, is not contrary to the public policy in India. The said award is enforceable in India. The reference of subject matter is capable under the law of India. There is no case of fraud or corruption raised before the Tribunal and or even before this Court. There was no incapacity which the parties have subjected the agreement between the parties as invalid. There was full opportunity given to the parties on all stages including the appointment of arbitrator till the hearing of the matter by the Tribunal. The disputes/difference clause within the ambit of the terms of the arbitration. The computation of arbitral tribunal was within the framework of arbitration and as apart from that the agreement or clauses of Arbitration is in accordance with law of the country, where the arbitration took place. Though it is an interim awards, it became binding on the parties as are not set aside or suspended by any appellate Court under the law in which the awards have been passed.

[18] Therefore, in view of this and considering the commercial transaction between the parties and the scheme and object of the Arbitration Act, there is no reason that this Court should not respect such foreign award which is in all respect enforceable in India.

[19] The respondents have relied on the following authorities:-

1. U. P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd., reported in AIR 1996 SC 1373. 2. Smita Conductors Ltd. Versus Euro Alloys Ltd. reported in (2002) 7 Supreme Court Cases 728.

3. Jindal Drugs Ltd. Versus Noy Vallesina Engineering SPA & Ors. reported in 2002 (3) Bom. C.R. 554.

4. Pramod Chimanbai Patel versus Lalit Construction & Another reported in 2002 (6) Bom. C.R.72.

5. Nirav Securities Pvt. Ltd. versus Prabhuta Motiram Adhvaryu reported in 2002 (6) Bom. C.R.745.

6. A.Mohammed Basheer Versus State of Kerala & Ors. reported in (2003) 6 Supreme Court Cases 159.

7. Sekhsaria Exports versus Union of India & Ors. reported in 2003 (Supp.2) Bom. C.R.480.

8. United Bank of India versus Ramdas Mahadeo Prashad and Others reported in (2004) 1 Supreme Court Cases 252.

9. Dresser Rand S.A. versus Bindal Agro Chem. Ltd. & Ors. reported in (2006) 1 Supreme Court Cases 751.

[20] The learned counsel appearing for the petitioner has relied on Smita Conductors Ltd. Vs. Euro Alloys Ltd, (2002)7 SCC 728 in support of his submission.

[21] The submission that, there was no binding agreement and or concluded contract between the parties based upon the above judgments, is unacceptable. The facts and circumstances of those cases are totally distinct and distinguishable. There was no such case, similar to the present one, where the Tribunal has concluded the issue about the existing agreement between the parties and passed the interim awards which became final.

[22] A strong reliance has been placed on the Judgment of Jindal Drugs Limited (supra) by the learned counsel appearing for the petitioners, and contended that the respondents can agitate all the issues as contemplated under Section 48 and 49 of the Arbitration Act, on the grounds as available under Section 34 of the Act. The facts in that case are totally different, as the petitioners there, had challenged the foreign award itself under Section 34 of the Arbitration Act and subsequently by amendment, added Section 48 of the Arbitration Act. In the present case the place of Arbitration is at

Singapore. The English Law has been made applicable. The remedy of challenging the Arbitral award under Section 34 of the Arbitration Act is not available to the respondents. In the present case, there is admittedly, no such challenge made to the awards under Section 34 of the Arbitration Act.

[23] All the Judgments as cited by the learned counsel appearing for the petitioners are in reference to the submission of non-existence of any binding and valid agreement between the parties. As noted above, the Tribunal has already rejected this preliminary submission and pass the interim awards which remained final, I am not inclined to consider the submission raised by the learned counsel appearing for the petitioners that such issue can be re-agitated before this Court in India again in such petition. There is nothing in the Arbitration Act-1996 which gives the power to the Indian Courts to set aside the foreign arbitral award or sit over the decision concluded by the Tribunal based on the provisions of the Arbitration Act about the existence of the agreement. Sections 45 to 49 of the Arbitration Act-1996 need to consider from the point of view of enforceability of the foreign award and further, where such foreign award is enforceable in India or not. The challenge to the enforceability, no way can be equated to the challenge to the merit of the interim awards passed by the foreign tribunal on the foundation of the existence of valid and binding agreement between the parties.

[24] Therefore, taking all this into account, the objection as raised by the learned counsel appearing for the respondents are rejected.

[25] Resultantly, the petition is allowed in terms of prayer Clause (a). Prayer Clause (a) reads thus:-

> (a) The Hon'ble Court be pleased to declare the arbitration award dated 9th October, 2006 enforceable as a decree of this Hon'ble Court.

[26] No costs.

e-Mails

However before discussing the contents of the emails it may be stated that as per Section 65B of the The Indian Evidence Act, 1872, for such emails to be proved, it has to be proved/established that the computer during the relevant period was in the lawful control of the person proving the email; that information was regularly fed into the computer in the ordinary course of the activities; that the computer was operating properly and the contents printed on paper are derived from the information fed into the computer in the ordinary course of activities and a certificate identifying the electronic record has to be proved.

BABU RAM AGGARWAL & ANR

V/S

KRISHAN KUMAR BHATNAGAR & ORS.2013 LawSuit(Del) 422.

HIGH COURT OF DELHI

BABU RAM AGGARWAL & ANR
V/S
KRISHAN KUMAR BHATNAGAR & ORS

Date of Decision: 24 January 2013

Citation: 2013 LawSuit(Del) 422

Hon'ble Judges: Rajiv Sahai Endlaw

Case Type: Civil Suit

Case No: 86 of 2009

Subject: Civil

Acts Referred:
Code Of Civil Procedure, 1908 Or 39R 3

Final Decision: Suit dismissed

Eq. Citations: 2013 (2) AD(Del) 441

Advocates: Sarabjit Sharma, Swati Yadav

Judgement Text:-

Rajiv Sahai Endlaw, J

[1] The two plaintiffs seek a decree for specific performance against the defendants No.2,3&4, by directing the defendant No.2 to execute the Sale Deed of 1/3 rd share in respect of property bearing No.C-23, Hauz Khas, New Delhi and by directing the defendants No.3&4 to execute the Sale Deeds of 1/6 th share each, in favour of the

plaintiffs.

[2] The case set out in the plaint is:-

(i). that Shri Shiv Prasad Bhatnagar father of the defendants No.1&2 and grandfather of defendants No.3&4 was the owner of property No.C-23, Hauz Khas, New Delhi;

(ii). that Shri Shiv Prasad Bhatnagar died on 14 th May, 1985 leaving a registered Will dated 19 th January, 1978 whereunder the said property was bequeathed in favour of the his three sons namely defendants No.1&2 and Shri Prem Nath Bhatnagar and the said property was also mutated in the records of the MCD vide letter dated 1 st November,1990 in the names of the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar;

(iii). that the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar entered into an Agreement of Construction dated 14 th January, 1992 with M/s D.S. Associates for re-development of the said property and the re-developed property was then divided amongst the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar as per the Family Settlement/Agreement dated 17 th March, 1998;

(iv). that under the aforesaid Family Settlement/Agreement dated 17 th March, 1998 the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar became co-owners to the extent of 1/3 rd share each in respect of the complete dwelling unit at the rear side of the second floor and the roof of the total second floor of the said property together with proportionate undivided share in the land underneath the said property;

(v). that Shri Prem Nath Bhatnagar died on 18 th November, 2004 leaving defendants No.3&4 as his son and daughter as his only legal heirs;

(vi). that vide Memorandum of Family Settlement dated 5 th March, 2005 between the defendants No.3&4, they became owners of 1/6 th share each in the 1/3 rd share of their father Shri Prem Nath Bhatnagar in the aforesaid second floor flat;

(vii). that the plaintiff No.1 in November, 2006 approached the defendant No.1for purchase of the aforesaid second floor flat and the defendant No.1 on 2 nd December, 2006 informed the plaintiff No.1 that he had obtained the consent of the defendants No.2 to 4 by communicating with them on telephone to sell off the said second floor flat with terrace thereon for a total consideration amount of Rs.48 lacs and that they had also authorized the defendant No.1 to negotiate and finalize the deal;

(viii). that the plaintiff No.1 and the defendant No.1 entered into an Agreement to Sell dated 9 th December, 2006; the defendant No.1 signed the Agreement on his behalf as well as on behalf of defendants No.2 to 4;

(ix). the plaintiff No.1 in the second week of January, 2007 requested the defendant No.1 to obtain the formal consent of the defendants No.2 to 4 in writing; the son of the defendant No.1 Mr. Rahul Bhatnagar affirmed that he had already sent one email dated 12 th December, 2006 to defendants No.3&4; he further affirmed that an email dated 10 th January, 2007 for obtaining the consent of defendants No.3&4 was again sent; that through two emails dated 17 th January, 2007 sent by defendant No.3 to defendant No.1 and Mr. Rahul Bhatnagar, consent was given for sale of the property in suit; copy of the email dated 1 st February, 2007 confirming the consent given by defendants No.3&4 was delivered by the defendants No.1 to the plaintiffs;

(x). the defendant No.1 also confirmed that he had obtained the consent of defendant No.2 on telephone by making three phone calls in November 2006, for sale of the share of the defendant No.2 for Rs.16 lacs; copy of the bill of three telephone calls made was also given by the defendant No.1 to the plaintiff;

(xi). that Clause No.6 of the Agreement to Sell dated 9 th December, 2006 allowed the plaintiff No.1 to get the Sale Deed executed in favour of a nominee and exercising which right specific performance is claimed in favour of both the plaintiffs;

(xii). that the defendants through defendant No.1 received a sum of Rs.5 lacs as earnest money and the balance of Rs.43 lacs was to be paid by the plaintiff No.1 when the vacant physical possession was to be delivered by the defendants to the plaintiff No.1;

(xiii). that the defendant No.1 being authorized by the defendants No.2 to 4, accepted the balance sale consideration of Rs.43 lacs and executed a Sale Deed dated 3 rd September, 2008 of his 1/3 rd share in the said second floor flat; the defendant No.1 accepted Rs.16 lacs on account of his share, Rs.16 lacs on account of share of defendant No.2 and Rs.8 lacs each on account of share of the defendants No.3&4;

(xiv). that the defendant No.1 handed over vacant physical possession of the second floor flat to the plaintiffs;

(xv). however the cheques given by the plaintiffs to the defendant No.1 in the names of defendants No.2 to 4 were not presented for encashment and the defendants No.2 to 4 also did not come forward to execute the Sale Deed;

(xvi). that upon the plaintiffs approaching the defendant No.1, he informed that he had couriered the cheques in the name of defendants No.2 to 4 to the defendants No.2 to 4 and also vide letter requested the defendants No.2 to 4 to come to Delhi and execute the Sale Deeds of their respective shares in favour of the plaintiffs; however the defendants No.2 to 4 had not complied;

[3] Though the relief claimed in the suit is against the defendants No.2 to 4 only and who as per the plaint also were/are not residing at C-23, Hauz Khas, New Delhi but the plaintiffs, in the plaint and the memo of parties, qua the defendants No.2 to 4, made an endorsement "Service to be effected through Defendant No.1 C-23, Hauz Khas, New Delhi 16".

[4] Summons of the suit and notice of the application for interim relief were issued to the defendants on 16 th January, 2009 and vide ex parte order of the said date, the

defendants were restrained from creating any third party interest in respect of the property. The plaintiffs having, in the plaint and the memo of parties, given the address for service of the defendants No.2 to 4 as that of the defendant No.1 only, the summons were sent at the said address only. Compliance by the plaintiffs of Order 39 Rule 3 of the CPC was also at the said address only. Though the summons were issued for 12 th March, 2009 but even prior thereto, the defendant No.1 made an application for direction to the plaintiffs to deposit Rs.32 lacs in favour of the defendants No.2 to 4 in the Court. Notice of the said application was issued and accepted by the plaintiffs on 13 th February, 2009. The Advocate for the defendant No.1 on 13.02.2009 also, stated that the Agreement to Sell was entered into by the defendant No.1 on his own behalf as well as on behalf of defendants No.2 to 4 and took time to obtain instructions from defendants No.2 to 4 and to file Vakalatnama on behalf of defendants No.2 to 4 as well. However on the next date of hearing i.e. 25 th February, 2009, the defendant No.1 withdrew the said application.

[5] The report on the summons sent to the defendants No.2 to 4 being that they had "shifted? from the aforesaid address or they were "out of station?, the plaintiffs on 13 th November, 2009 stated that the only address available with the plaintiffs of the defendants No.2 to 4 was as given in the plaint/memo of parties, and on oral request of the counsel for the plaintiffs for substituted service, vide order dated 13 th November, 2009 the defendants No.2 to 4 were ordered to be served through publication in the newspaper "The Statesman? "having circulation in the locality of the defendants" and by affixation at the last known address of the said defendants namely at C-23, Hauz Khas, New Delhi. Since none appeared on their behalf, they were vide order dated 23 rd March, 2010 proceeded against ex parte. Though in some of the earlier orders the presence of the counsel for the defendant No.1 had also been noted qua defendant No.2, but the said counsel on 23 rd March, 2010 clarified that she had entered appearance on behalf of defendant No.1 only. It was further clarified that since no relief had been claimed against the defendant No.1, no written statement was required to be filed. The plaintiffs were accordingly ordered to lead their ex parte evidence and the earlier interim order was made absolute.

[6] Though the counsel for the defendant No.1 had made the statement aforesaid, but continued to appear thereafter and affidavit verified on 21 st March, 2011 by way of admission/denial was also filed by the defendant No.1, without being required to file such affidavit, admitting all the documents of the plaintiffs.

[7] The plaintiffs filed the affidavit by way of examination-in-chief of the plaintiff No.1 and

closed his ex parte evidence.

[8] Part arguments of the counsel for the plaintiffs were heard on 14 th January, 2013, when it was enquired from the counsel for the plaintiffs as to how the defendants No.2 to 4 against whom only the relief is claimed in this suit can be said to be properly served with the summons of the suit when the address for their service given by the plaintiffs is through the defendant No.1 only with whom the plaintiffs have no lis and who is rather supporting the case of the plaintiffs. The counsel for the plaintiffs argued that since the Agreement to Sell of which specific performance is claimed had been executed by the defendants No.1 only, not only for himself but also on behalf of defendants No.2 to 4, the plaintiffs are justified in serving the defendants No.2 to 4 through the defendant No.1. It was further contended that the only address available to the plaintiffs of the defendant No.2 to 4 was through the defendant No.1. It was however put to the counsel for the plaintiffs on that date that the plaintiffs could have sought to serve at least the defendants No.3 &4 through email, address whereof was available to the plaintiffs. It was further put to the counsel for the plaintiffs that the plaintiffs could have asked the defendant No.1 also, who has throughout been appearing in the suit and supporting the plaintiffs, to furnish the address of the defendants No.2 to 4 who are his close relatives. It is also the case of plaintiffs and defendant No.1 that cheques in the names of defendants No.2 to 4 delivered by plaintiffs to defendant No.1 were sent / couriered by defendant No.1 to them. This would have been possible only if the address of defendants No.2 to 4 was known. The oral statement of the counsel for the plaintiffs while seeking order for substituted service, that the plaintiffs had no other address of the defendants No.2 to 4 available with them is thus found to be without any substance, as ways and means were available to the plaintiffs to know the address of the defendants No.2 to 4 and serve them at that address. Further hearing was adjourned on that date.

[9] Though the matter has been listed nearly daily thereafter and owing to paucity of time could not be taken up, but the counsel for the plaintiffs on none of the said dates made any request for service of the defendants No.2 to 4 at their address. No such request is made today also. The counsel for the plaintiffs has been heard further.

[10] Before the matter is discussed further, it may be mentioned that yet another affidavit verified on 21 st March, 2012 has been filed by the defendant No.1 further affirming even the contents of the documents admitted by him in his earlier affidavit and also affirming the factum of having delivered copies of emails and telephone bills to the plaintiffs and giving his no objection to the suit being decreed.

[11] There is admittedly no authority in writing of the defendants No.2 to 4 in favour of the defendant No.1 to execute the Agreement to Sell, specific performance whereof is claimed in this suit. The counsel for the plaintiffs was thus asked to satisfy this Court on this aspect. Attention of the counsel for the plaintiffs was also drawn to the Memorandum of Family Settlement/Agreement dated 17 th March, 1998 between the defendants No.1&2 and their brother Shri Prem Nath Bhatnagar and on photocopy whereof Exhibit PW-1/4 has been put, and Clauses 5&6 whereof are as under:-

> "5. That neither of any party can have power to construct, sell, mortgage, Gift or transfer in any way the entire terrace of Second Floor and rear portion's dwelling unit of C-23, Hauz Khas, New Delhi, without the written consent of the other parties.
>
> 6. That if any of the above said deal is executed by any of the party with the written consent of the other parties relating to the entire terrace of Second Floor and the rear portion's dwelling unit of Second Floor of property No.C-23, Hauz Khas, New Delhi, then the same shall be binding amongst the three parties mentioned above." It was put to the counsel for plaintiffs, that as per the aforesaid agreement of the defendant No.1 with the defendant No.2 and the predecessor of the defendants No.3 and 4, the defendant No.1 was not authorized to transfer the said second floor flat without the written consent of the other parties. It is asked from the counsel for the plaintiffs, where is the said written consent.

[12] The counsel for the plaintiffs, to show the consent of the defendant No.2 has invited attention to Exhibit PW-1/6, being the photocopy of a STD/ISD Detail of Telephone No.2460551 showing one call having been made to Jaipur on 13 th November, 2006 and two calls on 16 th November, 2006. The counsel for the plaintiffs has argued that in the said telecons, the defendant No.2 had given consent to the defendant No.1 to enter into the Agreement to Sell on his behalf.

[13] The counsel for the plaintiffs has next invited attention to email dated 12 th December,2006, Exhibit PW-1/8 from Rahul, son of defendant No.1 to the defendant No.3, which is as under:-

> "Dear Prashant, hope all is fine at your end. As per our earlier discussions and mutual consent I'm going ahead with the sale proceedings of Raje

Chacha's portion and terraces for Rs.48 lakhs. Pls confirm your and didi's programme so that we can complete sale proceedings accordingly. Did u speak to Mahinder Chacha? give love to kids and blessing to Mona love Rahul"

[14] It has been enquired from the counsel as to whether there is anything on record to show that the reference to "Raje Chacha?s portion" is reference to the father of the defendants No.3&4. There is nothing on record. It has further been put to the counsel for the plaintiffs that the said Email is of after the Agreement to Sell of 9 th December, 2006 and whether there is any email of prior thereto. There is none.

[15] The counsel for the plaintiffs has next referred to email dated 17 th January, 2007 Exhibit PW-1/11 from defendant No.3 to the defendant No.1 and his son is as under:-

"Respected Kishan Chacha and Rahul Bhai, Namastey, Hope this mails finds you, resp chachi and bhabhi in best of health and spirits, and kids must also be busy in their routines. I am receipt of your two mails below, and have noted its contents. My pre-occupation with new job and activities here prevented me from replying for long. It is a welcome decision of resp. Kishan Chacha to sell the flat of raja chacha in order to help you tide over your financial liabilities. Its only in such times that family members can be of good help. As mentioned in your mail below and as also conveyed to you over phone, I had spoken to resp. Mahender chacha about this decision of resp. Kishan Chacha to sell the flat He told me that you have already spoken to Sarita chachi about the same. I am sure by now he would have spoken to resp Kishan Chacha and the elders in the family must have taken decisions taking into account the interests of resp raja chacha. Efforts of resp. Kishan chacha and yourself in taking care of resp. raja chacha is quite ludable, as having seen the same done by Respected Papa & me for a long time and by Respected Didi before her marriage, i can appreciate it quite well.

I am sending the family agreement between myself and didi and am in the process of arranging the balance documents and shall send you the same in due course, for helping you in the process. In the meantime, may I request you to let me and did know the break up of payments terms (how much money, when and how they shall be made), so that share of the sales proceeds. Nothing more to pen, pls convey regards to elders and luv to

young ones. We look forward to your visit to singapore, whenever convenient and possible for you all. regards Reena didi and Prashant."

[16] Email dated 1 st February, 2007 Exhibit PW-1/12 from defendant No.3 to the defendant No.1 is as under:-

"Respected Chachaji, Namastey Apologise for not replying to you earlier as was extremely busy in the new office activities. I can appreciate the urgency from your side, as I believe by now all the formalities must have been completed from your side, including submission of all the relevant documents by respected Mahender chacha. Regarding the sale of flat, both myself and didi have already given the consent and have even send the family agreement, wherein it says about the share of assets. Pls do let us know in case anything needs to be done from our side. As I do not have any power of attorney in India as of now, pls tell me procedure so that I can issue this power of attorney in your favor, so that you can transact on my behalf. Regarding the MCD notice for bhikaji, I checked with respected did and she has requested in case you may send the same to Jijaji's residence in Jaipur. We sincerely thank you for all your efforts and taking care of things on our behalf. Thanking you and with regards to self and resp chachiji, rahul bhai, bhabhi and luv to kids. yours respectfully, prashant"

[17] Email dated 1 st October, 2007, again of the son of defendant No.1 to the defendants No.3&4 and on which Exhibit PW-1/9 has been put and which is as under:-

"Respected Sanjeev Jijaji, Reena Didi & Dear Prashant, Which you all a very happy new year. Hope all is fine at your end. Howzz weather at Newzeland, when r u planning to come to india howzz our little sukku and dear savy r doing?" prashant, pls note the breakup for raje chacha's portion and front terrace, the evaluation for 2 nd floor flat with back terrace is for approx Rs.38 to 40 lakhs and the front terrace evaluation is for Rs.8 to 10 lakhs, pls also note the aggarwal chemist from hauz Khas Market opposite Mandir is interested to Buy the entire Portion and already given us the token amount of Rs.5 lakhs, if you need to keep the front terrace its fine with us. We also have to pay 2% commission to the agent who is involved in this deal. Mr. aggarwal has to take Bank Loan against above said property and Bank wants following Documents:-

1) Death certificate of Tauji & Taiji

2) Family agreement between you & Reena did (as there is no will by Tauji).

3) General power of Attorney from U, Reena Didi & Mohinder Chacha or you Reena Didi & Mohinder Chacha should be present at the time of finalising the Deal. give love to kids and blessing to Mona Love Rahul"

[18] What falls for adjudication in the present case is whether on the basis of the aforesaid emails, the defendant No.1 can be said to be having the written consent of the defendants No.3 &4 to transfer or agree to transfer the aforesaid second floor flat.

[19] However before discussing the contents of the emails it may be stated that as per Section 65B of the The Indian Evidence Act, 1872, for such emails to be proved, it has to be proved/established that the computer during the relevant period was in the lawful control of the person proving the email; that information was regularly fed into the computer in the ordinary course of the activities; that the computer was operating properly and the contents printed on paper are derived from the information fed into the computer in the ordinary course of activities and a certificate identifying the electronic record has to be proved. Most of the emails aforesaid are stated to be exchanged by the defendants No.3&4 with the son of the defendant No.1 who has however not been produced in evidence. The plaintiff No.1 in his affidavit by way of examination-in-chief has also not satisfied the aforesaid conditions of Section 65B of the Act. The emails on which reliance is placed to plead written consent of the defendants No.3&4 cannot thus be said to be proved.

[20] However even if the said emails were to be held to be proved, in my view the same do not constitute written consent of the defendants No.3&4 to the defendant No.1 agreeing to transfer the share of the defendants No.3&4 in the second floor flat, within the meaning of the Memorandum of Family Settlement/Agreement dated 17 th March, 1998 supra for the following reasons;

(a). There is no email of prior to the date of Agreement to Sell.

(b). There is no statement that the email address with which the said emails

had been exchanged are that of the defendants No.3&4.

(c). The defendant No.1 or his son with whom the emails are stated to have been exchanged by the defendants No.3&4 have not been examined as witnesses.

(d). What is conveyed by the son of the defendant No.1 to the defendant No.3 in the email Exhibit PW-1/8 dated 12 th December, 2006 is that he was going ahead with the sale when as aforesaid the Agreement to Sell had already been executed prior thereto.

(e). There is no evidence as to who is Raje Chacha, referred to in the emails.

(f). There is nothing to show that the e-mails purported to have been sent by the defendant No.1 or his son were delivered to the defendants No.3&4.

(g). Even in the email dated 1 st October,2007, what is purported to be conveyed to the defendant No.3 is that the Aggarwal Chemist from the Hauz Khas Market (plaintiff No.1) was interested to buy and option was given to the defendant No.3 to keep the front terrace. The language thereof is indicative of nothing having been finally decided till then, when as aforesaid the Agreement of which specific performance is claimed is of a date prior thereto.

(h). The email Exhibit PW-1/10 dated 17 th January, 2007 purportedly from the defendant No.3 is only of forwarding the certain documents and does not confirm consent to sell. Email Exhibit PW-1/11 dated 17 th January, 2007 again purportedly of the defendants No.3&4 shows that Raje Chacha is still alive. Reference to Raje Chacha thus cannot be to the father of the defendants No.3&4. Once that is so, the email Exhibit PW-1/8 dated 12 th December, 2006 referring to the sale of Raje Chacha?s portion cannot be with respect to the Second Floor flat aforesaid in which the defendants No.3&4 had a share. In this regard, it may be mentioned that admittedly the property bearing No.C-23, Hauz Khas, New Delhi has other flats also besides the second floor flat and which also belong to the family.

(i). The email Exhibit PW-1/12 dated 1 st February, 2007, purportedly from the defendant No.3 is also of consent to sell off Raje Chacha?s share which as aforesaid cannot be a reference to the defendants No.3 or 4, or their deceased father. Further, by the said email defendant No.3 is asking for the procedure so that he can issue Power of Attorney in favour of the defendant No.1 to enable the defendant No.1 to transact on his behalf; it means that till then there was no such Power of Attorney.

(j). The defendant No.1 admittedly was never so authorized by the defendants No.3&4 in as much as he ultimately executed the Sale Deed of his share only of the second floor flat and not of the share of the defendants No.3 & 4.

(k). Though as per Agreement dated 09.12.2006 advance of Rs.5 lacs was received on behalf of all defendants but was adjusted in sale consideration of defendant No.1 only; there is thus no consideration paid by plaintiffs to defendants No.2 to 4 as sought to be represented.

(l). The hesitation of the plaintiffs and the defendant No.1 to serve the defendants No.2 to 4 at their addresses. The statement made by the counsel for the plaintiffs while seeking the order for substituted service of the defendants No.2 to 4 was obviously false in as much as it is the case of the plaintiffs that the defendant No.1 forwarded the cheques of consideration amount of the share of the defendants No.2 to 4 to the said defendants by courier; though the original courier receipt is not proved, but a photocopy of a courier dispatched by the defendant No.1 to the defendant No.3 at the address of Singapore is filed. However no attempt was made by the plaintiffs or the defendant No.1 to serve the defendants No.2 to 4 at their known address.

(m). The eagerness of the defendant No.1 to help/assist the plaintiffs.

[21] As far as defendant No.2 is concerned, according to the plaintiffs and defendant

No.1 also, the consent is also verbal; while as per Memorandum / Settlement Agreement dated 17.03.1998, written consent was required.

[22] From the entire conduct of the suit it thus appears that the present suit is a collusive suit between plaintiffs and the defendant No.1, intended to have the Sale Deed of the share of the second floor flat of the defendants No.2 to 4 executed in favour of the plaintiffs, without even the defendants No.2 to 4 coming to know of the same. It may be mentioned that once a decree for specific performance is passed, the plaintiffs shall be entitled to have the same executed by having a Sale Deed of the Share of the defendants No.2 to 4 in the second floor flat executed in their favour, and all without even the defendants No.2 to 4 coming to know of the same.

[23] Not only has thus the plaintiffs chosen to not serve the defendants to the suit at their correct address but even on merits the plaintiffs are not found to have proved a case of the defendant No.1 having been authorized by the defendants No.2 to 4 to enter into an Agreement to Sell on their behalf with the plaintiffs or with any other person; accordingly no specific performance of such agreement against defendants No.2 to 4 can be ordered.

[24] The suit is dismissed. The plaintiffs having taken up the time of the Court, are burdened with costs of Rs.20,000/- payable to the Delhi Legal Services Authority within four weeks of today. Decree Sheet be drawn up.

Requirement of certificate under section 65-B for CDR produced by the prosecution.

BALASAHEB GURLING TODKAR AND ORS

V/S

STATE OF MAHARASHTRA AND ORS.2015 LawSuit(Bom) 1060

HIGH COURT OF BOMBAY (AURANGABAD BENCH) *(D.B.)*

BALASAHEB GURLING TODKAR AND ORS
V/S
STATE OF MAHARASHTRA AND ORS

Date of Decision: 09 June 2015

Citation: 2015 LawSuit(Bom) 1060

Hon'ble Judges: V K Tahilramani, I K Jain

Case Type: Criminal Appeal

Case No: 432 of 2012

Subject: Criminal

Head Note:

Evidence Act, 1872 - Sec 65B - Indian Penal Code, 1860 - Sec 120B, 300 - criminal conspiracy and murder - circumstantial evidence - permissibility to produce electronic board of Call Details Record as evidence - dead body recovered and post mortem performed - however, non-examination created doubt as to homicide death - theory of last seen is not established by prosecution against accused Nos. 1 and 3 - evidence regarding recovery of articles in pursuance to information given by accused not reliable in absence of any independent panch witnesses - Panch witness was not from that locality - when other independent panch could have been easily available, created a serious doubt about prosecution case - evidence showing that articles were not in sealed condition - Muddemal was not sealed - in present case requisite certificate on Call Details Record as per law was not filed - thus, in absence of such certificate would render CRD inadmissible in law - being inadmissible same cannot be considered - evident that testimonies of main witnesses wholly unreliable, un-natural, and self-contradictory - merely because there were internal bickerings between accused and deceased relating to

business, landed property and parking of vehicle that alone would not be sufficient to hold accused guilty of commission of alleged murder of deceased - reasonings recorded by the trial court are not in consonance with the record - on the contrary, they are totally in disregard to the settled provisions resulting in grave miscarriage of justice to the accused - accused entitled to acquittal - appeal allowed.

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 368, SEC 149, SEC 201, SEC 34, SEC 302, SEC 364, SEC 365, SEC 120B
EVIDENCE ACT, 1872 SEC 26, SEC 27, SEC 65B(4)

Eq. Citations: 2015 (3) BCR(Cri) 51

Advocates: U R Agandsurve, Ritesh Thobde, A S Shitole, Madhav J Jamdar, P G Sarda, Swapnil Ovalekar

Reference Cases:
Cases Referred in (+): **9**

Judgement Text:-

Indira K Jain, J

[1] These appeals arise out of judgment and order dated 21st March, 2012 passed by the learned Ad-hoc Additional Sessions Judge, Solapur in Sessions Case No.60 of 2006. By the said judgment and order, trial Court convicted the Appellants original Accused Nos.1 and 3 to 11 under sections 364, 365, 368, 302, 120-B, 201 read with 149 of the Indian Penal Code. The details of the punishment under various sections are as under:

Accused Nos.	Under Sections	Sentence
1 and 3 to 11	120-B of the Indian Penal Code	Rigorous imprisonment for 5 years and fine of Rs.5,000/- each in default 1 year 3 months imprisonment.
1 and 3 to 11	364 read with 149 of the Indian Penal Code	Rigorous imprisonment for 10 years and fine of Rs.5,000/- each in default imprisonment of 2 and 1/2 years each.

1 and 3 to 11	368 read with 149 of the Indian Penal Code	Rigorous imprisonment for 3 years and fine of Rs.1,000/- each in default further imprisonment of 9 months each.
1 and 3 to 11	302 read with 149 of the Indian Penal Code	Imprisonment for life and fine of Rs.1,000/- each in default imprisonment for 6 months.
1 and 3 to 11	201 read with 149 of the Indian Penal Code	Rigorous imprisonment for 2 years and fine of Rs.1,000/- each in default further imprisonment for 6 months each.

[2] Accused No.2 Basavraj @ Basu Gurusidhappa Loni was acquitted by the learned trial Judge of all the offences referred above.

[3] For the sake of convenience we shall refer the Appellants as they were referred before the trial Court.

[4] The prosecution case briefly stated is as under:

> That, Shakuntala and Brahrambika were the wives of Gurusidhappa. Shakuntala and Gurusidhappa had two sons and two daughters viz. Mallinath, Chinappa, Shantabai and Sridevi, Basavraj @ Basu Gurusidhappa Loni, Revansidha @ Bapu Gurusidhappa Loni, Nagratna and Mahadevi, were two sons and two daughters of Mallinath from Brahrambika. Victim Rajesh was the only son of Mallinath and complainant Sunanda.

[5] According to prosecution, Complainant Sunanda and her son Rajesh were residing on the second floor, Revansidha alongwith his family was residing on the ground floor and Basavraj was residing on the first floor of the same building situated at Budhwar Peth, Samrat Chowk, Solapur.

> They were running business in the name and style "Gurusidhappa M. Loni" dealing in manufacturing food grains, chillies grinding machineries and their spare parts. They had a shop and they were also running lodge "Vijay" and "City Palace". It was a joint family business looked after by Basavraj, Revansidha and Rajesh.

[6] It appears that Rajesh used to leave home for factory at around 09:00 am. In the afternoon at 02:00 pm, he was going home for lunch. Immediately after lunch he used to go to factory and then returning at about 09:00 p.m. or so after closing the factory.

Some time, Rajesh was going for dinner with friends outside in hotel and returning home.

[7] It is the prosecution case that Revansidha @ Bapu and Basavsidha @ Basu used to raise quarrel with Rajesh. It was relating to business, properties and parking of vehicles. There were two four wheelers i.e. one Ambassador Car and one Indica Car which were to be used by them for business purpose. It is alleged that Rajesh was denied use of vehicles for business purpose. Both Revansidha and Basavsidha were dominating Rajesh in business. As use of vehicle was denied to him, Rajesh purchased a Santro Car before 8 months of the incident. Revansidha and Basavsidha did not like purchase of Santro Car by Rajesh. There was altercation between them and Rajesh on purchase of new vehicle. Both the brothers were annoyed with Rajesh as he used to park his car in the bungalow.

[8] On 17th September, 2005 at around 09:00 pm, Rajesh came home. He was served food. He did not like food and so at around 10.30 p.m., he went to hotel to bring the food. While he was returning, Revansidha called Rajesh and asked him to remove his vehicle. There was hot exchange between Revansidha and Rajesh on parking of car. That time, Revansidha slapped Rajesh and threatened to assault him. Sunanda intervened and took Rajesh home. Revansidha passed adverse remarks against Sunanda. Wife of Revansidha also came there and tried to take her husband inside the house, but Revansidha slapped her too.

[9] On 19th September, 2005, as usual, Rajesh was to leave for factory at about 09:00 a.m. He received telephonic call from Revansidha @ Bapu that he had fallen down in the factory and sustained injuries to his leg. Rajesh immediately rushed to the factory. It was informed to wife of Revansidha also. When Rajesh reached the factory, Revansidha told him that he was feeling giddy and therefore, he fell down.

Thereafter, Rajesh returned home.

[10] On 20th September, 2005 (Tuesday) at around 09:00 a.m. Rajesh went to factory. He came home for lunch at 2.00 p.m. and at 2.30 p.m. went back to factory. Being Tuesday, Puja was to be performed at the house of Rajesh. So, while leaving the house, he asked his mother to arrange for Puja by the time he returns from factory. Accordingly Sunanda made arrangements for Puja. Till 08:00 pm, Rajesh did not come to the house. So, Sunanda called Rajesh on his mobile phone. It was switched off. Sunanda was surprised as Rajesh was never keeping his mobile on switched off mode.

She was worried and tried to contact at the shop. Satish was the servant working at the shop. He received call from Sunanda. She inquired from him about Rajesh. Satish replied that Rajesh and Bapu @ Revansidha had gone to a shop in search of mobile. After some time, again Sunanda called at the shop. Satish informed her that Rajesh had not returned to the shop. Third time, Sunanda called and that time, Satish told her that Rajesh had gone alongwith his friends. Sunanda was waiting for her son till 10:00 p.m. She inquired from Satish, whether there was any quarrel between Bapu and Rajesh. Satish told her that Rajesh had gone with his friends in a car and Bapu had left for home.

[11] Sunanda then informed Revansidha on phone that Rajesh had not come back. It is alleged that Revansidha got annoyed and told her that Rajesh was not a child and he must have gone with his friends. As no one was helping Sunanda to find out whereabouts of her son Rajesh, she phoned her nephew Gururaj and informed him that Rajesh was missing and she was worried about him. Thereafter, Gururaj alongwith his friend went in search of Rajesh. They had been to the house of Sachin Ashtekar one of the friends of Rajesh. But Rajesh was not found any where.

[12] One Qadar was the driver working with Rajesh. Sunanda inquired about Rajesh from Qadar. He told her that Rajesh had gone with Revansidha on the previous night to purchase a mobile.

[13] Sunanda then went to the house of Revansidha. Again, she informed him that whereabouts of Rajesh could not be traced. That time, Revansidha and his brother Basavsidha got annoyed and did not help Sunanda in search of whereabouts of Rajesh.

[14] Sunanda then went to Tarti Naka Police Chawki and lodged missing report. Initially PSI More inquired into the missing report. Later, it was handed over to PI Shankar Chavan (PW 37). On the report of Sunanda, Missing Entry No.25 of 2005 was recorded. During inquiry, PI Chavan interrogated Complainant Sunanda. It was revealed that due to property dispute, frequent quarrels and dispute on parking of vehicles, Rajesh was kidnapped by Revansidha and Basavraj on 20th September, 2005 at around 07:00 p.m. from the premises of Loni Firm situated at Solapur. On 19th November, 2005, complaint was lodged by Sunanda. PI Chavan recorded complaint lodged by Sunanda and forwarded the same to Foujdar Chawadi Police Station, Solapur.

[15] On the basis of report of Sunanda, Crime No.261 of 2005 was registered at Foujdar Chawadi Police Station for the offences punishable under Sections 364, 365, 120-B read with 34 of the Indian Penal Code. Investigation was entrusted to PI Chavan.

[16] During investigation, I.O. visited spot from where Rajesh was kidnapped. Spot Panchanama was drawn in the presence of two Panch Witnesses, Satish Patil and Pandit. It was found that Revansidha and Basavraj were absconding. In search, Revansidha was found in a lodge at Hubli. On 20th November, 2005, he was taken in custody.

[17] On 21st November, 2005, two police officials were sent to Pune to arrest Basavraj Desai. Basavraj Desai was arrested and brought to Solapur. In further investigation, two mobile phones were recovered from Revansidha. They were seized and its seizure Panchanama was drawn in the presence of Panchas.

[18] On 22nd November, 2015, both the accused were arrested and produced before the learned Judicial Magistrate First Class, Solapur. The police custody of these accused was sought.

[19] On 23rd November, 2005 when Basavraj-Desai was in police custody one mobile found with him was seized. On the same day, Basavraj-Desai had shown spot to police where they got down for purchase of mobile. During interrogation BasavrajDesai named some other persons as accused. One mobile phone was seized from Padmakar Waghmode. One Tata Sumo was seized from Malang Shende. During investigation search of house of Revansidha was taken. One revolver was found in his house. It came to be seized under Panchanama. A motorcycle of Chandrakant Shinde, a mobile from Umesh Popat were recovered. Supplementary statement of Sunanda was recorded. Many other witnesses were examined in the course of investigation.

[20] When investigation of C.R. No.261 of 2005 registered at Foujdar Chawadi Police Station, Solapur was in progress, CPI Najirsab Mokashi attached to Baswan Bagewadi Police Station, received a telephonic call on 21st September, 2005 at 03:00 pm from PSI, Kolar Police Station that a dead body of an unknown person was found lying on the boundary of village Shirnal in the land belonging to Gurupudappa. On receiving message, CPI Mokashi went to the spot. He took over investigation from PSI, Kolar Police Station, which was within the jurisdiction of Baswan Bagewadi Police Station. CPI Mokashi drew Inquest Panchanama of the dead body of unknown person aged between 25 and 30 years. Several injuries were noticed on the dead body. CPI Mokashi recorded statements of witnesses who were present on the spot. One Green Plastic Rope, earth mixed with blood and simple earth were seized from the spot. Accordingly, Spot Panchanama was drawn before the Panchas. CR No.175 of 2005 under Sections 302

and 201 of the Indian Penal Code was registered at Kolar Police Station. PI Chavan collected the papers of CR No.175 of 2005 from Kolar Police Station. The photo of dead body was shown to mother of Rajesh and other witnesses. They identified the same as of Rajesh.

[21] In further investigation blood stained clothes and ornaments on person of deceased Rajesh, identified by complainant Sunanda were seized. Investigating Agency prepared a CD of visits to all the places. CDR of the calls from mobiles of accused was collected. In all 11 accused were found involved and they were arrested. As many as 30 different Panchanamas were drawn. The seized muddemal articles were forwarded to CA. On completing investigation, charge- sheet was submitted to the Court of Judicial Magistrate First Class, Solapur who in turn committed the case for trial to the Court of Sessions at Solapur.

[22] Charge came to be framed against the Appellants vide Exhibit 39. Appellants accused pleaded not guilty to the charge and claimed to be tried. Their defence was of total denial and false implication. Prosecution examined in all 37 witnesses. On going through the evidence of prosecution witnesses and hearing the parties, learned Adhoc Additional Sessions Judge convicted and sentenced the Appellants as stated in paragraph No.1 above. Hence these appeals.

[23] We have heard the learned Advocates for the Appellants and the learned APP for State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the Judgment delivered by the trial Court and the evidence on record, for the reasons stated below, we are of the opinion that prosecution has failed to bring home the guilt of the accused beyond reasonable doubt and the impugned judgment and order of conviction and sentence does not sustain for the reasons stated hereinbelow.

[24] Needless to state that in a case of murder, exclusive burden lies on the prosecution to establish that death of a human being is caused. Further, the prosecution has to overrule by adducing reliable and convincing evidence the possibility of natural, accidental or suicidal death indicating totally the homicidal death beyond reasonable doubt. In the present case, it can seen from the judgment of the trial court, that no specific finding on the factum of homicidal death has been recorded. To prove that death in question was a homicidal death evidence of the Medical Officer, who performed Post Mortem on the dead body was essential. Prosecution in its own wisdom chose not to examine the Doctor who performed the Post Mortem.

[25] Prosecution examined PW-2 Vitthal Dalwai, PW-3 Sagarappa Jakkal, PW-24 Gurupadappa and PW-35 CPI Mokashi, to establish that the death in question was unnatural death. According to PW-2 Vitthal, Police visited their village. He saw that a dead body was lying in a pit besides road of Kirsyal village in the farm of Gurupadappa. There were injuries on the head of the dead body. Those injuries were probably caused by assault with stones. PW-2 could not identify the dead body from the photograph shown to him but stated that it was of the person of age group of around 36 years or so.

According to PW-3 Sagarappa, who acted as Panch on Inquest Panchanama, he saw the dead body of a person aged about 25 years or so lying between Krisyal village and Nirgundi village. It was in the farm of PW-34 Gurupadappa. He stated that one plastic rope was lying near the dead body. He did not see the blood lying on spot. He saw one injury on the head of dead body. He stated that Inquest Panchanama was drawn in his presence.

PW-34 Gurupadappa was the owner of field in which dead body was found. He stated that on 20.09.2005, at 8.00 a.m. he had seen dead body of young boy in his land at village Krisyal on Bagewadi road. One gunny sack and one plastic rope was also lying there. The evidence of this witness creates doubt that the dead body was of Rajesh as he was found missing after 7.00 p.m. on 20.09.2005.

Even otherwise from the evidence of the above 3 witnesses, it cannot be positively stated that the dead body found in the field of PW-4 Gurupadappa was the dead body of Rajesh.

PW-35 CPI Mokashi was attached to BaswanBagewadi police station at the relevant time. On 21.9.2005, at 3.00 p.m. he received a telphonic call from PSI Kolar Police Station that an incident of murder was reported. It took place on Baswan-Bagewadi Nirgundi Road. On receiving information, he rushed to the spot and conducted Inquest Panchanama on the dead body. CPI Mokashi stated that dead body was of unknown person aged about 25 to 30 years. He drew Inquest Panchanama in the presence of Panch witnesses.

The injuries which were found on the body were mentioned in the Inquest Panchanama.

From Inquest Panchanama (Exhibit 224) the oral evidence of panch witnesses and the testimony of PW-35 CPI Mokashi, it is apparent that the dead body was not identified by any one of them. Prosecution, however, placed reliance on the photograph of the dead body shown to PW-5 Sunanda mother of deceased Rajesh. She identified that the dead body shown in the photograph was of her son Rajesh. The clothes and ornaments on the person of deceased which were seized at Kolar police station were also shown to complainant Sunanda.

She identified the same as of her son Rajesh. On the basis of photos articles A to E and clothes and ornaments of the deceased, prosecution tried to contend that death was homicidal death. It is pertinent to note that a nylon rope was found near the dead body. Except head injury, no other injuries were noticed on the dead body. In such circumstances, examination of the Doctor who performed Post Mortem was utmost necessary. Non-examination of the Medical Officer creates doubt regarding the cause and mode of death as homicidal.

Even if it is assumed for a moment that the dead body which was recovered from the field of PW-34 Gurupadappa was of a human being and particularly of Rajesh and the death was homicidal, that ipso facto would not relieve the prosecution from proving that the accused were responsible for causing the death.

[26] There is no direct evidence in the matter. So far as authorship of the accused is concerned, prosecution case exclusively rests on circumstantial evidence. On the law relating to circumstantial evidence, learned counsel for accused No.1 placed reliance on Balwinder Singh Vs. State of Punjab, 1996 CrLJ 883 and learned counsel for accused No.10 relied upon Dhan Raj @ Dhand Vs. State of Haryana, 2014 6 SCC 745.

We have gone through these authorities referred by learned counsel for accused. They reiterate the settled propositions of law on circumstantial

evidence. It may be stated that for a crime to be proved, it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct or ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or "factum probandum" may be proved indirectly by means of certain inferences drawn from "factum probans" i.e. evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence on various other facts in issue that taken together forms a chain of circumstances from which the existence of a principal fact can be legally inferred or presumed.

[27] It has been consistently laid down by the Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. A legal trend would further show that for a conviction in murder case on circumstantial evidence, following conditions must be fulfilled :

i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is, they should not be explainable on any other hypothesis except that the accused is guilty.

iii) The circumstances should be of a conclusive nature and tendency.

iv) They should exclude every possible hypothesis except the one to be proved.

v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and it must show that in all human probability, the act must have been done by the accused and the accused alone.

[28] Keeping in view the ratio laid down by the Hon'ble Apex Court, we have to examine the circumstantial evidence on which reliance is placed by the prosecution. In the present case, prosecution has relied upon the following incriminating circumstances, which according to the prosecution, prove the guilt of the accused beyond reasonable doubt.

[a] Deceased was last seen in the company of accused Nos. 1 and 3.

[b] Recovery of incriminating articles at the instance of accused Nos. 1,3,4,9,10,11 and sons of accused Nos. 6 and 8.

[c] Call Details Record (CDR) in respect of accused Nos. 1,3,6 and 8.

[d] Motive against accused No.1.

At the outset, it is to be mentioned here that PW-1, PW-20, PW-27 and PW-33, are the translators. Evidence of PW-10, PW-12, PW-13 and PW-26 is not of any assistance to the prosecution as they have been declared hostile and they have not supported the prosecution.

[29] [a] Deceased was last seen in the company of accused Nos. 1 and 3 :-

On the law relating to theory of Last Seen Shri Khamkar, learned counsel for accused No.1 placed reliance on Malleshappa Vs. State of Karnataka, 2008 AllMR(Cri) 280 wherein the Hon'ble Apex Court held as under:-

"The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime.

There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an

irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide."

In the case on hand,PW-4 Rahematulla Samiullah Qadri (Exhibit 110) is the star witness on the theory of last seen.Rahematulla was working as Driver on the vehicles of the firm. In 2005, he was driver with accused No.1. He used to clean the vehicles and proceed to the house of Revansidha.

He was also attending the domestic work of the family of accused No.1. After attending domestic work, he was going to the shop where accused No.1 was running a flour mill. From 9.00 a.m. to 2.00 p.m. PW-4, Rahematulla was working in the flour mill. After one hour recess for lunch, he was returning to the shop and remaining there till 8.00 p.m. or so.

It appears from the evidence of PW-4 Rahematulla that on 20.9.2005, at around 7.30 p.m. he was sitting in front of the shop. Satish Huge (PW-36) and other servants were lighting incense stick (Agarbatti). That time, one person came with a mobile to the shop. He showed that mobile to Revansidha in his cabin inside the shop. Then Revansidha called Rajesh. He asked PW-4 Rahematulla to keep watch on the shop as he was proceeding to purchase another mobile. PW-4 Rahematulla identified the person in the dock who came with mobile. He was accused No.3 Basavraj Desai. It is stated by PW-4 Rahematulla that he saw Revansidha, Rajesh and Basavraj Desai then proceeding on foot towards Bhagwat Theater. At around 9.00 p.m. or so, Revansidha alone returned to the shop and asked Rahematulla to remove the motorcycle of Rajesh which was parked inside the shop and to park the same outside. Accordingly, Rahematulla removed the motorcycle of Rajesh from the shop and parked it outside. Thereafter, they closed the shop and went away.

In his further evidence, Rahematulla stated that on 21.9.2005, at about 9.30 a.m. he went to the house of Revansidha. Mother of Rajesh called him from second floor while he was cleaning the car. So, Rahematulla went up. She enquired from him whether he was knowing anything about Rajesh as he

had not returned home since night. That time, Rahematulla informed her that on the previous evening Revansidha, one person and Rajesh had proceeded together towards Bhagwat theater. Thereafter, Sunanda, mother of Rajesh, came down and made enquiry from accused No.1 Revansidha.

Another witness on the theory of last seen together examined by the prosecution is PW-36 Satish Huge. He was an employee in Gurusiddhappa Loni firm. On 20.09.2005, in the evening at 7.00 p.m, or so, he was in the shop. He stated that he alongwith Rajesh, Bapu Loni and one employee Qadar was present in the shop. As heater was not working, he went to Dnyaneshwar Electronics for getting a coil. At 7.30 p.m., he came back to the shop. He was lighting incense stick (Agarbatti). One person came there with a mobile. He identified accused No.3 Basavraj Desai in the dock as the same person. He stated that the said person had shown mobile to Bapu. Then Bapu called Rajesh. Three of them proceeded on foot towards Bhagwat Theater to see a mobile.

It appears from his evidence that then Bapu reached the shop at around 9.30 p.m. Sunanda - mother of Rajesh called on phone and enquired about Rajesh. Satish picked up the phone and informed her that Rajesh, Bapu and one person had gone towards Bhagwat Theater for seeing a mobile. He admitted in unequivocal terms in the extensive crossexamination that third time when mother of Rajesh called on phone and enquired about Rajesh, he informed her that Rajesh had gone in a car alongwith his friends.

If evidence of PW-5 complainant - Sunanda is looked into, it can be seen that on 20.09.2005, Rajesh had been to the house for lunch at 2.30 p.m. He asked her to prepare for Puja and told that he would come back by 8.00 p.m.

As he did not return she tried to contact him on mobile. His mobile was switched off. She was worried as Rajesh was never keeping his mobile on switched off mode. So, she phoned at the shop at 9.30 p.m. PW-36 Satish received the phone. When she enquired, he told her that Satish was taken by Revansidha to purchase a mobile. Thereafter again, Sunanda phoned at the shop. Satish picked up the phone. He informed her that Rajesh had gone

in a car with his friend and Bapu Malak had left for home.

It is significant to note that the statement of these two star witnesses PW-4 Rahemtullah and PW-36 Satish came to be recorded on 26.11.2005 i.e. after 2 months of the incident.

There is no whisper in the entire evidence of the witnesses including the investigating Officer to explain delay in recording statements. Further admissions elicited in cross examination of PW-4 Rahemtulla and PW-36 Satish, clearly shows that last seen ceased to be a circumstance against accused Nos. 1 and 3 as according to witnesses and complainant, Rajesh had gone with his friend in a car and accused No.1 Revansidha returned to the house.

[30] In this background, we hold that theory of last seen is not established by the prosecution against accused Nos. 1 and 3. So far as other accused are concerned, it is not the prosecution case that deceased Rajesh was last seen in their company.

[31] [b] Recovery of incriminating articles against accused Nos. 1,3,4,9,10,11 and sons of accused Nos. 6 and 8 :-

So far as recovery of incriminating articles from the accused is concerned, according to prosecution, following articles were recovered in pursuance to the information given by the accused.

Accused Number	Item recovered
Accused No.1	[I] Two mobiles
	[ii] 0.32 Bore Revolver and 5 bullets
Accused No.3	A Mobile
Accused No.4	[I] Tata Sumo
	[ii] one knife
	[iii] one Nylon Rope
	[iv] one pant
Accused No.6	One mobile from his son Umesh
Accused No.8	[I] One mobile from his son Ramesh
	[ii] One motorcycle
Accused No. 9	[i]Shirt

	[ii]Pant
Accused No.10	[I] Knife
	[ii] Gold ring
	[iii] Gold Chain
	[iv] Shirt.
Accused No.11	[I] Shirt
	[ii] Pant
	[iii] Sattur with blood stained mud

On the law relating to recovery of articles, particularly, under Section 27 of the Indian evidence Act, learned counsel for accused No.1 strongly relied upon Salim Akhtar alias Mota Vs. State of Uttar Pradesh, 2003 CrLJ 2302 , learned counsel for accused Nos. 5 to 8 and 9 to 11, placed reliance on Vijay Kumar Vs. State of Rajasthan, 2014 3 SCC 412.

In Wakkar and another. Vs. The State of Uttar Pradesh, 2011 3 SCC 306 relied upon by the learned counsel for accused No.10, the Hon'ble Apex Court held as under:

"The scope of this provision was explained by the Privy Council in the well known case of Pulukuri Kottaya and others v. Emperor, 1947 AIR(PC) 67, wherein it was held that it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Therefore, what is admissible is the place from where the polythene bag containing pistol and other articles was allegedly recovered. The fact that some terrorist organisation had given the pistol and other articles to the appellant or its use would not be admissible."

Keeping in view the settled law in respect of recovery of articles in pursuance to the information given by accused, under Section 27 of the Evidence Act, it would be essential now to consider the prosecution evidence.

PW-7 Dinesh Suhas Pandit is the Panch Witness examined on the following 30 panchanamas recorded within a span of 2 months by the investigating agency.

Sr. No.	Date of Panchanama	Type of Panchanama	Exhibit No.
1	20/11/2005	Spot Panchanama	124
2	21/11/2005	Common Arrest panchanama of accused No.1 Revansidha and accused No.2 Basavraj and seizure of two mobiles from accused No.1 Revansidha	125
3.	23/11/2005	Arrest-cum-seizure Panchanama of mobile from accused No.3 Basavraj Desai	126
4.	24/11/2005	Seizure Panchanama of Tata Sumo and green nylon rope	133
5.	26/11/2005	Seizure of Nokia 6600 mobile from Sachin Waghmode	134
6	26/11/2005	Seizure Panchanama of 0.32 bore revolver and 5 bullets at the instance of Revansidha Loni	135
7	26/11/2005	Seizure Panchanama of mobile of motorola company and motorcycle of Boxer company from Ramesh Chandrakant Shinde, son of accused No.8	136
8	26/11/2005	Seizure Panchanama of mobile of Nokia company from Umesh mane	137
9	28/11/2005	Memorandum Panchanama with respect of burning of certain papers – accused No.2 Basavraj Loni	138
10	28/11/2005	Recovery Panchanama of burnt papers – accused No.2 Basavraj Loni	139
11	29/11/2005	Memorandum Panchanama with respect to readiness to show knife – accused No.4 Malang Shende	140
12	29/11/2005	Seizure Panchanama of knife – accused No.4 Malang Shinde	141
13	30/11/2005	Seizure Panchanama of clothes of accused No.4 Malang Shende	143
14	30/11/2005	Seizure Panchanama of clothes of accused No.9 Navnath Salunke	144
15	01/12/2005	Memorandum Panchanama with respect to readiness to show knife – accused No.10 Sanjay Zingadekar	145
16	01/12/2005	Seizure Panchanama of Knife and clothes - accused No.10 Sanjay Zingadekar	146
17	01/12/2005	Seizure Panchanama of gold chain – accused No.10 Sanjay Zingadekar	147
18	02/12/2005	Seizure of one American diamond gold ring – accused No.10 Zanjay Zingadekar	148

19	13/12/2005	Panchanama of opening and again sealing of two knives for showing them to doctor	149
20	15/12/2005	Seizure Panchanama of clothes of deceased Rajesh Loni	150
21	13/01/2006	Arrest Panchanama of accused No.11 Ambadas Talathi	151
22	15/01/2006	Seizure Panchanama of accused No.11 Ambadas Talathi	152
23	16/01/2006	Memorandum Panchanama with respect to readiness to show Sattur – accused No.11 Ambadas Talathi	153
24	16/01/2006	Recovery Panchanama of Sattur – accused No.11 Ambadas Talathi	154
25	18/01/2006	Panchanama of opening and again sealing of Sattur for showing them to Doctor	155
26	19/01/2006	Seizure of Video CD prepared by Videographer PW 30 Anand Arun Gangaji	156
27	19/01/2006	Panchanama of record of Call details of mobiles of Chandrakant Shinde, Popat Mane and Basavraj Desai received from IDEA Company 27 pages	157
28	19/01/2006	Seizure Panchanama of Airtel Company call details report 58 pages	158
29	19/01/2006	Seizure Panchanama of IDEA company call details report - 35 pages	159
30	19/01/2006	Seizure Panchanama of IDEA company call detail report – 33 pages	160

[32] Commenting upon the manner in which articles were seized learned counsel for accused submitted that no efforts were made to get independent Panch witness and this itself is enough to discard the evidence of Panch witness. In support thereof, learned counsel relied upon Salim Akhtar alias Mota Vs. State of Uttar Pradesh , in which the Hon'ble Apex Court held as under :

> "P.W. 1, N.P. Rai, has stated that after reaching P.S. Lisari Gate, he had summoned two public witnesses, namely, Vipin and P.W.3 Anuj Kaushik out of whom only one has been examined in Court. P.W. 3 has deposed that he works as a photographer for a magazine known as 'Sachi Duniya'. He had received a phone call from his office that there was a traffic jam near Medical College and accordingly he started for the said place on his scooter to take photographs. However, he saw some police personnel near Lisari Gate Chaupal and inquired from them why they were standing there and on their asking he accompanied the police party. He has admitted that he often goes to the police stations in the city and he had been paid Rs. 640/- for taking the

photographs but he had not issued any receipt for the same. The statement of this witness shows that he is a frequent visitor to the police stations and this may be on account of the fact that the police may have been obliging him by asking him to take photographs on those occasions in which taking of photographs was considered necessary. It is not possible to accept his statement that though he was paid Rs. 640/- by the police for taking the photographs but he did not issue any receipt. P.W. 1 has admitted that though Lisari Gate locality was only two or three furlongs from the place from where recovery was made but no witness was summoned there. It, therefore, shows that the police made no effort to get any independent public witness at the time when the alleged recovery was made at the pointing out of A-I and the only public witness examined, appears to be a person who was not only intimate but was also obliged to them."

[33] In the instant case facts are identical. It is significant to note that all disclosures, discoveries and even arrests have been made in the presence of PW-7 Dinesh. He admitted in cross-examination that Faujdar Chawadi Police Station was at the distance of 4-5 Kilometers from his house. His evidence shows that within a span of two months, he visited police station for about 18 times. According to him, he used to sit in the shop of his paternal uncle. His paternal uncle was running a Xerox/STD shop. The shop used to open at 9.00 a.m. and close at 10.00 p.m. He stated that he was not paid cash by way of salary but his uncle was maintaining his family comprising his parents, brother and himself. He had no other business or trade. Since 10 to 12 years he was sitting in his uncle's shop. He admitted that there were many residential houses surrounding Faujdar Chawadi police station. In view of these admissions, moot question that arises here is whether reliance can still be placed on the testimony of PW-7 Dinesh Pandit.

So far as requirements of law are concerned, in such cases, Investigating Officer is required to call upon some independent witness of the locality and if such person is not available, or is not willing to act as panch then another independent and respectable person can be called as a Panch witness. Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness stated here, that choosing a person who is not of the locality as a Panch on 30 Panchnamas, when other independent Panch could have been easily available, creates a serious doubt. The ingenuity devised by the prosecution in the instant case knew no bounds. From the admissions elicited in cross-examination of PW-7 Dinesh,

it cannot be attributed to be sheer coincidence. On the contrary, it appears to be deliberate, as a person who was working without salary was chosen as a Panch on series of panchanamas recorded during the period of 2 months. Investigating Officer could not give plausible explanation for not choosing independent Panch witnesses for number of panchanamas. The manner in which investigating agency had acted creates strong suspicion about the fairness of investigation as it frustrates the object of :-

[i] preventing unfair dealings on the part of investigating agency;

[ii] safeguarding the rights of the subject and to ensure that search and seizure is conducted honestly;

[iii] ensuring confidence in the public in general that anything incriminating which may be found shall really be found and shall not be planted;

[iv] to obtain as reliable evidence as possible and exclude the possibility of concoction and malpractice of any kind; and

[v] to ensure genuine search and recoveries.

[34] In the light of the above, we do not find it necessary to go into further details of evidence of PW-7 Dinesh on the recoveries of various articles at the instance of accused persons. Suffice it to state, that under the circumstances brought on record, his evidence does not inspire confidence and no reliance can be placed on such testimony. Even otherwise, mere proof of panchanamas would not help the prosecution unless recovery of various articles are connected with the commission of the alleged crime by the accused.

PW-19 Avinash Patil had carried 25 articles alongwith one Tata Sumo jeep to the Chemical Analyser. His evidence shows that the articles were not in sealed condition.

This important admission is elicited in his cross-examination. PW-35 CPI

Mokashi also admitted in cross-examination that Muddemal was not sealed. None of the CA reports connect either of the accused with the commission of any act as the results were mostly inconclusive. If it is so there is no point in considering the evidence of PW-8 Maruti Vedphatak, PW-11 Sohel Abdul K. Alim, PW-14 Santosh Pawar, PW-15 Munna Kazi,PW-16 Vaibhav Kadam and PW-22 Sachin Ashtikar as it would be a futile exercise and better course would be to keep their testimonies out of consideration. In this premise, we hold that prosecution has failed in proving this circumstance too.

[35] [c] Call Details Record (CDR) in respect of accused Nos. 1,3,6 and 8 :-

It is the prosecution case that, at the relevant time, there was exchange of calls amongst accused Nos. 1,3,6 and 8. To prove CDR, prosecution examined PW-24 Sachin Shinde and PW-32 Suresh Shilgire. PW-24 Sachin Shinde (Exhibit 199) was serving as Nodal Officer with Idea Cellular Ltd. On 28.11.2005, company received a letter from Deputy Police Commissioner to provide call details of the mobiles mentioned in the letter. Accordingly, call details were furnished. Same are proved at Exhibits 157 (1)to (157). These call details were pertaining to mobiles of accused No.1 son of accused No.6 and accused No.8.

PW-32 Suresh Shilgire (Exhibit 218) was working in Airtel company. Police visited the company and sought information regarding incoming and outgoing calls on mobile of Vaibhav Kadam, which was stolen and allegedly used by accused No.3 Basavraj Desai. This mobile was recovered from accused No.3. CDR report is at Exhibit 219.

On CDR, learned counsel for accused No.1 strenuously submitted that there is no compliance of the mandatory provisions of Section 65B of the Indian Evidence Act and therefore, CDR reports cannot be admitted in evidence. In support, Shri Khamkar, learned counsel placed vehement reliance on Anvar P. V. Vs. P. K. Basheer and others, 2015 AIR(SC) 180. In this case, the Hon'ble Supreme Court overruled its previous decision in AIR 2005 SC 3820 and held in para 19 & 22 as under:-

"19. Proof of electronic record is a special provision introduced by the IT Act

amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete Code in itself. Being a special law, the general law under Sections 63 and 65 has to yield."

"22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

[36] It is pertinent to note that in the State (NCT of Delhi) Vs. Navjot Sandhu two Judge Bench of the Hon'ble Apex Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones it was held that secondary evidence is permissible in the absence of certificate under sub-section (4) of Section 65-B of the Indian Evidence Act. This judgment was overruled in Anvar's case .

In the present case the requisite certificate on Call Details Record as per law was not filed. In view of the ratio laid down in the above authority absence of such certificate would render the CRD inadmissible in law. Being inadmissible, same cannot be considered.

[37] [d] Motive :-

Prosecution had attributed motive to accused No.1 to eliminate the life of Rajesh in view of the disputes over :-

[a] Business;

[b] landed property; and

[c] parking of vehicles.

To establish motive, prosecution relied upon evidence of PW-4 Rahemtulla, PW-5 Sunanda, PW-6 Gurupad, PW-21 Sunita, PW-23 Shivsharnappa, PW-25 Vasanti John, PW-28 Kumar Harihar, PW-29 Shrikant Tiwari, and PW-31 Dr. Natraj.

On motive learned counsel for accused No.1 Shri Khamkar, submitted that the prosecution has failed to prove that accused were responsible for causing the death of Rajesh and so motive, howsoever strong, would not be sufficient to establish the guilt of the accused. To substantiate his submission Shri Khamkar, placed reliance on State of Punjab Vs. Sucha Singh and others, 2003 AIR(SC) 1471, in which the Hon'ble Apex Court observed:-

"Mr. Walia, learned counsel, lastly contended that there is a strong motive connecting the accused with the crime for the reasons being that Kuldip Singh, nephew of accused Sucha Singh was murdered by the complainant party and the accused had nursed a grudge against the complainant party for revenge. This plea is of no help to the prosecution case. When the basic foundation of the prosecution case crumbled down, the motive becomes inconsequential. At the same time, animosity is a double edged sword. It could be a ground for false implication, it could also be a ground for assault. In the instant case, in view of the facts and circumstances as discussed above, the motive, however, strong merely creates a suspicion. Suspicion

cannot take the place of proof of guilt."

[38] In the case on hand, prosecution had miserably failed to prove any of the circumstances against the accused.

> Therefore, assuming that there were internal bickerings between accused No.1 and Rajesh relating to business, landed property and parking of vehicle, that alone would not be sufficient to hold the accused guilty of commission of alleged murder of Rajesh.

[39] As discussed above, statements of material witnesses do not help the prosecution to bring home the guilt of the accused persons beyond reasonable doubt. It is also evident that the testimonies of main witnesses is wholly unreliable, unbelievable, unnatural, untrustworthy and selfcontradictory. The entire prosecution evidence bristles with improbable version and material lacunas. There are series of circumstances which are self speaking to indicate that prosecution case is overlain with number of doubts and mass of lies so embedded that its impossible to separate the truth from falsehood. The major deficiencies emerged in the prosecution case are -

> [i] In missing report lodged by PW-5 Sunanda, she did not attribute any specific role to the accused though she admitted that she was informed by PW-4 Rahemtulla and PW- 36 Satish that accused Nos. 1 and 3 had taken Rajesh alongwith them;
>
> [ii] PSI More, who enquired into missing report was an important witness. He was kept away from the witness box for the reasons best known to prosecution;
>
> [iii] Medical Officer on Post Mortem report not examined;
>
> [iv] Doctor to whom weapons were sent for opinion was not examined;
>
> [v] PW-7 Dinesh was chosen as a Panch on 30 Panchanamas recorded during the span of two months.

[vi] Articles which were seized during investigation were sent to Chemical Analyser after 30 to 35 days of alleged seizure and in unsealed condition;

[vii] FIR was lodged on 19.11.2005. Inordinate delay in lodging FIR not explained; and

[viii] It has come during evidence that Rajesh was close to a girl named Jullie. No investigation was made in that direction despite the statement of witnesses that he lastly went in a car with his friend.

The above infirmities are inherent in nature. We find this case as an example once again to remind the Investigating Agency and prosecution of its onerous duty to place the truth before the Court with utmost sensitivity instead of adopting its own approach in such a serious crime where the question of life and death of persons is involved.

[40] So far as approach of the trial court is concerned less said is the better. On 26.10.2009, the learned Additional P.P. submitted an application (Exhibit 127A) during the course of trial. By the said application, a request was made to allow the prosecution to prove memorandum statement of accused No.3 Basavraj Desai recorded on 23.11.2005. Vide order dated 2/11/2009, this application was dismissed.

[41] It is shocking that the same Presiding Officer relied upon memorandum statement of accused No.3 Basavraj Desai recorded during the course of investigation, despite rejection of permission to exhibit the same and held that accused Nos. 1 and 2 planned before 5 months of the incident to kill Rajesh and conspired with accused Nos. 3 to 11, to whom Rs. 3 Lakhs were given as contract killing money and then executed the plan.

[42] The observations of the learned trial judge in para.134 of the impugned judgment clearly indicate lack of simple understanding of the provisions of Sections 26 and 27 of the Indian Evidence Act. It appears that the learned trial judge has turned blind eye to these important provisions and wrongly considered the same. The reasonings recorded by the trial court are not in consonance with the record. On the contrary, they are totally in disregard to the settled provisions resulting in grave miscarriage of justice to the accused. In this background, we find that the impugned judgment and order of conviction and sentence does not legally sustain and needs to be quashed and set

aside.

[43] In the result, we pass the following order :-

[a] The impugned judgment and order of conviction and sentence in Sessions Case No. 60 of 2006 passed by the learned Ad-hoc Additional Sessions Judge, Solapur, is hereby quashed and set aside ;

[b] Accused Nos. 1 and 3 to 11 are acquitted of the offences punishable under Sections 120B, 364 r/w.149, 368 r/w. 149, 302 r/w. 149 and 201 r/w. 149 of IPC;

[c] Accused No. 1 Revansidha Loni, Accused No.3 Basavraj Desai, Accused No.4 Malang Shende, Accused No. 10 Sanjay Zingadekar and Accused No.11 Ambadas Talathi, who are in jail, shall be released forthwith, if not otherwise required in any other case;

[d] Bail bonds of accused Nos. 5,6,7,8 and 9 shall stand cancelled and they are set at liberty forthwith;

[e] Registry to communicate this order to the accused in jail through the concerned Jail Authorities;

[f] We quantify the fees to be paid by the High Court Legal Services Committee, to the appointed Advocate for accused No.3 Shri Swapnil Ovalekar, at Rs. 5,000/-.

Requirement of Certificate under section 65-B

ANVAR P V

V/S

P K BASHEER AND OTHERS. 2015 AIR(SC) 180.

SUPREME COURT OF INDIA *(F.B.)*

ANVAR P V
V/S
P K BASHEER AND OTHERS

Date of Decision: 18 September 2014

Citation: 2014 LawSuit(SC) 783

Hon'ble Judges: R M Lodha, Kurian Joseph, Rohinton Fali Nariman

Case Type: Civil Appeal

Case No: 4226 of 2012

Subject: Criminal, Election

Head Note:

Evidence Act, 1872 - Sec 45A, 22A, 59, 65B, 63, 65A, 65, 3, 65B(4), 65B(2) - evidence of electronic record - admissibility of such a document - any documentary evidence by way of an electronic record under Evidence Act, in view of Sec 59 and 65A, can be proved only in accordance with procedure prescribed under Sec 65B - Sec 65B deals with admissibility of electronic record - purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer - it may be noted that Section starts with a non obstante clause - thus, notwithstanding anything contained in Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if conditions mentioned under sub-Section (2) are satisfied, without further proof or production of original - very admissibility of such a document, i.e., electronic record which is called as computer output, depends on satisfaction of four conditions under Sec 65B(2) as to, (i) electronic record containing information should have been produced by computer during period

over which same was regularly used to store or process information for purpose of any activity regularly carried on over that period by person having lawful control over use of that computer;

(ii) information of kind contained in electronic record or of kind from which information is derived was regularly fed into computer in ordinary course of said activity;

(iii) During material part of said period, computer was operating properly and that even if it was not operating properly for some time, break or breaks had not affected either record or accuracy of its contents; and

(iv) information contained in record should be a reproduction or derivation from information fed into computer in ordinary course of said activity.

Evidence Act, 1872 - Sec 65B, 65B(4), 65B(2) - Representation Of People Act, 1951 - Sec 100(1)(b), 123(4), 123(2)(a)(II), 123(2), 123(2)(II) - Information Technology Act, 2000 Sec 79A - general election to State Legislative Assembly - election petition dismissed by High Court holding that corrupt practices pleaded in petition are not proved and, hence, election cannot be set aside under Sec 100(1)(b) of RP Act - appeal - nature and manner of admission of electronic records -- opinion of examiner of electronic evidence - electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, whole trial based on proof of electronic records can lead to travesty of justice - only if electronic record is duly produced in terms of Sec 65B of Evidence Act, question would arise as to genuineness thereof and in that situation, resort can be made to Sec 45A opinion of examiner of electronic evidence - Evidence Act does not contemplate or permit proof of an electronic record by oral evidence if requirements under Sec 65B of Evidence Act are not complied with, as law now stands in India - genuineness, veracity or reliability of evidence is seen by court only after stage of relevancy and admissibility - appellant admittedly has not produced any certificate in terms of Sec 65B in respect of CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22 - therefore, same cannot be admitted in evidence - thus, whole case set up regarding corrupt practice using songs, announcements and speeches fall to ground - having regard to admissible evidence available on record, though for different reasons, it is extremely difficult to hold that appellant has founded and proved corrupt practice under Sec 100(1)(b) read with Sec 123(4) of RP Act against first respondent - in result, there

is no merit in appeal - accordingly dismissed.

Acts Referred:

Evidence Act, 1872 Sec 45A, Sec 22A, Sec 59, Sec 65B, Sec 63, Sec 65A, Sec 65, Sec 3, Sec 65B(4), Sec 65B(2)

Representation Of The People Act, 1951 Sec 100(1)(b), Sec 123(4), Sec 123(2)(a)(II), Sec 123(2), Sec 123(2)(II)

Police And Criminal Evidence Act, 1984 Sec 69

Information Technology Act, 2000 Sec 79A

Final Decision: Appeal dismissed

Eq. Citations: 2014 (3) GLH 305, 2014 (4) KerLT 104, 2014 (4) RCR(Civ) 504, 2014 (10) Scale 660, 2014 (6) AIRBomR 511, 2014 (4) AIRKarR 580, 2014 (6) ALD(Cri) 203, 2014 (6) AllMR 951, 2014 (10) SCC 473, 2014 (9) SCJ 1, 2015 AIR(SC) 180, 2015 (1) SCC(L&S) 108, 2015 (1) SCC(Cri) 24, 2015 (1) JCC 214, 2015 (1) KarLJ 547, 2015 (1) AWC 156, 2014 (10) JT 459, 2014 (6) ALD(SC) 203, 2015 (2) MhLJ 135, 2014 (4) PLJR(SC) 334, 2014 (5) GauLT 62, 2015 (1) LAR 225, 2014 (5) LawHerald(SC) 3677, 2015 (1) MPLJ 507, 2015 (111) AllLR 811, 2015 (3) ALT(Cri) 161, 2015 (129) RevDec 112

Advocates: Vivek Chib, Asif Ahmed, Neeraj Shekhar, Kapil Sibal, Haris Beeran, Mushtaq Salim, Radha Shyam Jena

Reference Cases:

Cases Referred in (+): **6**

Judgement Text:-

Kurian Joseph, J

[1] Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records, is one of the principal issues arising for consideration in this appeal.

[2] In the general election to the Kerala Legislative Assembly held on 13.04.2011, the first respondent was declared elected to 034 Eranad Legislative Assembly Constituency. He was a candidate supported by United Democratic Front. The appellant contested the election as an independent candidate, allegedly supported by the Left Democratic Front. Sixth respondent was the chief election agent of the first respondent. There were five candidates. Appellant was second in terms of votes; others secured only marginal votes. He sought to set aside the election under Section 100(1)(b) read with Section 123(2)(ii) and (4) of The Representation of the People Act, 1951 (hereinafter referred to as 'the RP Act') and also sought for a declaration in favour of the appellant. By order dated 16.11.2011, the High Court held that the election petition to set aside the election on the ground under Section 123(2)(a)(ii) is not maintainable and that is not pursued before us either. Issues (1) and (2) were on maintainability and those were answered as preliminary, in favour of the appellant. The contested issues read as follows:

> "1) xxx xxx xxx
>
> 2) xxx xxx xxx
>
> 3) Whether Annexure A was published and distributed in the constituency on 12.4.2011 as alleged in paragraphs 4 and 5 of the election petition and if so whether Palliparamban Aboobacker was an agent of the first respondent?
>
> 4) Whether any of the statements in Annexure A publication is in relation to the personal character and conduct of the petitioner or in relation to the candidature and if so whether its alleged publication will amount to commission of corrupt practice under section 123(4) of The Representation of the People Act?
>
> xxx xxx xxx
>
> 6) Whether the Flex Board and posters mentioned in Annexures D, E and E1 were exhibited on 13.4.2011 as part of the election campaign of the first respondent as alleged in paragraphs 6 and 7 of the election petition and if so whether the alleged exhibition of Annexures D, E and E1 will amount to

commission of corrupt practice under section 123(4) of The Representation of the People Act?

7) Whether announcements mentioned in paragraph 8 of the election petition were made between 6.4.2011 and 11.4.2011, as alleged in the above paragraph, as part of the election propaganda of the first respondent and if so whether the alleged announcements mentioned in paragraph 8 will amount to commission of corrupt practice as contemplated under section 123(4) of The Representation of the People Act?

8) Whether the songs and announcements alleged in paragraph 9 of the election petition were made on 8.4.2011 as alleged, in the above paragraph, as part of the election propaganda of the first respondent and if so whether the publication of the alleged announcements and songs will amount to commission of corrupt practice under section 123(4) of The Representation of People Act?

9) Whether Mr. Mullan Sulaiman mentioned in paragraph 10 of the election petition did make a speech on 9.4.2011 as alleged in the above paragraph as part of the election propaganda of the first respondent and if so whether the alleged speech of Mr. Mullan Sulaiman amounts to commission of corrupt practice under section 123(4) of The Representation of the People Act?

10) Whether the announcements mentioned in paragraph 11 were made on 9.4.2011, as alleged in the above paragraph, as part of the election propaganda of the first respondent and if so whether the alleged announcements mentioned in paragraph 11 of the election petition amount to commission of corrupt practice under section 123(4) of The Representation of the People Act?

11) Whether the announcements mentioned in paragraph 12 of the election petition were made, as alleged in the above paragraph, as part of the election propaganda of the first respondent and if so whether the alleged announcements mentioned in paragraph 12 of the election petition amount

to commission of corrupt practice under section 123(4) of The Representation of the People Act?

12) Whether the alleged announcements mentioned in paragraph 13 of the election petition were made as alleged and if so whether it amounts to commission of corrupt practice under section 123(4) of The Representation of the People Act?

13) Whether the alleged announcements mentioned in paragraph 14 of the election petition were made as alleged and if so whether it amounts to commission of corrupt practice under section 123(4) of The Representation of the People Act.

14) Whether the election of the first respondent is liable to be set aside for any of the grounds mentioned in the election petition?"

[3] By the impugned judgment dated 13.04.2012, the High Court dismissed the election petition holding that corrupt practices pleaded in the petition are not proved and, hence, the election cannot be set aside under Section 100(1)(b) of the RP Act; and thus the Appeal.

[4] Heard Shri Vivek Chib, learned Counsel appearing for the appellant and Shri Kapil Sibal, learned Senior Counsel appearing for the first respondent.

[5] The evidence consisted of three parts (i) electronic records, (ii) documentary evidence other than electronic records, and (iii) oral evidence. As the major thrust in the arguments was on electronic records, we shall first deal with the same.

[6] Electronic record produced for the inspection of the court is documentary evidence under Section 3 of The Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act'). The Evidence Act underwent a major amendment by Act 21 of 2000 [The Information Technology Act, 2000 (hereinafter referred to as 'IT Act')]. Corresponding amendments were also introduced in The Indian Penal Code (45 of 1860), The Bankers Books Evidence Act, 1891, etc.

[7] Section 22A of the Evidence Act reads as follows:

"22A. When oral admission as to contents of electronic records are relevant.- Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question."

[8] Section 45A of the Evidence Act reads as follows:

"45A. Opinion of Examiner of Electronic Evidence.-When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000(21 of 2000)., is a relevant fact.

Explanation.--For the purposes of this section, an Examiner of Electronic Evidence shall be an expert."

[9] Section 59 under Part II of the Evidence Act dealing with proof, reads as follows:

"59. Proof of facts by oral evidence. All facts, except the contents of documents or electronic records, may be proved by oral evidence."

[10] Section 65A reads as follows:

"65A. Special provisions as to evidence relating to electronic record: The contents of electronic records may be proved in accordance with the provisions of section 65B."

[11] Section 65B reads as follows:

"65B. Admissibility of electronic records:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the

information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and

belief of the person stating it.

(5) For the purposes of this section, -

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation: For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

[12] These are the provisions under the Evidence Act relevant to the issue under discussion.

[13] In the Statement of Objects and Reasons to the IT Act, it is stated thus:

"New communication systems and digital technology have made drastic changes in the way we live. A revolution is occurring in the way people transact business."

[14] In fact, there is a revolution in the way the evidence is produced before the court. Properly guided, it makes the systems function faster and more effective. The guidance relevant to the issue before us is reflected in the statutory provisions extracted above.

[15] Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

> (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
>
> (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
>
> (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
>
> (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

[16] Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

[17] It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

[18] Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A opinion of examiner of electronic evidence.

[19] The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

[20] It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984

(PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

[21] Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

[22] In State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru., 2005 11 SCC 600], a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows:

> "150. According to Section 63, secondary evidence means and includes, among other things, "copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies". Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub- section (4) of Section 65-

B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

[23] It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

[24] The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

[25] The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

[26] The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized

through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act.

[27] Now, we shall deal with the ground on publication of Exhibit-P1-leaflet which is also referred to as Annexure-A. To quote relevant portion of Paragraph-4 of the election petition:

> "4. On the 12th of April, 2011, the day previous to the election, one Palliparamban Aboobacker, S/o Ahamedkutty, Palliparamban House, Kizhakkechathalloor, Post Chathalloor, who was a member of the Constituency Committee of the UDF and the Convenor of Kizhakkechathalloor Ward Committee of the United Democratic Front, the candidate of which was the first respondent, falling within the Eranad Mandalam Election Committee and was thereby the agent of the first respondent, actively involved in the election propaganda of the first respondent with the consent and knowledge of the first respondent, had got printed in the District Panchayat Press, Kondotty, at least twenty five thousand copies of a leaflet with the heading "PP Manafinte Rakthasakshidhinam Nam Marakkathirikkuka April 13" (Martyr Day of P P Manaf - let us not forget April 13) and in the leaflet there is a specific reference to the petitioner who is described as the son of the then President of the Edavanna Panchayat Shri P V Shaukat Ali and the allegation is that he gave leadership to the murder of Manaf in Cinema style. The name of the petitioner is specifically mentioned in one part of the leaflet which had been highlighted with a black circle around it specifically making the allegation that it was the petitioner under whose leadership the murder was committed. Similarly in another part of the leaflet the name of the petitioner is specifically mentioned with a black border in square. The leaflet comprises various

> excerpts from newspaper reports of the year 1995 highlighting the comments in big letters, which are the deliberate contribution of the publishers. The excerpts of various newspaper reports was so printed in the leaflet to expose the petitioner as a murderer, by intentionally concealing the fact that petitioner was honourably acquitted by the Honourable Court. "

[28] The allegation is that at least 25,000 copies of Exhibit-P1-leaflet were printed and published with the consent of the first respondent. Exhibit-P1, it is submitted, contains a false statement regarding involvement of the appellant in the murder of one Manaf on 13.04.1995 and the same was made to prejudice the prospects of the appellant's election. Evidently, Exhibit-P1 was got printed through Haseeb by PW-4-Palliparamban Aboobakar and published by Kudumba Souhrida Samithi (association of the friends of the families), though PW-4 denied the same. The same was printed at District Panchayat Press, Kondotty with the assistance of one V. Hamza.

[29] At Paragraph-4 of the election petition, it is further averred as follows:

> "4. Since both the said Aboobakar and V. Hamza are agents of the first respondent, who had actively participated in the election campaign, the printing, publication and distribution of annexure-A was made with the consent and knowledge of the first respondent as it is gathered from Shri P V Mustafa a worker of the petitioner that the expenses for printing have been shown in the electoral return of the first respondent. "

[30] At Paragraph-18 of the election petition, it is stated thus:

> "18. As far as the printing and publication of annexure-A leaflet is concerned, the same was not only done with the knowledge and connivance of the 1st respondent, it was done with the assistance of the his official account agent Sri V. Hamza, who happened to be the General Manager of the Press in which the said leaflets were printed. ..."

[31] PW-4-Palliparamban Aboobakar has completely denied the allegations. Strangely, Shri Mustafa and Shri Hamza, referred to above, have not been examined. Therefore, evidence on printing of the leaflets is of PW-4- Aboobakar and PW-42. According to PW-4, he had not seen Exhibit-P1-leaflet before the date of his examination. He also denied that he was a member of the election committee. According to PW-42, who was

examined to prove the printing of Exhibit-P1, the said Hamza was never the Manager of the Press. Exhibit-X4-copy of the order form, based on which the leaflet was printed, shows that the order was placed by one Haseeb only to print 1,000 copies of a supplement and the order was given in the name of PW-4 in whose name Exhibit-P1 was printed, Exhibit-X5-receipt for payment of printing charges shows that the same was made by Haseeb. The said Haseeb also was not examined. Still further, the allegation was that at least 25,000 copies were printed but it has come out in evidence that only 1,000 copies were printed.

[32] It is further contended that Exhibit-P1 was printed and published with the knowledge and consent of the first respondent. Mere knowledge by itself will not imply consent, though, the vice-versa may be true. The requirement under Section 123(4) of the RP Act is not knowledge but consent. For the purpose of easy reference, we may quote the relevant provision:

> "123. Corrupt practices. The following shall be deemed to be corrupt practices for the purposes of this Act:
>
> (1) xxx xxx xxx xxx
>
> (2) xxx xxx xxx xxx
>
> (3) xxx xxx xxx xxx
>
> (4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election."

[33] In the grounds for declaring election to be void under Section 100(1)(b), the court must form an opinion "that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned

candidate or his election agent". In other words, the corrupt practice must be committed by (i) returned candidate, (ii) or his election agent (iii) or any other person acting with the consent of the returned candidate or his election agent. There are further requirements as well. But we do not think it necessary to deal with the same since there is no evidence to prove that the printing and publication of Exhibit-P1-leaflet was made with the consent of the first respondent or his election agent, the sixth respondent. Though it was vehemently contended by the appellant that the printing and publication was made with the connivance of the first respondent and hence consent should be inferred, we are afraid, the same cannot be appreciated. 'Connivance' is different from 'consent'. According to the Concise Oxford English Dictionary, 'connive' means to secretly allow a wrong doing where as 'consent' is permission. The proof required is of consent for the publication and not connivance on publication. In Charan Lal Sahu v. Giani Zail Singh and another, 1984 1 SCC 390], this Court held as under:

> "30. 'Connivance' may in certain situations amount to consent, which explains why the dictionaries give 'consent' as one of the meanings of the word 'connivance'. But it is not true to say that 'connivance' invariably and necessarily means or amounts to consent, that is to say, irrespective of the context of the given situation. The two cannot, therefore, be equated. Consent implies that parties are ad idem. Connivance does not necessarily imply that parties are of one mind. They may or may not be, depending upon the facts of the situation. "

[34] Learned Counsel for the appellant vehemently contends that consent needs to be inferred from the circumstances. No doubt, on charges relating to commission of corrupt practices, direct proof on consent is very difficult. Consent is to be inferred from the circumstances as held by this Court in Sheopat Singh v. Harish Chandra and another, 1960 AIR(SC) 1217]. The said view has been consistently followed thereafter. However, if an inference on consent from the circumstances is to be drawn, the circumstances put together should form a chain which should lead to a reasonable conclusion that the candidate or his agent has given the consent for publication of the objectionable material. Question is whether such clear, cogent and credible evidence is available so as to lead to a reasonable conclusion on the consent of the first respondent on the alleged publication of Exhibit-P1- leaflet. As we have also discussed above, there is no evidence at all to prove that Exhibit-P1-leaflet was printed at the instance of the first respondent. One Haseeb, who placed the order for printing of Exhibit-P1 is not examined. Shri Hamza, who is said to be the Manager of the Press at the relevant time,

was not examined. Shri Mustafa, who is said to have told the appellant that the expenses for the printing of Exhibit-P1 were borne by the first respondent and the same have been shown in the electoral return of the first respondent is also not examined. No evidence of the electoral returns pertaining to the expenditure on printing of Exhibit-P1 by the first respondent is available. The allegation in the election petition is on printing of 25,000 copies of Exhibit-P1. The evidence available on record is only with regard to printing of 1,000 copies. According to PW-24- Sajid, 21 bundles of Exhibit-P1 were kept in the house of first respondent as directed by wife of the first respondent. She is also not examined. It is significant to note that Sajid's version, as above, is not the case pleaded in the petition; it is an improvement in the examination. There is further allegation that PW-7-Arjun and PW-9-Faizal had seen bundles of Exhibit-P1 being taken in two jeeps bearing registration nos. KL 13B 3159 and KL 10J 5992 from the residence of first respondent. For one thing, it has to be seen that PW-7-Arjun was an election worker of the appellant and Panchayat Secretary of DYFI, the youth wing of CPI(M) and the member of the local committee of the said party of Edavanna and Faizal is his friend. PW-29 is one Joy, driver of jeep bearing registration no. KL 10J 5992. He has completely denied of any such material like Exhibit-P1 being transported by him in the jeep. It is also significant to note that neither PW-7-Arjun nor PW-9-Faizal has a case that the copies of Exhibit-P1 were taken from the house of the first respondent. Their only case is that the vehicles were coming from the house of the first respondent and PW-4- Palliparamban Aboobakar gave them the copies. PW-4 has denied it. It is also interesting to note that PW-9-Faizal has stated in evidence that he was disclosing the same for the first time in court regarding the receipt of notice from PW-4. It is also relevant to note that in Annexure-P3- complaint filed by the chief electoral agent of the appellant on 13.04.2011, there is no reference to the number of copies of Exhibit-P1-leaflet, days when the same were distributed and the people who distributed the same, etc., and most importantly, there is no allegation at all in Annexure-P3 that the said leaflet was printed by the first respondent or with his consent. The only allegation is on knowledge and connivance on the part of the first respondent. We have already held that knowledge and connivance is different from consent. Consent is the requirement for constituting corrupt practice under Section 123(4) of the RP Act. In such circumstances, it cannot be said that there is a complete chain of circumstances which would lead to a reasonable inference on consent by the first respondent with regard to printing of Exhibit-P1-leaflet. Not only that there are missing links, the evidence available is also not cogent and credible on the consent aspect of first respondent.

