JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(July 29-August 02, 2019)

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1. ***Shamsher Singh and Another v. Lt. Col. Nahar Singh (D) Thr. Lrs. and Others, (2019 SCC OnLine SC 938)***

Decided on : - 29.07.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(In the proceeding under Order XXI Rules 99, 100 and 101, right, title or interest has to be determined and without establishing right, title or interest, the applicant cannot claim that he should be put back into possession.)

Facts

One Tarapada Dutta owned premises No. 15, Sahanagar Road, P.S. Tollygunge, Calcutta. An agreement for sale was executed by Anadi Dutt, who claimed to be son of Tarapada Dutta in favour of Rajvindar Singh in respect of 4 Kh. 4 Ch. and 00 sft. of land and structures at premises No. 15. Another agreement for sale was entered by Anadi Dutt with Shamsher Singh in respect of 4 Kh. 6 Ch. and 6 Sft. of land and structures of premises No. 15.

The respondent had filed a T.S. No. 211 of 1990 before the 3rd Munsif at Alipore praying for decree of declaration of his right with regard to premises in question on the basis of adverse possession.

Anadi Dutt having not executed the sale deed in pursuance of agreement for sale dated 07.05.1990, two title suits being Suit No. 50 of 1994 and 51 of 1994 were filed by Rajvindar Singh and Shamsher Singh, which were decreed ex-parte on 20.12.1994. In pursuance of decree of the Court, two separate Deeds of Conveyance were executed in favour of Dayal Singh (Nominee of Rajvindar Singh) and in favour of Shamsher Singh. Decree holders filed two execution cases vide Execution no. T.Ex. No. 09 of 1995 and T.Ex. No. 10 of 1995 seeking delivery of possession of the suit property. First Time Court Bailiff could not succeed in delivering possession, however, subsequently the Court Bailiff with the help of police delivered Khas vacant possession of the suit premises to the Decree Holder on 12.04.1996.

After lapse of 30 days, respondent No. 1 filed two Misc. cases Nos. 10 of 1996 and 11 of 1996 against Rajvindar Singh, Shamsher Singh, Dayal Singh and Asis Dutt under Order XXI Rules 98, 99 and 100 CPC before the 6th Assistant District Judge, Alipore. In the said two Misc. cases, respondent No. 1 claimed that his father Sardar Iqbal Singh was the occupier and was running his business under the name and style as Public Transport Business in the suit premises and after his death, respondent No. 1 has been running a business under the name and style of Ex-Service United Coal Enterprise (P) Ltd. In the above said Misc. Case No. 10 of 1996, the respondent No. 1 claimed that Anadi Dutt was not the son of Tarapada and it was Asis Kumar Dutt, who was the only son, owner and only legal heir of Late Tarapada. It was also claimed that a T.S. No. 211 of 1990 was pending before 3rd Munsiff at Alipore filed by respondent No. 1, in which he claimed right and title of the suit premises on the basis of

adverse possession. It was further claimed that Shamsher Singh, Rajvindar Singh and Dayal Singh had fraudulently obtained decree in collusion with Anadi Dutt and has evicted the respondent No. 1 from the suit property.

In Misc. proceeding application, although, the respondent No. 1 has impleaded Asis Kumar Dutt but he neither contested the Misc. application nor challenged the title of Anadi Dutt, against whom an ex-parte decree was passed. On 21.01.1999, Dayal Singh also got a deed of conveyance executed in his favour by Asis Kumar Dutt, alleged true legal heir of the Late Tarapada Dutta. Dayal Singh got his name mutated in Kolkata Municipal Corporation.

The Executing Court by order dated 10.08.2004 rejected Misc. Case No. 10 of 1996 and Misc. Case No. 11 of 1996 filed by respondent No. 1. Trial court held that respondent No. 1 failed to prove that he has acquired title by way of adverse possession. Against the order dated 10.08.2004 rejecting the Misc. applications filed by respondent No. 1, first appeal, FMA No. 720 of 2005 was filed by respondent No. 1 in the Calcutta High Court, which appeal has been allowed by Calcutta High Court by the impugned judgment dated 15.12.2009. The High Court by impugned judgment has set aside the order of the Executing Court dated 10.08.2004 disposing the application filed by respondent No. 1 under Order XXI Rules 98, 99 and 100 with a direction that appellant (respondent No. 1 in this appeal) should be put back into possession of the suit property. Aggrieved by the judgment of the High Court, this appeal was filed.