[35] Now, we shall deal with distribution of Exhibit-P1-leaflet. Learned counsel for the appellant contends that consent has to be inferred from the circumstances pertaining to

distribution of Exhibit-P1. Strong reliance is placed on the evidence of one Arjun and Faizal. According to them, bundles of Exhibit-P1-leaflet were taken in two jeeps and distributed throughout the constituency at around 08.00 p.m. on 12.04.2011. To quote the relevant portion from Paragraph-5 of the election petition:

> "5. Both the first respondent and all his election agents and other persons who were working for him knew that the contents of Annexure A which was got printed in the manner stated above are false and false to their knowledge and though the petitioner was falsely implicated in the Manaf murder case he has been honourably acquitted in the case and declared not guilty. True copy of the judgment in S.C. No. 453 of 2001 of the Additional Sessions Court (Adhoc No.2), Manjeri, dated 24.9.2009 is produced herewith and marked as Annexure B. Though this fact is within the knowledge of the first respondent, his agents referred to above and other persons who were working for him in the election on the 12th of April, 2011 at about 8 AM bundles of Annexure A which were kept in the house of the first respondent at Pathapiriyam, within the constituency were taken out from that house in two jeeps bearing Nos KL13-B 3159 and KL10-J 5992 which were seen by two electors, Sri V Arjun aged 31 years, Kottoor House, S/o Narayana Menon, Pathapiriyam Post, Edavanna and C.P. Faizal aged 34 years, S/o Muhammed Cheeniyampurathu Pathapiriyam P.O., who are residing in the very same locality of the first respondent and the jeeps were taken around in various parts of the Eranad Assembly Constituency and Annexure A distributed throughout the constituency from the aforesaid jeeps by the workers and agents of the first respondent at about 8 PM that night. The aforesaid publication also amounted to undue influence as the said expression is understood in Section 123(2)(a)(ii) of The Representation of the People Act, in that it amounted to direct or indirect interference or attempt to interfere on the part of the first respondent or his agent and other persons who were his agents referred to below with the consent of the first respondent, the free exercise of the electoral right of the voters of the Eranad Constituency and is also a corrupt practice falling under Section 123(4) of The Representation of the People Act, 1951. "

[36] The allegation is on distribution of Exhibit-P1 at about 08.00 p.m. on 12.04.2011. But the evidence is on distribution of Exhibit-P1 at various places at 08.00 a.m., 02.00 p.m., 05.00 p.m., 06.30 p.m., etc. by the UDF workers. No doubt, the details on

distribution are given at Paragraph-5 (extracted above) of the election petition at different places, at various timings. The appellant as PW-1 stated that copies of Exhibit-P1 were distributed until 08.00 p.m. Though the evidence is on printing of 1,000 copies of Exhibit-P1, the evidence on distribution is of many thousands. In one panchayat itself, according to PW-22-KV Muhammed around 5,000 copies were distributed near Areakode bus stand. Another allegation is that two bundles were entrusted with one Sarafulla at Areakode but he is not examined. All this would show that there is no consistent case with regard to the distribution of Exhibit-P1 making it difficult for the Court to hold that there is credible evidence in that regard.

[37] All that apart, the definite case of the appellant is that the election is to be declared void on the ground of Section 100(1)(b) of the RP Act and that too on corrupt practice committed by the returned candidate, viz., the first respondent and with his consent. We have already found that on the evidence available on record, it is not possible to infer consent on the part of the first respondent in the matter of printing and publication of Exhibit-P1-leaflet. There is also no evidence that the distribution of Exhibit-P1 was with the consent of first respondent. The allegation in the election petition that bundles of Exhibit-P1 were kept in the house of the first respondent is not even attempted to be proved. The only connecting link is of the two jeeps which were used by the UDF workers and not exclusively by the first respondent. It is significant to note that there is no case for the appellant that any corrupt practice has been committed in the interest of the returned candidate by an agent other than his election agent, as per the ground under Section 100(1)(d)(ii) of the RP Act. The definite case is only of Section 100(1)(b) of the RP Act.

[38] In Ram Sharan Yadav v. Thakur Muneshwar Nath Singh and others, 1984 4 SCC 649], a two- Judge Bench of this Court while dealing with the issue on appreciation of evidence, held as under:

> "9. By and large, the Court in such cases while appreciating or analysing the evidence must be guided by the following considerations:
>
> (1) the nature, character, respectability and credibility of the evidence,
>
> (2) the surrounding circumstances and the improbabilities appearing in the case,

(3) the slowness of the appellate court to disturb a finding of fact arrived at by the trial court who had the initial advantage of observing the behaviour, character and demeanour of the witnesses appearing before it, and

(4) the totality of the effect of the entire evidence which leaves a lasting impression regarding the corrupt practices alleged."

[39] On the evidence available on record, it is unsafe if not difficult to connect the first respondent with the distribution of Exhibit-P1, even assuming that the allegation on distribution of Exhibit-P1 at various places is true.

[40] Now, we shall deal with the last ground on announcements. The attack on this ground is based on Exhibit-P10-CD. We have already held that the CD is inadmissible in evidence. Since the very foundation is shaken, there is no point in discussing the evidence of those who heard the announcements. Same is the fate of the speech of PW-4-Palliparamban Aboobakar and PW-30-Mullan Sulaiman.

[41] We do not think it necessary to deal with the aspect of oral evidence since the main allegation of corrupt practice is of publication of Exhibit-P1- leaflet apart from other evidence based on CDs. Since there is no reliable evidence to reach the irresistible inference that Exhibit-P1-leaflet was published with the consent of the first respondent or his election agent, the election cannot be set aside on the ground of corrupt practice under Section 123(4) of the RP Act.

[42] The ground of undue influence under Section 123(2) of the RP Act has been given up, so also the ground on publication of flex boards.

[43] It is now the settled law that a charge of corrupt practice is substantially akin to a criminal charge. A two-Judge Bench of this Court while dealing with the said issue in Razik Ram v. Jaswant Singh Chouhan and others, 1975 4 SCC 769], held as follows:

"15. The same evidence which may be sufficient to regard a fact as proved in a civil suit, may be considered insufficient for a conviction in a criminal action. While in the former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite for a conviction. The same is largely true about proof of a charge of corrupt practice, which cannot be established by mere balance of probabilities, and, if, after giving due

consideration and effect to the totality of the evidence and circumstances of the case, the mind of the Court is left rocking with reasonable doubt not being the doubt of a timid, fickle or vacillating mind as to the veracity of the charge, it must hold the same as not proved."

[44] The same view was followed by this Court P.C. Thomas v. P.M. Ismail and others., 2009 10 SCC 239], wherein it was held as follows:

"42. As regards the decision of this Court in Razik Ram and other decisions on the issue, relied upon on behalf of the appellant, there is no quarrel with the legal position that the charge of corrupt practice is to be equated with criminal charge and the proof required in support thereof would be as in a criminal charge and not preponderance of probabilities, as in a civil action but proof "beyond reasonable doubt". It is well settled that if after balancing the evidence adduced there still remains little doubt in proving the charge, its benefit must go to the returned candidate. However, it is equally well settled that while insisting upon the standard of proof beyond a reasonable doubt, the courts are not required to extend or stretch the doctrine to such an extreme extent as to make it well-nigh impossible to prove any allegation of corrupt practice. Such an approach would defeat and frustrate the very laudable and sacrosanct object of the Act in maintaining purity of the electoral process. (please see S. Harcharan Singh v. S. Sajjan Singh)"

[45] Having regard to the admissible evidence available on record, though for different reasons, we find it extremely difficult to hold that the appellant has founded and proved corrupt practice under Section 100(1)(b) read with Section 123(4) of the RP Act against the first respondent. In the result, there is no merit in the appeal and the same is accordingly dismissed.

[46] There is no order as to costs.

HIGH COURT OF BOMBAY *(D.B.)*

FAIM @ LALA IBRAHIM KHAN
V/S
STATE OF MAHARASHTRA

Date of Decision: 20 November 2015

Citation: 2015 LawSuit(Bom) 2455

Hon'ble Judges: V K Tahilramani, A S Gadkari

Case Type: Criminal Appeal

Case No: 1009 of 2012

Subject: Criminal

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 302, SEC 120B
EVIDENCE ACT, 1872 SEC 65B, SEC 27

Final Decision: Appeal allowed

Advocates: Rajendra Shirodkar, Archit Sakhalkar, Yug Mohit Chaudhary, Yogesh Rawat, S S Redekar, R M Gadhavi

Reference Cases:
Cases Referred in (+): **3**

Judgement Text:-

A S Gadkari, J

[1] The appellants have questioned the correctness of the judgment and order dated

10.7.2012 passed by the Additional Sessions Judge, Vasai, District Thane in Sessions Case No.329 of 2007.. By the said judgment and order dated 10.7.2012 the appellant-original accused No.2-Haresh Patil has been convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer life imprisonment with a fine of Rs.10,000/- and in default of payment of fine further rigorous imprisonment of one year. The appellant -original accused No.1 Kamlesh @Babla @ Bablya Shankar Malpedi, accused No.2 Haresh Patil and accused No.3-Faim @ Lala Ibrahim Khan have been convicted for the offence punishable under Section 120B of the Indian Penal Code and sentenced to suffer life imprisonment with a fine of Rs.10,000/- each and in default of payment of fine to further suffer rigorous imprisonment for one year each. The Trial Court has thus convicted the original accused No.1 Kamlesh @ Babla @ Bablya Malpedi and accused No.3 Faim Lala Ibrahim Khan for the offence punishable under Section-120B of the Indian Penal Code. By the same impugned judgment and order the Trial Court was pleased to acquit the original accused No.4- Durgeshkumar @ Durga Ramshankar Pande from all the charges levelled against him. For the sake of brevity the appellants named herein above will be referred to with their original accused numbers as they were before the Trial Court.

[2] The facts which are enumerated from the record and necessary to decide the present appeal can briefly be stated as under:-

(i) The date and time of incident was 2.4.2007. Between 9.00 to 9.30p.m. the complainant Arun Chandran (P.W.3) along with his friend Amit Mishra (P.W.4) were proceeding towards Vasai (East) on their scooter. On the bridge, they saw one person was assaulting by stick to the victim. Complainant Arun Chandran (P.W.3) and his friend Amit (P.W.4) stopped their vehicle and rushed towards the person (victim) who was being assaulted. As soon as Arun and Amit rushed towards the person who was assaulting the victim by stick, he ran away.

(ii) Arun (P.W.3) and Amit (P.W.4) thereafter took the injured from an auto rickshaw to the hospital. From the diary which was found from the injured person they came to know the name of the injured as Faim Ibrahim Khan. Arun (P.W.3) intimated the family members of Faim Khan. Arun also lodged FIR (Exh.71) with Manikpur Police Station. On the basis of the said First Information Report bearing CR NO.I-125/2007 came to be registered. The investigation was initially carried out by PSI Naikwade of Manikpur Police

Station. Mr. Naikwade drew the spot panchanama, Inquest panchanama and the seizure panchanama. He also recorded the statements of some of the witnesses. The said investigation was subsequently transferred to PSI Nitin Thakare (PW-22) of LCB, Thane (Rural). He arrested the accused persons. He also discovered the sticks at the instance of accused No.1 Kamlesh under Section 27 of the Evidence Act. PSI Nitin Thakare collected the call detail record pertaining to the mobile phones of the appellants. He also gathered the post mortem notes and Chemical Analysis report during the course of investigation. After completion of the investigation PSI Nitin Thakare submitted the charge sheet in the court of J.M.F.C. Vasai at Vasai under Section 302 and 120B of the Indian Penal Code.

(iii) As the offence under Section-302 of the I.P.C. was exclusively triable by the Court of Sessions, the learned J.M.F.C. committed the said case to the Court of Additional Sessions Judge Vasai, At Vasai. After committal of the case, the learned Trial Court framed the charge below Exh.18.The said charge was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. The prosecution in support of its case and to prove the guilt against the accused persons examined in all 22 witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said case was pleased to convict the appellants as stated herein above.

[3] The present case is based on ocular evidence of Arun Chandran (P.W.3), Amit Mishra (P.W.4) and Siddesh Kadam (P.W.21), P.W.3 Arun Chandran in his testimony has deposed that on 2.4.2007 he along with his friend Amit Mishra (P.W.4) were going towards Vasai (East) by a scooter. On the bridge they saw one person assaulting by stick to the victim. He therefore, stopped his vehicle and went to see what was happened. In the mean while, the person who was assaulting the other person (deceased) threw the stick there and ran away. P.W.3 Arun thereafter took the injured person by auto rickshaw to the hospital. He also found a diary near the injured person. The name of the injured person was Faim Khan. The said injured was admitted to Kanekar hospital. P.W.3-Arun Chandran gave intimation about the incident to the family members of Faim Khan. He handed over the said diary to the police. In the night he received a phone call from the police that the said injured expired. Thereafter, the police obtained his complaint which is at Exh.71. He had seen the person who had assaulted

the deceased. He was called for identification parade wherein he identified the said person. He was Haresh Patil (Accused No.2).

> In the cross examination this witness had admitted that Amit (P.W.4) was driving scooter. From the other side of the road he saw the accused assaulting. That, when he carried the injured (Munna) to the hospital, he was unable to talk. He further admitted that when he reached on the bridge it was about 9.00 to 9.30 p.m. He had seen the assailant assaulting the victim from the distance of about 10 to 15 ft. and the scooter on which he was pillion rider was at a speed of about 30 K.M. per hour. That, they reached near the injured within 30 to 40 seconds after stopping of the vehicle and by that time the assailant ran away.

[4] P.W.4- Amit Mishra has also deposed in the same line as has been deposed by P.W.3 Arun. In the cross examination P.W.4 Amit has admitted that victim was also having scooter. On the date of incident P.W.4 was riding the scooter at the speed of 30 K.M. per hour. That, he stopped his scooter 50ft. ahead from the place where victim was lying. That, within 15 to 20 seconds they reached towards the injured.

[5] P.W.21 Siddesh Kadam has deposed that on 2.4.2007 at about 7.30p.m.he along with his friends decided to go to Vasai (West) and they started proceeding on their motorcycle. They stopped on the flyover connecting Vasai East and West. At that time, he saw one person assaulting the said 'uncle' with something in his hand. As a result of which the said person on the scooter fell down on the road. Thereafter said two persons left the place and ran away. P.W.21 thereafter left the said spot.

> In the cross examination this witness has admitted that he reached to the flyover at about 9.00p.m. That his statement was recorded by police after about 5 days from the date of incident. He did not remember whether there was light on the flyover or not. He saw the said incident from the distance of about 200ft.

[6] P.W.12 Avinash Koshti was serving as Resident Naib Tahsildar, at Vasai. P.W.12 has conducted the Indemnification parade. In his deposition he has stated that witness Arun Chandran (P.W.1) has identified the accused No.3 Harish. P.W.12 has also stated that another witness has also identified Haresh. P.W.12 is silent about the fact whether P.W.21 Siddesh Kadam has identified the accused No.2 Harish or not. At this stage we

must note here that the evidence of P.W.12 Avinash Koshti is as vague as possible and is of no help to the persecution. The minute scrutiny of his deposition leads us to conclude that he was very casual while deposing in the court. Even the test identification parade panchanama (Exh.98) suffers from various material irregularities and/or infractions of the guidelines framed under the Criminal Manual and therefore in our opinion in view of the facts of present case, the said contemporaneous document (Exh.98) is also unsafe to rely upon.

[7] The learned counsel appearing for the appellant No.2 submitted that the date of incident is 2.4.2007. That, the appellant No.2 Haresh was arrested on 22.5.2007 and the identification parade was conducted by the police on 4.8.2007.There is substantial delay caused at the instance of the investigating agency in conducting the said identification parade. He therefore, submitted that reasonable doubt arises about the bonafide of the test identification parade. In support of his contention, he placed reliance on the decision of the Supreme Court [Hari Nath and another vs. State of U.P., 1988 1 SCC 14] The Supreme Court has held that if there is no explanation at all for the delay by the prosecuting agency, the benefit of this wholly unexplained lack of promptitude in holding the test identification, reasonable doubt arises. At this stage, we may also observe that after taking into consideration the evidence of P.W. 3 and 4 in observing accused No.2 in such a short span of 30 seconds precisely and then identifying him after a lapse of more than about four months appears to be very doubtful. As far as P.W.21 is concerned, though he claims himself to be an eye witness he has not identified accused No.12 Harish as the assailant. It further appears that P.W.21, Siddesh is a chance witness and claims that he had seen the incident from a distance of about 200ft. In view of the fact that sufficient delay in conducting the test identification parade by the investigating agency, the principle laid down by the Supreme Court in the case of Hari Nath and Another is applicable to the present case and we hold that identification by P.W.3 and 4 of accused No.2 Haresh is doubtful and the benefit of doubt goes in favour of accused No.2 Haresh Patil.

[8] It is further to be noted here that P.W.3 in his testimony has categorically deposed that the person who was assaulting the victim had thrown the stick on the spot and ran away. However, surprisingly the police have discovered two wooden logs by effecting a panchanama dated 28.5.2011 (Exh.145) from accused No.1 Kamlesh. The said discovery panchanama has been proved by P.W.22-Nitin Thakare, the Investigating Officer. The scene of offence panchanama which is at Exh. 58 discloses one wooden log was found at the spot of incident itself. The prosecution case rests on the theory that only Accused-2 i.e. Haresh assaulted the deceased with a wooden log and in that view

discovery of 2 more wooden logs from accused no.1 Kamlesh creates doubt in the mind of this Court. After taking into consideration the direct contradictions about the wooden log used in the crime and its place of discovery, it creates strong doubt in our mind about the genuineness of the discovery panchanama itself. Discovery at the instance of accused No.1 Kamlesh therefore, assumes no value and is not at all useful to the prosecution as the weapon of assault was found on the spot of incident itself, there was no recovery at the instance of accused No.2, Haresh, to whom role of actual assault is attributed. The record pertaining to the present case is absolutely silent about the fact that there were any finger prints found on the said weapon, of the appellant Haresh.

[9] The prosecution has examined P.W.18 Ashok D. Bhande, P.W.19 Kundan K. Jadhav to prove the motive behind the crime. They deposed that deceased Naim Khan was the brother of accused No.3 Faim @ Lala Ibrahim Khan. Accused No.3 Faim @ Lala Ibraghim Khan was doing the business of transport alongwith deceased Munna @ Naim Khan. A dispute ensued between the brothers on account of money. By the mediation of P.W.18 and 19 the said dispute was resolved. The deceased Munna @ Faim Khan started his own business and was doing well in the same. That, enraged accused No.3 Faim @ Lala Ibrahim Khan and therefore, he decided to kill his brother-Munna @ Naim Khan.

[10] The prosecution has thereafter examined P.W.9 Manoj Sagare to further prove the motive and also the conspiracy hatched by the accused persons. P.W.9 has deposited that on 12th of year 2007 (month not mentioned). Lala had called him with vehicle and accused no.1, accused no.2 and accused no.3 had been to the High Court. On the next day he along with accused persons were returning from S.P Office in the vehicle of accused No.3 Faim @ Lala Ibrahim Khan when Lala (accused no.3) said that Munna (deceased) was having excess fat (Charabi) and he (deceased) was to be managed. This is the only sentence which was uttered by accused Faim @ Lala Ibrahim Khan on the basis of which the prosecution has put forth the theory of conspiracy hatched by the accused persons. A close scrutiny of the evidence of P.W.9 reveals that the said statement made by accused No.3 Faim Khan is neither inculpatory nor is the statement which would lead us to infer that it amounts to conspiracy. It appears that Faim @ Lala Khan (accused no.3) was jealously talking about his brother who was flourishing in his own business and nothing more.

[11] The prosecution has also relied upon recovery of three mobile phones at the instance of accused No.3 Faim @ Lala Ibrahim Khan. The prosecution has come up with a case that all the three coble phones were discovered at the instance of accused

No.3. Out of the said three mobile phones, two mobile phones bearing Nos.9322444929 and 9322444930 were in the name of accused No.1 Kamlesh Malpedi and Mobile No.9321662525 was in the name of accused No.3 Faim Khan. The learned counsel appearing for accused No.3 Faim Khan criticized the finding recorded by the learned Trial Court in Paragraphs 55 and 56 of the impugned judgment wherein, the Trial Court has held that call detail record shows that there were en number of calls exchanged between these two mobile phones belonging to accused No.1 Kamlesh Malpedi. He further held that it is impossible that anybody having two mobile phones with it, would call himself from one mobile to another. That, the case of the prosecution that mobile phone No.9322444429 was used by accused No.2 appearing to be more probable. In the absence of any evidence to the effect that the said mobile phone bearing No.9322444929 was with accused No.2 Haresh, at the time of incident, the observations made by the Trial Court in Paragraphs 55 and 56 of the impugned judgment and the finding recorded thereto, in our considered opinion is based only on conjectures. Mr. Shirodkar, learned counsel appearing for original accused No.1 Faim @ Lala Ibrahim Khan further submitted that assuming for the sake of arguments that there were exchange of phone calls on 1.4.2007 and 2.4.2007 inter see in the said two mobile numbers, the same itself would not attract the charge of conspiracy. In support of his contention he relied upon a decision of the Supreme Curt in the case of State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru, 2005 11 SCC 600 wherein Supreme Court has held that there were exchanges between two persons on cellular phone but form that circumstance alone no inference can be drawn of reasonable degree of certainty that said persons have entered into conspiracy. According to us, in the present case the prosecution has failed to prove that exchange of telephone calls between the said three phone numbers was for the purpose of firstly hatching and thereafter executing the conspiracy entered into by and between the accused Nos. 1 and 3. It is to be noted here that accused No.3 Faim Khan is the employer of accused No.1 Kamlesh and accused No.2 Haresh and therefore, there was other probability that they might have exchanged telephone calls for the purpose of their business. The prosecution has not brought on record any other material to show that the said three mobile numbers were being used for the purpose firstly hatching conspiracy and thereafter executing it which was resulted into the death of deceased Faim Khan. In view of the same we give benefit of doubt to original accused No.1 Kamlesh and accused No.3 Faim Khan for the same.

[12] Mr. Shirodkar further submitted that in the present case apart from the fact that prosecution has failed to prove the conspiracy, has also failed to produce a certificate as contemplated under Section 65-B(4) of the Evidence Act which is mandatory in view of the amendment to the said Act which has come into effect from 17.2.2000. In support of

his contention he relied upon a decision of the Supreme Court in the case of Anvar P.V. vs.P.K.Basheer and others, 2014 10 SCC 473 and in particular, Paragraph Nos. 15 and 22 which reads as under:-

> "15. Under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
>
> (a) There must be a certificate which identifies the electronics record containing the statement;
>
> (b) The certificate must describe the manner in which the electronic record was produced;
>
> (c) The certificate must furnish the particulars of the device involved in the production of that record;
>
> (d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and
>
> (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation f the relevant device.
>
> 22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by his Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An

Electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied.

Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible."

In the present case the date of incident is 2.4.2007.The amendment of Section 65 of the Evidence Act came into effect from 17.2.2000 and therefore, it was mandatory for the prosecuting agency to produce the certificate in terms of Section 65-B obtained at the time of collecting document (CDR) without which the secondary evidence pertaining to electronic record is inadmissible. Thus, in view of the mandate of Section 65-B of the Evidence Act and in the absence of its compliance the evidence of CDR produced by the prosecuting agency in respect of the three aforesaid mobile phones is fully inadmissible in evidence.

[13] Thus, after taking into consideration the entire evidence available on record, we are of the considered opinion that the identification by P.W.3-Arun Chandran and P.W.4-Amit Mishra of accused No.2 Haresh is very doubtful. The test identification parade which was held belatedly also creates doubt about the said fact that whether after the lapse of about four months P.W.3 and P.W.4 the eye witnesses were really able to identify accused No.2-Haresh. As stated above, the P.W. Nos.3 and 4 had at the most only 30 seconds to observe the accused No.2 at the time of incident from a running scooter and they have identified the accused no.2 in test identification parade after a gap of about 4 months without any special characteristics of accused no.2 and therefore, it creates doubt about their claim of identifying the accused No.2-Haresh Patil. As stated earlier the record of call details of the aforesaid three mobile numbers produced by the prosecuting agency is inadmissible in view of the mandate of Section 65-B of the Evidence Act and therefore, according to us the accused persons are entitled for benefit of doubt.

[14] Thus, the benefit of doubt is given to the accused persons and they are acquitted from the charges framed against them. Hence, the following order.

ORDER

a) The appeals preferred by the respective appellant are allowed. They are acquitted from all the charges framed against them.

b) Fine, if any, paid by the appellants be refunded to them.

c) The appellants be released from Jail forthwith if they are not required in any other case.

d) The Appellant-Accused No.3 is on bail and his bail bond stands cancelled.

If no objection was taken at the time of admission on certificate.

It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr.P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

SONU @ AMAR

V/S

STATE OF HARYANA. 2017 AIR(SC) 3441.

SUPREME COURT OF INDIA (FROM PUNJAB & HARYANA) *(D.B.)*

SONU @ AMAR
V/S
STATE OF HARYANA

Date of Decision: 18 July 2017

Citation: 2017 LawSuit(SC) 704

Hon'ble Judges: S A Bobde, L Nageswara Rao

Eq. Citations: 2017 (3) RCR(Cri) 786, 2017 (8) Scale 45, 2017 AIR(SC) 3441, 2017 (7) JT 362, 2017 (3) CurCriR 241, 2017 (3) UC 1684, 2017 (8) SCC 570, 2017 (3) SCC(Cri) 663, 2017 AIR(SC)(Cri) 1170, 2017 CrLJ 4352, 2017 (5) CTC 207, 2017 (2) LW(Cri) 606, 2017 (4) MadLJ(Cri) 23, 2017 (2) ALD(Cri) 814, 2017 (7) SCJ 165

Case Type: Criminal Appeal

Case No: 1418 of 2013

Subject: Criminal

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 201, SEC 302, SEC 364A, SEC 328, SEC 120B, SEC 328A
CODE OF CRIMINAL PROCEDURE, 1973 SEC 161, SEC 294
EVIDENCE ACT, 1872 SEC 65B, SEC 33, SEC 65B(4)
ARMS ACT, 1959 SEC 25

Final Decision: Appeal dismissed

Advocates: P N Puri, D N Goswami, Sushil Balwada, Ram Lal Roy, Satyendra Kumar, Vinod Sharma, Pawan Relay, Piyush Hans, Monika Gusain, Karumesh Kr Shukla, Vishwa Pal Singh

Reference Cases:

Cases Referred in (+): **18**

Judgement Text:-

L Nageswara Rao, J

[1] The Appellants in the above appeals along with Dharmender @ Bunty were found guilty of abduction and murder of Ramesh Jain. They were convicted and sentenced for life imprisonment. Their conviction and sentence was confirmed by the High Court. Accused Dharmender @ Bunty did not file an appeal before this Court. Accused Rampal was convicted under Section 328 read with 201 IPC and was sentenced to 7 years imprisonment. His conviction was also confirmed by the High Court which is not assailed before us.

[2] Dinesh Jain (PW-1) approached the SHO, Ganaur Police Station (PW 31) at 01:30 pm on 26.12.2005 with a complaint that his father was missing on the basis of which FIR was registered by PW 31. As per the FIR, Dinesh Jain left the rice mill at 7:00 pm on 25.12.2005 and went home while his father stayed back. As his father did not reach home even at 10:00 pm, he called his father's mobile number and found it to be switched off. He went to the rice mill and enquired about the whereabouts of his father from Radhey, the Chowkidar and was informed that his father left the rice mill at 9:30 pm on his motor cycle bearing Registration No. DL-8-SY-4510. He along with his family members searched for his father but could not trace him. He apprehended that his father might have been kidnapped.

[3] After registration of the FIR, PW 31 started investigation by visiting the rice mill and making inquiries. On 28.12.2005 one motor cycle was recovered from a pit near Bai crossing. As the number plate of the vehicle was blurred, PW31 verified the engine number, compared it with the registration certificate to find that the seized motor cycle belonged to Ramesh Jain.

[4] On 09.01.2006, Dinesh Jain (PW 1) and Ashok Jain (PW 3) informed PW 31 that a call was received on the mobile phone of PW 1 from a person who identified himself as Bunty and who was speaking in Bihari dialect. He informed them that Ramesh Jain was in his custody and demanded a ransom of Rs.1 crore for his release. They were also

asked to purchase another mobile phone having Delhi network to which future calls would be made. The Investigating Officer (PW31) visited the rice mill belonging to deceased Ramesh Jain on 17.01.2006 and met PW 1, PW3 and Dhir Singh (PW 7). They handed over four threatening letters (Exh.P 1 to P 4), one key ring (Exh.P 9), one silver ring having a precious stone (Exh.P 10) and a piece of cloth of a shirt worn by the deceased on 25.12.2005 when he was kidnapped (Exh.P11). PW 1 and PW 3 informed the Investigating Officer that Bunty called them and told them that they would find the key ring, silver ring, a piece of cloth and cuttings of newspaper near Bai crossing. They collected the said articles from Bai crossing.

[5] The Investigating Officer along with SHO Special Cell, Rohini, Delhi constituted three raiding parties on 20.01.2006 on the basis of information that the accused would visit Tibetan Market. Pawan (A1), Surender (A2) and Dharmender @ Bunty (A3) were arrested at 11:45 pm when they visited the Tibetan Market, Delhi in a Maruti car. Their mobile phones and some cash were recovered from them.

[6] On 22.01.2006, Amar @ Sonu (A5) and Parveen (A4) were arrested near the bus stand at Ganaur Chowk, GT Road, Ganaur. Two mobile phones were seized from Sonu (A5). Parveen @ Titu (A4) suffered a disclosure statement during the course of investigation that Ramesh Jain was abducted and a demand of Rs. 1 crore was made from his family members for his release. Parveen (A4) stated that Ramesh Jain was murdered and his dead body was buried at Baba Rude Nath temple in village Kheri Khusnam. In his disclosure statement, Surender (A2) further disclosed that Dr. Rampal administered injections to keep Ramesh Jain unconscious. He further disclosed that Ramesh Jain was murdered on 29.12.2005 and his dead body was buried in a pit at Baba Rude Nath temple. Dharmender @ Bunty (A3) and Surender (A2) also suffered disclosure statements in which they stated that they can identify the place where Ramesh Jain was murdered and buried.

[7] The Investigating Officer was led by Parveen (A4), Dharmender (A3) and Surender (A2) to Baba Rude Nath temple in village Kheri Khusnam on 22.01.2006. The room in which Ramesh Jain was confined and murdered was pointed out by A2 to A4. The dead body of Ramesh Jain was exhumed from the place identified by A2 and A4. PW1, PW3, PW6 along with PW11 Jai Chand, SDM were present at the spot from where the dead body of Ramesh Jain was taken out from the pit.

[8] On 24.01.2006, a disclosure statement was made by Parveen (A4) pursuant to which he identified the place where the key ring of the motor cycle, threatening letters

and a ring of deceased Ramesh Jain were placed near a sign board at the crossing of village Bai. He further disclosed that he concealed another ring of Ramesh Jain at his house in village Ghasoli at a place which he can only identify. Parveen led the police party to the place where he concealed the golden ring of the deceased which was identified by PW1 and recovered through memo Exh.PT/5. Dharmender @ Bunty (A3) led the police party to a rented room situated at Shashtri Park, Delhi from where the SIM card of mobile No. 9896351091 belonging to deceased Ramesh Jain was recovered from a concealed place. Pursuant to a disclosure statement, he also identified the place where the motor cycle of deceased was thrown after he was abducted. On 30.01.2006, Sonu @ Amar suffered a disclosure statement to the effect that he had concealed the wallet of Ramesh Jain and certain documents like PAN card, diary, three electricity bills, two water bills and his photographs underneath the seat of his shop which were exclusively in his knowledge. The said documents were seized by the Investigating Officer from the shop belonging to Sonu @ Amar (A5). The registration certificate of the motor cycle of deceased Ramesh Jain was recovered from a drawer of the table in the house situated at Begha Road, Ganaur which was occupied by Pawan (A1) pursuant to a disclosure statement by him. A country made pistol with two live cartridges were recovered from the same room situated at Begha Road on the basis of disclosure statement made by Surender (A2).

[9] Dr. Ram Pal (A6) surrendered in the Court of Sub Divisional Judicial Magistrate (SDJM), Ganaur on 01.02.2006. He suffered a disclosure statement on the basis of which a syringe which was used for giving injections to keep the deceased unconscious was seized from the roof of Baba Rude Nath temple, village Kheri Khusnam. A spade was also recovered from underneath a cot in his house on the basis of his disclosure statement.

[10] The Investigating Officer collected the Call Detail Records (CDRs) of all the mobile phones that were recovered from the accused, mobile phones of the deceased and Dinesh Jain (PW 1) from the Nodal officers of the mobile companies.

[11] Accused Manish (A7) who is a cousin of Sonu (A5) surrendered on 12.04.2006 in the Court of SDJM, Ganaur. He is alleged to have assisted A5 in the abduction. He was acquitted by the Trial Court which was confirmed by the High Court which remains unchallenged. The accused were tried for offences punishable under Section 120 B, 364 A, 302, 328 A and 201 read with 120 B of the Indian Penal Code. In addition, A2 was also charged for committing an offence under Section 25 of the Arms Act. The

Additional Sessions Judge, Sonepat by his judgment dated 11.10.2010 convicted A1 to A5 for the aforesaid offences and sentenced them to life imprisonment. A6 was convicted under Section 328 and 201 of IPC and sentenced to seven years. All the convicted accused filed appeals before the High Court. Dinesh Jain (PW 1) filed an appeal for enhancement of the sentence of the convicted appellants. He also challenged the acquittal of accused Manish (A7). The High Court dismissed all the appeals after a detailed re-appreciation of the material on record. A1, A2, A4 and A5 have approached this Court by filing appeals against the confirmation of their conviction and sentence.

[12] We have carefully examined the entire material on record and the judgments of the Trial Court and the High Court. The Trial Court relied on the testimonies of PW1 and PW3, the recoveries made pursuant to the disclosure statements of the accused and the CDRs of the mobile phones of the accused, the deceased and PW 1 to conclude that the prosecution established that the accused are guilty beyond reasonable doubt. The Trial Court also discussed the complicity of each of the accused threadbare. The High Court re-appreciated the evidence and placed reliance on the disclosure statements, the consequential recoveries and the CDRs of the mobile phones to confirm the findings of the Trial Court.

[13] Ramesh Jain left his rice mill at 9:30 pm on 25.12.2005. His dead body was exhumed from the premises of the temple in village Kheri Khusnam on the intervening night of 22/23.01.2006. The post mortem examination was conducted by Dr. Pankaj Jain (PW16) on 23.01.2006. He deposed that the process of decomposition was in progress. The skin was peeled off at most places. A muffler was present around the neck of the dead body. Both wrists and ankles were tied by a piece of cloth. The hyoid bone was found fractured. In the opinion of PW 16, Ramesh Jain died of asphyxia. The probable time of death, according to him, was 3/4 weeks prior to 23.01.2006. He also deposed that the process of decomposition would be slower during winter. Dinesh Jain (PW1) deposed that there was a demand of ransom of Rs.1 crore for the release of his father which was made through a telephone call on 06.01.2006 from a person who identified himself as Bunty and who was speaking in Bihari dialect. He also spoke of the calls that were made from the mobile phone bearing No. 9896351091 belonging to his father on 08.01.2006 and 09.01.2006 by which the ransom demands were repeated. He further stated about the threatening letters received by him at his shop address. He also deposed that he collected a piece of shirt worn by his father on the day of his abduction along with one silver ring and a key ring of the motor cycle of his father at a place

specified in a call received by him on 16.01.2006. He was present when the dead body of his father was being taken out and he video-graphed the exhumation. Ashok Jain (PW3) who is the brother of deceased Ramesh Jain, corroborated the evidence of PW1 regarding the demands that were made for payment of ransom for the release of Ramesh Jain.

[14] The arrest of A1 to A3 from Tibetan Market, Delhi at 11:45 pm on 20.01.2006 led to several disclosure statements made by the accused pursuant to which relevant material was recovered. The details of recoveries made from each of the accused will be discussed later. The dead body of the deceased Ramesh Jain was also recovered pursuant to a disclosure statement made by A2 to A4. The CDRs that were obtained from the Nodal officers of the telephone companies which were exhibited in the Court without objection clearly prove the complicity of all the accused. A detailed and thorough examination of the number of calls that were made between the accused during the period 25.12.2005 to 20.01.2006 was made by the Courts below to hold the accused guilty of committing the offences. We do not see any reason to differ from the conclusions of the Courts below on the basis of the evidence available on record. Neither do we see any perversity in the reasons and the conclusion of the Courts below. The jurisdiction of this Court in criminal appeals filed against concurrent findings is circumscribed by principles summarised by this Court in Dalbir Kaur v. State of Punjab, 1976 4 SCC 158 , as follows:

> "8. Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:
>
> "(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;
>
> (2) that the Court will not normally enter into a re-appraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;
>
> (3) that the Court would not enter into credibility of the evidence with a view

to substitute its own opinion for that of the High Court;

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence."

[15] Admittedly, there is no direct evidence of kidnapping or the murder of Ramesh Jain. This is a case of circumstantial evidence. In a catena of cases, this Court has laid down certain principles to be followed in cases of circumstantial evidence. They are as under:

1. The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

2. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

3. The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

(See: Shanti Devi v. State of Rajasthan, 2012 12 SCC 158); (See also: Hanumant v. State of Madhya Pradesh, 1952 SCR 1091 (P.1097) Sharad Birdhichand Sarda v. State of Maharashtra, 1984 4 SCC 116).

[16] Applying the above principles to the facts of this case, we find that the following circumstances would lead to the conclusion of guilt against the accused:

A. The deceased was missing from 23.12.2005 and his dead body was dug out from the premises of a temple on 23.01.2006.

B. Demand of ransom for the release of the deceased is proved by the oral testimonies of PW1 and PW3.

C. Disclosure statements of A2 to A4 and the recovery of the dead body from the premises of the temple.

D. Disclosure statements made by the accused pursuant to which there was recovery of several articles belonging to the deceased including the SIM card of his mobile number, wallet containing his personal belongings, etc.

E. The CDRs of the mobile which clearly show the interaction of the accused during the period from 25.12.2005 to 20.01.2006 as well as the calls made to PW1 including the calls made from the mobile phone of the deceased.

F. The silver ring, key ring of the motor cycle and a piece of cloth worn by the deceased on 25.12.2005 which were sent to PW1 by the accused.

[17] We deem it proper to consider the submissions made by the learned counsel for the accused.

A1 - Pawan (Criminal Appeal No.1416 of 2013)

[18] The registration certificate of motor cycle No. DL-8-SY-4510 of the deceased was recovered from A1 pursuant to the disclosure statement Exh.PDD. The registration certificate was recovered from the drawer of a table lying in the room of his house situated at Begha Road, Ganaur.

[19] Mr. D. B. Goswami, learned counsel appearing for A1 submitted that A1 and A4 are

brothers. A4 and A2 were partners in transport business. He submitted that A1 was arrested from his house in his village Ghasoli, District Sonepat. He relied upon the evidence of DW 2 and DW 5 in support thereof. DW2 and DW 5 who are residents of village Ghasoli deposed that police personnel visited the village around 9 am in search of Parveen (A4) on 20.01.2006. They stated that A1 accompanied the police to the police station. He travelled in his own car and the police went in the Govt. Jeep. On the other hand, the case of the prosecution is that A1 was arrested along with A2 and A3 at 11:45 PM on 20.01.2006 at Tibetan Market, Delhi. The police from Rohini Police Station, Delhi were also involved in the raid pursuant to which A1 was arrested. The interested testimonies of DW2 and DW5 do not merit acceptance, especially when the prosecution has proved the arrest and the subsequent recoveries made pursuant to the disclosure statement of A1. The learned counsel submitted that the application filed by A1 to take his voice sample was rejected by the Trial Court and so he cannot be found fault with for not giving his voice sample. A1 refused to give his voice sample when the prosecution moved the Court. Thereafter, A1 filed an application to take his voice sample and the said application was disposed of by the Trial Court giving liberty to A1 to file again after the prosecution evidence was completed. Therefore, the learned counsel for A1 is wrong in contending that his application for giving voice samples was rejected by the Court. The learned counsel further submitted that the CDRs of the mobile phone of A1 would suggest that he was making calls only to A2, A3 and A4. He made an attempt to justify the calls on the ground that A4 was his brother and A2 was his brother's partner. No justification has been given for the 28 calls between him and A3 who is from Bihar and who was making the calls demanding a ransom of Rs.1 crore from PW 1.

A2 - Surender (Criminal Appeal No.1652 of 2014)

[20] A2 was arrested on 20.01.2006 in Tibetan Market, Delhi along with A1 and A3 and was found to be in possession of a mobile phone bearing No.9813091701 which was used by him for conversing with A1, A3 and A4 between 25.12.2005 to 20.01.2006. Three STD booth receipts Exh.P41, P42 and P43 were recovered from A2. These receipts showed calls being made to mobile No. 9896001906 which belongs to A5 Sonu. He was a resident of Jhinjhana village and the calls made from the STD booth with telephone No. 01398257974 pertain to Jhinjhana. An amount of Rs.20,000/- was also recovered from him at the time of his arrest. The said amount was supposed to have been given to him by A5 Sonu. Pursuant to his disclosure statement Exh.PCC A2

led the police party to his rented accommodation at Begha Road, Ganaur and a country made pistol with two live cartridges .315 bore were recovered in the presence of PW5 Mohan Lal. He also identified the place of abduction of Ramesh Jain at Ganaur and the place where the dead body was buried at Baba Rude Nath temple in village Kheri Khusnam. Mr. Ram Lal Roy, learned counsel for A2 doubted the recovery of the country made pistol and cartridges. He submitted that the dead body recovered on 22.01.2006 is that of a priest and not of Ramesh Jain. There is no foundation laid by the defence in support of this contention. There is nothing on record to prove that the dead body is that of a priest. We are of the opinion that the dead body is that of Ramesh Jain as identified by his relatives. The medical evidence shows that the skin was peeled off at several places but the features of the body could easily be made out. PW 16 also deposed that decomposition is slow in winter months. We have perused the photograph of Ramesh Jain and compared it with a photograph of the dead body recovered. We are convinced that the body recovered is that of the deceased Ramesh Jain.

A4 - Parveen @ Titu (Criminal Appeal No.1653 of 2014)

[21] The STD booth receipt Exh. P44 showing a call made from STD booth having No. 01398257974 from Shamli village in Uttar Pradesh was recovered from A4 at the time of his arrest on 22.01.2006. As per the receipt, a call was made to mobile No.9896001906 which belongs to Sonu (A5). Pursuant to the disclosure statement made by him, he identified the place at village Bai crossing on GT Road where he kept the key ring of motor cycle, silver ring belonging to deceased Ramesh Jain and the threatening letters. A golden ring of the deceased was also recovered from his residential house at village Ghasoli. He also made a disclosure statement which led the police to the place where the deceased was wrongfully confined. His SIM card with mobile No. 9812016269 was seized from his residential house. There is sufficient evidence on record to suggest that he was in constant touch with the other accused. His mobile phone and the recoveries that were made pursuant to the disclosure statement would clearly prove his involvement in the crime.

A5 - Sonu (Criminal Appeal No.1418 of 2013)

[22] Mr. Sidharth Luthra, learned Senior Counsel appearing for A5 submitted that it is highly improbable that A5 was arrested at a bus stop at Ganaur Chowk, GT Road, Ganaur. According to him, A5 was arrested on 20.01.2006 at 10:15(30) pm from his

house. He relied upon the evidence of DW5 and DW8. We do not find any substance in the submission that A5 was arrested on 20.01.2006 itself as it is clear from the testimony of DW8 that no complaint was made regarding the forcible arrest of A5 on 20.01.2006. A disclosure statement was made by A5 which was marked as Exh.PBB pursuant to which there was a recovery of the wallet belonging to the deceased from the shop of A5. A laminated PAN card, one passport size photograph of the deceased, three electricity bills, two water bills and a small diary of Jain Mantras bearing title 'Aanu Purvi' were recovered from underneath the seat of his Aarat shop at Ganaur Mandi. The STD booth receipts which were recovered from A2 Surender and A4 Parveen at the time of their arrest show that they made calls on the mobile No.9896001906 belonging to A5 on 29th and 30th December, 2005. A5 also received a call from an STD booth in Patna on 06.01.2006. Pursuant to a disclosure statement made by him an Indica car bearing No. DL-3CW-2447 which was used in the abduction was seized. The recoveries made pursuant to the disclosure statements of A5 cannot be relied upon, according to Mr. Luthra. He referred to the six disclosure statements made by A5 between 22.01.2006 and 04.02.2006. He commented upon the improbability of recovery of the wallet from underneath his seat at his shop. He also submitted that the recovery is from a public place accessible to everybody and so the recoveries made cannot be relied upon. We disagree with Mr. Luthra as the recovery of the wallet from underneath his seat is something which is to his exclusive knowledge though other people might have access to his shop.

[23] Mr. Luthra contended that the CDRs are not admissible under Section 65B of the Indian Evidence Act, 1872 as admittedly they were not certified in accordance with sub-section (4) thereof. He placed reliance upon the judgment of this Court in Anvar P. V. v. P.K. Basheer, 2014 10 SCC 473 by which the judgment of this Court in State (NCT of Delhi) v. Navjot Sandhu, 2005 11 SCC 600 was overruled. In Navjot Sandhu this court held as follows:

> "Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65".

In Anvar's case, this Court held as under:

"22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground."

In view of the law laid down in the case of Anvar, Mr. Luthra submitted that the CDRs are liable to be eschewed from consideration.

[24] Mr. Vivek Sood, learned Senior Counsel appearing for the State of Haryana submitted that the CDRs were adduced in evidence without any objection from the defence. He submitted that the accused cannot be permitted to raise the point of admissibility of the CDRs at the appellate stage. He placed reliance on Padman v. Hanwanta, 1915 AIR(PC) 111 in which the Privy Council held that objections regarding

admissibility of a document must be raised in the Trial Court. Mr. Sood contended that there can be two classes of objections regarding admissibility of documents. The first class is that a document is per se inadmissible in evidence. The second is where the objection is regarding the method or mode of the proof of the document. He submitted that the objection of the accused in this case is regarding the mode or method of proof as it cannot be said that the CDRs are per se inadmissible in evidence.

[25] Refuting the contentions of the learned senior counsel for the State, Mr. Luthra submitted that the objection raised by him pertains to inadmissibility of the document and not the mode of proof. He urged that the CDRs are inadmissible without the certificate which is clear from the judgment of this Court in Anvar's case. He refers to the judgment of RVE Venkatachala Gounder v. Arulmigu Visweswaraswami, 2003 8 SCC 752 relied upon by the prosecution to contend that an objection relating to admissibility can be raised even at the appellate stage. Mr. Luthra also argued that proof required in a criminal case cannot be waived by the accused. He relied upon a judgment of the Privy Council in Chainchal Singh v. King Emperor, 1946 AIR(PC) 1 in which it was held as under:

> "In a civil case, a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence"
>
> He further relied upon the judgment of a Full Bench of the Bombay High Court in Shaikh Farid v. State of Maharashtra, 1983 CrLJ 487. He also submitted that Section 294 Cr. P.C. which is an exception to the rule as to mode of proof has no application to the facts of the present case.

[26] That an electronic record is not admissible unless it is accompanied by a certificate as contemplated under Section 65B (4) of the Indian Evidence Act is no more res integra. The question that falls for our consideration in this case is the permissibility of an objection regarding inadmissibility at this stage. Admittedly, no objection was taken when the CDRs were adduced in evidence before the Trial Court. It does not appear from the record that any such objection was taken even at the appellate stage before the High Court. In Gopal Das v. Sri Thakurji, 1943 AIR(PC) 83, it was held that:

> "Where the objection to be taken is not that the document is in itself

inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof."

In RVE Venkatachala Gounder, this Court held as follows:

"Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the

opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

It would be relevant to refer to another case decided by this Court in PC Purshothama Reddiar v. S Perumal, 1972 1 SCC 9. The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

"Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility."

[27] It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred tothat an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and

objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr. P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

[28] Another point which remains to be considered is whether the accused is competent to waive his right to mode of proof. Mr. Luthra's submission is that such a waiver is permissible in civil cases and not in criminal cases. He relies upon a judgment of the Privy Council in Chainchal Singh's case in support of the proposition. The Privy Council held that the accused was not competent to waive his right. Chainchal Singh's case may have no application to the case in hand at all. In that case, the issue was under Section 33 of the Evidence Act, and was whether evidence recorded in an earlier judicial proceeding could be read into, or not. The question was whether the statements made by a witness in an earlier judicial proceeding can be considered relevant for proving the truth or facts stated in a subsequent judicial proceeding. Section 33 of the Evidence Act allows for this inter alia where the witness is incapable of getting evidence in the subsequent proceeding. In Chainchal Singh, the accused had not objected to the evidence being read into in the subsequent proceeding. In this context, the Privy Council held that in a civil case, a party can waive proof but in a criminal case, strict proof ought to be given that the witness is incapable of giving evidence. Moreover, the judge must be satisfied that the witness cannot give evidence. Chainchal Singh also held that:

> "In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence".
>
> The witness, who had deposed earlier, did not appear in the subsequent proceeding on the ground that he was unable to move from his house because of tuberculosis, as deposed by the process server. There was no medical evidence in this regard. The Court observed that the question of whether or not he was incapable of giving evidence must be proved in this

context, and in the proof of such a fact it was a condition that statements given in an earlier proceeding can be taken as proved in a subsequent proceeding. Chainchal Singh's case therefore, does not lay down a general proposition that an accused cannot waive an objection of mode of proof in a criminal case. In the present case, there is a clear failure to object to the mode of proof of the CDRs and the case is therefore covered by the test in R.V.E. Venkatachala Gounder.

[29] We proceed to deal with the submission of Mr. Luthra that the ratio of the judgment of the Bombay High Court in Shaikh Farid's case is not applicable to the facts of this case. It was held in Shaikh Farid's case as under:

"6. In civil cases mode of proof can be waived by the person against whom it is sought to be used. Admission thereof or failure to raise objection to their tendering in evidence amount to such waiver. No such waiver from the accused was permissible in criminal cases till the enactment of the present Code of Criminal Procedure in 1973. The accused was supposed to be a silent spectator at the trial, being under no obligation to open his mouth till the occasion to record his statement under section 342 (present S. 313) of the Code arose. Even then he was not bound to answer and explain the circumstances put to him as being appearing against him. In the case of Chainchal Singh v. Emperor, 1946 AIR(PC) 1 it was held by the Privy Council that the accused was not competent to waive his right and the obligation of the prosecution to prove the documents on which the prosecution relied. Resultantly, the prosecution was driven to examine witnesses even when the accused was not interested in challenging the facts sought to be proved though them. The inconvenience and the delay was avoidable.

7. Section 294 of the Code is introduced to dispense with this avoidable waste of time and facilitate removal of such obstruction in the speedy trial. The accused is now enabled to waive the said right and save the time. This is a new provision having no corresponding provision in the repealed Code of Criminal Procedure. It requires the prosecutor or the accused, as the case may be, to admit or deny the genuineness of the document sought to be relied against him at the outset in writing. On his admitting or indicating no dispute as to the genuineness, the Court is authorised to dispense with its

formal proof thereof. In fact after indication of no dispute as to the genuineness, proof of documents is reduced to a sheer empty formality. The section is obviously aimed at undoing the judicial view by legislative process.

8. The preceding Section 293 of the Code also dispenses with the proof of certain documents. It corresponds with Section 510 of the repealed Code of Criminal Procedure. It enumerates the category of documents, proof of which is not necessary unless the Court itself thinks it necessary. Section 294 makes dispensation of formal proof dependent on the accused or the prosecutor, not disputing the genuineness of the documents sought to be used against them. Such contemplated dispensation is not restricted to any class or category of documents as under section 293, in which ordinarily authenticity is dependent more on the mechanical process involved than on the knowledge, observation or the skill of the author rendering oral evidence just formal. Nor it is made dependent on the relative importance of the document or probative value thereof. The documents being primary or secondary or substantive or corroborative, is not relevant for attracting Sec. 294 of the Code. Not disputing its genuineness is the only solitary test therefor.

9. Now the post-mortem report is also a document as any other document. Primary evidence of such a document is the report itself. It is a contemporaneous record, prepared in the prescribed form, of what the doctor has noticed in the course of post-mortem of the dead body, while investigation the cause of the death. It being relevant, it can be proved by producing the same. But production is only a step towards proof of it. It can be received in evidence only on the establishment of its authenticity by the mode of its proof as provided under sections 67 to 71 of the Evidence Act. Section 294(1) of the Code enables the accused also, to waive this mode of proof, by admitting it or raising no dispute as to its genuineness when called upon to do so under sub-section (1). Sub-section (3) enables the Court to read it in evidence without requiring the same to be proved in accordance with the Evidence Act. There is nothing in Section 294 to justify exclusion of it, from the purview of "documents" covered thereby. The mode of proof of it also is liable to be waived as of any other document."

[30] Section 294 of the Cr. P.C. 1973 provides a procedure for filing documents in a Court by the prosecution or the accused. The documents have to be included in a list and the other side shall be given an opportunity to admit or deny the genuineness of each document. In case the genuineness is not disputed, such document shall be read in evidence without formal proof in accordance with the Evidence Act. The judgment in Shaikh Farid's case is not applicable to the facts of this case and so, is not relevant.

The Effect of Overrule

[31] Electronic records play a crucial role in criminal investigations and prosecutions. The contents of electronic records may be proved in accordance with the provisions contained in Section 65B of the Indian Evidence Act. Interpreting Section 65B (4), this Court in Anvar's case held that an electronic record is inadmissible in evidence without the certification as provided therein. Navjot Sandhu's case which took the opposite view was overruled.

[32] The interpretation of Section 65B (4) by this Court by a judgment dated 04.08.2005 in Navjot Sandhu held the field till it was overruled on 18.09.2014 in Anvar's case. All the criminal courts in this country are bound to follow the law as interpreted by this Court. Because of the interpretation of Section 65B in Navjot Sandhu, there was no necessity of a certificate for proving electronic records. A large number of trials have been held during the period between 04.08.2005 and 18.09.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in Anvar's case has to be retrospective in operation unless the judicial tool of 'prospective overruling' is applied. However, retrospective application of the judgment is not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final.

[33] This Court in IC Golak Nath v. State of Punjab, 1967 2 SCR 762 held that there is no acceptable reason why it could not restrict the operation of the law declared by it to the future and save transactions that were effected on the basis of earlier law. While referring to the doctrine of prospective overruling as expounded by jurists George F. Canfield, Robert Hill Freeman, John Henry Wigmore and Cardozo, this Court held that

when a subsequent decision changes an earlier one, the latter decision does not make law but rather discovers the correct principle of law and the result is that it is necessarily retrospective in operation. As the law declared by this Court is the law of land, it was held that there is no reason why this Court declaring the law in supersession of the law declared by it earlier cannot restrict the operation of the law as declared to the future and save transactions that were affected on the basis of earlier law. While so holding, this Court in Golak Nath laid down the following propositions:

> "(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.
>
> (2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.
>
> (3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and, the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid."

While taking note of the doctrine of 'prospective overruling' in the United States, this Court referred to the decisions concerning the admissibility of evidence obtained by unreasonable search and seizure. In Weeks v. United States,1914 232 US 383, the US Supreme Court held that evidence obtained by an unreasonable search and seizure has to be excluded in criminal trials. In 1949, the US Supreme Court in Wolf v. Colorado,1949 338 US 25 held that the rule of exclusion laid down in Weeks did not apply to proceedings in State Courts. The judgment in Wolf was over ruled in Mapp v. Ohio,1961 367 US 643 . Subsequently, the US Supreme Court applied the doctrine of prospective overruling in Linkletter v. Walker,1965 381 US 618 as it was of the opinion that if Mapp was applied retrospectively it would affect the interest of the administration of justice and the integrity of the judicial process.

[34] The effect of overrule of a judgment on past transactions has been the subject matter of discussion in England as well. In R. v. Governor of H.M. Prison Brockhill, ex p. Evans (No. 2), 2000 4 AllER 15, Lord Slynn dealing with the principle of prospective over ruling observed as under:

> "The judgment of the Divisional Court in this case follows the traditional route of declaring not only what was the meaning of the section at the date of the judgment but what was always the correct meaning of the section. The court did not seek to limit the effect of its judgment to the future. I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. The European Court of Justice, though cautiously and infrequently, has restricted the effect of its ruling to the particular claimant in the case before it and to those who had begun proceedings before the date of its judgment. Those who had not sought to challenge the legality of acts perhaps done years before could only rely on the ruling prospectively. Such a course avoided unscrambling transactions perhaps long since over and doing injustice to defendants."

[35] This Court did not apply the principle of prospective overruling in Anvar's case. The dilemma is whether we should. This Court in K. Madhav Reddy v. State of Andhra Pradesh, 2014 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of Anvar is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice. As Anvar's case was decided by a Three Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We leave it open to be decided in an appropriate case by a Three Judge Bench. In any event, this question is not germane for adjudication of the present dispute in view of the adjudication of the other issues against the accused.

[36] For the aforementioned reasons, the judgment of the High Court confirming the Trial Court is upheld. The appeals are dismissed.

Requirement of certificate foe electronic record produced by a person not in custody of gadget.

"In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory."

SHAFHI MOHAMMAD

V/S

STATE OF HIMACHAL PRADESH2018 AIR(SC) 714.

SUPREME COURT OF INDIA (FROM HIMACHAL PRADESH) *(D.B.)*

SHAFHI MOHAMMAD
V/S
STATE OF HIMACHAL PRADESH

Date of Decision: 30 January 2018

Citation: 2018 LawSuit(SC) 58

Hon'ble Judges: Adarsh Kumar Goel, Uday Umesh Lalit

Eq. Citations: 2018 (2) Scale 235, 2018 (2) SCC 801, 2018 AIR(SC) 714, 2018 (2) JT 277, 2018 (1) SCC(Cri) 860, 2018 (1) ApexCJ 750, 2018 (2) CriCC 260

Case Type: Special Leave Petition (Criminal)

Case No: 2302 of 2017

Subject: Criminal

Acts Referred:
Code Of Criminal Procedure, 1973 Sec 54A, Sec 164(1)
Evidence Act, 1872 Sec 65B, Sec 63, Sec 65A, Sec 65, Sec 3, Sec 65B(4)
Information Technology Act, 2000 Sec 2(o), Sec 2(t)

Advocates: Jayant Bhushan, Ketan Paul, Reeja Varghese, Tushar Bhushan, Meenakshi Arora, Ananya Ghosh, Rituj Chopra, Arun Mohan, E R Sumathy, Bharat Bhushan, Jaspreet Gogia, Raj Kamal, Mandakini Singh, Yashank Adhyaru, Shirin Khajuria, Sanskriti Bhardwaj, Ayushi Gaur, B V Balaram Das, V Mohana, Asha G Nair, Zoheb Hussain, Rukmini Bobde, Kumar Shashank, Ajay Marwah, Seema Sharma, Varinder K Sharma, Karan Thakur, Vikas Mahajan, Vinod Sharma, Arun Singh, Anuradha Mutatkar

Reference Cases:

Cases Referred in (+): **8**

Judgement Text:-

[1] Slp(Crl.)No.2302 of 2017 :

(1) One of the questions which arose in the course of consideration of the matter was whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected.

(2) In Order dated 25th April, 2017 statement of Mr. A.N.S. Nadkarni, learned Additional Solicitor General is recorded to the effect that videography will help the investigation and was being successfully used in other countries. He referred to the perceived benefits of "Body-Worn Cameras" in the United States of America and the United Kingdom. Body-worn cameras act as deterrent against anti-social behaviour and is also a tool to collect the evidence. It was submitted that new technological device for collection of evidence are order of the day. He also referred to the Field Officers' Handbook by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India. Reference was also made to Section 54-A of the Cr.P.C. providing for videography of the identification process and proviso to Section 164(1) Cr.P.C. providing for audio video recording of confession or statement under the said provision.

(3) Thereafter, it was noted in the Order dated 12th October, 2017, that the matter was discussed by the Union Home Secretary with the Chief Secretaries of the States in which a decision was taken to constitute a Committee of Experts (COE) to facilitate and prepare a road-map for use of videography in the crime scene and to propose a Standard Operating Procedure (SOP). However, an apprehension was expressed about its implementation on account of scarcity of funds, issues of securing and storage of data and admissibility of evidence. We noted the suggestion that still-photography may be useful on account of higher resolution for forensic

analysis. Digital cameras can be placed on a mount on a tripod which may enable rotation and tilting. Secured portals may be established by which the Investigation Officer can e-mail photograph(s) taken at the crime scene. Digital Images can be retained on State's server as permanent record.

SLP(Crl.)NO.9431 of 2011:

(1) Since identical question arose for consideration in this special leave petition as noted in Order dated 12th October, 2017, we have heard learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, assisted by Ms. Ananya Ghosh, Advocate, on the question of admissibility of electronic record. We have also heard Mr. Yashank Adhyaru, learned senior counsel, and Ms. Shirin Khajuria, learned counsel, appearing for Union of India.

[2] An apprehension was expressed on the question of applicability of conditions under Section 65B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

[3] We have been taken through certain decisions which may be referred to. In Ram Singh and Others v. Col. Ram Singh, 1985 Supp1 SCC 611, a Three-Judge Bench considered the said issue. English Judgments in R. v. Maqsud Ali, 1965 2 AllER 464, and R. v. Robson, 1972 2 AllER 699, and American Law as noted in American Jurisprudence 2d (Vol.29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and

new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

[4] In Tukaram S. Dighole v. Manikrao Shivaji Kokate, 2010 4 SCC 329, the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

[5] In Tomaso Bruno and Anr. v. State of Uttar Pradesh, 2015 7 SCC 178, a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra, 2012 9 SCC 1 and State (NCT of Delhi) v. Navjot Sandhu, 2005 11 SCC 600.

[6] We may, however, also refer to judgment of this Court in Anvar P.V. v. P.K. Basheer and Others, 2014 10 SCC 473, delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandh that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

[7] Though in view of Three-Judge Bench judgments in Tomaso Bruno and Ram Singh ,

it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(h).

[8] Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. , this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

[9] The term "electronic record" is defined in Section 2(t) of the Information Technology Act, 2000 as follows:

> "Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

[10] Expression "data" is defined in Section 2(o) of the Information Technology Act as follows.

> "Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

[11] The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of

the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.

[12] Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

[13] To consider the remaining aspects, including finalisation of the road-map for use of the videography in the crime scene and the Standard Operating Procedure (SOP), we adjourn the matter to 13th February, 2018.

[14] We place on record our deep appreciation for the valuable assistance rendered by learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, who was assisted by Ms. Ananya Ghosh, Advocate, as well as by Mr. Yashank Adhyaru, learned senior counsel, and Ms. Shirin Khajuria, learned counsel, appearing for Union of India.

Production of certificate later

Supreme Court observation. "We are in agreement with the aforesaid findings. Learned counsel for the appellants rightly argued that non-production of the certificate under Section 65-B of the Indian Evidence Act, 1872 on an earlier occasion was a curable defect which stood cured"

UNION OF INDIA & ORS

V/S

CDR RAVINDRA V DESAI.2018 Law Suit(SC) 358

SUPREME COURT OF INDIA *(D.B.)*

UNION OF INDIA & ORS
V/S
CDR RAVINDRA V DESAI

Date of Decision: 18 April 2018

Citation: 2018 LawSuit(SC) 358

Hon'ble Judges: A K Sikri, Ashok Bhushan

Case Type: Criminal Appeal

Case No: 579 of 2016

Subject: Criminal

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 509
EVIDENCE ACT, 1872 SEC 65B
NAVY ACT, 1957 SEC 74, SEC 48(C), SEC 58, SEC 77(2)
ARMED FORCES TRIBUNAL ACT, 2007 SEC 30, SEC 17, SEC 31

Final Decision: Appeal dismissed

Advocates: Maninder Singh, Mukesh Kumar Maroria, Harshvir Pratap Sharma, Paras Joshi, Pankaj Kumar

Reference Cases:
Cases Referred in (+): **3**

Judgement Text:-

A K Sikri, J

[1] These two are cross appeals filed by both the parties to the lis. On the one hand is the Union of India, along with the Chief of Naval Staff as well as the Flag Officer, Commanding-in-Chief, Headquarters, Western Naval Command (hereinafter referred to as the 'appellants'). On the other hand is Commander Ravindra V. Desai, a naval officer with Indian Navy (hereinafter referred to as the 'respondent').

[2] On certain allegations against the respondent, he was served with charge-sheet containing ten charges which led to the court martial proceedings against him. Court Martial returned the finding of 'guilty' on all charges which led to imposition of sentence of dismissal from the naval service as well as forfeiture of 24 calender months of seniority. After exhausting departmental remedies, the respondent challenged its conviction before the Armed Forces Tribunal (for short, 'AFT'). Finding certain reasons stated at the appropriate stage, the AFT decided to itself record the evidence on those charges by giving opportunities to both the parties. On the basis of evidence produced before the AFT, the AFT set aside the finding of 'guilty' in respect of three charges (8th, 9th and 10th charges) on the ground of misjoinder of charges holding that it had no connection with charges 1 to 7. However, in respect of charges 1 to 7, the AFT maintained that the appellant could successfully prove these charges by cogent evidence. The AFT, thereafter, proceeded to consider the quantum of punishment and came to the conclusion that the punishment of a 'dismissal from service' is disproportionate to the nature of charges. It also observed that when the respondent had been awarded the punishment of 'dismissal from service', second punishment, namely, forfeiture of seniority for 24 months did not make any sense. On these grounds, the AFT set aside the punishment of 'dismissal from the service' and held that interest of justice would be met if only the punishment of 'forfeiture of seniority of 24 months' is inflicted upon the respondent. It has, accordingly, directed the appellants to reinstate the respondent in naval service without payment of any salary for the intervening period, i.e., the back wages. Both the parties feel aggrieved by this judgment. In the first instance, they moved application before the AFT seeking leave to appeal. The AFT declined this request stating that no question of law of public importance is involved. This is the reason for both the parties to approach this Court. These appeals were clubbed together. In the appeal, filed by the respondent while issuing notice, operation of the order of the AFT was also stayed. As a result, the respondent has not been allowed to join back the service. Both these appeals were admitted formally on July 01, 2016 and direction was given to expedite the hearing. It was also directed that interim

order shall continue to operate. This is how the appeals have come up for final hearing in which both the sides were heard at length.

[3] With the aforesaid introductory remarks, we now proceed to narrate the factual matrix of the case in some more detail. The respondent was commissioned in Indian Navy on January 01, 1998 as Sub. Lieutenant. He was promoted to the rank of Commander on January 16, 2011. At that time, he was posted as the Executive Officer of INS Mahish at Port Blair in Andaman Island. His aforesaid posting was from May, 2010 to June, 2011. In June, 2011, he was transferred to INS Viraat as Commander Operations vide orders dated June 02, 2011. In obedience to the said orders, the respondent along with his wife and daughters left for Mumbai on June 15, 2011. The respondent joined duties at the transferred place with 10 days' leave/joining time. He had undertaken the aforesaid journey from Port Blair to Mumbai by Indian Airlines. According to him, on reaching Mumbai he stayed with his sister-in-law Amita Gavankar at Goregaon, Mumbai as he was on leave till June 25, 2011. From June 16, 2011 to June 19, 2011, he visited different places in Maharashtra and even went to Goa with his family. On June 25, 2011, he shifted to the official accommodation, i.e., Integrated Mess Sports Complex Cottage No. 1, along with his wife and daughter, which accommodation was allotted to him at that time. On June 26, 2011, he reported to INS Taragiri, the waiting ship for INS Viraat, as INS Viraat was berth at Kochi at that time. On June 29, 2011, he reported for duty at INS Viraat at Kochi.

[4] It may be mentioned, at this stage, that according to him he had earlier purchased two mobile sim cards for mobile hand sets when he was posted at INS Mahish, Port Blair. One from BSNL with no. 9476045470 for himself and 2nd from Vodafone South Limited with no. 9564784782 for his wife. Again, according to him, on 19th June, 2011 when he had come to Mumbai, he purchased two sim cards from Idea Cellular Pvt. Ltd., one having 8108770020 for himself and other no. 8108770030 which was meant for his wife.

[5] On July 01, 2011 at about 22.45 hours, he was woken up from his sleep and escorted by Commander Manoj Jha (PW-20) to Captain Hari Kumar, the Commanding Officer of INS Viraat. Captain Hari Kumar questioned him about mobile no. 9564784782, as sexually explicit calls were received from the same number by wives of some naval officers. He explained that this sim card remained in possession of his wife through out who had used the same. Search was made but no such sim card was found with the respondent. His mobile telephone no. 8108770020 was confiscated and

detained for 18 hours whereafter, on the next day, it was returned back to him. Thereafter, One Man Inquiry (for short, 'OMI') was ordered on January 05, 2012. This OMI was conducted with effect from January 11, 2012 and concluded on January 31, 2012. Thereupon, the respondent was issued a charge sheet dated September 05, 2012 for trial by Court Martial. Ten charges were framed against the respondent. Seven out of which were under Section 77(2) of the Navy Act, 1957 (hereinafter referred to as the 'the Act") read with Section 509 of the Indian Penal Code ('IPC') and three charges were framed against the respondent under Sections 58, 74 and 48(c) of the Navy Act. These charges pertained to the alleged obscene calls purportedly made by the respondent to the three ladies.

[6] It is on the findings of the OMI, Headquarters Western Naval Command directed the Commanding Officer, INS Kunjali where the respondent was attached for the investigation, to investigate and record Summary of Evidence (SoE) of prosecution witnesses.

[7] On September 05, 2012, the Commanding Officer, INS Kunjali read the charges mentioned in the charge sheet and the respondent was given a chance to file reply thereto, which he did. Thereafter, decision was taken that the respondent be brought to trial of the Court Martial. In the Court Martial, the prosecution examined 33 witnesses and produced 40 documents which were exhibited. The court called for five witnesses as co-witnesses and exhibited 19 documents as 'exhibits' (C-1 to C-19). After the conclusion of the trial, finding of 'guilty' was returned in respect of all the 10 charges and the punishment was awarded as mentioned above. Thereafter, the appellant filed O.A. before the Tribunal.

[8] The facts which have been noted upto now would demonstrate that main allegation against the respondent was that he had made explicit sexual calls to three ladies, namely, Mrs. Reena Chandel (PW-9), Mrs. Aditi Barathwal (PW-12) and Mrs. Pallavi Tiwari (PW-18), who are wives of three officers of Navy. These calls were made from Vodafone Cell Phone No. 9564784782. Further, these calls were made on their landline numbers which were provided by NOFRA Exchange installed and operated by NOFRA (Naval Officers Residential Area). Each of the officers residing in the area is provided with an extension number from the Exchange of NOFRA. They were not knowing the person making the calls. They complained to their husbands, who, in turn, reported to their senior officers and finally, all the sexually explicit calls made to these three ladies were traced to Mobile No. 9564784782. These calls were made to Reena Chandel on

June 21, 2011 in the night, on June 22, 2011 in the morning, on June 23, 2011 in the afternoon and the last call was made to her on June 30, 2011 in the morning at 06:57. Her extension number was 222217. Thirteen calls were made to Mrs. Pallavi (PW-18) during the night between June 31, 2011 and July 01, 2011. PW-12 Aditi received similar calls twice in the night on June 30, 2011. According to the prosecution, all the calls were traced through the record of NOFRA Exchange to Mobile No. 9564784782 registered in the name of the accused. Initially, the Naval Authorities or the officers operating NOFRA Exchange had no knowledge as to whom the said mobile belonged. Therefore, it was difficult for them to trace the person making the calls. They approached the Deputy Commissioner of Police, Zone I, Mumbai, who made inquiries from several service providers about the said mobile number. Finally, it was revealed that the said mobile was registered in the name of the respondent with Vodafone South Limited, having office in Kolkata.

[9] In order to prove the aforesaid charge, the appellants were required to establish the aforesaid ingredients:

(a) The respondent possessed, at the relevant time, Vodafone Cell Phone No. 9564784782.

(b) Obscene Calls were made to the landline numbers of the three ladies and on the dates mentioned above.

(c) These calls originated from Mobile No. 9564784782 and were made by the respondent and none else.

[10] Insofar as first ingredient is concerned, it has been admitted by the respondent himself that he was having Cell Phone with Vodafone Connection and the sim card was provided with phone number 9564784782. The defence of the respondent, however, was that on the relevant dates, the respondent was not having this number and, in fact, the sim card had been lost and a report regarding the loss of sim card was made to the Police. Details of his explanation, in this behalf, are that when the respondent was posted at Port Blair in Andaman and Nicobar Islands, he had purchased two mobile sim cards for mobile handsets: one from BSNL with No. 9476045470 for himself and the second from Vodafone South Limited with No. 9564784782 for his wife, Mrs. Pallavi Desai. In June, 2011, he was transferred and posted to INS Viraat as Commander

Operations vide order dated June 02, 2011. Pursuant to the said transfer orders, after reaching Mumbai, he purchased two Idea sim cards from Idea Cellular Private Limited on June 19, 2011, having number 8108770020 for himself and 8108770030 for his wife. He claimed that he destroyed his mobile sim card No. 9476045470 and replaced the same with new mobile sim No. 8108770020. He also claimed to have advised his wife to replace her old sim No. 9564784782 by the new mobile sim No. 8108770030. According to him, when officers visited his cabin while he was at INS, Viraat at Kochi on July 01, 2011 and inquired him about Mobile No. 9564784782, he explained that the said number was used throughout by his wife. Thereafter, when he called his wife, he was informed that said sim card was missing from her purse. Then, he advised his wife to lodge a report with the Police and inform the service provider which she did on July 04, 2011. It is also his case that when the officers searched his cabin, they could not find that sim card with the respondent which shows that the said sim card was not with the respondent and, therefore, he could not have used the sim to make the purported obscene calls.

[11] It is clear from the above that the respondent has admitted the fact that he had purchased sim card from Vodafone with Mobile No. 9564784782. However, according to him, this sim card was not with him and was being used by his wife. Moreover, after he had purchased another sim card on reaching Mumbai, this sim card was not used and was ultimately found missing even from his wife custody. The aforesaid explanation of the respondent has not been accepted either by the GCM or the AFT, and rightly so.

[12] The reason for discarding the explanation of the respondent is that he has been taking inconsistent stands in this behalf. Before the Commanding Officer, the respondent had stated that he had thrown away his sim card in Goregaon and, therefore, he could not have used this sim card at the relevant time i.e. on the dates of alleged incident when the obscene calls were made. On the other hand, when the show cause notice has been issued to the respondent on July 02, 2011, in response thereto, in his deposition, the respondent took up the position that his wife has kept the sim card in his purse and could have dropped it while travelling.

> Apart from the aforesaid contradictory versions given by the respondent himself, one particular piece of evidence produced by the appellants clinches the issue. It is noticed by the AFT that as per report dated July 04, 2011 (Ex. P-29) lodged by the wife of the respondent on July 04, 2011, the sim card was lost sometime between 6 pm on June 20, 2011 to June 25, 2011.

However, even after June 20, 2011, calls were made from this mobile number to Cdr. Arjun Kumar (PW-33) and Cdr. Arjun Kumar deposed that he has received these calls from the respondent. This aspect is discussed by the AFT in the following manner:

"If we go by this report lodged by the wife of the accused, it appears that the said SIM card was lost in transit sometimes from 6.00 p.m. of 20th to 25th June, 2011. Now, according to the accused, from 19th June, 2011, the SIM card of his wife was replaced by the new card and sometimes between the evening of 20th June, 2011 till 25th June, 2011, the old SIM card of 9564784782 was lost. If it is so, this number could not have been used for making any call at least from 21st June, 2011 onwards. On perusal of the CDR, Exhibit T-2, it appears that on 20th June, 2011 at 13.29 hours, a call was made from this mobile number to mobile No. 9619796549, which was the mobile number of Cdr. Arjun Kumar. The record also shows that on 20th June, 2011 itself at 18.31 hours, again, there was a call from the said mobile to the above referred mobile number of Cdr. Arjun Kumar. There was also call from the said mobile of the accused to the mobile of Cdr. Arjun Kumar on 23rd June, 2011 at 11.46 hours. On 25th June, 2011 at 09.50 hours and 15.06 hours, again, there were two calls from the said mobile No. 9564784782 to mobile No. 9619796549 of Cdr. Arjun Kumar. Again, there were three calls from the said mobile number to the mobile of Cdr. Arjun Kumar on 28th June, 2011 between 17.15 to 17.55 hours. PW-33 Cdr. Arjun Kumar has deposed on oath that he had received these calls and that the accused was in contact with him on all these days from his mobile. It shows that the said mobile was being used by the accused even after 25th June, 2011. Cdr. Arjun Kumar had no reason to falsely depose that he had received the calls from the accused on these days."

Dr. Sharma had made extensive argument in endeavour to dislodge the creditworthiness of Cdr. Arjun Kumar. However, in our view, his deposition remains unshaken and credible.

[13] Another interesting evidence which have surfaced and which nails the respondent on this aspect is that as per the respondent himself, he had proceeded to Kochi on June

29, 2011 to join the duty on INS Viraat. For this purpose, he had left Mumbai on June 29, 2011 by Air India AI-681 flight which left Mumbai at 5:30 pm and arrived Kochi at 7:20 pm on June 29, 2011. One of the calls was made from this phone at 05:01 pm from Mumbai area. Thereafter, another call was made from this very phone on the same day at 08:01 pm from Kerala area. At 05:01 pm, when the call was made from Mumbai, the respondent was in Mumbai and his flight left Mumbai at 05:30 pm. He had reached Kochi at 07:20 pm and another call is made at 08:01 pm. This also shows that the Cell Phone with the aforesaid number was with the respondent only. The AFT has lucidly discussed this aspect in the following manner:

> "He claims to have left Mumbai on 29th June, 2011 by Air India AI681 flight. Exhibit P-S is the flight details and the Boarding Pass shows that the boarding time was 17.05 hrs. The flight details show that AI-681 flight left Mumbai at 5.30 p.m. and arrived Kochi at 7.20 p.m. on 29th June, 2011. Going back to the CDR, it is revealed that on 29th June, 2011, the said call was made from the said mobile of the accused at 17.01 hrs. The record clearly shows that the call was made from Vodafone Mumbai area. Thereafter, the next call from the said mobile of the accused on 29th June, 2011 at 20.01 hrs. was made and that call was made from Vodafone Kerala area. Thereafter, all the calls on 29th and 30th June and 1st July, 2011 are made from the said mobile of the accused from Vodafone Kerala area. Admittedly, during that period, the accused was at Kochi. If the said SIM Card was found by some other person and he was using the SIM card, he could not travelled along with the accused at the same time and in the same flight. This document produced by the accused himself goes to prove, beyond any reasonable doubt, that the said mobile was being used by the accused and none else and, therefore, it must be held that all the sexually explicit calls to the three ladies were made by the accused from his said mobile and none else."

[14] We are, therefore, of the opinion that the prosecution has been able to give satisfactory proof to prove that when the offending calls in question were made, the Cell Phone with Mobile No. 9564784782 was with the respondent.

[15] Coming to the second ingredient, in order to prove that sexually explicit calls were received by the wives of the three officers, the prosecution produced these ladies as PW-9, PW-12 and PW-18. They have explained in detail having received these calls

and the offending language. To show that the calls were received from the aforesaid phone which belongs to the respondent, the prosecution had produced Call Data Record (CDR) of NOFRA land line numbers. Cdr. Anurag Saxena, Officer-in-Charge of NOFRA who appeared as PW-3 probe the said CDRs of NOFRA Telephone Exchange showing that all the calls had originated from Mobile No. 9564784782. He also produced Exh. P-10, which is the certificate issued by him to the effect that the land line numbers of the three female victims were provided by the NOFRA Telephone Exchange. He specifically deposed that true and correct call records have been produced and there is no reason to disbelieve that.

[16] We now advert to the third ingredient. From the evidence discussed above, it stands established that calls were made from Cell Phone No. 9564784782. However, some controversy has arisen in respect of CDRs produced from the service provider, namely, Vodafone South Mumbai and the respondent is trying to take advantage thereof. In this behalf, it may be mentioned that in the NOFRA records, though Cell Phone No. 9564784782 is rightly mentioned, the said phone number is displayed as belonging to Idea network. On that basis, it was argued that NOFRA CDRs could not have been relied upon. However, it needs to be recorded that the appellants had given satisfactory explanations for the aforesaid mistake. It was explained before the AFT that the mobile number of the respondent had been erroneously shown as an Idea Cell Number due to feeding of Code "95" as that of Idea Cell in the system of NOFRA. This was also clarified by Mr. Fernandes who appeared as CW-2. He was the Programmer of the NOFRA system. It is significant to point out that there is no cross-examination by the respondent on this point. The discussion of the AFT, on this aspect, runs as follows:

> "The learned counsel for the accused pointed out that as per call record from NOFRA, vide Exhibit P-8 for Extension No. 7000, Exhibit P-9 for Extension No. 7164 and Exhibit P-10 for Extension No. 6328, service provider of said Mobile No. 9564784782 was Idea Cell. He contended that in view of this record, the CDR Exhibit P-27 or Exhibit T-2 from Vodafone South cannot be believed. However, the learned counsel for the respondents contended that it was wrongly shown that said Mobile Number was of Idea Cell and this mistake had occurred due to feeding of Code "95" as of Idea Cell in the system of NOFRA. This fact is clarified by CW-2 Fernandes, who was the Programmer for NOFRA System. The learned counsel for the accused contended that the accused was not given opportunity to cross-examine the Courtwitnesses and, therefore, the evidence of CW-2 Fernandes is liable to

be rejected. During the trial, the accused was defended by a lawyer. The accused and his advocate were present at the time of recording of evidence of the Court-witnesses. There is nothing to show that the advocate wanted to cross-examine the Courtwitnesses but he was not allowed. The evidence of CW-2 Fernandes has gone unchallenged. CDR Exhibit T-2 is proved by TW-1 Sabir Kumar Deb, as discussed earlier. Therefore, no importance needs to be given to the wrong information in NOFRA record that the mobile number was of Idea Cell."

It is also pertinent to note that apart from raising the dispute that NOFRA record shows that it was Idea Cell number, it is not disputed that phone number in question as recorded in NOFRA system is the same which belongs to the respondent. It is only the description of the phone number that had been erroneously displayed as Idea Cell which aspect has been satisfactorily explained by the appellants. It would be of no significance, inasmuch as same Cell number could not belong to both the Idea as well as Vodafone.

[17] One aspect remains to be discussed. In the Court Martial proceedings, officer from Vodafone South Mumbai was produced who had brought the CDR of the Cell Phone in question to prove that calls were made from this phone. The said officer was examined as PW13 and CDR record produced by him was marked as Exh. P-27. However, before the AFT, the respondent had raised the objection that Exh. P-27 did not have any evidentiary value as Certificate under Section 65-B of the Indian Evidence Act, 1872 produced by PW-13 was in relation to customer agreement and not for CDR and that PW13 was Nodal Officer for Vodafone Mumbai and not for Vodafone South. In view of the aforesaid technical objection, the appellants filed an application under Section 17 of the Armed Forces Tribunal Act, 2007 for summoning Nodal Officer, Mumbai Sector, Vodafone along with a direction to produce the CDR of the mobile number of the respondent. Order dated November 20, 2014 was passed on this application whereby prayer contained in the application was allowed and summons issued to the Nodal Officer, Mumbai Sector, Vodafone for production of CDR of the mobile number belonging to the respondent along with the Certificate under Section 65-B of the Indian Evidence Act, 1872. This order was not challenged by the respondent. In response to the summons issued by the AFT on November 10, 2014, Vodafone South Limited, Kolkata had submitted the CDR as well as the Customer Agreement of the respondent

along with the certificate under Section 65-B which came to be exhibited as Exhibit T-3. However, the AFT was not satisfied with the format in which Exhibit T-3 had been made available by Vodafone South Limited. In its order dated February 26, 2015, the AFT categorically observed that the CDR (Exhibit T-3) made available to the AFT was identical to the previous CDR (Exhibit P-27) in respect of the serial number of calls, the A Number (i.e. the number from which the calls had originated) and the B Number (the number to which the call had been made), the year, time and duration of the call. However, certain details such as the date, time, month etc. were missing from the said CDR (Exhibit T-3). Further, Section 65-B certificate did not bear the designation of the person who had signed the certificate. As such, vide order dated February 26, 2015, the AFT directed the Nodal Officer, Vodafone South to produce before the Tribunal the complete CDR of the said Mobile phone number for the period from June 01, 2011 to July 04, 2011 along with the Customer Agreement and the Certificate under Section 65-B before the AFT. The concerned official of Vodafone had also been directed to be present before the Tribunal on March 03, 2015. In compliance Mr. Subir Kumar Deb from Vodafone appeared as TW-1 before the AFT and explained that it is only due to improper alignment etc. that certain information had been omitted from being generated in the CDR Exhibit T-3. He also explained that sometimes because of the failure of the linking system in the server, some information may not come out. However, the AFT decided not to take into consideration the CDR Exhibit T-3. In terms of the order dated February 26, 2015 of the AFT, Mr. Sudhir Kumar Deb, official of Vodafone India, appeared before the AFT as TW-1. The AFT has recorded the testimony of TW-1 in relation to the manner in which the CDRs are stored by Vodafone in the Centralized Server located at Pune. TW-1 also produced before the Tribunal the CDR of the Mobile number of the respondent (Exhibit T-2) along with the Certificate under Section 65-B of the Indian Evidence Act, 1872 (Exhibit T-1). CDR Exhibit T-2 along with the certificate under Section 65-B being Exhibit T-1 duly proved by TW-1. In his crossexamination, TW-1 had inter alia stated that whereas CDR Exhibit T-3 (submitted to the AFT in December, 2014) had been generated on November 01, 2011, Exhibit T-2 had been generated on March 02, 2015 and had been signed and certified by TW-1. The alleged discrepancy in CDR Exhibit T-2 sought to be pointed out during his cross-examination was also duly explained by TW-1. He had explained that after 2011, as per guidelines issued by DoT, Government of India, the format of the CDR had been changed. After considering the testimony of TW-1, AFT has observed that Exhibit T2, submitted by TW-1, is reliable and is properly stored and generated in the Centralized Server of Vodafone, as under:

"However, Subir Kumar Deb deposed on oath and explained that though the CDR, Exhibit T-3, was submitted with certificate in December, 2014, the heading of the same clearly shows that it was generated on November 01, 2011, while the CDR, Exhibit T-2, signed and certified by him, was generated on March 2, 2015, after receipt of summons from this Tribunal. He explained that if the specific command is given for header or heading of the call data for the target mobile number, i.e., the mobile number about which the call data is to be generated, the period, the date and the time of generation are printed and in such case, the first column is always the serial number of the calls. But if that command is not given the heading and the serial number column are not printed. He explained that everyday hundreds of CDRs are generated and printed and possibly, while taking the print of the CDR, Exhibit T-2, he had not given the command for header or heading and, therefore, heading as well as column for serial number is missing from the CDR, Exhibit T-2. He further explained that after 2011, as per the guidelines issued by the Government of India, Department of Tele-Communications, the format of CDR has been changed and as per the said guidelines, missed calls are also required to be deleted from the CDR. He pointed out that these missed calls in respect of SMS are still maintained because from the SMS, the company generates revenue, while no such revenue is generated from the missed calls. Therefore, the missed calls, which were shown as 'Null' or 'Nil' call time in the earlier record, are not shown in the present record, but such 'Null' record about the SMS is still maintained. It appears that the column for 'Call Time' has been shifted from the 9th column to 3rd column due to change in format. In view of the explanation given by witness Subir Kumar Deb, we are satisfied that the CDR, Exhibit T-2, now submitted by him, is reliable and it is properly stored and generated in the Centralised Server, as deposed by him. We do not find any major defect and the minor changes and the differences in the earlier record and the present record, Exhibit T-2, are properly explained by the witness."

[18] We are in agreement with the aforesaid findings. Learned counsel for the appellants rightly argued that non-production of the certificate under Section 65-B of the Indian Evidence Act, 1872 on an earlier occasion was a curable defect which stood cured. Law in this behalf has been settled by the judgment of this Court in Sonu alias Amar v. State of Haryana, 2017 8 SCC 570, which can be traced to the following

discussion in the said judgment:

> "32. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the trial court without a certificate as required by Section 65-B(4). It is clear from the judgments referred tothat an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 CrPC, 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65-B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

[19] We may point out, at this stage, that when the AFT found the technical defect in Exhibit T-2, it was in support of Section 65-B of the Indian Evidence Act. The AFT had summoned the record in exercise of its power contained in Section 17 of the Act.

> "17. Powers of the Tribunal on appeal under section 15. The Tribunal, while hearing and deciding an appeal under Section 15, shall have the power
>
> (a) to order production of documents or exhibits connected with the

proceedings before the court-martial;

(b) to order the attendance of the witnesses;

(c) to receive evidence;

(d) to obtain reports from court-martial;

(e) order reference of any question for inquiry;

(f) appoint a person with special expert knowledge to act as an assessor; and

(g) to determine any question which is necessary to be determined in order to do justice in the case."