Observations and Decision

The Hon'ble referred to the amendments brought into force in 1976 in Order XXI Rules 97-103, particularly in Rule 101 and Rule 103 and, after discussing the differences in the Rules before and after the Amendment, observed as follows :-

> ***"16.*** *There is a marked difference between Rule 101 as it existed prior to amendment and as it now exists after 1976 amendment. Earlier a person who was a bona fide claimant and who satisfied that he was in possession of the property on his own account or on account of some other person then the judgment-debtor could have been put in possession of the property on an application under Rules 100 and 101, whereas now after the amendment for putting back into possession an applicant has not only to prove that he is in bona fide possession rather he has to prove his right, title or interest in the property. What was earlier to be adjudicated in a suit under unamended Rule 103 is now to be adjudicated in Rule 101 itself, thus, for being put in possession, an applicant has to prove his right, title or interest in the property and by simply proving that he was in possession prior to the date he was dispossessed by decree-holder, he is not entitled to be put back in possession.*
>
> ***17.*** *In view of the statutory scheme which is delineated by amended provisions of Rule 101, the submissions of the counsel of the respondent that by simply proving the fact that he was in possession prior to he being dispossessed by decree-holder, he should be put back in possession cannot be accepted. The respondent-applicant had to prove his right, title or interest in the property to be put back in possession."*

The Hon'ble Court, then referred to the following Rules of Order XXI :-

> *"**99. Dispossession by decree-holder or purchaser**— (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.*
> *(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.*
> ***100. Order to be passed upon application complaining of dispossession**— Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,—*
> *(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or*
> *(b) pass such other order as, in the circumstances of the case, it may deem fit.*
> ***101. Question to be determined**— All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."*

The Hon'ble Court also referred to the judgment of the Supreme Court in ***Shreenath v. Rajesh***[1] where the amendments made in Order XXI Rules 97 to 103 by Code of Civil Procedure (Amendment) Act, 1976 came to be considered as follows :-

> ***"2.** The courts within their limitation have been interpreting the procedural laws so as to conclude all possible disputes pertaining to the decretal property which is within its fold in an execution proceeding, i.e., including what may be raised later by way of another bout of litigations through a fresh suit. Similarly legislatures equally are also endeavouring by amendments to achieve the same objective. The present case is one in this regard. Keeping this in view, we now proceed to examine the present case.*
> *3. In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice is to be adopted. The procedural law is always subservient to and is in aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.*
> * * * * * *
> *5. The question raised is, whether the third party in possession of a property claiming independent right as a tenant not party to a decree under execution could resist such decree by seeking adjudication of his objections under Order 21 Rule 97 of the Civil Procedure Code?"*

The Hon'ble Court also referred to several other judgments[2] of the Supreme Court in relation to the aforementioned issue particularly on Rules 97-103 of Order XXI and held as follows :-

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[1] (1998) 4 SCC 543.

[2] *Noorduddin* v. *Dr. K.L. Anand*, (1995) 1 SCC 242; *Silverline Forum Pvt. Ltd.* v. *Rajiv Trust*, (1998) 3 SCC 723; *Ghasi Ram* v. *Chait Ram Saini*, (1998) 6 SCC 200; *Ashan Devi* v. *Phulwasi Devi*, (2003) 12 SCC 219; *Bhag Mal* v. *Ch. Parbhu Ram*, (1985) 1 SCC 61.