[20] It was argued by the learned ASG appearing for the Union of India that powers conferred upon the AFT under Section 17 of the Act are similar to the powers of the Industrial Tribunal/Labour Court specified in Section 11A of the Industrial Disputes Act and, therefore, judgment of this Court in United Planters Association of Southern India v. K.G. Sangameswaran and another, 1997 4 SCC 741 explaining the powers of Labour Court/Industrial Tribunal would be applicable to AFT as well. However, we need not go into this question in these proceedings inasmuch as the learned counsel appearing for respondent did not question the powers of the AFT to summon the records from Vodafone and permitting the parties to lead evidence before it as well as examining the said evidence. Thus, in the absence of any question mark put up by the learned counsel for the respondent to the course of action taken by the AFT, we proceed on the basis that this exercise was validly done.

[21] Dr. Sharma, learned counsel appearing for the respondent had taken pains to point out certain discrepancies in Exhibit T-2 as well as Exhibit P-27 and had, on that, basis, made a fervent plea that such documents had no credence or evidentiary value and, therefore, AFT had committed a serious error in relying upon these documents. It is not necessary to pinpoint the alleged discrepancies which according to Dr. Sharma had

occurred in these documents as we find that these are suitably take care of by the Tribunal itself and the above discussion as well as the discussion contained hereinafter would reflect the nature of so-called discrepancies and the answer thereto by the AFT. After purpose would be served by reproducing the following portion of the orders dated February 26, 2015 passed by AFT after the official of the Vodafone South Limited, Kolkata produced the CDR as well as documents pertaining to customer agreement of the respondent pertaining to his mobile umber 9564784782 along with certificate under Section 65-B of the Indian Evidence Act.

> "2. After receipt of the said record, we have carefully perused the Call Data Record submitted with the aforesaid certificate dated 10th December, 2014, as well as the earlier Call Data Record purporting to have been issued by Vodafone, along with the Customer Agreement on 26th December, 2012. on careful perusal and comparison of both the records, we have noted that in the record supplied earlier during the Court-Martial proceedings, against every call, the date was mentioned in full like o1-Jun-2011". However, in the column for the date in the date which is now supplied, against all the entries, except the entry dated "01-Jul-2011", the dates are missing. Only year '2011' is shown. In the prescribed proforma of the data, there are columns for "First Cell ID A", "Last Cell ID A', "IMEI" and "IMSI" also. In the previous record, the information under all the four heads was provided against each call entry. However, that information is completely missing in The record, which is now supplied to us. The record purports to have been stored on the designated hard disk of the computer/system of Vodafone South Limited and the data, which is supplied to us, purports to have been generated by the computer automatically. In view of this system, when certain data has been stored, it must be completely generated which the hard copy is required to be taken. Only some of the record cannot be lost. For example, if the full date is generated, the date and the month cannot be lost if year "2011" remains. Similarly, the data under the four heads, viz., First Cell ID A, Last Cell ID A, IMEI and IMSI, could not be lost. Either the whole of the record could have been lost or no part of it could be lost. The Call Data Record, which is supplied to us now, s identical with the previous record in respect of the serial number of the calls, a number, i.e., Number of the Mobile Phone to which the call is made, year, time and duration of the call are shown. We fail to understand why the data about the date, month and under other heads as indicated above is not shown in the Call Data Record submitted to us. As the

certificate issued under Section 65-B does not bear the name and designation of the person, who has signed the certificate, it is difficult for us, at this stage, to know how and why the complete Call Data Record is not submitted to us. In view of this, even though the formality of issuance of certificate under Section 65-B of the Indian Evidence Act is completed, we are of the opinion that our order to submit the complete Call Data Record and other documents with the certificate under Section 65-B has not been complied by Vodafone South Limited. Therefore, we find it necessary to issue the following directions:-

Summons be issued to Nodal Officer, Vodafone South Limited, to direct the officer, who is responsible for the operations and the Management of the computer system required for the purpose of providing mobile facility to secure hard copies of the complete Call Data Record of Mobile Phone No. 9564784782 for the period from 1 st June, 2011 to 4th July, 2011, along with the record of Customer Agreement and to submit the same to this Tribunal with certificate under Section 65-B, disclosing the name and designation of the person who has signed the said certificate. The said record shall be submitted before this Tribunal on 3rd March, 2015 before 11.00 A.M. by the officer signing the certificate under Section 65-B personally without fail.

We also hereby direct Vodafone South Limited to disclose the name and designation of the person, who had issued the certificate under Section 65-B on 10th December, 2014, along with Call Data Record and also to keep him present before this Tribunal on 3rd March, 2015 at 11.00 A.M. to explain how some of the data, particularly the dates, First Call ID A, Last Call ID A, IMEI and IMSI, are missing from the said record."

[22] In this behalf, we also note that Mr. Sabir Kumar Deb, official of Vodafone, appeared as a witness, in his deposition before the AFT had suitably and satisfactorily clarified all the aspects including the following :

"Examination-in-Chief :

The Call Data Record of the mobile phones are maintained in the centralised

server located at Pune. Call records of the phones issued by all the 23 licensees under Vodafone Limited are preserved and maintained in the centralised server.

The mobile number for which the date is extracted is the 'target numbers' for the system. Identity number of hand set from which that mobile number operates is recorded in the column IMEI. The same handset number will be shown in that column when a call is made or is received by that mobile handset. However, if the handset is changed, the identity of that handset is changed and therefore, number may be same.

When mobile number is roaming outside the territory of the service provider/licensee the Cell IDA and IMEI will not record the correct numbers because it may not capture the correct number in the area outside the jurisdiction of the licensee. Therefore, at page No. 4 from 3rd entry dated 15.06.2011, the column for IMEI is blank. From that entry onwards till the end on 01.07.2011 the mobile number was operating outside the home network area. In the last column the area in which the mobile was roaming the operating is indicated.

Now, I am shown the record which I have s8ubmitted to the Court as per Ex. T-2. After perusing that record with the record available with me, I say that due to oversight, page no. 8 of the record showing the call from 30.06.2011 at 6:20:12 to the call on 01.07.2011 at 21:53:28 has not been submitted to the Court. Now, I am attaching the page containing the said record under my signature and stamp of Vodafone South Limited. I state that this record is true and generated as per the system. (The said record is added to the CDR Ex. T-2 as page No. 8).

Now, the record and letter dated 10.12.2014 marked Article T-1 (Now T-3) collectively is shown to me. It contains same call data record which I have produced today. However, in the record data, first Cell IDA, last cell IDA, IMEI and IMSE columns are blank. Also, SMS centre column is blank. The title of that record shows that the record of mobile number 95664784782 from 1.6.2011 to 4.7.2011 and report dated was 1.11.2011. similar title is not

printed on the record which I have submitted today. The columns noted above might have remained blank because of some misalignment of columns while taking the prints of the call record. Now, said record Article T-1 is marked Exhibit T-3. I maintain that the information in the Call Data Record could not be selectively deleted before taking print.

Cross-Examination:

I voluntarily say tat sometimes, due to failure of network link also some date may be missing at particular moment, and is not printed. Now, it is brought to my notice that in Call Data Record at Exhibit T-2, column 'call time' is listed earlier the Call Data Record at Ex. T-3 where it is 9th column. Now, on perusal of the two records, I see that in Ex. T-2, SMS MT or SMS O are show but in Ex. T-3 they are indicated as SMS INC and SMS OUT respectively. Call Data Record Exh. T-3 shows that it was originated on November 1st, 2011 and Call Data Record at Ex. T-2 was originated on 2nd March, 2015.

Now, it is brought to my notice that entry nos. 329 and 330 are not be seen in the Call Data Report Ex. T-2. There are similar other numbers also which are missing from Exh. T-2. I say that wherever there were missed calls, they were shown as NULL. In 2011, such 'missed c alls' have been deleted from the record and, therefore, they are not seen in Call Data Record at Ex. T-2. However, the SMS which were shown as NULL and which could not materialise are still maintained because the company was to earn revenue."

[23] We, thus, do not agree with the submission of the learned counsel for the respondent that there were discrepancies in the CDR produced by Vodafone before the AFT. In fact, the witness from Vodafone was able to clear all the doubts which were expressed by the respondent.

[24] In view of this factual position emerging on record, judgment in the case of Shafhi Mohammad. V. State of Himachal Pradesh, 2018 2 SCC 801 is of no avail to the respondent as it is not applicable to the facts and circumstances of the present case.

[25] At the end, insofar as appeal of the respondent is concerned, we would like to comment that once the charges are proved in the court martial conducted by the authorities and the AFT also has given its imprimatur to the same by putting its stamp of approval, that too, after recording the evidence, with detailed analyses thereof, it is not the function of this Court to revisit the entire evidence to find out as to whether the finding of the authorities below are correct or not. No doubt, the instant proceedings are in the form of appeal preferred under Sections 30 and 31 of the Act and, therefore, the Court is examining the matter as an appellate authority. However, the scope of such appeal is limited as can be seen from the language of these provisions:

> "30. Appeal to Supreme Court.
>
> (1) Subject to the provisions of section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under section 19): Provided that such appeal is preferred within a period of ninety days of the said decision or order: Provided further that there shall be no appeal against an interlocutory order of the Tribunal.
>
> (2) An appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in the exercise of its jurisdiction to punish for contempt:
>
> Provided that an appeal under this sub-section shall be filed in the Supreme Court within sixty days from the date of the order appealed against.
>
> (3) Pending any appeal under sub-section (2), the Supreme Court may order that
>
> (a) the execution of the punishment or the order appealed against be suspended; or
>
> (b) if the appellant is in confinement, he be released on bail:
>
> Provided that where an appellant satisfies the Tribunal that he intends to

prefer an appeal, the Tribunal may also exercise any of the powers conferred under clause (a) or clause (b), as the case may be.

31. Leave to appeal.

(1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.

(2) An application to the Tribunal for leave to appeal to the Supreme Court shall be made within a period of thirty days beginning with the date of the decision of the Tribunal and an application to the Supreme Court for leave shall be made within a period of thirty days beginning with the date on which the application for leave is refused by the Tribunal.

(3) An appeal shall be treated as pending until any application for leave to appeal is disposed of and if leave to appeal is granted, until the appeal is disposed of; and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it might have been made, but it is not made within that time."

[26] A combined reading of the aforesaid provisions clearly brings out that appeal to this Court has to be on a point of law on general public importance.

[27] In any case, this Court has examined the records having regard to the submissions made by Dr. Sharma on behalf of the respondents. However, no case is made out that the conclusion arrived at by the Tribunal was utterly perverse which no reasonable person could have arrived at. We have not found any such infirmity at all.

[28] Resultantly, we do not find any merit in the appeal preferred by the Officer.

[29] We now advert to the appeal preferred by the Union of India. As pointed out above, the limited scope of this appeal is to be on the quantum of sentence given by the AFT.

After setting aside the sentence of dismissal from service, the Tribunal has substituted the same by the sentence of loss of seniority for 24 months. Further, while directing reinstatement in service, the Tribunal has also ordered that the respondent herein shall not be entitled to pay and allowances for the period from the date when he was dismissed from the service till the date of reinstatement, if it is within three months from the date of order of the Tribunal.

[30] The respondent has not reinstated in service as this court had, vide orders dated August 31, 2015, stayed the operation of the said order/direction. Thus, the respondent is still out of service and, therefore, lost his salary from the date of the order of the Tribunal which was passed on March 04, 2015. The respondent was dismissed from service vide orders dated January 26, 2013. For all these reasons, we are not inclined to interfere with the order of the Tribunal on sentence inasmuch the effect is that not only seniority of the respondent is forfeited by 24 months, he is also deprived of his salary for more than five years. Such a sentence, according to us, would meet the ends of justice and in these circumstances discretion exercised by the Tribunal does not need any interference.

[31] As a consequence, both the appeals are dismissed. The respondent herein shall be reinstated in service within 2 weeks from the date of passing of this order and he shall not be entitled to any salary for the intervening period, i.e., from the date of dismissal till the date of reinstatement.

There shall be no orders as to costs.

HIGH COURT OF DELHI

DHARAMBIR; JAGDISH CHANDRA; AJAY KHANNA; ANAND MOHAN SHARAN
V/S
CENTRAL BUREAU OF INVESTIGATION

Date of Decision: 11 March 2008

Citation: 2008 LawSuit(Del) 686

Hon'ble Judges: S Muralidhar

Eq. Citations: 2008 (148) DLT 289, 2008 (3) AD(Del) 557, 2008 (102) DRJ 299, 2008 (102) DRJ 300, 2008 (2) CurCriR 1, 2008 (2) JCC 945, 2008 (2) AD(Cri) 413

Case Type: Criminal Miscellaneous; Writ Petition (Criminal

Case No: 1775, 1980, 6476 of 2006, 203, 3626, 3657 of 2007; 1393 of 2007

Subject: Constitution, Criminal, Press Media & Telecommunication

Acts Referred:
Constitution Of India Art 22, Art 20, Art 226, Art 21
Indian Penal Code, 1860 Sec 120B
Code Of Criminal Procedure, 1973 Sec 482, Sec 173(5)(a), Sec 161, Sec 164, Sec 165, Sec 239, Sec 173(5), Sec 207(v), Sec 173(5)(b), Sec 227, Sec 207, Sec 173(6)
Evidence Act, 1872 Sec 65(b), Sec 3
Prevention Of Corruption Act, 1988 Sec 13(2), Sec 9, Sec 13(1)(d), Sec 10, Sec 7, Sec 8, Sec 11, Sec 12
Telegraph Act, 1885 Sec 5(2)
Official Secrets Act, 1923 Sec 14
Information Technology Act, 2000 Sec 2(o), Sec 2(t)

Final Decision: Petition disposed

Advocates: R N Mittal, S K Rungta, Rekha, Madhu Sudan Narayan, Samrat Singh, Sidharth Luthra, Manish Vashisht, Sameer Vashisht, Rajni Gupta, Madhav Khurana, A M Singhvi, Manoj Taneja, Samarjit Patnaik, Sandeep Kapur

Reference Cases:

Cases Cited in (+): **9**

Cases Referred in (+): **22**

Judgement Text:-

S Muralidhar, J

[1] Questions of law concerning supply of copies of documents, gathered by the prosecution during investigation, to an accused person at the pre-charge stage arise for consideration in these petitions. It involves the interpretation of Sections 173 (5) and 207 of the Code of Criminal Procedure 1973 (CrPC), Sections 3 and 65B of the Indian Evidence Act 1872 ('EA') and Sections 2 (o) read with Section 2 (t) of the Information Technology Act, 2000 (IT Act).

> 1.2 In order to appreciate the issues that arise a brief background is being set out. The petitioners here are persons accused of offences under Section 120-B IPC and under Sections 7 to 12, 13 (2) read with 13(1) (d) of the Prevention of Corruption Act, 1988 ('PC Act') in four different cases. In the charge sheets filed in the four cases, the prosecution has stated that as part of the investigation, intercepted telephonic conversations between the accused persons were recorded on four hard discs (HDs) in the computer systems kept at the office of the Special Unit (SU) of the Central Bureau of Investigation (CBI) in New Delhi. The charge sheets further state that these conversations took place on fifteen mobile phones and land lines (hereafter 'tapped phones'), belonging to one of the accused, which were placed under electronic surveillance between December 2002 and March 2003 pursuant to statutory permissions obtained from time to time from the competent authority. After listening to and analyzing the intercepted conversations recorded on the HDs, the CBI transferred to separate Compact Discs (CDs) such of those conversations which CBI considered to be relevant for each of

the four cases.

1.3 The four computer systems containing the HDs and the CDs were then sent to the Andhra Pradesh Forensic Sciences Laboratory (APFSL) for certification for two purposes. First, that the HDs were in working condition as required by Section 65B (2) (c) EA and secondly, that the conversations transferred to the CDs were true copies of their original recording on the HDs. The CDs certified by the APFSL were thereafter forwarded to the learned Special Judge, New Delhi along with the charge sheets. The four HDs have been retained at the APFSL, Hyderabad.

1.4 The Special Judge took cognizance of the offences and issued process to the accused. Copies of the respective charge sheet and its annexures, along with a transcript of the intercepted telephone conversations relevant to the case were furnished to each of the accused. Later, the CDs containing the said relevant telephone conversations were also supplied to the accused.

1.5 During the course of arguments on charge, some of the accused in the four cases filed applications before the Special Judge asking for a direction to the CBI to supply to each of them mirror-image copies of the HDs. This was declined by the Special Judge by separate orders. Aggrieved, the accused have approached this Court with the present petitions, one of which is under Article 226 of the Constitution and the others under section 482 CrPC.

1.6 On 16th May 2007 this Court directed that arguments on charge could be proceeded with before the Special Judge but 'formal order be kept in reserve.' This order was challenged before the Supreme Court and the Special Leave Petition was disposed of on 29th February 2008 requesting this Court to take up the case on 4th March 2008 and 'dispose of the matter latest by 11.03.2008.'

1.7 In compliance of an order dated 29th February 2008 passed by the

Supreme Court, these petitions were heard on March 4th, 6th, 8th and 9th 2008 and judgment is delivered today, 11th March 2008. Despite the last three dates being holidays, counsel for the parties addressed arguments on each of them. The Court expresses its appreciation of the cooperation extended by counsel.

[2] There are four cases in each of which a charge sheet has been filed and where some or all of the Petitioners here have been arrayed as accused. The FIR in the earliest of the four cases, bearing No. RC 0025(A)/2003-DLI was registered on 3rd April 2003 under Sections 7, 13(2) read with 13(1) (d) PC Act.

This concerns the unauthorised construction of a lift at the property at Mahavira Towers, IIIrd Floor, Paschim Vihar. In this case (hereinafter the 'Lift Case') Shri Subhash Sharma ('Sharma'), the former Vice-Chairman of the Delhi Development Authority (DDA) is accused No.1, Shri Dharambir Khattar ('Khattar') who allegedly worked as a middleman between public servants and private individuals is accused No.2, Shri Ved Prakash Kaushik an individual and coconspirator who helped in liaising with the DDA is accused No.3, Shri Pradeep Kapoor husband of Smt. Kavita Kapoor, a partner of a firm M/s APY Hoteliers and Developers is Accused No.4 and Shri Anil Wadhwa and Shri Yashpal Manocha, the other two partners of the said firm are accused Nos. 5 and 6 respectively. The charge sheet in the Lift Case was filed on 15th July 2004 The prosecution concluded its arguments on charge almost two years ago on 2nd June 2006.

Arguments on behalf of accused No.1 Sharma have been completed. The arguments on behalf of accused No.2 Khattar are in progress and arguments are yet to be addressed on behalf of the four other accused.

2.2 The second case is RC-1(A)/2003-ACU-1 which was registered on 26th March 2003 for the offences under Section 120B IPC read with Section 13(2), 13(1) (d) PC Act. It concerns the Modern Public School Education Society, Shalimar Bagh, Delhi ('Society'). The chargesheet was filed in this case [hereafter 'the School case'] on 30th July 2004 It states that the Society was allotted 3.977 acres of land by the DDA on 11th July 1985 for the construction of a higher secondary school and playground. Despite approval

of the building plan on 2nd August 1991, the Society did not construct the school building within a stipulated time of two years. A show cause notice was therefore issued to it by the DDA on 18th November 2002 for cancellation of the lease. The case of the prosecution is that the Accused No.1 Sharma, accused No.2 Shri Jagdish Chandra, the then Director (Lands) DDA, Accused No.4 Shri Ashok Kapoor, the then Private Secretary to Sharma, and Accused No.5, Shri Amrit Lal Kapoor, Director of the Society, in conspiracy with Accused No.3 Khattar ensured that the lease was not cancelled and the composition fee not imposed leading to a pecuniary loss of Rs.62,06,594 to the Government. Arguments on charge have been completed by the prosecution on 7th November 2005. The arguments of only accused Nos. 4 and 5 remain to be addressed and are expected to be completed on 19th March 2008.

2.3 The third case is RC.2(A)/2003-ACUIII registered on 26th March 2003 under Sections 120 B IPC read with Sections 7, 8, 13 (2) read with 13(1)(d) PC Act.

Accused No.1 is Sharma, the former Vice-Chairman DDA, Accused No.2 is Shri Anand Mohan Sharan ('Sharan'), the former Commissioner (Land Disposal) DDA, Accused No.3 is Shri Vijay Risbud, Commissioner (Planning) DDA, Accused No.4 is Shri Jagdish Chandra Director (Lands) DDA, Accused No.5 is Khattar, Accused No.6 is Shri Ajay Khanna of DLF Universal Ltd. Shri Ravinder Taneja, Shri G.R. Gogia and Shri Mukesh Saini, accused Nos.7,8 and 9 respectively, have been named as co-conspirators. The charge sheet in this case (hereinafter known as 'DLF case') was filed on 31st March 2005. The case of the prosecution is that the accused entered into a criminal conspiracy with private parties in order to show undue benefit to DLF in the matter of allowing Floor Area Ratio of 300 in place of 139 and by charging rates much below the prevailing market rates in lieu of obtaining illegal gratification from DLF. The bribe amount agreed was Rs. 1.1 Crores of which Sharma then Vice Chairman of DDA was to get Rs.50 lakhs and the rest of the amount was to be shared amongst Sharan, Chandra and Khattar. Risbud was to be gratified separately by DLF. It is stated that Taneja and Gogia were involved in the delivery of amount of the bribe. In this case the

prosecution is expected to complete its arguments on 13th March 2008 after which arguments would be addressed on behalf of each of the other accused.

2.4. The fourth case is RC.3(A)/2003-ACU.X in which the FIR was registered on 29th April, 2003 under Sections 120B read with 7, 8, 9, 12, 13 (2) read with 13 (1) (d) PC Act. Accused No.1 is Shri Shameet Mukherjee ('Mukherjee') a former Judge of this Court, Accused No.2 is Sharma, the former Vice-Chairman DDA, Accused No.3 is Shri Vinod Khatri ('Khatri') and Accused No.4 is Shri Ashok Kapoor ('Kapoor'), a former Private Secretary to Sharma. In this case (hereafter the 'Shameet Mukherjee Case'), the charge sheet was filed on 5th April 2005. The prosecution's case is that Khattar enjoyed a close relationship with Sharma and Mukherjee. Even after he became a Judge of this Court, Mukherjee used to visit premises of Khattar at 431, Mathura Road, Jangpura Extension, New Delhi and 2 K. G. Road and frequently enjoy the hospitality of Khattar. It is stated that Khattar acted as a conduit between Mukherjee and various private parties who wanted their pending cases to be decided favourably. The allegation is that the official files and records of cases in the Court of Mukherjee used to be taken to the premises of Khattar at Mathura Road in which Mukherjee used a room for his work. It is stated that CBI recovered files of cases pending in the Court of Mukherjee while they were being taken out from the aforementioned premises belonging to Khattar by Ashok Kapoor in his Maruti Van on 26th March, 2003.

This included a six-page draft, unsigned order of the Court in a Suit titled Azad Singh v. DDA. It is alleged that the conspiracy was entered into between the accused aforementioned to cause undue benefit to Khatri who was interested in two suits pending in the Court of Mukherjee which pertained to two properties. Khatri, a dismissed Constable of the Delhi Police, had illegally occupied Gram Sabha land vested with the DDA for running the Sahara Restaurant.

He was interested in the continuation of the interim order passed in Azad Singh v. DDA which effectively prevented the widening of the Aruna Asaf Ali

Road. If the stay was lifted, it would cause Khatri a huge loss because he would have had to lose possession of two plots adjacent to the plot which was being claimed by Azad Singh. Also the commercial interests of the Sahara Restaurant which was about 1900 feet away from the Azad Singh plot would be affected by the road widening. The charge sheet details the manner in which the conspiracy between the accused ensured a interim order being passed to protect the interests of Khatri. The arguments on charge on behalf of the CBI and Mukherjee have concluded. The arguments on behalf of Sharma are in progress. The arguments on behalf of other three accused are yet to take place.

[3] What is common to all the chargesheets is that apart from the statements of witnesses, and certain documents details of which have been set out in the Anexures to the chargesheets, the prosecution seeks to rely on intercepted conversations involving the accused made on 15 mobile and landline telephones belonging to Khattar, his family members and other accused which were placed under electronic surveillance between December 2002 and March 2003 pursuant to permissions being obtained from the competent authority from time to time under the Indian Telegraph Act 1885 and the Rules thereunder.

3.2 After listening to the various conversations between the accused, the CBI prepared call information records of identified calls of conversations between accused persons relevant to each of these cases. In the Shameet Mukherjee case, according to the charge sheet, the relevant calls between the accused persons were copied on to 19 CDs and taken on record for investigation.

These 19 CDs contained conversations pertaining to 768 calls. From these 19 CDs, 100 short-listed telephone conversations relevant to Shameet Mukherjee case were prepared and transferred to 4 CDs. According to the chargesheets filed in the other three cases, the postion regarding the relevant calls according to the CBI are as under:

(i) The Lift Case: 25 calls, transferred to 3 CDs.

(ii) The School case: 14 calls transferred to 2 CDs.

(iii) The DLF case: 62 calls transferred to 3 CDs.

3.3 As noticed earlier, the four hard discs and the CDs containing the relevant conversations were sent to the Andhra Pradesh Forensic Science Laboratory ('APFSL') for comparison with the originals and certification that the conversations recorded in the CDs were true copies of the original recording in the hard discs and further for certifying that the HDs were in a working condition. The APFSL was asked to certify that the time, date and duration of the calls in the CDs tallied with the data files in the four hard discs. The APFSL sent to the CBI the results of the examination in a report dated 22nd July 2003 which confirmed that the recorded conversations were true copies of the originals and that the HDs were in a working condition.

3.4 It is not disputed that the CDs containing the copies of all the aforementioned relevant conversations were forwarded to the court of the Special Judge by the CBI along with the charge sheets. Initially along with the copies of the respective charge sheets, each of the accused was given a transcript of the relevant intercepted telephone conversations recorded in the CDs.

Thereafter, pursuant to the orders passed by the Special Judge, the copies of the CDs containing the relevant intercepted telephone conversations themselves were furnished to each of the accused.

[4] After the charge sheets were filed the learned Special judge took cognizance of the offences and issued process. Over a period of two years thereafter, the accused filed applications before the learned Special Judge under Section 207 seeking copies of documents and in particular the mirror image copies of the hard discs. The learned Special Judge by separate orders dated 17th September 2005 and 8th March 2006 in the School case, 24th March 2006 in the Lift case, 5th September 2006 in the Shameet Mukherjee case, 19th September 2007 in the DLF case, rejected each of the applications. The significant findings in the order dated 19th September 2007 passed by

the Special Judge in the DLF case, were as under:

a. The certificate dated 22nd July, 2003 issued by the APFSL on examination of the 3 hard discs, i.e. A, D and E and 3 CDs containing the 62 calls in the DLF case, was to the effect that the data in 62 telephone calls tallied with the respective files in the hard discs. The certificate was therefore in compliance with Section 65 B (4) EA and had to be treated as evidence within the meaning of Section 3 EA. Therefore the 3 CDs fell within the definition 'computer output' being an electronic record within the meaning of Section 65B (1) EA and had to be treated as an original document.

b. There was force in the contention of the learned counsel for the CBI that the four hard discs recorded telephone calls between persons not connected with the present cases and handing over a copy of these hard discs to the accused persons would prejudice the case of the other co-accused and persons unconnected with these cases. In any event, since the CDs of the relevant telephone conversations which were computer output within the meaning of Section 65 B EA had been handed over to the accused, the mandate of Section 207 (v) read with 173 (5) CrPC had been complied with.

c. Since the prosecution was not relying upon telephone calls other than those copied on the CDs and therefore did not include the other calls in the list of documents appended with the charge sheet with 3 CDs, nothing more needed to be handed over to the accused. The request for supply of mirror image copies of the hard disc was rejected.

d. As regards non-compliance with the requirement of Rule 419 of the Indian Telegraph Rules, those were matters of evidence which could not be gone into at the stage of framing of charge.

d. The question whether the prosecution was, in the garb of indicating what evidence they proposed to rely upon, indulging in arbitrary picking and choosing of telephone calls, did not arise since the prosecution was not relying upon the four hard discs, copies of which were sought by the accused. There would be ample opportunity for the defence to cross-examine the

expert witnesses of the APFSL on their analysis of the call duration, time date and so on.

[5] Aggrieved by the aforementioned orders, some of the accused have filed these petitions under Section 482 CrPC. As regards AM Sharan, he has filed Writ Petition (Crl) 1393 of 2007, in which the prayer is for a direction that the 'entire recorded and intercepted messages be destroyed' on the ground that they have been illegally obtained in contravention of Section 5 (2) of Indian Telegraph Act, 1885 and Rule 419A of the Indian Telegraph Rules, 1951. He has further prayed for quashing the order dated 19th September 2007 passed by learned Special Judge, declining the request for the mirror images of the hard disc in the DLF case. Jagdish Chandra, an accused in the DLF case has filed Crl. Misc. (C) No. 203 of 2007 for a direction to the trial court to hear arguments on charge on a day-to-day basis.

5.2 Initially, when these petitions were filed notices were directed to issue but no interim order was passed. On 16th May 2007, since the position of the board did not permit a hearing of the cases, it was directed that they should be listed on 28th May, 2007 and that 'in the meanwhile, the trial court may continue with hearing on charge but formal order be kept in reserve.' Thereafter the interim orders were kept continued from time to time.

5.3 Aggrieved by the order dated 16th May, 2007 the CBI filed SLP (Crl) No. [Crl. MP No. 3060] of 2008 in which the following order was passed by the Supreme Court on 29th February 2008:

Delay condoned.

Since the parties are present, we request the High Court to take up the matter on 04.03.2008. Without further notice, the parties shall appear before the learned Chief Justice of the High Court with a copy of our order so that an appropriate Bench can be fixed for hearing of the petition, i.e. Criminal Misc. Application No. 2845 of 2007 in Criminal M.C. No. 203 of 2007. The High Court is requested to dispose of the matter latest by 11.03.2008. The special leave petition is disposed of accordingly.

5.4 This order was communicated to this Court on 4th March, 2008 during the lunch recess. Since the decision in Crl.M.A. No. 2845 of 2007 in Crl.M.C. 203 of 2007 would affect all the connected cases, counsel for the parties in all the cases insisted that they should all be heard as well. On 4th March 2008 the hearing commenced and orders were reserved on 9th March, 2008.

[6] Arguments have been heard at length of Shri R.N. Mittal, Dr. A.M. Singhvi and Shri Siddharth Luthra, learned Senior counsel, appearing for the Petitioners. Shri Dayan Krishnan, learned counsel addressed arguments on behalf of the CBI.

6.2 The submissions on behalf of the petitioners were:

(i) In each of the charge sheets, the CBI has detailed the process of arriving at the list of calls 'relevant' to each of the cases. This process shows that telephone conversations on the tapped phones were recorded into a hard disc and from the hard disc the so-called relevant calls were culled out and transferred into CDs which have been handed over to the accused. Since there is a reference to the hard discs in the charge sheet, the conversations recorded in those hard discs were certainly 'documents' within the meaning of Section 3 EA read with Section 173 (5)(a) and 207 (v) CrPC. Such documents as had been relied upon had necessarily to be supplied to the accused.

(ii) Section 65(B) (1) EA states that copies of an electronic record transferred to another medium would be deemed to be a document admissible in evidence subject to the conditions in Section 65 (2) EA being complied with. This would render the HDs as relied upon documents and this would therefore also require the accused to be given copies of the HDs.

(iii) The CDs furnished to each of the accused is only partial information and the prosecution is bound to furnish to each of them at the pre-charge stage the entire material gathered by it during the course of investigation. The CBI Manual specifically mandates the procedure to be followed by the CBI while investigating the case when it involves electronic records. A clone of the hard

disc is expected to be prepared and sent for analysis since the removal of a hard disc from a Computer Processing Unit ('CPU') can itself alter the structure of the content of the hard disc. Unless each of the accused was given a mirror image copy of the hard disc it would not be possible to ascertain whether even in relation to these so-called relevant calls whether they have been altered in any manner by writing over, removal and reinsertion and so on. It is stated that this is absolutely essential since the test report of the APFSL when compared with the information provided by the telephone companies shows that there is a discrepancy in call duration and time and this cannot be verified except by obtaining a copy of the hard disc.

(iv) Admittedly, the number of intercepted telephone conversations that took place between the accused and recorded in the HDs was in excess of 50,000. It is entirely the whim of the CBI as to how it has chosen certain telephone calls which are considered to be 'relevant'. It is sought to be demonstrated from the printout of the details of the telephone calls as furnished by the service provider that between the same two persons all the conversations on a particular date have not been picked up as being relevant. Even between 4 or 5 calls made in succession, alternate calls have been picked up and rest left out. Unless the entire set of calls recorded on the hard disc is provided to the accused persons, they would not be able to demonstrate if any material contained in the left out calls, is of advantage to the accused, or exculpates the accused.

(v) Each of the accused has a fundamental right to a fair trial under Articles 20,21, and 22 of the Constitution of India, which fundamental right has been given effect to in the various provisions of the CrPC. Denial of any material gathered during investigation by the prosecution, and referred to or produced with a charge sheet, would be a violation of that right.

(vi) It is submitted that for the purposes of Section 173(5) (a) CrPC what can be said to be 'relevant' by the prosecution cannot be left to be decided by the prosecution itself. In any event the Court is not powerless, if it feels that the document or a portion of the document that has been referred to by the prosecution is necessary to be given to the accused, it can direct that

the prosecution should furnish such a copy to ensure that the accused is not denied the fair right of defence at the trial.

(vii) It makes no difference if the prosecution were to say that the hard discs are either not relied upon or are being referred to only for the purposes of compliance with Section 65 (B) of the EA. By conveniently not producing the hard discs at this stage before the Court, which in any event the prosecution was bound to do in terms of Section 165 CrPC and by conveniently stating that they were not relying upon the hard discs, the prosecution has denied accused the material that is vital to the accused for a proper defence.

(viii) It is submitted that the learned Special Judge was in error in holding that the CDs supplied to the accused had to be treated as the original documents themselves. This was belied by what the CBI has explained in the charge sheet to the effect that these CDs have been copied from the hard disc.

Even if these copies have been certified by the APFSL, that was of rebuttable authenticity and the accused could not be expected to rebut it without access to the original recordings of those conversations as contained in the hard discs.

(ix) It is submitted that mere playing all the relevant calls relied upon by the CBI from the hard disc would not suffice as the accused would still not have access to the other conversations involving them contained in the hard disc.

(x) Illegally collected evidence, in the form of telephonic conversations intercepted without following the mandatory requirement of the Indian Telegraph Act and the Rules made thereunder ought not to be permitted to be relied upon by the prosecution.

(xi) Finally, it was urged that even where the prosecution withholds a certain document from the accused at the pre-charge stage on the ground that it does not propose to rely upon such document, the trial court or even this

Court in exercise of its inherent powers can direct the prosecution to provide to the accused a copy thereof in recognition of the right of the accused to a proper and effective opportunity of being heard even at the stage of charge.

6.3 The submissions on behalf of the CBI were as follows:

(a) There is a distinction between a device and an electronic record. The HD is only an electronic device for storing information and is not a document and hence it is shown in the list of articles and not in the list of documents accompanying the chargesheet.

(b) The provision of Section 65 (B) EA has been followed by the CBI in letter and spirit in this case. Therefore, once the conditions in Section 65B(2) have been satisfied then the CDs containing the relevant telephone conversations, duly certified by the APFSL, would be deemed to be a document under Section 65B(1) EA. It is admissible evidence without requirement of proof of production of the original computer output.

(c) It is not open, to the accused to ask for the production of the original computer output or the hard disc at the stage of the trial, and therefore, even less can they do so at the pre-charge stage of furnishing copies of documents.

(d) The reference to hard discs in the chargesheet was only to explain the process of making copies of the relevant calls and it was shown in the list of materials only for the purposes of proving to the court during the trial that the conditions contemplated under Section 65 (B)(2) EA were duly complied with.

(e) The prosecution is therefore not obliged, in terms of Section 207(v) CrPC read with Section 173 (5) (a) thereof, to supply the mirror image of the HDs as demanded by the accused. In any event a mirror image of the hard disc which contains calls pertaining to other cases as well is not only not contemplated under Section 207 (v) CrPC but would also prejudice the right

to privacy of other persons not connected with the cases.

(f) The accused would have the right to cross-examine the witnesses of the APFSL regarding the discrepancies concerning the relevant calls including call duration and time and therefore would not be prejudiced if the hard disc is not produced at this stage.

(g) The prosecution can validly determine what is relevant for the case amidst the large number of documents gathered during investigation and choose to rely upon only such documents for proving its case. In fact, the prosecution risks not relying upon any other documents for bringing home the charge. It is not as if the telephone calls are the only piece of evidence relied upon by the prosecution. The court will have to go only by what the prosecution says it relies upon at the stage of framing charges. This court cannot itself determine what the prosecution ought to rely upon. Referring to State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568 it is submitted that the accused has no right to obtain copies of documents not relied upon by the prosecution.

(h) Even if the prosecution was to bring on record any other document which it proposes to rely upon at a subsequent stage, it can only be done in accordance with the procedure contemplated in the CrPC. At that stage the accused will have full opportunity of knowing in advance what is proposed to be relied upon and can ask for access to those documents as well.

(i) Relying upon the DPP v Mckewon [1997] All.E.R. 737 and State v. Navjot Sandhu (2005) 11 SCC 600 it is submitted that the stage for explaining the discrepancies concerning the call information as provided by the telephone companies and that certified by the APFSL is at the trial and not at the pre-charge stage. The question of legality and illegality of the evidence gathered can be examined also only at the trial and the stage of framing of charges is not appropriate for that purpose.

(j) The scope of the power of the High Court under Section 482 CrPC does

not cover the examination of the admissibility of the evidence relied upon by the prosecution at the pre-charge stage.

[7] In the above background, and in light of submissions of counsel for the parties, the questions that arise for determination in these petitions are:

(i) Are the HDs on which the intercepted telephone conversations have been recorded, 'documents' within the meaning of Section 173 (5) (a) read with Section 207 (v) CrPC.

(ii) Can the prosecution decide which of the documents gathered by it during investigation are 'relevant' and therefore choose to 'rely upon' and furnish to the accused only copies of such documents under Section 207 (v) CrPC or is the prosecution obliged to furnish copies of all documents gathered by it during investigation.

(iii) Even where the prosecution states that it is relying upon only some of the documents gathered by it during investigation, can the trial Court or this Court direct that a copy of (or inspection of) a certain document should nevertheless be given to an accused in recognition of the right of the accused to a proper and effective opportunity of being heard even at the stage of charge.

(iv) Does the denial to the accused at the pre-charge stage of copies of all documents gathered by the prosecution during investigation tantamount to a violation of the fundamental right to a fair trial under Article 21 of the Constitution.

(v) Is it sufficient compliance with Section 207 (v) CrPC for the prosecution in the instant case to furnish copies of the CDs containing the relevant conversations or must it give to the accused copies of or at least an inspection of the original of those conversations as recorded in the HDs' In other words, if the answer to question (i) is in the affirmative, relevant to the cases on hand, to what extent can the accused demand to be furnished with

copies of or inspection of the HDs and in what form.

[8] In order to appreciate why the question whether, in the instant cases, four hard discs are documents and of which copies can be demanded by the accused it is necessary to recapitulate the statutory provisions that mandate supply to the accused by the prosecution of the copies of those documents forwarded to the court along with the charge sheet which it proposes to rely upon as well as of those documents already sent to the court during investigation. The relevant provisions are Section 173 (5) (a) and Section 207 CrPC, which read thus:

> 173. Report of police officer on completion of investigation.
>
> (1) Every investigation under this Chapter shall be completed without unnecessary delay.
>
> (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-
>
> (a) The names of the parties;
>
> (b) The nature of the information;
>
> (c) The names of the persons who appear to be acquainted with the circumstances of the case;
>
> (d) Whether any offence appears to have been committed and, if so, by whom;
>
> (e) Whether the accused has been arrested;
>
> (f) Whether he has been released on his bond and, if so, whether with or

without sureties;

(g) Whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) All documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) The statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note

requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of' sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

"207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following.

(i) the police report;

(ii) the first information report recorded under section 154:

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173.

(iv) The confessions and statements, if any, recorded under section 164;

(v) Any other document or relevant extract thereof forwarded to the

Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof', direct that he will only be allowed to inspect it either personally or through pleader in Court."

8.2 The scheme of the above two Sections indicates that the Legislature has intended to differentiate between documents forwarded to a court by the police along with the charge sheet or sent to it earlier during the course of investigation on the one hand and the statements of prospective witnesses recorded by the police during investigation under Section 161 CrPC, copies of which are also forwarded to the Court along with the charge sheet, on the other.

This is plain from the language of Section 173 (5) (a) when compared with that of Section 173 (5)(b) read with Section 173 (6) and the first and second provisos to Section 207 (v) CrPC. For instance, the reference in Section 173 (6) to 'any such statement' is to the statement of witnesses referred to in Section 173(5)(b) CrPC, i.e statements recorded of prospective witnesses under Section 161 CrPC. In relation to these statements the police office has a discretion under Section 173 (6) CrPC to withhold a part thereof if he forms an opinion that it is inexpedient in public interest to do so and inform the Magistrate accordingly. Further, the first proviso to Section 207 (v) gives a discretion to the Magistrate to provide to the accused even those statements which 'the Magistrate thinks appropriate' shall be furnished.

8.3 This is in contrast to the position regarding documents. Section 173 (5)

(a) CrPC refers to documents 'on which the prosecution proposes to rely' other than 'those already sent to the Magistrate during the investigation'. These documents are to be forwarded to the Magistrate along with report. Therefore at the stage when the supply of documents has to be made in terms of Section 207 (v) CrPC what the Magistrate has with him are those documents which have already been sent to the Magistrate during the course of investigation and those documents that are forwarded by the police officer along with the charge sheet. Under Section 207 (v), the Magistrate has no discretion in the matter of not supplying such documents. The only limited discretion that the Magistrate has in terms of the second proviso to Section 207 (v) CrPC is if the documents are so voluminous he can direct that the accused will be permitted only an inspection of the documents.

8.4. Since considerable importance is attached, on a reading of the aforementioned two provisions of the CrPC, to the supply to the accused of all the 'documents' proposed to be relied upon by the prosecution, the question that arises is whether the HDs are documents of which copies can be asked for by the accused. If the HDs are not documents at all and only storage devices as contended by the CBI, then the further question whether they are being relied upon by the CBI and whether copies thereof therefore need to be supplied to the accused will not arise.

8.5 The meaning of the word 'document' used in Section 173 (5) (a) as well as Section 207 (v) has to be appreciated in the present case in the context of the nature of document the copy of which is being sought. Here we are concerned with digital copies, in the form of voice executable .WAV (sound format) files, of the intercepted telephone conversations which were directly recorded on to an electronic device viz., the hard disc.

8.6 This can be better understood by referring to the meaning of the words 'document' and 'evidence' occurring in Section 3 of the EA. The said definitions read as under:

"3 - Interpretation clause. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the

context:-

'Document'.-'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

'Evidence'.-'Evidence' means and includes--(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence;

(2) [all documents including electronic records produced for the inspection of the Court];

such documents are called documentary evidence."

Section 3 EA states that the expression 'electronic record' has the same meaning as attributed to it in the IT Act. Section 2 (t) of the IT Act defines ' electronic record' to mean:

"(t) 'electronic record' means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."

The word 'data' has been defined in Section 2 (o) IT Act to mean:

"(o) 'data' means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be

in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer".

8.7 A collective reading of the above definitions shows that an electronic record is not confined to data alone but it also means the record or data generated received or sent in an electronic form. The word 'data' includes 'a representation of information, knowledge and facts' which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored initially in the memory of computer.

8.8 The word 'data' therefore includes not only the active memory of the computer, in this case the hard disc, but even the subcutaneous memory. Indeed it was submitted by learned counsel for CBI that there are six levels of memory in the hard discs and therefore an information which was written and then rewritten upon more than 5 times could still be retrieved from the subcutaneous memory of the hard disc. Even if there is a doubt whether that entire information can be reconstructed, certainly the information to the effect that the memory in the hard disc has been written and rewritten upon for over six times would be available. It is possible to analyse a hard disc with the help of a software programme, to find out on what date the information was first written with the exact time of such change. It is possible to retrieve such information in respect of each of the occasions when such information is removed and reinserted or changed on the hard disc.

8.9 While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will contain some information and will therefore be an electronic

record. This is of course peculiar to electronic devices like hard discs.

8.10 Therefore, when Section 65-B EA talks of an electronic record produced by a computer (referred to as the computer output) it would also include a hard disc in which information was stored or was earlier stored or continues to be stored.

There are two levels of an electronic record. One is the hard disc which once used itself becomes an electronic record in relation to the information regarding the changes the hard disc has been subject to and which information is retrievable from the hard disc by using a software programme. The other level of electronic record is the active accessible information recorded in the hard disc in the form of a text file, or sound file or a video file etc. Such information that is accessible can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc. Even a blank hard disc which contains no information but was once used for recording information can also be copied by producing a cloned HD or a mirror image.

8.11. The conclusions that can be drawn from the above discussion are:

(a) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer;

(b) Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose;

(c) Therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not at present contain any accessible information

(d) In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(e) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the EA, read with Sections 2 (o) and (t) IT Act, there can be no doubt that an electronic record is a document.

(f) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files being copied on to CDs. They are electronic records for both their latent and patent characteristics.

(g) In the instant cases, for the purposes of Section 173 (5) (a) read with Section 207 (v) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and therefore documents but the HDs themselves would be electronic records and therefore documents.

[9] We are in present cases at a stage prior to the stage of framing of charges. At this pre-charge stage the accused are demanding to be supplied copies of documents in the form of four hard discs. According to them these are documents that have been gathered by the prosecution during investigation and sine they have been referred to extensively in the charge sheet they cannot be stated to be not relied upon by the prosecution for the purposes of Section 207 (v) CrPC read with Section 173 (5) (a) thereof.

9.2. The phrase 'proposes to rely upon' in Section 173 (5) (a) CrPC indicates something that has to be done in the future i.e. at the stage of pressing the charges and thereafter. Therefore ideally in the charge sheet the prosecution

would normally indicate the documents which it proposes to rely upon. The controversy in the present cases stems from the difference in the statements made or omitted to be made by the CBI in the charge sheets filed concerning the documents it proposes to rely upon.

9.3 In the charge sheet filed in the School case it is stated in para 44 as under:

"List of witnesses and documents/ articles relied upon by the prosecution are enclosed herewith. Additional list of witnesses and documents will be furnished, if required in due course."

Annexure A to this charge sheet is the entire sequence of movement of the Model School file linking it to the relevant telephonic conversations. Annexure B is the transcript of the relevant telephonic conversations. Following this is the list of documents which lists out 59 documents with the note at the end which states 'further list of documents will be submitted, if required.' Following this is a list of witnesses which contains 70 names with a note at the end which states 'further list of witnesses will be submitted, if required.'

9.4 In the DLF case para 38 of the charge sheet reads as follows: "38. That the lists of witnesses, documents and material objects relied upon by the prosecution are enclosed herewith as per Annexures-I, II and III. Additional lists of witnesses, documents and material objects will be furnished, if required, in due course."

Enclosed with the charge sheet are the transcriptions of telephonic conversations as Annexure A, the sanctions for prosecution of the public servants, A1 to A3, the list of witnesses as per Annexure I, the list of documents in Annexure II which contains description of 126 documents and the list of material objects in Annexure III which lists 11 items. It is significant that these material objects do not include the HDs or the CDs whereas the list of documents includes the call information reports and call details of the

relevant telephone numbers relevant to the case.

9.5 In the Lift Case the charge sheet encloses a list of witnesses which lists 91 witnesses, a list of documents which lists 104 documents, a list of articles which list so 5 articles. The charge sheet does not specifically state that the CBI is relying upon is the list of documents appended but since this has been forwarded as such with the charge sheet, it must be presumed that it is proposed to be relied upon by the prosecution. In any event the charge sheet extensively refers to the conversations and the documents.

9.6 In each of the above three charge sheets, the CBI has not stated that it is proposing to rely upon the hard discs. However, it has also not said that it is not relying on them. The situation gets more complicated in the chargesheet filed in the Shamit Mukherjee case. There, unlike in the DLF case, there is no specific statement by the CBI as to what it is relying upon. Enclosed with the charge sheet is a list of witnesses containing names of 90 witnesses, with a note in the end stating 'additional list of witnesses if any will be submitted in due course of time.' Then we have a list of documents which lists out 105 documents with a similar note in the end stating 'additional list of documents, if any, will be submitted in due course of time. Then we have a list of articles which sets out 15 articles and contains a note in the end stating 'additional list of articles if any, will be submitted in due course of time.

In this list of articles serial No. 1 to 7 detail the 19 CDs referred to earlier. Serial No. 8 to 11 mentions the 4 hard discs. Sl Nos. 12 to 15 refer to the phones used in the conversations. Following this is Annexure 1 which lists out details of 100 short-listed calls from various CDs.

9.7 Learned counsel appearing for the accused in the Shameet Mukherjee case urged that the prosecution having itself appended to the charge sheet a list of materials including the 4 hard discs and not having stated in the charge sheet that it was not relying on those materials, cannot now be heard to say that it will not supply to the accused all that is mentioned in the charge sheet. On the contrary, it is submitted by learned counsel for the CBI that it has annexed to the chargesheet a list of 100 relevant calls and obviously the

CBI proposes to rely upon only those 100 relevant calls.

9.8 The question that arises is whether the prosecution can itself decide what it wants to rely upon among the documents it has gathered during investigation and leave out documents which may or may not help the accused in the defence of their case'

9.9 A reading of Sections 173 (5) (a) and Section 207 (v) CrPC indicates that there is very little discretion left with the court to substitute its opinion as to what the prosecution should be relying upon for proving its case. Where the prosecution categorically sates in the charge sheet that it is relying on only certain documents and not others, it is not possible for the court to overlook that and insist that the prosecution should also rely upon some other document that it has gathered and therefore should provide the accused with a copy thereof. It does appear that in the matter of documents, the Court does not have the discretion of the type urged by the counsel for the petitioners.

9.10 There are also other good reasons why the trial courts should not be asked to undertake the task of requiring copies all documents gathered by the during investigation to be provided to the accused notwithstanding the fact that the prosecution says that it is relying only upon some of them for the purposes of the case. There are limited powers of the criminal courts circumscribed by the CrPC. To expect a judge to sit in judgment over what the prosecution considers to be documents worth relying upon even at the pre-charge stage of is to require the trial court to perform a task it is plainly not expected to perform upon a reading of the various provisions of the CrPC. The CrPC also envisages that at different stages of the progress of the criminal proceedings, the trial court is expected to get increasingly involved. For instance, the degree of scrutiny of materials at the stage of cognizance will of course not be as strict as at the stage of pre-charge and charge and would increase at the stage of framing of charge. There are provisions to take care of contingencies when in his defence the accused wants to summon documents or witnesses. There is also Section 91 CrPC. However, for the purposes of the present case, it is sufficient to observe that at the pre-charge

stage the trial court is not expected to insist that copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

9.11 Where of course the prosecution is silent in the chargesheet about what it is relying upon, then two courses are available to the court to follow. One is to proceed on the basis that whatever document is forwarded with the chargesheet is in fact proposed to be relied upon by the prosecution. For instance, in the Lift Case, a list of documents is attached; the court at the pre-charge stage has to proceed on the basis that those are the documents that are proposed to be relied upon by the prosecution. Where the accused insists that some other document apart from what is stated in the list of documents is being relied upon by the prosecution as is evident from a reading of the charge sheet, the court can examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also being relied upon, then it can require the prosecution to furnish the accused a copy of such document as well.

As will be seen hereafter, in the Shameet Mukherjee case, in view of what is stated in the chargesheet, it appears to this Court that the prosecution is relying upon conversations other than the 100 relevant conversations it has mentioned in the list appended to it.

9.12 The position may be different when it comes to statement of witnesses as already noticed hereinbefore. There Section 173 (5) (b) read with Section 173 (6) CrPC and the first proviso to Section 207 (v) CrPC indicates that the court has some element of discretion on what it wants the accused to be furnished even at the pre-charge stage. That is why the number of decisions relied upon by the petitioners do not have much relevance for the purposes of the present case.

9.13 In reply filed in one of these petitions i.e. Crl.M.C. 6476 of 2005 the stand taken by the CBI in relation to its reliance upon the hard discs is two-fold. In para 7 it is stated that 'the hard discs are relied upon document in the sense that they will be proved in terms of Section 65 A and 65 B of the EA

and, therefore, what is tendered in the trial court would be documents in the nature of compact disc and other related media/printout which would be deemed as original in terms of those Sections'. It is stated that the original system have already been certified for the purity and there is no legal requirement for their production in the trial. It is then stated that in para 12 'the said hard discs would be produced by the relevant witnesses at the time of cross- examination for the limited purpose of satisfying the Court in respect of duration of relied upon phone calls in terms of the judgment of the Supreme Court in State v. Navjot Sandhu (2005) 11 SCC 600.' This much is therefore clear. Even for a limited purpose the CBI says that it is relying on the HDs. The question is to what extent it is.

9.14 There are two issues that arise in this context. In the first place whether the CDs which have recorded the relevant telephone conversations in each case has to be considered to be the original documents and therefore does not require to be proved in terms of Section 65B (1) by producing the original recording made in the HDs as long as the CBI satisfies the Court that the requirement of Section 65 B (2) have been complied with. The second is whether it is open to the CBI to contend that only certain calls of the total intercepted ones are 'relevant' are therefore being relied upon; and that since CDs containing those calls have been provided to the accused, there is no obligation to provide mirror copies of the entire hard disc or even provide an inspection thereof either to the accused or to the Court.

9.15 In order to test this submission of the CBI a reference has necessarily to be made to Section 65B EA which reads thus:

'65B-Admissibility of electronic records. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any

fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether'

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in the section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with

or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.-For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]

9.16 A perusal of the title to Section 65-B EA which has been introduced by an Amendment made in 2000 simultaneous with the enactment of the IT Act with effect from 17th October, 2000 indicates that it concerns 'admissibility of the electronic records' at the stage of the trial when the question arises whether a certain electronic record is admissible in evidence or not. Section 65 B (1) states that if any information contained in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record that has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65 B (2) being satisfied. Both in relation to the information as well as the computer in question such document 'shall be admissible in any proceedings when further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.'

9.17 The conditions specified in Section 65 (B) 2 are that the computer output containing the information should have been produced by the computer during the period over which the computer was used regularly to

store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer. It must also be shown that during the said period the information of the kind contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'. A third requirement is that during the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time that break did not affect either the record or the accuracy of its contents. The fourth requirement is that the information contained in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.

9.18 Under Section 65 B (4) the certificate which identifies the electronic record containing the statement and describes the manner in which it was produced giving the particulars of the device involved in the production of that record and deals with the conditions mentioned in Section 65 (B) (2) and is signed by a person occupying a responsible official position in relation to the operation of the relevant device 'shall be evidence of any matter stated in the certificate.'

9.19 Turning to the case on hand, it will be useful to recall the modus operandi adopted by the CBI, which is common to the four cases as explained in the chargesheets themselves. For instance, it is stated in the chargesheet filed in the DLF case in para 5 that:

"as per the procedure of electronic computerised recording of telephone calls, the orders of the competent authority were conveyed to the concerned telephone company/companies who in turn provided parallel connectivity or leased lines to the CBI. These leased lines did not have any numbers, but were identified by pairs and colours of wires. These leased lines were connected directly with the identified hard disc of a computer through a voice logger. Every incoming and outgoing call of the monitored telephone numbers were automatically recorded on a .WAV (sound format) file in the hard discs of the computers giving complete details viz., call time, call

duration, calling party's telephone number and called party telephone number through window operating system, voice logger drivers and voice executable .WAV (sound format) files. The conversations recorded in these computer files were heard and two Call Information Reports containing 49 and 13 identified calls of conversations between accused persons relevant to this case were prepared and transferred into three compact discs and the same have been taken on record for investigation in this case. The compact discs so prepared are true replicas of recording done in the hard discs of the computer system through electro magnetic media. The purity of the process of recording has been certified by the Andhra Pradhesh Forensic Science Laboratory (APFSL), Hyderabad after examining the hard discs and compact discs vide their expert opinion NO.COM/12/2003 dated 22.07.2003. Shri N.S. Virk, Superintendent of Police, Special Unit, CBI has given a certificate as required under Section 65-B of the Indian Evidence Act, 1872 for use of electronically generated information as admissible evidence."

9.20 In other words, the intercepted telephone conversations on the tapped telephones which were under electronic surveillance were being directly recorded through parallel leased lines in four hard discs (HDs) kept at the conference room of the SU of CBI. Each call had a separate file and was identifiable as such since it was in a voice executable .WAV (sound format) format file. For convenience, the four computer systems in which the HDs were placed marked A, B, D and E for identification. The certificate issued by Shri Navdeep Singh Virk, Superintendent of Police, SU, CBI dated 7th June 2003 sets out the description of the four computer systems in which the HDs were located and explains further how the calls were recorded, copies made and of the relevant calls on audio CDs and the HDs then being taken over by the investigation unit of the CBI. The relevant portion of the said certificate reads as under:

"1. That the information contained in the hard disks of the above mentioned 4 computer systems was regularly recorded into them in the ordinary course of the activities of my unit.

2. That during the period in question the above mentioned 4 computer

systems were operating properly and there have been no such operational problems so as to affect the accuracy of the electronic record.

3. That the computer hardware and software used in the above said computer systems have built in security mechanisms.

4. The call content and call related information of the various telephone numbers monitored by this unit was recorded on the hard disks of the said four systems. Contents of the recorded telephone calls, which were given to the Investigating Officers from time to time, in the form of audio compact discs, are an output of the said computer systems.

5. That these above said computer systems are in working condition, till today, i.e. 7th June, 2003 when they are taken over by Sh M K Bhatt, Additional SP ACU (IX), Investigating Officer of RC 3A 2003-ACU X, AC-III, CBI Delhi for the purpose of investigation."

9.21 In the Shameet Mukherjee case, the letter dated 8th June 2003 sent by the CBI at the time of forwarding the 4 HDs and the 19 CDs to the APFSL for certification, indicates that the opinion of the APFSL was sought on two aspects. The first was for an 'examination of the above hard discs of CPUs marked A,B,D and E in order to ascertain the continuity of recordings of the telephone numbers under surveillance in each of them, and to check for any kind of overwriting, interpolation or any other kind of editing/tampering and issuing of certification to this effect for each of the hard discs in the above CPUs.'

The second was to opine whether the copies of the calls transferred on the CDs were true copies of their original recordings on the hard discs. It was stated in para 4 (A) of the letter that:

"4. Your expert opinion is solicited on the following:-

A) Hard Disc of CPU marked A purported to contain the original recording of the following numbers for the 9810258734 from 14.1.2003 to 20.3.2003 20050871 from 14.1.2003 to 05.02.2003 24311053 from 01.02.2003 to 25.02.2003"

9.22 The letter then sought the opinion of the APFSL with reference to the particular intercepted conversations on identified telephone numbers, between specified dates, the original recording of which was purportedly contained in the hard disc.

9.23 The reply dated 22nd July 2003 of the APFSL indicates that the hardware had been physically examined and that there was "examination of storage media using DIBS forensic work station, which is a computer forensic tool, comprises of both hardware and analyzer software an unauthorized tool for Scotland yard Police Federal Bureau of Investigation and other premier investigation agencies." The opinion in regard to the 5 CPUs, one IDE hard disc and the 19 CDs was as under: "Item nos. 1 to 7 are analyzed and found that all are in working condition. Item No. 1 to 4 are I.D.E. hard disks containing windows operating system, voice Item no.1 and 2 have logger drivers, media player programme, voice logging executable files, WAV file conversation executable file which can be used for logging/recording the telephonic conversation."

9.24 Thereafter opinion is given on the particular audio files of conversations were verified and a report given thereon. For instance, with regard to "audio files recorded with extension .VTM from 21.12.2002 to 24.05.2003 in different partitions", the opinion was as follows:

"Each audio file is verified using forensic work station with respect to creation date/time, update/time corresponding to the details provided in the above reference letter in the form of the hard copy under recorded calls information report containing the date and time, duration of the calls from different telephones logged on to the computer through different voice logging cannels and found that the time and dates and duration the calls are

tallying with the audio files contained in the hard disk."

9.25 A perusal of the entire procedure outlined hereinabove indicates that the purpose of sending the hard discs to the APFSL was two fold. The prosecution has sent to the APFSL the hard discs not for the purposes of certifying all that was contained in the hard disc. The APFSL was to certify on a physical examination that the hard discs were in a proper working condition in terms of Section 65B(2)(c) EA read with Section 65B (4) thereof. Secondly APFSL was to certify whether the relevant intercepted telephone calls copied on the CDs are in fact tallying with the original recordings of those calls in the hard disc.

The scope of the examination by the APFSL was therefore to find out whether the hard disc was properly functioning and whether in respect of the calls copied on to the CDs the corresponding files in the HDs pertaining to those calls have been overwritten modified interpolated in any manner. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

9.26 While the certification by the APFSL may enable the CBI to avoid producing the original recordings of the conversations in the HDs for the purposes of proof it cannot obviate the statutory requirement under Section 207 (v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document. The stage of proof would be at the trial. At the present pre-charge stage, the accused has to be given access to the HDs as a relied upon document to the limited extent as explained hereinbefore.

9.27 It was then argued that in a statement recorded under Section 161 CrPC, Inspector M.C. Kashyap adverts to the fact that he listened to all the conversations before deciding on the relevant calls. It is submitted that this statement has in turn referred to all the calls in the hard discs. This Court is unable to agree. One thing is to say is that the evidence was collected of a large number of calls but that does not mean that the prosecution would be relying upon all those calls. A mere reference to these calls which were

listened to in the course of the investigation would not make them automatically relied upon. The prosecution has to therefore indicate to the court what it proposes to rely upon. It cannot be said that in determining what it proposes to rely upon the prosecution is indulging in pick and choose. The very scheme of the Section 173 (5) requires the prosecution to tell the court that it has relied upon this or that document. It is not possible to imagine that the learned trial court has itself to perform the exercise of examining the entire document collected by the prosecution and then determine what the prosecution shall rely upon. It is inconceivable and impractical to proceed on the basis that all the material gathered during investigation is to be relied upon by the prosecution. It is not possible to accede to the contention of the petitioners that each and every document that the prosecution gathers should be deemed to be relied upon. That is contrary to the scheme of the CrPC.

9.28 There is yet another aspect in the Shameet Mukherjee case concerning the relied upon calls that requires to be dealt with. The case of the prosecution is that it is relying upon only 100 relevant calls and therefore it is sufficient if the accused are furnished the CDs of those 100 calls at the stage of pre- charge. The explanation for the said 100 short-listed calls is contained in para 21 of the charge sheet which reads as under:

"21. That as per the procedure followed by the Special Unit of CBI in computerized telephonic surveillance, the orders of the competent authority are conveyed to the concerned telephone company who in turn provide a parallel connectivity to CBI. Every incoming and outgoing call of each monitored telephone number is automatically recorded in the hard disc of the computer giving the complete details of the monitored number, the call time and duration.

The conversations so recorded were heard and the relevant calls between accused persons, were copied onto 19 Compact Discs and taken on record for investigation. The Compact Discs so prepared are a true copy of the recordings in the hard discs of the relevant computer system. The integrity of the process of recording has been certified by the Andhra Pradesh Forensic

Science Laboratory (APFSL), Hyderabad after examining the hard discs and the 19 Compact Discs vide their Expert Opinion No. COM/10/2003 dated 7.7.2003. The APFSL opined that each audio file in each hard disc was verified by their experts by using a standardized forensic work station with the parameters of creation date/time and the date/time corresponding to the details provided to them in the form the hard copy and found that the time, date and duration were tallying with the audio files contained in the four hard discs. The experts of APFSL have also opined that the 100 shortlisted telephonic conversations relevant to this case as listed vide Annexure-I and other calls, recorded electronically on computer, were on the relevant hard discs of the relevant computers of the Special Unit of CBI. Shri N. S. Virk, Superintendent of Police, Special Unit, CBI, New Delhi has given a Certificate under Section 65-B of the Indian Evidence Act, 1892 for use of electronically generated records as admissible evidence."

(emphasis supplied)

9.29 It is clear from the reading of the above paragraph that the CBI itself contends that 768 calls contained in 19 CDs are 'relevant' for the case. The CBI states that these 768 calls were further screened to arrive at the further 100 relevant calls. On a reading of the above paragraph of the charge sheet it is not possible to conclude that the CBI was not proposing to rely upon the 768 calls contained in the 19 CDs. In fact it sent these 19 CDs for certification to the APFSL. This Court, therefore, comes to the conclusion that as far as the charge sheet in Shameet Mukherjee case is concerned, notwithstanding the fact that the CBI has not included the 768 calls in the 19 CDs in the list of documents appended to the charge sheet, the court must proceed on the basis that the CBI proposes to rely upon these 19 CDs containing 768 calls as well. The consequence is that in terms of Section 207 (v) read with Section 173 (5) (a) CrPC each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

9.30 To summarise the conclusions on questions (ii) and (iii):

(a) In terms of Sections 207 (v) read with Section 173 (5) (a) CrPC, the prosecution is obliged to furnish to the accused copies of only such documents that it proposes to rely upon as indicated in the charge sheet or of those already sent to the court during investigation;

(b) The trial court or this court cannot, at the pre-charge stage, direct the prosecution to furnish copies of documents other than that which it proposes to rely upon or which have already been sent to the court during investigation;

(c) At the pre-charge stage the trial court is not expected to insist that copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

(d) The prosecution is bound to indicate in the charge sheet submitted to the Court the documents it is proposing to rely upon for persuading the court to frame a charge against the accused. If it fails to do so, the court will proceed on the basis that whatever document is forwarded with the chargesheet is in fact proposed to be relied upon by the prosecution. Where the accused insists that some other document apart from what is stated in the list of documents should be taken as being relied upon by the prosecution, as is evident from a reading of the charge sheet, the court can examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also proposed to be relied upon by the prosecution, then it can require the prosecution to furnish the accused a copy of such document as well.

(e) In the instant case, the scope of the examination by the APFSL was to find out whether the hard discs were properly functioning and whether in the calls copied on to the CDs are true copies when compared with the corresponding files in the HDs pertaining to those calls. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

(f) The certification in terms of Section 65 B (4) EA Act does not obviate the

statutory requirement under Section 207 (v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document.

(g) As far as the Shameet Mukherjee case is concerned, in view of what is stated in para 21 of the charge sheet in that case, the court has to proceed on the basis that the CBI proposes to rely upon the 19 CDs containing 768 calls in addition to the document listed by it in the annexure to the charge sheet.

Therefore each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

[10] Extensive arguments were addressed on the basis of Article 21 of the Constitution. It was contended that the denial of a copy of each and every document gathered by the prosecution during the investigation to the accused at the pre-charge stage would violate the fundamental right of the accused to a fair trial as enshrined in Articles 20, 21 and 22 of the Constitution. It was also contended that short of a challenge to the constitutional validity of the provisions, the words 'all documents'on which the prosecution proposes to rely'. occurring in Section 173 (5) (a) CrPC should be read down to mean 'all documents'.which have been gathered by the prosecution during investigation.

It was urged that the principle of purposive construction must be adopted to advance the right to a fair trial which is the running thread through the entire CrPC.

10.2 There is no challenge in these petitions to the constitutional validity of either Section 173 (5) (a) or Section 207 (v) CrPC which are exhaustive of what can be provided to an accused as documents at the pre-charge stage. As long as the said provisions of the CrPC are strictly complied with, and they should be insisted upon being strictly followed, there can be no quarrel that they encapsulate and operationalise the procedural due process requirements of the provisions of the Constitution. Therefore, if the prosecution is able to show that it has complied with the said provisions at the pre-charge stage then the accused cannot be heard to say that the denial

of a document that falls outside the scope of those provisions would still constitute a violation of the fundamental right to a fair trial.

10.3 Reliance was placed on the judgment of the Supreme Court in Hindustan Construction Company Ltd. v. Union of India AIR 1967 SC 526 in support of the proposition that the copy of a document must be full and accurate reproduction of the original. This was in an arbitration case and really does not advance the case of the petitioners. Reliance was placed on the judgment in Union of India v. Purnanda Biswas 2005 12 SCC 576 where it was said that the document favouring the accused not annexed to the charge sheet would vitiate the trial. It requires to be noticed that the said decision was not dealing with the right of the accused at the pre-charge stage and therefore the question of scope of Section 207 (v) Cr PC did not arise for consideration. For the same reason the decisions under the law of preventive detention, viz. Khudi Ram v. State of West Bengal 1975 2 SCC 81 and M. Ahmed Kutty v. Union of India 1990 2 SCC1 can have no application in the instant case. The question involved in the decision in Ashok Kumar Aggarwal v. CBI 2007 (4) JCC 2429 concerns the statements of witnesses under Section 161 and whether that was relevant for the purposes of grant of sanction. Likewise the decision in Ashok Kumar Aggarwal v. CBI 2007 (4) JCC 2557 concerning the relevance of a statement made under Section 164 CrPC for the grant of pardon to the approver is also of no relevance here.

10.4 In Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick AIR 1981 SCC 917 the Supreme Court was considering the scope of Section 14 of the Official Secrets Act, 1923 and held that the said provision cannot take away the right of the accused to get copies of statement recorded of witnesses or documents obtained by the police during investigation. The question whether each and every document collected by the police during investigation should be furnished to the accused at the pre-charge stage or whether it was limited by Section 173 (5) (a) read with Section 207 (v) CrPC clearly did not arise for consideration there. Reference was then made to State of Uttar Pradesh v. Lakshmi Brahman (1983) 2 SCC 3872 where the Supreme Court observed that the language of Section 207 CrPC was mandatory and the furnishing of copies by the Magistrate to the

accused was not an administrative but a judicial function. In any event, the said judgment nowhere states that all documents collected by the prosecution at the stage of investigation should be provided to the accused at the pre-charge stage and that a denial thereof would constitute a violation of the fundamental right to a fair trial. The decision of the Gujarat High Court in Pravin Kumar Lalchand v. State of Gujarat 1982 Cri. L.J. 763 turned on its own facts. There since the enlarged photographs had been examined by the expert for giving the opinion, it was held that the said document cannot be denied to the accused. In the instant case the APFSL has not been asked to certify the entire contents of the 4 HDs but as pointed out earlier have compared the conversations recorded on the CDs with their original recordings in the HDs. Therefore, this case is of no assistance to the petitioners.

10.5 Reliance was also placed on the judgments in Shakuntala v. State 139 (2007) DLT 178, Pravin Kumar Lalchand Shah v. State of Gujarat (1982) Cri. L. J. 76, S.J. Chowdhary v. State 1984 Cri. L. J. 864, State of Kerala v. Raghavan 1974 Cri. L. J. 1373, and Shiv Narayan Kachawa v. State of Rajasthan (1985) Cri. L. J. 761 to contend that nothing can prevent the Court from forming an opinion that a certain document is essential for the defence of the accused and no such document can be denied even by the prosecution. After perusing each of these decisions, this Court finds that either the facts there did not deal with the question of supply of documents at the pre-charge stage or even if they did, it did not involve the interpretation of what was proposed to be relied upon by the prosecution as stated in the charge sheets filed in those cases.

10.6 None of the decisions cited by the petitioners support their contention that the denial to the accused at the pre-charge stage of a copy of each and every document gathered during investigation by the prosecution would constitute a violation of the fundamental right of the accused to a fair trial.

[11] Some of the other contentions raised are now taken up for consideration. A reference was made to Sections 74 and 76 of the EA to contend that the hard discs are themselves public documents, access to which cannot be denied. The decision of this

Court in Ram Jethmalani v. Director, CBI 1987 Cri. L.J. 570 was relied upon for this purpose. It is noticed that the said case was in the context of the statement recorded by the police under Section 161 CrPC being considered to be a public document. The case was not about documents gathered during investigation, which as explained, stand on a different footing in the context of the two provisions that we are immediately concerned with. The argument that hard disc is a public document which the petitioner has a right to inspect, need not to be gone into in view of the finding of this Court that what is recorded in the hard discs is in fact an electronic record to which the petitioner can insist upon an inspection but limited to the extent that it relates to the calls which the CBI has relied upon for the purposes of the case.

11.2 It was then submitted that under Section 165CrPC the prosecution was duty bound to submit the documents immediately to the Magistrate which was not done in the instant case for over two years after their seizure. It is also submitted that under Section 457 the seized documents are required to be deposited in the Court, which was not done. It is stated that even now hard discs have been kept in Hyderabad and not in the control of the Court. The contention of the CBI is that the learned Special Judge has been informed that the hard discs are in the custody of APFSL and this satisfies the statutory requirement. Whether in fact the documents evidencing seizures were not produced as part of the chargesheet, or the documents themselves were not produced before the court immediately after seizure, whether evidence was collected illegally and whether that has prejudiced the rights of the accused is a matter that can be examined at a subsequent stage. It would be open to the accused to show how it has been prejudiced by the non-compliance, if any, of these provisions.

11.3 An argument was made about the non-compliance with Rule 419 A and Section 5 (2) of the Telegraph Act. Reliance was placed on the judgment in Pooran Mal v. The Director of Inspection (Investigation), New Delhi (1974) 1 SCC 345 where it was held that if the evidence is illegally gathered it can still be relied upon by the agency. Counsel for the petitioner submitted that there is an observation in the said decision to the effect that this rule does not apply where the gathering of such evidence is expressly prohibited by law. The question whether the evidence has been gathered contrary to any express or implied provision as mentioned in Pooran Mal, cannot be

determined without examination of evidence in that behalf. This necessarily means that this exercise cannot be performed at the pre-charge stage. It is open to the petitioner to raise this point at the appropriate stage.

11.4 An apprehension was expressed by the counsel for the accused that in the impugned order the learned Special Judge has foreclosed their arguments which can be advanced at the stage of trial. This Court would like to clarify that none of the defences available to the accused during the trial would be foreclosed either by the order of the learned Special Judge or by this order. Of course, the accused will not be permitted to again file the application asking for the same relief which has been declined to them by the impugned order by the learned Special Judge as modified by this order.

11.5 Extensive arguments were made on the basis of the judgment of the Supreme Court in State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568. The first paragraph of the judgment indicates that the Court was considering a case where accused wanted to produce certain documents even at the stage of framing of charge. That was declined by the Supreme Court. In the present case the accused are not seeking to produce any document and they are seeking copies of the hard discs which have been referred to in the charge sheets by the prosecution. Therefore this Court does not consider it necessary to discuss the decision in Debendra Nath Padhi.

11.6 It was submitted that unless they are given mirror images of the HDs, it will not be possible for the accused to demonstrate that any of the calls relied upon by the prosecution vis-vis an accused has been altered or tampered with in any manner. The stage of questioning whether such documents have been tampered with is certainly not the pre-charge stage. That opportunity will be available to the accused at a subsequent stage.

11.7 An elaborate argument has been made about the scope of Section 239 CrPC which is different from Section 227 CrPC. It is submitted that even at the pre charge stage it is open to the accused to apply to the court to ask for being examined. It is submitted that Section 227 is silent and therefore the

right of an accused even at the stage of pre-charge before the Magistrate under Section 239 is wider in terms of the principle of natural justice. It is submitted when a request is made by an accused to access a document such request must be granted by the Court. This Court is unable to accept this submission. There is no application by an accused here seeking to produce a document or asking to be examined at the pre-charge stage. The request by the accused here is for being supplied with copies of documents, which according to them, have been wrongly withheld by the prosecution. Such a request would have to be considered within the scope of Section 207 (v) read with Section 173 (5)(a) CrPC.

11.8 It was stated that the stage of framing of charge is as important as trial itself and therefore every information that has been gathered by the prosecution has to be provided at this stage itself. It is not possible for this Court to agree with this contention. The stage of framing of charge has been explained to be different from the stage of the trial in various decisions of the Supreme Court. The observations in State of Bihar v. Ramesh Singh (1977) 4 SCC 39, Superintendent and Remembrancer v Anil Kumar Bhunja (1979) 4 SCC 274 and Soma Chakravarty v. State (2007) 4 SCC 274 are relevant.

[12] The question then arises whether, for the purposes of compliance with the requirement of Section 207 (v) CrPC, the accused petitioners should be given copies of all the conversations stored in voice files in the hard disc or is it enough to give them an inspection thereof. As already noticed, the four hard discs contain information pertaining to calls between persons not connected with the present cases. The accused cannot possibly claim access to this information. Apart from the issue of privacy of such other persons, it is also not warranted under the interpretation placed by this Court on the relevant statutory provisions.

12.2 There are bound to be problems in requiring further certification for providing copies of the original recordings from hard disc itself. Such certification can also be doubted by the accused who might insist on access to the original recording themselves. In fact counsel for the petitioners submitted that the copies of the conversations in the form of sound files transferred to the CDs supplied to them does not contain many of the call parameters which are certified to be present in the hard discs.

12.3 The appropriate approach to be adopted in cases concerning computer database has been discussed in a judgment of the Chancery Division in England in Darby and Co Ltd v Weldon 1991 (2) All.E.R. Ch D 901. There it was held that merely because information was not capable of being visually inspected, it cannot be said that the format in which it is recorded is not a document. It was pointed out that there are difficulties in giving access to inspect information stored in the database of a computer. It was observed that there may be irrelevant or privileged material which should not be provided access to; further it is possible for a party to frustrate the attempted inspection by reprogramming the entire computer in such a manner that information previously retrievable, cannot be retrieved without reprogramming; at the same time the access has to be arranged only after ensuring that the database itself does not get damaged as a result of such access and the interference with the everyday use of the computer is also minimised. It was pointed out that there was a discretion in the court to consider "if necessary in the light of expert evidence, what information is or can be made available, or how far it is necessary for there to be inspection of copying of the original document (database) or whether the provision of printouts or hard copies is sufficient, what safeguards should be incorporated to avoid damage to the database."

12.4 On a careful consideration of the submissions of the learned counsel for the petitioners, this Court concludes that it would be appropriate if, consistent with the requirement of Section 207(v) CrPC that the accused petitioners are permitted to listen to the original recordings of the relevant intercepted telephonic conversations relied upon by the prosecution in each of the four cases by having the said original recordings played directly from the hard discs in the presence of the accused or their representatives, their counsel and the learned Judge. At the pre-charge stage, there is no requirement for mirror images of the entire hard discs to be made available to the accused for this purpose. It is made clear however, that this will not foreclose the right of the accused, at the stage of the trial, for the purposes of cross- examining the witnesses of the APFSL to have access to the hard discs.

12.5 This court directs that for the above purpose the four hard discs, which were sealed and sent to the APFSL, Hyderabad by the CBI for certification of the recorded relevant telephonic conversations, should immediately be brought back to Delhi. Learned counsel for the CBI informs that as required by the CBI Manual cloned mirror images copies of the HDs have been made by the APFSL and these are also available in Hyderabad. It is,therefore, directed that the cloned copies of the four HDs can be retained at the APFSL, Hyderabad while the sealed hard discs sent to the APFSL should be brought back to Delhi within a period of six days from today and in any event not later than 17th March 2008.

12.6 The four HDs so brought back, will be kept in an aseptic environment in a temperature controlled room in either the Cyber Crime Section of the CBI or any other similar convenient place with prior intimation to the learned Special Judge. This place should be immediately indentified by the CBI, in consultation with the learned Special Judge so that the four HDs when brought back are straightway taken and kept in the said place. It is made clear that hereafter the said four HDs would be in the control and subject to directions issued by the learned Special Judge. Nothing will be done in relation to those four HDs without orders of the Special Judge.

12.7 The learned Special Judge will fix three continuous dates between 18th March and 25th March, 2008 for the playing of the original recorded conversations of the relevant intercepted telephone calls relied upon by the CBI in each of the four cases directly from the HDs in the presence of the accused or their representatives, the counsel for the parties and in the presence of and subject to the directions of the learned Special Judge. The venue will be the very place where the four hard discs are to be kept immediately upon being brought back to New Delhi. Since the duration of these calls are not expected to be very long, the entire process should be ideally completed within a period of two to three days. This entire exercise should be completed on or before 25th March 2008. The parties will be permitted to listen to these conversations as they are played from the HDs and make notes. This will not be stage for advancing arguments on whether the original recording is different from copies furnished to the accused.

12.8 As regards the 19 CDs in the Shameet Mukherjee case, copies thereof of which have been directed to be provided to the accused in that case, it is made clear that the 768 calls on these 19 CDs need not be played from the hard discs at this stage. In other words, there will be no need to provide to the accused access to the entire 768 calls as recorded in the hard disc other than the 100 listed calls which the CBI is relying on. The reason for this is that the accused are will able to listen to the 768 calls from the CDs themselves. If any of those calls are exculpatory of the accused, then obviously the accused would not doubt the authenticity of the recording of such calls and will perhaps to seek rely upon, at an appropriate stage, on the certification of their authenticity by the APFSL. Likewise the CBI will also not question the authenticity of the recording of these 768 calls which have been certified as such by the APFSL. In the unlikely event of the 768 calls (other than the 100 listed calls) containing material that is inculpatory of the accused in the Shameet Mukherjee case, then in any event at the pre-charge stage the CBI would not be permitted to rely on such material. The accused would therefore not be prejudiced by this procedure.

12.9 If the accused in the Shameet Mukherjee case want to refer to any of the 768 calls (other than the 100 listed calls) in the course of their arguments on charge before the learned Special Judge, they can play such calls straight from the CD itself before the learned Special Judge as they have been doing with reference to the calls relied upon by the CBI, copies of which have already been provided to them in CDs.

[13] To summarise the conclusions on the various questions:

(i) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. However, once a hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. Therefore, a hard disc that is once

written upon or subjected to any change is itself an electronic record even if does not contain any accessible information at present. In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(ii) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the EA, read with Sections 2 (o) and (t) IT Act, a Hard Disc which at any time has been subject to a change of any kind is an electronic record would therefore be a document within the meaning of Section 3 EA.

(iii) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files being copied on to CDs. They are electronic records for both their latent and patent characteristics.

(iv) In the instant cases, for the purposes of Section 207 (v) read with Section 173 (5) (a) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and therefore documents but the HDs themselves would be electronic records and therefore documents.

(v) In terms of Sections 207 (v) read with Section 173 (5) (a) CrPC, the prosecution is obliged to furnish to the accused copies of only such documents that it proposes to rely upon as indicated in the charge sheet or of those already sent to the court during investigation.

(vi) The trial court or this court cannot, at the pre-charge stage, direct the prosecution to furnish copies of documents other than that which it proposes to rely upon or which have already been sent to the court during investigation;

(vii) At the pre-charge stage the trial court cannot direct that a copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

(viii) The prosecution is bound to indicate in the charge sheet submitted to the Court the documents it is proposing to rely upon for persuading the court to frame a charge against the accused. If it fails to do so, the court will proceed on the basis that whatever document is forwarded with the charge sheet is in fact proposed to be relied upon by the prosecution.

(ix) Where the accused insists that some other document apart from what is stated in the list of documents attached to a charge sheet should be taken as being proposed to be relied upon by the prosecution, and submits that this is evident from a reading of the charge sheet, the trial court will examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also proposed to be relied upon by the prosecution, then it can require the prosecution to furnish the accused a copy of such document as well.

(x) In the instant case, the scope of the examination by the APFSL was to find out whether the hard discs were properly functioning and whether the calls copied on to the CDs are true copies when compared with the corresponding files of original recording of those calls in the four HDs. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

(xi) The certification in terms of Section 65 B (4) EA Act does not obviate the statutory requirement under Section 207 (v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document.

(xii) As far as the present cases are concerned, only those portions of the hard disc that relate to the files containing the original recording of the

relevant intercepted telephone conversations would be 'documents' proposed to be relied upon by the prosecution in terms of Section 207 (v) read with Section 173 (5) (a) CrPC. Those files would be documents both as regards the file containing the actual conversation so recorded as well as constituting a record of any changes that such file may have been subject to thereafter.

(xiii) Therefore, only to the extent explained in (xii) above, the accused would have a right of inspection of the hard discs since making mirror image copies of the entire HDs is not called for in the circumstances explained in this judgment.

(xiv) As far as the Shameet Mukherjee case is concerned, in view of what is stated in para 21 of the charge sheet in that case, the court has to proceed on the basis that the CBI proposes to rely upon the 19 CDs containing 768 calls in addition to the documents listed by it in the annexure to the charge sheet.

Therefore, each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

(xv) As long as the statutory requirements of Sections 207 (v) read with 173 (5) (a) CrPC are strictly complied with, and in the absence of any challenge to their constitutional validity, the failure to furnish to the accused by the prosecution at the pre-charge stage all documents gathered during investigation will not be a violation of the right to a fair trial under Article 21 of the Constitution

(xvi) The inspection as indicated in sub-para (xiii) above will be allowed by playing directly from the HDs the original recording of the relevant intercepted telephonic conversations in the presence of the accused or their authorized representatives, the counsel for the parties, the counsel for CBI and the learned Special Judge on two or three continuous days so that the said exercise is completed on or before March 25th 2008.

[14] Accordingly, these petitions are disposed of with the following directions:

(i) In the Shameet Mukherjee case, the CBI will provide to each of the accused copies of the 19 CDs which has been mentioned in para 21 of the charge sheet containing the 768 calls within a period of one week from today and in any event not later than 18th March, 2008.

(ii) The four hard discs sent by the CBI after sealing and to the APFSL for the purposes of certification will be immediately brought back and in any event not later than 17th March 2008. The cloned copies of the four hard discs certified as such by the APFSL will be retained by the APFSL in Hyderabad.

(iii) The four HDs so brought back, will be kept in an aseptic environment in a temperature controlled room in either the Cyber Crime Section of the CBI or any other similar convenient place with prior intimation to the learned Special Judge. This place should be immediately identified by the CBI, in consultation with the learned Special Judge so that the four HDs when brought back are straightway taken and kept in the said place.

(iv) It is made clear that hereafter the said four HDs would be in the control and subject to directions issued by the learned Special Judge. Nothing will be done in relation to those four HDs without orders of the Special Judge.

(v) The learned Special Judge will fix three continuous dates between 18th March and 25th March, 2008 for the playing of the original recorded conversations of the relevant intercepted telephone calls relied upon by the CBI in each of the four cases directly from the HDs in the presence of the accused or their representatives, the counsel for the parties and in the presence of and subject to the directions of the learned Special Judge. The venue will be the very place where the four hard discs are to be kept immediately upon being brought back to New Delhi. Since the duration of these calls are not expected to be very long the entire exercise should be completed on or before 25th March 2008.

(vi) As regards the 19 CDs containing 768 calls this need not to be played at the stage from the hard disc. There will be no need to provide to the accused access to the entire 768 calls as recorded in the hard disc other than the 100 listed calls which the CBI is relying on. If the accused in the Shameet Mukherjee case want to refer to any of the 768 calls in the course of their arguments on charge before the learned Special Judge, they can play such calls straight from the CD itself before the learned Special Judge.

(vii) The arguments on charge thereafter be positively concluded in all the four cases on or before 30th April, 2008 and orders on charge be passed on or before 31st May, 2008 Each of the learned counsel will cooperate in this entire exercise.

[15] The petitions and the applications stand disposed of.

Providing image of hard disc to accused under section 207 of Cr P C.

Supreme Court observed "Theft of software's source code - Infringement of copy right -Recovery of hard disks containing source code from accused - Supply of documents to the accused - Whether accused is entitled to for the copy of hard disk also - Held - Yes - Further Held - The right to get copies of hard disk is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trail that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy"

TARUN TYAGI

V/S

CENTRAL BUREAU OF INVESTIGATION.2017 AIR(SC) 1136.

SUPREME COURT OF INDIA (FROM DELHI) *(D.B.)*

TARUN TYAGI
V/S
CENTRAL BUREAU OF INVESTIGATION

Date of Decision: 08 February 2017

Citation: 2017 LawSuit(SC) 122

Hon'ble Judges: A K Sikri, R K Agrawal

Eq. Citations: 2017 AIR(SC) 1136, 2017 (4) SCC 490, 2017 (2) SCC(Cri) 428, 2017 (1) ALD(Cri) 632, 2017 (99) AllCriC 360, 2017 (2) Scale 368, 2017 (1) RCR(Civ) 1016, 2017 (2) RCR(Cri) 85, 2017 (349) ELT 542, 2017 (3) JT 229, 2017 (3) CurCriR 38, 2017 (2) JCC 990, 2017 (2) LW(Cri) 324, 2017 (71) PTC 323

Case Type: Criminal Appeal

Case No: 102 of 2017

Subject: Civil, Criminal, Intellectual Property Rights

Head Note:

Indian Penal Code, 1860 - Sec 381 - Code Of Criminal Procedure, 1973 - Sec 238, Sec 173(5), Sec 207 - Information Technology Act, 2000 - Sec 66 - Theft by clerk or servant of property in possession of master - Theft of software's source code - Infringement of copy right -Recovery of hard disks containing source code from accused - Supply of documents to the accused - Whether accused is entitled to for the copy of hard disk also - Held - Yes - Further Held - The right to get copies of hard disk is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trail that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and

also to enable him to prepare his cross-examination and defence strategy - The hard disks be supplied to the appellant subject to the conditions - Appeal disposed of (Para 10 , 12 , 13)

Acts Referred:

INDIAN PENAL CODE, 1860 SEC 381

CODE OF CRIMINAL PROCEDURE, 1973 SEC 482, SEC 238, SEC 173(5), SEC 207

COPYRIGHT ACT, 1957 SEC 63, SEC 63B, SEC 14(B)(II)

INFORMATION TECHNOLOGY ACT, 2000 SEC 66

Final Decision: Appeal allowed

Advocates: Ashwin Vaish, Rajat Pahwa, Vinod Pandey, Nitin Kumar Thakur

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Judgement Text:-

A K Sikri, J

[1] On the basis of a complaint lodged by one Mr. Alok Gupta, Director of M/s. Unistal Systems Private Limited (hereinafter referred to as the complainant), a First Information Report (FIR) was registered by the Central Bureau of Investigation (CBI) on July 23, 2007 wherein the appellant was made an accused. In the said FIR, the complainant had alleged that on or around March 11, 2005, the appellant had stolen the 'source code' of a software known as 'Quick Recovery' developed by the complainant's company and thereafter put it for sale on the website of the appellant company under the name 'Prodatadoctor'. Case was registered under Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B read with Section 14(b)(ii) of the Copyright Act, 1957. The CBI took up the investigation and seized certain documents and material from the office/residential premises of the appellant after conducting search and seizure on August 03, 2007. The appellant moved, some time in January 2008, an application seeking release of the seized property. This application was rejected by the Court of Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on March 03, 2008. The High Court of Delhi set aside this order in Criminal Misc. Case No. 1518 of 2008, which was preferred by the appellant against the order of the trial court rejecting this application. The order of the High Court is dated May 18, 2009. By this order, the High Court restored the application for release with direction to the concerned Magistrate to

deal with the application afresh. Operative portion of the order reads as under:

> "2. The submission of learned counsel for the Petitioner is that the entire business of the Petitioner is affected because of the seizure of all the electronic hardware equipments although incriminating the evidence, if any, may be only on some of them. He further submits that although the chargesheet was filed in June, 2008, no cognizance has yet been taken of the offence, if any, by the learned ACMM.
>
> 3. Learned counsel for the parties were unable to inform the Court whether the opinion of GEQD on the seized electronic hardware equipment has been received by the trial court.
>
> 4. In view of the facts as noticed hereinabove, it is directed that the learned ACMM will first and foremost if not done already, consider whether cognizance should be taken of the offence, if any, on the basis of the charge sheet filed. This will be done within ten days of the receipt by the learned ACMM of the certified copy of this order."