"27. The purpose of amendment under Rule 103 is also that any adjudication made under Rule 101 shall have same force and be subject to the same conditions as to an appeal or otherwise as if it was a decree. Rule 101, thus, affords an opportunity to get all issues relating to right, title or interest in the property to be determined. When the respondent No. 1 filed his application claiming to be put back into possession, it was obliged to establish its right, title or interest in the property without which his application could not have been allowed. *The Executing Court has considered the application of respondent No. 1 in right perspective and has clearly held that respondent No. 1 failed to prove his title by adverse possession, hence application deserves to be rejected.*

28. *High Court committed error in observing that in application proceedings under Order XXI Rules 99, 100 and 101, the Court is not to decide such question. Without determination of right, title or interest, the application could not have been allowed. We having already extracted the observations of the High Court, where it clearly held that the title in respect of the property by way of adverse possession need not be gone into in the appeal before it. The above observation of the High Court was erroneous.* ***In the proceeding under Order XXI Rules 99, 100 and 101, right, title or interest has to be determined and without establishing right, title or interest, the respondent No. 1 cannot claim that he should be put back into possession.*** *We do not accept the submission of the learned counsel for the respondent that on mere fact that respondent No. 1 was in possession of the premises prior to being dispossessed, they should be put back into possession. For putting back into possession, the respondent No. 1 was obliged to establish his title to the property by adverse possession, without which, he could not have asked the Court to put him back into possession. The High Court clearly erred in allowing the appeal and the Executing Court has rightly rejected the application filed by respondent No. 1. We may further notice that suit No. 211 of 1990 filed by respondent No. 1 seeking declaration of title to the property by adverse possession has been subsequently dismissed by decree on 16.03.2009 and no steps have been taken for restoration of the suit.*

29. *We do not find any error in the order passed by the Executing Court and the High Court committed error in allowing the appeal, directing the respondent No. 1 to be put back into possession. In view of the foregoing discussions, we allow this appeal and set aside the judgment of the High Court dated 15.12.2009 and restore the order of the Executing Court dated 10.08.2004. Parties shall bear their own costs."*

(Emphasis supplied)

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2. *Maharashtra Chess Association v. Union of India and Others, (2019 SCC OnLine SC 932)*

Decided on : - 29.07.2019

Bench :- 1. Hon'ble Mr. Justice D.Y. Chandrachud
2. Hon'ble Ms. Justice Indira Banerjee

(The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors.)

Issue

Whether a private agreement entered into between the Appellant and the second Respondent in the form of the Constitution and Bye Laws of the latter can, by conferring exclusive jurisdiction on the courts at Chennai, oust the writ jurisdiction of the Bombay High Court under Article 226 of the Constitution?

Facts

The second Respondent, the All India Chess Federation is a society registered under the Societies Registration Act 1860. It is a central governing authority for chess in India. The Appellant is a society registered under the Act of 1860 and was an affiliated member of the second Respondent since 1978. On 25 December 2016, the Central Council of the second Respondent passed a resolution to disaffiliate the Appellant. After the institution of the writ proceedings, the third Respondent has been affiliated by the second Respondent in place of the Appellant.

The Appellant had filed a writ petition before the Bombay High Court under Article 226 of the Constitution impleading, *inter alia* the second Respondent. The second Respondent raised a preliminary objection that the Bombay High Court did not have jurisdiction to entertain the writ petition on the ground that Clause 21 of the Constitution and Bye Laws conferred exclusive jurisdiction on courts at Chennai in disputes involving the second Respondent and any other party to the Constitution and Bye Laws, including the Appellant. The Bombay High Court held that Clause 21 ousted the jurisdiction of all other courts except the courts at Chennai.

Clause 21 of the Constitution and Bye Laws of the second Respondent is as follows:

> *"21. Legal Course*
> *(i) The Federation shall sue and or be sued only in the name of the Hon. Secretary of the Federation.*
> *(ii) Any Suits/Legal actions against the Federation shall be instituted only in the Courts at Chennai, where the Registered Office of All India Chess Federation is situated or at the place where the Secretariat of the All India Chess Federation is functioning"*

Observations and Decision

The Hon'ble Court referring to the judgment of the Supreme Court in ***A B C Laminart (P) Limited v. A P Agencies, Salem***[3] and several other judgments[4] held as follows :-

> ***"11.*** *Parties cannot by agreement confer jurisdiction on a court which lacks the jurisdiction to adjudicate. But where several courts would have jurisdiction to try the subject matter of the dispute, they can stipulate that a suit be brought exclusively before one of the several courts, to the exclusion of the others. Clause 21 does not oust the jurisdiction of all courts. Rather, the Appellant and the second Respondent have agreed to submit suits or legal actions to the courts at Chennai. So long as the courts at Chennai have proper jurisdiction over a dispute involving the Appellant and the second Respondent, Clause 21 is not in violation of the principle set out in A B C Laminart. However, the decision in A B C Laminart was made in the context of an original suit and the jurisdiction of an ordinary civil court. The present case is materially different. The Appellant approached the Bombay High Court under Article 226. The second Respondent seeks to rely on Clause 21 to oust the writ jurisdiction of the High Court of Bombay.*
>
> ***12.*** *Article 226(1) of the Constitution confers on High Courts the power to issue writs, and consequently, the jurisdiction to entertain actions for the issuance of writs.*[5] *The text of Article 226(1) provides that a High Court may issue writs for the enforcement of the fundamental rights in Part III of the Constitution, or "for any other purpose". A citizen may seek out the writ jurisdiction of the High Court not only in cases where her fundamental right may be infringed, but a much wider array of situations....."*

Regarding the jurisdiction of High Courts under Article 226, the Hon'ble Court referred to the judgment of ***A V Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani***[5] and other judgments[6] and held that the jurisdiction of the High Court under Article 226 of the Constitution is equitable and discretionary. The power under that Article can be exercised by the High Court "to reach injustice wherever it is found. The role of the High Court under the Constitution is crucial to ensuring the rule of law throughout its territorial jurisdiction. In order to achieve these transcendental goals, the powers of the High Court under its writ jurisdiction are necessarily broad. They are conferred in aid of justice. This Court has repeatedly held that no limitation can be placed on the powers of the High Court in exercise of its writ jurisdiction. The powers of the High Court in exercise of its writ jurisdiction cannot be circumscribed by strict legal principles so as to hobble the High Court in fulfilling its mandate to uphold the rule of law. The Hon'ble Court further held as follows:-

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[3] (1989) 2 SCC 163.

[4] *Rajasthan State Electricity Board* v. *Universal Petrol Chemicals Limited* (2009) 3 SCC 107; *Interglobe Aviation Limited* v. *N Satchidanand* (2011) 7 SCC 463.

[5] (1962) 1 SCR 753.

[6] *Minerva Mills* v. *Union of India* (1980) 3 SCC 625; *L Chandra Kumar* v. *Union of India* (1997) 3 SCC 261; *Uttar Pradesh State Sugar Corporation Limited* v. *Kamal Swaroop Tondon,* (2008) 2 SCC 41; *State of Uttar Pradesh* v. *Indian Hume Pipe Co. Limited,* (1977) 2 SCC 724; *Sangram Singh* v. *Election Tribunal, Kotah,* (1955) 2 SCR 1.

> ***"16.*** *While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution."*

The Hon'ble Court then addressed the issue whether the existence of an alternate remedy would create a bar on the High Court entertaining a writ petition under Article 226.

Regarding this issue, the case of the second Respondent is that the dispute should be heard and decided at Chennai. It follows that if the Respondent's argument is accepted, the High Court of Madras would hear the present matter. Therefore, the alternate remedy (i.e. a writ petition before the High Court of Madras) is equal in every way to the present remedy sought by the Appellant. The High Court of Madras is imbued with the same powers in the exercise of its writ jurisdiction. The submission on the above premises is that the Appellant can avail of the same relief at Chennai as it may in Mumbai. Hence, the agreement between the parties must prevail and the writ jurisdiction of the Bombay High Court under Article 226 stands ousted.