[2] In the meantime, on June 28, 2006, the CBI had filed the charge sheet after completing the investigation. On May 27, 2009, the trial court took cognizance of offence under Section 381 of the Indian Penal Code, 1860, Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B of the Copyright Act, 1957. Insofar as the application of the appellant for release of the seized property is concerned, the trial court passed the orders dated September 03, 2009 thereupon, directing the Investigating Officer to find out as to whether copies of the hard disk in question can be prepared with Unite Protect Software so that the appellant/accused is unable to use it till the pendency of the case. The Government Examiner of Questioned Documents (GEQD), Directorate of Forensic Science, Hyderabad, vide letter dated January 01, 2009, addressed to the Investigating officer, opined that cloned copy of the hard disk can be prepared.

[3] After receipt of this report, the appellant preferred another application on July 20, 2010 under Section 207/238 of the Code of Criminal Procedure, 1976 (hereinafter referred to as the 'Code') seeking supply of deficient copies of documents, such as hard disk relied upon by the prosecution, i.e. Q-2, 9 and 20. The learned Magistrate rejected

this application vide orders dated November 06, 2013. This order was challenged by the appellant by filing Criminal Misc. Case under Section 482 of the Code. The High Court has, vide impugned judgment dated June 13, 2016, dismissed the said petition. It is this order which is the subject matter of challenge in the instant appeal. To put it in nutshell, along with the chargesheet filed by the CBI, various documents are enclosed which include hard disk as well that was seized from the office of the appellant.

> These are Q-2, 9 and 20. Though, copies of all other are supplied to the petitioner, he is not given the aforesaid three disks. The appellant wants copies of these disks as well. His submission is that as per the report of GEQD, cloned copies of these hard disks can be prepared and, therefore, there is no problem in supplying the same to the appellant.

[4] Before dealing with the aspect in detail, we may take note of the case put up by the CBI in the charge sheet submitted before the trial court after completing the investigation into the matter:

[5] The prosecution case is that M/s. Unistel Systems Private Limited (hereinafter referred to as the 'company') is a company established in the year 1995 and the business of the company was to buy, sell, import-export and distribute all types of computer software and related works. The computer software manufactured by the company were all Data Recovery software related to recovery of lost data in crashed hard disks of the computer with various types of operating systems. The Data Recovery software developed by the company is under the brand name of 'Quick Recovery'. This software was developed and launched in the year 1999 and later got renamed as 'Quick Recovery Windows'. The software was a DOS based software and used to work for File Allocation Table (FAT). Subsequently, the software was got upgraded to FAT and New Technology File System (NTFS). This software was developed by a team headed by one Manu Bhardwaj and others in the office premises of the complainant's company and all these persons were employed in the company in the capacity of Programmers. The source code of the software programme 'Quick Recovery for FAT & NTFS' was stored in the programming room that was networked for the purpose of convenience and was not password protected and easily accessible by the other employees in the office of the company.

[6] The appellant was an employee of the company initially for a brief period of two months, i.e. in October and November 2003. He rejoined the company in June 2004 and

worked till end of April 2005. The appellant had his own website, which he started while working in the complainant's company. The appellant, with dishonest intention of selling data recovery software, made out with the stolen source code. The website developed by the appellant was registered with Direct Internet Service of Mumbai. The appellant, during the period of his employment with the company, had access to the source code of 'Quick Recovery for FAT & NTFS' and unauthorisedly misappropriated the same from the programming room of the company. After leaving the services of the company, the appellant formed his own company by the name M/s. Prodata Doctor Private Limited. The appellant secured the services of one Mr. Vikas Yadav as the Programmer, who was given the stolen source code of 'Quick Recovery for FAT & NTFS' and was directed to make a recovery software by modifying the stolen code. During investigation, Vikas Yadav made a statement as to how he had prospered the software 'Data Doctor Recovery for FAT & NTFS' based on the source code of the complainant's company. He further stated that how the appellant instructed him to remove the name of the company from the Graphical User Interface of the source code while adopting it for the new software 'Data Doctor Recovery for FAT & NTFS'. He further disclosed that he had developed variant of the software like Data Doctor Recovery for iPOD, Pendrive, Memory Card, Digital Camera, SIM Card, etc. with the help of the stolen source code of the company. During investigation, the stolen source code was recovered from his mail which was sent by the appellant. The appellant, after developing the 'Data Doctor Recovery for FAT & NTFS' out of the stolen source code of the company, put it for sale on his website and remittance was received by him from abroad, through various payment gateways, and the variant software developed by Vikas Yadav was sold through these gateways. As per the CBI, it is also found that the appellant obtained a total amount of more than Rs. 5 crores between 2004-2008 due to online sale of the software under the name 'Data Doctor Recovery for FAT & NTFS'.

[7] It is on the basis of the aforesaid allegations in the chargesheet, that the cognizance is taken by the trial court of the offence under various provisions of the IPC, Information Technology Act as well as the Copyright Act. Keeping in mind the aforesaid case put up against the appellant, we now advert to the moot question, namely, whether the approach of the courts below is correct in refusing to supply the hard disk and compact disk to the appellant herein. Request was made by the appellant invoking the provisions of Section 207 of the Code. Other relevant provision, aid whereof is taken by the appellant, is Section 238 of the Code. We would, therefore, like to reproduce these two provisions herein:

"207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

(i) the police report,

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub0section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred t in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

xx xx xx

238. Compliance with section 207. When, in any warrant-case instituted on a

police report, the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of section 207."

[8] Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report under Section 173(5) of the Code. Such a compliance has to be made on the first date when the accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the accused with the copy thereof, the Magistrate can allow the accused to inspect it either personally or through pleader in the Court.

[9] Learned counsel for the appellant referred to the aforesaid provisions and argued that it was his right to receive the documents in question relied upon by the prosecution, in the absence of which the appellant would not be able to put up his defence effectively. He also submitted that the complainant had filed a suit bearing CS (OS) No. 792 of 2008 against the appellant seeking to restrain him from using/selling the said/similar software or its versions. The Division Bench of the High Court declined to attach the bank account of the appellant in which monies were generated from the sale of the disputed software. The said suit came to be dismissed for non-prosecution on October 15, 2014, thus, demolishing the argument of the CBI that the appellant can misuse the same to the detriment of anyone much less the complainant who claimed to have a copyright in the same. It was pointed out that the CBI, in the second FIR against one accused Rupesh Kumar, has conceded to supply the mirror image/copies of the CDs, i.e. the questioned documents, and accepted the finding of the courts below wherein it has been held that 'there is no answer from the CBI whether the software is unique and there is no other software in the market for the recovery of lost data'.

[10] It is clear from the above that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the appellant which contained the source code of the data recovery software. Defence of the appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005.

In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right to get these copies is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trail that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the appellant may misuse the same.

[11] The aforesaid apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. Cambridge Dictionary defines "write protect" in the following manner: "to protect the data on a computer disk so that it cannot be changed or removed by a user"

Likewise, Collins Dictionary defines the term "write protected" as under: " (of a computer disk) having been protected from accidental writing or erasure"

In view of this opinion of the Expert, it needs to be ensured that the appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure fair trial by giving due opportunity to the accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of.

[12] We find that CBI, under similar circumstances in the case of Rupesh Kumar, accepted the order of the trial court whereby directions were given to the CBI to supply the hard disk. In the said case, the trial court found that there was no answer from the CBI whether the software in question was unique and there was no other software in the market for the recovery of lost data from the logical cracked hard disk. Number of softwares are available in the market which negated the arguments of CBI that by supplying the mirror image of the documents, the complainant will lose its money and it will be in violation of the Copyright Act, 1957. In that case, the Court took undertaking from the appellant that he would not misuse the copy of cloned CD. We, thus, are of the opinion that in order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the appellant subject to the following conditions:

> (a) Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the appellant.
>
> (b) The appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court.

[13] The appeal stands allowed in the aforesaid terms.

Supreme Court on Trial of Case for the offence under section 67 of IT Act by male or female officer.

FATIMA RISWANA

V/S

STATE REP BY A C P CHENNAI. 2005 AIR(SC) 712.

SUPREME COURT OF INDIA (FROM MADRAS) *(D.B.)*

FATIMA RISWANA
V/S
STATE REP BY A C P CHENNAI

Date of Decision: 11 January 2005

Citation: 2005 LawSuit(SC) 53

Hon'ble Judges: N Santosh Hegde, S B Sinha

Eq. Citations: 2005 (1) SCC 582, 2005 AIR(SC) 712, 2005 (1) Scale 161, 2005 AIR(SCW) 372, 2005 (1) Supreme 166, 2005 (1) JT 425, 2005 CrLJ 900, 2005 (1) KCCR 43, 2005 (3) RajLW 409, 2005 (1) KerLT 502, 2005 (1) CgLJ 371, 2005 (1) RCR(Cri) 730, 2005 (1) MadLJ 456, 2005 (116) DLT 382, 2005 (1) PLJR 252, 2005 (1) ALD 589, 2005 (1) AICLR 927, 2005 (1) SCJ 311, 2005 AllMR(Cri) 818, 2005 SCC(Cri) 427, 2005 (1) AllCriR 927, 2005 (1) AllCriR 343, 2005 (2) BLJR 135, 2005 CrLR 99, 2005 (2) EastCriC 22, 2005 (26) AllIndCas 73, 2005 (1) JCR 209, 2005 (1) MPWN 110, 2005 (51) AllCriC 441, 2005 (1) CurCriR 46, 2005 (1) JLJR 160, 2005 (1) JCC 191, 2005 (1) Crimes(SC) 121, 2005 (1) ALT(Cri) 262, 2005 (1) CriCC 672, 2005 (1) ALD(Cri) 589, 2005 (2) SRJ 51, 2005 (1) SLT 301, 2005 MadLJ(Cri) 456, 2005 (30) OCR 420, 2005 SCCriR 615, 2005 (1) ChandCriC 103, 2005 (1) AD(Cri) 342, 2005 (2) ChandLR(Civ&Cri) 19

Case Type: Criminal Appeal

Case No: 61 of 2005

Subject: Criminal

Head Note:

Criminal Procedure

Transfer of case -- Offence offences punishable under Section 67 of Information

Technology Act, 2000 r/w Section 6 of Indecent Representation of Women (Prohibition) Act, 1986, u/ss 5 and 6 of Immoral Traffic (Prevention) Act, 1956, u/s 27 of Arms Act, 1959 and Sections 120(B), 506 (ii), 366, 306 and 376, I.P.C -- Making pornographic photos and videos Case transferred from female presiding officer to male proceeding office on the ground that the proceedings in the trail being one involving pornographic acts and the evidence in the case is such that it would embarrass a lady Presiding Officer -- Inference drawn by the High Court merely based on the fact that the Presiding Officer is a lady -- High Court has considered only the embarrassment that may be caused to the lawyers and Judges and has failed to take into consider the embarrassment that may be caused to the lady witnesses like the appellant herein who have been summoned in this case to appear before a court presided over by a male Judge to give evidence more where their own acts are part of the prosecution evidence. Therefore, if at all, there was a question of avoiding the embarrassment caused to any of the people involved in the case, in our opinion, the court ought to have considered the embarrassment that would be caused to the witness who are actually in the nature of victims while giving evidence of their acts before a male Judge.

Acts Referred:

INDIAN PENAL CODE, 1860 SEC 376, SEC 366, SEC 306, SEC 120B, SEC 506

IMMORAL TRAFFIC (PREVENTION) ACT, 1956 SEC 6, SEC 5

INFORMATION TECHNOLOGY ACT, 2000 SEC 67

Final Decision: Appeal allowed

Advocates: Kavita Wadia, Subramanium Prasad, Balaji Srinivasan, S Srinivasan, D N Goburdhan

Reference Cases:

Cases Cited in (+): **1**

Cases Referred in (+): **1**

Judgement Text:-

N Santosh Hegde, J

[1] Criminal Appeal Nos. 61-62 of 2005 (Arising out SLP (Crl) Nos. 1518-1519 of 2004) heard learned counsel for the parties. Leave granted.

[2] The appellant is a prosecution witness in S. C. No. 9 of 2004 wherein respondents 2 to 6 are the accused facing trial for offences punishable under Section 67 of Information technology Act, 2000 r/w Section 6 of Indecent representation of Women (Prohibition) act, 1986, u/s 5 and 6 of Immoral Traffic (Prevention) act, 1956) , u/s 27 of Arms Act, 1959 and Sections 120 (B) , 506 (ii) , 366, 306 and 376 i. P. C. The said trial relates to exploitation of certain men and women by one of the accused dr. L. Prakash for the purpose of making pornographic photos and videos in various acts of sexual intercourse and thereafter selling them to foreign websites. The said sessions trial came to be allotted to the V Fast Track Court, chennai which is presided over by a lady Judge. That court also happened to be the "mahila courts" constituted vide Government Notification g. O. Ms. No. 556. Home (Courts II) department of the Tamil Nadu Government, constituted to exclusively deal with offences against women and for speedy trial of cases of offences committed against women and also case under other Social Laws enacted by the central and the State Governments for the protection of women.

[3] When the said trial before the V Fast track Court was pending certain criminal revision petitions came to be filed by the accused against the orders made by the said court rejecting their applications for supply of copies of 74 Compact Discs (CDs) containing pornographic material on which the prosecution was relying. The said revision petitions were rejected by the Madras High Court by its order dated 13th February, 2004 holding that giving all the copies of the concerned CDs might give room for copying such illegal material and illegal circulation of the same, however the court permitted the accused persons to peruse the CDs of their choice in the Chamber of the Judge in the presence of the accused, their advocates, the expert, the public prosecutor and the Investigating officer. While doing so the High court observed thus : "learned Public Prosecutor and the learned Counsel for the petitioners submitted that there will be some embarrassment for them to view the said C. Ds in the Chambers of the learned District judge who is a lady Officer. It is true that there may be some embarrassment for the Presiding Officer of the said court when she being a lady Officer. But, neither the counsel for the accused nor the accused themselves have filed any application for transfer of the said case to some other court presided by a male officer. In such circumstances, it is open to the learned District Judge concerned whether the said case should be transferred to some other court, if she feels embarrassment or it is open to the parties themselves to file transfer petitions at the earliest opportunity without causing

any further delay in the trial of the case since already this court has ordered expeditious trial of the case since all the accused are in jail. (Emphasis supplied).

[4] It is seen form the above that the court anticipated the possibility of some embarrassment being caused to the Presiding Officer who was a lady if the CDs were to be viewed in the chamber of the Judge in the company of other male persons, therefore, the court observed that if the Presiding Officer felt any embarrassment in trying the case she could transfer the case to another appropriate court presided over by a male Judge.

[5] After the above order was made and the matter went back to the concerned Fast track Court another criminal revision petition, (Criminal O. P. No. 5989 of 2004) was filed by the 6th respondent herein who is an accused in the trial possibly taking clue from the observations made by the High Court in the previous revision petition, for transfer of the sessions case from the file of the V Fast Track court to another court within the jurisdiction of Chennai and presided by a male Judge. It is in this revision petition that the High Court by the impugned order has directed the transfer of S. C. No. 9 of 2004 from the file of the V fast Track Court, Chennai (which as stated above is presided by a lady Judge) to the file of iv Fast Track Court, Chennai which is presided over by a male Judge. The basis of the transfer was that the entire proceedings in the said trial would be about the exploitation of women and their use in sexual escapades by the accused, and the evidence in the case is in the form of cds. and viewing of which would be necessary in the course of the trial, therefore, for a woman Presiding Officer it would cause embarrassment. While transferring the said case on the above ground the High Court recorded the consent of the public prosecutor for such transfer. But it is pertinent to note that while so transferring the witnesses like the appellants herein were not heard because they were not parties to the proceedings nor did the court take into consideration the object of the creation of Mahila Courts.

[6] Soon after coming to know of the transfer of the sessions trial from the V Fast Track court to IV Fast Track Court, the appellant moved a criminal revision petition O. P. No. 9528 of 2004 contending that such transfer of the case from a court presided over by lady judge to a court presided over by a male Judge would embarrass the appellant, she being a woman. It was also contended that such transfer runs counter to the object of the creating the Mahila Courts as also to the decision of this Court in the case of State of Punjab vs. Gurmit Singh 1996 (2) SCC 384. The High court rejected the said prayer of the petitioner hence this appeal.

[7] In this appeal the learned senior counsel appearing for the appellant contended the

entire approach of the High Court in the instant case runs counter to the interest of the witnesses who are really in the shoes of victims. It is also contended that the concerned presiding Officer having not expressed any embarassment in conducting the trial herself the court could not have presumed such an embarassment based on the fact that the Presiding officer is a lady officer. It is submitted that the embarassment arises from an attitude of mind of a person and the same cannot be confined to lady Officer alone. Hence, the High court ought not to have transferred the case solely on the ground that the V Fast Track Court is presided over by a lady Officer. At any rate, it is contended that when the appellant brought to the notice of the court the problems faced by her in view of the transfer of the said case to a court presided over by a male Presiding officer the High Court ought to have appreciated her point of view and allowed the petition by re-transferring he trial to IV Fast Track court.

[8] Countering the above argument of the learned counsel for the respondents contended the law officer appearing in the case had expressed their embarrassment in conducting the trial before a lady Presiding Officer and even though the Presiding Officer did not expressly record her embarrassment, it was apparent that she too wanted the case to be transferred to another court, therefore, this Court should not interfere with the order of transfer. It is also submitted on behalf of the respondents that the appellant though arrayed as a witness, for all purposes was an accused herself being involved in the illegal activities of accused No. 1, hence re-transferring at her request should not be permitted. It is also submitted that the High court has erred in not granting the copies of the CDs on which the prosecution based its case.

[9] The last of the argument pertaining to the issuance of copies of CDs need not be gone into in this appeal because same does not arise in this appeal. We are also told that the respondents have already filed another SLP challenging that part of the High Court order by which they were denied the copies of the CDs. Therefore, we will confine ourselves to the correctness of the order of transfer of the sessions trial from V Fast Track Court to IV Fast track Court by the High Court and the correctness of the rejection of the petition filed by the appellant for re-transferring the case of the v Fast Track Court.

[10] As noted above, the sole ground on which the High Court directed the transfer of the case at the instance of the accused on 13-2-2004 was that the proceedings in the trail being one involving pornographic acts and the evidence in the case is such that it would embarrass a lady Presiding Officer. It is to be noced herein the concerned lady

Presiding Officer has not sought for or directed the transfer of the case. This is an inference drawn by the High Court merely based on the fact that the Presiding Officer is a lady. It is also to be noticed at this stage that at an earlier stage the high Court had given the choice of the transfer to the Presiding Officer herself but she did not direct or seek the transfer of the trial. In this background, we are unable to accept the correctness of the presumption drawn by the high Court.

[11] As contended by the learned counsel for the appellant embarassment is a state of mind which is more individual related than related to the sex of a person. It is but natural that any decent person would be embarrassed while considering the evidence in a case like this but this embarrassment cannot be attributed to a lady Officer only. A Judicial Officer be it a female or male is expected to face this challenge when the call of duty required it. It is expected of a Judicial Officer to get over all prejudices and predilections when situation requires, hence in our considered opinion the high Court was not justified in presuming embarrassment to the Judicial Officer solely on the ground that she is a lady Officer even when the Officer concerned had not expressed any reservation in this regard. If situation requires the Presiding Officer may make such adjustments/arrangements so as to avoid viewing the cds in the presence of male persons. This is a matter of procedure to be adopted by the Presiding Officer.

[12] It was nextly contended on behalf of the respondent that even the prosecution counsel and the defence counsel would feel embarrassed to appear before the court presided over by a lady Officer in a trial like this. But we think this cannot be a ground for transfer of the case. So far as the lawyers are concerned they have accepted the brief knowing very well the facts of the case, it is left to them to decide whether to continue in or not. Their embarrassment cannot be a ground for transfer of the case in a situation like this.

[13] It is also to be seen that the High court has considered only the embarrassment that may be caused to the lawyers and Judges and has failed to take into consider the embarrassment that may be caused to the lady witnesses like the appellant herein who have been summoned in this case to appear before a court presided over by a male Judge to give evidence more where their own acts are part of the prosecution evidence. Therefore, if at all, there was a question of avoiding the embarrassment caused to any of the people involved in the case, in our opinion, the court ought to have considered the embarrassment that would be caused to the witness who are actually in the nature of victims while giving evidence of their acts before a male Judge. The learned counsel for

the appellant, in our view, was justified in this context in relying upon the judgment of this court in the case of State of Punjab Vs. Gurmit Singh (supra).

[14] The argument of the learned counsel for the respondent that a retransfer at the instance of the appellant ought not to be done because the appellant herself is in a position of an accused in this trial cannot be countenanced. The fact that the respondent wants the appellant to be arrayed as an accused has no relevance for the purpose of deciding the present appeal.

[15] For the reasons stated above, we are of the considered opinion that this appeal has to be allowed in the sessions case No. 9 of 2004 now transferred to the IV Fast Track court, Chennai be transferred back to the V fast Track Court, Chennai and the trial be proceeded before the said Fast Track Court as expeditiously as possible keeping in mind the direction issued by the High Court in this regard. It is ordered accordingly. Appeals allowed. Criminal Appeal No. 63 of 2005 (Arising out of SLP (Crl.) No. 1606 of 2004)

[16] In view of our order in Crl. A. Nos. 61-62 of 2005 arising out of SLP (Crl.) Nos. 1518-1519 of 2004, there is no need to pass any separate order, hence, Crl. A. No. 63 of 2005 arising out of SLP (Crl.) No. 1606 of 2004 is disposed of in terms of the above order. Appeals allowed.

Supreme Court on Section 69A of IT Act.

Publication of material on Prenatal Diagnosis by google, yahoo and Microsoft search sites etc.

SABU MATHEW GEORGE

V/S

UNION OF INDIA AND ORS. 2015 LawSuit(SC) 305.

SUPREME COURT OF INDIA *(D.B.)*

SABU MATHEW GEORGE
V/S
UNION OF INDIA AND ORS

Date of Decision: 28 January 2015

Citation: 2015 LawSuit(SC) 305

Hon'ble Judges: Dipak Misra, Prafulla C Pant

Eq. Citations: 2015 (1) RCR(Cri) 801, 2015 (1) RCR(Civ) 797, 2015 (1) LawHerald(SC) 634

Case Type: Writ Petition (Civil)

Case No: 341 of 2008

Head Note:

Pre-Conception And Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 - Sec. 22 - Information Technology Act, 2000 - Sec.69A - The Respondents, namely, Google, yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the 1994 Act - The matters relating to total blocking of the items that have been suggested by the Union of India and providing the URL and IP addresses by Google, Yahoo and Micro Soft. (Para 1, 5)

Acts Referred:
INFORMATION TECHNOLOGY ACT, 2000 SEC 69A
PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 SEC 22

Advocates: Sanjay Parikh, Anitha Sharma, Mamta Saxena, Ritwik Parikh, A N Singh,

Manjula Gupta, Ranjit Kumar, Binu Tamta, Sunita Sharma, Gunwant Dara, R R Rajesh, D S Mahra

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Judgement Text:-

[1] Heard Mr. Sanjay Parikh, learned Counsel for the Petitioner, Mr. Ranjit Kumar, learned Solicitor General of India, Mr. Shyam Divan, learned senior counsel for Respondent No. 3, Mr. Anupam Das Gupta, learned Counsel for Respondent No. 4 and Mr. Vishwanathan, learned senior counsel for Respondent No. 5.

All the affidavits are taken on record.

It is submitted by Mr. Ranjit Kumar, learned Solicitor General of India, relying on the additional affidavit filed by the Union of India, that it can stop the presentation of any kind of thing that relates to sex selection and eventual abortion, if the URL and the LP. addresses are given along with other information by the Respondents, regard being had to the key words, namely, "prenatal diagnostic tests for selection of sex before or after conception, pre-natal conception test, pre-natal diagnostic, pre-natal fetus copy for sex selection, pre-natal ultrasonography for sex selection, sex selection procedure, sex selection technique, sex selection test, sex selection administration, sex selection prescription, sex selection services, sex selection management, sex selection process, sex selection conduct, pre-natal image scanning for sex selection, pre-natal diagnostic procedure for sex selection, sex determination using scanner, sex determination using machines, sex determination using equipment, scientific sex determination and sex selection" It is his submission that such blocking/filtering on key-words advertisements links can be effectively or regularly done by the Respondents as they have access to their respective mathematical algorithms all the time. In essence, either the Respondents can block themselves or on certain details being provided the Union of India can block it.

[2] Learned Counsel for the Respondents have referred to Section 22 of the PCPNDT

Act 1994 and Section 69A of the Information Technology Act, 2000, apart from other provisions.

[3] Mr. Sanjay Parikh, learned Counsel appearing for the Petitioners has submitted that throughout the world, the search engines have been directed to block certain service/giving of information which are not permissible to be shown in that country despite the issues of jurisdiction and technical problems being raised. He undertakes to file a convenience volume of judgments by the next date.

[4] Having heard the learned Counsel for the Petitioner, as an interim measure, it is directed, the Respondents, namely, Google, yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the PCPNDT Act, 1994. If any advertise is there on any search engine, the same shall be withdrawn forthwith by the Respondents.

[5] At this juncture, Mr. Parikh, learned Counsel appearing for the Petitioner submitted that the order passed today shall be put on the policy page as also on the page containing 'terms and conditions of service' by Respondent Nos. 4 to 6. The prayer is accepted and accordingly so directed. The matters relating to total blocking of the items that have been suggested by the Union of India and providing the URL and IP addresses by Google, Yahoo and Micro Soft shall be taken up on 11.02.2015 when the matter shall be taken up for further hearing.

Supreme Court on Section 69A of IT Act.

Publication of material on Prenatal Diagnosis by google, yahoo and Microsoft search sites etc.

SABU MATHEW GEORGE

V/S

UNION OF INDIA AND ORS. 2015 LawSuit(SC) 305.

SUPREME COURT OF INDIA *(D.B.)*

SABU MATHEW GEORGE
V/S
UNION OF INDIA AND ORS

Date of Decision: 28 January 2015

Citation: 2015 LawSuit(SC) 305

Hon'ble Judges: Dipak Misra, Prafulla C Pant

Eq. Citations: 2015 (1) RCR(Cri) 801, 2015 (1) RCR(Civ) 797, 2015 (1) LawHerald(SC) 634

Case Type: Writ Petition (Civil)

Case No: 341 of 2008

Head Note:

Pre-Conception And Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 - Sec. 22 - Information Technology Act, 2000 - Sec.69A - The Respondents, namely, Google, yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the 1994 Act - The matters relating to total blocking of the items that have been suggested by the Union of India and providing the URL and IP addresses by Google, Yahoo and Micro Soft. (Para 1, 5)

Acts Referred:
INFORMATION TECHNOLOGY ACT, 2000 SEC 69A
PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994 SEC 22

Advocates: Sanjay Parikh, Anitha Sharma, Mamta Saxena, Ritwik Parikh, A N Singh,

Manjula Gupta, Ranjit Kumar, Binu Tamta, Sunita Sharma, Gunwant Dara, R R Rajesh, D S Mahra

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Judgement Text:-

[1] Heard Mr. Sanjay Parikh, learned Counsel for the Petitioner, Mr. Ranjit Kumar, learned Solicitor General of India, Mr. Shyam Divan, learned senior counsel for Respondent No. 3, Mr. Anupam Das Gupta, learned Counsel for Respondent No. 4 and Mr. Vishwanathan, learned senior counsel for Respondent No. 5.

All the affidavits are taken on record.

It is submitted by Mr. Ranjit Kumar, learned Solicitor General of India, relying on the additional affidavit filed by the Union of India, that it can stop the presentation of any kind of thing that relates to sex selection and eventual abortion, if the URL and the LP. addresses are given along with other information by the Respondents, regard being had to the key words, namely, "prenatal diagnostic tests for selection of sex before or after conception, pre-natal conception test, pre-natal diagnostic, pre-natal fetus copy for sex selection, pre-natal ultrasonography for sex selection, sex selection procedure, sex selection technique, sex selection test, sex selection administration, sex selection prescription, sex selection services, sex selection management, sex selection process, sex selection conduct, pre-natal image scanning for sex selection, pre-natal diagnostic procedure for sex selection, sex determination using scanner, sex determination using machines, sex determination using equipment, scientific sex determination and sex selection" It is his submission that such blocking/filtering on key-words advertisements links can be effectively or regularly done by the Respondents as they have access to their respective mathematical algorithms all the time. In essence, either the Respondents can block themselves or on certain details being provided the Union of India can block it.

[2] Learned Counsel for the Respondents have referred to Section 22 of the PCPNDT

Act 1994 and Section 69A of the Information Technology Act, 2000, apart from other provisions.

[3] Mr. Sanjay Parikh, learned Counsel appearing for the Petitioners has submitted that throughout the world, the search engines have been directed to block certain service/giving of information which are not permissible to be shown in that country despite the issues of jurisdiction and technical problems being raised. He undertakes to file a convenience volume of judgments by the next date.

[4] Having heard the learned Counsel for the Petitioner, as an interim measure, it is directed, the Respondents, namely, Google, yahoo and Micro Soft shall not advertise or sponsor any advertisement which would violate Section 22 of the PCPNDT Act, 1994. If any advertise is there on any search engine, the same shall be withdrawn forthwith by the Respondents.

[5] At this juncture, Mr. Parikh, learned Counsel appearing for the Petitioner submitted that the order passed today shall be put on the policy page as also on the page containing 'terms and conditions of service' by Respondent Nos. 4 to 6. The prayer is accepted and accordingly so directed. The matters relating to total blocking of the items that have been suggested by the Union of India and providing the URL and IP addresses by Google, Yahoo and Micro Soft shall be taken up on 11.02.2015 when the matter shall be taken up for further hearing.

SUPREME COURT OF INDIA (FROM DELHI) *(D.B.)*

SHARAT BABU DIGUMARTI
V/S
GOVT OF NCT OF DELHI

Date of Decision: 14 December 2016

Citation: 2016 LawSuit(SC) 1195

Hon'ble Judges: Dipak Misra, Prafulla C Pant

Eq. Citations: 2017 (1) MadLJ(Cri) 86, 2017 (1) BCR(Cri) 289, 2017 (2) SCC 18, 2017 (1) SCC(Cri) 628, 2017 (1) GLH 547, 2016 (235) DLT 618, 2017 CrLJ 977, 2017 (1) UC 148, 2017 (1) CurCriR 13, 2017 (1) JLJR 255, 2017 (1) RCR(Cri) 196, 2017 (1) PLJR 382, 2017 (99) AllCriC 14, 2017 (1) ALD(Cri) 602, 2017 (123) CutLT 691, 2017 (1) LW(Cri) 578, 2017 AIR(SC) 150, 2016 (12) Scale 736, 2017 (1) SCJ 698, 2017 (3) KerLT 20, 2016 (8) Supreme 592, 2017 (1) CriCC 421, 2017 (2) JT 509, 2017 (1) LawHerald(SC) 443, 2017 (3) Crimes(SC) 51, 2017 (3) CalLT 65

Case Type: Criminal Appeal

Case No: 1222 of 2016

Subject: Criminal

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 292, SEC 294
NEGOTIABLE INSTRUMENTS ACT, 1881 SEC 141
INFORMATION TECHNOLOGY ACT, 2000 SEC 67A, SEC 85, SEC 69, SEC 69A, SEC 81, SEC 67B, SEC 67, SEC 2(1)(T), SEC 66A, SEC 79, SEC 2(1)(ZA)

Final Decision: Appeal allowed

Advocates: Karanjawala & Co, D S Mahra

Reference Cases:

Cases Referred in (+): **21**

Judgement Text:-

Dipak Misra, J

[1] Leave granted.

[2] The appellant along one Avnish Bajaj and others was arrayed as an accused in FIR No. 645 of 2004. After the investigation was concluded, charge sheet was filed before the learned Metropolitan Magistrate who on 14.02.2006 took cognizance of the offences punishable under Sections 292 and 294 of the Indian Penal Code (IPC) and Section 67 of the Information Technology Act, 2000 (for short, "the IT Act") against all of them. Avnish Bajaj filed Criminal Misc. Case No. 3066 of 2006 for quashment of the proceedings on many a ground before the High Court of Delhi which vide order dated 29.05.2008 came to the conclusion that prima facie case was made out under Section 292 IPC, but it expressed the opinion that Avinish Bajaj, the petitioner in the said case, was not liable to be proceeded under Section 292 IPC and, accordingly, he was discharged of the offence under Sections 292 and 294 IPC. However, he was prima facie found to have committed offence under Section 67 read with Section 85 of the IT Act and the trial court was directed to proceed to the next stage of passing of order of charge uninfluenced by the observations made in the order of the High Court.

[3] Being grieved by the aforesaid order, Avnish Bajaj preferred Criminal Appeal No. 1483 of 2009. The said appeal was tagged with Ebay India Pvt. Ltd. v. State and Anr. (Criminal Appeal No. 1484 of 2009). The said appeals were heard along with other appeals that arose from the lis relating to interpretation of Sections 138 and 141 of the Negotiable Instruments Act, 1881 (for short, "NI Act") by a three-Judge Bench as there was difference of opinion between the two learned Judges in Aneeta Hada v. Godfather Travels and Tours (P) Ltd., 2008 13 SCC 703.

[4] Regard being had to the pleas raised by Avnish Bajaj and also the similarity of issue that arose in the context of NI Act, the three-Judge Bench stated the controversy that emerged for consideration thus:-

"2. In Criminal Appeals Nos. 1483 and 1484 of 2009, the issue involved pertains to the interpretation of Section 85 of the Information Technology Act, 2000 (for short "the 2000 Act") which is in pari materia with Section 141 of the Act.

Be it noted, a Director of the appellant Company was prosecuted under Section 292 of the Penal Code, 1860 and Section 67 of the 2000 Act without impleading the Company as an accused. The initiation of prosecution was challenged under Section 482 of the Code of Criminal Procedure before the High Court and the High Court held that offences are made out against the appellant Company along with the Directors under Section 67 read with Section 85 of the 2000 Act and, on the said base, declined to quash the proceeding.

3. The core issue that has emerged in these two appeals is whether the Company could have been made liable for prosecution without being impleaded as an accused and whether the Directors could have been prosecuted for offences punishable under the aforesaid provisions without the Company being arrayed as an accused."

[5] In the context of Section 141 of NI Act, the Court ruled thus:-

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

[6] As far as the appeal of Avnish Bajaj is concerned, the Court referred to Section 85 of

the IT Act which is as follows:-

"85. Offences by companies.

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."

[7] Interpreting the same, the Court opined thus:-

"64. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the Director. As a logical

sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed."

[8] After the judgment was delivered, the present appellant filed an application before the trial court to drop the proceedings against him. The trial court partly allowed the application and dropped the proceedings against the appellant for offences under Section 294 IPC and Section 67 of the IT Act, however, proceedings under Section 292 IPC were not dropped, and vide order 22.12.2014, the trial court framed the charge under Section 292 IPC.

[9] Being aggrieved by the order framing of charge, the appellant moved the High Court in Criminal Revision No. 127 of 2015 and the learned Single Judge by the impugned order declined to interfere on the ground that there is sufficient material showing appellant's involvement to proceed against him for the commission of the offence punishable under Section 292 IPC. It has referred to the allegations made against him and the responsibility of the appellant and thereafter referred to the pronouncements in P. Vijayan v. State of Kerala and Anr., 2010 2 SCC 398 and Amit Kapoor v. Ramesh Chander and Anr., 2012 9 SCC 460 which pertain to exercise of revisional power of the High Court while dealing with propriety of framing of charge under Section 228 of the Code of Criminal Procedure.

[10] The central issue that arises for consideration is whether the appellant who has been discharged under Section 67 of the IT Act could be proceeded under Section 292 IPC.

[11] Be it noted, on the first date of hearing, Dr. A.M. Singhvi, learned senior counsel appearing for the appellant urged that the dispute raised require interpretation of various provisions of the IT Act and bearing that in mind, the Court thought it appropriate to hear the learned Attorney General for the Union of India. In the course of hearing, the Court was assisted by Mr. Mukul Rohatgi, learned Attorney General for India, Mr. Ranjit Kumar, learned Solicitor General and Mr. R.K. Rathore, learned counsel for the Union of India.

[12] It is not disputed that the appellant is the senior manager of the intermediary and the managing director of the intermediary has been discharged of all the offences as per the decision in Aneeta Hada . and further that singular charge that has been framed against the appellant is in respect of Section 292 IPC. It is submitted by Dr. Singhvi that

the appellant could not have been proceeded under Section 292 IPC after having been discharged under Section 67 of the IT Act. Mr. Rohatgi, learned Attorney General assisting the Court submitted that Section 67 of the IT Act is a special provision and it will override Section 292 IPC. He has made a distinction between the offences referable to the internet and the offences referable to print/conventional media or whatever is expressed in Section 292 IPC. Mr. D.S. Mahra, learned counsel appearing for the NCT of Delhi, would contend that publishing any obscene material as stipulated under Section 67 of the IT Act cannot be confused or equated with sale of obscene material as given under Section 292 IPC, for the two offences are entirely different. It is urged by him that an accused can be charged and tried for an offence independently under Section 292 IPC even if he has been discharged under Section 67 of the IT Act. According to him, there is no bar in law to charge and try for the offence under Section 292 IPC after discharge from Section 67 of the IT Act. Learned counsel would further contend that the role of person in charge of the intermediary is extremely vital as it pertains to sale of obscene material which is punishable under Section 292 IPC and not under Section 67 of the IT Act. It is put forth by the learned counsel that the plea advanced by the appellant is in the realm of technicalities and on that ground, the order of charge should not be interfered with.

[13] Dr. Singhvi has taken us through the legislative history of proscription of obscenity in India. He has referred to the Obscene Books and Pictures Act, 1856. The primary object of the said Act was to prevent the sale or exposure of obscene books and picture. It prohibited singing of obscene songs, etc. to the annoyance of others. Any person found indulging in the said activities was liable to pay a fine of Rs. 100/- or to imprisonment up to 3 years or both. Be it noted, learned senior counsel has also referred to the Obscene Publications Act, 1925. The said Act has been repealed.

[14] Section 292 IPC in its original shape read as follows:-

> "292. Sale, etc., of obscene books, etc.
>
> Whoever-
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other

obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception. This section does not extend to any book, pamphlet, paper, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance or idols, or kept or used for any religious purpose."

[15] The constitutional validity of Section 292 IPC was challenged in Ranjit D. Udeshi v. State of Maharashtra, 1965 AIR(SC) 881. Assailing the constitutional validity, it was urged before the Constitution Bench that the said provision imposes incompatible and unacceptable restrictions on the freedom of speech and expression guaranteed under Section 19(1)(a) of the Constitution. The Constitution Bench opined as follows:-

"7. No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article 1 of the International' Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency (1) (1868) L.R. 3 Q.B. 360. and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as "dirt for dirt's sake" and which has now received the appellation of hardcore pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse, sexual feelings.

x x x x

9. The former he thought so because it dealt with excretory functions and the latter because it dealt -with sex repression. (See Sex, Literature and Censorship pp. 26 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the-propagation of ideas, opinions and information of public interest or profit." When there is propagation of ideas, opinions and information of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with

intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19."

[16] Eventually, the Court upheld the constitutional validity of the said provision. After the pronouncement by the Constitution Bench, the legislature amended Section 292 which presently reads thus:-

"292. Sale, etc., of obscene books, etc.

(1) For the purposes of sub-section (2), book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception. This section does not extend to

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

[17] At the outset, we may clarify that though learned counsel for the appellant has commended us to certain authorities with regard to role of the appellant, the concept of possession and how the possession is not covered under Section 292 IPC, we are not disposed to enter into the said arenas. We shall only restrict to the interpretative aspect as already stated. To appreciate the said facet, it is essential to understand certain provisions that find place in the IT Act and how the Court has understood the same. That apart, it is really to be seen whether an activity emanating from electronic form which may be obscene would be punishable under Section 292 IPC or Section 67 of the IT Act or both or any other provision of the IT Act.

[18] On a perusal of material on record, it is beyond dispute that the alleged possession of material constitutes the electronic record as defined under Section 2(1)(t) of the IT Act.

The dictionary clause reads as follows:-

"Section 2(1)(t). electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

Thus, the offence in question relates to electronic record.

[19] In Shreya Singhal v. Union of India, 2015 5 SCC 1 the Court was dealing with constitutional validity of Section 66-A of the IT Act and the two-Judge Bench declared the said provision as unconstitutional by stating thus:-

"85. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is

"grossly offensive" or "menacing". In Collins case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him.

Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A and the authorities who are to enforce Section 66-A have absolutely no manageable standard by which to book a person for an offence under Section 66-A.

This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66-A is unconstitutionally vague.

86. Ultimately, applying the tests referred to in Chintaman Rao v. State of M.P., 1951 AIR(SC) 118 and State of Madras v. V.G. Row, 1952 AIR(SC) 196 case, referred to earlier in the judgment, it is clear that Section 66-A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right."

[20] Thereafter the Court referred to Kameshwar Prasad State of Bihar, 1962 Supp3 SCR 369 and Central Prison v. Ram Manohar Lohia, 1960 AIR(SC) 633 and came to hold as follows:-

"94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth."

[21] While dealing with obscenity, the Curt referred to Ranjit D. Udeshi and other decisions and opined thus:-

> "48. This Court in Ranjit D. Udeshi v. State of Maharashtra took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in R v. Hicklin,1868 3 QB 360 which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the U.K., the United States as well as in our country. Thus, in Directorate General of Doordarshan v. Anand Patwardhan, 2006 8 SCC 433 this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject-matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, educational or scientific value (see para 31).
>
> 49. In a recent judgment of this Court, Aveek Sarkar v. State of W.B., 2014 4 SCC 257 this Court referred to English, US and Canadian judgments and moved away from the Hicklin test and applied the contemporary community standards test.
>
> 50. What has been said with regard to public order and incitement to an offence equally applies here. Section 66-A cannot possibly be said to create an offence which falls within the expression "decency" or "morality" in that what may be grossly offensive or annoying under the section need not be obscene at all in fact the word "obscene" is conspicuous by its absence in Section 66-A."

[22] In Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Ors, 2015 6 SCC 1 analyzing the said judgment another two-Judge Bench has opined that as far as test of obscenity is concerned, the prevalent test is the contemporary community standards test. It is apt to note here that in the said case the Court was dealing with the issue,

what kind of test is to be applied when personalities like Mahatma Gandhi are alluded.

The Court held:-

"142. When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene. While so concluding, we leave it to the poet to put his defence at the trial explaining the manner in which he has used the words and in what context. We only opine that view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be flawed."

[23] Reference to Shreya Singhal is only to show that in the said case the Court while dealing with constitutional validity of Section 66-A of the IT Act noticed that the said provision conspicuously did not have the word "obscene". It did not say anything else in that regard. In the case at hand, it is required to be seen in which of the provision or both an accused is required to be tried. We have already reproduced Section 292 IPC in the present incarnation. Section 67 of the IT Act which provides for punishment for publishing or transmitting obscene material in electronic form reads as follows:-

"67. Punishment for publishing or transmitting obscene material in electronic form.

Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either

description for a term which may extend to five years and also with fine which may extend to ten lakh rupees."

[24] Section 67A stipulates punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form. Section 67B provides for punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form. It is as follows:-

"67B. Punishment for publishing or transmitting of material depicting children in seually explicit act, etc., in electronic form.

Whoever

(a)publishes or transmits or causes to be published or transmitted material any electronic form which depicts children engaged in sexually explicit act or conduct; or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or

(d)facilitates abusing children online; or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

> Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form-
>
> (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or
>
> (ii) which is kept or used for bona fide heritage or religious purposes.
>
> Explanation.-For the purpose of this section "children" means a person who has not completed the age of 18 years."

[25] Section 69 of the IT Act provides for power to issue directions for interception or monitoring or decryption of any information through any computer resource. It also carries a penal facet inasmuch as it states that the subscriber or intermediary who fails to comply with the directions issued under sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

[26] We have referred to all these provisions of the IT Act only to lay stress that the legislature has deliberately used the words "electronic form". Dr. Singhvi has brought to our notice Section 79 of the IT Act that occurs in Chapter XII dealing with intermediaries not to be liable in certain cases. Learned counsel has also relied on Shreya Singhal as to how the Court has dealt with the challenge to Section 79 of the IT Act. The Court has associated the said provision with exemption and Section 69A and in that context, expressed that:-

> "121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the

originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid."

[27] We have referred to the aforesaid aspect as it has been argued by Dr. Singhvi that the appellant is protected under the said provision, even if the entire allegations are accepted.

According to him, once the factum of electronic record is admitted, Section

79 of the IT Act must apply ipso facto and ipso jure. Learned senior counsel has urged Section 79, as the language would suggest and keeping in view the paradigm of internet world where service providers of platforms do not control and indeed cannot control the acts/omissions of primary, secondary and tertiary users of such internet platforms, protects the intermediary till he has the actual knowledge. He would contend that Act has created a separate and distinct category called 'originator' in terms of Section 2(1) (z)(a) under the IT Act to which the protection under Section 79 of the IT Act has been consciously not extended. Relying on the decision in Shreya Singhal , he has urged that the horizon has been expanded and the effect of Section 79 of the IT Act provides protection to the individual since the provision has been read down emphasizing on the conception of actual knowledge. Relying on the said provision, it is further canvassed by him that Section 79 of the IT Act gets automatically attracted to electronic forms of publication and transmission by intermediaries, since it explicitly uses the non-obstante clauses and has an overriding effect on any other law in force. Thus, the emphasis is on the three provisions, namely, Sections 67, 79 and 81, and the three provisions, according to Dr. Singhvi, constitute a holistic trinity. In this regard, we may reproduce Section 81 of the IT Act, which is as follows:-

"81. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act 1957 or the Patents Act 1970."

The proviso has been inserted by Act 10 of 2009 w.e.f. 27.10.2009.

[28] Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67A and 67B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said

protection has been expanded in the dictum of Shreya Singhal and we concur with the same. Section 81 also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply. In this regard, we may refer to Sarwan Singh and Anr. v. Kasturi Lal, 1977 1 SCC 750.

> The Court was considering Section 39 of Slum Areas (Improvement and Clearance) Act, 1956 which laid down that the provisions of the said Act and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law. The Delhi Rent Control Act, 1958 also contained non-obstante clauses. Interpreting the same, the Court held:-
>
> "When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. A piquant situation, like the one before us, arose in Shri Ram Narain v. Simla Banking & Industrial Co. Ltd., 1956 AIR(SC) 614 the competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45-A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act, 1951 contained each a non-obstante clause, providing that certain provisions would have effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force ...". This Court resolved the conflict by considering the object and purpose of the two laws and giving

precedence to the Banking Companies Act by observing:

> "It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein" (p. 615)
>
> As indicated by us, the special and specific purpose which motivated the enactment of Section 14-A and Chapter III-A of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore, the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act."

[29] In Talcher Municipality v. Talcher Regulated Market Committee, 2004 6 SCC 178 the Court was dealing with the question whether the Orissa Municipal Act, 1950 or Orissa Agricultural Produce Markets Act, 1956 should apply. Section 4(4) of the 1956 Act contained a non-obstante clause. In that context, the Court opined:-

> "The Act, however, contains special provisions. The provision of Section 4(4) of the said Act operates notwithstanding anything to the contrary contained in any other law for the time being in force. The provisions of the said Act, therefore, would prevail over the provisions of the Orissa Municipal Act. The maxim "generalia specialibus non derogant" would, thus, be applicable in this case. (See D.R. Yadav v. R.K. Singh, 2003 7 SCC 110 Indian Handicrafts Emporium v. Union of India, 2003 7 SCC 589 and M.P. Vidyut Karamchari Sangh v. M.P. Electricity Board, 2004 9 SCC 755.)"

[30] In Ram Narain , the Court faced a situation where both the statutes, namely, Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951 contained non-obstante clause. The Court gave primacy to the Banking Companies Act. To arrive at the said conclusion, the Court evolved the following principle:-

> "7. It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

[31] In Solidaire India Ltd. v. Fairgrowth Financial Services Ltd., 2001 3 SCC 71 this Court while dealing with two special statutes, namely, Section 13 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and Section 32 of Sick Industrial Companies (Special Provisions) Act, 1985, observed as follows:-

> "Where there are two special statutes which contain non obstante clauses the later statute must prevail.
>
> This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply."

[32] The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.

[33] In Jeewan Kumar Raut v. CBI, 2009 7 SCC 526 in the context of Transplantation of Human Organs Act, 1994 (TOHO) treating it as a special law, the Court held:-

> 22. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.
>
> 23. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code." And again:-
>
> "27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO."

[34] In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC.

[35] Consequently, the appeal is allowed, the orders passed by the High Court and the trial court are set aside and the criminal prosecution lodged against the appellant stands quashed.

Whether section 292 IPC is applicable in case of electronic record if comes under section 67 of IT Act?

Supreme Court observed that "In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC"

SHARAT BABU DIGUMARTI

V/S

GOVT OF NCT OF DELHI. 2017 AIR(SC) 150.

SUPREME COURT OF INDIA (FROM DELHI) *(D.B.)*

SHARAT BABU DIGUMARTI
V/S
GOVT OF NCT OF DELHI

Date of Decision: 14 December 2016

Citation: 2016 LawSuit(SC) 1195

Hon'ble Judges: Dipak Misra, Prafulla C Pant

Eq. Citations: 2017 (1) MadLJ(Cri) 86, 2017 (1) BCR(Cri) 289, 2017 (2) SCC 18, 2017 (1) SCC(Cri) 628, 2017 (1) GLH 547, 2016 (235) DLT 618, 2017 CrLJ 977, 2017 (1) UC 148, 2017 (1) CurCriR 13, 2017 (1) JLJR 255, 2017 (1) RCR(Cri) 196, 2017 (1) PLJR 382, 2017 (99) AllCriC 14, 2017 (1) ALD(Cri) 602, 2017 (123) CutLT 691, 2017 (1) LW(Cri) 578, 2017 AIR(SC) 150, 2016 (12) Scale 736, 2017 (1) SCJ 698, 2017 (3) KerLT 20, 2016 (8) Supreme 592, 2017 (1) CriCC 421, 2017 (2) JT 509, 2017 (1) LawHerald(SC) 443, 2017 (3) Crimes(SC) 51, 2017 (3) CalLT 65

Case Type: Criminal Appeal

Case No: 1222 of 2016

Subject: Criminal

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 292, SEC 294
NEGOTIABLE INSTRUMENTS ACT, 1881 SEC 141
INFORMATION TECHNOLOGY ACT, 2000 SEC 67A, SEC 85, SEC 69, SEC 69A, SEC 81, SEC 67B, SEC 67, SEC 2(1)(T), SEC 66A, SEC 79, SEC 2(1)(ZA)

Final Decision: Appeal allowed

Advocates: Karanjawala & Co, D S Mahra

Reference Cases:

Cases Referred in (+): **21**

Judgement Text:-

Dipak Misra, J

[1] Leave granted.

[2] The appellant along one Avnish Bajaj and others was arrayed as an accused in FIR No. 645 of 2004. After the investigation was concluded, charge sheet was filed before the learned Metropolitan Magistrate who on 14.02.2006 took cognizance of the offences punishable under Sections 292 and 294 of the Indian Penal Code (IPC) and Section 67 of the Information Technology Act, 2000 (for short, "the IT Act") against all of them. Avnish Bajaj filed Criminal Misc. Case No. 3066 of 2006 for quashment of the proceedings on many a ground before the High Court of Delhi which vide order dated 29.05.2008 came to the conclusion that prima facie case was made out under Section 292 IPC, but it expressed the opinion that Avinish Bajaj, the petitioner in the said case, was not liable to be proceeded under Section 292 IPC and, accordingly, he was discharged of the offence under Sections 292 and 294 IPC. However, he was prima facie found to have committed offence under Section 67 read with Section 85 of the IT Act and the trial court was directed to proceed to the next stage of passing of order of charge uninfluenced by the observations made in the order of the High Court.

[3] Being grieved by the aforesaid order, Avnish Bajaj preferred Criminal Appeal No. 1483 of 2009. The said appeal was tagged with Ebay India Pvt. Ltd. v. State and Anr. (Criminal Appeal No. 1484 of 2009). The said appeals were heard along with other appeals that arose from the lis relating to interpretation of Sections 138 and 141 of the Negotiable Instruments Act, 1881 (for short, "NI Act") by a three-Judge Bench as there was difference of opinion between the two learned Judges in Aneeta Hada v. Godfather Travels and Tours (P) Ltd., 2008 13 SCC 703.

[4] Regard being had to the pleas raised by Avnish Bajaj and also the similarity of issue that arose in the context of NI Act, the three-Judge Bench stated the controversy that emerged for consideration thus:-

"2. In Criminal Appeals Nos. 1483 and 1484 of 2009, the issue involved pertains to the interpretation of Section 85 of the Information Technology Act, 2000 (for short "the 2000 Act") which is in pari materia with Section 141 of the Act.

Be it noted, a Director of the appellant Company was prosecuted under Section 292 of the Penal Code, 1860 and Section 67 of the 2000 Act without impleading the Company as an accused. The initiation of prosecution was challenged under Section 482 of the Code of Criminal Procedure before the High Court and the High Court held that offences are made out against the appellant Company along with the Directors under Section 67 read with Section 85 of the 2000 Act and, on the said base, declined to quash the proceeding.

3. The core issue that has emerged in these two appeals is whether the Company could have been made liable for prosecution without being impleaded as an accused and whether the Directors could have been prosecuted for offences punishable under the aforesaid provisions without the Company being arrayed as an accused."

[5] In the context of Section 141 of NI Act, the Court ruled thus:-

"58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted."

[6] As far as the appeal of Avnish Bajaj is concerned, the Court referred to Section 85 of

the IT Act which is as follows:-

"85. Offences by companies.

(1) Where a person committing a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of business of the company as well as the company, shall be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where a contravention of any of the provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly."

[7] Interpreting the same, the Court opined thus:-

"64. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the Director. As a logical

sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed."

[8] After the judgment was delivered, the present appellant filed an application before the trial court to drop the proceedings against him. The trial court partly allowed the application and dropped the proceedings against the appellant for offences under Section 294 IPC and Section 67 of the IT Act, however, proceedings under Section 292 IPC were not dropped, and vide order 22.12.2014, the trial court framed the charge under Section 292 IPC.

[9] Being aggrieved by the order framing of charge, the appellant moved the High Court in Criminal Revision No. 127 of 2015 and the learned Single Judge by the impugned order declined to interfere on the ground that there is sufficient material showing appellant's involvement to proceed against him for the commission of the offence punishable under Section 292 IPC. It has referred to the allegations made against him and the responsibility of the appellant and thereafter referred to the pronouncements in P. Vijayan v. State of Kerala and Anr., 2010 2 SCC 398 and Amit Kapoor v. Ramesh Chander and Anr., 2012 9 SCC 460 which pertain to exercise of revisional power of the High Court while dealing with propriety of framing of charge under Section 228 of the Code of Criminal Procedure.

[10] The central issue that arises for consideration is whether the appellant who has been discharged under Section 67 of the IT Act could be proceeded under Section 292 IPC.

[11] Be it noted, on the first date of hearing, Dr. A.M. Singhvi, learned senior counsel appearing for the appellant urged that the dispute raised require interpretation of various provisions of the IT Act and bearing that in mind, the Court thought it appropriate to hear the learned Attorney General for the Union of India. In the course of hearing, the Court was assisted by Mr. Mukul Rohatgi, learned Attorney General for India, Mr. Ranjit Kumar, learned Solicitor General and Mr. R.K. Rathore, learned counsel for the Union of India.

[12] It is not disputed that the appellant is the senior manager of the intermediary and the managing director of the intermediary has been discharged of all the offences as per the decision in Aneeta Hada . and further that singular charge that has been framed against the appellant is in respect of Section 292 IPC. It is submitted by Dr. Singhvi that

the appellant could not have been proceeded under Section 292 IPC after having been discharged under Section 67 of the IT Act. Mr. Rohatgi, learned Attorney General assisting the Court submitted that Section 67 of the IT Act is a special provision and it will override Section 292 IPC. He has made a distinction between the offences referable to the internet and the offences referable to print/conventional media or whatever is expressed in Section 292 IPC. Mr. D.S. Mahra, learned counsel appearing for the NCT of Delhi, would contend that publishing any obscene material as stipulated under Section 67 of the IT Act cannot be confused or equated with sale of obscene material as given under Section 292 IPC, for the two offences are entirely different. It is urged by him that an accused can be charged and tried for an offence independently under Section 292 IPC even if he has been discharged under Section 67 of the IT Act. According to him, there is no bar in law to charge and try for the offence under Section 292 IPC after discharge from Section 67 of the IT Act. Learned counsel would further contend that the role of person in charge of the intermediary is extremely vital as it pertains to sale of obscene material which is punishable under Section 292 IPC and not under Section 67 of the IT Act. It is put forth by the learned counsel that the plea advanced by the appellant is in the realm of technicalities and on that ground, the order of charge should not be interfered with.

[13] Dr. Singhvi has taken us through the legislative history of proscription of obscenity in India. He has referred to the Obscene Books and Pictures Act, 1856. The primary object of the said Act was to prevent the sale or exposure of obscene books and picture. It prohibited singing of obscene songs, etc. to the annoyance of others. Any person found indulging in the said activities was liable to pay a fine of Rs. 100/- or to imprisonment up to 3 years or both. Be it noted, learned senior counsel has also referred to the Obscene Publications Act, 1925. The said Act has been repealed.

[14] Section 292 IPC in its original shape read as follows:-

> "292. Sale, etc., of obscene books, etc.
>
> Whoever-
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other

obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception. This section does not extend to any book, pamphlet, paper, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance or idols, or kept or used for any religious purpose."

[15] The constitutional validity of Section 292 IPC was challenged in Ranjit D. Udeshi v. State of Maharashtra, 1965 AIR(SC) 881. Assailing the constitutional validity, it was urged before the Constitution Bench that the said provision imposes incompatible and unacceptable restrictions on the freedom of speech and expression guaranteed under Section 19(1)(a) of the Constitution. The Constitution Bench opined as follows:-

"7. No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article 1 of the International' Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency (1) (1868) L.R. 3 Q.B. 360. and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as "dirt for dirt's sake" and which has now received the appellation of hardcore pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse, sexual feelings.

x x x x

9. The former he thought so because it dealt with excretory functions and the latter because it dealt -with sex repression. (See Sex, Literature and Censorship pp. 26 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the-propagation of ideas, opinions and information of public interest or profit." When there is propagation of ideas, opinions and information of public interest or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with

intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19."

[16] Eventually, the Court upheld the constitutional validity of the said provision. After the pronouncement by the Constitution Bench, the legislature amended Section 292 which presently reads thus:-

"292. Sale, etc., of obscene books, etc.

(1) For the purposes of sub-section (2), book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception. This section does not extend to

(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

[17] At the outset, we may clarify that though learned counsel for the appellant has commended us to certain authorities with regard to role of the appellant, the concept of possession and how the possession is not covered under Section 292 IPC, we are not disposed to enter into the said arenas. We shall only restrict to the interpretative aspect as already stated. To appreciate the said facet, it is essential to understand certain provisions that find place in the IT Act and how the Court has understood the same. That apart, it is really to be seen whether an activity emanating from electronic form which may be obscene would be punishable under Section 292 IPC or Section 67 of the IT Act or both or any other provision of the IT Act.

[18] On a perusal of material on record, it is beyond dispute that the alleged possession of material constitutes the electronic record as defined under Section 2(1)(t) of the IT Act.

The dictionary clause reads as follows:-

"Section 2(1)(t). electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

Thus, the offence in question relates to electronic record.

[19] In Shreya Singhal v. Union of India, 2015 5 SCC 1 the Court was dealing with constitutional validity of Section 66-A of the IT Act and the two-Judge Bench declared the said provision as unconstitutional by stating thus:-

"85. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is

"grossly offensive" or "menacing". In Collins case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him.

Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A and the authorities who are to enforce Section 66-A have absolutely no manageable standard by which to book a person for an offence under Section 66-A.

This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66-A is unconstitutionally vague.

86. Ultimately, applying the tests referred to in Chintaman Rao v. State of M.P., 1951 AIR(SC) 118 and State of Madras v. V.G. Row, 1952 AIR(SC) 196 case, referred to earlier in the judgment, it is clear that Section 66-A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right."

[20] Thereafter the Court referred to Kameshwar Prasad State of Bihar, 1962 Supp3 SCR 369 and Central Prison v. Ram Manohar Lohia, 1960 AIR(SC) 633 and came to hold as follows:-

"94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth."

[21] While dealing with obscenity, the Curt referred to Ranjit D. Udeshi and other decisions and opined thus:-

> "48. This Court in Ranjit D. Udeshi v. State of Maharashtra took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in R v. Hicklin,1868 3 QB 360 which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the U.K., the United States as well as in our country. Thus, in Directorate General of Doordarshan v. Anand Patwardhan, 2006 8 SCC 433 this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject-matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, educational or scientific value (see para 31).
>
> 49. In a recent judgment of this Court, Aveek Sarkar v. State of W.B., 2014 4 SCC 257 this Court referred to English, US and Canadian judgments and moved away from the Hicklin test and applied the contemporary community standards test.
>
> 50. What has been said with regard to public order and incitement to an offence equally applies here. Section 66-A cannot possibly be said to create an offence which falls within the expression "decency" or "morality" in that what may be grossly offensive or annoying under the section need not be obscene at all in fact the word "obscene" is conspicuous by its absence in Section 66-A."

[22] In Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Ors, 2015 6 SCC 1 analyzing the said judgment another two-Judge Bench has opined that as far as test of obscenity is concerned, the prevalent test is the contemporary community standards test. It is apt to note here that in the said case the Court was dealing with the issue,

what kind of test is to be applied when personalities like Mahatma Gandhi are alluded.

The Court held:-

"142. When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealistic voice to put words or to show him doing such acts which are obscene. While so concluding, we leave it to the poet to put his defence at the trial explaining the manner in which he has used the words and in what context. We only opine that view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be flawed."

[23] Reference to Shreya Singhal is only to show that in the said case the Court while dealing with constitutional validity of Section 66-A of the IT Act noticed that the said provision conspicuously did not have the word "obscene". It did not say anything else in that regard. In the case at hand, it is required to be seen in which of the provision or both an accused is required to be tried. We have already reproduced Section 292 IPC in the present incarnation. Section 67 of the IT Act which provides for punishment for publishing or transmitting obscene material in electronic form reads as follows:-

"67. Punishment for publishing or transmitting obscene material in electronic form.

Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either

description for a term which may extend to five years and also with fine which may extend to ten lakh rupees."

[24] Section 67A stipulates punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form. Section 67B provides for punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form. It is as follows:-

"67B. Punishment for publishing or transmitting of material depicting children in seually explicit act, etc., in electronic form.

Whoever

(a)publishes or transmits or causes to be published or transmitted material any electronic form which depicts children engaged in sexually explicit act or conduct; or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or

(d)facilitates abusing children online; or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

> Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form-
>
> (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or
>
> (ii) which is kept or used for bona fide heritage or religious purposes.
>
> Explanation.-For the purpose of this section "children" means a person who has not completed the age of 18 years."

[25] Section 69 of the IT Act provides for power to issue directions for interception or monitoring or decryption of any information through any computer resource. It also carries a penal facet inasmuch as it states that the subscriber or intermediary who fails to comply with the directions issued under sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

[26] We have referred to all these provisions of the IT Act only to lay stress that the legislature has deliberately used the words "electronic form". Dr. Singhvi has brought to our notice Section 79 of the IT Act that occurs in Chapter XII dealing with intermediaries not to be liable in certain cases. Learned counsel has also relied on Shreya Singhal as to how the Court has dealt with the challenge to Section 79 of the IT Act. The Court has associated the said provision with exemption and Section 69A and in that context, expressed that:-

> "121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the

originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid."

[27] We have referred to the aforesaid aspect as it has been argued by Dr. Singhvi that the appellant is protected under the said provision, even if the entire allegations are accepted.

According to him, once the factum of electronic record is admitted, Section

79 of the IT Act must apply ipso facto and ipso jure. Learned senior counsel has urged Section 79, as the language would suggest and keeping in view the paradigm of internet world where service providers of platforms do not control and indeed cannot control the acts/omissions of primary, secondary and tertiary users of such internet platforms, protects the intermediary till he has the actual knowledge. He would contend that Act has created a separate and distinct category called 'originator' in terms of Section 2(1) (z)(a) under the IT Act to which the protection under Section 79 of the IT Act has been consciously not extended. Relying on the decision in Shreya Singhal , he has urged that the horizon has been expanded and the effect of Section 79 of the IT Act provides protection to the individual since the provision has been read down emphasizing on the conception of actual knowledge. Relying on the said provision, it is further canvassed by him that Section 79 of the IT Act gets automatically attracted to electronic forms of publication and transmission by intermediaries, since it explicitly uses the non-obstante clauses and has an overriding effect on any other law in force. Thus, the emphasis is on the three provisions, namely, Sections 67, 79 and 81, and the three provisions, according to Dr. Singhvi, constitute a holistic trinity. In this regard, we may reproduce Section 81 of the IT Act, which is as follows:-

"81. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act 1957 or the Patents Act 1970."

The proviso has been inserted by Act 10 of 2009 w.e.f. 27.10.2009.

[28] Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67A and 67B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said

protection has been expanded in the dictum of Shreya Singhal and we concur with the same. Section 81 also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply. In this regard, we may refer to Sarwan Singh and Anr. v. Kasturi Lal, 1977 1 SCC 750.

> The Court was considering Section 39 of Slum Areas (Improvement and Clearance) Act, 1956 which laid down that the provisions of the said Act and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law. The Delhi Rent Control Act, 1958 also contained non-obstante clauses. Interpreting the same, the Court held:-
>
> "When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. A piquant situation, like the one before us, arose in Shri Ram Narain v. Simla Banking & Industrial Co. Ltd., 1956 AIR(SC) 614 the competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45-A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act, 1951 contained each a non-obstante clause, providing that certain provisions would have effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force ...". This Court resolved the conflict by considering the object and purpose of the two laws and giving

precedence to the Banking Companies Act by observing:

> "It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein" (p. 615)
>
> As indicated by us, the special and specific purpose which motivated the enactment of Section 14-A and Chapter III-A of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore, the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act."

[29] In Talcher Municipality v. Talcher Regulated Market Committee, 2004 6 SCC 178 the Court was dealing with the question whether the Orissa Municipal Act, 1950 or Orissa Agricultural Produce Markets Act, 1956 should apply. Section 4(4) of the 1956 Act contained a non-obstante clause. In that context, the Court opined:-

> "The Act, however, contains special provisions. The provision of Section 4(4) of the said Act operates notwithstanding anything to the contrary contained in any other law for the time being in force. The provisions of the said Act, therefore, would prevail over the provisions of the Orissa Municipal Act. The maxim "generalia specialibus non derogant" would, thus, be applicable in this case. (See D.R. Yadav v. R.K. Singh, 2003 7 SCC 110 Indian Handicrafts Emporium v. Union of India, 2003 7 SCC 589 and M.P. Vidyut Karamchari Sangh v. M.P. Electricity Board, 2004 9 SCC 755.)"

[30] In Ram Narain , the Court faced a situation where both the statutes, namely, Banking Companies Act, 1949 and the Displaced Persons (Debts Adjustment) Act, 1951 contained non-obstante clause. The Court gave primacy to the Banking Companies Act. To arrive at the said conclusion, the Court evolved the following principle:-

> "7. It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."

[31] In Solidaire India Ltd. v. Fairgrowth Financial Services Ltd., 2001 3 SCC 71 this Court while dealing with two special statutes, namely, Section 13 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and Section 32 of Sick Industrial Companies (Special Provisions) Act, 1985, observed as follows:-

> "Where there are two special statutes which contain non obstante clauses the later statute must prevail.
>
> This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply."

[32] The aforesaid passage clearly shows that if legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.

[33] In Jeewan Kumar Raut v. CBI, 2009 7 SCC 526 in the context of Transplantation of Human Organs Act, 1994 (TOHO) treating it as a special law, the Court held:-

"22. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

23. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code." And again:-

"27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO."

[34] In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC.

[35] Consequently, the appeal is allowed, the orders passed by the High Court and the trial court are set aside and the criminal prosecution lodged against the appellant stands quashed.

Information Technology Act, 2000 -Section 79 -Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 8, 24, 29, 67 & Schedule -Immunity from prosecution.

Supreme Court held that "We thus find that the appellant and his associates were not innocent intermediaries or network service providers as defined under section 79 of the Technology Act but the said business was only a fagade and camouflage for more sinister activity. In this situation, Section 79 will not grant immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Technology Act itself"

Sanjay Kumar Kedia

V/S

Narcotics Control Bureau. 2008 (2) SCC 294.

SUPREME COURT OF INDIA *(D.B.)*

Sanjay Kumar Kedia
V/S
Narcotics Control Bureau

Date of Decision: 03 December 2007

Citation: 2007 LawSuit(SC) 1478

Hon'ble Judges: S B Sinha, Harjit Singh Bedi

Eq. Citations: 2008 (2) SCC 294, 2007 (13) Scale 631, 2007 AIR(SCW) 7902, 2007 (8) Supreme 325, 2008 (2) KCCR 865, 2008 (Supp2) KerLT 574, 2008 (221) ELT 20, 2007 (12) SCR 812, 2008 (1) LW 628, 2008 (4) SCJ 473, 2008 AllMR(Cri) 311, 2008 (1) SCC(Cri) 346, 2008 RCrD(SC) 394, 2008 (1) AllCriR 243, 2008 CrLR 51, 2008 (1) JCC 9, 2008 (1) Crimes(SC) 26, 2008 (2) ALT(Cri) 234, 2008 (1) CriCC 108, 2008 (1) ApexCJ 178, 2008 (1) LW(Cri) 628, 2008 (17) GHJ 236, 2008 (39) OCR 307

Case Type: Appeal (Criminal)

Case No: 1659 of 2007

Subject: Criminal, Narcotics

Head Note:

Information Technology Act, 2000 -Section 79 -Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 8, 24, 29, 67 & Schedule -Immunity from prosecution- When not available -Bail matter -Section 79 will not grant immunity to an accused who has violated the provisions of the NDPS Act as this provision gives immunity from prosecution for an offence under IT Act itself- "Phentermine" and "Butabbital" are psychotropic substances and therefore, fall within the prohibition contained in Section 8 thereof-Appellant and his associates were not innocent intermediaries or network service providers, but the said business was

only a facade and camouflage for more sinister activity -Thus. Section 79 will not grant immunity to an accused.- Appeal Dismissed

Acts Referred:

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 SEC 29, SEC 67, SEC 8, SEC 24

INFORMATION TECHNOLOGY ACT, 2000 SEC 79

Final Decision: Appeal dismissed

Important Para: 7, 9

Reference Cases:

Cases Cited in (+): **4**

Judgement Text:-

HARJIT SINGH BEDI, J

[1] Special Leave granted.

[2] The appellant Sanjay Kumar Kedia, a highly qualified individual, set up two companies M/s. Xponse Technologies Limited (XTL) and M/s. Xponse IT Services Pvt. Ltd. (XIT) on 22.4.2002 and 8.9.2004 respectively which were duly incorporated under the Indian Companies Act, 1956. On 1.2.2007 officers of the Narcotics Control Bureau (NCB) conducted a search at the residence and office premises of the appellant but found nothing incriminating. He was also called upon to appear before the NCB on a number of occasions pursuant to a notice issued to him under Section 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act") and was ultimately arrested and the bank accounts and premises of the two companies were also seized or sealed. On 13.3.2007 the appellant filed an application for bail in the High Court which was dismissed on the ground that a prima facie case under Sections 24 and 29 of the Act had been made out and that the investigation was yet not complete. The appellant thereafter moved a second bail application before the High Court on 16.4.2007 which too was dismissed with the observations that the enquiry was at a critical stage and that the department should be afforded sufficient time to conduct its enquiry and to bring it to its logical conclusion as the alleged offences had widespread

ramifications for society. It appears that a bail application was thereafter filed by the appellant before the Special Judge which too was rejected on 28.5.2007 with the observations that the investigation was still in progress. Aggrieved thereby, the appellant preferred yet another application for bail before the High Court on 4.6.2007 which too was dismissed on 7.6.2007. The present appeal has been filed against this order.

[3] Notice was issued on the Special Leave Petition on 30.7.2007 by a Division Bench noticing a contention raised by Mr. Tulsi that service providers such as the two companies which were intermediaries were protected from prosecution by Section 79 of the Information Technology Act, 2000. An affidavit in reply has also been filed on behalf of the respondent NCB and a rejoinder affidavit in reply there to by the appellant.

[4] We have, heard learned counsel for the parties at length.

[5] Mr. Tulsi has first and foremost argued that the allegations against the appellant were that he had used the network facilities provided by his companies for arranging the supply of banned psychotropic substances on line but there was no evidence to suggest that the appellant had been involved in dealing with psychotropic substances or engaged in or controlled any trade whereby such a substance obtained outside India had been supplied to persons outside India and as such no case under section 24 of the Act had been made out against the appellant. Elaborating this argument, he has submitted that the two drugs which the appellant had allegedly arranged for supply were phentermine and butalbital and as these drugs were not included in Schedule-I of the Narcotic Drugs or Psychotropic Substances Rules 1987 in terms of the notification dated 21.2.2003 and were also recognized by the Control Substances Act, a law applicable in the United States, as having low potential for misuse and it was possible to obtain these drugs either on written or oral prescription of a doctor, the supply of these drugs did not fall within the mischief of Section 24. He has further argued that in the circumstance, the companies were mere network service providers they were protected under Section 79 of the Technology Act from any prosecution.

[6] Mr. Vikas Singh, the learned Additional Solicitor General for the respondents has however pointed out that the aforesaid drugs figured in the Schedule appended to the Act pertaining to the list of psychotropic substances (at Sri. Nos. 70 and 93) and as such it was clear that the two drugs were psychotropic substances and therefore subject to the Act. It has also been pointed out that the appellant had been charged for offences under Sections 24 and 29 of the Act which visualized that a person could be guilty

without personally handling a psychotropic substance and the evidence so far collected showed that the appellant was in fact a facilitator between buyers and certain pharmacies either owned or controlled by him or associated with the two companies and that Section 79 of the Technology Act could not by any stretch of imagination guarantee immunity from prosecution under the provisions of the Act.

[7] It is clear from the Schedule to the Act that the two drugs phentermine and butalbital are psychotropic substances and therefore fall within the prohibition contained in Section 8 thereof. The appellant has been charged for offences punishable under Sections 24 and 29 of the Act. These Sections are re-produced below: Punishment for external dealings in narcotic drugs and psychotropic substances in contravention of section 12.- Whoever engages in or controls any trade whereby a narcotic drug or a psychotropic substance is obtained outside India and supplied to any person outside India without the previous authorization of the Central Government or otherwise than in accordance with the conditions (if any) of such authorization granted under section 12, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but may extend to two lakh rupes: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees" Punishment for abetment and criminal conspiracy. -

> (1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.
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> (2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which (a) would constitute an offence if committed within India; or
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> (b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute

it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.

[8] A perusal of Section 24 would show that it deals with the engagement or control of a trade in Narcotic Drugs and Psychotropic Substances controlled and supplied outside India and Section 29 provides for the penally arising out of an abetment or criminal conspiracy to commit an offence under Chapter IV which includes Section 24. We have accordingly examined the facts of the case in the light of the argument of Mr. Tulsi that the companies only provided third party data and information without any knowledge as to the commission of an offence under the Act. We have gone through the affidavit of Shri A. P. Siddiqui Deputy Director, NCB and reproduce the conclusions drawn on the investigation, in his words.

> "(i) The accused and its associates are not intermediary as defined under section 79 of the said Act as their acts and deeds was not simply restricted to provision of third party data or information without having knowledge as to commission of offence under the NDPS Act. The company (Xponse Technologies Ltd. And Xpose IT Services Pvt. Ltd. Headed by Sanjay Kedia) has designed,developed, hosted the pharmaceutical websites and was using these websites, huge quantity of psychotropic substances (Phentermine and Butalbital) have been distributed in USA with the help of his associates. Following are the online pharmacy websites which are owned by Xponse or Sanjay Kedia.
>
> (1) Brother Pharmacy.com and LessRx.com: Brothers pharmacy.com, online pharmacy was identified as a marketing website' .(front end) for pharmaceutical drugs. LessRx.com has been identified as a "back end" site which was being utilized to process orders for pharmaceutical drugs through Brotherspharmacy.com. LessRx.ccm's registrant and administrative contact was listed True Value Pharmacy located at 29B, Rabindra Sarani, Kolkata, India-7000.73. Telephone No.033-2335-7621 which is the address of Sanjay Kedia. LessRx.com's IP address is 203.86.100.95. The following websites were also utilizing this IP address ALADIESPHARMACY.com, EXPRESSPHENTERMINE.com, FAMILYYONLINEPHARMACY.com ONLTNEEXPRESSPHARMACYcom, SHIPPEDLIPITOR.com Domain name

Servers for LessRx.com (IP address: 203.86.100.95) were NS.PALCOMONLINE.com and NS2PALCOMLINE.com. The Less Rx.com's website hosting company was identified as Pacom

Web Pvt Ltd, C-56/14,lst Floor, Institutional Area, Sector 62, Noida-201301. Sanjay Kedia entrusted the hosting work to Palcom at VSNL, Delhi. These servers have been seized. Voluntary statement of Shri Ashish Chaudhary, Prop. Of Palcom Web Pvt Ltd.indicates that He maintained the websites on behal of Xponse. According to the bank records, funds have been wired from Brothers pharmacy, Inc's Washington Mutual Bank Account #0971709674 to Xponse IT services Pvt Ltd, ABN AMRO bank account No. 1029985, Kolkata.

(2) Deliveredmedicine.com : A review of the Xponse's website-XPONSEIT.com was conducted and observed and advertisement for XPONSERX. That XPONSERX was described as a software platform developed for the purpose of powering online pharmacies. Xponserx was designed to process internet pharmacy orders by allowing customers to order drugs. Drug Enforcement Administration (DEA), USA conducted a "whois" reverse lookup on domain name XPONSERX.COM was at domaintools.Com and it revealed that XPONSERX.COM was registered to Xponse IT Services Pvt Ltd, Sanjay kedia, 29B,Rabindra Sarani, 12E,3rd floor, Kolkata, WB 70073. Telephone no.+ 91-9830252828 was also provided for Xponse. Two websites were featured on the XPONSEIT.COM websites as featured clients. And these were

DELIVEREDMEDICINE.COM AND TRUEVALUEPRESCRIPTIONS.COM. Review indicated that these two websites were internet pharmacies. Consequently a "whois" reverse look-up on domain name DELIVEREDMEDICINE.COM at domainstools.com conducted by DEA revealed that it was registered to Xponse Inc.,2760 Park Ave.,Santa Clara, CA, USA which is the address of Sanjay Kedia.

(3) Truevalueprescriptions.com: Review of this website indicated that this website was a internet pharmacy. In ad-

> dition TRUEVALUEPRESCRIPTIONS listed Phentermine as a drug available for sale. It appeared that orders for drugs could be made without a prescription from the TRUEVALUE website, it was noted that orders for drugs could be placed without seeing a doctor. According to the website, a customer can complete an online questionnaire when placing the order for a drug in lieu of a physical exam in a physician's office. Toll free telephone number 800-590-5942 was provided on the TRUEVALUE website for customer Service. DEA, conducted a "whois" reverse look-up on domain name TRUEVALUEPRESCRIPTI0NS.COM at domaintools.com and revealed that IP address was 203.86.100.76 and the server that hosts the website was located at Palcom, Delhi which also belongs to Xponse.From the above facts it is clear that the Xponse Technologies Ltd and Xponse IT Services Pvt Ltd were not acting merely as a network service provider but were actually running internet pharmacy and dealing with prescription drugs like Phentermine and Butalbital."

[9] We thus find that the appellant and his associates were not innocent intermediaries or network service providers as defined under section 79 of the Technology Act but the said business was only a fagade and camouflage for more sinister activity. In this situation, Section 79 will not grant immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Technology Act itself.

[10] We are therefore of the opinion that in the face of overwhelming inculpatory evidence it is not possible to give the finding envisaged under Section 37 of the Act for the grant of bail that there were reasonable grounds for believing that the appellant was not guilty of the offence alleged, or that he would not resume his activities should bail be granted.

[11] For the reasons recorded above, we find no merit in this appeal, which is accordingly dismissed. We however qualify that the observations made above are in the context of the arguments raised by the learned counsel on the bail matter which obligated us to deal with them, and will not influence the proceedings or decision in the trial in any manner.

Information Technology Act, 2000 - Sec 66, Sec 43, Sec 65 - Forgery and cheating and mis-appropriation of funds – Creating separate web page.

RAMESH RAJAGOPAL

V/S

DEVI POLYMERS PRIVATE LIMITED. 2016 AIR(SC) 1920.

SUPREME COURT OF INDIA (FROM MADRAS) *(D.B.)*

RAMESH RAJAGOPAL
V/S
DEVI POLYMERS PRIVATE LIMITED

Date of Decision: 19 April 2016

Citation: 2016 LawSuit(SC) 357

Hon'ble Judges: S A Bobde, Amitava Roy

Eq. Citations: 2016 (6) SCC 310, 2016 AIR(SC) 1920, 2016 (4) Scale 198, 2016 (4) JT 210, 2016 CrLJ 2339, 2016 (2) AIRJharHCR 786, 2016 (2) GLH 726, 2016 (3) RajLW 2525, 2016 (2) RCR(Cri) 843, 2016 (2) SCC(Cri) 567, 2016 (4) CTC 769, 2016 (4) SCJ 311, 2016 (2) UC 986, 2016 (2) CurCriR 203, 2016 (3) GCD 2007, 2016 (2) ApexCJ 431, 2016 (3) Supreme 22, 2016 (2) LawHerald(SC) 1255, 2016 (3) JCC 1585, 2016 (2) Crimes(SC) 140, 2016 (2) MadLJ(Cri) 507

Case Type: Criminal Appeal

Case No: 133 of 2016

Subject: Criminal

Head Note:

Indian Penal Code, 1860 - Sec 409, Sec 463, Sec 468, Sec 471, Sec 120B - Code of Criminal Procedure, 1973 - Sec 482 - Information Technology Act, 2000 - Sec 66, Sec 43, Sec 65 - Forgery and cheating and mis-appropriation of funds - Creating separate web page for Devi Consultancy which is one Unit of the Devi Polymers Pvt Ltd, the main Company- Payment made from the account of main Company - Criminal complaint for forgery and mis-appropriation - Contention that by creating separate website in the name of Devi Consultancy appellant has committing forgery and by making entire payment from main account of the

company the appellant has mis-appropriated the funds of the Company - Contention rejected - Held - From perusal of website there is no intent of causing damage to the main Company - By projecting a separate website for Devi Consultancy, the appellant has received no separate amount - The appellant has not deceived any person fraudulently or dishonestly, to deliver any property to any person thus there was no intention of cheating the Company - Intention of cheating is a necessary ingredient for the offence under Section 468 of IPC - No case is made out. Criminal proceedings quashed (Para 12 , 14 , 15 , 23)

Acts Referred:

INDIAN PENAL CODE, 1860 SEC 409, SEC 463, SEC 468, SEC 471, SEC 120B

CODE OF CRIMINAL PROCEDURE, 1973 SEC 482

INFORMATION TECHNOLOGY ACT, 2000 SEC 66, SEC 43, SEC 65

Advocates: R Anand Padmanabhan, Romil Pathak, Shashi Bhushan Kumar, B Karunakaran, Ritu Bhardwaj, Anita Bafna, A Radhakrishnan

Reference Cases:

Cases Cited in (+): **1**

Cases Referred in (+): **6**

Judgement Text:-

S A Bobde, J

[1] We have heard learned counsel for the parties.

[2] Leave granted.

[3] The appellant has preferred this appeal against the judgment passed by the Madras High Court in Criminal O.P. No. 4404 of 2010 refusing to quash the criminal proceedings initiated against him.

[4] The appellant was prosecuted by the respondent under Sections 409, 468 and 471 of the Indian Penal Code (in short 'the IPC') read with Sections 65 and 66 of the Information Technology Act, 2000 read with Section 120(b) of the IPC. The appellant is a Director in Devi Polymers Private Limited, Chennai which is a leader in Polyester

Moulding Compound (PMC), Sheet Moulding Compound (SMC) and Dough Moulding Compound (DMCO) in India.

> It is also manufacturing SMC and DMC moulded components for the electrical, automotive and various other industries. The company is also supplying SMC and DMC compounds and components to almost all the leading electrical switch gear industries and automotive industries in India.

[5] It has three Units A, B and C. Unit 'C' is being headed by the appellant. It is not disputed that the Unit 'C' primarily renders consultancy services. However, all the three Units are units of one entity i.e. Devi Polymers Private Limited.

[6] In the course of business, the appellant thought of improving the consultancy services and apparently contacted a consultant known as Michael T Jackson. He also contacted the regular consultants of the Company i.e. Devi Polymers Private Limited. The consultants apparently advised the creation of a separate entity known as Devi Consultancy Services and accordingly, in the web page that was created by the consultant, this name occurred. Since an invoice was raised by the consultant Michael T Jackson in the sum of 10,857.50 US Dollars, the said amount was paid from the funds of Devi Polymers Private Limited amounting to Rs.5,57,207/-. The amount of Rs.17,000/-has been paid by the Devi Polymers Private Limited to M/s Easy Link. These amounts were paid as advised by the appellant. It is significant that no amount has been paid or received by Unit C separately, independently of Devi Polymers Private Limited. All this, namely the engaging of consultants and payments to them was apparently done at the behest of the appellant.

[7] The relationship being strained between the respondent and the appellant, who are relatives, several proceedings seem to have been initiated in the Company Law Board pertaining to oppression and mismanagement. As of now, it is said that the appellant's petition for mismanagement has been dismissed but an appeal is pending. We are, however, not concerned with those proceedings.

[8] However, in the course of disputes and the pending proceedings, the respondent initiated the instant criminal complaint against the appellant.

> The main circumstances which are relied upon by the respondent in the complaint is that in the website for Devi Consultancy Services that was

created on the advice of the consultant is shown as a separate division independent of Devi Polymers Private Limited. According to the complainant, this has resulted in forgery, since there is no such thing as Devi Consultancy Services; though the existence of Unit C of Devi Polymers Private Limited, which deal with consultancy is not denied. The second circumstance seems to be the payment made by the Devi Polymers Private Limited to the consultants from their own account. The former is said to be forgery and the latter is said to be mis-appropriation of funds and breach of trust.

[9] Having given our anxious consideration to the dispute, we find that none of the aforesaid circumstances can lead to an inference of commission of an offence under the IPC at any rate none of the offence alleged. As far as the website is concerned, though undoubtedly, Devi Consultancy Services (DCS) is mentioned, it is made clear in the website itself that DCS is a part of Devi Polymers Private Limited which is apparent from a link which shows Devi Polymers Private Limited, in the website itself, are shown as Devi Polymers Private Limited, the main Company and Devi Consultancy Services as a sister Company. Similarly, in the website of Devi Polymers Private Limited, which was moved by the consultant, there is a link which shows that Devi Consultancy Services is a sister concern and it is stated that viewers may visit that site. The address of Devi Consultancy Services is shown to be the same address as that of Devi Polymers Private Limited. We are satisfied that there is no attempt whatsoever to project the Devi Consultancy Services as a concern or a Company which is independent and separate from Devi Polymers Private Limited, to which both the parties belong. In any case it is not possible to view the act as an act of forgery.

[10] It might have been possible to attribute some criminal intent to the projection of the Unit C as Devi Consultancy Services in the website, if as a result of such projection, the appellant had received any amounts separate from the Devi Polymers Private Limited, but a perusal of the complaint shows that this is not so. Not a single rupee has been received by the appellant in his own name or even separately in the name of Unit C, which he is heading. All amounts have been received by Devi Polymers Private Limited.

[11] Section 463 of the Indian Penal Code defines forgery which reads as follows:-

"463. Forgery.- Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or

> title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

[12] It is not possible to view the contents of the website showing the Devi Consultancy Services as a concern which is separate from Devi Polymers Private Limited in view of the contents of the website described above. Moreover, it is not possible to impute any intent to cause damage or injury or to enter into any express or implied contract or any intent to commit fraud in the making of the said website. The appellant has not committed any act which fits the above description. Admittedly, he has not received a single rupee or nor has he entered into any contract in his own name on the basis of the above website.

[13] Section 468 of the IPC reads as follows:-

> "468. Forgery for purpose of cheating - Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

[14] In the absence of any act in pursuance of the website by which he has deceived any person fraudulently or dishonestly, induced any one to deliver any property to any person, we find that it is not possible to attribute any intention of cheating which is a necessary ingredient for the offence under Section 468.

[15] We find that the allegations that the appellant is guilty of an offence under the aforesaid section are inherently improbable and there is no sufficient ground of proceedings against the accused. The proceedings have been initiated against the appellant as a part of an ongoing dispute between the parties and seem to be due to a private and personal grudge.

[16] In State of Haryana and Ors. v. Bhajan Lal and Ors, 1992 Supp1 SCC 335, this Court laid down the following guidelines where the power under Section 482 should be exercised. They are:-

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by

this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

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

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

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

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

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

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

We find that the High Court ought to have exercised its power under Clause (1), (3) and (5) of the above said judgment.

[17] In Madhavrao Jiwajirao Scindia and Ors. v. Sambhajirao Chandrojirao Angre and Ors., 1988 1 SCC 692, this Court observed as follows:-

"7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

[18] This Court in Janata Dal v. H.S. Chowdhary and Ors., 1992 4 SCC 305, observed as follows:-

"132. The criminal courts are clothed with inherent power to make such

orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles."

We reiterate the same caution having found that this is an appropriate case for the exercise of such powers.

[19] The entire law on the subjects was reviewed by a three Judges Bench of this Court in Inder Mohan Goswami and Anr. v. State of Uttaranchal and Ors., 2007 12 SCC 1 vide paragraphs 23 to 39. Thereafter, the law was reiterated in R. Kalyani v. Janak C. Mehta and Ors., 2009 1 SCC 516 vide paragraphs 15 and 16.

[20] In all the cases the principle that the accused must be relieved from the prosecution, even if the allegations are taken at their face value and accepted in their entirety do not constitute any offence has been upheld, and thereafter in Umesh Kumar v. State of Andhra Pradesh and anr., 2013 10 SCC 591.

[21] As regards the commission of offences under the Information Technology Act, 2000 the allegations are that the appellant had, with fraudulent and dishonest intention on the website of Devi Consultancy Services i.e. www .devidcs.com that the former is a sister concern of Devi Polymers. Further, that this amounts to creating false electronic record. In view of the finding above we find that no offence is made out under Section 66 of the I.T. Act, read with Section 43. The appellant was a Director of Devi Polymers and nothing is brought on record to show that he did not have any authority to access the computer system or the computer network of the company. That apart there is nothing on record to show the commission of offence under Section 65 of the I.T. Act, since the allegation is not that any computer source code has been concealed, destroyed or altered. We have already observed that the acts of the appellant did not have any dishonest intention while considering the allegations in respect of the other offences. In the circumstances, no case is made out under Sections 65 and 66 of the I.T. Act, 2000.

[22] The High Court seems to have over looked these circumstances and has merely dismissed the petition under Section 482 of the Criminal Procedure Code on the ground that it requires evidence at a trial to come to any conclusion. We, however, find that the criminal proceedings initiated by the respondent constitute an abuse of process of Court and it is necessary to meet the ends of justice to quash the prosecution against the appellant.

[23] Accordingly, the appeal succeeds. The prosecution is quashed.

Power of the Magistrate to try offences under IT Act-Yes. High Court for the State of Telangana and the State of Andhra Pradesh.

POTLURI SRI BALA VAMSI KRISHNA

V/S

STATE OF A P. 2016 (2) ALT(Cri) 21.

HIGH COURT OF TELANGANA AND ANDHRA PRADESH (AT HYDERABAD)

POTLURI SRI BALA VAMSI KRISHNA
V/S
STATE OF A P

Date of Decision: 22 December 2015

Citation: 2015 LawSuit(Hyd) 1021

Hon'ble Judges: B Siva Sankara Rao

Eq. Citations: 2016 (2) ALT(Cri) 21, 2016 (1) ALD(Cri) 491

Case Type: Criminal Petition

Case No: 6764 of 2013, 6765 of 2013

Subject: Criminal

Acts Referred:
INDIAN PENAL CODE, 1860 SEC 193, SEC 379, SEC 196, SEC 228
CODE OF CRIMINAL PROCEDURE, 1973 SEC 345, SEC 482, SEC 374(2), SEC 195, SEC 346, SEC 5, SEC 4(2), SEC 374, SEC 389(1)
INFORMATION TECHNOLOGY ACT, 2000 SEC 66, SEC 44, SEC 77B, SEC 57(1), SEC 74, SEC 85, SEC 61, SEC 77, SEC 48(1), SEC 46(5), SEC 69, SEC 77A, SEC 58, SEC 46(1), SEC 70, SEC 72, SEC 48, SEC 46, SEC 43, SEC 75, SEC 78, SEC 67, SEC 68, SEC 45, SEC 71, SEC 2(N), SEC 2(C), SEC 73, SEC 84(B), SEC 65, SEC 2(M), SEC 84(C), SEC 58(2), SEC 57, SEC 76, SEC 70(B)(8)

Final Decision: Petition allowed

Advocates: Raja Sekhar Tulasi

Reference Cases:

Cases Referred in (+): **2**

Judgement Text:-

B Siva Sankara Rao, J

[1] These two Criminal Petitions are filed by the petitioner/ accused in C.C. Nos.175 and 176 of 2012 dated 30.01.2013. The learned III Additional Judicial I Class Magistrate, Rajahmundry, East Godavari District has taken cognizance for the offences punishable under Sections 66 of the Information Technology Act and Section 379 IPC and after full dressed trial with reference to the evidence on record of PWs.1 to 8, Exs.P1 to P13 and M.Os 1 to 4 in C.C. No.175 of 2012 and PWs.1 to 6, Exs.P1 to P7, and MOs.1 and 2 in C.C. No.176 of 2012 convicted the accused for the said offences. The accused is sentenced to undergo simple imprisonment for a period of three years for each offence and both sentences shall run concurrently and by giving set off of the period undergone by the accused from 08.01.2012 to 13.01.2012 and 12.06.2012 to 30.01.2013 in C.C. No.175 of 2012 and from 07.07.2012 to 30.01.2013 in C.C. No.176 of 2012. Impugning the two conviction judgments respectively on 30.01.2013, the accused maintained two appeals before the District and Sessions Judge, Rajahmundry under Section 374 Cr.P.C. The office of Sessions Judge has taken objection on maintainability of two appeals particularly for the offence under Section 66 of I.T Act saying there is Cyber Appellate Tribunal (for short 'CAT') constituted having jurisdiction. It is impugning the same, these two applications are filed under Section 482 Cr.P.C.

[2] Section 482 Cr.P.C reads as under: Section 482 - Saving of inherent powers of High Court - Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

[3] The grounds urged in the applications impugning said office objection of the Court of Sessions of the respective Sessions Division, are that the learned Sessions Judge erred in not entertaining the respective appeals under Section 374 (2) Cr.P.C and also application under Section 389 (1) Cr.P.C to suspend the sentence or order as the case may be by further saying the Tribunal's jurisdiction is no way to be invoked against the trial Court's conviction judgment particularly for the offence under Section 66 I.T Act for

no such enabling provision to the Tribunal to entertain the appeal and hence to set aside said objection of the learned Sessions Judge and to give a direction to number the appeals if otherwise in order.

[4] Heard learned counsel for petitioner and learned amicus curiae appointed by this Court by name Sri B.Nalin Kumar and also learned public prosecutor and perused the material on record.

[5] Now the points that arise for consideration are:

i) Whether the learned Magistrate can try any offence under I.T Act, particularly covered by Chapter XI Sections 65 to 78 including the sub-sections in between Chapter XIII Sections 84 (B) and (C) and 85 of the I.T Act, amended by Act 10 of 2009 w.e.f., 27.10.2009 and if so, along with any other IPC offences or offence of any other special law and if so, in the event of conviction by the trial Court to which form the appeal lies to say whether it is to the Court of Sessions or CAT?

ii) to what result?

POINT No.1:

[6] Section 57 of the Information Technology Act, 2009 reads as under:

Section 57 - Appeal to Cyber Appellate

Tribunal - (1) Save as provided in sub-section (2), any person aggrieved by an order made by Controller or an adjudicating officer under this Act may prefer an appeal to a Cyber Appellate Tribunal (CAT) having jurisdiction in the matter.

(2) No appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-

five days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Cyber appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under subsection (1), the Cyber Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Cyber Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Controller or adjudicating officer.

(6) The appeal filed before the Cyber Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

[7] So far as Section 57 (1) concerned, the term Controller used therein is defined under Section 2 (m) of the Act which says the Controller of Certifying Authorities appointed under Section 17 (1) of the Act by Central Government by notification, may also by the same or subsequent notification appoint such number of Deputy Controllers, [Assistant Controllers, other officers and employees] as it deems fit. The Controller shall discharge his functions under this Act subject to the general control and directions of the Central Government. The Deputy Controllers and Assistant Controllers shall perform the functions assigned to them by the Controller under the general superintendence and control of the Controller.

[8] So far as the term adjudicating officer used under Section 57 (1) concerned, it is defined under Section 2 (c) of the Act to mean the adjudicating officer appointed under sub section (1) of Section 46.

[9] Section 46 of the Act says, any person committed a contravention of any of the provisions of this Act or of any rule, regulation [direction or order made thereunder which renders him liable to pay penalty or compensation,] the Central Government shall, subject to the provisions of sub-section (3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer for holding an inquiry in the manner prescribed by the Central Government.

[10] As per Section 46 (5) of the Act, every adjudicating officer shall have the powers of a civil court that are conferred on the Cyber Appellate Tribunal under sub-section (2) of Section 58 of the Act, and all proceedings before it shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1860) and shall be deemed to be a civil court for the purposes of Sections 345 and 346 Cr.P.C.

[11] A reading of Section 46 read with Sections 43 to 45 of the Act, it is made clear that it is only in relation to a limited jurisdiction for penalty or compensation payable and otherwise it is not conferred any jurisdiction to adjudicating officer for any of the offences to be tried under Chapter 11 and 13 of the Act referred supra, particularly in relation to sections referred above.

[12] Thus, such adjudicating officer even equated to CAT has no jurisdiction to decide and adjudicate the Chapter XI and part of Chapter XIII of the Act offences with or without any of the provisions of IPC or other laws as the case may be.

[13] Coming to CAT, which is defined under Section 2 (n) of the Act to mean the CAT established under sub-section (1) of Section 48. Section 48 speaks of Establishment by notification, establish one or more appellate tribunals and it shall also specify, in the notification, the matters and places in relation to which the CATs may exercise jurisdiction. The procedure to be followed by CAT is specified under Section 58 of the Act, that it can adopt its own procedure and need not follow the procedure laid down by the C.P.C but shall be guided by the principles of natural justice and, subject to other provisions of this Act and of any rules; for the purposes of discharging its functions under this Act, the same powers are vested as a civil court under the C.P.C, while trying a suit, in matters relating to summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents or other electronic records; receiving evidence on affidavits; issuing commissions for the

examination of witnesses or documents; reviewing its decisions; dismissing an application for default or deciding it ex parte; any other matter which may be prescribed; and the proceedings shall be deemed to be the judicial proceedings under Sections 193 and 228 IPC read with 196 IPC and it shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of Cr.P.C.

[14] It is specifically stated under Section 61 of the Act that, no Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which an adjudicating officer appointed under this Act or the CAT constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any powers conferred by or under this Act.

[15] There is no appeal from or against decision of CAT but for to the High Court. Thereby the CAT is only a civil court for adjudication and the appeal against it lies to the High Court and no Civil Court can entertain those matters, which are and can be decided by CAT. It is to mean CATs jurisdiction is confined only to civil disputes or such disputes of civil nature covered by the provisions of the Act and for the time being with any other law in force and applicable as the case may be and the CAT has no jurisdiction in criminal matters to entertain and decide.

> Thereby, the office objection taken by the Court of Sessions for numbering the appeal saying the CAT is constituted and got jurisdiction from the above provisions is untenable.

[16] No doubt, the same is not the be all and end all but for to refer some of the other provisions also. The other special provisions covered by the Information Technology Act, 2000 amended in 2009 are with some non-abstante clause saying, the offences under the Act are punishable as per Section 77-A or as per 77-B of the Act. The offence punishable of three years and above are cognizable and as per the said provision, the offences up to three years are even bailable, notwithstanding anything contained in the Cr.P.C schedules particularly part-II. Further Section 78 of the Act with non-abstante clause says the offences under the Act, more particularly chapter XI and part of Chapter XIII referred are to be investigated, not withstanding anything contained in Cr.P.C, by the officer who is in the cadre of inspector of police. It clearly says jurisdiction of regular police only of the cadre of inspector to investigate and the same is substituted in 2009 for the cadre of Deputy Superintendent under the original Act for more clarity.

[17] Thus, the offences under the Act referred supra, can be investigated by regular police, no doubt, with cyber knowledge. So far as the offences in other respects for the registration of crime and investigation, the Cr.P.C provisions that are made applicable automatically and equally to say at all stages of investigation to submit the police final report or to arrest and interrogate any accused or to remand any accused to judicial custody or to submit the progress of investigation before the regular Magistrate having local jurisdiction as the case may be.

[18] Section 85 of the Act speaks of the special procedure in relation to the offence committed by companies. It is akin to Section 141 of the N.I Act, for the officers responsibility to the day-to-day affairs of the company are being liable vicariously from the legal fiction. From the above, it is necessary to mention that, in the area where there is no procedure for investigation but for the cadre of officer and there is no procedure for taking of cognizance by the learned Magistrate concerned and remanding of accused, submission of the crime report or progress of investigation and issuing of summons and conducting of trial or maintaining of appeal as the case may be concerned, Cr.P.C provisions alone that can be applicable. It is on the fundamental principal that special law covers only to the extent it is specifically provided and in the area and other than that is not provided, the general law of Cr.P.C that is applicable. In this regard, it is necessary to read Section 4 (2) read with Section 5 and Section 26 (b) read with Schedule part-I and Part-II Cr.P.C.

> The Apex Court in Director of Enforcement vs Deepak Mahajan, 1994 3 SCC 440 at para Nos.121 to 125 held as follows:
>
> 121.Lastly, it falls for our consideration whether Section 4 (2) of the Code of Criminal Procedure can be availed of for investigating, inquiring or trying offences under any law other than the Indian Penal Code which expression includes FERA and Customs Act etc.
>
> 122. Section 4 (2) of the Code corresponds to Section 5 (2) of the old Code. Section 26 (b) of the Code corresponds to Section 29 of the old Code except for a slight change. Under the present Section 26 (b) any offence under any other law shall, when any court is mentioned in this behalf in such law, be tried by such court and when no court is mentioned in this behalf, may be tried by the High Court or other court by which such offence is shown in the

First Schedule to be triable. The combined operation of Sections 4 (2) and 26(b) of the Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence indicates no special procedure.

123. We shall now consider the applicability of provisions of Section 167 (2) of the Code in relation to Section 4 (2) to a person arrested under FERA or the Customs Act and produced before a Magistrate. As we have indicated above, a reading of Section 4 (2) read with Section 26 (b) which governs every criminal proceeding as regards the course by which an offence is to be tried and as to the procedure to be followed, renders the provisions of the Code applicable in the field not covered by the provisions of the FERA or Customs Act.

124. We are not concerned with sub-section (1) of Section 4 in this matter which provides for the procedure to be followed in every investigation, inquiry or trial in relation to offences under the Indian Penal Code stating that all offences under the Indian Penal Code "shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained."

125. In this context, Section 5 of the Code which is for all practical purposes identical with the relevant portion of the corresponding Section 1 (2) of the old Code, also may be referred to which states,

"Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

The expression 'special law' or 'local law' is defined under Sections 41 and 42 of the Indian Penal Code."

It is ultimately held at para No.128 as follows:

> "128. To sum up, Section 4 is comprehensive and that Section 5 is not in derogation of Section 4 (2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4 (2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the Special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4 (2) itself limits the application of the provisions of the Code reading " but subject to any enactment of the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

[19] This Court in Gaddameedi Nagamani vs State of Telangana, 2015 2 ALT(Cri) 263 held as follows:

> 10.Now coming to Section 4 and 5 of Cr.P.C., Section 4 (1) deals with offences under Indian Penal Code whereas Section 4 (2) deals with other offences. Section 4 (2) reads that all offences under any other law shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions (of the Code), but subject to any enactment for the time being in force regulating the matter or place of investigating, inquiring into, trying or otherwise dealing with such offence. Section 5 speaks 'Saving' clause that nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. It is to say from the combined reading of Section 4 (ii) r/w Section 5 of Cr.P.C.

[20] Regular Criminal Courts of Magistrate got jurisdiction to try the offences as per Cr.P.C that is applicable regarding registration of crime, arrest of accused, investigation and submitting accused to judicial custody and grant of bail and the like and also taking cognizance and conducting of trial as per the procedure from nature of offence as to summary or summons or warrant (either on police report or on private complaint as per procedure). Particularly for the offences specified under Section 70 (B) (8) of the Act as per amended Act 2009, no court shall take cognizance of any offence under this

Section, except on a complaint made by an officer authorized in this behalf by the agency referred to in sub section (1).

[21] This Court also earlier considered the scope of Section 4 (2) and Section 5 of Cr.P.C in Crl.P. No.5846 of 2014 dated 06.08.2014 in Superintendet of Customs vs Kannur Abdul Kader Mohammed Haneefa.

[22] Having regard to the above, from the Information Technology Act, the jurisdiction of CAT is only a civil jurisdiction as a substitute to the Civil Court with bar of civil suit and not for criminal proceedings. The jurisdiction of the adjudicating officer even designed under Section 57 along with appellate Tribunal is not for taking cognizance and to try any of the offences under Chapter XI and part of XIII of the Act, but for to impose penalties or compensation and there is no other authority provided by virtue of specific provisions of the Act to try the penal offences or to entertain an appeal against such accused tried and convicted or acquitted among the penal provisions covered by Chapter XI and part of Chapter XIII of the Act and there is no any special procedure laid down but for to the limited area referred supra. Thus, the Cr.P.C provisions alone that apply in the area not specifically covered and as per the Cr.P.C provisions, the Magistrate Court concerned alone are as the judicial Magistrate or Metropolitan Magistrate or the Assistant Sessions Judge or Sessions Judge concerned, as per Cr.P.C to entertain and take cognizance of the offence and to entertain and take cognizance of the appeals against conviction or acquittal as the case may be and as per the procedure laid down in Cr.P.C. Thus, the appeal lies before the Sessions division covered and not before CAT and the office objection of the Court of Sessions for numbering the appeals, is untenable.

[23] Accordingly and in the result, the Criminal Petitions are allowed and the objection taken by the learned Sessions Judge since untenable the same are set aside and the learned Sessions Judge is required to number the appeals if otherwise in order and to proceed with the matters.

[24] Miscellaneous petitions, pending if any in these Criminal Petitions shall stand closed.

High Court for the State of Telangana and the state of Andhra Pradesh on role of intermediary and binding force of foreign judgements.

GOOGLE INDIA PRIVATE LIMITED

V/S

VISAKA INDUSTRIES LIMITED AND 2 OTHERS. 2017 (4) ALD 327.

HIGH COURT OF TELANGANA AND ANDHRA PRADESH (AT HYDERABAD)

GOOGLE INDIA PRIVATE LIMITED
V/S
VISAKA INDUSTRIES LIMITED AND 2 OTHERS

Date of Decision: 18 November 2016

Citation: 2016 LawSuit(Hyd) 548

Hon'ble Judges: M Satyanarayana Murthy

Eq. Citations: 2017 (1) ALT 620, 2017 (4) ALD 327

Case Type: Second Appeal

Case No: 505 of 2016

Subject: Civil, Constitution, Contract

Acts Referred:
CONSTITUTION OF INDIA ART 141
CODE OF CIVIL PROCEDURE, 1908 OR 41R 22, SEC 100, OR 41R 31
SPECIFIC RELIEF ACT, 1963 SEC 39
INFORMATION TECHNOLOGY ACT, 2000 SEC 2(1)(W), SEC 79(3), SEC 2(1), SEC 79(3)(B), SEC 79
INFORMATION TECHNOLOGY (INTERMEDIARIES GUIDELINES) RULES, 2011 R 2(I), R 3

Final Decision: Appeal allowed

Advocates: Raghunandan, N Vijay, N V Anantha Krishna

Reference Cases:
Cases Referred in (+): **23**

Judgement Text:-

M Satyanarayana Murthy, J

[1] The 2nd defendant-Google India Private Limited in O.S.No.143 of 2010 filed the present second appeal under Section 100 of C.P.C, challenging the decree and judgment passed in A.S.No.50 of 2014 by the I Additional Chief Judge, City Civil Court, Secunderabad, reversing the judgment of XVIII Junior Civil Judge-cum-Additional Rent Controller, Secunderabad in O.S.No.143 of 2010.

[2] The Appellate Court while declaring that message ID c9c2524a080731712p120a3110rc120b94a 135de0b2@mail.gmail.comURLhttp//groups.gogole.co.in/group/ banasbestosindia/msgf30988 efldfd0826d?hl-en&dmode=source dated 31.07.2008 (hereinafter referred to as Message 1) and message ID c9c2524a 0811202054t4ae0a4dudec0dec0d29fc4b0901@mail.gmail.comURL: httpgroups.google.co.in/group/banasbestos india/msg/6 cde794a4082157?h1=en&dmode=source dated 21.11.2008 (hereafter referred to as Message 2) posted by the 1st defendant on the blogsite of the defendants 2 & 3 as defamatory in nature and directed the defendants 2 & 3 to withdraw Message 1 & Message 2 posted by the 1st defendant on their blogsite, by mandatory injunction.

[3] For convenience of reference, the ranks given to the parties in O.S.No.143 of 2010 will be adopted throughout the judgment.

[4] The plaintiff M/s Visaka Industries Limited is a registered company carrying on business of asbestos cement sheets since 1981, having 7 manufacturing plants and more than 25 marketing offices all over India, filed suit claiming declaration that the Messages 1 & 2 are defamatory and also sought for mandatory injunction for removal of the Messages 1 & 2 posted by the 1st defendant in the blogsite of the defendants 2 & 3.

[5] The 1st defendant is a coordinator of Ban "Asbestos India", a group which is hosted by 2nd defendant, publishes regular articles regarding various issues. On 21.11.2008, the 1st defendant posted an article with a caption "Poisoning the system: Hindustan Times", aimed at the plaintiffs company, as if it is a single manufacturing company of Asbestos cement products. Further, the names of renowned politicians like Sri

G.Venkataswamy and Smt. Sonia Gandhi who have nothing to do with the ownership or management of the plaintiff company were mentioned in the said article. He also published an article dated 31.07.2008 with a caption "Visaka Asbestos Industries making gains". The said article contained defamatory statement against the plaintiffs company which was available for worldwide audience.

[6] The asbestos cement sheets are being manufactured in India for more than 70 years and there is no single case where the health of the people has been effected by usage of Chrysotile asbestos (white) fibre which is a raw material for manufacturing asbestos cement sheets. The Government of India has permitted manufacturing Asbestos cement sheets with Chrysotile asbestos fibre and granted environmental clearance for all manufacturing units of the plaintiff.

[7] The acts and misdeeds of the defendants in continuing the postings of the above said article in the cyber space aimed not only the company but also its employees. There are other industries like Everest group, Ramco group who are engaged in the manufacture of asbestos cement sheets, but the plaintiff company is singled out in both the above mentioned articles and those defendants are trying to bring down the image of the plaintiffs company by running Hate Campaign against them through the said articles. Even though thee is no ban on production and usage of asbestos products in 95% of the world nations including countries like USA and Canada, the contents of the above said article read that Visaka Industries Manufacturers asbestos products i.e., banned in 50 countries is a defamatory statement. The plaintiff further contended that the contents of the said article dated 30.03.2008 read that the plaintiff company belongs to Sri G. Venkataswamys family and in the article dated 21.03.2008 it was titled as poisoning the system: Hindustan Times. The article posted on 31.07.2008 under the caption it has opened asbestos cement plant in Raebareli, Uttar Pradesh (Parliamentary constituency of Smt. Sonia Gandi) to signalling patronage the asbestos industry enjoys the highest political level and leaders like Mrs. Gandhi and Venkataswamy are least concerned about the death toll due to their profit making with a malafide intention to bring down its image in India and world wide. Such statements of defendant no.1 posted in blogsite which are against the plaintiffs company interest caused annoyance and business sufferance which cannot be compensated by granting monetary compensation.

[8] The 2nd defendant who is an Internet Service Provider (ISP) has made it easier than ever before to disseminate defamatory statement to worldwide audience without taking

any care to prevent it: that the defendants in connivance with each other have intentionally disseminated the above articles in the cyber space to bring down the image of the plaintiff company to cause damage to its reputation and harm its business, which is a cyber crime.

[9] The plaintiff on noticing the defamatory articles in the blogsite of defendants 2 & 3 issued a notice dated 09.12.2008, requesting the defendants 1 & 2 to delete the articles posted by 1st defendant, while claiming compensation of Rs.20-00 crores towards damage caused to the plaintiffs company reputation, but the defendants did not respond. Therefore, criminal prosecution was launched against defendants 1 & 2 which is registered as C.C.No.679/09 on the file of XI Additional Chief Metropolitan Magistrate at Secunderabad. The defendants 2 & 3 filed a Criminal Petition No.7207 of 2009 before this Court to quash the criminal case against them.

[10] The plaintiffs company sent entire information on 13.10.2009 to the 3rd defendant and also addressed a letter dated 21.11.2009 and on receipt of the same, a reply notice dated 16.12.2009 from defendants 2 & 3 was issued, informing to obtain a direction to remove the above referred defamatory content, through their website. Since the Messages 1 & 2 in the blogsite of defendants 2 & 3 are defamatory, the plaintiff sought for the aforesaid reliefs against the defendants 1 to 3.

[11] The 1st defendant remained exparte and the 2nd defendant filed written statement refuting the contentions raised in the plaint by the plaintiff while contending that the 2nd defendant is a subsidiary of 3rd defendant i.e. Google Inc., which is a company incorporated under the laws of United States of America. It is further contended that the 2nd defendant is incorporated under the provisions of Companys Act and that the services on Google groups available on Google groups website are not controlled by 2nd defendant and that the reliefs claimed by the plaintiffs company against the 2nd defendant are misdirected and not maintainable.

[12] The 2nd defendant contended that the Google groups website is a platform enabling users to post their content online which was developed outside India and that no employee or defendant no.2 has access or ability to remove or delete the content when once it is posted on the Google Groups website. The criminal complaint filed against the 2nd defendant is unjustified as it has any connection or no control over the Google Groups website. It is further contended that the 2nd defendant does not act as a representative or agent of the 3rd defendant, particularly, for the services on Google Groups website. It is also submitted that the Criminal complaint against 2nd defendant

is unjust as it has no connection or control over the Google Groups website. The 2nd defendant is not acting as a representative or agent to 3rd defendant for the services of Google Group website. The 2nd defendant further contended that the above article in question does not amount to defamatory statement.

[13] The 3rd defendant who is a service provider did not perform the functions of publishing the alleged content and upholding any articles. Such article is completely written, selected, edited by the concerned author and therefore in the control of author and the service is nothing but an online bulletin board where users upload articles and views subject to certain guidelines which clearly advises users not to upload defamatory content.

[14] The 2nd defendant is contended that under Section 79 of Information Technology Act, 2002, an intermediary service provider is not liable for content uploaded by third parties. The allegation that the 2nd defendant did not take due care and diligence to prevent uploading of allegedly defamatory content is incorrect and the 2nd defendant does not act as a moderator for any of the groups including the specific group in question and it has no legal obligation to scrutinize, edit or monitor the material as authored by a user of the service prior to it being uploaded on the website. Therefore, the 2nd respondent being an intermediary has no liability and not responsible for posting of such statements in the site and prayed for dismissal of the suit.

[15] The 3rd defendant filed separate written statement contending that they provided the service for sharing information and knowledge without exercise of any editorial control or monitoring by 3rd defendant. Considering the letter of the plaintiff, it was informed through their letter dated 16.12.2009 their policy for removal of allegedly defamatory content from the Google Groups website through an order from Court of competent jurisdiction identifying certain content to be prima facie defamatory and that the persons who have uploaded blogs and content in the Google groups website or the service provider at no point of time assume responsibility of such content.

[16] As per Section 79 of Information Technology Act, 2000, as amended, an intermediary service provider is not liable for content uploaded by third parties. In the present case, the plaintiff at best is entitled to claim relief against the 1st defendant, who is the author of the alleged defamatory article. The 3rd defendant, as a service provider has no connection with the disputes of 1st defendant and plaintiff and it does not have any malafide intention. The 3rd defendant denied the other allegations against it and specifically contended that the 3rd defendant did not indulge in any cyber defamation

and prayed for dismissal of the suit.

[17] Basing on the above pleadings, the followings six issues were framed by the Trial Court.

(1) Whether this Court has got jurisdiction to try the present suit filed by the plaintiff?

(2) Whether the suit filed by the plaintiff discloses any cause of action against defendants 2 and 3?

(3) Whether an intermediary service provider is liable for contents uploaded on the website by the 3rd parties?

(4) Whether the messages dated 31.7.08 and 21.11.08, alleged to have been published by the Ist defendant and hosted by 2nd and 3rd defendants are defamatory in nature?

(5) Whether the plaintiff is entitled for mandatory injunction against the defendants?

(6) To what relief?

[18] During Trial, on behalf of the plaintiffs P.Ws 1 to 3 were examined and marked Exs.A-1 to A-22. On behalf of the defendants D.Ws.1 & 2 were examined and marked Exs.B-1 to B-4, besides Exs.C-1 & C-2.

[19] Upon hearing argument of both the counsel and considering oral and documentary evidence on record, the Trial Court dismissed the suit holding all the issues against the plaintiff and in favour of the defendants.

[20] Aggrieved by the decree and judgement passed by the Trial Court, the plaintiff filed an appeal in A.S.No.50 of 2014 on the file of the I Additional Chief Judge, City Civil Court, Secunderabad. Upon hearing argument of both the counsel, the First Appellate Court while concurring with the finding recorded by trial Court on Issue No.3 in

paragraphs 21(b) & 23, held the 2nd defendant (appellant) liable to remove the alleged cyber defamatory statements, granting relief against both, while holding that the intermediary (appellant) not liable for posting such defamatory statements.

[21] Assailing the decree passed by the first Appellate Court against the defendants 2 & 3, the 2nd defendant alone filed the appeal raising several contentions, mainly contending that the findings of the First Appellate Court in paragraph 23 of the judgment is contrary to the finding in paragraph 21(b) and that when the 2nd defendant-appellant herein being an intermediary is not liable for any such postings and upholded the findings recorded by the Trial Court on Issue No.3 that it ought not to have granted relief against 2nd defendant-appellant. Therefore, the judgment of the First Appellate Court is erroneous.

[22] It is further contended that the First Appellate Court did not assign any reason to come to a conclusion that how the postings in the blogsite of 3rd defendant are defamatory and issuing a direction for removal of the content in the postings against the 3rd defendant along with 2nd defendant is nothing but fastening liability on 2nd defendant and it is contrary to the findings recorded in paragraph 21(b). Therefore, the judgment of the First Appellate Court is erroneous and self contradictory.

[23] During hearing, the learned Senior Counsel Sri Raghunandan appearing on behalf of Sri N. Vijay, Advocate on Record, drawn attention of this Court to various paragraphs in the judgment of First Appellate Court, more particularly 7(b), 21(b) & 23 which are self contradictory. That apart, the original Court refused to rely on the judgments of Foreign Courts on the ground that they are not binding on Courts in India, but the First Appellate Court, based on "Shreya Singhal v. Union of India, 2015 5 SCC 1" concluded that the foreign judgments can be considered and the Supreme Court has responded positively (vide paragraph 22 of the judgment).

[24] In the absence of any judgment from our Indian Courts, the judgements of foreign Courts are having highest persuasive value though not binding precedent, as those judgments are not the law declared by the Apex Court under Article 142 of Constitution of India. Therefore, the Trial Court and the Appellate Court would have accepted the highest persuasive value of the judgments of foreign Courts, but ignored totally. It is also drawn attention of this Court to Section 79 (3) of Information Technology Act, 2000, which is amended by Act.10/2009 with effect from 27.10.2009 to claim immunity from liability, since 2nd defendant is only an intermediary having no control over the contents of the postings and the definition of the term intermediary under The Information

Technology Act, 2000, and placed reliance on the judgments in "Vodafone International Holdings B.V. v. Union of India and another, 2012 6 SCC 613"; "ISI SRA v Google Italy Srl, Google Infrastructure Srl, Yahoo! Italia Srl. - Court of Milan - translated version", "A v Google New Zealand Ltd.,2012 NZHC 2352"; "Duffy v Google Inc. & anr,2011 SADC 178" Crop Care Federation of India v. Rajasthan Patrika (Pvt.) Ltd. And Ors., LAWS (DLH) 2009 11 369 and "R.Rajagopal @ R.R. Gopal @ Nakkheeran Gopal and another v. J.Jayalalitha and another, 2006 AIR(Mad) 312" on the strength of those judgments and principles laid down in those judgments, learned counsel for the appellant (D-3) would contend that 2nd defendant being an intermediary has no liability, since it has no control over the postings in the blogsite and the 2nd defendant proved exercise of due diligence.

[25] Per contra, Sri N.V. Anantha Krishna, learned counsel for the plaintiff supported the judgment of the First Appellate Court in all respects, while contending that the 2nd defendant is only an agent of 3rd defendant in India and therefore, all the defendants are liable for the reliefs claimed in the suit and contents of those statements on the blogsite of the 3rd defendant is totally defamatory in nature and issuing direction declaring that the contents of Messages 1 & 2 referred above are defamatory in nature which effects the business of the plaintiff company worldwide and adversely affects its business and its employees. In such circumstances, the findings of the Trial Court that contents of those Messages 1 & 2 referredas defamatory cannot be interfered with in the present second appeal, as its jurisdiction is confined to substantial question of law under Section 100 of C.P.C.

[26] Learned counsel further contended that, though relief of mandatory injunction under Section 39 of Specific Relief Act is the harshest remedy, issuing such direction to the defendants including defendants 2 & 3 for removal of Messages 1 & 2 on the blogsite on the defendants 2 & 3 by 1st defendant is justifiable for the reason that the contents of those postings 1 & 2 would adversely effect the business of the plaintiff and it would create fear complexion in the minds of general public in the commercial world and issuing such direction by way of mandatory injunction is justifiable in those circumstances and prayed for dismissal of the appeal, confirming the decree and judgment passed by the First Appellate Court.

[27] Considering the contentions of both the counsel and findings recorded by the First Appellate Court, the substantial questions of law that arise for determination by this Court are as follows:

(1) Whether the judgment of the first appellate court is in consonance with Order XLI Rule 31 of C.P.C.?

(2) Whether the 2nd defendant is an intermediary within the definition of intermediary under Guideline No.2(i) read with subsection (1) of Section 2 of Information Technology Act, 2000 (and Information Technology Rules, 2011). If so, whether the 2nd defendant (appellant) is having any control over the postings by Google Groups. If so, liable for the acts of the Google Groups for removing the contents of Messages 1 & 2.

SUBSTANTIAL QUESTION NO.1:

[28] The first and foremost contention raised by the counsel for the appellant defendant No.2 is that the findings of the appellate Court are self contradictory and those findings cannot be sustained in view of mandatory procedure prescribed under Order XLI Rule 31 of C.P.C. He has drawn the attention of this Court to certain findings recorded by the first appellate Court and the trial Court.

[29] The trial Court framed as many as 6 issues and one of the issues framed by the trial Court is with regard to liability of intermediaries i.e. issue No.3, which is extracted hereunder:

"Whether an intermediary service provider is liable for contents uploaded on the website by the 3rd parties?"

[30] This issue was answered in negative, recording a specific finding in paragraph No.54 by the trial Court and held the issue against the plaintiff before the trial Court.

[31] Aggrieved by the finding on issue No.3 and other issues, an appeal was preferred before the Additional Chief Judge, City Civil Court, Secunderabad. The first appellate Court framed a point for determination in most casual manner without adhering to the mandatory procedure prescribed under Order XLI Rule 31 of C.P.C. and grounds urged before the Court. The point for consideration framed by the first appellate Court is as follows:

> "Whether the appellant has established substantial ground to set aside the judgment and decree of the trial Court and to decree the suit as prayed for or not?"

[32] While deciding the point for determination in paragraph No.21 (b), the first appellate Court recorded a specific finding with regard to liability of intermediary i.e. the appellant herein and it is extracted hereunder for better appreciation.

> "In the light of the above observations, the finding on issue No.3 is not liable to be set aside to the effect that defendant No.3 being an intermediary service provider is not liable for the contents posts on the website by third parties i.e. defendant No.1"

> The first appellate Court in the said paragraph instead of holding that the defendant No.2 is an intermediary held that the defendant No.3 is an intermediary, which appears to be a typographical mistake since the defendant No.3 is an internet service provider.

[33] In paragraph No.23, while allowing the appeal held as follows:

> "The suit is liable to be decreed as the messages referred above would amount to defamatory in nature and defendant Nos.2 and 3 were directed to withdraw the messages posted by the 1st defendant on their blogs by way of mandatory injunction."

[34] When the Court found that the appellant/defendant No.2 is not liable for the contents posted in the website of the defendant No.3, which is having total control over the postings in their blog and the appellant defendant No.2 is only an intermediary, who is making arrangements for advertisements etc. from India. Therefore, the first appellate Court having affirmed the findings recorded by the trial Court on issue No.3 and recorded a finding in paragraph No.21 (b) holding that the defendant No.2/appellant is not liable for the contents uploaded by the third parties, ought not to have issued a direction by way of mandatory injunction to withdraw the defamatory statements made by defendant No.1 in the website of the defendant No.3.

[35] The trial Court and the first appellate Court having adverted to Section 79 (3) (b) of

the Information Technology Act, 2000 did not consider the requirement under Section 79 (3) (b) failed to record a specific finding as to whether the defendant No.2 exercised due diligence as amended by Act 10 of 2009 with effect from 27.10.2009.

[36] Strangely, the plaintiff did not file any appeal against the decree and judgment of the first appellate Court challenging the specific finding recorded on issue No.3 by the trial Court and affirmed by the first appellate Court in paragraph No.21 (b) of the judgment and the plaintiff not filed any cross objections and not advanced any argument on the said issue during hearing of the appeal. Therefore, the findings on issue No.3 recorded by the trial Court and affirmed by the first appellate Court in paragraph No.21 (b) of the judgment cannot be disturbed by this Court in the absence of any appeal or cross objections filed by the plaintiff while considering the second appeal under Section 100 of C.P.C. Hence, recording a finding regarding exercise of due diligence or actual knowledge both by the trial Court and first appellate Court while deciding the issue No.3 by the trial Court and affirmed by the first appellate Court in paragraph No.21 (b) is insignificant.

[37] The first appellate Court is required to frame appropriate points determination and required to answer each and every point independently as mandated by the Order XLI Rule 31 of C.P.C. On the contrary the first appellate Court framed a point for determination in a most nonchalant manner without adverting to any of the contentions raised in the grounds of appeal before it and points raised during hearing strictly adhering to Order XLI Rule (1) of C.P.C. but on this ground the judgment of trial Court and finding recorded by the first appellate Court regarding liability of intermediary in paragraph No.21 (b) cannot be disturbed since it was not challenged by the plaintiff before this Court either by filing cross objections or by separate appeal or at least during hearing before this Court. Therefore, finding recorded by the first appellate Court in paragraph No.21 (b) and direction issued in paragraph No.23 are self contradictory and the first appellate Court is not expected to issue such direction against the defendant No.2/appellant having found that the defendant No.2 is not liable for the contents posted or uploaded in the website of the defendant No.3. Therefore, the direction of the first appellate Court in paragraph No.23 directing the defendant No.2 along with defendant No.3 to withdraw the messages posted by the 1st defendant on their blogs is liable to be set aside. Therefore, mandatory injunction issued by the first appellate Court against the defendant Nos.2 directing to withdraw the defamatory statements posted by the 1st defendant is erroneous and liable to be set aside. Accordingly set aside by answering the substantial question of law in favour of the appellant/defendant No.2 and against the

plaintiff/respondent.

SUBSTANTIAL QUESTION NO.2:

[38] One of the contentions raised before the trial Court and the first appellate Court is that the defendant No.2/appellant is only an intermediary, whose liability is subject to proof of due diligence or actual knowledge by the defendant No.2 as contemplated under Section 79 (3) of the Information Technology Act, 2000 while drawing the attention of trial Court and the first appellate Court to various judgments of foreign courts with regard to similar issue. The trial Court while observing that the judgments of the foreign courts are not binding precedents and they need not be followed, thereby failed to place reliance on the judgments of foreign courts as observed in paragraph No.54 of the judgment of the trial Court. Whereas the first appellate Court while adverting to various judgments of foreign courts relied on by the counsel for the defendant No.2/appellant herein before it; in paragraph No.22 observed that regarding applicability of foreign law was considered in Shreya Singhal v. Union of India, (referred supra) but did not record any finding based on the principles laid down by various foreign courts.

[39] Sri Raghunandan, learned Senior Counsel for the defendant No.2/appellant again placed reliance on the same judgments, which he relied before the first appellate Court and trial Court, whereas Sri N.V.Anantha Krishna, learned counsel for the plaintiff/1st respondent before this Court while accepting the observations made in paragraph No.22 contended that it is not the law laid down by the Apex Court to fall within the ambit of Article 141 Constitution of India and thereby they are not binding precedents.

[40] According to Article 141 of the Constitution of India, the law declared by the Supreme Court of India is binding on all the courts in India since the Supreme Court is the highest Court of record in the country and final Court of appeal. Thus, by virtue of Article 141 of Constitution of India what the Supreme Court lays down is the law of the land and its decisions are binding precedents on all the Courts till they are overruled by larger bench. Therefore, Article 141 of Constitution of India does not include the law declared by the Foreign Courts and thereby there is any amount of justification in the observations made by the trial Court in paragraph No.54 of the Judgment, but the first appellate Court basing on the judgment of the Apex Court rendered in Shreya Singhal v. Union of India (referred supra) concluded that the Apex Court responded positively but did not decide the applicability of the foreign judgments to the Courts in India.

[41] In "Chatturbhuj Vithaldas Jasani v. Moreshwar Parshram, 1954 AIR(SC) 236" the Apex Court held that the authority of English Cases and their dicta do not bind the Supreme Court.

[42] The Court can resort to the position in law as it obtained in England or in other countries if there is any patent or latent ambiguity and the courts are required to find out what was the true intendment of the legislature as held in "STO v. Kanhaiya Lal Makund Lal Saraf, 1959 AIR(SC) 135"

[43] The Supreme Court held that the Indian Courts have to build their own jurisprudence and cannot surrender Judgment and accept as valid in India whatever has been decided in England and that the foreign decisions are not helpful in interpreting post- independence enactments in "National Textile Workers Union v. P.R.Ramakrishnan, 1983 1 SCC 228" and "Aruna Basu Mullick v. Dorothea Mitra, 1983 3 SCC 522".

[44] The Apex Court also observed that there is a large body of company jurisprudence which is common to all the Commonwealth countries. Hence, a foreign decision is either worthy of acceptance or not depending upon the reasons contained in it and not on its origin or age. Unless a well reasoned foreign decision, is opposed to our ethics or otherwise unsuited to Indian conditions, should be followed. Where provisions are in pari materia between the English Act and the Indian Act and the conditions in both the countries do not materially differ. Indian Courts can profitably take the help of the decisions of the foreign courts. But Indian Courts cannot bodily import English decisions in our system to develop a hybrid legal system as held in "Cotton Corpn. India Ltd. v. United Industrial Bank Ltd., 1983 4 SCC 625"

[45] In "Forasol v. ONGC, 1984 Supp1 SCC 263" the Apex Court observed that the English decisions are of high persuasive value and our Courts should be cautious enough whether the rule laid down can be applied by them in the context of our laws and legal procedure and the practical realities of litigation in our country. Where law is laid down by Supreme Court and reiterated in numerous subsequent judgments, a wider proposition of law laid down in foreign judgment is not acceptable in view of the judgment rendered in "BSES Ltd. v. Fenner India Ltd., 2006 2 SCC 728"

[46] Thus, the judgments of foreign courts though not fall within the ambit of Article 141 of Constitution of India, the Courts in India can draw the principle laid down in those

judgments subject to similarity in the provisions of the Act i.e. if the provisions of a particular enactment in India and Foreign Countries are in Pari materia, however no precedent value can be attached to such judgments though they have higher persuasive value. In Shreya Singhal v. Union of India, (referred supra) the Apex Court drawn the principles to decide the issue relating to similar case with reference to Section 79 (3) of the Act mostly relied on the judgments of Foreign Courts, but the Supreme Court did not conclude that those judgments are binding on the courts in India. Therefore, the trial Court rightly observed that the law declared by the Foreign Courts is not binding precedent on the Indian Courts within Article 141 of Constitution of India since the law declared by the Apex Court is binding on all the Courts in India. Therefore, the judgment of Apex Court in Shreya Singhal v. Union of India, (referred supra) is a binding precedent on all the Courts in India including this Court being the Highest Court as a Court of record. Thus, this Court is bound to follow the law declared by the Apex Court in Shreya Singhal v. Union of India, (referred supra) and other judgments of Apex Court.

[47] The main contention of the appellant/defendant No.2 before this Court is that the appellant/defendant No.2 has no control over the postings and he is only an intermediary engaged for the purpose of advertisements etc. and drawn the attention of this Court to Google Groups Content Policy, which is marked as Ex.B.4, clause 3 of Ex.B.4 reads as under:

> "3. Hate Speech: If we learn of hate speech content, we may remove the reported content. By this, we mean, content that promotes hate or violence towards groups based on race, ethnicity, religion, disability, gender, age, veteran status, or sexual orientation/gender identity. For example, this would include content saying that members of a particular race are criminals or advocating violence against followers of a particular religion."

[48] Google Groups: Terms of Service, marked as Ex.B.3. Clause 5 of Ex.B.3 deals with responsibility of the person, who posted the content and it reads as follows:

> "5. Content:
>
> Your Responsibilities. You understand that all data, text, information, links and other content (collectively, Content), whether posted in public or restricted groups, is the sole responsibility of the person from which such Content originated. This means that you, and not Google, are entirely

responsible for all Content that you publish, post, upload, distribute, disseminate or otherwise transmit (collectively, Post) via the Service. You understand that by using the Service, you may be exposed to Content that is offensive, indecent or objectionable. Under no circumstances will Google be liable in any way for any Content, including, but not limited to, for any errors or omissions in any Content, or for any loss or damage of any kind incurred as a result of the use of any Content Posted via the Service. You agree that you must evaluate, and bear all risks associated with, the use of any Content, including any reliance on the accuracy, completeness, or usefulness of such Content. You understand that the technical processing and transmission of the Service, including Content, may involve (a) transmissions over various networks; and (b) changes to conform and adapt to technical requirements of connecting networks or devices.

Group Owners Rights and Responsibilities. Group Owners have additional capabilities and responsibilities in regard to the members and Content of a Group. The Owner of a Group decides whether a Group is restricted to certain members or accessible to the public generally, and the Owner may change the access to the Group at any time. In restricted Groups, the Owner decides who may be a member of the Group and can access and change the membership list in his or her sole discretion. A Group Owner may, at any time, transfer his or her ownership of a group to another Google Groups user. In regard to Content, a Group Owner shall be responsible for the maintenance and monitoring of the Content in the Group, including deleting any Group, Content or archived Content at any time and in his or her discretion.

Group Owners Must Mark Sexually Explicit Content. If you create a Group containing sexually explicit Content that is not suitable for minors, you agree to mark the Group as such. If your Group contains Content that is sexually explicit and you do not mark the Group appropriately, Google shall have the right to delete your Group, including all messages Posted to that Group.

Googles Rights. You acknowledge that Google does not pre-screen, control, edit or endorse Content made available through the Service and has no

> obligation to monitor the Content Posted via the Service. If Google discovers Content that does not appear to conform to the Terms of Service, Google may investigate and determine in good faith and in its sole discretion whether to remove the Content. Google will have no liability or responsibility for performance or non-performance of such activities. You acknowledge that certain Groups available through the Service are available only through the Service and others are available both through the Service and other sources, such as Usenet, over which Google has absolutely no control.
>
> Content Removal and Archiving. If you are not the Owner of a Group, you may request removal of a message that you have Posted yourself or (2) prevent archival of your message (For more information about preventing archival, please see our FAQ). You agree to resolve directly and exclusively with third parties any disputes you may have about messages that they posted or you may contact the Group Owner to request a removal. In this regard, you understand that Google does not monitor or control the content of information Posted by others, and instead simply provides a service by allowing users to access information that has been made available.

[49] According to clause 6 of Ex.B.3 the person, who posted such material in the blogsite alone is responsible for such violation. Defendant No.3 fixed responsibility on the person who posted those items, disowning its responsibility to any such postings.

[50] Defendant No.3 is a foreign company and governed by the laws of the said Country where it is incorporated and registered as a company. Even according to Clause 5 of Ex.B.3 Google Groups Terms of Service referred supra, the company is not responsible for any such postings and unless a person, who is claiming that the contents of such statement are defamatory and approached the Court, obtained order of injunction for removal of such content, defendant No.3 company has no obligation to remove such content that it is defamatory and cause damages substantially to the reputation of an person. In such a case, it is difficult for everyone to approach the Court to get order immediately and by the time they got order from the Court his/her reputation will be denounced in the public, which would cause incalculable loss and damage to the reputation. In such case, necessary steps have to be taken to make the service providers responsible when they are operating in our country. But the law does not permit to attach any such responsibility for posting of such defamatory statement in view

of the law declared by this Court.

[51] Shreya Singhal v. Union of India (referred supra) the Apex Court adverting to Section 79 (3) (b) as amended by the Act concluded that in paragraph No.122 observed as follows:

> "Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b)."

[52] In view observations recorded by the Apex Court in Shreya Singhal v. Union of India (referred supra) it is difficult to any intermediary to keep watch on millions of postings and requests by the users of internet, but when it is brought to the notice of the intermediary, the intermediary is under obligation to remove such objectionable content, here the case of the appellant/defendant No.2 is that the appellant/defendant No.2 has no control over the website and only the defendant No.3 is competent to remove such objectionable content posted in the website of the defendant No.3, but that cannot be accepted in view of the observations and law declared in paragraph No.122 of the judgment of the Apex Court in Shreya Singhal v. Union of India (referred supra).

[53] Before going further to decide whether the appellant/defendant No.2 is intermediary or not, it is appropriate to advert to the definition of the intermediary. The word intermediary is defined in the Information Technology (Intermediaries Guidelines) Rules, 2011. Rule 2 (i) defined intermediary as intermediary as defined in clause (w) of sub-section (1) of Section 2 of the Act.

[54] Clause (w) of sub-section (1) of Section 2 of the Act defined the word intermediary as follows:

> ""Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web- hosting service providers, search engines, online payment sites, online- auction sites, online- market places and cyber cafes."

[55] The appellant/defendant No.2 would come within the definition of intermediary being a web-hosting service provider though the overall control was only with the defendant No.3.

[56] Intermediary cannot be equated with an agent under the Indian Contract Act since there is specific definition in the Information Technology Act for the word intermediary. Intermediaries are third party organizations that offer intermediation services between the parties trading amongst themselves. Such organizations act as ducts for services offered by a supplier to the relevant consumer. Value addition to the service in question is a key aspect of the trading platform offered by such intermediaries, which is highly improbable if the trading is done directly. Provision of a trading platform for any kind of electronic commerce is the key link of the existence of an intermediary. Even to such intermediary service, certain safeguards have to be provided by the main service provider.

[57] As per Ex.B.4, the person, who accessing or posting any information in the website are bound by the general terms and conditions of the Google Groups Content Policy. In such case, intermediary is not liable for such postings in the web blog by the general public since the intermediary is only offers intermediary service between the parties subject to proof of requirement under Section 79 of the Information Technology Act.

[58] The liability of intermediary came up for consideration in various judgments including the judgment in Bazee.com case in India for the first time before the Delhi High Court. Under the Information Technology Act, 2000, no categorization of OSP/ISP/NSP has been attempted despite the view that liability has been imposed having regard to the functions performed by the service provider in order to give a meaningful disposition to infringement cases.

[59] To decide the liability of intermediary in India, Section 79 of Information Technology Act is relevant, which reads as follows:

> 79. Exemption from liability of intermediary in certain cases.--
>
> (1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of Sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
>
> (2) The provisions of Sub-section (1) shall apply if--
>
> (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
>
> (b) the intermediary does not--
>
> (i) initiate the transmission,
>
> (ii) select the receiver of the transmission, and
>
> (iii) select or modify the information contained in the transmission;
>
> (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
>
> (3) The provisions of Sub-section (1) shall not apply if--
>
> (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

> (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.
>
> Explanation.--For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary."

[60] A bare look at Section 79 after introduction of Section 3 (b), it is clear that the provisions of sub-section (1) shall not apply if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

[61] In the present facts of the case, it is not the case of the respondent No.1/plaintiff, that intermediary appellant/defendant No.2 has received actual knowledge about posting of defamatory statement by the defendant No.1 in the web blog of defendant No.3.

[62] In Shreya Singhal v. Union of India, (referred supra) the Apex Court applied Rule 3 of the Rules framed thereunder, which reads as follows:

> "Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and Regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rule 3(2) and 3(4) are important, they are set out hereinbelow:

3. Due diligence to be observed by intermediary.--The intermediary shall observe following due diligence while discharging his duties, namely:

(2) Such rules and Regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that--

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India,

friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in Sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of Sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes.

Learned counsel for the plaintiff assailed Rules 3 (2) and 3 (4) on two basis grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet."

[63] Therefore, to avoid liability by the intermediaries, he has to exercise due diligence as contemplated under Rule 3.

[64] But due diligence is not exactly defined by the Act, but in "Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd, 2006 6 BCR 510"

"The Dictionary meaning of the expression "due diligence" as given in the Blacks Law Dictionary, Sixth Edition, 1990 means "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Similarly the Law Lexicon by P. Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause

> shown as to why in spite of due diligence a party could not have raised the matter before commencement of trial, the Court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other."

[65] In "Chander Kanta Bansal v. Rajinder Singh Anand, 2008 5 SCC 117" the Apex Court while deciding a matter pertaining to amendment of pleadings under Order VI Rule 17 of C.P.C. discussed about the word due diligence in paragraph No.16 as follows:

> "The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

[66] In view of the definition of due diligence referredin the judgment of Bombay High Court and Apex Court, to avoid its liability by the intermediary, the intermediary has to prove that he has acted as an ordinary reasonable prudent man and it is a question of fact.

[67] In the pleadings before the trial Court, there is no allegation that the appellant/defendant No.2 negligently allowed postings in the web-blog and such posting of content is in actual knowledge, in the absence of any such pleading to claim exemption under Section 79 (3) of the Act, the appellant/defendant No.2 is not expected to adduce any evidence to disown its liability under the penumbra of Section 79 (3) of

I.T. Act. However, it is a question of fact and when the trial Court and the first appellate Court held that the appellant/defendant No.2 is not liable while answering issue No.3 by the trial Court and point for consideration by the first appellate Court in paragraph No.21 (b), this Court while exercising jurisdiction under Section 100 of C.P.C. cannot disturb such findings in view of lack of evidence regarding exercise of due diligence by the appellant/defendant No.2 and actual knowledge as required under Section 79 (3) of the Information Technology Act and Rule 3 of the Rules.

[68] On this ground, no liability can be attached to the appellant/defendant No.2 for the defamatory content posted by the plaintiff/defendant No.1 in the web-blog of defendant No.3.

[69] In view of the law declared by the Apex Court in Shreya Singhal v. Union of India, (referred supra), it is for the intermediary to prove that it had exercised due diligence in allowing posting of any content on the web-blog of the defendant No.3. Here, the Gate keeping theory is applicable to the Internet, it has already been discussed in detail by more than one scholar Jonathan Zittrain, in his book History of Online Gate keeping and Harvard Journal of Law and Technology 2 (2006), where authors described the intermediaries as Gatekeepers and concluded that making gatekeepers liable for enforcing law is a common choice within legal frameworks. It has been explored in some detail by Reinier Kraakman, who distinguishes it from other kinds of collateral or third party liability by explaining that gatekeepers are private parties who are in a position to disrupt misconduct by withholding their cooperation from wrongdoers in his book the Anatomy of a Third-Party Enforcement Strategy.

[70] But the theory of gatekeeper attached more responsibility to the intermediary and it is only an effort to control online content by leveraging the position of the gatekeepers to flow of information online. The reasoning here is that since online intermediaries such as "Avnish Bajaj v. State, 2005 3 CompLJ 364 Del." (referred to as the Bazee.com case) (or Facebook, Gmail, Google or The Pirate Bay) host and facilitate access to vast amounts of Internet content, and since internet service providers such as Airtel or BSNL physically connect users to the Internet, they are the gatekeepers presiding over the flow of information. Therefore, making these gatekeepers liable for blocking, filtering and removing illegal content, is seen as an effective way to put a stop to the sharing of illegal content. This is particularly appealing in contexts in which the author of illegal content is difficult to identify, or is based in another country, and cannot be located, much less prosecuted, in India. In these contexts, it is very difficult for the government to

raise the expected penalties applicable to the wrongdoers. Therefore, direct deterrence becomes ineffective, creating the need to explore third party liability.

[71] Coming to India in Baazee.coms case the High Court of Delhi had an occasion to deal with a similar situation with reference to provisions of the Act and later it was dealt at length with reference to foreign judgments in Shreya Singhal v. Union of India, (referred supra) elaborately and pointed out that it is difficult to attach liability to the intermediaries and propounded the theory of due diligence based on Section 79 (3) of the Act and the law declared by the Apex Court in Shreya Singhal v. Union of India, (referred supra) is binding on the courts in India.

[72] Various theories of liability like strict liability standard cannot be applied to the provisions of Information Technology Act.

[73] As observed in the earlier paragraphs, the judgments of Foreign Courts are not binding precedents under Article 141 of Constitution of India. But the law in India on the intermediaries liability is not yet developed except for the first time in Shreya Singhal v. Union of India, (referred supra) by the Apex Court. One of the reasons for non-adverting to the liability declared by the Foreign Courts by the trial Court is that the judgments of Foreign Courts are not binding precedents, but in Shreya Singhal v. Union of India, (referred supra) the Apex Court formulated its principles based on the principles laid down in the foreign judgments. However, the judgments of Foreign Courts have highest persuasive value though not binding precedents as held in Forasol v. ONGC (referred supra). Therefore, the law declared by the Foreign Courts can be looked into but lay down the law with the assistance of those Judgments.

[74] Learned counsel for the appellant defendant No.2 drawn the attention of this Court to a judgment of the Apex Court rendered in Vodafone International Holdings BV v. Union of India and another (referred supra), wherein the conflict is with regard to liability of the directors of the company was decided but it is of no help to the present issue involved.

[75] Learned counsel for the appellant also drawn the attention of this Court to a judgment of Court of Milan, Division Specialising in the Field of Industrial and Intellectual Property, rendered in ISI SRL v Google Italy Srl, Google Infrastructure Srl, Yahoo! Italia Srl., (G.R.No.61372/2011) wherein it is held in paragraph No.2 as follows:

"In relation to the position of Google Italy and Google Infrastructure, the

> objection raised concerning the Defendants lacking the capacity to be sued, appears to be founded. The records of proceedings show that the Google Groups services are managed directly and exclusively by Google Inc., a company governed by US Laws, which is separated and independent from the defendants. This is confirmed by the contractual terms, which can easily be consulted by accessing the Terms of Service link present in every page of the service in question. Moreover, the interlocution at the out-of-Court stage (see doc.15 of the plaintiff), was unable to raise doubts on the point, so much so that Google responses expressly invoked current U.S.law. Furthermore, there are no subscriptions or other indications of origin from the answer that can itself be traced back in any way to one of the two defendant parties listed.
>
> Regarding the issue and solely with reference to the residual position of Yahoo, the claim is not founded and as such it must be denied."

[76] Learned counsel for the appellant further drawn the attention of this Court to another judgment of High Court of Newzealand in A v. Google Newzealand Ltd. (referred supra), wherein the question came up before the said Court is that the responsibility of a search engine service provider for the content of information on third party websites accessed from search results and after analyzing provisions of Newzealand enactments it is held that the plaintiffs causes of action cannot succeed against the defendant. Accordingly, the plaintiffs application is dismissed, and summary judgment is awarded to the defendant against the plaintiff.

[77] Learned counsel for the appellant drawn the attention of this Court to another judgment rendered by the District Court of South Australia in Duffy v. Google Inc. and another (referred supra). It is only District Court judgment in Australia, which I need not advert to the principle laid down therein.

[78] Time and again similar issues came up before Foreign Courts.

[79] In "Playboy Enterprises INC v Frena, 839 F Supp 1552 (M D Fla 1993)" it is held as follows:

> "This was one of the initial cases wherever liability of ISPs for the copyright infringement of subscribers was examined.The defendant, George Frena,

operated a Bulletin Board Service (BBS) for those who purchased bound product from the suspect and anyone who paid a fee might log on and browse through totally different BBS directories to look at the pictures and they might conjointly transfer copies of the photographs. Among several images that the defendant created offered to his customers, one hundred and seventy were unauthorized proprietary photographs that belonged to the litigant. The Court noted that the intent of the BBS operator was irrelevant and applied strict liability principle of the Copyright Act. The BBS operator was liable for direct infringement as a result of the defendants system itself equipped unauthorized copies of proprietary work and created them offered to the public. It was irrelevant that the suspect did not create infringing copies itself. However, with time the Courts ruling was widely debated and discredited."

[80] In "Religious Technology Center v. Netcom, 907 F.Supp. 1361 (N. D. Cal. 1995)" it is held as follows:

"Few years later, came the Netcom case. The plaintiffs, Religious Technology Center (RTC) control copyrights in the unpublished and revealed works of L Ron Hubbard, the founder of the Church of Scientology. The suspect, Erlich was a former minister of religion who had later on become a vocal critic of the Church. On associate on-line forum for discussion and criticism of religion, Erlich announce portions of the works of L Ron Hubbard. Erlich gained his access to the web through BBS that was not directly joined to web, however was connected through Netcom On-Line Communications INC. After failing to win over Erlich to stop his postings, RTC contacted BBS and Netcom. The owner of BBS demanded the litigant to prove that they owned the copyrights of the works announce by Erlich therefore that he would be unbroken off the BBS. The plaintiffs refused BBS owners request as unreasonable. Netcom similarly refused plaintiffs request that Erlich not be allowed to gain access to web through its system. Netcom contended that it would be not possible to prescreen Erlichs postings and that to forestall Erlich from victimization the web meant doing the same to hundreds of users of BBS. Consequently, plaintiffs sued BBS and Netcom in their suit against Erlich for copyright infringement on the web. The Court reasoned that eventhough copyright is a strict liability statute, there ought to be some part

of volition or causing that is lacking wherever a defendants system is simply used to produce a copy by third party. The Court additional noted that, when the subscriber is directly liable it is senseless to hold different parties (whose involvement is simply providing Internet facilities) liable for actions of the subscriber. The Court conjointly noted that the notice of infringing activity of service supplier can implicate him for contributory negligence as failure to forestall associate infringing copy from being distributed would constitute substantial participation.

Substantial participation is wherever the suspect has data of primary infringers infringing activities and induces, causes or materially contributes to the infringing conduct of primary infringer. The Court rejected the argument of the suspect that associate ISP is similar to a common carrier and so entitled to exemption from strict liability written in Section III of the Copyright Act and declared that carriers are not sure to carry all the traffic that passes through them. Nevertheless, the Court did not impose direct infringement liability on ISP as that would result in liability for every single server transmitting information to each different laptop."

[81] In "Viacom International, INC. v. Youtube, INC, 676 F.3d 19" the Court of Appeals for the Second Circuit discussed about safe harbor to an intermediary and held that in construing the statutory safe harbor, the District Court concluded that the actual knowledge or aware(ness) of facts or circumstances that would disqualify online service provider from safe harbor protection under US laws. The Court further held that item-specific knowledge of infringing activity is required for a service provider to have the right and ability control.

[82] It is further held that the basic function of the YouTube website permits users to "upload" and view video clips free of charge. Before uploading a video to YouTube, a user must register and create an account with the website. The registration process requires the user to accept YouTube's Terms of Use agreement, which provides, inter alia, that the user "will not submit material that is copyrighted ... unless [he is] the owner of such rights or ha[s] permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein." When the registration process is complete, the user can sign in to his account, select a video to upload from the user's personal computer, mobile phone, or other device and instruct the YouTube system to

upload the video by clicking on a virtual upload "button." The same is the procedure in Google Website. Thus, if the actual knowledge to the intermediary is proved, then intermediary cannot escape its liability.

[83] In "Barnhart v. Sigmon Coal Co.,2002 534 US 438" certain guidelines were framed to claim benefit under safe harbor, which are as follows:

> (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
>
> (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
>
> (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.

[84] If these principles are applied, intermediary cannot be made liable.

[85] In "Godfrey v. Demon Internet Ltd., 1999 4 AllER 342" the responsibility of intermediary for publication of defamatory statement came up for consideration, while considering the scope of intermediary liability expressed its view that as a service provider who transmitted or facilitated the transmission to any of their news group subscribers of a posting received and stored by them via the Internet the defendants were a publisher of that posting at common law; that they were not merely the passive owner of an electronic device through which postings were transmitted but actively chose to receive and store the news group exchanges containing the posting which could be accessed by their subscribers, and could have chosen to obliterate the posting complained of, as they later did; that, although they were not a publisher within the meaning of section I (2) and (3) of the 1996 Act and could therefore satisfy section I (I) (a) of that Act, once they knew of the defamatory content of the posting and chose not to remove it from their news server they could no longer satisfy the additional requirements of section I (I) (b), that they took reasonable care in relation to the publication, or section I (I) (c), that they did not know and had no reason to believe that what they did caused or contributed to the publication; and that, accordingly, the parts of their pleaded defence which relied on section I (I) of the 1996 Act would be struck out.

[86] High Court of Australia in "Dow Jones and Company INC v. Joseph Gutnick,2002 HCA 56" had an occasion to decide posting of sexually explicit photographs and heavily relied on such publication under laws of Australia and held that it not single publication which contained defamatory material complained and when the subordinate distributor did not know that the publication contained the defamatory material complained of; the subordinate distributor did not know that the publication was of a character likely to contain defamatory material and such want of knowledge was not due to negligence on the part of the subordinate distributor, but the publication under the rules would give rise to a separate cause of action in view of Australia and English law. Therefore, the torts of libel and slander are committed when and where comprehension of the defamatory matter occurs. The rules have been universally applied to publications by spoken word, in writing, on television, by radio transmission, over the telephone or over the internet. In "Browne v. Dunn,1893 6 R 67" the House of Lords held that there was no publication of a defamatory petition to a person (Mrs Cook) who had signed but not read the petition. On an overall consideration, the Court concluded that the Court has got jurisdiction since it amounts to defamatory in nature.

[87] The Supreme Court of the United States in "United States v. X-Citement Viedo, INC., ET AL.,1994 513 US 64" held as follows:

> Because the term knowingly in 2252 (a) (1) and (2) modifies the phrase the use of a minor in subsections (1) (A) and (2) (A), the Act is properly read to include a scienter requirement for age of minority. This Court rejects the most natural grammatical reading, adopted by the Ninth Circuit, under which knowingly modifies only the relevant verbs in subsections (1) and (2), and does not extent to the elements of the minority of the performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation. Some applications of that reading would sweep within the statutes admit actors who had no idea that they were even dealing with sexually explicit material, an anomalous result that the Court will not assume congress to have intended. Moreover, Morissette v. United States, 342 U.S. 246, 271, 72 S.Ct. 240, 254, 96 L.Ed. 288, reinforced by Staples v. United States, 511 U.S. 600, 619, 114 S.Ct. 1793, 1804, 128 L.Ed.2d 608, instructs that the standard presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct, and the minority status of the performers is the crucial element separating legal

> innocence from wrongful conduct. The legislative history, although unclear as to whether Congress intended knowingly to extend to performer age, persuasively indicates that the word applies to the sexually explicit conduct depicted, and thereby demonstrates that knowingly is emancipated from merely modifying the verbs in subsections (1) and (2). As a matter of grammar, it is difficult to conclude that the word modifies one of the elements in subsections (1) (A) and (2) (A), but not the other. This interpretation is supported by the canon that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions.

[88] Supreme Court of Florida in "Jane Doe, mother and legal guardian of John Doe, a minor v. America Online, INC., 783 So.2d 1010 (2001)" based on policy underlying the CDA and the CDAs explicit legislative history held as follows:

> "It is inconceivable that Congress intended the CDA to shield from potential liability an ISP alleged to have taken absolutely no actions to curtail illicit activities in furtherance of conduct defined as criminal, despite actual knowledge that a source of child pornography was being advertised and delivered through contact information provided on its service by an identified customer, while profiting from its customer's continued use of the service. Such an interpretation transforms a statute intended to further and support responsible ISP efforts to protect children and the public from even questionably harmful and illegal materials into a statute which both condones and exonerates a flagrant and reprehensible failure to act by an ISP in the face of allegedly specific, known dissemination of material unquestionably harmful to children. In my view, the interpretation adopted today provides a foundation for far-ranging forms of illegal conduct (possibly harmful to society in far different ways) which ISPs can, very profitably and with total immunity, knowingly allow their customers to operate through their Internet services. I fear that the blanket immunity interpretation adopted by the majority today thrusts Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit."

[89] The Supreme Court of the United States in "Edmund G. Brown, JR., Governor of California, ET AL. v. Entertainment Merchants Association ET AL.,2011 131 US 2729"

held as follows:

> "The majority's circular argument misses the point. The question is not whether certain laws might make sense to judges or legislators today, but rather what the public likely understood "the freedom of speech" to mean when the First Amendment was adopted. See District of Columbia v. Heller,2008 554 US 570, 634-635. I believe it is clear that the founding public would not have understood "the freedom of speech" to include speech to minor children bypassing their parents. It follows that the First Amendment imposes no restriction on state regulation of such speech. To note that there may not be "precedent for [such] state control," ante, at 8, n. 3, "is not to establish that [there] is a constitutional right," McIntyre v. Ohio Elections Commn,1995 514 US 334, 373 (SCALIA, J., dissenting)."

[90] However, the foreign judgments are not binding precedents within the scope of Article 141 of Constitution of India, at best they would have highest persuasive value and apart from that the provisions of the Act are in pari materia, in such case this Court can fallback on the principles laid down in those judgments. Moreover, in Shreya Singhal v. Union of India (referred supra), the Apex Court persuaded by those judgments came to such conclusion. In those circumstances, based on the principles laid down in the foreign judgments and the Apex Court in Shreya Singhal v. Union of India (referred supra), this Court can safely conclude that the appellant/defendant No.2 is not responsible for the defamatory, posted by the defendant No.1 in the web-blog of defendant No.3, which is directly under its control and the defendant No.2 has nothing to do with the content and it can neither edit or remove any such defamatory statement.

[91] The order of the day in our country is that most of the websites are being mis-used by the general public for one reason or the other and internet users creating fake accounts both in the Face book and other internet service providers like Google and posting sexually explicit material and sometimes defamatory statements inviting comments from the net users, as such it is difficult for the service provider or intermediary to keep watch on such accounts of net users, which are in millions everyday. Moreover, such fake statements i.e. sexually explicit material and defamatory statements would cause incalculable damage to the reputation of the individuals, which reduces the image of the individual in the society and sometimes it would adversely effect the key position occupied by such person in the society. But the Information Technology Act produced some leverage to such intermediaries subject to attributing

actual knowledge as required under Section 79 (3) (b) of Information Technology Act and proof of exercise of due diligence by the intermediary as per Rule 3 of rules framed thereunder. Sometimes, even after issue of notice of cease and desist, intermediary expressing its inability to remove or block those defamatory contents or sexually explicit material only on the ground that it has no control over it and the internet service provider directing the parties to approach the Court and obtain order for removal of such material; indirectly it amounts to encouraging the net users to post such defamatory content or sexually explicit material including child pornography in the websites and it will be continued on the website till a direction was issued by competent Court for removal of such content. It is also a known fact how much delay is being caused in the present adversarial system in Indian Courts and sometimes it will take years together and by the time direction was issued by the Courts, total reputation of such person against whom such defamatory content was posted would be greatly effected in the eye of the society and sometimes personal attacks against such persons and exposing those persons by sexually explicit material by morphing etc., would seriously effects the character and image of such person. Therefore, the Courts should give preference to such suits or petitions filed before the Courts and grant instant relief by way of interim orders to block or removal of such defamatory or sexually explicit content against the internet service provider, otherwise approaching Court for such relief is nothing but a futile exercise even if a direction is given after lapse of few years and it would not serve any purpose and the loss caused to such persons would not be compensated in monetary terms, but the present law under Information Technology Act is not able to provide such immediate reliefs to the person aggrieved by such defamatory or sexually explicit content or hate speeches etc. Therefore, the Legislature has to take necessary steps to provide safeguard to the interest of public at large on account of such defamatory content, sexually explicit material or pornography etc. by creating fake accounts by the net users and to provide stringent punishment to such net users, who created fake accounts and posted such material, by necessary amendment to the Information Technology Act and Rules.

[92] In the present facts of the case, the contention of the respondent No.1 - plaintiff was that a defamatory statement was posted by the respondent No.2 defendant No.1 in the web-blog of the defendant No.3 and the defendant No.2 hosted such content and despite the demand made by the plaintiff, the defendant No.2 did not remove the content or blocked access to the site and consequently claimed a mandatory injunction.

[93] Thus, the principle laid down in all the judgments is only based on actual

knowledge about posting of defamatory or any content by the 3rd parties on the web-blog. The same is the language used in Section 79 (3) (b) of the Information Technology Act. Added to that another safeguard is provided under Rule 3 of the Rules framed thereunder i.e. exercise of due diligence. If the intermediary exercised due diligence and when such posting of defamatory content in the web-blog came to their actual knowledge or brought to their actual knowledge, the intermediary has to take steps to block access to such content or remove such content from the blog after due verification. Therefore, the actual knowledge and exercise of due diligence is a matter of evidence and while deciding the lis before the trial Court and the first appellate Court, the Court has to consider the evidence adduced by both the parties to find out whether any actual knowledge was attributed to the intermediary by the plaintiff and whether the intermediary exercised due diligence and such question is a question of fact, which cannot be gone into by this Court in Second Appeal while exercising power under Section 100 of C.P.C.

[94] The trial Court and the first appellate Court did not record any specific finding with regard to exercise of due diligence by the intermediary and on actual knowledge was attributed by the plaintiff to the defendant Nos.2 and 3 in the cease and desist notice demanding them to remove the said content. But no notice was issued to the defendant No.3 demanding it to remove such content. It is the contention of the defendant No.2 that defendant No.2 is only an intermediary and the entire control over the website is with the defendant No.3 and defendant No.3 alone is competent to remove or block any such postings of defamatory material on verification. As seen from Exs.B.3 and B.4 i.e. Google Groups Terms of Service and Google Groups content policy. It is clear that defendant No.3 is alone competent to remove or block any defamatory content or sexually explicit material posted by 3rd parties on the web-blog or URL of the defendant No.3. In such circumstances, even if any knowledge is attributed to the defendant No.2, it has no control over the website. In such case, it is impossible for defendant No.2 to block access to the defamatory content posted by the defendant No.1 or remove it from the web- blog. The trial Court rightly exonerated the defendant No.2/ appellant from its liability and the same was affirmed by the 1st appellate Court in paragraph 21 (b) of its judgment, but strangely without applying its mind issued a direction to remove the defamatory content posted by the defendant No.1 against the plaintiff in the message Nos.1 and 2 referred supra, such direction in the nature of mandatory injunction against defendant Nos.2 and 3 is erroneous. Therefore, the direction issued by the first appellate Court against defendant No.2 is liable to be set aside since it is contrary to its findings in paragraph No.21 (b) of the judgment.

[95] Though, the adverse finding recorded by the first appellate Court against the plaintiff, the plaintiff had neither challenged the adverse finding recorded by the first appellate Court in paragraph No.21 (b) either by filing cross objections or separate appeal or at least during hearing of this appeal in view of Order XLI Rule 22 of C.P.C. In the absence of any separate appeal or cross objections by the plaintiff, it is impermissible to upset the finding of the first appellate Court recorded against the plaintiff and in favour of defendant No.2 in paragraph No.21 (b) of its judgment since the said finding attained finality as it remained unchallenged as per the procedure provided in C.P.C.

[96] The trial Court exonerated the defendant No.2 totally from its liability to take any action for removal of defamatory content, but the appellate Court in its inconsistent finding at paragraph No.23 concluded that the defendant No.2 also liable and directed to withdraw the messages posted by the defendant No.1, but strangely the first appellate Court affirmed the finding recorded by the trial Court regarding appellant/defendant No.2. Therefore, on the face of the judgment, it is erroneous and inconsistent with one finding to the other, such judgment cannot be sustained under law, more particularly when it is in compliance of Order XLI Rule 31 C.P.C. Therefore, it is liable to be set aside. Accordingly, the substantial question of law is answered in favour of the appellant/ defendant No.2 and against the plaintiff/respondent No.1 herein.

[97] In the result, the appeal is allowed setting aside the judgment and decree dated 29.01.2016 passed in A.S.No.50 of 2014 by the I Additional Chief Judge, City Civil Court, Secunderabad dismissing the suit against the defendant No.2 in O.S.No.143 of 2010 on the file of the XVIII Junior Civil Judge cum Additional Rent Controller, Secunderabad. No costs.

[98] The miscellaneous petitions pending, if any, shall also stand closed.

On section 79 A by Hon'ble High Court for the State of Telangana and the State of Andhra Pradesh,

"A perusal of the above section clearly demonstrates that the Central Government has to issue notification identifying any department, body or agents of the Central Government or State Government as an examiner of the electronic evidence. The Parliament in its wisdom incorporated Section 79-A of the Information Technology Act in order to prevent malicious prosecution basing on the expert opinion given by unrecognized bodies/laboratories. [141] Section 45-A of the Indian Evidence Act enables the Court to send the electronic document to the expert for opinion, in order to place reliance on it. To place any reliance on the opinion of an Expert, the electronic document should have been sent to the recognized laboratory through the Court."

NARA CHANDRABABU NAIDU, S/O LATE KHARJURA NAIDU

V/S

STATE OF TELANGANA, REPRESENTED BY ITS PUBLIC PROSECUTOR AND ANOTHER.2017 (1) ALT(Cri) 100.

HIGH COURT OF TELANGANA AND ANDHRA PRADESH (AT HYDERABAD)

NARA CHANDRABABU NAIDU, S/O LATE KHARJURA NAIDU
V/S
STATE OF TELANGANA, REPRESENTED BY ITS PUBLIC PROSECUTOR AND ANOTHER

Date of Decision: 09 December 2016

Citation: 2016 LawSuit(Hyd) 593

Hon'ble Judges: T Sunil Chowdary

Eq. Citations: 2017 (1) ALT(Cri) 100

Case Type: Criminal Petition

Case No: 13117 of 2016

Subject: Constitution, Criminal

Acts Referred:
CONSTITUTION OF INDIA ART 141, ART 226, ART 21
INDIAN PENAL CODE, 1860 SEC 107, SEC 120B
CODE OF CRIMINAL PROCEDURE, 1973 SEC 190, SEC 397(2), SEC 156(3), SEC 482, SEC 173(2), SEC 161, SEC 201, SEC 204, SEC 210(2), SEC 39, SEC 164, SEC 203, SEC 156, SEC 210, SEC 210(1), SEC 210(3), SEC 200, SEC 397, SEC 465, SEC 202(1), SEC 2(D), SEC 2(R), SEC 190(1)(A), SEC 202, SEC 154, SEC 202(2)
EVIDENCE ACT, 1872 SEC 45A
PREVENTION OF CORRUPTION ACT, 1988 SEC 7, SEC 19(3)(C), SEC 11, SEC 12
INFORMATION TECHNOLOGY ACT, 2000 SEC 79A

Final Decision: Petition allowed

Advocates: Siddharth Luthra, P Subbarao, V Ravi Kiran Rao, P Sudhakar Reddy

Reference Cases:

Cases Referred in (+): **81**

Judgement Text:-

T Sunil Chowdary, J

[1] This Criminal Petition is filed under Section 482 Cr.P.C., seeking to quash the order dated 29.8.2016 as well as the proceedings in CCSR No.958 of 2016 in Crime No.11/ACB-CR-1- HYD/2015 on the file of the Court of the Principal Special Judge for SPE and ACB cases, Hyderabad (the Special Court/the Special Judge).

Pleadings of the petitioner

[2] The petitioner filed the present petition contending that the second respondent, who is a Member of Legislative Assembly (MLA) representing Mangalagiri Constituency in Andhra Pradesh, belongs to YSR Congress Party, and who has no connection with Crime No.11/ACB-CR-1-HYD/2015 on the file of ACB Police Station, City Range-I, Hyderabad (neither informant nor a witness), filed the private complaint (CCSR No.958 of 2016) against the petitioner before the Special Court on 08.8.2016. The complaint was filed basing on the same allegations in the above Crime, in which a charge sheet had been filed on 27.7.2015. It is pertinent to note that the complaint does not disclose about the filing of the charge sheet in the Crime. The impugned order dated 29.8.2016 passed by learned Special Judge in CCSR No.958 of 2016 directing the ACB to conduct thorough investigation and file report under Section 156(3) Cr.P.C., is legally not sustainable, as the power under section 156(3) Cr.P.C., is not available to post cognizance stage i.e., after filing of charge sheet. If the impugned order is allowed to stand, it would result in an anomalous situation of registration of second First Information Report (FIR), in connection with the same incident. The alleged incident is relating to the elections to the Legislative Council of the State of Telangana for which the second respondent is no way concerned. The second respondent filed the complaint, as a weapon, to wreak vengeance against the petitioner. The second respondent has no locus standi to file the private complaint, especially, with a request to invoke the provisions of Section 210 Cr.P.C., as he is neither a victim nor an aggrieved person. The relief under Section 210 Cr.P.C., cannot be granted, as it mandates pre-

existence of a private complaint before the Magistrate, which is not the case herein. The second respondent has not followed the procedure contemplated under the Cr.P.C., in filing the complaint; therefore, the complaint is not maintainable.

[3] The complaint was not supported by affidavit. The second respondent filed the complaint with a prayer to take cognizance of his complaint and to proceed further in terms of Section 210 Cr.P.C., whereas the learned Special Judge ordered investigation under Section 156(3) Cr.P.C., which is contrary to the relief sought by the second respondent. Mere endorsement of the learned Special Judge that he has gone through the complaint, documents and heard the complainant is not sufficient to come to a conclusion that he has applied his mind at the time of passing the impugned order under Section 156(3) Cr.P.C. The learned Special Judge passed the impugned order without applying his judicial mind to the facts of the case and therefore, the order is not sustainable under law.

[4] The petitioner has not committed any offence much less the offence as alleged by the second respondent. The complaint does not disclose any cognizable offence either to take it on file or to refer it to the ACB for investigation. The allegations made in the complaint are vague, untenable and false. In Criminal Petition No.5520 of 2015 filed by Jerusalem Mathai (A.4), this Court, by order dated 03.6.2016, quashed the proceedings against A.4 in Crime No.11/ACB-CR-1-HYD/2015. As per the observations made and findings arrived at by this Court in Criminal Petition No.5520 of 2016, there is no criminal conspiracy in this case; therefore, the Prevention of Corruption Act, 1988 (the PC Act) has no application to the facts and circumstances of the case (which judgment, though challenged before the Hon'ble apex court, is not stayed or set aside so far). Keeping in view the above findings, the learned Special Judge acted with undue haste and contrary to judicial propriety though he has no jurisdiction either to entertain the complaint or to refer it to the Police for investigation.

[5] Hence, the petitioner prays this Hon'ble Court to quash the complaint in CCSR No.958 of 2016 pending on the file of the Special Court as well as the order dated 29.8.2016 passed therein.

Pleadings of the first respondent

[6] The first respondent filed the counter with the following averments: It is a fact that the Anti Corruption Bureau, Telangana State (the ACB) had initially registered Crime

No.11/ACB-CR-1- HYD/2015 against four persons, investigated into the matter and had filed charge sheet against A.1 to A.4 under Section 173(2) Cr.P.C., before the Special Court on 27.7.2015. As on today, the investigation in the above crime is still pending against one Sandra Venkata Veeraiah, MLA, who is subsequently arraigned as A.5, and others. In the charge sheet, the ACB has specifically mentioned as follows:

> "The investigation in this case is still under investigation against the Accused No.5 Sri Sandra Venkata Veeraiah (who was arrested on 06.07.2015 and was produced before this Hon'ble Court on 07.07.2015) and other accused. Any other material which comes to light during the further course of investigation against A.1 to A.4 and others, the same would be placed before this Hon'ble Court by filing supplementary charge sheet."

[7] The learned Special Judge had taken cognizance of the offence against A.1 to A.3 in Crime No.11/ACB-CR 1-HYD/2015, numbered the charge sheet as C.C.No.15 of 2016 and A.1 to A.3 made their appearance before the Special Court on 29.9.2016. Against the order of this Court dated 03.6.2016 in Criminal Petition No.5520 of 2015 quashing the proceedings against A.4 in Crime No.11/ACB-CR 1-HYD/2015, the ACB filed SLP No.5248 of 2016 before the Hon'ble apex Court on 06.7.2016 and notice was ordered to A.4. The matter is now pending before the Hon'ble apex Court.

[8] In respect of the same incident, giving rise to one or more cognizable offences, there can be no second FIR. The ACB has filed a Memo before the Special Court on 31.8.2016 stating that "The transaction subject matter of the investigation done by the ACB Telangana in Cr.No.11/ACB-CR-1-HYD/2015 and the subject matter in the complaint filed by Sri Alla Ramakrishna Reddy, M.L.A, Mangalagiri in C.C.SR. No.958/ 2016 are one and the same and the same is under investigation as submitted above."

[9] There is no prayer in the complaint of the second respondent to refer the same for investigation under Section 156(3) Cr.P.C. The second respondent filed the complaint with a prayer to deal with the matter under Section 210 Cr.P.C., only. The provisions of Section 210 Cr.P.C., can be pressed into service when a private complaint is filed in relation to a transaction, which is the subject matter of a Crime pending for investigation. Locus standi is alien to criminal jurisprudence. Hence, this Court may be pleased to pass appropriate orders in the facts and circumstances of the case.

Pleadings of the second respondent

[10] The second respondent filed the complaint under Sections 190 and 200 Cr.P.C., before the Special Court alleging that on 28.5.2015 one Mr.Elvis Stephenson, MLA, representing AngloIndian Community (hereinafter referred to as 'the de facto complainant') submitted a report to the Director General of Police, ACB, Hyderabad, Telangana State, who in turn forwarded the same to the Deputy Superintendent of Police, ACB, City Range-I, Hyderabad to verify the contents of the report and take action as per law. In the said report the de facto complainant alleged that one Mr.Jerusalem Mathai (A.4) approached him and offered an amount of Rs.2.00 crores to vote in favour of Telugu Desam Party (TDP) Candidate in MLC elections in the State of Telangana or in alternative offered a ticket to leave the country if he wants to abstain from the voting. It is further alleged that the de facto complainant was also contacted by Mr.Bishop Harry Sebastian (A.2), who offered him a sum of Rs.5.00 crores, to abstain from casting his vote in the elections to be held on 01.6.2015 or to vote in favour of TDP candidate and that the entire transaction would be dealt with by Revanth Reddy (A.1), MLA of Kodangal Constituency, Telangana.

[11] The DSP, ACB, City Range-I, Hyderabad took up inquiry into the matter and kept watch on the above named persons and came to know that A.2 and A.4 are the followers of TDP (Christian Cell). On 30.5.2015 at about 10.30 AM the de facto complainant informed the DSP, ACB that A.1 and A.2 were coming to his house situated at H.No.6-2-101/1/7, New Bhoiguda for discussions on the deal. Immediately, the DSP, ACB rushed to the residence of the de facto complainant and got arranged electronic gadgets. At about 12.00 Noon, A.2 along with A.1 came to the house of the de facto complainant and A.1 requested him to cast his vote in favour TDP Candidate, offering Rs.2.50 crores towards quid pro-quo. A.1 also invited the de facto complainant to talk to the petitioner directly on the deal and assured that such meeting would be 100% confidential.

[12] On 30.5.2015 at about 4.00 PM, A.2 made calls to the mobile of the de facto complainant, three or four times, and informed that the petitioner is busy and he would make him (the petitioner) to call to the de facto complainant whenever the petitioner finds leisure. Accordingly, at 4.00 PM A.2 made a call to the de-facto complainant through his mobile number and informed him that the petitioner wants to talk to him and handed over the phone to the petitioner, who in turn spoke to the de facto complainant saying that:

"Hello! Good evening brother, how are you, Manavallu briefed me. I am with you, Don't bother For everything I am with you, what all they spoke will honour. Freely you can decide. No problem at all. That is our commitment. We will work together.

Thank you."

[13] After getting seeming approval from the petitioner for enhancing the bribe amount from Rs.2.5 crores to Rs.5.00 crores, A.1 and A.2 persuaded the operation further and informed the de facto complainant that on 31.5.2015 they would be coming, but requested him to change the place to handover the proposed bribe amount. Upon which, the de facto complainant informed A.1 and A.2 to come to the house of Malcolm Taylor at Pushpa Nilayam, Plot No.204 to handover the bribe amount. The de facto complainant informed the Investigating Officer about the visiting of A.1 and A.2 to the house of Malcolm Taylor at Pushpa Nilayam to handover the bribe amount. The Investigating Officer, after receiving the said information, laid a trap by implanting audio and video recorders at the house of Mr. Malcolm Taylor and kept a watch. On the same day at about 4.00 PM, A.1 and A.2 came to Plot No.204, Pushpa Nilayam along with cash bag containing Rs.50.00 lakhs. A.1 and A.2 negotiated with the de facto complainant and offered Rs.5.00 crores as bribe for casting his vote in favour of TDP Candidate in MLC elections to be held on 01.6.2015. On the directions of A.1, Rudra Udaya Simha (A.3) opened the cash bag and kept the currency bundles on the T-Poy as advance bribe amount. In the meanwhile, the Investigating Officer came to the spot and seized the cash and cell phones and prepared panchanama. On 31.5.2015, the Investigating Officer registered a case in Crime No.11/ACB-CR-1-HYD/2015 against A.1, A.2, A.3 and A.4 and subsequently one Sandra Venkata Veeraiah, MLA was arraigned as A.5. During the course of investigation, the Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C.