The Hon'ble Court referred to the cases of ***Uttar Pradesh State Spinning Co. Limited v. R S Pandey***[7]and***State of Uttar Pradesh v. Mohammad Nooh***[8]and also***Aligarh Muslim University v. Vinay Engineering***[9]and held that the existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. The writ jurisdiction of a High Court can be exercised where no adequate alternative remedies exist. The Hon'ble Court allowed the appeal and finally held as follows :-

[7] (2005) 8 SCC 264.
[8] 1958 SCR 595.
[9] 1994) 4 SCC 710

25. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. *Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the Appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter.*

* * * * * *

29. *In the present case, the Bombay High Court has relied solely on Clause 21 of the Constitution and Bye Laws to hold that its own writ jurisdiction is ousted. The Bombay High Court has failed to examine the case holistically and make a considered determination as to whether or not it should, in its discretion, exercise its powers under Article 226.* ***The scrutiny to be applied to every writ petition under Article 226 by the High Court is a crucial safeguard of the rule of law under the Constitution in the relevant territorial jurisdiction. It is not open to a High Court to abdicate this responsibility merely due to the existence of a privately negotiated document ousting its jurisdiction.***

30. *It is certainly open to the High Court to take into consideration the fact that the Appellant and the second Respondent consented to resolve all their legal disputes before the courts at Chennai. However, this can be a factor within the broader factual matrix of the case.* ***The High Court may decline to exercise jurisdiction under Article 226 invoking the principle of forum non conveniens in an appropriate case. The High Court must look at the case of the Appellant holistically and make a determination as to whether it would be proper to exercise its writ jurisdiction.*** *We do not express an opinion as to what factors should be considered by the High Court in the present case, nor the corresponding gravity that should be accorded to such factors. Such principles are well known to the High Court and it is not for this Court to interfere in the discretion of the High Court in determining when to engage its writ jurisdiction unless exercised arbitrarily or erroneously. The sole and absolute reliance by the Bombay High Court on Clause 21 of the Constitution and Bye Laws to determine that its jurisdiction under Article 226 is ousted is however one such instance.*

(Emphasis Supplied)

3. *Anil Khadkiwala v. State (Government of NCT of Delhi) and Another, (2019 SCC OnLine SC 941)*

Decided on : - 30.07.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(A successive application under Section 482, Cr.P.C. under changed circumstances was maintainable and the dismissal of the earlier application was no bar to the same.)

Facts

Respondent no. 2 filed a complaint under Section 142 read with Section 138 of the Negotiable Instruments Act (hereinafter referred to as "the Act") against the appellant who was the Director of M/s. ETI Projects Ltd., the Company in question. It was alleged that the accused person had issued cheques dated 15.02.2001 and 28.02.2001, which were dishonoured upon presentation. The appellant had preferred Crl.M.P. No. 1459 of 2005 for quashing the same. He took the defence, without any proof that he had already resigned from the Company on 20.12.2000 and which was accepted by the Board of Directors on 20.01.2001. The application was dismissed on 18.09.2007 after noticing the plea of resignation, solely on the ground that the cheques were issued under the signature of the appellant.

The appellant then preferred a fresh application under Section 482 giving rise to the present proceedings. The High Court noticing the reliance on Form 32 issued by the Registrar of Companies, under the Companies Act, 1956, in proof of resignation by the appellant prior to the issuance of the cheques, issued notice, leading to the impugned order of dismissal subsequently. The application preferred by the appellant under Section 482, Cr.P.C. to quash the summons issued in complaint case no. 3403/1/2015 was dismissed by the High Court opining that since the earlier Crl.M.C. No. 877 of 2005 for the same relief had already been dismissed, the second application was not maintainable.

Observations and Decision

The Hon'ble Court referred to the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal* **v.** *Mohan Singh*[10] and held that a successive application under Section 482, Cr.P.C. under changed circumstances was maintainable and the dismissal of the earlier application was no bar to the same. The Hon'ble Court further referred the case of *Harshendra Kumar D.* **v.** *Rebatilata Koley*[11] where the Supreme Court had held as follows:-

> *"22. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a*

[10] (1975) 3 SCC 706.
[11] 2011 Crl.L.J. 1626.

criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to Appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the Appellant has resigned much before the cheques were issued by the Company. As noticed above, the Appellant resigned from the post of Director on March 2, 2004. The dishonoured cheques were issued by the Company on April 30, 2004, i.e., much after the Appellant had resigned from the post of Director of the Company. The acceptance of Appellant's resignation is duly reflected in the resolution dated March 2, 2004. Then in the prescribed form (Form No. 32), the Company informed to the Registrar of Companies on March 4, 2004 about Appellant's resignation. It is not even the case of the complainants that the dishonoured cheques were issued by the Appellant. These facts leave no manner of doubt that on the date the offence was committed by the Company, the Appellant was not the Director; he had nothing to do with the affairs of the Company. In this view of the matter, if the criminal complaints are allowed to proceed against the Appellant, it would result in gross injustice to the Appellant and tantamount to an abuse of process of the court."