[14] It is further alleged that in spite of scientific investigation done up to a certain point by the Investigating Agency in unearthing such a gruesome offence of bribery and unfortunately it was busted due to the involvement of the petitioner.

[15] It is clearly evident that the petitioner being a party to the criminal conspiracy hatched up a plan along with A.1, A.2 and others, and abetted the de facto complainant to vote in favour of their party candidate in the MLC elections to be held on 01.6.2015.

In reward of the same, the petitioner offered Rs.5.00 crores as bribe and paid Rs.50.00 lakhs towards advance. In furtherance of the conspiracy, A.1, A2 and others have conspired with each other and committed the offence. It is further alleged that the de facto complainant being the MLA is a public servant and his casting of vote as per free will in the biennial elections for the Legislative Council is a public duty required to be performed by him, whereas A.1, A2 and others, in pursuance of the criminal conspiracy, offering of bribe to influence him by corrupt means to vote against his free will, is an offence under Section 12 of the PC Act. The oral and documentary evidence proves the meeting of minds and collusion between the A.1, A2 and others. Therefore, the petitioner is liable for punishment for the offences under Section 12 of the PC Act and Section 120-B of IPC.

[16] The preliminary charge sheet was filed on 27.7.2015 and the Investigating Officer, in the Memo filed before the Special Court on 31.8.2016, has clearly stated that the investigation is still continuing. The Investigation Agency failed to conduct the basic investigation with regard to the involvement of the petitioner. The silence on the part of the Investigating Agency made the second respondent to step into the shoes of the Investigating Agency, which abandoned its statutory duty and purposefully failed to conduct basic investigation, nab and bring the prime offender before the Court of law. This respondent sent the disputed telephonic conversation between the petitioner and the informant and the admitted voice of the petitioner to the Forensic Laboratory by name Helic Advisory, Bombay for comparison and report. As per the report of the Laboratory, the disputed conversation matches with the voice of the petitioner.

[17] The present criminal petition is not maintainable in view of Section 19(3)(c) of the PC Act. When the learned Special Judge forwarded the complaint to the ACB for investigation under Section 156(3) Cr.P.C., it is obvious that he has not taken cognizance of the offence, and therefore, it is a pre-cognizance stage and cannot be equated with post cognizance stage. The impugned order directing the ACB to investigate the cognizable offence and file report is an interlocutory order, against which no revision lies in view of the bar contained in Section 397(2) of Cr.P.C. Bar of revision cannot be circumvented by filing a petition under Section 482 Cr.P.C.

[18] The contention of the petitioner that this respondent has no locus standi to file the complaint is not sustainable either on facts or in law. In other words, the principle that any one can set the criminal law in motion remains intact unless contra is indicated by the statutory provision. This respondent had filed the complaint praying the Special

Court to invoke the power under Section 210 Cr.P.C., and even assuming but not conceding that the learned Special Judge has no jurisdiction to invoke Section 156(3) Cr.P.C., a bear reading of the impugned order discloses that though it is mentioned as under section 156(3) Cr.P.C., it should be treated as a direction to the ACB to file a report on the contents of the complaint under Section 202(1) Cr.P.C.

[19] The contention of the petitioner that "the order of the Special Judge directing investigation and report under Section 156(3) Cr.P.C., would result in anomalous situation as it would be a second FIR being registered with respect to the same transaction after filing a preliminary charge sheet", is unfounded and there could never be a situation where a second FIR being registered with respect to the same transaction as it was totally not taken into consideration and that it is not a normal IPC case where the police should register the FIR if a cognizable offence is brought to their notice and investigate into the same. But here it is a case under the PC Act wherein on receipt of the complaint, without registering an FIR, a discrete enquiry should be conducted as per Point 78 in page 31 contained in Chapter-7 in the ACB Manual, which is also incorporated in Chapter-9 of the Vigilance Manual.

[20] The complaint is filed under Sections 190 and 200 Cr.P.C., praying the Special Court to take cognizance against the petitioner as there is a simultaneous investigation going on in respect of the same offence and hence the contention of the petitioner that the complaint is not maintainable for non-filing of the sworn affidavit is not sustainable. It is submitted that as the allegations in the complaint are grave against the petitioner, the learned Special Judge thought it fit to refer it for investigation and report, and the learned Special Judge has got three options for getting a report from the Investigating Agency i.e., Section 156 (3) Cr.P.C, 210 Cr.P.C., and 202 Cr.P.C., and the intention is only to get a report from the Investigating Agency. The allegations made in the complaint attract the ingredients of Section 12 of the PC Act and Section 120-B of IPC; therefore, it is not a fit case to quash the proceedings.

[21] The petitioner, being the Chief Minister of the State of Andhra Pradesh, by offering bribe through his stooges i.e., A.1, A.2 and others to another Legislative Member of Telangana State to influence him to vote in favour of TDP candidate in the MLC elections, is guilty of a high crime, misdemeanour and that agreement to bring about such a state of things constitutes a criminal conspiracy. Hence the petition may be dismissed.

Rival contention of the parties

[22] Heard Sri Siddharth Luthra, learned senior counsel representing Sri P.Subbarao, learned counsel for the petitioner, Sri V.Ravi Kiran Rao, learned standing counsel for the first respondent ACB for the State of Telangana and Sri P.Sudhakar Reddy, learned counsel for the second respondent.

[23] The learned counsel for the second respondent strenuously submitted that the petition is not maintainable under law as the impugned order passed by the learned Special Judge is an interlocutory order, against which no revision lies, in view of legal embargo under Section 19(3)(c) of the PC Act. When there is a specific bar under the PC Act, filing of the petition under Section 482 Cr.P.C., is nothing but circumventing the provisions of the PC Act, which is not permissible under law. He further submitted that Section 482 Cr.P.C., has no application to the PC Act. Per contra, the learned senior counsel for the petitioner submitted that any interlocutory order passed under the provisions of the PC Act can be assailed by an aggrieved party by invoking Section 482 Cr.P.C., and the bar is for filing a revision or a stay petition only. Refuting the contentions made by the learned counsel for the second respondent, learned standing counsel for the first respondent submitted that the petition is maintainable under Section 482 Cr.P.C.

[24] In view of the complexity of the issues relating to facts and law being involved, this court is inclined to resolve them under separate headings.

Whether the petition under Section 482 Cr.P.C., is maintainable or not?

[25] When the very maintainability of petition itself is under serious challenge, the Court has to address that issue at the threshold, so as to get itself satisfied about the maintainability of the petition, before adverting to the other aspects in detail.

Whether the provisions of the PC Act excludes the application of Section 482 Cr.P.C.?

[26] For better appreciation of the rival contentions, it is apposite to extract hereunder Section 19(3)(c) of the PC Act, which reads as follows:

19. Previous sanction necessary for prosecution

(1)

(2)

(3) Notwithstanding anything contained in the code of Criminal Procedure, 1973,-

(a)

(b)

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

[27] A perusal of clause (c) of Sub-section (3) of Section 19 of the PC Act, at a glance, clearly demonstrates that no court shall stay or revise any interlocutory order passed under the PC Act. The provision does not create a legal embargo to challenge the interlocutory orders by invoking extraordinary jurisdiction of High Courts under Section 482 Cr.P.C.

[28] It is a cardinal principle of law of interpretation that the Court has to interpret the statutes in such a manner so as to achieve the object for which a particular provision is inserted in the statute. The primary test, which can safely be applied, is the language used in the Act and therefore, when the words are clear and plain, the Court must accept the expressed intention of the legislature. The provisions of Cr.P.C., should be construed so as to advance cause of justice and legislative object sought to be achieved.

[29] In Harbhajan Singh v Press Council of India, 2002 3 SCC 722 the Hon'ble apex Court, at para No.9, held as follows:

9. Cross in Statutory Interpretation (3rd Edn., 1995) states:

"The governing idea here is that if a statutory provision is intelligible in the context of ordinary language, it ought, without more, to be interpreted in accordance with the meaning an ordinary speaker of the language would ascribe to it as its obvious meaning, unless there is sufficient reason for a different interpretation . Thus, an 'ordinary meaning' or 'grammatical meaning' does not imply that the Judge attributes a meaning to the words of a statute independently of their context or of the purpose of the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they are used. By enabling citizens (and their advisers) to rely on ordinary meanings, unless notice is given to the contrary, the legislature contributes to legal certainty and predictability for citizens and to greater transparency in its own decisions, both of which are important values in a democratic society." (p. 32, ibid)

The learned author cites three quotations from speeches of Lord Reid in the House of Lords cases, the gist whereof is:

(i) in determining the meaning of any word or phrase in a statute, ask for the natural or ordinary meaning of that word or phrase in its context in the statute and follow the same unless that meaning leads to some result which cannot reasonably be supposed to have been the legislative intent;

(ii) rules of construction are our servants and not masters; and

(iii) a statutory provision cannot be assigned a meaning which it cannot reasonably bear; if more than one meanings are capable you can choose one but beyond that you must not go. .

[30] In Vijay Kumar Mishra v High Court of Judicature at Patna, 2016 9 SCC 313 the Hon'ble apex Court, at para 25, held as follows:

25. It is a settled principle of rule of interpretation that one must have regard to subject and the object for which the Act is enacted. To interpret a statute

> in a reasonable manner, the Court must place itself in a chair of reasonable legislator/ author. So done, the rules of purposive construction have to be resorted to so that the object of the Act is fulfilled. Similarly, it is also a recognised rule of interpretation of statutes that expressions used therein should ordinarily be understood in the sense in which they best harmonise with the object of the statute and which effectuate the object of the legislature. (see Interpretation of Statutes, 12th Edn., pp.119 and 127 by G.P. Singh).

[31] If the argument of the learned counsel for the second respondent is accepted, without looking into the other relevant legal aspects, an accused, who is facing trial under the provisions of the PC Act, has no right whatsoever to challenge an interlocutory order passed under the PC Act regardless of its illegality, irregularity or impropriety, except filing of appeal against conviction and sentence. Thus, Section 482 Cr.P.C., becomes redundant or a dead letter in the Statute (Cr.P.C) so far as the PC Act is concerned. If that so, various High Courts might not have entertained the petitions under Section 482 Cr.P.C., so far as the PC Act is concerned. The Hon'ble apex Court also entertained the SLPs filed challenging the orders passed by various High Courts under Section 482 Cr.P.C. Under the Old Cr.P.C., the High Court can exercise inherent powers under Section 561-A Cr.P.C.

[32] The Parliament enacted the PC Act in the year 1947. By that time, Section 561-A Cr.P.C., was in force. In 1947 PC Act, there is no specific provision excluding the application of Section 561-A Cr.P.C. The PC Act was re-enacted in the year 1988, which came into force with effect from 09.9.1988, by which time Section 482 Cr.P.C., was in the Statute. If the intention of the Parliament is to exclude the PC Act from the purview of Section 482 Cr.P.C., the same would have been depicted in any of the provisions of the PC Act like Section 19(3)(c) of PC Act. The Court has to strictly adhere to the provisions of a statute in letter and spirit.

[33] If any submission made by a learned counsel is contrary to the provisions of a statute, the same has no force in the eye of law. The Parliament in its wisdom incorporated Section 482 Cr.P.C., (Section 561-A of old Cr.P.C.,) conferring inherent jurisdiction on Constitutional Courts with an avowed object to safeguard personal liberty of an individual from frivolous and vexatious prosecution launched by unscrupulous litigant with an ulterior motive. There are instances where complaints are being filed with vague, bald and frivolous allegations, despite they being prohibited by law, with an

ulterior motive to wreak vengeance against their opponents. In such factual scenario, if such criminal proceedings are allowed to continue, thereby forcing the accused to face rigour of trial, certainly it would amount to miscarriage of justice and infringement of personal liberty of an individual as enshrined under Article 21 of the Constitution of India. The Parliament taking note of the then prevailing political and socio-economic scenario, as well as visualising the future, incorporated Section 482 Cr.P.C., to protect the citizens of this country from biting the bullet in the form of malicious prosecution. There is no straight jacket formula under which circumstances Section 482 Cr.P.C., can be pressed into service. The yardstick to press into Section 482 Cr.P.C., which is applicable to other criminal cases launched under different enactments, equally applies to the provisions of the PC Act. If the proposition of law advanced by the learned counsel for the second respondent is glibly swallowed, it amounts to depriving an accused person from challenging the illegal or irregular interim orders passed under the PC Act. Simply because a person is facing trial under the PC Act, that itself will not take away the legitimate and legal right of such an accused person to challenge interlocutory order by knocking the doors of the Constitutional Courts invoking the provisions of Section 482 Cr.P.C., in order to prevent abuse of process of law or to secure the ends of justice.

[34] Let me consider the case-law on which the learned counsel for the second respondent has placed reliance, in the backdrop of the foregoing discussion.

[35] In Satyanarayana Sarma v State of Rajasthan, 2001 8 SCC 607 the Hon'ble apex Court, at para No.17, held as follows:

> 17. Thus in cases under the Prevention of Corruption Act, there can be no stay of trials. We clarify that we are not saying that proceedings under Section 482 of the Criminal Procedure Code cannot be adapted. In appropriate cases proceedings under Section 482 can be adapted. However, even if petition under Section 482 of the Criminal Procedure Code is entertained, there can be no stay of trials under the said Act. It is then for the party to convince the court concerned to expedite the hearing of that petition. However, merely because the court concerned is not in a position to take up the petition for hearing would be no ground for staying the trial even temporarily.

[36] The principle enunciated in the above case, in fact, negates the contention of the

second respondent that the present petition is not maintainable under Section 482 Cr.P.C. In the same judgment at para No.29, the Hon'ble apex Court observed that several High Courts are granting stay of proceedings under the PC Act overlooking Section 19(3)(c) of the Act.

[37] In State of Uttar Pradesh v Pragyesh Misra, 2012 12 SCC 754 the Hon'ble apex Court reiterated the principle enunciated in Satyanarayana Sarma and held that Section 19(3)(c) of PC Act contains a specific bar to stay criminal proceedings.

[38] In order to appreciate the contention of learned counsel for the second respondent with regard to the maintainability of petition under Section 482 Cr.P.C., against an interim order under the PC Act, it is apposite to refer pars Nos.2 and 3 of the decision in Pragyesh Misra, which read as follows:

> 2. The State of U.P. has preferred this special leave petition being aggrieved by the observations made by the High Court while deciding the petition under Section 482 of the Code of Criminal Procedure (CrPC) which was filed by the present respondent. The apprehension of the petitioner is that the observations of the High Court are likely to influence the proceedings in the trial.
>
> 3. The apprehension of the petitioner is misconceived and unfounded. The observations in the impugned order[1] are confined to the consideration of the petition under Section 482 CrPC. Obviously, in this view of the matter, such observations cannot and shall not have any bearing in the course of trial or the proceedings before the trial court in any manner whatsoever. The trial court shall consider the matter on its own merits uninfluenced by any observations as made in the impugned order of the High Court.

[39] In the above case, the Hon'ble apex Court has not held that Section 482 Cr.P.C., has no application to the interlocutory orders passed under the PC Act.

[40] As per the principle enunciated in the cases cited supra, the High Court shall not grant stay to hamper the progress of trial in cases arising under the PC Act.

[41] The learned counsel for the second respondent also laid stress on paragraph Nos.29 to 32 of the judgment in Shahid Balwa v Union of India, 2014 2 SCC 687. In the

said paragraphs, the Hon'ble apex Court has dealt with the speedy trial in 2G Scam case. The Hon'ble apex Court made it clear that when it transfers cases from one High Court to another High Court or to the Supreme Court, the affected party cannot file an application under Section 482 Cr.P.C., or under Article 226 or 227 of the Constitution of India before any High Court for redressal. The observations made by Hon'ble apex Court are confined to 2G scam case only. The learned standing counsel for the first respondent has also placed reliance on this decision.

[42] To substantiate the arguments, the learned senior counsel for the petitioner has drawn the attention of this Court to the following decisions:

(i) In M.Sejappa Madimallappa v State of Mysore, 1966 CrLJ 677 the Mysore Bench of Karnataka High Court, at para No.7, held as under:

(7) It does not appear to us that the decision of the Privy Council in Emperor v. Khwaja Nazir Ahmed, 1945 47 BLR 245, can support the proposition placed before us by Mr. Government Pleader that in no case could we stop the investigation commenced by the police. The amplitude of our power under S.561-A is wide enough us in a proper case to stop the investigation which should never have commenced or to make which there is no power under the Code of Criminal Procedure. This view which we take receives support from what Lord Porter said in Nazir Ahmed's case. He said thus:

"No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation and for this reason Newsam J. may well have decided rightly in Chidambaram Chettiar v. Shanmugham Pillai, 1938 AIR(Mad) 129."

The enumeration made by the noble Lord as to the category of cases in which the police would have no authority to undertake an investigation is of course not exhaustive. Likewise it would be neither necessary nor possible to make an enumeration of all those cases in which this Court could under S. 561-A exercise its inherent power with respect to an investigation commenced by the police. That power is always exercisable where there is a misuse of power by the police or there is the commencement of an investigation without the requisite authority and the Court considers it

necessary to exercise its inherent power to secure the ends of justice.

(ii) In S. N. Sharma v Bipen K. Tiwari, 1970 1 SCC 653 the Hon'ble apex Court, at para No.11, held as follows:

11. It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers. .

(iii) In Imtiyaz Ahmad v State of U.P, 2012 2 SCC 688 the Hon'ble apex Court, at Para No.55, held as under:

55. Certain directions are given to the High Courts for better maintenance of the rule of law and better administration of justice:

While analysing the data in aggregated form, this Court cannot overlook the most important factor in the administration of justice. The authority of the High Court to order stay of investigation pursuant to lodging of FIR, or trial in deserving cases is unquestionable. But this Court is of the view that the exercise of this authority carries with it the responsibility to expeditiously dispose of the case. The power to grant stay of investigation and trial is a very extraordinary power given to the High Courts and the same power is to be exercised sparingly only to prevent an abuse of the process and to promote the ends of justice. It is therefore clear that:

(i) Such an extraordinary power has to be exercised with due caution and circumspection.

(ii) Once such a power is exercised, the High Court should not lose sight of the case where it has exercised its extraordinary power of staying investigation and trial.

(iii) The High Court should make it a point of finally disposing of such proceedings as early as possible but preferably within six months from the date the stay order is issued.

[43] Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am unable to accede to the contention of the learned counsel for the second respondent that Section 482 Cr.P.C., has no application to the PC Act. There is no legal embargo to challenge the interlocutory orders passed under the provisions of the PC Act by filing petition under Section 482 Cr.P.C. The contention of learned counsel for the second respondent that the present petition is liable to be dismissed at the threshold is not sustainable either on facts on in law. Therefore, I am of the considered view that the petition is maintainable under Section 482 Cr.P.C.

Whether an order passed under Section 156(3) Cr.P.C., is a judicial order or an administrative order?

[44] The learned counsel for the second respondent strenuously submitted that the order passed by the learned Special Judge under Section 156(3) Cr.P.C., is purely an administrative order, but not a judicial order and hence, the same cannot be challenged either under Section 397 Cr.P.C., or under Section 482 Cr.P.C. Per contra, the learned senior counsel for the petitioner and learned standing counsel for the first respondent vehemently opposed the proposition of law submitted by the learned counsel for the second respondent and submitted that an order passed under Section 156(3) Cr.P.C., is a judicial order.

[45] To substantiate the argument, the learned counsel for the second respondent has placed reliance on the following decisions:

(i) In Siya Ram Agrahari v State of U.P, 2008 CrLJ 2179 the Allahabad High Court, at Para Nos.5 and 6, held as under:

5. .. .. In para 22 of the decision in the case of Chandan v. State of U.P. as under:

...No doubt, as has been held by me hereinbefore, that the order under Section 156(3) Cr.P.C. is a judicial order but it is administrative in nature because of it's placement under chapter XII, Cr.P.C., relating to power of the police to investigate a matter.

6. Therefore, it had already been observed in this decision that the order passed under Section 156(3), Cr.P.C. is the judicial order but it is administrative in nature. In such circumstances, the impugned orders passed under Section 156(3), Cr.P.C. cannot be interfered with in a petition filed under Section 482, Cr.P.C. on behalf of the prospective accused.

(ii) In Prof. Ram Naresh Chaudhry v State of U.P., 2008 CrLJ 1515 the Allahabad High Court held as under:

Order passed under Sec.156(3) Cr.P.C., at precognizance stage though a judicial order is administrative in nature. Such order cannot be challenged by the proposed accused by means of revision or moving an application u/S. 482 Cr.P.C., since no accused can stop the registration of F.I.R against him.

[46] The above two decisions were rendered by learned Single Judges of Allahabad High Court. In Ajay Malviya v. State of U.P., 2000 41 AllCriC 435 a Division Bench of Allahabad High Court held that an order under Section 156(3) Cr.P.C., is a judicial order. Incidentally, this point was also urged before the Full Bench of Allahabad High Court in Father Thomas v. State of U.P, 2011 CrLJ 2278. The Full Bench made the following observation in para 54.

54. As on the basis of the aforesaid reasoning, we have already held the order under Section 156 (3) Cr.P.C., not be amenable to challenge in a criminal revision or an application under Section 482 Cr.P.C., it is not necessary for this Court to go into the further question whether the said order is administrative in nature as urged by Sri G.S.Chaturvedi and the

> learned Government Advocate or judicial in nature as contended by Sri D.S.Mishra and Sri Dileep Gupta. Following the decision of the Hon'ble apex Court in Asit Bhattacharjee v Hanuman Prasad Ojha, 2007 5 SCC 786, we are also not inclined to express any opinion on this issue, and leave the question open for decision in a subsequent proceeding where an answer to this question may become necessary.

[47] When there is a conflict of opinion expressed by a learned Single Judge and a Division Bench, the opinion expressed by the Division Bench will prevail, in view of the judicial propriety. Therefore, I am agreeing with the view expressed by the Division Bench of the Allahabad High Court in Ajay Malviya that the order passed under Section 156(3) Cr.P.C., is a judicial order.

[48] To substantiate their arguments, learned senior counsel for the petitioner aand learned standing counsel for the first respondent have placed reliance on the decision in Shankarlal Aggarwala v Shankarlal Poddar, 1965 AIR(SC) 507 (1) wherein the Hon'ble apex Court, at para 13, held as under:

> 13. It is perhaps not possible to formulate a definition which would satisfactorily distinguish, in this context, between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a Court is not decisive of the question whether the Act or decision is administrative or judicial. But we conceive that an administrative order should be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the Court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a Court, and if the discretion has to be exercised on objective, as distinguished from a purely subjective, consideration, it would be a judicial decision.

[49] The learned standing counsel for the first respondent also placed reliance on the decision in Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity, 2010 3 SCC 732 wherein the Hon'ble apex Court, at para No.40, held as follows:

> 40. It is a settled legal proposition that not only administrative but also

> judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." Vide State of Orissa v. Dhaniram Luhar, 2004 AIR(SC) 1794; and State of Rajasthan v. Sohan Lal and Ors., 2004 5 SCC 573.

[50] These two decisions eloquently dealt with the distinction between an administrative order and a judicial order. Whether an order is a judicial order or administrative order depends on the following two conditions: (i) whether any discretionary power is left over to the Magistrate and if so, exercising of such discretionary power should be based on sound principles of law; and (ii) the order passed by the Magistrate directly or indirectly or by necessary implication affects the rights of the parties to the proceedings. If the order passed by the Magistrate satisfies the above two conditions, it is a judicial order. If not, it is only an administrative order. In other words, passing of a judicial order mandates application of mind by the Court as the same eventually affects the rights and personal liberty of an individual. An administrative order is one which regulates the proceedings of the Court without affecting the rights of the parties to the proceedings. For example: (i) issuance of summons, (ii) payment of batta, etc.

> The test to be applied is whether the impugned order passed by the learned Special Judge affects the rights and liabilities of the petitioner or not. If the answer is affirmative, it falls within the ambit of "judicial order" and if the answer is negative, it falls within the ambit of "administrative order".

[51] Let me consider whether the impugned order passed under Section 156(3) Cr.P.C., is an administrative order or a judicial order. In order to appreciate the rival contentions,

it is imperative to consider certain provision of the Cr.P.C. Sections 190 and 200 Cr.P.C., deal with filing of a private complaint. Section 190 Cr.P.C., postulates four modes of taking cognizance of offence by the Magistrate having jurisdiction: (1) Upon a complaint; (2) Upon a police report; (3) Upon information received from any person, or (4) Upon his own knowledge.

[52] Section 156(3) Cr.P.C., contemplates that the Magistrate having jurisdiction to take cognizance of offence basing on a complaint is empowered to forward the same to the concerned police for investigation and report. On filing of the complaint under Section 190 and 200 Cr.P.C., the competent Court can take the cognizance of offence and proceed further under Sections 202, 203 and 204 Cr.P.C., or can forward the complaint to the concerned Police for investigation and report. These two provisions (Section 190 and Section 156(3) Cr.P.C.,) explicitly confer discretion to the learned Special Judge. Such discretion has to be exercised by applying judicial mind.

[53] The Hon'ble apex Court in Priyanka Srivastava v State of U.P, 2015 6 SCC 287, Anil Kumar v M.K. Aiyappa, 2013 10 SCC 705 and Ramdev Food Products Private Limited v State of Gujarat, 2015 6 SCC 439 held that while forwarding the complaint under Section 156(3) Cr.P.C, the learned Magistrate has to apply his mind to the facts of the complaint. In the two decisions viz., Siya Ram Agrahari and Prof. Ram Naresh Chaudhry rendered by Single Judges of Allahabad High Court, and relied upon by the learned counsel for the second respondent, it was held that the order passed under Section 156 (3) Cr.P.C., is judicial order but administrative in nature. Even according to those two decisions also, the order under Section 156(3) Cr.P.C., is not purely an administrative order as contended by the learned counsel for the second respondent.

[54] Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am unable to agree with the submission of the learned counsel for the second respondent on this aspect. In view of the legal consequences flow from the order passed under Section 156(3) Cr.P.C., by any stretch of imagination, it cannot be an administrative order but, it is a judicial order. Whether the order passed under Section 156(3) Cr.P.C., is not amenable to Section 482 Cr.P.C., in view of the bar to file a revision under Section 397(2) Cr.P.C.?

[55] The predominant contention of the learned counsel for the second respondent is that the impugned order is interlocutory in nature; therefore, no revision lies in view of Sub-section (2) of Section 397 Cr.P.C. In such circumstances, filing of the petition under

Section 482 Cr.P.C., is nothing but circumventing the provision under Section 397(2) Cr.P.C. Per contra, learned senior counsel for the petitioner and learned standing counsel for the first respondent submitted that an interlocutory order can be challenged under Section 482 Cr.P.C., despite the bar contained in Sub-section (2) of Section 397 Cr.P.C.

[56] To substantiate the argument, learned counsel for the second respondent has drawn the attention of this Court to the decisions rendered by the Single Judges of Allahabad High Court in Siya Ram Agrahari, Gulam Mustafa @ Jabbar v State of U.P, 2008 LawSuit(All) 235, Harpal Singh v State of U. P., 2008 LawSuit(All) 47 and Prof. Ram Naresh Chaudhry. As per the principle enunciated in these cases: (i) no revision lies against the orders passed under Section 156(3) Cr.P.C., at the instance of the prospective accused, in view of the legal embargo in Sub-section (2) of Section 397 Cr.P.C., and (ii) in view of the bar contained in Sub-section (2) of Section 397 Cr.P.C., the order passed under Section 156(3) Cr.P.C., cannot be challenged under Section 482 Cr.P.C.

[57] In Father Thomas, a Full Bench of the Allahabad High Court formulated the following three questions for consideration:

> A. Whether the order of the Magistrate made in exercise of powers under Section 156(3) Code of Criminal Procedure directing the police to register and investigate is open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued?
>
> B. Whether an order made under Section 156(3) Code of Criminal Procedure is an interlocutory order and remedy of revision against such order is barred under Sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973?
>
> C. Whether the view expressed by a Division Bench of this Court in the case of Ajay Malviya v. State of U.P. and Ors., 2000 41 AllCriC 435, that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, no writ petition for quashing an F.I.R. registered on the basis of the order will be maintainable, is correct?

And answered the above three questions as under:

A. The order of the Magistrate made in exercise of powers under Section 156(3) Code of Criminal Procedure directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156(3) Code of Criminal Procedure is an interlocutory order and remedy of revision against such order is barred under Sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya v. State of U.P. and Ors., 2000 41 AllCriC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct.

[58] The view expressed, in the above decisions, is either revision or quash petition is not maintainable against an order passed under Section 156(3) Cr.P.C. Confuting the submissions of the learned counsel for the second respondent, learned senior counsel for the petitioner has drawn the attention of this court in Priyanka Srivastava, Anil Kumar and Ramdev Food Products Private Limited. As per the principle in the cases cited, an order passed under Section 156(3) Cr.P.C., can be assailed under Section 482 Cr.P.C.

(i) In Madhu Limaye v The State of Maharashtra, 1977 4 SCC 551 the Hon'ble apex Court, at Para No.10, held as follows:

10 ..In our opinion, a happy solution of this problem would be to say that the bar provided in Sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in

exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial after proper sanction will not be barred on the doctrine of Autrefois Acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused upto the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible.

As per the principle enunciated in the above case, an interlocutory order can be challenged under Section 482 Cr.P.C., in spite of bar to file revision.

(ii) In Prabhu Chawla v State of Rajasthan, 2016 AIR(SC) 4245 a three Judge Bench of the Hon'ble apex Court while reaffirming the principle laid down in Madhu Limaye, at Para No.6, held as follows:

6. In our considered view any attempt to explain the law further as regards

> the issue relating to inherent power of High Court under Section 482 Code of Criminal Procedure is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante Clause to state: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more." We venture to add a further reason in support. Since Section 397 Code of Criminal Procedure is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers Under Section 482 Cr.P.C.

[59] The law declared or observations made by the Hon'ble apex Court are binding on the High Courts as well as Subordinate Court, in view of Article 141 of the Constitution of India. Therefore, the decisions of learned Single Judges and the Full Bench of the Allahabad High Court have no legal force.

[60] Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, the contention of the learned counsel for the second respondent that the order passed under Section 156(3) Cr.P.C., is not amenable to Section 482 Cr.P.C., in view of the bar to file a revision under Section 397(2) Cr.P.C., holds no water.

> Whether the learned Special Judge has wrongly quoted Section 156(3) Cr.P.C., in the impugned order?

[61] The learned counsel for the second respondent strenuously submitted that the learned Special Judge passed the impugned order for limited purpose of calling for preliminary report; therefore, it can be treated as an order passed under Section 202(1) Cr.P.C., instead of an order passed under Section 156(3) Cr.P.C. He further submitted mere quoting of wrong provision by itself will not change the nature of the order. To substantiate the stand, he has drawn the attention of this Court to the judgment passed by a Division Bench of this Court in W.A.No.239 of 2016 dated 22.03.2016. The Division Bench, while following the judgments of the Hon'ble apex Court, in H. L. Mehra v Union

of India, 1974 4 SCC 396, Municipal Corporation of City of Ahmedabad v Ben Hiraben Manilal, 1983 2 SCC 422 and Kedar Shashikant Deshpande v Bhor Municipal Council, 2011 2 SCC 654 . In the last decision, at para No.12.4, it was held as follows:

> 12.4 It is thus clear from the judgments of the Supreme Court, that wrong reference or quoting wrong provision of the Statute while exercising power, under which action has been taken by the authority, would not per se vitiate that action or invalidate the decision, if it could be otherwise justified under some other provision/power under which such action could be lawfully taken. In other words, merely quoting wrong provisions of the statute while exercising power would not invalidate the decision/resolution made by the authority, including the authority such as the House, if it is shown that such decision/resolution could be traced to some other provision of the statute/ Constitution.

[62] Per contra, learned senior counsel for the petitioner submitted that the learned Special Judge consciously passed the order under Section 156(3) Cr.P.C., and not under any other provision of the Cr.P.C. He further submitted that the question of mere quoting of wrong provision of law does not arise in this case. He has drawn the attention of this Court to the decision in Ramdev Food Products Private Limited. On the other hand, learned standing counsel for the first respondent submitted that the stand taken by the second respondent is imaginary and contrary to the provisions of the Cr.P.C.

[63] At this juncture, the crucial question that falls for consideration is whether the impugned order passed by the learned Special Judge can be treated as an order passed under Section 202(1) Cr.P.C. In order to resolve the controversy, the court has to consider the true legal concept of 'taking of cognizance'. The phrase 'taking of cognizance of offence' is not defined under the provisions of Cr.P.C. In legal or common parlance, taking cognizance of offence by the Magistrate means application of his judicial mind to the facts of the case. To put it in another way, whether the allegations made in the complaint prima facie constitute the offence alleged or not? is the sole criterion for taking cognizance of offence. If the allegations made in the complaint are ex facie taken to be true and correct, no prima facie case is made out, then the Magistrate can decline to take cognizance of offence. If the Magistrate feels that if the allegations made in the complaint prima facie disclose a cognizable offence, then he can take cognizance of such offence. Therefore, 'taking cognizance of offence' is nothing but application of judicial mind to the facts of the case. Otherwise, the Parliament might not

have deployed the words, "of facts which constitute such offence" in Clause (a) of Sub-Section (1) of Section 190 Cr.P.C.

[64] It is a settled principle of law that the Magistrate has no power whatsoever to conduct an enquiry or direct investigation by the Police under Section 202(1) Cr.P.C., prior to taking cognizance of offence under clause (a) of Sub-section (1) of Section 190 Cr.P.C. There has been no gain-saying that the learned Special Judge has not taken cognizance of offence against the petitioner by exercising jurisdiction under Section 190(1)(a) Cr.P.C., on the complaint filed by the second respondent.

[65] Chapter XII Cr.P.C., deals with information to the police and their power to investigate. Section 156 Cr.P.C., falls under Chapter XII of the Code. Section 190 Cr.P.C., forms integral part of Chapter XIV, which deals with the conditions requisite for initiation of proceedings. Chapter XV deals with complaint to Magistrate which encompasses in it Sections 200 to 203 Cr.P.C. Chapter XVI deals with commencement of proceedings before the Magistrate. Section 210 Cr.P.C., falls under Chapter XVI. Section 156 (3), 190 and 202 Cr.P.C., are placed suitably under different Chapters of Cr.P.C., with a particular object i.e., to avoid overlapping and confusion.

[66] Section 156(3) and Section 202(1) Cr.P.C operate in two different spheres. Sections 156(3) and 202(1) Cr.P.C., will not go together. An order passed under Section 156(3) Cr.P.C., cannot be equated with an order passed under Section 202(1) Cr.P.C., or vice versa. The Magistrate can exercise the jurisdiction under Section 156(3) Cr.P.C., before taking cognizance of offence. The Magistrate can direct the police to investigate into the matter under Section 202(1) Cr.P.C., after taking cognizance of offence. Section 156(3) Cr.P.C., can be pressed into service at the pre-cognizance stage, whereas Section 202 (1) Cr.P.C., comes into operation at post cognizance stage.

[67] Chapter XII deals with statutory powers of the Investigating Agency right from registration of the FIR till filing of final report under Section 173(2) Cr.P.C. Section 190 Cr.P.C., contained in Chapter XIV deals with taking of cognizance. A perusal of Section 2(d) Cr.P.C., clearly demonstrates that complaint does not include police report. Section 2(r) Cr.P.C., defines police report.

[68] On receipt of a complaint under Sections 190 and 200 Cr.P.C., the Magistrate has two avenues to follow (1) He can take cognizance of offence under Section 190 Cr.P.C., and proceed further under Sections 200 to 204 Cr.P.C., (2) If the Magistrate is not inclined to take cognizance of offence, he can forward the complaint to the concerned

police under Section 156 (3) Cr.P.C., for investigation and report. The learned Magistrate can choose any one of the two options available to him basing on the facts and circumstances of each case. The complainant has no right whatsoever to compel the Magistrate to follow the option of his (complainant's) choice. A fascicular reading of Sections 190 and 156(3) Cr.P.C., clearly spell out that the Magistrate, who is competent to take cognizance of offence, can forward the complaint to the police for investigation and report.

[69] In A. R. Antulay v Ramdas Sriniwas Nayak, 1984 2 SCC 500 , at Para 31, the Hon'ble apex Court held as under:

> 31. Upon a complaint being received and the court records the verification, it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue of process that the Court of necessity must hold the inquiry as envisaged by Section 202 or direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in Section 202 when it says that the Magistrate may "if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer , for the purpose of deciding whether or not there is sufficient ground for proceeding". Therefore, the matter is left to the judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the court enjoys cannot be circumscribed or denied by making it mandatory upon the court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision.

> As per the principle enunciated in the above decision, on receipt of the complaint, the court has judicial discretion either to enquire into the case or direct for investigation. In the case on hand, after perusing the complaint and other relevant documents, the learned Special Judge, by arriving at the conclusion that it is conducive to justice, forwarded the complaint to the ACB under section 156(3) Cr.P.C., for investigation and report.

[70] The Hon'ble apex Court considered the scope of Section 190(1)(a), Section 156(3) and Section 200 of Cr.P.C in Devarapalli Lakshminarayana Reddy vs. V.Narayana Reddy, 1976 3 SCC 252 and at Para No.17 held as under:

> 17. Section 156(3) occurs in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while Section 202 is in Chapter XV which bears the heading "Of complaints to Magistrates". The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under Sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge sheet under Section 173. On the other hand Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not here is sufficient ground for proceeding". Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

[71] Recently, the Hon'ble apex Court reiterated and reaffirmed the above principle in Ramdev Food Products Private Limited. Viewed from any dimension, the impugned order cannot be treated as an order passed under Section 202(1) Cr.P.C., as the

learned Special Judge has not taken the cognizance of offence basing on the complaint of the second respondent. There is no other provision under Cr.P.C., enabling the learned Special Judge to call for the report from the ACB, except under Section 156 (3) Cr.P.C. If the learned Special Judge had taken cognizance of offence and ordered investigation by mentioning the provision of law as Section 156 (3) Cr.P.C., certainly the submission made by the learned counsel for the second respondent has some legal force.

[72] Having regard to the facts and circumstances of the case, I am of the considered view that the learned Special Judge, while passing the impugned order, quoted Section 156(3) Cr.P.C., knowing fully well that he has no power to direct investigation under Section 202(1) Cr.P.C., in view of non-taking of cognizance of offence under Clause (a) of Sub-section (1) of Section 190 Cr.P.C., basing on the complaint. In view of the facts and circumstance of the case, it cannot be presumed that the learned Special Judge quoted wrong provision of law. Viewed from any angle, either on facts or in law, the contention of the learned counsel for the second respondent has no legs to stand. Whether the learned Special Judge had passed the order without application of mind?

[73] The learned senior counsel for the petitioner as well as the learned standing counsel for the first respondent have strenuously submitted that the learned Special Judge exercised jurisdiction under Section 156 (3) Cr.P.C., without applying his mind; therefore, the impugned order is not sustainable. They further submitted that if the order of the learned Special Judge is allowed to stand, certainly, it would amount to miscarriage of justice.

[74] The learned counsel for the second respondent strenuously submitted that the words "non application of mind" is not defined in Cr.P.C; therefore, question of application of mind does not arise at all and that word has no legal sanctity. He further submitted that the learned Special Judge perused the material on record and forwarded the complaint to the ACB under Section 156(3) Cr.P.C., and hence the impugned order is in consonance with the settled principles of law.

[75] For appreciation of rival contentions, it is apposite to quote Sub-section (3) of Section 156 Cr.P.C.

156. Police officer's power to investigate cognizable case

(1)

(2)

(3) Any Magistrate empowered under section 190 may order such investigation as above mentioned.

Section 190 (1) (a) Cr.P.C., reads as follows:

190. Cognizance of offence by Magistrates:

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence

(a) upon receiving a complaint of facts which constitute such offence.

[76] A fascicular reading of clause (a) of Sub-section (1) of Section 190 and Sub-section (3) of Section 156 Cr.P.C., clearly demonstrates that the Magistrate, having jurisdiction to take cognizance of offence, can forward the complaint to the concerned Police for investigation and report.

[77] To buttress the argument, learned senior counsel for the petitioner has drawn the attention of this court to the following decisions:

(i) In Ramdev Food Products Private Limited, the Hon'ble apex Court, at Para No.22.1, held as follows:

22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered

appropriate to straightaway direct investigation, such a direction is issued.

(ii) In Priyanka Srivastava, the Hon'ble apex Court, at paras 20, 27 and 34, held as under:

20. The learned Magistrate, as we find, while exercising the power Under Section 156(3) Code of Criminal Procedure has narrated the allegations and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power Under Section 156(3) Code of Criminal Procedure, cannot be marginalized. To understand the real purport of the same, we think it apt to reproduce the said provision:

156. Police officer's power to investigate cognizable case.-(1) ...

(2)

(3) Any Magistrate empowered Under Section 190 may order such an investigation as above-mentioned.

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction Under Section 156(3) Code of Criminal Procedure and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution

and circumspection has to be adhered to.

34. In view of the aforesaid analysis, we allow the appeal, set aside the order passed by the High Court and quash the registration of the FIR in case Crime No.298 of 2011, registered with Police Station, Bhelupur, District Varanasi, U.P.

(iii) In Guruduth Prabhu & Ors. v. M.S. Krishna Bhat and Ors., 1999 CrLJ 3909 the Hon'ble apex Court, at Para No.10, held as under:

10. When the allegation made in the complaint does not disclose cognizable offence, the Magistrate has no jurisdiction to order police investigation under Sub-section (3). In the present case, the learned Magistrate without applying his mind had directed an investigation by the police. Such an order which is passed without application of mind is clearly an order without jurisdiction. Therefore, the order passed directing the police to investigate under Sub-section (3) of Section 156, Cr. P.C, passed without jurisdiction is liable to be quashed by this Court either under Section 482, Cr.P.C, or under Article 226 of the Constitution of India. We find from the materials on record, the learned Magistrate has not at all applied his mind before directing police investigation under Section 156(3), Cr. P.C. If the Magistrate had applied his mind, the Magistrate could have found that no cognizable offence is made out even if the entire allegations made in the complaint are accepted. We have already come to the conclusion that none of the complaints filed by the complainants disclose a cognizable offence alleged under Section 167, IPC. On this count alone the direction given by the Magistrate is liable to be quashed. The Hon'ble Supreme Court in State of Haryana v. Bhajan Lal, 1992 CrLJ 527 has held that the High Court could either exercise its power under Article 226 of the Constitution of India or under Section 482, Cr.P.C and quash the investigation to prevent abuse of the process of law or to secure the end of justice. It has been held that where uncontroverted allegations made in the complaint do not disclose the commission of a cognizable offence justifying an investigation by police, the High Court is empowered to quash such an investigation. As per the principle enunciated in the cases cited supra, an order passed by the Magistrate under Section 156(3) Cr.P.C., without

application mind, is not sustainable. The learned standing counsel for the first respondent also placed reliance on the proposition laid down in Priyanka Srivastava.

(iv) In Anil Kumar, the Hon'ble apex Court, at paras 3 and 11, held as follows:

3. On receipt of the complaint, the Special Judge passed an order on 20.10.2012 which reads as follows:

"On going through the complaint, documents and hearing the complainant, I am of the sincere view that the matter requires to be referred for investigation by the Deputy Superintendent of Police, Karnataka Lokayukta, Bangalore Urban, Under Section 156(3) of Code of Criminal Procedure. Accordingly, I answer point No. 1 in the affirmative.

Point No. 2: In view of my finding on point No. 1 and for the foregoing reasons, I proceed to pass the following:

ORDER

The complaint is referred to Deputy Superintendent of Police - 3 Karnataka Lokayukta, Bangalore Urban Under Section 156(3) of Code of Criminal Procedure for investigation and to report."

11. The scope of the above mentioned provision came up for consideration before this Court in several cases. This Court in Maksud Saiyed case examined the requirement of the application of mind by the Magistrate before exercising jurisdiction Under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Code of Criminal Procedure, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter Under Section 156(3) against a public servant without a valid sanction

> order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation Under Section 156(3) Code of Criminal Procedure, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation.

[78] The learned counsel for the second respondent submitted that the second respondent filed the complaint under Sections 190 and 200 Cr.P.C., seeking a relief under section 210 Cr.P.C., whereas the learned Special Judge passed the impugned order under Section 156(3) Cr.P.C. He further submitted that though the order passed by the learned Special Judge was labelled as an order under Section 156(3) Cr.P.C., the same can be treated as an order passed under Section 202(1) Cr.P.C.

[79] Let me consider whether the learned Special Judge has followed the principle enunciated in the cases cited supra. The second respondent filed the complaint under Sections 190 and 200 Cr.P.C., against the petitioner for the offences punishable under Sections 12 of the PC Act and Section 120-B of IPC. The learned Special Judge has to satisfy himself that the allegations made in the complaint prima facie disclose the offences punishable under Section 12 of P.C Act and Section 120-B of IPC. Whether the learned Special Judge has applied his mind to the allegations made in the complaint or not is the question to be decided. It is needless to say that the learned Special Judge need not pass an elaborate order while forwarding the complaint under Section 156 (3) Cr.P.C. That does not mean that the learned Special Judge can pass a cryptic and slipshod order, without application of mind. Suffice it to say that the application of mind shall be depicted in the order passed. The objective satisfaction of the Magistrate is sine qua non to forward the complaint under Section 156(3) Cr.P.C. If the learned Special Judge has applied his mind to the facts of the mind, then this Court has no right whatsoever to interfere with the impugned order. If not, this Court can quash the proceedings by exercising jurisdiction under Section 482 Cr.P.C., in view of the principle enunciated in cases cited supra.

[80] In order to appreciate the contention of the learned senior counsel for the petitioner

it is apposite to extract the impugned order hereunder:

> Heard the learned counsel for the petitioner/ complainant. Perused the entire record filed by the petitioner/complainant. The material filed along with the complaint is to be required to be enquired and investigated thoroughly by the concerned police.
>
> In the facts and circumstances of the case, I am of the firm view that the complaint filed by the complainant is required to be forwarded to the concerned police under Section 156 (3) Cr.P.C for thorough investigation and report. The office is directed to send all the records along with complaint to the concerned police, duly indexed by 29.09.2016.

[81] There is no mention in the impugned order that the allegations made in the complaint prima facie constitute the offences punishable under Section 12 of PC Act and Section 120-B of IPC which requires a thorough investigation and report. Mere using of words "Heard the learned counsel for the petitioner/complainant. Perused the entire record filed by the petitioner/complainant" does not denote or connote application of mind. Application of mind is some thing more than the perusal of the record. In Anil Kumar, which also arises under PC Act, the Court has forwarded the complaint under Section 156 (3) Cr.P.C. The prospective accused challenged the order of the learned Special Judge by way of filing a Writ Petition before Karnataka High Court for quashing of the same. The Karnataka High Court quashed the orders of the Special Court. The complainant preferred SLP before the Hon'ble apex Court and the same was dismissed. The facts of the case on hand are almost identical to the facts of the case.

[82] A perusal of the impugned order clearly manifests that the learned Special Judge has not applied his mind to the allegations made in the complaint and passed the order under Section 156 (3) Cr.P.C., in a laconic manner.

[83] The other contention of the learned senior counsel for the petitioner is that the second respondent did not file affidavit along with the complaint; therefore, the learned Special Judge ought not to have entertained the complaint. The learned counsel for the second respondent submitted that the second respondent filed the complaint seeking relief under Section 210 Cr.P.C., hence there is no necessity to file affidavit. To substantiate the argument learned senior counsel for the petitioner has drawn the

attention of this court to the decision in Priyanka Srivastava, wherein at paras 30 and 35, it was held as follows:

> 30. In our considered opinion, a stage has come in this country where Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.
>
> 35. A copy of the order passed by us be sent to the learned Chief Justices of all the High Courts by the Registry of this Court so that the High Courts would circulate the same amongst the learned Sessions Judges who, in turn, shall circulate it among the learned Magistrates so that they can remain more vigilant and diligent while exercising the power under Section 156(3) CrPC.

[84] As per the principle enunciated in the case cited supra, filing of affidavit along with private complaint is mandatory in order to forward the same to the concerned Police under Section 156 (3) Cr.P.C., for investigation and report. In para 35, the Hon'ble apex Court directed all the High Courts to circulate copy of the judgment among the learned Magistrates. This court also circulated the copy of the judgment in Priyanka Srivastava to all the Magistrates in the State of Telangana and the State of Andhra Pradesh. For one reason or the other, the learned Special Judge has not considered filing of the affidavit in support of the complaint, before passing the impugned order under Section 156 (3) Cr.P.C. This aspect also goes to prove, non application of the mind by the learned Special Judge.

[85] In view of the foregoing discussion, I have no hesitation to hold that learned Special Judge passed the impugned order without application of mind, therefore the same is liable to be quashed by exercising inherent jurisdiction under Section 482 Cr.P.C.

Whether the registration of second FIR is permissible basing on same set of facts?

[86] The learned senior counsel for the petitioner strenuously submitted that if the impugned order is allowed to stand, the ACB has to register second FIR, basing on the same set of facts, which is not permissible under law; therefore, the impugned order is liable to be set aside. The learned standing counsel for the first respondent concurred with the submission of the learned senior counsel for the petitioner, on this aspect. Refuting the above submissions, leaned counsel for the second respondent submitted that in pursuance of the impugned order, the ACB can conduct discrete enquiry and file preliminary report, without registering the FIR much less the second FIR in the same crime. He further submitted that the learned Special Judge only called for the report of the ACB and therefore, the impugned order is legally sustainable.

[87] The crucial question that falls for consideration is whether the ACB can conduct discrete enquiry and file preliminary report in this case without registering the FIR. Before considering the case law, it is imperative to mention few relevant facts. The ACB registered the Crime, basing on the complaint lodged by the de facto complainant. The second respondent filed complaint against the petitioner before the Special Court on 08.8.2016. The learned Special Judge passed the impugned order on 29.8.2016. On 31.8.2016, the ACB filed a Memo before the Special Court stating that the allegations in the complaint case and the Crime are one and the same. It is not the case of the second respondent that the allegations made in Crime No.11/ACB-CR 1-HYD/2015 and the complaint are not one and the same. The learned Special Judge has taken cognizance of offence against A.1 to A.3 and numbered the charge sheet as C.C.No.15 of 2016 on 29.8.2016. On the same day, i.e., 29.8.2016, the learned Special Judge had passed the impugned order. By the time of passing of the impugned order, the learned Special Judge is very much aware that basing on the same set of facts, the ACB registered the Crime, investigated into and filed the charge sheet.

[88] The second respondent has taken a specific plea, in paragraph No.33 of the counter, that ACB is entitled to conduct enquiry without registration of second FIR in view of point No.78 of Chapter-7 of ACB Manual. Of course, the second respondent has

not produced copy of the Manual. The learned senior counsel for the petitioner submitted that even if there is a Manual, the same has no statutory enforcement. He further submitted that if there is a conflict between the provisions of Cr.P.C., and the Manual of the concerned department, the provisions of Cr.P.C., will prevail.

[89] To substantiate the argument, learned senior counsel for the petitioner also placed reliance on paragraph No.89 of the decision in Lalita Kumari v Government of Uttar Pradesh, 2014 2 SCC 1 which reads as follows:

> 89. Besides, the learned Senior Counsel relied on the special procedures prescribed under the CBI Manual to be read into Section 154. It is true that the concept of "preliminary inquiry" is contained in Chapter IX of the Crime Manual of CBI. However, this Crime Manual is not a statute and has not been enacted by the legislature. It is a set of administrative orders issued for internal guidance of the CBI officers. It cannot supersede the Code. Moreover, in the absence of any indication to the contrary in the Code itself, the provisions of the CBI Crime Manual cannot be relied upon to import the concept of holding of preliminary inquiry in the scheme of the Code of Criminal Procedure. At this juncture, it is also pertinent to submit that CBI is constituted under a special Act, namely, the Delhi Special Police Establishment Act, 1946 and it derives its power to investigate from this Act.
>
> As per the principle enunciated in the case cited supra, the ACB Manual is meant for internal administrative guidance without any statutory force. The ACB has to follow the provision of the Cr.P.C., in letter and spirit regardless of their Manual.

[90] Having regard to the facts and circumstances of the case and the principle enunciated in the case cited supra, I am of the considered view that the ACB Manual will not prevail over the provisions of the Cr.P.C.

[91] The second limb of the argument of learned counsel for the second respondent is that the Investigating Agency can conduct discrete enquiry and file preliminary report, without registering the second FIR. The word "discrete enquiry" does not find place in Chapter XII of Cr.P.C., which envisages investigation and filing of report. It is a settled principle of law that the Investigating Officer has to investigate the case within the four corners of Chapte-XII of Cr.P.C. In the absence of a specific provision in the Cr.P.C.,

the Investigating Officer has no right whatsoever to conduct discrete enquiry and file preliminary report. Section 154 Cr.P.C., mandates registration of FIR immediately after receipt of the information about the commission of a cognizable offence. Therefore, I am unable to accede to the contention of the learned counsel for the second respondent that the Investigating Agency has power to conduct discrete enquiry without registration of FIR.

[92] To substantiate the argument, learned counsel for the second respondent has drawn the attention of this court to the decision in Lalita Kumari. Para 120.1, 120.5 and 120.6 read as follows:

> 120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
>
> 120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
>
> 120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:
>
> (a) Matrimonial disputes/family disputes
>
> (b) Commercial offences
>
> (c) Medical negligence cases
>
> (d) Corruption cases
>
> (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

[93] The learned counsel for the second respondent has mainly placed reliance on para 120.6, wherein the Hon'ble apex Court observed that a preliminary enquiry is to be conducted in certain type of cases. In para 120.5, the Hon'ble apex Court made an observation that preliminary enquiry is only to ascertain whether information reveals any cognizable offence. In para 120.1, the Hon'ble apex Court made an observation that registration of FIR is mandatory in view of Section 154 Cr.P.C. The principle enunciated in Lalita Kumari also did not support the contention of the learned counsel for the second respondent.

[94] To substantiate the argument, learned senior counsel for the petitioner has drawn the attention of this court to the following decisions:

(i) In T. T. Anthony v State of Kerala, 2001 6 SCC 181. Relevant portion in Para 28 reads as follows:

28. The course adopted in this case, namely, the registration of the information as the second FIR in regard to the same incident and making a fresh investigation is not permissible under the scheme of the provisions of CrPC as pointed out above, therefore, the investigation undertaken and the report thereof cannot but be invalid. We have, therefore, no option except to quash the same leaving it open to the investigating agency to seek permission in Crime No. 353 or 354 of 1994 of the Magistrate to make further investigation, forward further report or reports and thus proceed in accordance with law.

(ii) In Amitbhai Anil Chandra Shah v CBI, 2013 6 SCC 348 relevant portions in paras 38 and 60 read as follows:

38. As a matter of fact, the aforesaid proposition of law making registration of fresh FIR impermissible and violative of Article 21 of the Constitution is reiterated and reaffirmed in the following subsequent decisions of this Court: (1) Upkar Singh v. Ved Prakash, 2004 13 SCC 292, (2) Babubhai v. State of Gujarat, 2010 12 SCC 254, (3) Chirra Shivraj v. State of A. P., 2010 14 SCC 444, and (4) C. Muniappan v. State of T. N., 2010 9 SCC 567. In C.

Muniappan, this Court explained the "consequence test" i.e. if an offence forming part of the second FIR arises as a consequence of the offence alleged in the first FIR then offences covered by both the FIRs are the same and, accordingly, the second FIR will be impermissible in law. In other words, the offences covered in both the FIRs shall have to be treated as a part of the first FIR.

60. In view of the above discussion and conclusion, the second FIR dated 29-4-2011 being RC No.3(S)/ 2011/Mumbai filed by CBI is contrary to the directions issued in judgment and order dated 8-4-2011 by this Court in Narmada Bai v. State of Gujarat, 2011 5 SCC 79 and accordingly the same is quashed.

(iii) In Dilawar Singh v. State of Delhi, 2007 12 SCC 641 the Hob'ble apex Court, at para 11, held as follows:

11. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

(iv) In Mohd. Yousuf v Afaq Jahan, 2006 1 SCC 627 the Hon'ble apex Court, at para 11, held as under:

11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable

offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

[95] As per the principle enunciated in the cases cited supra, the Investigating Agency has no right whatsoever to conduct preliminary enquiry without registering FIR. The purpose of conducting of preliminary enquiry is to ascertain whether the allegations made in the complaint discloses commission of cognizance offence and not to ascertain the truthfulness or otherwise of the allegations made in the complaint. As observed earlier, the complaint in this case is replica of the charge sheet. In such circumstances, if the impugned order is allowed to stand, the ACB has no other alternative except to register the second FIR basing on the same set of facts, which is not permissible under law. Viewed from this angle also, the impugned order is not sustainable.

Whether the second respondent can seek the relief under Section 210 Cr.P.C., in view of peculiar facts and circumstances of the case?

[96] The predominant contention of learned counsel for the second respondent is that the second respondent filed the complaint seeking relief under Section 210 Cr.P.C., and therefore, the learned Special Judge ought to have followed the procedure as contemplated under Section 210 Cr.P.C. The learned senior counsel for the petitioner strenuously submitted that the relief sought by the second respondent is misconceived. He further submitted that the very purpose of Section 210 Cr.P.C., is to protect the interest of the accused and not of the complainant. He also submitted that in view of the relief sought by the second respondent, the complaint itself is not maintainable. The learned standing counsel for the first respondent submitted that ultimately the learned Special Judge has to take a decision either to resort to Section 156(3) Cr.P.C., or to Section 210 Cr.P.C.

[97] In support of the contention, learned senior counsel for the petitioner has placed reliance on the following decisions:

(i) In Sankaran Moitra v Sadhna Das, 2006 4 SCC 584 the Hon'ble apex

Court, at Paras 77, 78 and 79, held as follows:

77. The object of enacting Section 210 of the Code is threefold:

(i) it is intended to ensure that private complaints do not interfere with the course of justice;

(ii) it prevents harassment to the accused twice; and

(iii) it obviates anomalies which might arise from taking cognizance of the same offence more than once.

78. The Joint Committee of Parliament observed:

"It has been brought to the notice of the Committee that sometimes when a serious case is under investigation by the police, some of the persons file complaint and quickly get an order of acquittal either by cancellation or otherwise.

Thereupon the investigation of the case becomes infructuous leading to miscarriage of justice in some cases.

To avoid this, the Committee has provided that where a complaint is filed and the Magistrate has information that the police is also investigating the same offence, the Magistrate shall stay the complaint case. If the police report (under Section 173) is received in the case, the Magistrate should try together the complaint case and the case arising out of the police report. But if no such case is received the Magistrate would be free to dispose of the complaint case. This new provision is intended to secure that private complainants do not interfere with the course of justice."

79. It is thus clear that before Section 210 can be invoked, the following

conditions must be satisfied.

(i) there must be a complaint pending for inquiry or trial;

(ii) investigation by the police must be in progress in relation to the same offence;

(iii) a report must have been made by the police officer under Section 173; and

(iv) the Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case.

(ii) In Dilawar Singh, the Hon'ble apex Court, at paragraph No.13, held as follows:

13. The principle has been statutorily recognised in Section 210 CrPC which enjoins upon the Magistrate, when it is made to appear before him either during the inquiry or the trial of a complaint, that a complaint before the police is pending investigation in the same matter, he is to stop the proceeding in the complaint case and is to call for a report from the police. After the report is received from the police, he is to take up the matter together and if cognizance has been taken on the police report, he is to try the complaint case along with the GR case as if both the cases are instituted upon police report. The aim of the provision is to safeguard the interest of the accused from unnecessary harassment.

(iii) In Geevarghese Yohannan v Philipose, 1987 CrLJ 1605 (Karala HC) the Kerala High Court, at para 11, held as follows:

11. This is not a case where there was a private complaint and the Magistrate had already taken cognizance of the offence on the basis of the private complaint and subsequently it was made to appear to the Magistrate,

during the course of the inquiry that investigation by Police was in progress in relation to the offence which was the subject matter of the inquiry or trial held by him. Therefore S. 210 of the Criminal P.C. does not authorize the Magistrate to proceed as if both cases were instituted on police report.

The decision in Namathoti Sankaramma v State of A.P., 2001 1 ALT(Cri) 17 also deals with the scope of Section 210 Cr.P.C.

[98] The learned counsel for the second respondent, in support of the contention, has placed reliance on para 14 of the decision in Dilawar Singh, which reads as follows:

14. The provisions of Section 210 CrPC are mandatory in nature. It may be true that non-compliance with the provisions of Section 210 CrPC, is not ipso facto fatal to the prosecution because of the provision of Section 465 CrPC, unless error, omission or irregularity has also caused the failure of justice and in determining the fact whether there is a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. But even applying the very same principles it is seen that in fact the appellant was in fact prejudiced because of the non-production of the records from the police.

[99] In Hanumanth v State of Karnataka, 1980 LawSuit(Kar) 260 the High Court of Karnataka, at para 4, held as follows:

4. The combined effect of these provisions (Subsections (1), (2) and (3) of Section 210 Cr.P.C.,) is: where the accused mentioned in the police report and those mentioned in the private complaint are one and the same, the case instituted on the private complaint stands merged with the police case, and no separate inquiry in the complaint case is necessary. The Magistrate has to inquire into and try both the cases together, as if they were instituted on police report. However, where the accused mentioned in the police report and those mentioned in the complaint case are different or only some are common and others different, the Magistrate has to proceed with the inquiry or trial of the case as against those all or the remaining accused in the case instituted on the private complaint.

[100] The ratio laid down in Narmada Prasad Sonkar v Sardar Avtar Singh Chabara, 2006 9 SCC 601 is that the High Court is not justified in quashing the complaint itself for non-following of the procedure simply because the Magistrate issued the process (under Section 202 Cr.P.C.,) without following the procedure and without application of mind.

[101] As per the principle enunciated in the cases cited supra, the underlying object of Section 210 Cr.P.C., is three fold: (1) to prevent the complainant to interfere with the investigation, (2) to safeguard the interest of the accused, (3) to conduct joint trial basing on the complaint case and police report. Now, it should be considered whether the facts of the case on hand are fit in the conditions enumerated in the cases cited supra.

[102] On 28.5.2015, the de facto complainant submitted a complaint to the Director General of Police, ACB and the same was forwarded to the Deputy Superintendent of Police, ACB, Range-I, Hyderabad to take necessary action. The ACB registered the FIR on 31.5.2015 in Crime No.11/ACB-CR-1-HYD/2015 against A1 to A4 and subsequently A5 was added. On 28.7.2015, the ACB laid the charge sheet before the Special Court against A1 to A4. In the charge sheet, it is categorically stated that the investigation is in progress so far as A5 is concerned. As per the prosecution version, the investigation is still pending for the reasons mentioned in the charge sheet. On 29.8.2016, learned Special Judge has taken cognizance of offences under Section 12 of the PC Act and Section 120-B IPC against A1 to A3 basing on the police report.

[103] Admittedly, the petitioner is not an accused in the Crime. A.1 to A.3 and A5 in the Crime are not parties to the complaint. The learned Special Judge has not examined the complainant and witnesses on his behalf as postulated under Section 200 Cr.P.C. The learned Special Judge has not taken the cognizance of offence under clause (a) of Sub-section (1) of Section 190 Cr.P.C. It is not the case of the second respondent that the learned Special Judge, while conducting enquiry under Section 202 Cr.P.C., came to know about the pendency of investigation in the Crime. Even assuming, but not conceding, that the learned Special Judge has taken cognizance of offence basing on the complaint, the conditions stipulated in Sub-section (2) of Section 210 Cr.P.C., are not fulfilled in this case. The learned Special Judge has no power whatsoever to proceed under Section 210 Cr.P.C., without staying the proceedings in the complaint. Section 210(3) Cr.P.C., applies in two situations: (1) where the police report does not relate to any accused in the complaint case; or (2) if the Magistrate does not take cognizance of offence on the police report at all. Even the conditions enumerated in

Sub-section (3) of Section 210 Cr.P.C., are also not satisfied in this case.

[104] Having regard to the facts and circumstances of the case and the principle enunciated in the cases cited supra, I am of the considered view that the second respondent, as a matter of right, is not entitled to seek the relief under Section 210 Cr.P.C., for the following reasons:

a) When the Special Court has not taken the cognizance of offence basing on the complaint, neither conducted an enquiry under Section 202(2) Cr.P.C., nor stayed the proceedings under Section 210(1) Cr.P.C., seeking of relief under Section 210 Cr.P.C., by the second respondent is like engaging a Priest to prepare horoscope of an unborn child.

b) If the second respondent is really seeking the relief under Section 210 Cr.P.C., nothing prevented him to challenge the impugned order passed by the Special Court under Section 156(3) Cr.P.C.

c) Advancing the argument that though the order was passed under Section 156(3) Cr.P.C., the same can be construed as a direction to conduct discrete enquiry and file a preliminary report, itself expressly indicates that the second respondent is very much satisfied with the impugned order.

d) Having accepted and welcomed the impugned order, the second respondent cannot now put the clock back and seek direction to follow the procedure postulated under Section 210 Cr.P.C.

e) The second respondent cannot blow hot and cold viz., supporting the impugned order on one hand by way pleadings in paragraph Nos.22 Ground 1.a), 2.a), b), c), e), 23, 24, 32, 36, 37 and 43 of the counter, and seeking the relief under Section 210 Cr.P.C., on the other.

f) The two reliefs sought by the second respondent in "reason e)" are mutually self-destructive.

Whether the second respondent is entitled to file complaint by obtaining documents, by not adopting the procedure established by law?

[105] The learned senior counsel for the petitioner submitted that the second respondent has obtained the Court documents including Section 164 Cr.P.C., statements without following the procedure. The learned counsel for the second respondent submitted that obtaining of documents in illegal manner is not a valid ground to quash the complaint.

[106] It is needless to say that the statements recorded under Section 164 Cr.P.C., shall be in the custody of the court. Normally, Section 164 Cr.P.C., statements will not be furnished even to the accused unless the court satisfies that the exigencies so warrant. Even the accused is not entitled for the certified copies of the FIR and Section 161 Cr.P.C., statements without following the procedure contemplated under the Criminal Rules of Practice.

[107] The learned senior counsel for the petitioner has drawn the attention of this court to Rule 192, 204, 205, 206, 207, 211 and 212 of Criminal Rules of Practice. It is not the case of the second respondent that he obtained documents from the Special Court by following the procedure contemplated under Criminal Rules of Practice. There is no explanation much less convincing explanation forthcoming from the second respondent how, when and where he got the copies of documents filed along with the complaint. The fact remains that the second respondent is not in a position to convince the court that he obtained the documents by strictly adhering the procedure contemplated under Criminal Rules of Practice.

[108] The learned counsel for second respondent submitted that the Court has to take into consideration the substance of the documents placed before it and not the mode and method of obtaining such documents. To substantiate the arguments, he has relied upon para 35 of the decision in Umesh Kumar v State of A.P, 2013 10 SCC 591 which reads as follows:

> 35. It is a settled legal proposition that even if a document is procured by improper or illegal means, there is no bar to its admissibility if it is relevant and its genuineness is proved. If the evidence is admissible, it does not matter how it has been obtained. However, as a matter of caution, the court in exercise of its discretion may disallow certain evidence in a criminal case

> if the strict rules of admissibility would operate unfairly against the accused. More so, the court must conclude that it is genuine and free from tampering or mutilation. This Court repelled the contention that obtaining evidence illegally by using tape recordings or photographs offends Articles 20(3) and 21 of the Constitution of India as acquiring the evidence by such methods was not the procedure established by law.

[109] In view of the principle enunciated in the case cited supra, I am of the considered view that production of the documents by illegal methods by itself is a sole ground to dismiss the complaint. Whether the second respondent has locus standi to file the complaint?

[110] The learned senior counsel for the petitioner strenuously submitted that the second respondent has no locus standi to file the complaint before the Special Court. He further submitted that the second respondent filed the complaint with an ulterior motive to take vengeance against the petitioner though he is neither a de facto complainant, nor a victim, or having any semblance of interest whatsoever in the matter.

[111] The learned standing counsel for the first respondent submitted that the second respondent made bald allegations against the investigating agency without any basis. He further submitted that the second respondent has no right whatsoever to interfere with the investigation being conducted by the State ACB. Per contra, the learned counsel for the second respondent vehemently submitted that locus standi is alien to criminal jurisprudence; therefore, any person who came to know about commission of a cognizable offence can set law in motion. He further submitted that the petitioner and the first respondent are hand in glove and derailed the investigation basing on the single window programme.

[112] In support of the arguments, the learned senior counsel for the petitioner has drawn the attention of this Court to the following decisions:

> (i) In Janata Dal v HS Chowdhary, 1991 3 SCC 756 the Hon'ble apex Court, at Para Nos.25, 26 and 27, held as follows:
>
> 25. It is most relevant to note that none of the appellants before this Court save the Union of India and CBI is connected in any way with the present criminal proceeding initiated on the strength of the first information report

which is now sought to be quashed by Mr H.S. Chowdhary. Although in the FIR, the names of three accused are specifically mentioned none of them has been impleaded as a respondent to these proceedings by any one of the appellants. Even Mr Martin Ardbo, former President of M/s A.B. Bofors, who was impleaded as a pro forma respondent in Criminal Appeal No. 310 of 1991 has been given up by the Solicitor General.

Therefore, under these circumstances, one should not lose sight of the significant fact that in case this Court pronounces its final opinion or conclusions on the issues other than the general issues raised by the appellants as public interest litigants, without hearing the really affected person/persons, such opinion or conclusions may, in future, in case the investigation culminates in filing a final report become detrimental and prejudicial to the indicated accused persons who would be totally deprived of challenging such opinion or conclusions of this apex court, even if they happen to come in possession of some valuable material to canvass the correctness of such opinion or conclusions and consequently their vested legal right to defend their case in their own way would be completely nullified by the verdict now sought to be obtained by these public interest litigants.

26. Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants.

27. We, in the above background of the case, after bestowing our anxious and painstaking consideration and careful thought to all aspects of the case and deeply examining the rival contentions of the parties both collectively and individually give our conclusions as follows:

1. Mr H.S. Chowdhary has no locus standi (a) to file the petition under Article 51-A as a public interest litigant praying that no letter rogatory/request be issued at the request of the CBI and he be permitted to join the inquiry

before the Special Court which on February 5, 1990 directed issuance of letter rogatory/request to the Competent Judicial Authorities of the Confederation of Switzerland; (b) to invoke the revisional jurisdiction of the High Court under Sections 397 read with 401 of the Code of Criminal Procedure challenging the correctness, legality or propriety of the order dated August 18, 1990 of the Special Judge and (c) to invoke the extraordinary jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure for quashing the first information report dated January 22, 1990 and all other proceedings arising therefrom on the plea of preventing the abuse of the process of the court.

2. In our considered opinion, the initiation of the present proceedings by Mr H.S. Chowdhary under Article 51-A of the Constitution of India cannot come within the true meaning and scope of public interest litigation.

3. Consequent upon the above conclusions (1) and (2), the appellants namely, Janata Dal, Communist party of India (Marxist) and Indian Congress (Socialist) who are before this Court equally have no right of seeking their impleadment/ intervention. For the same reasons, Dr P. Nalla Thampy Thera also has no right to file the Writ Petition (Criminal) No. 114 of 1991 as a public interest litigant.

(ii) In Simranjit Singh Mann v Union of India, 1992 4 SCC 653 the Hon'ble apex Court, at Para No.7, held as follows:

7. The person to suffer for the unilateral act of the third party would be the accused! Many such situations can be pointed out to emphasise the hazard involved if such third party's unsolicited action is entertained. Cases which have ended in conviction by the apex court after a full gamut of litigation are not comparable with preventive detention cases where a friend or next of kin is permitted to seek a writ of habeas corpus. We are, therefore, satisfied that neither under the provisions of the Code nor under any other statute is a third party stranger permitted to question the correctness of the conviction and sentence imposed by the Court after a regular trial. On first principles we find it difficult to accept Mr Sodhi's contention that such a public interest

litigation commenced by a leader of a recognised political party who has a genuine interest in the future of the convicts should be entertained. In S.P. Gupta v. Union of India, 1981 Supp1 SCC 87, Bhagwati, J. observed: (SCC p. 219, para 24)

"But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others ."

These observations were made while discussing the question of 'locus standi' in public interest litigation. These words of caution were uttered while expanding the scope of the 'locus standi' rule. These words should deter us from entertaining this petition. This accords with the view expressed by this Court in Krishna Swami v. Union of India, 1992 4 SCC 605.

(iii) In Subramanian Swamy v. Raju, 2013 10 SCC 465 the Hon'ble apex Court, at Para Nos.8 and 9, held as under:

8. The administration of criminal justice in India can be divided into two broad stages at which the machinery operates. The first is the investigation of an alleged offence leading to prosecution and the second is the actual prosecution of the offender in a court of law. The jurisprudence that has evolved over the decades has assigned the primary role and responsibility at both stages to the State though we must hasten to add that in certain exceptional situations there is a recognition of a limited right in a victim or his family members to take part in the process, particularly, at the stage of the trial. The law, however, frowns upon and prohibits any abdication by the State of its role in the matter at each of the stages and, in fact, does not recognise the right of a third party/stranger to participate or even to come to the aid of the State at any of the stages. Private funding of the investigative process has been disapproved by this Court in Navinchandra N. Majithia v. State of Meghalaya, 2000 8 SCC 323, and the following observations amply sum up the position: (SCC p.329, para 18)

"18. Financial crunch of any State treasury is no justification for allowing a private party to supply funds to the police for conducting such investigation. Augmentation of the fiscal resources of the State for meeting the expenses needed for such investigations is the lookout of the executive. Failure to do it is no premise for directing a complainant to supply funds to the investigating officer. Such funding by interested private parties would vitiate the investigation contemplated in the Code. A vitiated investigation is the precursor for miscarriage of criminal justice. Hence any attempt, to create a precedent permitting private parties to supply financial assistance to the police for conducting investigation, should be nipped in the bud itself. No such precedent can secure judicial imprimatur."

9. Coming to the second stage of the system of administration of criminal justice in India, this Court in Thakur Ram v. State of Bihar, 1966 AIR(SC) 911, while examining the right of a third party to invoke the revisional jurisdiction under the 1898 Code, had observed as under: (AIR p.912)

" The criminal law is not, however, to be used as an instrument of wrecking private vengeance by an aggrieved party against the person who, according to that party, had caused injury to it. Barring a few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all the steps necessary for bringing the person who has acted against the social interests of the community to book."

(iv) In Amanullah v State of Bihar, 2016 6 SCC 699 the Hon'ble apex Court, at Para Nos.19 and 20, held as under:

19. The term "locus standi" is a Latin term, the general meaning of which is "place of standing". Concise Oxford English Dictionary, 10th Edn., at p. 834, defines the term "locus standi" as the right or capacity to bring an action or to appear in a court. The traditional view of "locus standi" has been that the person who is aggrieved or affected has the standing before the court that is

to say he only has a right to move the court for seeking justice. Later, this Court, with justice-oriented approach, relaxed the strict rule with regard to "locus standi", allowing any person from the society not related to the cause of action to approach the court seeking justice for those who could not approach themselves. Now turning our attention towards the criminal trial, which is conducted, largely, by following the procedure laid down in CrPC. Since, offence is considered to be a wrong committed against the society, the prosecution against the accused person is launched by the State. It is the duty of the State to get the culprit booked for the offence committed by him. The focal point, here, is that if the State fails in this regard and the party having bona fide connection with the cause of action, who is aggrieved by the order of the court cannot be left at the mercy of the State and without any option to approach the appellate court for seeking justice.

20. In this regard, the Constitution Bench of this Court in P.S.R. Sadhanantham, 1980 3 SCC 141 has elaborately dealt with the aforesaid fact situation. The relevant paras 13, 14 and 25 of which read thus: (SCC pp. 146-48 & 150- 51)

"13. It is true that the strictest vigilance over abuse of the process of the court, especially at the expensively exalted level of the Supreme Court, should be maintained and ordinarily meddlesome bystanders should not be granted 'visa'. It is also true that in the criminal jurisdiction this strictness applies a fortiori since an adverse verdict from this Court may result in irretrievable injury to life or liberty.

14. Having said this, we must emphasise that we are living in times when many societal pollutants create new problems of unredressed grievance when the State becomes the sole repository for initiation of criminal action. Sometimes, pachydermic indifference of bureaucratic officials, at other times politicisation of higher functionaries may result in refusal to take a case to this Court under Article 136 even though the justice of the lis may well justify it. While 'the criminal law should not be used as a weapon in personal vendettas between private individuals', as Lord Shawcross (The Times, 26-5-1977, 20) once wrote, in the absence of an independent prosecution

authority easily accessible to every citizen, a wider connotation of the expression "standing" is necessary for Article 136 to further its mission. There are jurisdictions in which private individuals not the State alone may institute criminal proceedings. The Law Reforms Commission (Australia) in its Discussion Paper No. 4 on 'Access to Courts I Standing: Public Interest Suits' wrote:

'The general rule, at the present time, is that anyone may commence proceedings and prosecute in the Magistrate's Court. The argument for retention of that right arises at either end of the spectrum the great cases and the frequent petty cases. The great cases are those touching Government itself a Watergate or a Poulson. However independent they may legally be any public official, police or prosecuting authority, must be subject to some government supervision and be dependent on government funds; its officers will inevitably have personal links with the Government. They will be part of the "establishment". There may be cases where a decision not to prosecute a case having political ramifications will be seen, rightly or wrongly, as politically motivated. Accepting the possibility of occasional abuse the Commission sees merit in retaining some right of a citizen to ventilate such a matter in the courts.'

Even the English System, as pointed by the Discussion Paper permits a private citizen to file an indictment. In our view the narrow limits set in vintage English Law, into the concept of person aggrieved and "standing" needs liberalisation in our democratic situation. In Bar Council of Maharashtra v M.V.Dabholkar, 1975 2 SCC 702, this Court imparted such a wider meaning. The American Supreme Court relaxed the restrictive attitude towards "standing" in the famous case of Baker v. Carr, 1962 SCC OnLine US SC 40. Lord Denning, in the notable case of Attorney General of Gambia v. N jie, 1961 AC 617 spoke thus: (AC p. 634)

' the words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him;'

Prof. S.A. de Smith takes the same view:

'All developed legal systems have had to face the problem of adjusting conflicts between two aspects of the public interest the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him (Quoted in Standing and Justiciability by V.S.Deshpandi, Journal of the Indian Law Institute, April-June 1971 Vol.13, No.2, p.174)'

Prof. H.W.R. Wade strikes a similar note:

'In other words, certiorari is not confined by a narrow conception of locus standi. It contains an element of the actio popularis. This is because it looks beyond the personal rights of the applicant; it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers.

In Dabholkar case, 1975 2 SCC 702, one of us wrote in his separate opinion: (SCC p. 720, para 59)

'59. The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the Judges is misplaced because public resort to court to suppress public mischief is a tribute to the justice system.'

This view is echoed by the Australian Law Reforms Commission.

* * *

25. In India also, the criminal law envisages the State as a prosecutor. Under the Code of Criminal Procedure, the machinery of the State is set in motion

on information received by the police or on a complaint filed by a private person before a Magistrate. If the case proceeds to trial and the accused is acquitted, the right to appeal against the acquittal is closely circumscribed. Under the Code of Criminal Procedure, 1898, the State was entitled to appeal to the High Court, and the complainant could do so only if granted special leave to appeal by the High Court. The right of appeal was not given to other interested persons. Under the Code of Criminal Procedure, 1973, the right of appeal vested in the States has now been made subject to leave being granted to the State by the High Court. The complainant continues to be subject to the prerequisite condition that he must obtain special leave to appeal. The fetters so imposed on the right to appeal are prompted by the reluctance to expose a person, who has been acquitted by a competent court of a criminal charge, to the anxiety and tension of a further examination of the case, even though it is held by a superior court. The Law Commission of India gave anxious thought to this matter, and while noting that the Code recognised a few exceptions by way of permitting a person aggrieved to initiate proceedings in certain cases and permitting the complainant to appeal against an acquittal with special leave of the High Court, expressed itself against the general desirability to encourage appeals against acquittal. It referred to the common law jurisprudence obtaining in England and other countries where a limited right of appeal against acquittal was vested in the State and where the emphasis rested on the need to decide a point of law of general importance in the interests of the general administration and proper development of the criminal law. But simultaneously the Law Commission also noted that if the right to appeal against acquittal was retained and extended to a complainant the law should logically cover also cases not instituted on complaint. It observed:

'58. Extreme cases of manifest injustice, where the Government fails to act, and the party aggrieved has a strong feeling that the matter requires further consideration, should not, in our view, be left to the mercy of the Government. To inspire and maintain confidence in the administration of justice, the limited right of appeal with leave given to a private party should be retained, and should embrace cases initiated on private complaint or otherwise at the instance of an aggrieved person.'

However, when the Criminal Procedure Code, 1973 was enacted, the statute, as we have seen, confined the right to appeal, in the case of private parties to a complainant. This is, as it were, a material indication of the policy of the law."

The learned standing counsel for the first respondent has also placed reliance on the decision in Amanullah.

[113] In National Commission For Women v State of Delhi, 2010 12 SCC 599 the Hon'ble apex Court, at Para Nos.14 and 15, held as follows:

14. The Court then examined the implications of completely shutting out a private party from filing a petition under Article 136 on the locus standi and observed thus: (P.S.R. Sadhanantham vs. Arunachalam, 1980 3 SCC 141, SCC p. 147, para 14)

"14. Having said this, we must emphasise that we are living in times when many societal pollutants create new problems of unredressed grievance when the State becomes the sole repository for initiation of criminal action. Sometimes, pachydermic indifference of bureaucratic officials, at other times politicisation of higher functionaries may result in refusal to take a case to this Court under Article 136 even though the justice of the lis may well justify it. While 'the criminal law should not be used as a weapon in personal vendettas between private individuals', as Lord Shawcross once wrote, in the absence of an independent prosecution authority easily accessible to every citizen, a wider connotation of the expression 'standing' is necessary for Article 136 to further its mission."

15. A reading of the aforesaid excerpts from the two judgments would reveal that while an appeal by a private individual can be entertained but it should be done sparingly and after due vigilance and particularly in a case where the remedy has been shut out for the victims due to mala fides on the part of the State functionaries or due to inability of the victims to approach the Court. In the present matter, we find that neither the State which is the complainant nor the heirs of the deceased have chosen to file a petition in

the High Court. As this responsibility has been taken up by the Commission at its own volition this is clearly not permissible in the light of the aforesaid judgments.

[114] To substantiate the arguments, the learned standing counsel for the first respondent relied on the ratio laid down in P.S.R. Sadhanantham v Arunachalm, 1980 3 SCC 141 wherein the Hon'ble apex Court, at Para No.26, held as under:

> 26. ..In every case, the court is bound to consider what is the interest which brings the petitioner to court and whether the interest of the public community will benefit by the grant of special leave. In a jurisprudence which elevates the right to life and liberty to a fundamental priority, it is incumbent upon the court to closely scrutinise the motives and urges of those who seek to employ its process against the life or liberty of another. In this enquiry, the court would perhaps prefer to be satisfied whether or not the State has good reason for not coming forward itself to petition for special leave .."

[115] In Dattaraj Nathuji Thaware v State of Maharashtra, 2005 AIR(SC) 540 the Hon'ble apex Court, at para Nos.9 and 11, held as under:

> 9. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity- oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well as to enrich themselves.

Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

10. The Council for Public Interest Law set up by the Ford Foundation in USA defined "public interest litigation" in its Report of Public Interest Law, USA, 1976 as follows:

"Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, consumers, racial and ethnic minorities and others."

[116] On the other hand, to substantiate the argument, the learned counsel for the second respondent has drawn the attention of this Court to the following decisions.

(i) In A.R.Antulay v Ramdas Srinivas Nayak, 1984 AIR(SC) 718 the Hon'ble apex Court, at para No.6, held as under:

6. ..the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. This general principle of nearly universal application is founded on a policy that an offence i.e. an act or omission made punishable by any law for the time being in force [See Section 2(n) CrPC] is not merely an offence committed in relation to the person who suffers harm but is also an offence against society. The society for its orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance. If such is the public policy underlying penal statutes, who brings an act or omission made punishable by law to the notice of the authority competent to deal with it, is immaterial and irrelevant unless the statute indicates to the contrary.

Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straitjacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception

(ii) In Subramanian Swamy v Manmohan Singh, 2012 3 SCC 64 the Hon'ble apex Court, at para No.28, held as under:

28. There is no provision either in the 1988 Act or the Code of Criminal Procedure, 1973 (CrPC) which bars a citizen from filing a complaint for prosecution of a public servant who is alleged to have committed an offence. Therefore, the argument of the learned Attorney General that the appellant cannot file a complaint for prosecuting Respondent 2 merits rejection. A similar argument was negatived by the Constitution Bench in A.R. Antulay v. R. S. Nayak, 1984 2 SCC 500}.

(iii) In Prakash Singh Badal v State of Punjab, 2007 1 SCC 1 the Hon'ble apex Court, at para Nos.64 and 67, held as under:

64. The above sub-section corresponds to Section 154 of the old Code of 1898 to which various amendments were made by Act 26 of 1955 and also to Section 154 of the Code of Criminal Procedure of 1882 (Act 10 of 1882) except for the slight variation in that expression "local Government" had been used in 1882 in the place of "State Government". Presently, on the recommendations of the Forty-first Report of the Law Commission, sub-sections (2) and (3) have been newly added but we are not concerned with those provisions as they are not relevant for the purpose of the disposal of this case except for making some reference at the appropriate places, if necessitated. Section 154(1) regulates the manner of recording the first information report relating to the commission of a cognizable offence.

67. It has to be noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression

"information" without qualifying the same as in Sections 41(1)(a) or (g) of the Code wherein the expressions "reasonable complaint" and "credible information" are used. Evidently, the nonqualification of the word "information" in Section 154(1) unlike in Sections 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that "every complaint or information" preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that "every complaint" preferred to an officer in charge of a police station shall be reduced in writing. The word "complaint" which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word "information" was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190(c) of the Code. An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

(iv) The same principle was reiterated in K. Karunakaran v State of Kerala, 2007 1 SCC 59 wherein the Hon'ble apex Court, at para No.5, held as under:

5. The residual question therefore is whether mala fides are involved. As is noted in Parkash Singh Badal case even though there is an element of personal or political rivalry, it is ultimately to be seen whether materials exist to substantiate the allegations. In that sense it is not the credibility of the person who makes the allegations but the existence of materials necessitating investigation which is relevant.

(v) In Samaj Parivartan Samudaya v State of Karnataka, 2012 7 SCC 407 the Hon'ble apex Court, at para Nos.63 and 64, held as under:

63. We must notice that the criminal offences are primarily offences against the State and secondarily against the victim. In this case, if the investigation by specialised agency finds that the suspect persons have committed offences with or without involvement of persons in power, still such violation undoubtedly would have been a great loss to the environmental and natural resources and would hurt both the State and national economy. We cannot expect an ordinary complainant to carry the burden of proving such complex offences before the court of competent jurisdiction by himself and at his own cost. Doing so would be a travesty of the criminal justice system.

64. It was ever and shall always remain the statutory obligation of the State to prove offences against the violators of law. If a private citizen has initiated the proceedings before the competent court, it will not absolve the State of discharging its obligation under the provisions of Cr.PC and the obligations of the rule of law. The Court cannot countenance an approach of this kind where the State can be permitted to escape its liability only on the ground that multifarious complaints or investigations have been initiated by private persons or bodies other than the State.

In our considered view, it enhances the primary and legal duty of the State to ensure proper, fair and unbiased investigation.

[117] From a perusal of the ratio laid down in the above cases the following principles can be deduced.

a) Any person can set the criminal law into motion on coming to know about the commission of a cognizable offence.

b) No qualification is prescribed under the provisions of Cr.P.C or P.C. Act to set the criminal law in motion.

c) A stranger or a third party to the criminal proceedings, as a matter of right, is not entitled to intervene or implead under the guise of public interest.

d) If there is any substance in the allegations made in the complaint, mala fides attributed or political affiliation of the complainant are relegated to secondary or may be ignored as the case may be.

e) The Court has to meticulously scrutinise whether the third party approached the Court bona fidely or not; for that the Court has to unveil the mask of the public interest. If the court comes to the conclusion that the intervener is not an aggrieved person, and filed the complaint for personal or political gain, then the Court should not allow such persons to intervene in the criminal proceedings.

[118] The complaint starts with the quotation of Albert Einstein which commenced with:

"The world will not be destroyed by those who do evil, but by those who watch them without doing anything"

and ends with the quotation of Abraham Lincoln about democracy, which reads thus:

"of the people, by the people, and for the people"

[119] Lord Krishna expounded in Bhagavad-Gita contained in Chapter-IV Text (8):

"To deliver the pious and to annihilate the miscreants, as well as to re-establish the principles, I myself appear, millennium after millennium."

[120] In para No.5 of the counter, the second respondent has taken a specific plea that he has been serving the poor and down trodden since long time and fought even at the cost of his life whenever there is breach of law. The second respondent, by referring the above three quotations, made every attempt to create an impression in the mind of the

court that he approached the court motivated by purity in thoughts, and with an open heart for the cause of others, without any semblance of selfish or political motive. If any ordinary prudent man has perused the averments in the complaint and the counter, it creates an impression as if the second respondent approached the Court with the sole object of unearthing the truth eventually to see that rule of law will prevail in the society. Whether creating such an impression will withstand the judicial scrutiny or not? is the core issue.

[121] Let me consider the facts of the case on hand in the light of the above legal principles. At the cost of repetition, this Court is inclined to refer a few facts. On 27.7.2015 the investigating agency filed charge sheet against A.1 to A.4 on 29.8.2016, learned Special Judge has taken cognizance of offences under Section 120-B of IPC against A.1 to A.3. The prosecution also filed a memo stating that investigation is in progress so far as A.5 and others are concerned. The first respondent has taken a specific stand in the counter that though the charge sheet is filed, still investigation is in progress.

[122] The learned senior counsel for the petitioner has taken this Court to the nomenclature of the complaint which reads, "Complaint filed in Cr.No.11/ACB-CR 1-HYD/2015 for the offences punishable under Section 12 of the PC Act and Section 120-B of IPC". He strenuously submitted that the second respondent will not fall within the ambit of 'complainant' and utmost he may be an intervener or impleader. It is a settled principle of law that the Court has to take into consideration the sum and substance of the complaint and should not be carried away with the nomenclature of the complaint. The relief sought in the complaint is as follows:

> "Hence, it is prayed that this Hon'ble Court may be pleased to take the complaint on the file and deal with the Accused for the offences u/s 12 of the P.C. Act, 1988 and 120-B I.P.C. and it is humbly submitted that as the Police investigation is simultaneously proceeding in the same offence the Hon'ble Court may be pleased to invoke Section 210 Cr.P.C and deal with the Accused as per Law in the interest of justice."

[123] A perusal of the relief indicates that the second respondent filed the complaint seeking the sole relief under Section 210 Cr.P.C. Whether the second respondent has locus standi to file the complaint or not depends on various aspects to be discussed infra. It is not in dispute that the second respondent filed the complaint in Cr.No.11/ACB-

[124] The complaint was filed on 08.08.2016, by which time, the Investigating Officer laid charge sheet in the above crime before the Special Court. The copy of the charge sheet was annexed as one of the list of documents along with the complaint. For the reasons best known, the second respondent did not mention in the complaint about filing of the charge sheet, which has material bearing on the issue. The learned senior counsel for the petitioner magnified this aspect as if the second respondent approached the Court by suppressing material facts. Even assuming but not conceding that the second respondent intentionally and wilfully concealed the factum of filing of the charge sheet, that itself is not a sole ground to dismiss the complaint without considering the other relevant aspects. However, the Court shall not lose sight of this aspect.

[125] The learned standing counsel for the first respondent submitted that the second respondent made several allegations as if the Investigating Agency has not conducted any investigation in all these days. He further submitted that the Investigating Agency is meticulously following the procedure so as to avoid the future legal complications. His entire endeavour is to impress the Court that the Investigating Agency is proceeding systematically by taking assistance and aid of the Experts in the fields of science and technology in order to unearth the truth as well as to ascertain the involvement of others. He further submitted that if any hasty step is taken by the Investigating Agency that may demolish the very foundation of the investigation. The learned standing counsel further submitted that the second respondent has not produced any track record to convince this Court that he has been fighting for the sake of poor and downtrodden by way of filing Public Interest Litigation petitions. The gist of the submissions of the learned counsel first respondent is that the second respondent has no locus standi to file the complaint as he is no way connected with the Crime.

[126] In A.R.Antulay the complainant alone collected the material and approached the Court due to apathy on the part of the Investigating Agency. The learned senior counsel for the petitioner also placed reliance on the decision in Subramanian Swamy. It is not out of place to extract the relevant portion in para No.2 of Subramanian Swamy, which reads thus: "for the last more than three years, the appellant has been vigorously pursuing, in the public interest, the cases allegedly involving loss of thousand of crores of rupees to the public exchequer due to arbitral and illegal grant of licence at the behest of Mr. A.Raju-second respondent who was appointed as Minister of Communication and Information Technology by the President on the advice of Dr.

Manmohman Singh". This clearly indicates that the complainant therein has collected the information on his own accord and filed the complaint in public interest. In the case on hand, the second respondent has not collected any new information, to justify his intervention. As observed earlier, the complaint is nothing but replica of the charge sheet filed by the ACB, except making some bald allegations against the Investigating Agency and the petitioner. The petitioner, who belongs to State of Andhra Pradesh, has no control whatsoever over the administration of State of Telangana in general and the ACB in particular. In such circumstances, influencing the ACB, Telangana by the petitioner is only imaginary of the second respondent. No specific allegation is made against the ACB, Telangana, highlighting the laches if any on their part. It is very easy to make bald and unfounded allegations against anybody. If any information is placed before the Court in support of such allegation, then the Court can take judicial notice of the same. Mere making of allegations against the Investigating Agency and the petitioner, without any substance, itself is not a sufficient ground to allow the second respondent to come on record.

[127] The second respondent has taken a specific stand in the complaint that the silence on the part of the Investigating Agency made him to step into the shoes of the Investigating Agency, which abandoned its statutory duty and purposefully failed to conduct basic investigation, nab and bring the prime offender. This clearly indicates that the second respondent came forward to shoulder the responsibility of investigation. It is the statutory duty of the Investigating Agency to investigate into the cognizable offences. The Investigating Agency has been discharging its duties on behalf of the State. It is a settled principle of law that a private individual cannot be entrusted with the responsibility of the investigation. A private individual cannot be entrusted with the statutory duties. For any reason, if a private individual is allowed to investigate a case, which is already under investigation by the ACB, undoubtedly, it creates a suspicion in the mind of the public as well as it may affect the morality of the ACB. If the courts liberally allow the private individuals, who has no interest whatsoever in the case, to enter into the shoes of the Investigating Agency, the same leads to chaos. The learned standing counsel for the first respondent strenuously submitted that if the second respondent is allowed to step into the shoes of ACB, Telangana, it is nothing but intervening with the administrative affairs of the State of Telangana, which is not permissible under law. The ACB filed a Memo before the Special Court stating that the investigation is in progress, which negates the contention of the second respondent that the ACB abandoned its statutory duty.

[128] As rightly pointed out by the learned standing counsel for the first respondent if the persons like the second respondent are allowed to intervene with the investigation, thousands of people may also file similar type of petitions for intervening under the guise of public interest. If everyone is allowed to intervene, without scrutinising the bona fides and other relevant factors, there will be no end point to the investigation.

[129] It is the primary duty of the investigating agency to investigate into the matter in order to unearth the truth. Fair and proper investigation ensures the identification of perpetrator of the crime. It is the statutory duty of the Investigating Agency to conduct investigation on its own lines without any interruption form any corner. If the Investigating Agency failed to discharge its statutory duties, the aggrieved person will be the de-facto complainant or his kith and kin if there is any legal disability on the part of the de-facto complainant to pursue the proceedings. It is not the case of the second respondent that the de-facto complainant, in collusion with the Investigating Agency and the petitioner, derailed the investigation in order to protect the petitioner. The second respondent has not taken a specific plea in the complaint as well as the counter filed in this criminal petition that he is very much aware of Section 39 of Cr.P.C., but he has not acted so.

[130] In the State of Andhra Pradesh, TDP is in power and YSRCP is in the opposition. The petitioner is the Chief Minister of State of Andhra Pradesh and belongs to TDP. The second respondent was elected as MLA from Mangalagiri Constituency in the State of Andhra Pradesh on YSRCP ticket. The petitioner and the second respondent belong to two different rival political parties in the State of Andhra Pradesh. The alleged incident has taken place in the State of Telangana in connection with the elections to the Legislative Council of the State of Telangana. Admittedly, the second respondent is not one of the members of electoral rolls of the Legislative Council in the State of Telangana. The alleged incident neither directly nor indirectly or by necessary implication would affect the second respondent in any manner even so remotely. The de-facto complainant is a Member of Legislative Assembly of State of Telangana who is pursuing the issue in his own way. This Court is very much conscious of the scope of public interest litigation.

[131] In view of the prevailing scenario in the State of Andhra Pradesh, the possibility of filing the complaint by the second respondent in order to take political and personal vengeance against the petitioner cannot be ruled out completely. It is not uncommon to file petitions in the Court of law by the members of political parties in order to attract the

attention of the general public and media regardless of the truthfulness or otherwise of the allegations. Airing rumours and allegations, without any substance, knowing fully well that those allegations will not withstand to judicial scrutiny, is the order of the day. Therefore, a duty is cast on the Courts to meticulously scrutinize the intervener's petitions. Access to justice and public interest litigations do not mean that the Court of law can be used as a forum to take political and personal vendetta. The underlying object of 'access to justice' and 'public interest litigation' is to safeguard the interest of the persons who are incapable of espousing their cause due to lack of financial resources, lack of legal awareness or due to educational, social and cultural backwardness. A person, who approached the court under the guise of public interest with a hidden agenda, cannot be permitted to use the court as a forum to settle the personal and political scores. As per the ratio laid down in National Commission For Women, Janata Dal and Simranjit Singh Mann, the second respondent will not fall within the ambit of 'aggrieved person'. The second respondent is altogether a stranger to the proceedings; therefore, he is not legally entitled to intervene in the proceedings.

[132] Having regard to the facts and circumstances of the case and also the principles enunciated in the cases cited supra, I am of the considered view that the second respondent has no locus standi to file the complaint.

Whether the proceedings in CCSR No.958 of 2016 is liable to be quashed or not?

[133] The next question that falls for consideration is whether the allegations made in the complaint prima facie constitute the offence alleged to have been committed by the petitioner.

[134] The contention of the learned senior counsel for the petitioner is that the allegations made in the complaint do not constitute the offence alleged to have been committed by the petitioner. Per contra, the learned counsel for the second respondent submitted that the allegations made in the complaint prima facie constitute the alleged offence; therefore, the petition is liable to be dismissed. He further submitted that the Court cannot consider the evidentiary value of the material available on record at this juncture.

[135] To substantiate the argument, learned counsel for the second respondent has drawn the attention of this court to the following decisions:

(i) J. P. Sharma v Vinod Kumar Jain, 1986 3 SCC 67 wherein the Hon'ble apex Court, at para No.46, held that if no offence was made out, then only the High Court is justified in quashing the proceedings in exercise of its power under Section 482 of Code of Criminal Procedure. For better appreciation the relevant paragraph is extracted hereunder:

46. The power under Section 482, Criminal Procedure Code, has been examined by this Court in Municipal Corporation of Delhi v. Ram Krishan Rohtagi and Ors., 1983 CrLJ 159. It was laid down clearly that the test was that taking the allegations and the complaint as these were, without adding or subtracting anything, if no offence was made out then only the High Court would be justified in quashing the proceedings in exercise of its powers under Section 482 of CrPC. There this Court observed that the power under Section 482 should be used very sparingly. .

(ii) Taramani Prakash v State of M.P, 2015 11 SCC 260 wherein the Hon'ble apex Court at para No.12 made an observation as follows:

12.9. The parameters for quashing proceedings in a criminal complaint are well known. If there are triable issues, the Court is not expected to go into the veracity of the rival versions but where on the face of it, the criminal proceedings are abuse of Court's process, quashing jurisdiction can be exercised.

(iii) State of Punjab v Dharam Singh,1987 Supp SCC 89 wherein the Hon'ble apex Court held that the Court can scrutinise the averments contained in the FIR, but cannot traverse beyond and examine further.

(iv) State of Punjab v Devinder Kumar, 1983 2 SCC 384 wherein the Hon'ble apex Court, at para No.9, held as follows:

9. Before concluding we should observe that the High Court committed a serious error in these cases in quashing the criminal proceedings in different magistrates' courts at a premature stage in exercise of its extraordinary

> jurisdiction under Section 482 Criminal Procedure Code. These are not cases where it can be said that there is no legal evidence at all in support of the prosecution. The prosecution has still to lead its evidence. It is neither expedient nor possible to arrive at a conclusion at this stage on the guilt or innocence of the accused on the material before the Court. While there is no doubt that the onus of proving the case is on the prosecution, it is equally clear that the prosecution should have sufficient opportunity to adduce all available evidence.

[136] Let me consider the facts of the case, in the light of the above legal principles. As per the allegations made in the complaint, the second respondent sent the 'admitted' voice of the petitioner along with the disputed telephonic conversation to Helik Advisory, Bombay for comparison and opinion. The said laboratory confirmed that the voice in the disputed telephonic conversation matches with the 'admitted' voice of the petitioner. It is not explained how he got such an 'admitted' voice.

[137] The sole basis for filing of the complaint is the alleged telephonic conversation of the petitioner with de facto complainant. There is no mention in the complaint or in the counter how the second respondent secured the telephonic conversation. It is not the case of the second respondent that he has obtained the same from the Special Court or from the Investigating Agency or from any other competent authority by following proper procedure. There is no authenticity for the alleged telephonic conversation. In the absence of any semblance of legal authenticity of the electronic document, it is not safe to place reliance on it even for taking cognizance of offence, when the same is the sole basis.

[138] As observed earlier, the second respondent failed to establish that he obtained copies of FIR, statements of witnesses, Section 164 Cr.P.C., statements and other documents from the Special Court by strictly adhering the procedure as contemplated under Criminal Rules of Practice. The fact remains that the second respondent filed the complaint by obtaining documents by other means.

[139] To appreciate the rival contentions, it is necessary to consider the scope of Section 79-A of the Information Technology Act.

> 79A. Central Government to notify Examiner of Electronic Evidence: The Central Government may, for the purposes of providing expert opinion on

> electronic form evidence before any court or other authority specify, by notification in the official Gazette, any department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.
>
> Explanation:- For the purpose of this section, "Electronic Form Evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines".

[140] A perusal of the above section clearly demonstrates that the Central Government has to issue notification identifying any department, body or agents of the Central Government or State Government as an examiner of the electronic evidence. The Parliament in its wisdom incorporated Section 79-A of the Information Technology Act in order to prevent malicious prosecution basing on the expert opinion given by unrecognized bodies/laboratories.

[141] Section 45-A of the Indian Evidence Act enables the Court to send the electronic document to the expert for opinion, in order to place reliance on it. To place any reliance on the opinion of an Expert, the electronic document should have been sent to the recognized laboratory through the Court.

[142] It is not the case of the second respondent that the Central Government has issued a Notification under Section 79-A of the I.T. Act recognising Helik Advisory, Bombay, leave apart how the second respondent got the alleged 'admitted' voice of the petitioner. Generally, admitted electronic documents and admitted signatures will be taken in the open court by following the proper procedure.

> Any document placed before the court without following the procedure as statedcannot be treated as an admitted electronic document. Recording voice of an individual on electronic record without his knowledge or consent cannot be treated as his admitted voice, in the eye of law. All these aspects cast a cloud on the alleged telephonic conversation.

[143] Even as per the decision relied upon by the learned counsel for the second respondent in Umesh Kumar, it was observed at para 32 that, " However, as a matter of

caution, the court in exercise of its discretion may disallow certain evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. More so, the court must conclude that it is genuine and free from tampering or mutilation.".

[144] The learned senior counsel for the petitioner has drawn the attention of this court in Dattaraj Nathuji Thaware, wherein the Hon'ble apex Court, at para No.16, held as under:

> 16. ... the other interesting aspect is that in the PILs, official documents are being annexed without even indicating as to how the petitioner came to possess them. In one case, it was noticed that an interesting answer was given as to its possession. It was stated that a packet was lying on the road and when out of curiosity the petitioner opened it, he found copies of the official documents. Apart from the sinister manner, if any, of getting such copies, the real brain or force behind such cases would get exposed to find out the truth and motive behind the petition. Whenever such frivolous pleas, as noted, are taken to explain possession, the Court should do well not only to dismiss the petitions but also to impose exemplary costs. It would be desirable for the Courts to filter out the frivolous petitions and dismiss them with costs as afore-seated so that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

[145] All these aspects clearly go to prove that the second respondent got all the documents in an inappropriate manner. In view of this factual scenario, if Courts place reliance on this type of electronic documents, certainly, it would amount to encouraging the litigant public to approach the unrecognized bodies of their choice for their personal gain and file frivolous complaints of this nature to take personal vendetta against their opponents, which should be deprecated. If the second respondent had followed the procedure contemplated under law, while collecting the documents including the electronic documents, then there may be some justification in his stand.

[146] Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that it is unsafe to take cognizance of offence on the complaint basing on the opinion alleged to have been given by an unrecognised Expert/Laboratory on the electronic record which authenticity is very much doubtful.

[147] The complaint is filed under Section 12 of the PC Act and Section 120-B of IPC. Establishment of ingredients of Section 7 and 11 of the PC Act are sine qua non to press into service Section 12 of the PC Act.

[148] Section 7 of the PC Act reads as under:

> 7. Public servant taking gratification other than legal remuneration in respect of an official act: Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

[149] The gist of Section 7 of the PC Act is accepting or agreeing to accept gratification other than the legal remuneration by a public servant for doing or forbearing to do any official act in exercise of his official functions.

[150] Section 11 of the PC Act reads as under:

> 11. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant. Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or

related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

[151] It is not the case of the second respondent that the de facto complainant accepted valuable thing from the petitioner without consideration or inadequate consideration. Therefore, Section 11 of the PC Act has no application to the facts of the case.

[152] Section 12 of the PC Act reads as under:

> 12. Punishment for abetment of offences defined in section 7 or 11: Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

[153] The abetment of an offence under Section 7 or 11 of the PC Act is punishable under Section 12 of the PC Act. Let me consider the facts of the case in the light of the above legal provisions. The alleged episode started on 28.5.2015 and continued up to 31.5.2015. There is no allegation in the complaint that at the instance of the petitioner the other accused approached the defacto complainant. No role was attributed to the petitioner up to 29.5.2015 and on 31.5.2015. The specific allegation made against the petitioner in order to rope him in this criminal case is as follows:

> "Hello! Good evening brother, how are you,
>
> Manavallu briefed me. I am with you, Don't bother
>
> For everything I am with you, what all they spoke will honour.
>
> Freely you can decide. No problem at all.
>
> That is our commitment. We will work together.

"Thank you."

[154] The test to be applied is whether an ordinary prudent man, by perusing the above allegations will come to a conclusion that the above conversation prima facie satisfies the ingredients of Section 12 of the PC Act or Section 120-B of IPC.

[155] Establishment of following three ingredients, as contemplated under Section 107 of IPC, is condition precedent, to prove the offence under Section 12 of the PC Act.

(i) Instigation of any person to do a particular thing;

(ii) Engaging one or more persons to do a particular thing or illegal omission in pursuance of conspiracy;

(iii) Intentionally aiding a person by an act or an illegal omission to do particular thing.

[156] It is the case of the second respondent that at the instigation of the petitioner, the other accused approached the de facto complainant, who is a public servant, and offered bribe either to cast his vote in favour of TDP candidate or to leave the country by abstaining from voting. There is no specific allegation in the complaint that the petitioner conspired with other accused prior to 28.5.2015 and in pursuance of which the other accused approached the de facto complainant. It is not the case of the second respondent that the role alleged to have been played by the petitioner reflects in the FIR. Even if the alleged conversation is taken into consideration, the petitioner did not offer bribe to the defacto complainant. The petitioner did not ask the de-facto complainant either to vote in favour of TDP candidate or abstain from voting by leaving the country.

[157] The learned counsel for the second respondent mainly placed reliance on the words "what all they spoke will honour" from the alleged telephonic conversion. The learned counsel for the second respondent submitted that these words are sufficient to prove the complicity of the petitioner. It is needless to say that a particular sentence cannot be read or interpreted in isolation of the other part. A duty is cast on the Court to consider the entire allegations made in the complaint in order to arrive at a just and reasonable conclusion. The Court shall not lose sight of the following words "freely you

can decide; no problem at all" also. Even assuming but not conceding that the alleged conversation is a genuine one, this itself falsifies the case of the second respondent that the petitioner is one of the conspirators of the alleged crime. The allegations made in the complaint are bereft of the ingredients of Section 12 of the PC Act and Section 120-B of IPC. In such circumstances, forcing the petitioner to face the rigour of criminal trial is nothing but abuse of process of law and amounting to miscarriage of justice.

[158] The learned senior counsel for the petitioner submitted that exercising of franchise will not fall within the ambit of public duty; therefore, registration of case under the PC Act itself is not maintainable. In support of his contention, he relied on the ratio laid down in Kuldip Nayar and Others vs. Union of India, 2006 7 SCC 1. Per contra, learned counsel for the second respondent submitted that offering of bribe to influence a public servant to vote in favour of a particular party also attract the provisions of the PC Act. In support of his contention, learned counsel for the second respondent placed reliance on the decisions in Ajit Pramod Kumar Jogi vs. Union of India, 2004 LawSuit(Chh) 13, P. V.Narasimha Rao vs. Union of India, 1998 AIR(SC) 2120, Damodar Krishna Kamli vs. State, 1955 CrLJ 181 of the Bombay High Court and Bhimsingh vs. State, 1955 AIR(Raj) 108 of Rajasthan High Court.

[159] The learned senior counsel for the petitioner has also drawn the attention of this Court to paragraph No.48 of the order passed by the coordinate Bench of this Court in Crl.P.No.5520 of 2015, to convince this Court that basing on those observations it is a fit case to quash the proceedings against the petitioner. Para No.48 of the order passed in the above case reads as follows:

> 48) From the above, when the allegations in the report or in the charge sheet repeatedly says only offering of bribe by petitioner, which does not attract the ingredients of Section 12 of P.C.Act, against the petitioner, leave about A.1 to A.3 or A.5 or others, for even case made out against the defacto-complainant under Section 7 or 11 of the P. C. Act, 1988.

[160] At this juncture, the learned standing counsel for the first respondent submitted that the ACB, State of Telangana has preferred SLP No.5248 of 2016 before the Hon'ble apex Court challenging the order in Criminal Petition No.5520 of 2016, quashing the criminal proceedings against A.4, and in view of the pendency of the matter before the Hon'ble apex Court in SLP No.5248 of 2016, it is not just and proper to decide that issue in this case. The learned counsel for all the parties submitted that

the Hon'ble apex Court has not granted stay in the S.L.P. No.5248 of 2016 or suspended the orders in Criminal Petition No.5520 of 2016. Unless and until the order passed in Criminal Petition No.5520 of 2016 is set aside or modified by the Hon'ble apex Court, the same holds good. Hence, it is not fair on the part of this Court to express any opinion on this issue.

[161] In State of Haryana v Bhajanlal, 1992 AIR(SC) 604 the Hon'ble apex Court at para No.105 , held as follows:

> 105. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.
>
> 1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.
>
> 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

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

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

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

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

[162] The Apex Court in R. P. Kapur v. State of Punjab, 1960 AIR(SC) 866 at para 6, held as hereunder:

6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under s. 561-A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. In the present case the magistrate before whom the police report has been filed under s. 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant

that his request for the quashing of the proceedings is not at the present stage covered by any specific provision of the Code. It is well-established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases

where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under s. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re : Shripad G. Chandavarkar, 1928 AIR(Bom) 184, Jagat Chandra Mozumdar v. Queen Empress, 1899 26 ILR(Cal) 786, Dr. Shanker Singh v. The State of Punjab, 1954 56 PunLR 54, Nripendra Bhusan Ray v. Gobind Bandhu Majumdar, 1924 AIR(Cal) 1018 and Ramanathan Chettiyar v. K. Sivarama Subrahmanya Ayyar, 1924 47 ILR(Mad) 722.

[163] In Guruduth Prabhu, Mysore Bench of Karnataka High Court, at para No.11, held as follows.

11. We have also found in this case that the complaints filed by the complainants is manifestly tainted with mala fides and instituted maliciously with an ulterior motive for wreaking vengeance on the accused with a view to spike them due to private and personal grudge. When such is the circumstance which is disclosed from the materials on record, it is not only empowers this Court to interfere in the interest of justice, but it is the duty of this Court to nip such an investigation in the bud.

The principle enunciated in the cases citedis squarely applicable to the facts of the case on hand.

Epilogue

(i) The provisions of the PC Act do not exclude the invocation of jurisdiction under Section 482 Cr.P.C., either expressly or by necessary implication.

(ii) An interlocutory order passed under the provisions of the PC Act is amenable to Section 482 Cr.P.C., despite bar of revision under Section 19(3)(c) of the PC Act.

(iii) An order passed under Section 156 (3) Cr.P.C., is a judicial order, as it requires application of mind by the learned Magistrate or the learned Special Judge, as the case may be.

(iv) An order passed under Section 156 (3) Cr.P.C., by the learned Magistrate or the learned Special Judge without application of mind is liable to be quashed under Section 482 Cr.P.C.

(v) If the impugned order is allowed to stand, the ACB, State of Telangana has no option except to register the second FIR basing on the same set of facts, which is not permissible under law.

(vi) The impugned order under Section 156 (3) Cr.P.C., is passed for investigation and report and not to call for the preliminary report as contemplated under Section 202(1) Cr.P.C.

(vii) For one reason or the other, the second respondent has not challenged the impugned order and thereby allowed the same to become final so far as he is concerned.

(viii) Having done so, the second respondent is now estopped to put the clock back and claim relief under Section 210 Cr.P.C.

(ix) The main relief sought by the second respondent in the complaint is contrary to the underlying object of Section 210 Cr.P.C.

(x) The second respondent has no locus standi to intervene in Crime No.11/ACB-CR 1-HYD/2015 by way of filing complaint.

(xi) Even if the allegations made in the complaint are ex facie taken to be true and correct, they do not constitute any offence much less the offence alleged to have been committed by the petitioner under Section 12 of the PC Act and Section 120-B of IPC.

[164] Having regard to the facts and circumstances of the case and also the principles enunciated in the cases referred supra, the criminal petition is allowed quashing the impugned order dated 29.8.2016 and the proceedings in CCSR No.958 of 2016 in Crime No.11/ACB-CR-1-HYD/2015 on the file of the Court of the Principal Special Judge for SPE and ACB cases, Hyderabad. Miscellaneous petitions, if any pending in this criminal petition, shall stand closed.

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1. Pragyesh Misra v State of U.P., Crl.MC.No.1099 of 2011, order dated 14.3.2011 (All). Since the details in the judgment delivered by the Supreme Court are limited, the impugned order is being published along with it.

Section 66 A- Supreme Court judgement in Shreya Singhal's Case

SHREYA SINGHAL

V/S

UNION OF INDIA. 2015 (2) SCC(Cri) 449.

SUPREME COURT OF INDIA *(D.B.)*

SHREYA SINGHAL
V/S
UNION OF INDIA

Date of Decision: 24 March 2015

Citation: 2015 LawSuit(SC) 265

Hon'ble Judges: J Chelameswar, R F Nariman

Eq. Citations: 2015 (5) SCR 963, 2015 (1) ApexCJ 706, 2015 (5) SCC 1, 2015 AIR(SC) 1523, 2015 (4) Scale 1, 2015 AIR(SCW) 1989, 2015 (2) Supreme 513, 2015 (3) JT 225, 2015 (1) GLH 741, 2015 (2) KarLJ 292, 2015 (2) KerLT 1, 2015 (2) RCR(Cri) 403, 2015 (3) MadLJ 162, 2015 (218) DLT 370, 2015 (2) PLJR 138, 2015 (2) ALD 971, 2015 (4) SCJ 283, 2015 (2) SCC(Cri) 449, 2015 CrLR 449, 2015 (2) KerLJ 292, 2015 (149) AllIndCas 224, 2015 (2) BCR(Cri) 515, 2015 (2) CurCriR 47, 2015 (2) JLJR 161, 2015 (2) ALT(Cri) 251, 2015 (10) AD(SC) 586, 2015 (2) ALD(Cri) 971, 2015 (2) LawHerald(SC) 881, 2015 (3) CalCriLR 748, 2015 (1) UC 594, 2015 (2) RSJ 258, 2015 (2) CompLJ 143, 2015 (2) LAR 485, 2015 ALLSCR 1157

Case Type: Writ Petition (Criminal)

Case No: 167 of 2012

Subject: Constitution, Criminal

Head Note:

A. Constitution of India, 1950 - Art.32, 19(1)(g) - Information Technology Act of 2000 - Sec.66A - Punishment for sending offensive messages through communication service, etc.- Any person who sends, by means of a computer resource or a communication device - Unconstitutionality of this Section - S.69A - The petitioners also contend that their rights under Articles 14 and 21 are

breached inasmuch there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication - To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case. (Para 5)

B. A relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds - An intelligible differentia having a rational relation to the object sought to be achieved - that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled - A penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness - In all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expression "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66A. (Para 27, 56, 70)

C. Information Technology (Intermediaries Guidelines) Rules, 2011 - No safeguards are provided as in the 2009 Rules made under Section 69A and also, for the very reasons that Section 66A is bad, the petitioners assailed sub-rule (2) of Rule 3 saying that it is vague and over broad and has no relation with the subjects specified under Article 19(2) - Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and sec.69A, Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid - Section 118(d) of the Kerala Police Act, 2011 is struck down being violative of Article 19(1)(a) and not saved by Article 19(2) - All the writ petitions are disposed. (Para 114, 119)

Acts Referred:

CONSTITUTION OF INDIA ART 19(6), ART 19(2), ART 19(1)(G), ART 226, ART 32, ART 21, ART 19(1)(A), ART 14, ART 19

INDIAN PENAL CODE, 1860 SEC 505(2), SEC 510, SEC 153B, SEC 153A, SEC 295A, SEC 505(3), SEC 294, SEC 505(1), SEC 499, SEC 120B, SEC 25, SEC 108A, SEC 24

CODE OF CRIMINAL PROCEDURE, 1973 SEC 96, SEC 196, SEC 95, SEC 199

INFORMATION TECHNOLOGY ACT, 2000 SEC 69A(1), SEC 69A(3), SEC 69A, SEC

2(ZA), SEC 66A, SEC 2(V)

KERALA POLICE ACT, 2011 SEC 118, SEC 118(D)

Final Decision: Petition disposed

Advocates: Soli Sorabjee, Manali Singhal, Ranjeeta Rohtagi, Ninad Laud, Abhikalp Pratap Singh, Mehernaz Mehta, Gursimran Dhillon, Karan Mathur, Santosh Sachin, Gaurav Shrivastava, Deepak Rawat, Jaya Khanna, Prashant Bhushan, Sajan Poovayya, Sumit Attri, Praveen Sehrawat, Priyadarshi Banerjee, E C Agrawala, Krishan Kumar, Pukhrambam Ramesh Kumar, Liz Mathew, Kush Chaturvedi, Abhinav Mukerji, Gopal Sankaranarayanan, Renjith B, Lakshmi N Kaimal, Vikramditya, Subail Farrukh, Priya Puri, Ranjan Dubey, Anip Sachthey, D S Mahra, V G Pragasam, S I Aristotle, Prabu Ramasubramanian, Sapam Biswajit Meitei, Z H Issac Haiding, Ashok Kumar Singh, Asha Gopalan Nair, D Mahesh Babu, R V Kameshwaran, Vijay Kumar, Ravi Prakash Mehrotra, Gaurav Bhatia, Gaurav Srivastava, Utkarsh Jaiswal, Abhishek Chaudhary, Mohit D Ram, P S Naarsimha, V Shyamohan, P Venkat Reddy, Sumanth Nookala, Aftab Ali Khan, Nafis A Siddiqui, Divya Roy

Reference Cases:

Cases Cited in (+): **23**

Cases Referred in (+): **51**

Judgement Text:-

R F Nariman, J

[1] This batch of writ petitions filed under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The immediate cause for concern in these petitions is Section 66A of the Information Technology Act of 2000. This Section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27.10.2009. Since all the arguments raised by several counsel for the petitioners deal with the unconstitutionality of this Section it is set out hereinbelow:

"66-A. Punishment for sending offensive messages through communication

service, etc.-Any person who sends, by means of a computer resource or a communication device,-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.- For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."[1]

[2] A related challenge is also made to Section 69A introduced by the same amendment which reads as follows:-

"69-A. Power to issue directions for blocking for public access of any information through any computer resource.-(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the

public any information generated, transmitted, received, stored or hosted in any computer resource.

(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.

(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."

[3] The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in paragraph 3 that:

"3. A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as Phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Indian Penal code, the Indian Evidence Act and the code of Criminal Procedure to prevent such crimes."

[4] The petitioners contend that the very basis of Section 66A - that it has given rise to new forms of crimes - is incorrect, and that Sections 66B to 67C and various Sections of the Indian Penal Code (which will be referred to hereinafter) are good enough to deal with all these crimes.

[5] The petitioners' various counsel raised a large number of points as to the constitutionality of Section 66A. According to them, first and foremost Section 66A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2). According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill- will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted

to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said Section would really be an insidious form of censorship which impairs a core value contained in Article 19(1)(a). In addition, the said Section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the internet.

> The petitioners also contend that their rights under Articles 14 and 21 are breached inasmuch there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

[6] In reply, Mr. Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part-III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

> Freedom of Speech and Expression

Article 19(1)(a) of the Constitution of India states as follows:

> "Article 19. Protection of certain rights regarding freedom of speech, etc.-
>
> (1) All citizens shall have the right-
>
> (a) to freedom of speech and expression;"

[7] Article 19(2) states:

> "Article 19. Protection of certain rights regarding freedom of speech, etc.- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

[8] The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be over emphasized that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.

[9] Various judgments of this Court have referred to the importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government. For example, in the early case of , , this Court stated that freedom of speech lay at the foundation of all democratic organizations. In , , a Constitution Bench of this Court said freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. In a separate concurring judgment Beg,J. said, in ,, that the freedom of speech and of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.[2]

[10] Equally, in , this Court stated, in paragraph 45 that the importance of freedom of speech and expression though not absolute was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a pre-condition for meaningful governance, the culture of open dialogue is generally of great societal importance.

[11] This last judgment is important in that it refers to the "market place of ideas" concept that has permeated American Law. This was put in the felicitous words of Justice Holmes in his famous dissent in , , thus:

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

[12] Justice Brandeis in his famous concurring judgment in Whitney v. California, 71 L. Ed. 1095 said:

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to

discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." (at page 1105, 1106)

[13] This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a

particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.[3] It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".

[14] It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(a). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

[15] It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the U.S. first Amendment - Congress shall make no law which abridges the freedom of speech. Second, whereas the U.S. First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject matters - that is any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject matters set out in Article 19(2).

[16] Insofar as the first apparent difference is concerned, the U.S. Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early U.S. Supreme Court Judgments, continues even today. In Chaplinsky v. New Hampshire, 86 L. Ed. 1031, Justice Murphy who delivered the opinion of the Court put it thus:-

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well- defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting'

> words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed.1213, 128 A.L.R. 1352." (at page 1035)

[17] So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the U.S. Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject matters that there is a vast difference. In the U.S., if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject matters set out under Article 19(2). If it does not, and is outside the pale of 19(2), Indian courts will strike down such law.

[18] Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to sub- serving the general public interest that there is the world of a difference. This is perhaps why in ,, this Court held:

> "As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading "Congress shall make no law.... abridging the freedom of speech..." appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power - the scope of which

however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Art. 19(1) (a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision." (At page 378)

[19] But when it comes to understanding the impact and content of freedom of speech, in ,, Venkataramiah,J. stated:

"While examining the constitutionality of a law which is alleged to contravene Article 19 (1) (a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19 (1) (a) and of Article 19 (1) (g) of our constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19 (1) (a) and Article 19 (1) (g) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made." (at page 324)

[20] With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Article 19(1)(a) -

Section 66A has been challenged on the ground that it casts the net very wide - "all information" that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(v) of Information Technology Act, 2000 defines information as follows:

"2. Definitions.-(1) In this Act, unless the context otherwise requires,- (v) "Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66A. Information of all kinds is roped in - such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know - the market place of ideas - which the internet provides to persons of all kinds is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A.

In this regard, the observations of Justice Jackson in American Communications Association v. Douds, 94 L. Ed. 925 are apposite:

"Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better

shielded against error than the censored."

Article 19(2)

One challenge to Section 66A made by the petitioners' counsel is that the offence created by the said Section has no proximate relation with any of the eight subject matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said Section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

[21] Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In ,, this Court said:

"It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore for holding that the State cannot directly restrict one freedom by

placing an otherwise permissible restriction on another freedom." (at page 863)

[22] Before we come to each of these expressions, we must understand what is meant by the expression "in the interests of". In ,, this Court laid down:

"We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied there from; and between an Act that directly maintained public order and that indirectly brought about the same result. The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act." (at pages 834, 835)

"The restriction made "in the interests of public order" must also have reasonable relation to the object to be achieved, i.e., the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause." (at page 835)

"The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.....There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order" (at page 836).

Reasonable Restrictions:

[23] This Court has laid down what "reasonable restrictions" means in several cases. In ,, this Court said:

> "The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality." (at page 763)

[24] In ,, this Court said:

> "This Court had occasion in , to define the scope of the judicial review under clause (5) of Article19 where the phrase "imposing reasonable restriction on the exercise of the right" also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, where ever prescribed, should be applied to each, individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an

important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable." (at page 606-607)

[25] Similarly, in ,, this Court said:

"The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency-national or local-or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved." (at page 161)

[26] In ,, a Constitution Bench also spoke of reasonable restrictions when it comes to procedure. It said:

"While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years externment or ten years externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the court under clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it has to determine if the exercise of the right

has been reasonably restricted." (at page 524)

[27] It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

> "(i) the reach of print media is restricted to one state or at the most one country while internet has no boundaries and its reach is global;
>
> (ii) the recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;
>
> (iii) In case of televisions serials [except live shows] and movies, there is a permitted pre- censorship' which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;
>
> In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted I televised I viewed. While in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.
>
> By the medium of internet, rumors having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums.
>
> In case of mediums like print media, television and films, it is broadly not

possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy / borrow a newspaper and / or will have to go to a theater to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

(ix) In case of other mediums, it is impossible to maintain anonymity as a result of which speech ideal opinions films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

(x) In case of other mediums like newspapers, television or films, the approach is always institutionalized approach governed by industry specific ethical norms of self conduct. Each newspaper / magazine / movie production house / TV Channel will have their own institutionalized policies in house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article

19(1)(a).

> (xi) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constrains. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constrains have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click."

[28] As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved - that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a Section creating a new offence, such as Section 69A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

[29] In fact, this aspect was considered in , in para 37, where the following question was posed:

> "The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media."

> This question was answered in para 78 thus:

"There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation

> on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media."

Public Order

[30] In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made under Section 7 of the Punjab Maintenance of Public Order Act and to an order made under Section 9 (1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus in R, this Court held that an order made under Section 9(1)(a) of the Madras Maintenance of Public Order Act (XXIII of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

[31] Similarly, in ,, an order made under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

[32] As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

[33] In ,, this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in ,, where this Court held:

> "It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State." (at page 746)

[34] In ,, Ram Manohar Lohia's case was referred to with approval in the following terms:

> "In Dr. Ram Manohar Lohia's case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished, from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because

the repercussions of the act embrace large Sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr. Ram Manohar Lohia's case examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community.

> The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another." (at pages 290 and 291).

[35] This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent - there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel 'annoying' girls is telling - this Court has held that mere 'annoyance' need not cause disturbance of public order. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either 'persistently' or otherwise without in any manner impacting public order.

Clear and present danger - tendency to affect.

[36] It will be remembered that Justice Holmes in Schenck v. United States, 63 L. Ed. 470 enunciated the clear and present danger test as follows:

> "...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (At page 473, 474)

[37] This was further refined in , , this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the U.S. Supreme Court, the test has been understood to mean to be "clear and present danger". The test of "clear and present danger" has been used by the U.S. Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied, see- Terminiello v. City of Chicago 93 L. Ed. 1131 (1949) at page 1134-1135, Brandenburg v. Ohio 23 L. Ed. 2d 430 (1969) at 434-435 & 436, Virginia v. Black 155 L. Ed. 2d 535 (2003) at page 551, 552 and 553[4].

[38] We have echoes of it in our law as well , at paragraph 45:

> "45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

[39] This Court has used the expression "tendency" to a particular act. Thus, in ,, an

early decision of this Court said that an article, in order to be banned must have a tendency to excite persons to acts of violence (at page 662-663). The test laid down in the said decision was that the article should be considered as a whole in a fair free liberal spirit and then it must be decided what effect it would have on the mind of a reasonable reader. (at pages 664-665)

[40] In , , this court upheld Section 295A of the Indian Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in ,, Section 124A of the Indian Penal Code was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or creating feelings of enmity in certain people was not good enough or else it would violate the fundamental right of free speech under Article 19(1)(a). Again, in ,, Section 123 (3A) of the Representation of People Act was upheld only if the enmity or hatred that was spoken about in the Section would tend to create immediate public disorder and not otherwise.

[41] Viewed at either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

Defamation

[42] Defamation is defined in Section 499 of the Penal Code as follows:

> , except in the cases hereinafter excepted, to defame that person.
>
> Explanation 1.-It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.
>
> Explanation 2.-It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3.-An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4.-No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

[43] It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear therefore that the Section is not aimed at defamatory statements at all.

Incitement to an offence:

[44] Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with "incitement to an offence". As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional.

Decency or Morality

[45] This Court in , took a rather restrictive view of what would pass muster as not being

obscene. The Court followed the test laid down in the old English judgment in Hicklin's case which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the UK, United States as well as in our country. Thus, in ,, this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary artistic, political, educational or scientific value (see Para 31).

[46] In a recent judgment of this Court, ,, this Court referred to English, U.S. and Canadian judgments and moved away from the Hicklin test and applied the contemporary community standards test.

[47] What has been said with regard to public order and incitement to an offence equally applies here. Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all - in fact the word 'obscene' is conspicuous by its absence in Section 66A.

[48] However, the learned Additional Solicitor General asked us to read into Section 66A each of the subject matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject matters contained in Article 19(2) in Section 69A. We would be doing complete violence to the language of Section 66A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66A:

> "(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi racial society;

, @ para 9 and 21

Connolly v. Director of Public Prosecutions,2007 1 AllER 1012

House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media And Criminal Offences" @ pg 260 of compilation of judgments Vol I Part B

(ii) Information which is directed to incite or can produce imminent lawless action , ;

(iii) Information which may constitute credible threats of violence to the person or damage;

(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

,

(v) Information which advocates or teaches the duty, necessity or proprietary of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify glorify such violent means to accomplish political, social, economical or religious reforms

[Whitney vs. California 274 US 357];

(vi) Information which contains fighting or abusive material;

,

(vii) Information which promotes hate speech i.e.

Information which propagates hatred towards individual or a groups, on the basis of race, religion, religion, casteism, ethnicity,

Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.

Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.

(viii) Satirical or iconoclastic cartoon and caricature which fails the test laid down in ,

(ix) Information which glorifies terrorism and use of drugs;

(x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking.

(xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it.

,.

(xii) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.

,."

[49] What the learned Additional Solicitor General is asking us to do is not to read down Section 66A - he is asking for a wholesale substitution of the provision which is

obviously not possible.

Vagueness

[50] Counsel for the petitioners argued that the language used in Section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the Section be clear as to on which side of a clearly drawn line a particular communication will fall.

[51] We were given Collin's dictionary, which defined most of the terms used in Section 66A, as follows:

"Offensive:-

Unpleasant or disgusting, as to the senses

Causing anger or annoyance; insulting

For the purpose of attack rather than defence.

Menace:-

To threaten with violence, danger, etc.

A threat of the act of threatening

Something menacing; a source of danger

A nuisance

Annoy:-

To irritate or displease

To harass with repeated attacks

Annoyance

The feeling of being annoyed

The act of annoying.

Inconvenience

The state of quality of being inconvenient

Something inconvenient; a hindrance, trouble, or difficulty

Danger:-

The state of being vulnerable to injury, loss, or evil risk

A person or a thing that may cause injury pain etc.

Obstruct:-

To block (a road a passageway, etc.) with an obstacle

To make (progress or activity) difficult.

To impede or block a clear view of.

Obstruction:- a person or a thing that obstructs.

Insult:-

To treat, mention, or speak to rudely; offend; affront

To assault; attack

An offensive or contemptuous remark or action; affront; slight

A person or thing producing the effect of an affront = some television is an insult to intelligence

An injury or trauma."

[52] The U.S. Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a Section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a Section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in Musser v. Utah, 92 L. Ed. 562, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

[53] In Winters v. People of State of New York, 92 L. Ed. 840, a New York Penal Law read as follows:-

"1141. Obscene prints and articles

1. A person.....who,

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet,

magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; .....

'Is guilty of a misdemeanor, ...'" (at page 846)

The court in striking down the said statute held:

"The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law - obscene, lewd, lascivious, filthy, indecent or disgusting-and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct-massing stories to incite crime-has resulted in three arguments of this case in this Court. The legislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning.' Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. The entire text of the statute or the subjects dealt with may furnish an adequate standard. The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.

The subsection of the New York Penal Law, as now interpreted by the Court of Appeals prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person * * * not necessarily * * * sexual passion,' we find the specification of publications, prohibited from distribution, too uncertain and indefinite to

justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required- no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crime of violence against the person. No conspiracy to commit a crime is required. See Musser v. State of Utah, 68 S.Ct. 397, this Term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears. As said in the Cohen Grocery Co. case, supra, 255 U.S. at page 89, 41 S.Ct. at page 300, 65 L.Ed. 516, 14 A.L.R. 1045:

'It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.'

The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. it does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. Herndon v. Lowry, 301 U.S. 242, 259, 57 S.Ct. 732, 739, 81 L.Ed. 1066." (at page 851-852)

[54] In Burstyn v. Wilson, 96 L. Ed. 1098, sacrilegious writings and utterances were outlawed. Here again, the U.S. Supreme Court stepped in to strike down the offending Section stating:

> "It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art-for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious.' And if we cannot tell, how are those to be governed by the statute to tell? (at page 1121)

[55] In , , a Chicago Gang Congregation Ordinance prohibited criminal street gang members from loitering with one another or with other persons in any public place for no apparent purpose. The Court referred to an earlier judgment in , in which it was stated that the Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty. It was held that the broad sweep of the Ordinance violated the requirement that a legislature needs to meet: to establish minimum guidelines to govern law enforcement. As the impugned Ordinance did not have any such guidelines, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality.

[56] It was further held that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

[57] Similarly, in Grayned v. City of Rockford, 33 L.Ed. 2d. 222, the State of Illinois provided in an anti noise ordinance as follows:

> "'(N)o person, while on public or private grounds adjacent to any building in

which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . .' Code of Ordinances, c. 28, 19.2(a)."

The law on the subject of vagueness was clearly stated thus:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"(at page 227-228)

[58] The anti noise ordinance was upheld on facts in that case because it fixed the time at which noise disrupts school activity - while the school is in session - and at a fixed place - 'adjacent' to the school.

[59] Secondly, there had to be demonstrated a causality between disturbance that occurs and the noise or diversion. Thirdly, acts have to be willfully done. It is important to notice that the Supreme Court specifically held that "undesirables" or their "annoying conduct" may not be punished. It is only on these limited grounds that the said Ordinance was considered not to be impermissibly vague.

[60] In Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al., 521 U.S. 844 (1997), two provisions of the Communications Decency Act of

1996 which sought to protect minors from harmful material on the internet were adjudged unconstitutional. This judgment is a little important for two basic reasons - that it deals with a penal offence created for persons who use the internet as also for the reason that the statute which was adjudged unconstitutional uses the expression "patently offensive" which comes extremely close to the expression "grossly offensive" used by the impugned Section 66A. Section 223(d), which was adjudged unconstitutional, is set out hereinbelow:-

> "223 (d) Whoever-
>
> "(1) in interstate or foreign communications knowingly-
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
>
> (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both." (at page 860)

Interestingly, the District Court Judge writing of the internet said:

> "[i]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country - and indeed the world - as yet seen. The plaintiffs in these actions correctly describe the 'democratizing' effects of Internet

> communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern- day Luthers still post their theses, but to electronic bulletins boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen." 929 F. Supp. At 881. (at page 425)

[61] The Supreme Court held that the impugned statute lacked the precision that the first amendment required when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the impugned Act effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

[62] Such a burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving the legitimate purpose that the statute was enacted to serve. It was held that the general undefined term "patently offensive" covers large amounts of non-pornographic material with serious educational or other value and was both vague and over broad.

> It was, thus, held that the impugned statute was not narrowly tailored and would fall foul of the first amendment.

[63] In Federal Communications Commission v. Fox Television Stations, 132 S.Ct. 2307, it was held:

> "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See Connally v. General Constr. Co., 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); Papachristou v. Jacksonville, 405 US 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or

forbids'" (quoting Lanzetta v. New Jersey, 306 US 451, 453 (1939) (alteration in original))). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See United States v. Williams, 553 US 285, 304 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." Ibid. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See Grayned v. City of Rockford, 408 U. S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."(at page 2317)

[64] Coming to this Court's judgments, in , an inclusive definition of the word "goonda" was held to be vague and the offence created by Section 4A of the Goondas Act was, therefore, violative of Article 19(1)(d) and (e) of the Constitution. It was stated:

"Incidentally it would also be relevant to point out that the definition of the word "goonda" affords no assistance in deciding which citizen can be put under that category. It is an inclusive definition and it does not indicate which tests have to be applied in deciding whether a person falls in the first part of the definition. Recourse to the dictionary meaning of the word would hardly be of any assistance in this matter. After all it must be borne in mind that the Act authorises the District Magistrate to deprive a citizen of his fundamental right under Art. 19(1)(d) and (e), and though the object of the Act and its purpose would undoubtedly attract the provisions of Art. 19(5) care must always be taken in passing such acts that they provide sufficient safeguards

against casual, capricious or even malicious exercise of the powers conferred by them. It is well known that the relevant provisions of the Act are initially put in motion against a person at a lower level than the District magistrate, and so it is always necessary that sufficient safeguards should be provided by the Act to protect the fundamental rights of innocent citizens and to save them from unnecessary harassment. That is why we think the definition of the word "goonda" should have given necessary assistance to the District Magistrate in deciding whether a particular citizen falls under the category of goonda or not; that is another infirmity in the Act. As we have already pointed out s. 4-A suffers from the same infirmities as s. 4.

Having regard to the two infirmities in Sections 4, 4-A respectively we do not think it would be possible to accede to the argument of the Learned Advocate-General that the operative portion of the Act can fall under Art. 19(5) of the Constitution. The person against whom action can be taken under the Act is not entitled to know the source of the information received by the District Magistrate; he is only told about his prejudicial activities on which the satisfaction of the District Magistrate is based that action should be taken against him under s.4 or s. 4-A. In such a case it is absolutely essential that the Act must clearly indicate by a proper definition or otherwise when and under what circumstances a person can be called a goonda, and it must impose an obligation on the District Magistrate to apply his mind to the question as to whether the person against whom complaints are received is such a goonda or not. It has been urged before us that such an obligation is implicit in Sections 4 and 4-A. We are, however, not impressed by this argument. Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Art. 19(5). The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. In other words, the restrictions which it allows to be imposed on the exercise of the fundamental right of a citizen guaranteed by Art. 19(1)(d) and (e) must in the

circumstances be held to be unreasonable. That is the view taken by the High court and we see no reason to differ from it." (at pages 979, 980)

[65] At one time this Court seemed to suggest that the doctrine of vagueness was no part of the Constitutional Law of India. That was dispelled in no uncertain terms in ,:

"This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on Municipal Committee Amritsar and Anr. v. The State of Rajasthan . In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid on the ground that it violates the due process clause or that it is vague....." (at page 469)

"These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in , where the Central Provinces and Berar Goondas Act 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague.

The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction

which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases." (at pages 470, 471)

[66] Similarly, in ,, Section 27 of the Gold Control Act was struck down on the ground that the conditions imposed by it for the grant of renewal of licences are uncertain, vague and unintelligible. The Court held:

"21. We now come to Section 27 of the Act which relates to licensing of dealers. It was stated on behalf of the petitioners that the conditions imposed by sub-section (6) of Section 27 for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well founded and must be accepted as correct. Section 27(6)(a) states that in the matter of issue or renewal of licences the Administrator shall have regard to "the number of dealers existing in the region in which the applicant intends to carry on business as a dealer". But the word "region" is nowhere defined in the Act. Similarly Section 27(6)(b) requires the Administrator to have regard to "the anticipated demand, as estimated by him, for ornaments in that region." The expression "anticipated demand" is a vague expression which is not capable of objective assessment and is bound to lead to a great deal of uncertainty. Similarly the expression "suitability of the applicant" in Section 27(6)(e) and "public interest" in Section 27(6)(g) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (a),(d),(e) and (g) of Section 27(6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions

for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of Section 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. In our opinion clauses (a), (b), (e) and (g) are inextricably bound up with the other clauses of Section 27(6) and form part of a single scheme. The result is that clauses (a), (b), (c), (e) and (g) are not severable and the entire Section 27(6) of the Act must be held invalid. Section 27(2)(d) of the Act states that a valid licence issued by the Administrator "may contain such conditions, limitations and restrictions as the Administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers". On the face of it, this sub- section confers such wide and vague power upon the Administrator that it is difficult to limit its scope. In our opinion Section 27(2)(d) of the Act must be struck down as an unreasonable restriction on the fundamental right of the petitioners to carry on business. It appears, however, to us that if Section 27(2)(d) and Section 27(6) of the Act are invalid the licensing scheme contemplated by the rest of Section 27 of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power under Section 114 of the Act."

[67] In ,, a part of Section 3 of the National Security Ordinance was read down on the ground that "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" is an expression so vague that it is capable of wanton abuse. The Court held:

"What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" which occurs in Section 3(2) of the Act. Which supplies and services are essential to the community can easily be defined by the legislature and indeed,

legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

But that is not all. The Explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub-section (2), "acting in any manner prejudicial to the maintenance of supplies essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the Explanation to sub-section (1) of Section 3 of the Act of 1980. Clauses (a) and (b) of the Explanation to Section 3(1) of the Act of 1980 exhaust almost the entire range of essential commodities. Clause (a) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to Section 3(1) of the Act of 1980 relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in clause (a). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the Act of 1980, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub- section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the

basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21." (at page 325-326)

[68] Similarly, in , at para 130-131, it was held:

"130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

131. Let us examine clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted."

[69] Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined. Section 66 in

stark contrast to Section 66A states:

> "66. Computer related offences.-If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.
>
> Explanation.-For the purposes of this section,-
>
> (a) the word "dishonestly" shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860);
>
> (b) the word "fraudulently" shall have the meaning assigned to it in Section 25 of the Indian Penal Code (45 of 1860)."

[70] It will be clear that in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expression "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66A.

[71] The provisions contained in Sections 66B up to Section 67B also provide for various punishments for offences that are clearly made out. For example, under Section 66B, whoever dishonestly receives or retains any stolen computer resource or communication device is punished with imprisonment. Under Section 66C, whoever fraudulently or dishonestly makes use of any identification feature of another person is liable to punishment with imprisonment. Under Section 66D, whoever cheats by personating becomes liable to punishment with imprisonment. Section 66F again is a narrowly drawn section which inflicts punishment which may extend to imprisonment for life for persons who threaten the unity, integrity, security or sovereignty of India. Sections 67 to 67B deal with punishment for offences for publishing or transmitting obscene material including depicting children in sexually explicit acts in electronic form.

[72] In the Indian Penal Code, a number of the expressions that occur in Section 66A occur in Section 268.

> "268. Public nuisance.-A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury,

danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage."

[73] It is important to notice the distinction between the Sections 268 and 66A. Whereas, in Section 268 the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66A. Further, under Section 268, the person should be guilty of an act or omission which is illegal in nature - legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression "annoyance" appears also in Sections 294 and 510 of the IPC:

"294. Obscene acts and songs.-Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

510. Misconduct in public by a drunken person.-Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both."

[74] If one looks at Section 294, the annoyance that is spoken of is clearly defined - that is, it has to be caused by obscene utterances or acts. Equally, under Section 510, the

annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66A which in stark contrast uses completely open ended, undefined and vague language.

[75] Incidentally, none of the expressions used in Section 66A are defined. Even "criminal intimidation" is not defined - and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

[76] Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise - suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these expressions - and that is what renders the Section unconstitutionally vague.

[77] However, the learned Additional Solicitor General argued before us that expressions that are used in Section 66A may be incapable of any precise definition but for that reason they are not constitutionally vulnerable. He cited a large number of judgments in support of this submission. None of the cited judgments dealt with a Section creating an offence which is saved despite its being vague and in capable of any precise definition. In fact, most of the judgments cited before us did not deal with criminal law at all. The few that did are dealt with hereinbelow. For instance, , was cited before us. The passage cited from the aforesaid judgment is contained in para 19 of the judgment. The cited passage is not in the context of an argument that the word "terrorism" not being separately defined would, therefore, be struck down on the ground of vagueness. The cited passage was only in the context of upholding the conviction of the accused in that case. Similarly, in ,, the expression "insurgency" was said to be undefined and would defy a precise definition, yet it could be understood to mean break down of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the State and its sovereignty. This again was said in the context of a challenge on the ground of legislative competence. The provisions of the Maharashtra Control of Organised Crime Act were challenged on the ground that they

were outside the expression "public order" contained in Entry 1 of List I of the 7th Schedule of the Constitution of India. This contention was repelled by saying that the expression "public order" was wide enough to encompass cases of "insurgency". This case again had nothing to do with a challenge raised on the ground of vagueness.

[78] Similarly, in ,, paragraph 8 was cited to show that the expression "nuisance" appearing in Section 133 of the Code of Criminal Procedure was also not capable of precise definition. This again was said in the context of an argument that Section 133 of the Code of Criminal Procedure was impliedly repealed by the Water (Prevention and Control of Pollution) Act, 1974. This contention was repelled by saying that the areas of operation of the two provisions were completely different and they existed side by side being mutually exclusive. This case again did not contain any argument that the provision contained in Section 133 was vague and, therefore, unconstitutional. Similarly, in ,, the word "untouchability" was said not to be capable of precise definition. Here again, there was no constitutional challenge on the ground of vagueness.

[79] In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66A are. In ,, the very expression "grossly offensive" is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr. Collins who held strong views on immigration made a reference to "Wogs", "Pakis", "Black bastards" and "Niggers". Mr. Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr. Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen's Bench agreed and dismissed the appeal filed by the Director of Public Prosecutions. The House of Lords reversed the Queen's Bench stating:

> "9. The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ("Old Contemptibles"). There can

be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

10. In contrast with section 127(2)(a) and its predecessor subsections, which require proof of an unlawful purpose and a degree of knowledge, section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the subsection."

[80] Similarly in ,, the Queen's Bench was faced with the following facts:

"Following an alert on the Internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several "tweets" on Twitter in his own name, including the following: "Crap1 Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high1" None of the defendant's "followers" who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general Internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to section 127(1)(a) of the Communications Act 2003. He was convicted in a magistrates' court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "menacing per se" and that the defendant was, at the very least, aware that his message was of a menacing character."

[81] The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating:

> "31. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "Twitter" for widespread reading, a conversation piece for the defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address "you", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr. Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet "followers" in ample time for the threat to be reported and extinguished."

[82] These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no

manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague.

> Ultimately, applying the tests referred to in Chintaman Rao and V.G. Row's case, referred to earlier in the judgment, it is clear that Section 66A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

Chilling Effect And Overbreadth

[83] Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views" - such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

[84] Incidentally, some of our judgments have recognized this chilling effect of free speech. In ,, this Court held:

"19. The principle of Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] was carried forward - and this is relevant to the second question arising in this case - in ,, HL] , a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in Sunday Times questioning the propriety of investments made for its superannuation fund. The articles were headed "Revealed: Socialist tycoon deals with Labour Chief" and "Bizarre deals of a council leader and the media tycoon". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in ,] popularly known as "Spycatcher case", the House of Lords had opined that "there are rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in New York Times v. Sullivan [376 US 254 : 11 L Ed 2d 686 (1964)] and certain other decisions of American Courts and observed - and this is significant for our purposes-

"while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available." Accordingly, it was held that the action was not maintainable in law."

[85] Also in ,, this Court said:

> "47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the "freedom of speech and expression".

[86] That the content of the right under Article 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by Reno's case and by , at Para 78 already referred to. It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, , at 808 -809. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first Ram Manohar Lohia case, namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the Section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the Section takes in the innocent as well as the guilty, bonafide and malafide advice and whether the person be a legal adviser, a friend or a well wisher of the person instigated, he cannot escape the tentacles of the Section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without the field of constitutional prohibitions. It further held that the Section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

[87] In ,, Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The rule states "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

[88] The aforesaid rule was challenged under Articles 19 (1)(a) and (b) of the

Constitution. The Court followed the law laid down in , and accepted the challenge. It first held that demonstrations are a form of speech and then held:

> "The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Art. 19 (2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent-State is that the rule is framed "in the interest of public order". A demonstration may be defined as "an expression of one's feelings by outward signs." A demonstration such as is prohibited by, the rule may be of the most innocent type - peaceful orderly such as the mere wearing of a badge by a Government servant or even by a silent assembly say outside office hours - demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type - innocent as well as otherwise - and in consequence its validity cannot be upheld." (at page 374)

[89] The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held:

> "The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration - be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result." (at page 384)

[90] These two Constitution Bench decisions bind us and would apply directly on Section 66A. We, therefore, hold that the Section is unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth.

Possibility of an act being abused is not a ground to test its validity:

[91] The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66A is capable of being abused by the persons who administered it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In ,, this Court observed:

> "....This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:
>
> "If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably"
>
> and treating this as a ground for holding the statute invalid Viscount Simonds observed in ,] :
>
> "It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute."
>
> The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used

> is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (at page 825)

[92] In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If Section 66A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered.

Severability:

[93] The argument of the learned Additional Solicitor General on this score is reproduced by us verbatim from one of his written submissions:

> "Furthermore it is respectfully submitted that in the event of Hon'ble Court not being satisfied about the constitutional validity of either any expression or a part of the provision, the Doctrine of Severability as enshrined under Article 13 may be resorted to."

[94] The submission is vague: the learned Additional Solicitor General does not indicate which part or parts of Section 66A can possibly be saved. This Court in , repelled a contention of severability when it came to the courts enforcing the fundamental right under Article 19(1)(a) in the following terms:

> "It was, however, argued that Section 9(1-A) could not be considered wholly void, as, under Article 13(1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. Insofar as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision, as applied to the latter purpose, was covered by clause (2) of Article 19 and must, it was said,

be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent." (At page 603)

[95] It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following K.A. Abbas' case that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. Romesh Thappar's Case was distinguished in , in the context of a right under Article 19(1)(g) as follows:

"20. In , , the question was as to the validity of Section 9(1-A) of the Madras Maintenance of Public Order Act, 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper "for the purpose of securing the public safety or the maintenance of public order." Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Article 19(2), which saved "existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State." It was held by this Court that as the purposes mentioned in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to split up Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really

> a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in , was referred to in State of , and State of Bombay v. United Motors (India) Ltd., 1953 SCR 1069 at 1098-99] and distinguished."

[96] The present being a case of an Article 19(1)(a) violation, Romesh Thappar's judgment would apply on all fours. In an Article 19(1)(g) challenge, there is no question of a law being applied for purposes not sanctioned by the Constitution for the simple reason that the eight subject matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66A does not fall within any of the subject matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject matters is clear. We therefore hold that no part of Section 66A is severable and the provision as a whole must be declared unconstitutional.

Article 14

[97] Counsel for the petitioners have argued that Article 14 is also infringed in that an offence whose ingredients are vague in nature is arbitrary and unreasonable and would result in arbitrary and discriminatory application of the criminal law. Further, there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground. Similar offences which are committed on the internet have a three year maximum sentence under Section 66A as opposed to defamation which has a two year maximum sentence. Also, defamation is a non-cognizable offence whereas under Section 66A the offence is cognizable.

[98] We have already held that Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right under Article 19(1)(a) nor can it justify its denial. However, when we come to discrimination under Article 14, we are unable to agree with

counsel for the petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear - the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject matter of challenge in these petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Article 14 must fail.

Procedural Unreasonableness

[99] One other argument must now be considered. According to the petitioners, Section 66A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available under Section 199 Cr.P.C. would not be available for a like offence committed under Section 66A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Sections 95 and 96 of the Cr.P.C. are also absent when it comes to Section 66A. For example, where any newspaper book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be seized but under Section 96 any person having any interest in such newspaper, book or document may within two months from the date of a publication seizing such documents, books or newspapers apply to the High court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court.

[100] It is clear that Sections 95 and 96 of the Criminal Procedure Code reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject matters contained in

Article 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Article 19(2).

Further, Section 196 of the Cr.P.C. states:

"196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.- (1) No Court shall take cognizance of-

(a) any offence punishable under Chapter VI or under Section 153A, [Section 295-A or sub-section (1) of Section 505] of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in Section 108A of the Indian Penal Code (45 of 1860), except with the previous sanction of the Central Government or of the State Government.

[(1-A)

No Court shall take cognizance of-

(a) any offence punishable under Section 153-B or sub-section (2) or sub-section (3) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]

(2) No court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120-B of the Indian Penal Code (45 of 1860), other

than a criminal conspiracy to commit [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings:

Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction [under sub-section (1) or sub-section (1-A) and the District Magistrate may, before according sanction under sub-section (1-A)] and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155."

[101] Again, for offences in the nature of promoting enmity between different groups on grounds of religion etc. or offences relatable to deliberate and malicious acts intending to outrage religious feelings or statements that create or promote enmity, hatred or ill-will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked under Section 66A instead of the aforesaid Sections.

Having struck down Section 66A on substantive grounds, we need not decide the procedural unreasonableness aspect of the Section.

Section 118 of the Kerala Police Act.

[102] Learned counsel for the Petitioner in Writ Petition No. 196 of 2014 assailed sub-section (d) of Section 118 which is set out hereinbelow:

"118. Penalty for causing grave violation of public order or danger.- Any person who,-

(d) Causes annoyance to any person in an indecent manner by statements or verbal or comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means; shall, on conviction be punishable with imprisonment for a term which may extend to three years or with fine not exceeding ten thousand rupees or with both."

[103] Learned counsel first assailed the Section on the ground of legislative competence stating that this being a Kerala Act, it would fall outside Entries1 and 2 of List II and fall within Entry 31 of List I. In order to appreciate the argument we set out the relevant entries: "List - I

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

List - II

1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

2. Police (including railway and village police) subject to the provisions of entry 2A of List I."

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II. In addition, Section 118 would also fall within Entry 1 of List II in that as its marginal note tells us it deals with penalties for causing grave violation of public order or danger.

[104] It is well settled that a statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. In ,, the law is stated thus:

"The position, then, might thus be summed up : When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it,

> what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not." (at page 410)

[105] It is, therefore, clear that the Kerala Police Act as a whole and Section 118 as part thereof falls in pith and substance within Entry 2 List II, notwithstanding any incidental encroachment that it may have made on any other Entry in List I. Even otherwise, the penalty created for causing annoyance in an indecent manner in pith and substance would fall within Entry 1 List III which speaks of criminal law and would thus be within the competence of the State Legislature in any case.

[106] However, what has been said about Section 66A would apply directly to Section 118(d) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and over breadth, that led to the invalidity of Section 66A, and for the reasons given for striking down Section 66A, Section 118(d) also violates Article 19(1)(a) and not being a reasonable restriction on the said right and not being saved under any of the subject matters contained in Article 19(2) is hereby declared to be unconstitutional.

> Section 69A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

[107] Section 69A of the Information Technology Act has already been set out in paragraph 2 of the judgment. Under sub-section (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the official gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69A of the Act. Under Rule 4,

every organization as defined under Rule 2(g), (which refers to the Government of India, State Governments, Union Territories and agencies of the Central Government as may be notified in the Official Gazette by the Central Government)- is to designate one of its officers as the "Nodal Officer". Under Rule 6, any person may send their complaint to the "Nodal Officer" of the concerned Organization for blocking, which complaint will then have to be examined by the concerned Organization regard being had to the parameters laid down in Section 69A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an Organization or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in 69A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a Committee of Government Personnel who under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information. If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The Committee then examines the request and is to consider whether the request is covered by 69A(1) and is then to give a specific recommendation in writing to the Nodal Officer of the concerned Organization. It is only thereafter that the Designated Officer is to submit the Committee's recommendation to the Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, under Rule 14 a Review Committee shall meet at least once in two months and record its findings as to whether directions issued are in accordance with Section 69A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said

information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.

[108] Learned counsel for the petitioners assailed the constitutional validity of Section 69A, and assailed the validity of the 2009 Rules. According to learned counsel, there is no pre-decisional hearing afforded by the Rules particularly to the "originator" of information, which is defined under Section 2(za) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided under Section 95 and 96 of the Code of Criminal Procedure are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the petitioners.

[109] It will be noticed that Section 69A unlike Section 66A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.

[110] The Rules further provide for a hearing before the Committee set up - which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69A.

[111] Merely because certain additional safeguards such as those found in Section 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011.

[112] Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfill the conditions of the Section. Section 79 states:

> "79. Exemption from liability of intermediary in certain cases.-(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.
>
> (2) The provisions of sub-section (1) shall apply if-
>
> (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or
>
> (b) the intermediary does not-
>
> (i) initiate the transmission,
>
> (ii) select the receiver of the transmission, and
>
> (iii) select or modify the information contained in the transmission;
>
> (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.
>
> (3) The provisions of sub-section (1) shall not apply if-
>
> (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner. Explanation.-For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.]"

[113] Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rule 3(2) and 3(4) are important, they are set out hereinbelow:-

"3. Due diligence to be observed by intermediary.-The intermediary shall observe following due diligence while discharging his duties, namely:-

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that-

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource;

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation.

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes."

[114] Learned counsel for the petitioners assailed Rules 3(2) and 3(4) on two basic grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made under Section 69A. Also, for the very reasons that Section 66A is bad, the petitioners assailed sub-rule (2) of Rule 3

saying that it is vague and over broad and has no relation with the subjects specified under Article 19(2).

[115] One of the petitioners' counsel also assailed Section 79(3)(b) to the extent that it makes the intermediary exercise its own judgment upon receiving actual knowledge that any information is being used to commit unlawful acts. Further, the expression "unlawful acts" also goes way beyond the specified subjects delineated in Article 19(2).

[116] It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69A. We have seen how under Section 69A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed - one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69A read with 2009 Rules.

[117] Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

[118] The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.

[119] In conclusion, we may summarise what has been held by us above:

Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2).

Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of Information by Public) Rules 2009 are constitutionally valid.

Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

Section 118(d) of the Kerala Police Act is struck down being violative of Article 19(1)(a) and not saved by Article 19(2).

All the writ petitions are disposed in the above terms.

1.) The genealogy of this Section may be traced back to Section 10(2)(a) of the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. This Section was substantially reproduced by Section 66 of the UK Post Office Act, 1953 as follows:

66. Prohibition of sending offensive or false telephone messages or false telegrams, etc.

If any person

(a)sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character ;

(b)sends any message by telephone, or any telegram, which he knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person ; or

(c)persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid,

he shall be liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both.

This Section in turn was replaced by Section 49 of the British Telecommunication Act, 1981 and Section 43 of the British Telecommunication Act, 1984. In its present form in the UK, it is Section 127 of the Telecommunication Act, 2003 which is relevant and which is as follows:-

127. Improper use of public electronic communications network

(1) A person is guilty of an offence if he -

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) cause any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he-

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c.42)).

2.) Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism. The original ten commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple - that is the temple built by Solomon.

3.) A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an "honourable man". He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says-

ANTONY- Good friends, sweet friends, let me not stir you up To such a sudden flood of mutiny.

They that have done this deed are honourable:

What private griefs they have, alas, I know not,

That made them do it: they are wise and honourable, And will, no doubt, with reasons answer you.

I come not, friends, to steal away your hearts:

I am no orator, as Brutus is;

But, as you know me all, a plain blunt man,

That love my friend; and that they know full well

That gave me public leave to speak of him:

For I have neither wit, nor words, nor worth,

Action, nor utterance, nor the power of speech,

To stir men's blood: I only speak right on;

I tell you that which you yourselves do know;

Show you sweet Caesar's wounds, poor poor dumb mouths,

And bid them speak for me: but were I Brutus,

And Brutus Antony, there were an Antony

Would ruffle up your spirits and put a tongue

In every wound of Caesar that should move

The stones of Rome to rise and mutiny.

ALL- We'll mutiny."

4.) In its present form the clear and present danger test has been reformulated to say that:

"The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Interestingly, the US Courts have gone on to make a further refinement. The State may ban what is called a "true threat".

" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

"The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where

a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

See Virginia v. Black and Watts v. United States 22 L. Ed. 2d. 664 at 667

Finally but not the least on the subject, Supreme Court on importance of SOP in electronic records

SHAFHI MOHAMMAD; RAVINDER SINGH @ KAKU; OF PUNJAB

V/S

STATE OF HIMACHAL PRADESH; RAVINDER SINGH @ KAKU AND ANR

2018 LawSuit(SC) 301.

SUPREME COURT OF INDIA (FROM HIMACHAL PRADESH) *(D.B.)*

SHAFHI MOHAMMAD; RAVINDER SINGH @ KAKU; OF PUNJAB
V/S
STATE OF HIMACHAL PRADESH; RAVINDER SINGH @ KAKU AND ANR

Date of Decision: 03 April 2018

Citation: 2018 LawSuit(SC) 301

Hon'ble Judges: Adarsh Kumar Goel, Rohinton Fali Nariman

Case Type: Special Leave Petition (Criminal)

Case No: 2302 of 2017, 9431 of 2011, 9631 of 2012, 9632 of 2012, 9633 of 2012, 9634 of 2012

Acts Referred:
Evidence Act, 1872 Sec 65B(4)

Advocates: Arun Mohan, Rituj Chopra, Jayant Bhushan, Ketann Paul, Tushar Bhushan, E R Sumathy, Bharat Bhushan, Jaspreet Gogia, Manjakini Singh, A N S Nadkarni, Y P Adhyaru, Shirin Khajuria, Asha Gopalan Nair, Zoheb Hussain, Rukhmini S Bobde, Salvador S Rebello, Nivedita Nair, Sneha Prabhu Tendulkar, Amogh Prabhu, B V Balram Das, Vikas Mahajan, Vinod Sharma, Shyam Sundar Rai, Anuradha Mutatkar, Abhinav Mukerji, Bihu Sharma, Purnima Krishna

Reference Cases:
Cases Referred in (+): **11**

Judgement Text:-

[1] SLP(Crl.)No.2302 of 2017

1. Use of videography of the scene of crime is the subject matter of consideration herein. We may note the proceedings in the case on earlier hearings. In order dated 25th April, 2017, it was observed:

"Mr. A.N.S. Nadkarni, Additional Solicitor General, has accordingly put in appearance and made his submissions. He has also submitted a note to the effect that such videograph will indeed help the investigation and such concept is being used in some other advanced countries. The National Institute of Justice which is an agency of U.S. Department of Justice in its report has noted the perceived benefits for using the "Body-Worn Cameras" and also the precautions needed in doing so. The British Transport Police has also found body worn cameras as deterrent against anti-social behaviour and tool to collect evidence. He also referred to judgment of this Court in Karnail Singh Vs. State of Haryana, 2009 8 SCC 539 wherein reference to use of technology during search and seizure under Narcotic Drugs and Psychotropic Substances Act, 1985 has been made. Reference has also been made to Information Technology Act (Amendment) 2006, particularly, Section 79A. In Ziyauddin Burhanuddin Bukhari Vs. Brijmohan Ramdass Mehra & Ors., 1976 2 SCC 17 this Court noted that new techniques and devices are the order of the day. Audio and video tape technology has emerged as a powerful medium through which a first hand information can be gathered and can be crucial evidence.

Learned Additional Solicitor General has also drawn our attention to the Field Officers' Handbook issued by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India, inter-alia, suggesting that logistic support be provided to the search teams. It further suggests that all recovery and concealment methods should be videographed simultaneously. The said handbook 3 also suggests that permission should be taken under Section 52A of the Narcotic Drugs and Psychotropic Substances Act, 1985 for pretrial disposal of the contraband. Further, reference has been made to the Narcotic Drugs and Psychotropic Substances (Amendment) Bill, 2016 moved by a private member in the Lok Sabha. He submits that in his view such Bill will advance the interests of justice and he will advice the Government of India to consider and oversee adoption for these measures in

the Country by investigating agencies.

Mr. A.I. Cheema, learned Amicus points out that Second Proviso to Section 54A of the Cr.P.C. provides for videography of identification process in circumstances specified in the said provision. He also stated that there should be videography of confessional statement under Section 164 Cr.P.C. He states that such measures can also be adopted for recording dying declarations, identification processes and the post-mortem.

Since, we find that at the ground level these measures have not been fully adopted, we direct the Home Secretary, Government of India to ascertain from different Investigating Agencies to how far such measures can be adopted and what further steps be taken to make use of above technology for effective investigation and crime prevention."

[2] Thereafter, in the order dated 12th October, 2017 consideration of the matter was as follows:

"Mr. A.N.S. Nadkarni, learned Additional Solicitor General, has filed a note stating that the matter was discussed by the Union Home Secretary with the Chief Secretaries of the States. A decision was taken to constitute a Committee of Experts (COE) to facilitate and prepare a report to formulate a road-map for use of videography in crime investigation and to propose a Standard Operating Procedure (SOP). The Committee has held its meetings. The response of the States is in support of use of videography. The Central Investigation Agencies have also supported the said concept. However, certain reservations have been expressed in the implementation such as funding, securing the data and storage of the same. It has also been submitted that the production and admissibility of evidence are also issues which may need to be addressed.

We had requested Mr. Jayant Bhushan, learned senior counsel, to assist the court who has also submitted a note to the effect that videography will be a beneficial step for effective prosecution subject to the issue of admissibility being resolved to make the use of videography compatible and useful. He

also submitted that the direction ought to be issued for use of videography in investigation and such use be made mandatory.

We have also requested Mr. Arun Mohan, learned senior counsel, present in the Court, to assist the Court on the subject as amicus. He submitted that equipments which may be useful for scientific investigation have been suggested in certain publications on the subject. A copy each of the said 3 publications has been furnished to Mr. Nadkarni so that the same can be considered by the Committee of Experts. He submitted that still photography may be more useful as it enables much higher resolution for forensic analysis. Digital camera can be placed on a mount on a tripod which may enable rotation and tilting. Secured portals may be established to which Investigation Officer can e-mail photographs taken at the crime scene. To give authenticity and prevent manipulation, digital images can be retained on State's server as permanent record. The State server can re-mail the digital files back to the police station for further use. Special cameras may be selected by the BPR&D. Till this is done, smart-phones can also be used. BPR&D may prepare a guidance manual for the Investigation Officers for crime scene photography and video recording of statements of witnesses. He stated that a further note on the subject may be submitted by him."

[3] In order dated 30th January, 2018 it was observed:

"(3) We have been taken through certain decisions which may be referred to. In Ram Singh and Others v. Col. Ram Singh,1985 Supp SCC 611, a ThreeJudge Bench considered the said issue. English Judgments in R. v. Maqsud Ali, 1965 2 AllER 464, and R. v. Robson, 1972 2 AllER 699, and American Law as noted in American Jurisprudence 2d (Vol.29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to

be proved by the maker of the record, possibility of tampering 5 was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

(4) In Tukaram S. Dighole v. Manikrao Shivaji Kokate, 2010 4 SCC 329, the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

(5) In Tomaso Bruno and Anr. v. State of Uttar Pradesh, 2015 7 SCC 178, a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra, 2012 9 SCC 1 and State (NCT of Delhi) v. Navjot Sandhu, 2005 11 SCC 600."

[4] On the issue of interpretation of Section 65B(4) of the Evidence Act with regard to the admissibility of the electronic evidence it was observed :

"12. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

13. To consider the remaining aspects, including finalization of the road-map for use of the videography in the crime scene and the Standard Operating Procedure (SOP), we adjourn the matter to 13th February, 2018."

[5] We have now taken up the issue for further consideration. An affidavit dated 21st March, 2018 has been filed by the Director, Ministry of Home Affairs (MHA) annexing thereto Report of the Committee constituted by the MHA about use of videography in police investigation dated 22nd November, 2017. The Committee considered various issues including the present infrastructure and usage, concerns/problems raised by various States for use of videography during investigations, admissibility of electronic evidence in absence of a certificate under Section 65B(4) of the Evidence Act, operational difficulties, lack of training, funding, forensic facilities. The Committee observed that though crime scene videography was a "desirable and acceptable best practice", the mandatory videography required major issues being addressed. Videography may be done on "Best Effort" basis. The timeline should be different for different States and the Central Investigating Agencies. The Committee suggested two alternative timelines. The second option i.e. Option-B suggested by the Committee is as follows:

> "7.3 Option-B: Centrally Driven Plan of Action: The second approach suggested is for implementation of the directions in a phased manner with milestone based review mechanism.
>
> a. Phase-I: Three Months: Concept, Circulation and Preparation.
>
> * The concept for videography of the recommended categories of tasks, preparations for pilot project launch in i)Cities of 50 lakhs population or more; and, ii)at least one district of every remaining State/Union Territory; within three months of the orders of the Hon'ble Supreme Court. In the selected district(s), at least five police stations may be identified for implementation of the scheme on best effort basis as a pilot project
>
> * Capacity Building by organizing training programme for personnel in the police station on the Videography Techniques for them to be qualified as the Trained Police Videographer by the end of three months. Each selected Police Station should identify personnel for Trained Police Videographer qualification, at the rate of two (2) Trained Police Videographer for every 25 heinous/grave crime cases reported in that police station in a year.

* Selected Districts be enabled/provided finances to procure the equipment required for use by the Trained Police Videographer.

* A representative of the FSL trained in handling digital evidences should be identified by each of the states to mentor and hand hold the Pilot Project implementation district Trained Police Videographers. Where FSL has no resources to offer, the SP/DCP of the concerned district should be authorized to hire a private technical person proficient in digital imaging and back-up technologies to handhold/mentor the Trained Police Videographers.

* Preparation of Trainer Police Videographer Training Modules and Training of Trainers courses by BPR&D/CDTS/State Police Academies. b. Phase-II: Six Months: Pilot Project Implementation

* After the three months of Concept, Circulation and Preparation stage, the pilot project should be launched in the selected police stations of the shortlisted Districts of the States.

* The concerned District Superintendent of Police / Deputy Commissioner of Police, shall designate an officer of the rank of Deputy Superintendent of Police/Assistant Commissioner of Police, to supervise the implementation of the Pilot Project and to chronicle the Pilot implementation. Any implementation issues shall immediately be flagged and brought to the notice of the SP / DCP concerned. The officer designated will be responsible for the uninterrupted implementation of the Pilot.

* Launch of Trained Police Videographer Training Programmes/ Training of Trainer Course by BPR&D/CDTS/ State Police Academies.

c. Phase-III: Three Months: Pilot Implementation Review

* The Phase II Pilot implementation should be reviewed by an independent

consultant and, suggestions for seamless implementation on a wider scale should be prepared.

* The report of the independent consultant to be considered by MHA and select group of officers regarding Pilot implementation and review report preparation.

* The review and findings by MHA to be placed before the Hon'ble Supreme Court for incorporating necessary changes as required regarding the Videography during Investigation and obtain necessary instructions.

* During this phase, each state should prepare detailed plans for the launch of the next phase of Videography in Investigations project extending it to i) all cities with a population of 10 lakhs and more; b) in all districts with a population of 20 lakhs and more, during Phase-IV.

* A representative of the FSL trained in handling digital evidences should be identified for each of the new unit to mentor and hand hold the district Trained Police Videographers, where roll out is proposed in Phase-IV. Where FSL has no resources to offer, the SP/DCP of the concerned district should be authorized to hire a private technical person proficient in digital imaging and back-up technologies to handhold/mentor the Trained Police Videographers.

* Each state to submit plans for strengthening the Forensic Sciences Laboratories for handling increased Cyber Forensics/Digital Media analysis units. MHA to consider the requirements for this purpose under the MPF scheme.

* During Phase-III, the Pilot implementation districts/cities will continue with the Videography in Investigations project and extend them to all their Police Stations.

d. Phase-IV: One Year: Coverage extension from Pilot Implementation

* Implementation of the Videography in Investigations project to Cities of 10+ lakhs population/Districts of 20+ lakhs population identified during Phase-III.

* During this phase, each state should prepare detailed plans for the launch of the Videography in Investigations project in all remaining districts/cities, which were not covered during Pilot Phase (Phase-II) and Phase-III.

* A representative of the FSL trained in handling digital evidences should be identified for each of the remaining units to mentor and hand hold the district Trained Police Videographers, where roll out is proposed in Phase-V. Where FSL has no resources to offer, the SP/DCP of the concerned district should be authorized to hire a private technical person proficient in digital imaging and back-up technologies to handhold/mentor the Trained Police Videographers.

* MHA to work on extending the financial support for implementation of the project for remaining cities and districts during Phase-V.

e. Phase-V: One Year: Coverage extension to remaining Cities and Districts

* Implementation of the Videography in Investigations project in all remaining districts and cities.

* Review of Phase-IV implementation learning based on independent consultant's report by MHA and submission of status report to the Supreme Court for modifications/suggestions for improvement of the Videography in Investigations project."

[6] Apart from above, the Committee suggested that a group of experts may be set up at the level of Government of India comprising:

(i) One head of Central Investigation agencies (CBI, NIA, NCB) as Chairperson;

(ii) One head of State Police;

(iii) One head of CFSL or Senior Forensic Scientist with expertise in the area;

(iv) A Senior Legal Professional (LA of CBI or NIA or comparable from Ministry of Law); and

(v) A senior representative from MHA as members.

[7] The group should have the freedom to co-opt members and private experts. The group could periodically issue guidelines/advisories. It is further suggested that each State Police and the Central Investigating Agency may create a Steering Committee under HOPF/Head of CPO within the organization to spearhead this drive. Each State Police/Central Investigating Agency may also designate a senior officer in the rank of IG/ADG as Nodal Officer for spearheading the massive expansion of photography and videography in investigation. Such an officer should be given authority/responsibility to review the progress at periodic intervals and take/propose necessary measures.

[8] After considering the report of the Committee, the MHA prepared an action plan on the use of videography in the police investigation stipulating capacity building in terms of training, equipment, forensic facilities, a scheme for requisite funds, preparation of Standard Operating Procedure (SOP). For this purpose, the timeline suggested is as follows:

"All Central Agencies will be asked to prepare and submit Annual Action Plan on "photography and videography in Investigation for 2018 within three months.

The Ministry will scrutinize the plans and prepare a consolidated requirement and send a formal proposal/scheme to the Ministry of Finance for

concurrence and obtaining budget within two months from the finalization/approval of the consolidated action plan, insofar as Central Agencies are concerned.

Efforts will be made to obtain the budget from Ministry of Finance within the financial year 2018-19.

Similar action will have to be taken by States/UTs with respect to their forces."

[9] We are in agreement with the Report of the Committee of Experts that videography of crime scene during investigation is of immense value in improving administration of criminal justice. A Constitution Bench of this Court in Karnail Singh versus State of Haryana, 2009 8 SCC 539 noted that technology is an important part in the system of police administration [Para 34 - (2009) 8 SCC 539] . It has also been noted in the decisions quoted in the earlier part of this order that new techniques and devices have evidentiary advantages, subject to the safeguards to be adopted. Such techniques and devices are the order of the day. Technology is a great tool in investigation [Ram Singh and Ors. vs. Col. Ram Singh,1985 Supp SCC 611, R. vs. Maqsud Ali, 1965 2 AllER 464, R vs. Robson, 1972 2 AllER 699, Tukaram S. Dighole vs. Manikrao Shivaji Kokate, 2010 4 SCC 329, Tomaso Bruno and anr. vs. State of Uttar Pradesh, 2015 7 SCC 178, Mohd. Ajmal Amir Kasab vs. State of Maharashtra, 2012 9 SCC 1 and State (NCT of Delhi) vs. Navjot Sandhu, 2005 11 SCC 600]. By the videography, crucial evidence can be captured and presented in a credible manner.

[10] Thus, we are of the considered view that notwithstanding the fact that as of now investigating agencies in India are not fully equipped and prepared for the use of videography, the time is ripe that steps are taken to introduce videography in investigation, particularly for crime scene as desirable and acceptable best practice as suggested by the Committee of the MHA to strengthen the Rule of Law. We approve the Centrally Driven Plan of Action prepared by the Committee and the timeline as mentioned above. Let the consequential steps for implementation thereof be taken at the earliest.

[11] We direct that with a view to implement the Plan of Action prepared by the Committee, a Central Oversight Body (COB) be set up by the MHA forthwith. The COB

may issue directions from time to time. Suggestions of the Committee in its report may also be kept in mind. The COB will be responsible for further planning and implementation of use of videography. We direct the Central Government to give full support to the COB and place necessary funds at its disposal. We also direct that the COB may issue appropriate directions so as to ensure that use of videography becomes a reality in a phased manner and in first phase of implementation by 15th July, 2018 crime scene videography must be introduced at least at some places as per viability and priority determined by the COB.

[12] We place on record the suggestion of the learned amicus that funding for this project may be initially by the Centre to the extent possible and a central server may be set up. These suggestions may be considered by the COB. We also note that law and order is a State subject.

[13] We may also refer to a connected issue already dealt with by this Court in D.K. Basu versus State of West Bengal and ors., 2015 8 SCC 744. This Court directed that with a view to check human rights abuse CCTV cameras be installed in all police stations as well as in prisons. There is need for a further direction that in every State an oversight mechanism be created whereby an independent committee can study the CCTV camera footages and periodically publish report of its observations. Let the COB issue appropriate instructions in this regard at the earliest. The COB may also compile information as to compliance of such instructions in the next three months and give a report to this Court.

[14] Compliance of above directions may be ensured by the Secretary, Ministry of Home Affairs in the Central Government as well as Home Secretaries of all the State Governments.

[15] An affidavit of progress achieved may be filed by the Oversight Body on or before 31st July, 2018. Put up the matter for further consideration on 1st August, 2018.

High Court for the State of Telangana and the State of AP on use of skype in Court trials-SIRANGAI

SHOBA @ SHOBA MUNNURI

V/S

SIRANGI MURALIDHAR RAO. 2017 AIR(Hyd) 88.

HIGH COURT OF TELANGANA AND ANDHRA PRADESH (AT HYDERABAD)

SIRANGAI SHOBA @ SHOBA MUNNURI
V/S
SIRANGI MURALIDHAR RAO

Date of Decision: 19 October 2016

Citation: 2016 LawSuit(Hyd) 488

Hon'ble Judges: B Siva Sankara Rao

Eq. Citations: 2017 AIR(Hyd) 88, 2017 (5) ALT 475

Case Type: Civil Revision Petition

Case No: 337 of 2016

Subject: Civil, Criminal

Acts Referred:
CODE OF CIVIL PROCEDURE, 1908 OR 18R 12, OR 18R 4, OR 18R 4(4), OR 18R 4(1)
INDIAN PENAL CODE, 1860 SEC 376
CODE OF CRIMINAL PROCEDURE, 1973 SEC 265, SEC 267, SEC 245, SEC 238, SEC 164, SEC 266, SEC 278, SEC 244, SEC 285, SEC 273, SEC 275(1), SEC 317(2), SEC 209, SEC 251, SEC 228, SEC 313, SEC 167, SEC 309
EVIDENCE ACT, 1872 SEC 65B, SEC 65A
INFORMATION TECHNOLOGY ACT, 2000 SEC 4

Final Decision: Petition disposed

Advocates: Vedula Venkata Ramana, Mukheed, Gopinath Lakkineni

Reference Cases:

Cases Referred in (+): **14**

Judgement Text:-

B Siva Sankara Rao, J

[1] The revision petitioner, who is the unsuccessful respondent-wife in I.A. No.826 of 2015, impugning legality and correctness of the order dated 18.12.2015, allowing examination on Skype technology for recording evidence in the divorce petition of the petitioner-husband in O.P. No.59 of 2015 on the file of Principal Senior Civil Judge, Kothagudem, filed the revision.

[2] Coming to the relevant facts, in the divorce petition, after filing chief affidavit and when the matter was coming for cross-examination, the petitioner-husband at USA filed the petition before the trial Court to permit his examination including marking of documents on Skype technology at his expense, in open Court or through Advocate-commissioner, on the ground that he is unable to get leave to attend the Court due to most urgent works of his project at USA.

[3] The respondent-revision petitioner in opposing the same contended before the lower court on one among other that only in-order to-avoid facing the criminal case filed against him, the petitioner adopted said procedure for recording his evidence and there is every possibility to prompt or alert him to give a different answer and prayed to dismiss the petition.

[4] As the trial Court after hearing both sides allowed the petition, present revision is filed against it as referred supra.

[5] In the revision it is the contention, in support of the grounds by the learned senior counsel for revision petitioner, that the Court below committed error in allowing the petition, instead of dismissing by accepting the contentions of the cross-examination of a witness cannot be allowed to be done by using Skype Technology since the demeanor of the witness cannot be properly observed, identity of the party giving answers is difficult to fix, there is every possibility to prompt or alert him to give a different answer if the technology is used by screening the prompter from visibility, that a party cannot have the luxury of avoiding Court by keeping himself busy and conduct the trial of the case by taking advantage of Skype technology by appointing a G.P.A;

besides same is a device to avoid facing the criminal case allegedly filed against him and it defeats the very object of efforts for conciliation without presence and prayed to allow the revision by setting aside the impugned order.

[6] Whereas, it is the contention of the learned counsel for revision respondent-husband, while supporting the order of the lower court that placed reliance on a similar expression of this court, that same is a reasoned one and no way requires interference, any reconciliation if at all can be done by same technology, that demeanor of the witness can be properly observed including identity of the person giving answers and there is no possibility to prompt or alert to give a different answer from use of the technology by observing closely the demeanor of witness with no possibility of any others prompting, there is no any basis even to say same is a device to avoid facing the criminal case allegedly filed against him, that none of the provisions of law, muchless Sections 65A and B of the Indian Evidence Act prohibit such an e-recoding of evidence, that law is fairly settled for availing of the technological advancements and thereby sought for dismissal of the revision.

[7] Heard both sides with reference to the provisions and propositions and perused the material on record.

[8] The facts no way require repetition, in answering the rival contentions, to decide correctness of the order of the lower court and further as to recording of evidence through Skype or Dash or other technological device can be permitted and if so with what precautions and whether the case facts otherwise are impermissible even technology permits with taking care of precautions.

[9] Before dealing with the issue as a necessary background, it is to mention the need to avail technological innovations with necessary safeguards and precautions in the justice delivery system for speedy and effective disposal of cases that; after India attained independence, not only there is an explosion of population but the pendency of cases has grown in a multi-dimensional way and the present day statistics is more alarming. It is apt to quote from the erudite words of His Excellency, Hon'ble the President of India Dr.Pranab Mukherjee, on March 14, 2016, that- though the Indian judiciary has many strengths, for we have a long way to go, despite burdened with the pendency of more than three crore cases in various courts, there is every need to fully meet the aspirations of our people for speedy and affordable justice, by use of technology.

[10] There is a thin line between access to justice and effective access to justice. No one can dispute on the fact that ICT has virtually paved a new line of thinking in modernizing Indian judicial system for effective access to justice. The task is early disposal without sacrificing the quality of decision making and for that the Courts are bound to use the technological innovations. Our objective should not only be accessible but affordable justice to all.

[11] It is also apt in this regard to quote the erudite words of one of the great technocrats, no other than the former President of India-Bharat Ratna, Dr.A.P.J.Abdulkalam that:

> Technology is defined an essential element of change in all spheres of life. The element involved also is an important factor. If technology is properly used, it can bring about tremendous changes for the betterment of life. Any change we contemplate is for speedy justice mechanism keeping in focus the quality, transparency and public accountability.

[12] Thus the only thing to be kept in mind is what precautions can be taken to prevent any possibility of abuse of the process and in furtherance of and to sub serve the ends of justice.

[13] From the above, it can be well said that Science and Law, the two distinct professions have increasingly become commingled, for ensuring a fair process and to see that justice is done. On one hand, scientific evidence holds out the tempting possibility of extremely accurate fact-finding and a reduction in the uncertainty that often accompanies legal decision making. At the same time, scientific methodologies often include risks of uncertainty that the legal system is unwilling to tolerate.

[14] In Som Prakash V. State of Delhi, 1974 CrLJ 784 the Apex Court has observed four decades back that:

> in our technological age nothing more primitive can be conceived of than denying discoveries and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only thereby discouraging the liberal use of scientific aids to prove guilt.

[15] Thus statutory changes are generally needed to develop more fully a problem

solving approach to trials and to deal with heavy workload on the investigators and judges in so enabling them. However, when existing provisions enables to do so from the purposive interpretation to meet the situations, there is nothing to sit in flaccidly.

[16] In another expression in SIL IMPORT, USA Vs. Exim Aides Exporters, Bangalore, 1999 4 SCC 567 the Apex Court held that: Technological advancements like facsimile, Internet, e-mail, etc, were in swift progress even before the Bill for the Amendment Act was discussed by Parliament. So when Parliament contemplated notice in writing to be given we cannot overlook the fact that Parliament was aware of modern devices and equipment already in vogue.

[17] It was also quoted with approval in M/s. SIL IMPORTof what Francis Bennion on Statutory Interpretation has stressed the need to interpret a statute by giving allowances for any relevant changes that have occurred, since the Acts passing, in law, social conditions, technology, the meaning of words, and other matters. For the need to update legislations, the Courts have the duty to use interpretative process to the fullest extent permissible by the enactment.

[18] The following passage at page 167 of the above book has been quoted with approval by a three Judge-Bench of this Court in State Vs. S.J. Chaudhary, 1996 2 SCC 428 :

> It is presumed that Parliament intends the court to apply to an ongoing Act, a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

[19] The requirement of law from Sections 273 & 317(2) of the Code of Criminal Procedure, for short CrPC is that the evidence must be recorded in presence of the accused and unless he waives the same and consenting in the presence of his Advocate or special vakalath holder permitted if any. Leave such difficulty does not arise for Court to record Section 164 CrPC Statements or the like during crime investigation or examination of witness during pre-cognizance stage of private complaint or for the like. The term presence in this Section does not mean the actual physical presence of

the accused or witness in the Court or before officer of the court like in case Advocate is appointed to record evidence. It is to say, the idea of fair trial is implicit therein. As such, same is the law with all vigor and dynamism for presence of accused in Judicial custody placed in a jail or even on bail or bond could not physically present either from ill health or elsewhere- (including for Section 313 CrPC examination or pre-trial questioning /examination under Sections 209 or 251 or 238 or 244 & 245 or 228 CrPC or the like, as is in vogue of remand extension under Sections 167 or 309 CrPC or the like or even without need of physical production for compliance of Sections 265 to 267 CrPC or the like or even under any special law from any special provision of similar in nature), from the term presence in this context does not mean the actual physical presence of the witness or accused in the Court.

[20] In Sheeba Abidi Vs. State, 2004 113 DLT 125 it was held by the Delhi High Court that it can also be used where the Court on facts and circumstances do not want the witness to personally attend the Court and answer. It can happen in cases where the witness (victim) is a child who has been sexually exploited or in case if the child has suffered from unnatural offence against.

[21] The Supreme Court in Sakshi vs. Union of India, 2004 AIR(SC) 3566 accepted for adopting video conferencing recording of statements /evidence of witness, without physical presence in Court.

[22] From the above, there is no manner of doubt to hold that presence of parties and witnesses in civil matters from Orders 26,18 &16 of the Code of Civil Procedure, for short CPC does not mean actual physical presence either in the Court or before officer of the court like in case Advocate is appointed to record evidence, particularly in matrimonial matters where one party elsewhere to say abroad and other somewhere within India.

[23] It is often quoted across the globe from many walks of life that, the notion that ordinary people want black-robed judges, well dressed lawyers, and fine paneled courtrooms as the setting to resolve their disputes is not correct. Though such a contention is raised in any case, it is to consider as for sake of contention. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively, as possible. This observation is applicable even in the Indian context where people come to Courts with legal problems and want relief in a speedy manner and application of technologies with e-Courts (video/audio conferencing or internet conferencing) when helps in achieving said objective of speedy and efficient justice to

the common man.

[24] Recording of evidence by video/audio/tele- conferencing or internet conferencing is thus legally permissible in both civil and criminal matters and even in matrimonial matters.

[25] In fact to overcome any difficulty of understanding the existing provisionsof CrPC, a proviso was inserted to sub-section (1) to Section 275 of CrPC by Act 5 of 2009 (the Code of Criminal Procedure (Amendment) Act, 2008) which reads as follows:

> Provided that evidence of a witness under this sub- section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence.
>
> It is leave about recording of evidence on commission as per Section 285 CrPC with same analogy, for Commissioner is Officer of Court on being appointed for purpose of recording evidence of such witness.

[26] From the aforesaid provision, it is to gather including for civil matters that the evidence of a witness may be recorded by audio-video electronic means to say even by internet technology as once same is statutorily permissible in criminal proceedings, equally and undoubtedly permissible in all civil matters.

[27] The core function of digital video recording systems is to convert the audio and video signals from various microphones and cameras into a digital format and store it as a computer file (the video file). On the same lines, the system for video recording of Court proceedings will create a computer file, usually on the computers hard drive. However, the permanent (archieve) file would be created by copying the file from the hard drive to some other, often external, medium, usually optical media such as DVDs. Any auto decoding and conversion is from binary language to local language under command.

[28] The landmark expression of the Apex Court in 2003 in State of Maharashtra Vs. Praful B. Desai, 2004 AIR(SC) 3566 on the scope of its permissibility and person need not physically present, by considering the scope of Section 273 CrPC, speaks that in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience, the Court could consider issuing a commission to

record evidence by way of video conferencing. Normally a commission would involve recording of evidence at the place where the witness is. However, advancement in science and technology has now made it possible to record such evidence by way of video conferencing in the town/city where the Court is.

[29] Referring to the chances of witness abusing the trial Judge during video conferencing, the apex Court in Dr. Praful B. Desaiobserved in erudition that, as a matter of prudence, evidence by video-conferencing in open Court should be accepted only if the witness is in a Country which has an extradition treaty and under whose laws contempt of Court and perjury are punishable.

[30] The Apex Court in Dr. Praful B. Desaithen directed the Mumbai Court to set up a commission and take help of VSNL in recording Dr.Greenbergs (Medical witness) statement through video conferencing in the presence of the two accused doctors. It also allowed the two accused to cross- examine the US-based doctor, through video conferencing.

[31] The Apex Court in Dr. Praful B. Desaiby rejecting all arguments and objections about inferior video quality, disruption of link and other technical problems and of rights of the accused under Article 21 could not be subjected to a procedure involving virtual reality, holding in answer to all the queries that- by now science and technology has progressed enough to not worry about video image/audio interruptions or disruptions and video conferencing has nothing to do with virtual reality and gave the example of the telecast of the cricket World Cup of it could not be said those who watched the World Cup on television were witnessing virtual reality as they were not in the stadium where the match was taking place. This is not virtual reality, it is actual reality. Video conferencing is an advancement of science and technology which permits one to see, hear and talk with someone far away with the same facility as if he is present before you, that is, in your presence. Recording of evidence by video conferencing also satisfies the object of providing, in Section 273 CrPC, that evidence be recorded in the presence of the accused.

[32] In fact, in the recent past in the year,2013, the Apex Court in Kumar Saha Vs. Sukumar Mukherjee, (Civil appeal No.3173 of 2011 (arising out of SLP (c) No.27071 of 2010),dt.24.10.2013 in a medical negligence case, considered the evidence of the foreign expert witnesses by internet/video conferencing in recording of testimonies and cross-examination.

[33] It is however depends upon the accuracy of the proceedings, the appreciation depends. Precautions must be taken, both as to the identity of the witnesses and accuracy of the equipment, used for the purpose. Further, if it is not under control of Court or Commissioner appointed as Officer of Court in recording evidence by internet/video coverage, the other end from where witness speaks, the result will not be accurate from any lack of accuracy in evidence. For example, if the witness by internet/video conference from other end while giving evidence is tutoring by some other person outside of coverage spot, it is difficult to find out and such evidence got no value or lesser value in appreciation, subject to detection, so also from any audio pre-recorded tutoring to him with low voice, not traceable from the place of recording, which are the drawbacks. Such draw backs can be curbed and avoided if for the Court internet/video conference and recording evidence, a separate cloud with security is developed and adopted through NIC, like the devices of Dash, Skype etc., instead depending upon such social network technological devices.

[34] The Apex Court so far as recording of evidence in civil matters particularly through Advocate-Commissioners concerned, suggested way back in the year,2002 by interpreting the word mechanical process to include even audio/video recording. At Para 12 of its expression in Salem Advocates Bar Association, 2002 6 ALD 34 it was held that recording evidence in civil cases on commission not only at hand or typed to dictation, but also and simultaneously by tape recording/ audio/video recording, so as to obviate any controversies later between parties while recording evidence and Or.18 R.4(3)CPC was interpreted for said conclusion.

[35] Further, in its later expression in Salem Advocates Bar Association, 2005 6 SCC 344 for recording evidence in civil cases on commission, it was held at para 6, referring to Or.18 R.4(7) CPC of fees is payable by respective parties for examination of their respective witnesses.

[36] Even while recording evidence in civil cases on commission, Commissioner can and has to observe and record the demeanor of witnesses or such other remarks or objections in the deposition as per order 18 Rule 4(4) & Rule 12 CPC. Further, from the video or internet recording of evidence and presenting the same in an electronic disk, the Court also can during arguments by going through the recorded deposition, note down the demeanor of witness to the extent required as part of appreciation of evidence.

[37] Video recording of proceedings will ensure accuracy of the record. Further, by

preserving (and making available) matters which are not apparent from the written record, such as demeanor, voice inflections, body language and the like, the judges can form a better view of the witness and that would lead to better appreciation in evidence for a rationale conclusion. The Judge can also re-examine later the demeanor of the witness from such video recording while they give evidence, by replay and can come to a more accurate conclusion. The Judge can even focus on a close-up of the witnesses face in order to better observe facial expressions. These can be re-run and replay with ease. The Judge thus can replay for himself if necessary the recorded proceedings of any hearing from day one right up to the final arguments, while appreciating the evidence in deciding the lis.

[38] It is needless to say, the marking of any documents by Commissioner are only for reference sake, since it is the Court/Tribunal that has to later decide for ultimate marking, subject to objection if any as per order 18, Rule 4(1) Proviso CPC and Rule 113(7)(g) of Civil Rules of Practice and circular orders, for short, CRP. The venue for recording evidence is at the court premises or at the venue fixed by Court as per the facts of the case or by the Commissioner with consent of parties, as per Rule 113(6)(b) of CRP. The Commissioner can take any records from the Court/Tribunal by filing a memo only on or before the respective dates of recording evidence and return immediately after the purpose as it is in original condition as per Rule 113(8) of CRP.

[39] Further in a civil case in Twentieth Century Fox Film Corp. Vs. NRI Film Production Associates (P) Ltd., 2003 AIR(Kar) 148 it was held by the High Court of Karnataka in a matrimonial matter that, hearing suit and examination of witnesses and recording of evidence by commissioner are once contemplated by Order 18 Rule-4 CPC, the words Witness in attendance are to be understood as person being present and it need not by physical presence. Thus, recording of evidence through Audio, Video link is permissible complying with the words, in attendance. It would be a live communication between the two ends. Everything, including the visual would be recorded at both ends. This would then be available for viewing by the Court. Also the recording would be at both ends. This also minimizes and or almost eliminates the possibility of loss of material recorded. Also if an officer of the Court is present at the other end i.e. in USA in the same room of witness, the possibility if his being promoted would be eliminated. The officer of the Court can also administer oath.

39(a). There are Safeguards provided therein for the precautions to be taken in recording such evidence, viz.,

"1. Before a witness is examined in terms of the Audio-Video Link, witness is to file an affidavit or an undertaking duly verified before a notary or a Judge that the person who is shown as the witness is the same person as who is going to depose on the screen. A copy is to be made available to the other side. (Identification affidavit).

2. The person who examines the witness on the screen is also to file an affidavit/undertaking before examining the witness with a copy to the other side with regard to identification.

3. The witness has to be examined during working hours of Indian Courts. Oath is to be administered through the media.

4. The witness should not plead any inconvenience on account of time different between India and USA.

5. Before examination of the witness, a set of plaint, written statement and other documents must be sent to the witness so that the witness has acquaintance with the documents and an acknowledgement is to be filed before the Court in this regard.

6. Learned Judge is to record such remarks as is material regarding the demur of the witness while on the screen.

7. Learned Judge must note the objections raised during recording of witness and to decide the same at the time of arguments.

8. After recording the evidence, the same is to be sent to the witness and his signature is to be obtained in the presence of a Notary Public and thereafter it forms part of the record of the suit proceedings.

9. The visual is to be recorded and the record would be at both ends. The

witness also is to be alone at the time of visual conference and notary is to certificate to this effect.

10. The learned Judge may also impose such other conditions as are necessary in a given set of facts.

11. The expenses and the arrangements are to be borne by the applicant who wants this facility"

[40] In the matter of Suvarna Rahul Musale Vs. Rahul Prabhakar Musale, 2015 2 MhLJ 801 the Bombay High Court allowed the plea of the plaintiff to depose using video conference as the witness was staying in U.K. with her minor children and was unable to come to India.

[41] In kalian Chandra Sarkar V. Rajesh Ranjan @ Pappu Yadav, 2005 CrLJ 944 it was held that as a general rule in case where the attendance of accused or witness cannot be procured without any amount of delay, expense or inconvenience the Court could consider by way of video conferencing. The Apex Court directed the trial of the case in Patna shall continue without the presence of the appellant- accused by the court dispensing such presence and to the extent possible shall be conducted with the aid of video conferencing.

41(a). In fact it was way back in March, 2003 the Government of Andhra Pradesh was the first Indian State to introduce electronic pre-trials (E-pre trials) whereby criminals alleged is tried in prison using video conferencing, rather than physically appearing in a Court of law. By now in the entire country almost all Courts have the video linkage facility with prisons for video conferencing of remand extension, enquiry /trial to the extent necessary and the live. It is easy to use and manage system allows Judges, legal professionals, Court officials, inmates and witnesses to seamlessly communicate face to face in real time as effectively as if in same room.

[42] In Amitabh Bagchi Vs. Ena Bagchi, 2005 AIR(Cal) 11 the Culcutta High Court held including with reference to Sections 65A&B of the Evidence Act as follows:

It is to be remembered that by virtue of an amendment and insertion of

> Sections 65A and 65B of the Evidence Act a special provision as to evidence relating to electronic record and admissibility of electronic records has been introduced with effect from 17th October, 2000. Consequential amendments are also made therein. Therefore there is no bar of examination of witness by way of Video Conferencing being essential part of electronic method. Hence, such prayer cannot be ignored as unnecessary. It is to be evaluated with the amount of delay, expenses or inconvenience. If it appears that electronic video conferencing is not only much cheaper but also facilitates the Court and avoids delay of justice, a practical outlook is to be taken by the Court. In such circumstances, Court may dispense with such attendance and issue a Commission for examination of the witness. However, in allowing such prayer Court will first of all consider whether linkage of such facility will be available between two places or not.

[43] In CBI v. Tuncay Alankus, 2013 9 SCC 611 the Apex Court held that, trial court can direct examination of witnesses by video- conferencing as per Sections 242 & 243CrPC, however, necessary directions should also be given by the court as to who would bear requisite expenses.

[44] Thus recording of evidence by way of video conferencing can be ordered to be done in cases where the attendance of the witness cannot be ensured without delay, expense and inconvenience. It was also held by the Apex Court that recording of evidence by video conferencing was a procedure established by law.

[45] As technology improved and the size of the equipment shrunk, experimentation in some American Courts led to a steady growth in the provision of cameras to make video recordings of Court proceedings. Today, in America, Video Recording is common in most Courts.

[46] The influence of information technology in human lives and the storage of information in digital form brought amendment to the law to include the provisions regarding the appreciation of digital evidence. In 2000, the Information Technology Act was enacted, which brought in corresponding amendments to the Indian Evidence Act, 1872, Indian Penal Code, 1860 and the Bankers Book Evidence Act, Reserve Bank of India Act etc., to make digital evidence admissible.

[47] Section 4 of Information Technology Act says, where any law provides that

information or any other matter shall be in writing or typewritten or in the printed form, then notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is- (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference.

[48] In Bodala Murali Krishna vs Bodala Prathima, 2007 2 ALD 72 in the matrimonial matter, it was held that:

> "5. The only question that arises for consideration in this C.R.P. is as to whether the petitioner can be extended the facility of deposing as a witness before the trial Court, through the process of video conferencing?
>
> 6. The amendments carried to the Evidence Act by introduction of Sections 65-A and 65-B are in relation to the electronic record. Sections 67-A and 73-A were introduced as regards proof and verification of digital signatures. As regards presumption to be drawn about such records, Sections 85-A, 85-B, 85-C, 88-A and 90-A were added. These provisions are referred only to demonstrate that the emphasis, at present, is to recognize the electronic records and digital signatures, as admissible pieces of evidence. It is no doubt true that the recording of evidence through the process of video conferencing is not specifically referred to in these provisions.
>
> 7. Examination of witnesses in criminal cases, through video conferencing was approved by the Supreme Court in a judgment reported in State of Maharashtra v. Dr. Praful B. Desai. When such is the facility accorded in criminal cases, there should not be any plausible objection for adopting the same procedure, in civil cases as long as the necessary facilities, with assured accuracy exist. In Twentieth Century Fox Film Corporation and Amitabh Bagchi v. Ena Bagchi, the High Courts of Karnataka and Calcutta held that recording of evidence through video conferencing is permissible in law, provided that necessary precautions must be taken, both as to the identity of the witnesses and accuracy of the equipment, used for the purpose. Certain guidelines were indicated therein. The party, who intends to avail such facility, shall be under obligation to meet the entire expenditure. In Praful B.Desaithe Apex Court observed that video conferencing is an advancement of science and technology which permits seeing, hearing and

talking with someone who is not physically present with the same facility and ease as if they were physically present. The legal requirement for the presence of the witness does not mean actual physical presence. The Court allowed the examination of the witness through video conferencing and concluded that there is no reason why the examination of a witness by video conferencing should not be an essential part of electronic evidence.

8. For the foregoing reasons, C.R.P. is allowed and the order under revision is set aside. The I.A. shall stand allowed, subject to the conditions that:

(a) it shall be the obligation of the petitioner to arrange the necessary equipment for recording the evidence through video conferencing, duly satisfying the trial Court as to the accuracy of the equipment and identity of the witness;

(b) the petitioner shall be under obligation to display the passport and its individual pages as may be demanded, on behalf of respondent, and he shall abide by the directions of the Court, issued during the course of recording;

(c) the petitioner shall make necessary arrangements for undertaking this exercise within one month from to-day, in default, the trial Court shall proceed with the other steps."

[49] The expression of this Court in Dasam Vijay Rama Rao V. M.Sai Sri, 2015 5 ALT 150 is a step forward which holds that: Increasingly Family Courts have been noticing that one of the parties is stationed abroad. It may not be always possible for such parties to undertake trip to India, for variety of good reasons. On the intended day of examination of a particular party, the proceedings may not go on, or even get completed possibly, sometimes due to pre-occupation with any other more pressing work in the Court. But, however, technology, particularly, in the Information sector has improved by leaps and bounds. Courts in India are also making efforts to put to use the technologies available. Skype is one such facility, which is easily available. Therefore, the Family Courts are justified in seeking the assistance of any practicing lawyer to provide the

necessary skype facility in any particular case. For that purpose, the parties can be permitted to be represented by a legal practitioner, who can bring a mobile device. By using the Skype technology, parties who are staying abroad can not only be identified by the Family Court, but also enquired about the free will and consent of such party. This will enable the litigation costs to be reduced greatly and will also save precious time of the Court. Further, the other party available in the Court can also help the Court in not only identifying the other party, but would be able to ascertain the required information. Accordingly, I direct the Family Court to entertain the I.A. as it is maintainable and permit the GPA of the 2nd petitioner in O.P. to represent and depose on behalf of the 2nd petitioner in the O.P. and the Family Court shall also direct such GPA or any legal practitioner chosen by him to make available the Skype facility for the Court to interact with the 2nd petitioner, who is staying at Melbourne, Australia and record the consent of 2nd petitioner and proceed with the matter thereafter as expeditiously as is possible.

[50] A Division Bench of this Court in K.Ramesh V. Joint Secretary, Ministry of Social Justice, New Delhi, in WRIT APPEAL No.1135 OF 2015; on 15-02-2016 held that- If the 3rd respondent incumbent is truly facing any prosecution before the criminal Court, as alleged, it is the duty of Respondents 1 and 2 to ensure that the petitioner-appellant is sanctioned necessary permission to leave Gangtok and travel to Hyderabad/Secunderabad and then, depose before the competent criminal Court. It would also be equally open to them to allow the Petitioner appellant to depose on the Internet by participating in video-conferencing facility, provided such facility is available at the criminal Court. Otherwise, using Skype technology also, any such deposition of the petitioner appellant may be urged to be recorded by the criminal Court, but however, the necessary permission for the appellant to leave the Resource Centre, Gangtok for the said purpose, should be sanctioned.

[51] Further, video recording of proceedings will ensure accuracy of the record. Further, by preserving (and making available) matters which are not apparent from the written record, such as demeanors, voice inflections, body language and the like, the Judges can form a better view of the witness and that would lead to better conclusion. The Judge can also re-examine the demeanor of the witness while they give evidence, and can come to a more accurate conclusion. The Judge can even focus on a close-up of the witnesses face in order to better observe facial expressions. These can be re- run and replayed with ease. The Judge thus can replay for himself if necessary the recorded proceedings of any hearing from day one right up to the final arguments, while

appreciating the evidence in deciding the lis.

[52] In the recent expression of the Apex Court in Sujoy Mitra Vs. State of West Bengal , [Crl. Appeal No.1620 of 2015 arising from SLP (Criminal) No.8157/2015], dated.02.12.2015 while upholding the order of the trial Court in the sessions case for the offence under Section 376 IPC, after examination of four witnesses in permitting recording of evidence of the Prosecutrix, a citizen of Ireland and resident of Dubbiln, as PW5-through video conference, provided the following safeguards:

> I) The State of West Bengal shall make provision for recording the testimony of PW5 in the trial Court by seeking the services of the National Informatics Centre (NIC) for installing the appropriate equipment for video conferencing, by using "VC Solution" software, to facilitate video conferencing in the case. This provision shall be made by the State of West Bengal in a room to be identified by the concerned Sessions Judge, within four weeks from today. The NIC will ensure, that the equipment installed in the premises of the trial Court, is compatible with the video conferencing facilities at the Indian Embassy in Ireland at Dublin.
>
> II) Before recording the statement of the prosecutrix-PW5, the Embassy shall nominate a responsible officer, in whose presence the statement is to be recorded. The said officer shall remain present at all times from the beginning to the end of each session, of recording of the said testimony.
>
> III) The officer deputed to have the statement recorded shall also ensure, that there is no other person besides the concerned witness, in the room, in which the testimony of PW5 is to be recorded. In case, the witness is in possession of any material or documents, the same shall be taken over by the officer concerned in his personal custody.
>
> IV) The statement of witness will then be recorded. The witness shall be permitted to rely upon the material and documents in the custody of the officer concerned, or to tender the same in evidence, only with the express permission of the trial Court.

V) The officer concerned will affirm to the trial Court, before the commencement of the recording of the statement, the fact, that no other person is present in the room where evidence is recorded, and further, that all material and documents in possession of the prosecutrix-PW5 (if any) were taken by him in his custody before the statement was recorded. He shall further affirm to the trial Court, at the culmination of the testimony, that no other person had entered the room, during the course of recording of the statement of the witness, till the conclusion thereof. The learned counsel for the accused shall assist the trial Court, to ensure, that the above procedure is adopted, by placing reliance on the instant order.

VI) The statement of the witness shall be recorded by the trial Court, in consonance with the provisions of Section 278 of the Code of Criminal Procedure. At the culmination of the recording of the statement, the same shall be read out to the witness in the presence of the accused (if in attendance or to his pleader). If the witness denies the correctness of any part of the evidence, when the same is read over to her, the trial Court may make the necessary correction, or alternatively, may record a memorandum thereon, to the objection made to the recorded statement by the witness, and in addition thereto, record his own remarks, if necessary.

VII) The transcript of the statement of the witness recorded through video conferencing(as corrected, if necessary), in consonance with the provisions of Section 278 of the Code of Criminal Procedure, shall be scanned and dispatched through email to the embassy. At the embassy, the witness will authenticate the same in consonance with law. The aforesaid authenticated statement shall be endorsed by the officer deputed by the embassy. It shall be scanned and returned to the trial Court through email. The statement signed by the witness at the embassy, shall be retained in its custody in a sealed cover.

VIII) The statement received by the trial Court through email shall be re-endorsed by the trial Judge. The instant statement endorsed by the trial Judge, shall constitute the testimony of the prosecutrix-PW5, for all intents and purposes.

[53] A Division bench of the Delhi High Court, in the very recent expression, in International Planned Parenthood Federation (IPPF) vs. Madhu Bala Nath , FAO(OS) 416/2015, dt.07.01.2016-Delhi HC-DB has observed that Courts must be liberal and pragmatic in allowing the witnesses to depose through Video conferencing. Court should make use of modern technology so as to further the process of dispensation of justice. Relying upon the expression of the Apex Court in Dr. Praful B. Desainoting the difference between the concepts of virtual reality vis--vis video- conferencing that:

> Virtual reality is a state where one is made to feel, hear or imagine what does not really exist. In virtual reality, one can be made to feel cold when one is sitting in a hot room, one can be made to hear the sound of the ocean when one is sitting in the mountains, one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one's sofa etc. Video-conferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. The question whether commission can be issued for recording evidence in a country where there is no arrangement, is academic so far as this case is concerned. In this case we are considering whether evidence can be recorded by video-conferencing. Normally, when a commission is issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a judicial officer) would be required to record the evidence and to ensure/compel attendance. However, advancement of science and technology permit officials of the court, in the city where video-conferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the court can be deputed to record evidence on commission by way of video- conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The court in Mumbai would be issuing commission to record evidence by video-conferencing in Mumbai. Therefore the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a judicial officer) to proceed to the office of VSNL and record the evidence of Dr Greenberg in the presence of the respondent. The

officer shall ensure that the respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanor and hear the deposition of Dr Greenberg. The officers shall also ensure that the respondent has full opportunity to cross-examine Dr Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence.

[54] The Division Bench further observed in ordering the recording of evidence through video conferencing as follows:

14. Procedures have been laid down to facilitate dispensation of justice. Dispensation of justice entails speedy justice and justice rendered with least inconvenience to the parties as well as to the witnesses. If a facility is available for recording evidence through video conferencing, which avoids any delay or inconvenience to the parties as well as to the witnesses, such facilities should be resorted to. Merely because a witness is travelling and is in a position to travel does not necessary imply that the witness must be required to come to Court and depose in the physical presence of the court.

15. We are not for a moment laying down that a witness can never be called to Court. There may be circumstances or situations where physical presence of a witness may be necessary and required by the Court, in such situations it would be obligatory on the witness to be present in Court. Where a witness or a party requests that the evidence of a witness may be recorded through video conferencing, the Court should be liberal in granting such a prayer. There may be situations where a witness even though within the city may still want the evidence to be recorded through video conferencing in order to save time or avoid inconvenience, the Court should take a pragmatic view.

16. In the present case, the application was premised on the ground that the witness holds an important position in her organization and has to travel world over. We do not feel that such a request was unreasonable. Furthermore, the appellant/defendant has contended that the expenditure entailed for travel of the witness, who is a lady of over 54 years of age and her stay in Delhi would be a financial burden on the appellant. This, in our view is a factor that the learned single judge should have taken into account.

We are of the view that the learned Single Judge erred in dismissing the application.

17. In view of the above, the impugned order is set aside. The application IA No.7927/2015 is allowed. The Appellant is permitted to record the testimony and cross-examination of its witness Ms Rosalind Miller through audio video conferencing subject to the following conditions:-

(i) Evidence of the witness Ms Rosalind Miller shall be recorded through video conferencing between Delhi, India and London, U.K.

(ii) In Delhi, the video conferencing shall be conducted in the facilities available in the Annexed Block of the Delhi High Court.

(iii) Mr. Girish Sharma, Registrar (Computers) of this court is appointed as the coordinator with regard to the technical aspects of video conferencing in India.

(iv) The Indian High Commissioner at London shall nominate a senior officer not below the rank of Deputy Secretary of India to facilitate video conferencing. The officer nominated by the Indian High Commission shall co-ordinate the video conferencing arrangements in London and shall remain present at the time of recording of the evidence of the witness Ms Rosalind Miller.

(v) The officer nominated by the Indian High Commissioner in terms of the direction at serial no.(iv) above shall ensure that apart from his own presence, only counsel for the Appellant/Defendant is present at the time of video conferencing. He shall ensure that no manner of prompting by word or signs or by any other mode is permitted.

(vi) The officer nominated by the Indian High Commission shall verify the identity of the witness before commencement of her examination.

(vii) As soon as the identification part is complete, oath will be administered by the Joint Registrar (J.R.) through the media as per Oaths Act, 1969.

(viii) The witness shall be examined during working hours of Indian Courts. The plea of any inconvenience on account of time difference between India and London shall not be allowed. However, the convenience of the Indian High Commission in London shall be taken into consideration in fixing the time and schedule.

(ix) The cross-examination, as far as practicable, be proceeded without any interruption and without granting unnecessary adjournments. However, discretion of the Court (J.R.) shall be respected.

(x) The Court (J.R.) may record any material remarks regarding the demeanor of the witness while on the screen and shall note the objections raised during recording of evidence.

(xi) The deposition of the witness shall be signed immediately in the presence of the nominated officer of the Indian High Commission. The said officer shall certify/attest the signatures of the witness.

(xii) The audio and visual shall be recorded at both the ends and copies thereof shall be provided to the parties at the expense of the Appellant.

(xiii) The appellant shall bear the cost/expenses of the video conferencing. The expenses for the video conferencing to be undertaken in London shall be informed to the appellant through counsel by the Indian High Commissioner. However, in case of any difficulty, the same may be communicated to the Registrar (Computers) of this Court by e-mail, who shall communicate the same to the appellant's lawyer in India.

(xiv) The officer of the Indian High Commission to be nominated by the

Indian High Commissioner shall be paid a lump sum amount of Rs. 50,000/- as honorarium.

(xv) The appellant shall deposit an amount of Rs. 10,000/- as cost of preparation of the certified copies with the Registry of this Court in the present case within two weeks from today. The Registry shall thereafter prepare certified copies of the entire record of the case, which shall be sent in separate folders clearly marked as order sheets; pleadings; applications; plaintiff's documents and defendant's documents. The same shall be forwarded to the office of Indian High Commissioner with the assistance of Ministry of External Affairs.

(xvi) This record shall be made available to the officer nominated by the Indian High Commissioner for the purpose of undertaking the video conferencing as it would be necessary for recording the statement and cross examination of the witness.

(xvii) In case, the respondent is desirous of being physically present in London at the time of recording of the evidence, it shall be open for her to make arrangements on her own cost for appearance and her representation. The respondent shall ensure that prior intimation in this regard is filed in the Registry of this Court giving full particulars of the names of the persons as well as enclosing documents of authority in respect of the persons, who shall be representing them in the proceedings. The intimation in this regard as well as documents shall also be furnished to Indian High Commission in London.

[55] Having regard to the above, examination of witnesses and recording of evidence by commissioner contemplated by Order XVIII Rule 4 C.P.C from the words Witness in attendance are to be understood as person being present and it need not be physical presence thus, recording of evidence through Audio, Video link or through internet by Skype or similar technological device is permissible complying the words in attendance.

[56] From the above, coming back to facts, for there is no foundation to say the request to record evidence through Skype technology is a device to avoid facing the criminal

case allegedly filed against him and so far as the apprehensions as to demeanor and possibility of prompting or tutoring can be taken care of with necessary precautions, the reconciliation also can be done if need be by use of Skype technology, there are no grounds to interfere with the impugned order of the lower Court permitting the recording of evidence of the party- witness abroad through Advocate Commissioner and by use of Skype technology, but for to give necessary directions of the precautions required to be taken to ease out the apprehensions of the other side in giving disposal of the revision petition.

[57] In the result, the revision petition is disposed of with the following directions for the precautions to be taken for recording and in the course of recording evidence through Skype technology.

> "1. The audio and visual shall be recorded at both the ends through the Skype technology/audio and video conferencing that is from Khammam Town of the Telangana State, India at the premises of NIC in the Collectorate, Khammam Town and from the New Jersey of USA in the venue to be fixed by the officer to be nominated for the same Indian High Commissioner.
>
> 2. The officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA in the venue to be fixed for said recording shall be paid a lumpsum amount of Rs. 20,000/- as honorarium by the petitioner.
>
> 3. The petitioner by virtue of this order approach the Indian High Commissioner from USA for said purposesand fix the venue and date for recording the evidence.
>
> 4. The parties are to be permitted in the course of recording evidence to be represented by legal practitioners at the premises of NIC in the Collectorate, Khammam Town, who can bring mobile device or other gadgets and make available the Skype facility for the Court/its officer-the Advocate Commissioner to interact with the Petitioner/witness staying abroadand record the consent to proceed with the matter of recording evidence thereafter as expeditiously as possible and only after taking of oath through

media as per the provisions of the Oaths Act,1969.

5. Before the witness is being examined in terms of the Skype technology, the witness has to file an affidavit with an undertaking of not using any pre-recorded versions to prompt him therefrom or taking any assistance of another for prompting while giving evidence, got the pleadings and documents of the case with him to refer if other side require or Court/Advocate Commissioner permit during evidence and wont allow any other person during course of deposition but for the one to operate the phone or other electronic device/gadgets with internet facility of Skype technology duly verified before a notary or the officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA that the person who is shown as the witness is the same person who is going to depose on the screen without any prompting. The officer of the Indian High Commission to be nominated by the Indian High Commissioner from USA at the venue of recording evidence shall also ensure the above during course of recording evidence and not to allow any device or person to prompt the witness.

6. By using the Skype technology, the Petitioner/witness staying abroad can not only be easily identified by the Court/its officer- the Advocate Commissioner from the above, but also be ascertained by enquiring about the identity with proof with reference to the affidavit of identity that to be filedand can verify the same from assistance of opposite party or the Counsel or representative of opposite party present.

7. The witness has to be examined preferably during working hours of Indian Courts. Oath is to be administered through the media.

8. The Court/its officer-the Advocate Commissioner is to record such remarks as is material regarding the demur of the witness while on the screen and during course of evidence of the witness, including to note any objections raised during recording evidence of witness and to decide the same later.

9. After recording the evidence, the witness has to state that the contents are true and he authorises his representative or Advocate on his behalf to sign on the deposition and he is not going to dispute its correctness or authenticity at any time later to make it forms part of the record of the proceedings. Besides that he shall retrieve copy of deposition from other end recording device and sign and submit to the trial Court later through his counsel.

10. The Court/its officer-the Advocate Commissioner may also impose such other conditions as are necessary in a given set of facts and circumstances.

11. For any further difficulty, the Advocate Commissioner and the parties may approach the trial Court.

12. The trial Court shall fix the final fees of the Advocate Commissioner after filing of report on completion of recording of evidence and for that purpose, the petitioner shall deposit tentatively before the trial Court Rs.10,000/- to refund whatever remained or to pay further as the case may be"

There shall be no order as to costs. Pending miscellaneous petitions, if any, shall stand closed.

HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Misc(Pet.) No. 780 / 2018

State of Rajasthan

----Petitioner

Versus

Vikramjeet Singh @ Vika Virk son of Chranjeet Singh, b/c Jat Sikh, resident of Village Nissing District Karnal, Haryanaat present Central Jail, Jodhpur

----Respondent

For Petitioner : Mr. S.K. Vyas, AAG assisted by
Mr. Vikram Rajpurohit, Public Prosecutor
Mr. M.S. Panwar, Public Prosecutor

For Respondent : Mr. Farzand Ali
Mr. Sanjay Bishnoi
Mr. Naman Mohnot

Present in person : Mr. Ashok Rathore, IPS
Commissioner of Police, Jodhpur

Mr. Samir Kumar Singh, IPS
Dy. Commissioner of Police, Jodhpur West

Dr. Amandeep Kapoor, IPS
Dy. Commissioner of Police, Jodhpur East

Ms. Swati Sharma, IPS
ACP, Police Station Pratap Nagar, Jodhpur

Mr. Achal Singh,
CI, Police Station Pratap Nagar, Jodhpur

HON'BLE MR. JUSTICE VIJAY BISHNOI

Judgment / Order

23/05/2018

REPORTABLE Jodhpur, the second largest city of State of Rajasthan is relatively considered to be a peaceful and safe city. Known for its cultural heritage and hospitality, Jodhpur City is rapidly adopting

the metropolitan culture while trying to maintain balance between its originality and development.

However, the proud and belief of the residents of Jodhpur, of living in a peaceful and safe city, was shaken with two incidents, took place in the wee hours of 17.03.2017, in which some armed youth indiscriminately fired gunshots at the residences of two persons viz. Dr Sunil Chandak and Mr Manish Jain. Dr Sunil Chandak is owner of a private hospital having several branches in Jodhpur City, whereas Mr Manish Jain is a transporter, owner of a travel company.

The incidents of firing at residences of above named persons were immediately reported to the police. As the said incidents were recorded in the CCTV Cameras installed outside both the houses, the footage of those CCTV Cameras were collected by the police. The details of the said footage revealed that some youth on motorcycle stopped in front of houses of Dr Chandak and Mr Jain and started indiscriminate firing.

The group of youth first fired gunshots at the house of Dr Chandak and thereafter repeated the same at the house of Mr Jain and as the houses of Dr Chandak and Mr Jain are falling in different police stations, two FIRs were registered. The FIR of Dr Chandak is registered at Police Station, Pratap Nagar as FIR No.106/2017 and FIR of Mr Jain is registered as FIR No.69/2017 at Police Station, Shashtri Nagar. As per the police, after the registration of two above referred FIRs in the morning, the complainants in both the FIRs were threatened on their mobile phones, whereby the person calling them had reminded them of

the firing on their houses in the morning and asked them to give protection money, otherwise they and their family members either would be harmed or killed. Dr Chandak was called twice by the person in the evening of 17.03.2017 in which he was asked to give Rs.50 lac. Mr Chandak recorded the said conversation and made it available to the police in a pendrive.

During the course of investigation, the police arrested two persons from Punjab, who were allegedly the members of the group of youth, who had fired gunshot at the houses of Dr Chandak and Mr Jain. When the police decided to conduct test identification parade of those arrested persons and asked one person to make himself available for the same, Dr Chandak again received a call on his mobile phone on 12.04.2017, allegedly by the same person who had called him in the evening of 17.03.2017 to give Rs.50 lac, asking him not to identify the persons arrested by the police. The said conversation was also recorded by Dr Chandak and handed it over to the police.

It is the case of the prosecution that the person, who called Dr Chandak on 17.03.2017 twice and thereafter on 12.04.2017 is the respondent in this petition, who had made those calls from Italy through Voice Over Internet Protocol (VOIP). It is also the case of the police that with the help of the cyber crime experts, it has collected the evidence that the respondent-Vikramjeet Singh @ Vika had made those calls to Dr Chandak from Italy through VOIP on the instructions of one Lawrence Bishnoi, another accused, in this case. After collecting this evidence, the police has obtained arrest warrant of the respondent

from the court and in furtherance of that a lookout notice was also issued. Ultimately, the respondent was arrested at Indira Gandhi International Airport, Delhi while he was trying to flee abroad after a brief visit to India. After his arrest, the respondent has confessed that he made those calls to Dr Chandak on the instructions of Lawrence Bishnoi, who was lodged at Firozpur Jail, Punjab in some other criminal case.

Probably the police feel that the information given by the respondent to it is not sufficient and may be not admissible as the same is given in the police custody, it moved an application before the Additional Chief Metropolitan Magistrate No.2, Jodhpur Metropolitan (hereinafter to be referred as 'the Magistrate') with a prayer to direct the respondent to give his voice sample for the purpose of comparison of his voice with the recorded conversation, provided by Dr Chandak in connection with the FIR No.106/2017 lodged at Police Station, Pratap Nagar, Jodhpur.

The respondent, through his advocate, put in appearance before the Magistrate and as expected, refused to give his consent to collect his voice sample. Learned Magistrate after hearing the State and counsel for the respondent, has rejected the application filed by the police vide order dated 06.09.2017 while observing that the issue regarding the power of a Magistrate to authorize the investigating agency to record the voice sample of an accused of an offence is referred to the Larger Bench by the Hon'ble Supreme Court in ***Ritesh Sinha vs. State of U.P.***, reported in ***(2013) 2 SCC 357*** and as the High Court of Gujarat in ***Natvarlal Amarshibai Devani vs. State of Gujarat & Ors.,***

Special Criminal Appeal (Direction) No.5226/2015 decided on 18.01.2017 has held that in the absence of any provision, which empowers the police officer or the court in law, it is not permissible for the police to ask an accused to give his voice spectrography test, prayer of the police of this effect cannot be granted.

Being aggrieved with the order dated 06.09.2017 passed by the Magistrate, the Police through State of Rajasthan filed Cr.Revision No.495/2017 before the Additional Sessions Judge No.6, Jodhpur Metropolitan (hereinafter to be referred as 'the revisional court'), however, the said revision was dismissed by the revisional court vide order dated 27.10.2017 affirming the order passed by the Magistrate.

Hence, this criminal misc. petition is filed by the State under section 482 CrPC seeking following reliefs:

> "It is, therefore, most humbly and respectfully prayed that this Misc petition may kindly be allowed, impugned order dt. 27.10.2017 passed by learned revisional court and the order dated 06.09.2017 passed by the learned Addl. Chief Judicial Magistrate No.2 Jodhpur Metro may kindly be quashed and set aside and appropriate order for granting permission for voice sample of the accused respondent may kindly be passed in F.I.R. No.106/2017 of the Police Station, Pratapnagar by allowing application of prosecution.
>
> Any other order which this hon'ble Court deems just and proper may kindly passed in favour of State petitioner."

Assailing the impugned orders, learned Public Prosecutor Mr Vikram Singh Rajpurohit has argued that the courts

below have erred in rejecting the prayer of the police to direct the respondent to give his voice sample. It is argued that collection of voice sample of respondent will not prejudice him in any manner, rather it may help the police to reveal the truth and in reaching to the just conclusion of the case.

It is argued that the prosecution has every right to prove its case through scientific methods, and forensic examination of voice of any accused person is also one of such methods for arriving at a definite conclusion in the investigation.

It is also argued that the position of law is very clear as various High Courts and Hon'ble Supreme Court have categorically held in catena of decisions that the voice spectography test is in no manner violative to the provisions of Article 20(3) of the Constitution of India and in view of that the rejection of the prayer of the police to direct the respondent to give his voice sample is not justified.

Learned Public Prosecutor Mr Vikram Singh Rajpurohit has also argued that one of the Judges of Hon'ble Supreme Court, Hon'ble Mr Justice Ranjana P. Desai in Ritesh Sinha vs. State of U.P. (supra) has already held that the police can take voice sample of an accused during the course of investigation and the same view has also been followed by the various High Courts and in view of that this criminal misc. petition deserves to be allowed and the impugned orders are liable to be set aside and the prayers made in this petition are liable to be granted.

Learned Public Prosecutor in support of above arguments, has placed reliance on the view expressed by Hon'ble

Mr Justice Ranajan P. Desai in ***Ritesh Sinha vs. State of U.P.*** (supra) and on the decisions of Madras High Court in ***P.Kishore vs. State,*** reported in ***2018(1) MLJ(Crl) 208*** and in ***Rabindra Kumar Bhalotia and Ors. vs. State and Ors.***, reported in ***2018(1) MLJ (Crl) 149*** and on the decision of Allahabad High Court in ***Leena Katiyar vs. State of U.P. and Ors.***, reported in ***2015(1) ACR 989***.

With the permission of this Court, the Commissioner of Police, Jodhpur along with other Police Officers has given a power point presentation to demonstrate that the incidents of firing at the residences of Dr Chandak and Mr Jain are not isolated incidents but those incidents were part of an organized crime involving the criminals of various States. Police Commissioner has explained the *modus operandi* of the gang involved in this case and has submitted that the criminal gang involved in this case is spread in Rajasthan, Punjab and Haryana States and they use to collect details about the rich and prosperous people of any city through a local link. After collecting the details of the possible targets, the gang zero down some of them and give the task of doing racky of them to the members of the gang, who are mostly locals. Then they start threatening to the possible targets by making calls with intention to extort money from them. If a person does not fulfill their demand or ignore the same, shooters from other States are assigned to threat them by firing gunshots at their residences or work places. It is informed that even in some cases, the gang has also killed the persons, who have flatly refused to fulfill their demand even after firing at their residences

or work places.

The Commissioner of Police has further explained that in the cases of Dr Chandak and Mr Jain, some local criminals had given clue to the gangster, who was operating criminal activities of his gang from Firozpur Jail, Punjab that these two persons can be soft targets. After taking clue from the local criminals, the gangster, lodged at Firozpur Jail, Punjab directed his gang members to make threatening calls to Dr Chandak and Mr Jain. In February, 2017, the said two victims were in receipt of threatening calls but they did not take it seriously. Then just some days prior to the incident, some youth barged into the office of Mr Jain and attempted to fire gunshot. After that some of the accused-persons of Punjab reached Jodhpur in the morning of 17.03.2017 and straightaway went to the residences of Dr Chandak and Mr Jain along with some local members of gang on motorcycles and indiscriminately fired gunshots. In the evening of 17.03.2017, respondent called Dr Chandak twice from Italy asking him to give Rs.50 lac as protection money.

When the police have arrested two persons from Punjab, who had allegedly fired gunshots at the residences of victims and decided to conduct test identification parade of them, the respondent again called him and asked him not identify those two persons.

It is further informed by the Commissioner of Police, Jodhpur that some members of the same gang then opened fire at the shop of one Vasudev Sindhi at Sardarpura 'C' Road, Jodhpur on 19.06.2017 at 9:00 P.M. with the intention to extort money

from him. Next day on 20.06.2017 at about 9:00 P.M., the members of very same gang fired gunshot at the residence of one Ritesh Lohiya at Shashtri Nagar. On 03.07.2017, this gang threatened one Advocate Rajesh Panwar to give money. On 20.07.2017, one member of gang viz. Heera @ Harendra made a Whatsapp call to Vasudev Sindhi and demanded money, however, when Vasudev Sindhi flatly refused to give money, he was killed on 17.09.2017 at 10:45 P.M., while he was closing his shop, by Heera @ Harendra by firing gunshots on him.

The Commissioner of Police has urged that the criminals nowadays are using sophisticated techniques such as Whatsapp Calls, Internet Calls and Facebook for commission of crime. It is stated that it is very difficult to trace the calls made through Internet or Whatsapp from foreign countries, however, in the present case, police with the help of cyber crime experts are able to trace the calls made by the respondent to Dr Chandak from Italy. It is submitted that the recorded conversation of Dr Chandak and respondent is available with the police and the respondent has also confessed during interrogation that he made those calls but despite that it is necessary for the purpose of investigation that the voice sample of the respondent be collected, so that, it can be compared with the voice of respondent contained in the recorded conversation.

The Commissioner of Police has finally urged that the respondent and other criminals have disturbed the peace of the city and with the intention to terrorise the professionals and the businessmen of the city have committed crime in organized

manner while using sophisticated techniques and, therefore, it is necessary to allow the investigating agency also to make use of scientific method for the purpose of bringing offenders to justice, so that sense of security amongst the citizens be restored.

The Commissioner of Police undertakes that it will be ensured that the text which the respondent would be called upon to read out for the purpose of drawing his voice sample will not contain sentences appearing in the tape recorded conversation but will only contain some words drawn from the said conversation.

Per contra, this criminal misc. petition is vehemently opposed by Mr Farzand Ali, counsel for the respondent, assisted by Mr Sanjay Bishnoi and Mr Naman Mohnot, by raising few preliminary objections regarding maintainability of this misc. petition, which are thus:

(i) That the present misc. petition under section 482 CrPC is not maintainable because it is a second revision petition, which is filed after rejection of first revision petition by the Additional Sessions Judge No.2, Jodhpur Metropolitan and, therefore, it is barred as per the provisions of Section 397(3) CrPC.

(ii) The matter regarding power of a Magistrate to authorize the investigating agency to record the voice sample of the person accused of an offence is sub-judice before the Larger Bench of Hon'ble Supreme Court in a reference made vide judgment rendered in ***Ritesh Sinha vs. State of U.P.*** (supra), so it is not desirable to decide this point till the decision of the Larger Bench of the Hon'ble Supreme Court is delivered.

On merits, learned counsel Mr Farzand Ali has argued

that there is no illegality in the impugned orders passed by both the courts below as the courts below have rightly rejected the prayer of the police to allow them to take voice sample of the respondent because there is no such provision under any law, which empowers a Magistrate to allow the police to collect the voice sample of an accused during the course of investigation of a case.

It is also argued by learned counsel for the respondent that despite recommendation of the Law Commission submitted way back in the year 1980, the Legislature in its wisdom has not included voice sample either in the explanation of Section 53 or in Section 31A CrPC or in the Identification of Prisoners Act, 1920 (hereinafter to be referred as 'the Prisoners Act') and, therefore, it is clear that the Legislature has no intention to allow the investigating agency to collect the voice sample of a person of accused of an offence, hence, no such direction can be given when the accused-person has refused to give his voice sample.

In support of above arguments, learned counsel for the respondent has placed reliance on the observations made by Hon'ble Mr Justice Aftab Alam in ***Ritesh Sinha vs. State of U.P.*** (supra) and the decisions of Gujarat High Court rendered in ***Natvarlal Amarshibai Devani vs. State of Gujarat & Ors., Special Criminal Appeal (Direction) No.5226/2015*** decided on 18.01.2017 as well as of Kerala High Court rendered in ***Rupesh @ Praveen vs. Union of India***, reported in ***2017(5) KHC 983*** and has argued that when the Hon'ble Supreme Court and two High Courts have categorically held that in the absence of

any provision under any provision of law, which enables a Magistrate to allow the police to take the voice sample of a person of accused of an offence, no such direction can be issued and this criminal misc. petition seeking said relief is liable to be dismissed.

Heard learned counsels for the rival parties.

First of all, I would like to deal with the preliminary objections raised on behalf of the respondent regarding maintainability of this petition.

It is true that the revision petition filed on behalf of the State under Section 397 CrPC before the Additional Sessions Judge No.6 Jodhpur Metropolitan against the order passed by the Magistrate has already been dismissed, however, at present the State has not filed revision petition under section 397 and 401 CrPC but has filed this petition under section 482 CrPC. The law in this respect is well settled by the decision of Hon'ble Supreme Court rendered in ***Dhariwal Tobacco Products Ltd. vs. State of Maharashtra,*** reported in ***(2009) 2 SCC 370,*** wherein the Hon'ble Supreme Court has held that even in cases where the second revision petition before the High Court after dismissal of first one by the Court of Sessions is barred under Sectioni 397(3) CrPC, the inherent power of the High Court is still available. The relevant portion of the above referred decision is reproduced hereunder:

> "6**.....** Even where a revision application is barred, as for example the remedy by way of Section 115 of the Code of Civil Procedure, 1908, this Court has held that the remedies under Articles 226/227 of the Constitution of India would be available. (See *Surya*

Dev Rai v. Ram Chander Rai[6].) Even in cases where a second revision before the High Court after dismissal of the first one by the Court of Session is barred under Section 397(2)* of the Code, the inherent power of the Court has been held to be available.

"7. The power of the High Court can be exercised not only in terms of Section 482 of the Code but also in terms of Section 483 thereof. The said provision reads thus:

"483. *Duty of High Court to exercise continuous superintendence over Courts of Judicial Magistrates.*- Every High Court shall so exercise its superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates."

The inherent power of the High Court is not conferred by statute but has merely been saved thereunder. It is, thus, difficult to conceive that the jurisdiction of the High Court would be held to be barred only because the revisional jurisdiction could also be availed of. (See *Krishnan v. Krishnaveni*[7].)"

(Emphasis supplied)

As stated earlier, the State has not invoked the revisional jurisdiction of this Court but has filed this petition while invoking inherent jurisdiction of this Court under Section 482 CrPC and, therefore, this petition cannot be dismissed while treating it as second revision petition. Otherwise also, an important question of law is involved in this petition and, therefore, a petition under Section 482 CrPC can be entertained by this Court to secure the ends of justice. Hence, the first preliminary objection raised on behalf of the respondent is rejected.

So far as second preliminary objection raised on behalf of the respondent, that since the point in issue is pending before the Larger Bench of Hon'ble Supreme Court this Court should not finally decide this controversy, is concerned, I am unable to accept the same as there is no prohibition in deciding the matter even though if the point in issue is pending before the Larger Bench.

This view of mine gains strength from the observations made by the Hon'ble Supreme Court in ***Harbhajan Singh vs. State of Punjab***, reported in ***(2009) 13 SCC 608***, the relevant observations made in the said decision by the Hon'ble Supreme Court are reproduced hereunder:

> "**15. .....** Only because the correctness of a portion of the judgment in Mohd. Shafi has been doubted by another Bench, the same would not mean that we should wait for the decision of the larger Bench."

Thereafter, the Hon'ble Supreme Court in ***Ashok Sadarangani vs. Union of India,*** reported in ***(2012) 11 SCC 321*** has also made the following observations:

> "29. As was indicated in *Harbhajan Singh* case, the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh case need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field."

In view of the above, the second preliminary objection of the learned counsel for the respondent is also rejected.

Now I would like to deal with the judgment of the Honb'le Supreme Court rendered in ***Ritesh Sinha vs. State of U.P.*** (supra). The two Judges of Hon'ble Supreme Court in ***Ritesh Sinha vs. State of U.P.*** are agreed on the issue that if an accused-person is compelled to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution of India. The observations of this effect made by the Hon'ble Mr Justice Ranajana P. Desai, to which Hon'ble Mr Justice Aftab Alam also agreed, are reproduced hereunder:

> "27. Applying the test laid down by this Court in *Kathi Kalu Oghad* which is relied upon in *Selvi*, I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like fingerprint impression, signature or specimen handwriting of an accused. Like giving of a fingerprint impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape-recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is

asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives "identification data" to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution."

However, the difference of opinion cropped up in between two Hon'ble Judges is on the issue "whether in the absence of any provision in the Code can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence."

Hon'ble Mr Justice Ranjana P. Desai while interpretating the provisions of Identification of Prisoners Act and Section 53 CrPC has held as under:

"**60**. In the ultimate analysis, therefore, I am of the opinion that the Magistrate's power to authorise the investigating agency to record voice sample of the person accused of an offence can be traced to Section 5 of the Prisoners Act and Section 53 of the Code. The Magistrate has an ancillary or implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid investigation. This conclusion of mine is based on the interpretation of relevant sections of the Prisoners Act and Section 53 of the Code and also is in tune with the concern expressed by this Court

in *Kathi Kalu Oghad* that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

61. The principle that a penal statute should be strictly construed is not of universal application. In *Murlidhar Meghraj Loya v. State of Maharashtra* this Court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this Court, Krishna Iyer, J. held that any narrow and pedantic, literal and lexical construction of food law is likely to leave loopholes for the offender to sneak out of the meshes of law and should be discouraged and criminal jurisprudence must depart from old canons defeating criminal statutes calculated to protect the public health and the nation's wealth. Similar view was taken in *Kisan Trimbak Kothula* v. *State of Maharashtra.* In *State of Maharashtra v. Natwarlal Damodardas Soni,* while dealing with Section 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules, a narrow construction given by the High Court was rejected on the ground that that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view. Therefore, whether the penal statute should be given strict interpretation or not will depend on facts of each case. Considerations of public health, preservation of nation's wealth, public safety may weigh with the court in a given case and persuade it not to give a narrow construction to a penal statute.

62. In the view that I have taken, I find no infirmity in the impugned order passed by the High Court confirming the order passed by the learned Chief Judicial Magistrate, Saharanapur summoning

the appellant to the court for recording the sample of his voice. The appeal is dismissed."

On the other hand, Hon'ble Mr Justice Aftab Alam disagreed with the above view of Hon'ble Mr Justice Ranjana P. Desai and made certain observations, relevant portions whereof are as follows:

68. As regards the first question, relying primarily on the eleven-Judge Bench decision of this Court in *State of Bombay* v. *Kathi Kalu Oghad* which was followed in the more recent decision in *Selvi v. State of Karnataka* Desai, J. held that "taking voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution". I am broadly in agreement with the view taken by her on Article 20(3) but, since I differ with her on the second question, I think the issue of constitutional validity in compelling the accused to give his/her voice sample does not really arise in this case.

69. Coming to the second question, as may be seen, it has the recognition that there is no provision in the Criminal Procedure Code to compel the accused to give his voice sample. That being the position, to my mind the answer to the question can only be n the negative, regardless of the constitutional guarantee against self-incrimination and assuming that in case a provision in that regard is made in the law that would not offend Article 20(3) of the Constitution. Desai, J., however, answers the question in the affirmative by means of a learned and elaborate discourse. She has navigated the arduous course to the conclusion at which she arrived very painstakingly and skilfully.

.....

75. I am completely unable to see how Explanation (a) to Section 53 can be said to include

voice sample and to my mind the ratio of the decision is *Selvi* does not enlarge but restricts the ambit of the expressions "such other tests" occurring in the Explanation. In my opinion the Explanation in question deals with material and tangible things related to the human body and not to something disembodied as voice.

76. Section 53 applies to a situation where the examination of the person of the accused is likely to provide evidence as to the commission of an offence. Whether or not the examination of the person of the accused would afford evidence as to the commission of the offence undoubtedly rests on the satisfaction of the police officer not below the rank of Sub-Inspector. But, once the police officer makes a request to the registered medical practitioner for the examination of the person of the accused, what other tests (apart from those expressly enumerated) might be necessary in a particular case can only be decided by the medical practitioner and not the police officer referring the accused to him. In may view, therefore, Mr Dave, learned counsel for the appellant, is right in his submission that any tests other than those expressly mentioned in the Explanation can only be those which the registered medical practitioner would think necessary in a particular case. And further that in any event a registered medical practitioner cannot take a voice sample.

.....

86. A careful reading of Sections 3, 4 and 5 would make it clear that the three provisions relate to three categories of persons. Section 3 relates to a convicted person. Section 4 relates to a person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of 1 year or upwards. Section 5 is far wider in amplitude than Sections 3 and 4 and it relates to any person, the taking of whose measurements or

photographs might be expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure. In the case of the first two categories of persons, the authority to take measurements vests in a police officer but in the case of Section 5, having regard to it much wider amplitude, the power vests in a Magistrate and not in any police officer.

87. It is to be noted that the expression "measurements" occurs not only in Section 5 but also in Sections 3 and 4. Thus, if the term "measurements" is to be read to include voice sample then on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards (and voice sample would normally be required only in cases in which the punishment is one year or upward!) it wold be open to the police officer (of any rank) to require the arrested person to give his/her voice sample on his own and without seeking any direction from the Magistrate under Section 5. Further, applying the same parameters, not only voice sample but many other medical tests, for instance, blood tests such as lipid profile, kidney function test, liver function test, thyroid function test, etc., brain scanning, etc. would equally qualify as "measurements" within the meaning of the Identification of Prisoners Act. In other words on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards it would be possible for the police officer (of any rank) to obtain not only the voice sample but the full medical profile of the arrested person without seeking any direction from the Magistrate under Section 5 of the Identification of Prisoners Act or taking recourse to the provisions of Section 53 or 53-A of the Code of Criminal Procedure. I find it impossible to extend the

provisions of the Identification of Prisoners Act to that extent.

88. It may not be inappropriate her to point out that in exercise of the rule-making powers under Section 8 of the Identification of Prisoners Act some of the State Governments have framed rules. I have examined the ruels framed by the States of Maharashtra, Madhya Pradesh, Orissa, Pondicherry and Jammu and Kashmir. From a perusal of those rules it would appear that all the State Governments understood "measurements" to mean the physical measurements of the body or parts of the body. The framing of the rules by the State Government would not be binding on this Court in interpreting a provision n the rules. But it needs to be borne in mind that unless the provisions are incorporated in the Act in regard to the manner of taking voice sample and the person competent to take voice sample, etc. there may be difficulty in carrying out the direction of the Court.

89. For arriving at her conclusion regarding the scope of Section 5 of the Identification of Prisoners Act, Desai, J. has considered two High Court judgments. One is of the Bombay High Court in *CBI v. Abdul Karim Ladsab Telgi* and the other by the Delhi High Court in *Rakesh Bisht v. CBI.* She has approved the Bombay High Court decision in *Telgi case* and disapproved the Delhi High Court decision in *Bisht case.* The Bombay High Court decision is based on exactly the same reasoning as adopted by Desai, J. that the definition of "measurement" in Section 2 (a) is wide enough to include voice sample and hence a Magistrate is competent to order a person to give his voice sample. The relevant passage in the decision is as under: (*Telgi case,* Cri LJ p. 2876, para 14)

"14. … Be that as it may, the expression 'measurements' occurring in Section 5 has been defined in Section 2(a), which reads thus:

'2. Definitions. -In this Act …

(a) "**measurements**" include impressions and footprint impressions;'

The said expression is an inclusive term, which also includes finger impressions and footprint impressions. Besides, the term, measurement, as per the dictionary meaning is the act or an instance of measuring; an amount determine by measuring; detailed dimensions. With the development of Science and Technology, the voice sample can be analysed or measured on the basis of time, frequency, and intensity of the speech sound waves so as to compare and identify the voice of the person who must have spoken or participated in recorded telephonic conversation. The expression 'measurements' occurring in Section 5, to my mind, can be construed to encompass even the act undertaken for the purpose of identification of the voice in the tape-recorded conversation. Such construction will be purposive one without causing any violence to the said enactment, the purpose of which was to record or make note of the identity of specified persons."

.....

96. The Report as noted was submitted in 1980. The Code of Criminal Procedure was amended in 2005 when the Explanation was added to Section 53 and Sections 53-A and 311-A were inserted into the Code. Voice sample was not included either in the Explanation to Section 53 or Section 311-A.

97. Should the Court still insist that voice sample is included in the definition of "measurements" under the Identification of Prisoners Act and in the Explanation to Section 53 of the Code of Criminal Procedure? I would answer in the negative.

98. In light of the above discussion, I respectfully differ from the judgment proposed by my Sister Desai, J. I would allow the appeal and set aside the

order passed by the Magistrate and affirmed by the High Court. Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

Having taken into consideration both the above views, I would prefer to follow the view expressed by Hon'ble Mr Justice Ranjana P. Desai because nowadays, criminals are using sophisticated devices and modern techniques while committing heinous crimes. They are using Whatsapp Call, VOIP and many other modern techniques for committing the offences like extortion, kidnapping, blackmail and terrorist activities and looking to these circumstances, narrow interpretation of Section 53 CrPC or keeping voice sample out of the definition of measurement, as provided in the Prisoners Act, at one hand will result in giving long rope to the criminals indulged in destroying the peace of society and making life of an ordinary law abiding citizen miserable, whereas on the other hand will also result in throttling the investigation by the police or investigating agency. Hon'ble Mr Justice Ranjana P. Desai has rightly observed that consideration of public safety may weigh with the court in persuading it not to give narrow construction to a penal statute.

From the facts involved in this case, prima facie, it appears that criminals of different States form a gang to commit organized crime. The *modus operandi* of the gang is to threat the victims with the intention to extort money, first on telephone or mobile phone and when the victims do not toe their line, then to terrorise them and their family by firing gunshots at their houses

or work places or by killing anybody. The members of the gang made calls through Whatsapp or VOIP or other techniques from within country or from foreign country knowing well that it is very difficult for the police to trace them and even if the police is able to trace them, it is difficult to prove that they have called the victim because they cannot be compelled to give their voice sample. Misuse of the technology by the criminals can only be countered by good use of technology.

We must not forget that though the voice sample has not been expressly included in any of the provisions of CrPC or in the definition of measurement as provided in Prisoners Act but there is no prohibition in drawing voice sample in CrPC or in any other law either. The law is silent on this aspect.

It is settled law that the voice sample in itself is not a substantive piece of evidence. By giving it the accused does not convey any information based upon his personal knowledge, which can incriminate him. It can only be used for comparison with the recorded conversation and it cannot be treated as testimony at all.

When as per Section 65B of the Indian Evidence Act, tape recorded conversation containing voice of an accused is admissible in evidence and if the prosecution has to prove the said evidence, it is essential to allow the police or investigating agency to take voice sample of accused, otherwise, keeping of the recorded voice of the accused by the police in case file would be a futile exercise if it cannot be proved. In ***R.N.Malkani vs. State of Maharashtra***, reported in ***(1973) 1 SCC 471*** and in ***Ziyauddin Barhanuddin Bukhari vs. Brijmohan Ramdass Mehra & Ors***

reported in ***(1976) 2 SCC 17***, the Hon'ble Supreme Court has held that tape recorded conversation are admissible in evidence on satisfying the conditions about their genuineness.

Therefore, while following the view expressed by Hon'ble Mr Justice Ranjana P. Desai on the second point in ***Ritesh Sinha vs. State of U.P.*** (supra), I also endorse the view taken by Madras High Court in ***P.Kishore vs. State,*** and in ***Rabindra Kumar Bhalotia and Ors. vs. State and Ors.*** (supra) as well as by the Allahabad High Court in ***Leena Katiyal vs. State of U.P. and Ors.*** (supra) though for different reasons. At the same time, I express my respectful disagreement with the view taken by Kerala High Court in ***Rupesh @ Praveen vs. Union of India***, reported in ***2017(5) KHC 983*** and the decision of Gujarat High Court rendered in ***Natvarlal Amarshibai Devani vs. State of Gujarat & Ors.*** (supra) respectively.

I feel that there are two more aspects, which are also to be taken into consideration. Firstly when there is no provision under the law, which empowers a Magistrate to compel an accused to give his voice sample during the course of investigation or in other words when no procedure is prescribed under any law, which enables the police to take voice sample of an accused during the course of investigation, how a court of law can allow the police to take voice sample of any accused, who voluntarily agrees to give it.

In my opinion, if there is no provision under any law to take any voice sample of an accused-person during the course

of investigation, the same cannot be permitted even when the accused-person voluntarily agrees for it. Either the law permits it or does not permit it, there cannot be any via media.

Otherwise also, when Hon'ble Supreme Court and various High Courts have taken this view that voice spectography test is in no manner violative of Article 20(3) of the Constitution of India, the voice sample in itself is not a substantial piece of evidence, it can only be used for the purpose of comparing it with the tape recorded conversation and by giving voice sample, the accused does not convey any information based upon his/her personal knowledge, which can incriminate him/her, I don't think that there is any impediment in directing the accused-person of the offence to give voice sample to the police during the course of investigation. However, safeguard, which is to be observed is that the text which the accused would be called upon to read out for the purpose of his/her voice sample should not have the sentences from the inculpatory text but can contain words drawn from the recorded conversation as held by the Hon'ble Supreme Court in ***Sudhir Chaudhary vs. State (NCT of Delhi)***, reported in ***(2016) 8 SCC 307.***

The another aspect which I want to emphasise is that assuming that there is no provision under any law which enables a Magistrate to direct the accused-person to give his voice sample to the police during the course of investigation, can any such direction be given. I would like to refer the decision of this Court rendered in ***Mahipal Maderna vs. State of Rajasthan,***

reported in ***RLW 1971*** page ***43***, wherein this Court while dealing with similar argument has refused to interfere with the order passed by the Magistrate, where it has directed the accused of that case to give his hair sample. The case relates to the period when the Criminal Procedure Code, 1898 was in force, wherein there was no provision which could enable the Magistrate to direct the accused of the offence to give sample of his hair. The relevant observations in the above referred case are quoted hereunder:

> "15. It has however been argued by Mr. Singhvi, learned counsel for accused Mahipal Maderna, that in the absence of any direct provision in the law authorising the taking of the specimen of the hair of the accused, impugned order of the Magistrate contravenes the fundamental right enshrined in article 21 of the Constitution.
>
> 16.....It does not require much argument to hold that no inhibition against the deprivation of life is involved in the impugned order of the Magistrate for it does not impinge on the enjoyment of the life of the accused. So also, the order does not encroach upon the liberty of the accused in the sense in which the word has been used in the Constitution.
>
> 17. It is not disputed that it is the duty of the Deputy Superintendent of Police (Central Bureau of Investigation), at whose instance the learned Magistrate has made the impugned order, to make an investigation into the case. Sec.9 of the Evidence Act provides that facts which establish the identity of any person whose identity is relevant, are relevant. It was therefore, the duty of the Investigating Officer, under the law, to collect that evidence, for sec. 4(1)(l) Cr P. C. defines "investigation" to include all the proceedings under the Code for the collection of evidence. It will follow that in the absence of any

> legal provision to the contrary, he should be allowed to use the reasonable means for obtaining a few specimen of the hair of the accused for the purpose of establishing the identity of those who took part in the crime. This may in fact operate as a strong protection for the innocent persons, and is quite unexpeptionable."

So as held in the above case, it is the duty of the investigating officer to collect the evidence by using reasonable means to establish the identity of those, who took part in a crime. In the present case also, the police cannot be restrained from taking voice sample of respondent for establishing his involvement in the crime for the reason that there is no provision under the law which permits to take voice sample of the accused during the course of investigatiion.

Interestingly, Hon'ble Mr Justice Aftab Alam in ***Ritesh Sinha vs. State of U.P.*** (supra) in his opening remarks has emphasised on the need of equipping the police with all the forensic aid from science and technology. The said remarks are quoted hereunder:

> "In today's world when terrorism is a hard reality and terrorist violence is a common phenomenon, the police needs all the forensic aids from science and technology. The technology is in position today to say whether two voice recordings are of the same person or of two different people and, thus, to provide valuable aid in investigation."

Similarly, the Gujarat High Court in ***Natvarlal Amarshibai Devani vs. State of Gujarat & Ors.*** (supra) has also expressed the need of the use of advance technologies

during the course of investigation by police. The relevant portions of the above judgment are quoted hereunder:

> "35. Of all the functions of the police, the investigation is the most important and vital one. In the constantly evolving socio-economic scenario the criminals using sophisticated tools and techniques commit more and more crimes. In order to overcome these complexities the police all over the world are depending more and more on the scientific methods of investigation. A wide range of scientific techniques are now available for the analysis of varied nature of objects and materials encountered in the process of commission of crime by the culprit in and around the crime scene, on the suspect and victim. The study of such material evidence also known as the objective evidence or physical evidence applying the latest scientific tools and techniques for proving the guilt or innocence of the accused by the courts of law is broadly known as the Forensic Science.
>
> .....
>
> 40. In the recent world of technology, there are many methods to determine the individuality of a person. One of them is the voice - unique individual characteristic. Each person's voice is different because the anatomy of the vocal cords, vocal cavity, oral and nasal cavities is specific to the individual. The comparing of two recorded speech by means of spectrogram or voice prints is essential and important for the purpose of criminal cases such as murder, rape, drug dealing, bomb threats, corruption and terrorism. The Investigator has two complementary ways of making the identification through voice analysis. First, he or she will listen to the evidence sample and the sample taken from the suspect, comparing accent, speech habits, breath patterns and inflections. Then a comparing of the corresponding voice prints is made. Sometimes, voice is the only clue for the police and Forensic Scientists to identify

> the criminal. Especially in cases of telephoned bomb threat, demand of money in corruption and kidnapping cases etc. Speech sounds come from the vibration of the vocal cords inside the larynx or voice box. The cavities of the mouth, nose, and throat act as resonators, making the sounds louder. The teeth, lips, tongue, hard and soft palate are the articulators that shape the sounds into speech.
>
> .....
>
> 50. It may be mentioned here that the crime scenario in the country has undergone a sea change in the recent times. Criminals are using the most sophisticated weapons and highly specialised means to achieve their objective. Highly sophisticated devices like blasting of land mines by remote control are being used to thwart the law enforcement machinery from doing its duty. The change in the pattern of crime and mode of its commission requires modern scientific methods of crime detection so that the criminals may not move about with impunity holding the entire community at ransom."

The Kerala High Court in ***Rupesh @ Praveen vs. Union of India*** (supra) has observed in clear terms that if the investigating agency proceeds on the basis of tape recorded conversation belonging to the accused, the said fact requires proof which can be obtained only by method of scientific examination after obtaining voice sample.

Now the question is that despite realising the need of use of scientific methods in an investigation by the police or any investigating agency can any court of law refuse to act just because there is no provision under any law which empowers a Magistrate to direct an accused to give his voice sample to the investigating agency or police during the course of investigation.

My answer is in negative. First of all by directing an accused to give his/her voice sample to the police, he/she is not forced to give evidence against himself/herself which may be incriminatory. It is settled that voice spectography test is in no manner violative of Article 20(3) of the Constitution of India and voice sample is not a substantial evidence but can only be used for the purpose of comparing the voice of accused with the tape recorded conversation.

Certainly, we cannot stop any person, including the criminals, from using modern technology. When the criminals are using modern technologies to commit the crime, it is not justified to restrain the police or investigating agency to counter it with the aid of scientific methods or modern technology on the ground that there is no provision of this effect under any law. Rules of the game should be equal for all the players.

In the past also, the Courts have laid down guidelines and procedures to be followed in the matters, where the law is silent.

Hon'ble Supreme Court in ***Vishaka and Ors. vs. State of Rajasthan and Ors.***, reported in ***AIR 1997 SC 3011*** has laid down guidelines on the subject of sexual harassment of women at working place when there was no law on the subject. The Hon'ble Supreme Court has made a reference of objectives and functions of the judiciary, mentioned in Beijing Statements of Principles of the Independence of Judiciary, which reads as under:

"10.....

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State."

From the above, it is clear that one of the prime functions of the judiciary is to ensure the security of all the persons under the rule of law.

The phrase *"law has long arms"* should not only be left to be used in movies or stories but long arms of law should also be stretched to secure all persons from any kind of crime.

Mr Farzand Ali, counsel appearing for the respondent has made an attempt to pursuade this Court not to decide this criminal misc. petition finally because certain other cases, involving same issue, are pending before this Court and in those cases, the orders passed by the courts below of directing the persons, who are accused in criminal cases to give their voice sample to the police or investigating agency, have been stayed.

I am of the view that the pendency of a case involving similar issue cannot detain me to decide this petition when both the parties have finally argued the matter.

Learned counsel for the respondent has also submitted that now there will be no purpose in collecting the voice sample of the respondent because the police has already concluded investigation and charge-sheet has also been filed

against the respondent before the concerned Magistrate, who has already committed the case to the Court of Sessions and, therefore, there is no question of any further investigation in the case.

I don't find any merit in the above submission of the counsel for the respondent because it is settled that even after filing of the charge-sheet in a criminal case, the investigating agency can conduct further investigation with the approval of the court. It is to be noticed that when the police filed the application before the Magistrate, the charge-sheet was not filed against the respondent and it was filed on later date. In any case, I see no reason why the police should not be allowed to complete the investigation with reference to its application preferred before the Magistrate with the prayer for directing the respondent to give his voice sample.

In the present case, tape recorded conversation of the respondent is in possession of the police and the only requirement is to direct the respondent to give his voice sample, so that it can be compared with the tape recorded conversation.

In view of the above discussions, I allow this criminal misc. petition. The impugned orders passed by Additional Chief Judicial Magistrate No.2, Jodhpur Metropolitan as well as by Additional Sessions Judge No.6, Jodhpur Metropolitan are set aside and the following directions are issued:

(i) The police is directed to submit passage of written text which the respondent shall be required to read out for the purpose of giving his voice sample before the court, where the

case against the respondent is pending after committal, within a period of one week from today. However, it may be ensured that the said passage should not contain the sentences appearing in the tape recorded version but can contain only some words from the tape recorded version.

(ii) After receiving the proposed passage of a written text from the police, the court concerned, after verifying that the said passage does not contain any sentence of the tape recorded version and only contains some words from the said tape recorded version, shall summon the respondent for giving his voice sample within a period of two weeks thereafter.

(iii) After recording of the voice sample of the respondent, the court shall hand over the same to the police along with the tape recorded version in sealed condition for examination by the authorized laboratory of the State of Rajasthan.

(iv) The police after receiving report from the Laboratory shall submit it before the court concerned immediately.

Before parting, I appreciate the assistance provided by the Commissioner of Police, Jodhpur and team of the Officers with him.

(VIJAY BISHNOI)J.

m.asif/PS

Procedure to be followed by Magistrate when CCTV footage and video recordings is produced by police at the time of filing of chargesheet?

During the hearing of the case, we noticed that the trial Court had not played the DVR (MO-2) and seen the CCTV footages in the presence of the accused. In this regard we propose to dispel misgivings, if any, in the mind of trial Judges about their power to view such evidences. There will be instances where, by the time the case comes up for trial in one court, the electronic record would have had a natural death for want of proper storage facilities in the Court property room. To obviate these difficulties, we direct that, on a petition filed by the prosecution, the Judicial Magistrate, who receives the electronic record, may himself view it and take a back up, without disturbing the integrity of the source, in a CD or Pendrive or any other gadget, by drawing proceedings. The back up can be kept in safe custody by wrapping it in anti static cover and should be sent to the Sessions Court at the time of committal. The present generation of Magistrates are computer savvy and they only require legal sanction for taking a back up. They can avail the service of an expert to assist them in their endeavour. Recently the Supreme Court in Shamsher Singh Verma v. State of Haryana, MANU/SC/1345/2015 : 2015 (12) Scale 597, has held that CD is a 'document' within the meaning of Section 3 of the Indian Evidence Act, 1872. In Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, MANU/SC/0277/1975 : (1976) 2 SCC 17, the Supreme Court has held that tape records of speeches are 'documents' as defined in Section 3 of the Indian Evidence Act, 1872. This Judgment has been relied upon in Shamsher Singh Verma's case (cited supra). Therefore, we hold that articles like Memory Card, Hard Disc, CD, Pen-drive, etc., containing relevant data in electronic form are 'documents' as defined under Section 3 of the Indian Evidence Act, 1872, albeit, marking them as material objects. After all, nomenclature cannot have the effect of altering the characteristics of an object. The words 'proved' and 'disproved' in section 3 of the Evidence Act have the following common denominator;

"A fact is said to be proved/disproved when, after considering the matters before it..... " (emphasis supplied)

Without viewing the CCTV footage, how can any Court, "consider the matter before it " to conclude that a fact has been 'proved' or 'disproved' ? That apart, Section 62 of the Indian Evidence Act, 1872 states,

"Primary evidence means the document itself produced for the inspection of the Court."

(emphasis supplied).

This does not mean that, if a secondary evidence of a document is admitted lawfully, the Court is denuded of the power to inspect it. Such an inference will lead to absurdity. Therefore, we hold that a Court has the power to view CCTV footage and video recordings, be it primary or legally admissible secondary evidence, in the presence of the accused for satisfying itself as to

whether the individual seen in the footage is the accused in the dock. The trial Court should also specifically put questions to the accused when he is examined under Section 313 Cr.P.C. about his overt acts appearing in the footage and record his answers.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27-1-2016

Coram:

Mr.Justice R.SUDHAKAR

and

Mr.Justice P.N.PRAKASH

Referred Trial No.1 of 2015

Criminal Appeal No.110 of 2015

K. Ramajayam @ Appu Vs.The Inspector of Police,

****

Shared By :

ADV. RAKESH SONTAKKE

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.2119 of 2015

ORDER :

This Criminal Petition is filed by the Petitioners/Accused under Section 482 Cr.P.C seeking to quash the proceedings and set aside the order dated 02.03.2015 in Crl.M.P.No.47 of 2015 on the file of II Additional Judicial Magistrate of the First Class, Tirupati in Crime No.177 of 2014 of East Police Station, Tirupati. The subject petition was filed by the 1st respondent herein seeking to issue summons for producing the petitioners herein before the Assistant Director, Forensic Science Laboratory, Hyderabad for conducting voice test for the comparison and submission of the report for further investigation. The said petition was allowed by the learned Magistrate and hence, the petitioners questioned the same.

2) Heard both parties at length before admission and perused the material on record. Admittedly the investigating officer requested the Court to obtain voice sample to be subscribed by the persons facing the accusation in the crime under investigation and the learned Magistrate ordered despite counter opposing the same on maintainability apart from the copy of the C.D. to be given to him for his verification, without even cause furnishing.

3) Though the Eleven Judges Constitutional Bench expression of the Apex Court in ***State of Bombay V.***

Kathikalu Oghad[1] is clear that once accused is arrested in connection with investigation or other proceeding under Section 5 of the Identification of Prisoners Act, 1920, a Magistrate of the First Class, where satisfied that, for purpose of said investigation or proceeding under the Criminal Procedure Code, it is expedient to direct the person to allow his photographs or measurements (which include finger impressions or foot print impressions as per Section 2(i)(iii) of the Act, 1920 (that may extends to signatures even) for purpose of comparison with any disputed finger impressions or the like, that does not hit by Article 20(3) of the Constitution of India as not within the meaning of 'to be a witness' but for 'furnishing' evidence in the larger sense and what is protected an accused is from hazards of self incrimination, the bar under Article 20(3) of the Constitution of India can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the claim of evidence.

4) The law is very clear by interpretation of scope of Section 73 of the Indian Evidence Act that the Court has no power to ask for writing or thumb impression of an accused of a crime before commencement of enquiry or trial. Such obtaining by the Magistrate is besides unwarranted and even so taken and used for comparison during investigation, it is inadmissible in evidence, but for the same obtained during enquiry or trial to admit in evidence, vide

expressions of the Apex Court in ***Rambabu Mishra***[2] relied upon later in ***Sukhvinder Singh V. State***[3] ***Ajith Savanth***[4], ***Amrith V. State***[5], ***B.Mallesam V. State of A.P***[6]. No doubt, Section 311-A Cr.P.C is introduced by amended Act 25 of 2005 with effect from 23.06.2006, whereunder the investigating officer can ask during investigation for purpose of the investigation to provide for specimen signature or hand-writing of an arrested accused. Even this provision no way speaks giving of voice sampling but for confining at best to set at knot the impact of the expression of ***Rambabu Mishra*** (and the later expressions relied on it) on the scope of Section 73 of the Indian Evidence Act. It is needless to say even the law commission (pursuant to the observation in ***Rambabu Mishra*** supra) in its 87th report of August, 1980 suggested the amendments to Sections 3 to 5 of the Act, 1920 to update it by including the scientific advances in the aid of investigation, including at para 3.16 of the report, for voice identification to furnish voice of the accused, same not materialized for none of the provisions of the Act, 1920 amended. Section 311-A Cr.P.C inserted is only for the limited area of arrested accused specimen writings and even explanation to Section 53 of Cr.P.C besides Section 53-A inserted by inclusion of D.N.A profiling and such other tests which the registered medical practitioner thinks necessary in a particular case; thus when registered

medical practitioner cannot take a voice sample, Section 53 or 53-A or Section 311-A Cr.P.C or Section 73 of Indian Evidence Act or Sections 3 to 5 of the Act, 1920 have no application for taking voice sampling. Further when accused not arrested and brought before Court none of the provisions even enable to ask the accused or suspect to undergo any medical tests even muchless to subscribe handwriting or signature or thumb or palm impressions or foot prints.

5) The law is well settled no doubt that even a minority view of the Apex Court not in conflict to the majority view of the Apex Court, when that applicable to the lis is binding precedent under Article 141 of the Constitution of India. However, when there is difference of opinion between each of the two Judge bench of the Apex Court, High Court and subordinate Courts can follow which view among the two is sound to follow, but for to say if the view of first Judge is considered and differed by the second Judge, the High Court and Subordinate Courts cannot sit against the wisdom of the second Judge of the Apex Court. Hence, among the conflicting opinions of the two Judges expressed in ***Ritesh Sinha V. State***[7], the view expressed by Hon'ble Justice Aftab Alam is not only a later one after going through the views expressed by Hon'ble Justice R.P.Desai; but also a reasoned one to follow and accordingly relied up.

6) Having regard to the above, the criminal petition is

allowed by setting aside the order dated 02.03.2015 in Crl.M.P.No.47 of 2015 in Crime no.177 of 2014 passed by the learned II Additional Judicial Magistrate of the First Class, Tirupati holding the same is unsustainable and without jurisdiction conferred by law. As a sequel, miscellaneous petitions pending, if any, in this criminal petition shall stand closed.

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Dr. B. SIVA SANKARA RAO, J

23.06.2015
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[1] AIR 1961 SC 1808
[2] AIR 1980 SC 791
[3] 1994 SCC (Crl.) 1376
[4] AIR 1997 SCLJ 1364
[5] (1998)8 SCC 1613
[6] 1997(1) ALT (Crl.) AP 719
[7] AIR 2013 SC 1132