The Hon'ble Court further distinguished the case of ***Atul Shukla* v. *The State of Madhya Pradesh***[12]and held that the case is clearly distinguishable on its facts as the relief sought was for review/recall/modify the earlier order of dismissal in the interest of justice. Consequently, the earlier order of dismissal was recalled. It was in that circumstance that the Supreme Court had held that in view of Section 362, Cr.P.C. the earlier order passed dismissing the quashing application could not have been recalled. The case is completely distinguishable on its own facts.

The Hon'ble Court, therefore, allowed the present appeal and held as follows :-

"11. The Company, of which the appellant was a Director, is a party respondent in the complaint. The interests of the complainant are therefore adequately protected. In the entirety of the facts and circumstances of the case, we are unable to hold that the second application for quashing of the complaint was not maintainable merely because of the dismissal of the earlier application.

12. The impugned order of the High Court is set aside. The appeal is allowed and the proceedings against the appellant alone are quashed."

[12](Criminal Appeal No. 837 of 2019).

4. *Aliyathammuda Beethathebiyyappura Pookoya and Another v. Pattakal Cheriyakoya and Others, (2019 SCC OnLine SC 953)*

Decided on : - 01.08.2019

Bench :- 1. Hon'ble Mr. Justice Mohan M. Shantanagoudar
2. Hon'ble Mr. Justice Ajay Rastogi

(- A violation of the provisions of Order XXIII Rule3B of the CPC is not merely a procedural defect and goes to the root of the compromise decree drawn in violation thereof.

- The scope of such revisional jurisdiction is wider when the High Court is vested with the power to examine the legality or propriety of the lower Court's order under the statute from which the revisional power arises. In such a situation, the High Court may also examine the correctness of findings of fact, and re-appraise the evidence.)

Facts

The present dispute pertains to the office of mutawalli of the Andrott Jumah mosque situated in Lakshadweep. The mosque is presently a public waqf registered with the Lakshadweep Waqf Board. The respondents herein are the senior-most male members of the different thavazhies (branches of descendants through the female line) of the Pattakal family. They claim to be the descendants of one Saint Ubaidulla, who is stated to have built the Andrott Jumah mosque, and who was its first mutawalli. Thus, they claim that by customary tradition, the office of the mutawalli of the mosque is vested with their family. It is their case that the members of the family choose the mutawalli from amongst themselves, and Respondent No. 1 is functioning as the present mutawalli of the mosque.

The appellants in C.A. No. 9586/2010 are members of the Aliyathammuda tharawad and claim to be the khateebs (sermon-givers) in the mosque. The appellants in the connected appeals C.A. Nos. 9587/2010 and 9588/2010 claim to be suing as representatives of residents of Andrott Island, Lakshadweep. The common contention of the appellants in these three appeals is that the Jumah mosque was built by the inhabitants of Andrott island and was first administered by the 'Amin and Karanavan' system (i.e. by the executive officer assisted by the nominated heads of local families), and subsequently by a committee of elected public representatives from 1966-1972. The president of such committee from 1966-1972 was the respondents' predecessor Pattakal Koyammakoya Thangal, who was removed from presidency in 1974 after a dispute arose. While the appellants in C.A. No. 9586/2010 claim that the system of management by an elected committee continued after the dispute, the appellants in connected appeals C.A. Nos. 9587/2010 and 9588/2010 claim that due to this dispute, management of the mosque broke down. However, their common claim is that the respondents never had a customary right to the office of mutawalli, and the right to select the mutawalli should vest with the people of the local area.

It is also their common claim that a compromise decree was passed on 16.02.1981 in O.S. No. 10/1974 between the appellants' predecessors and Pattakal Koyammakoya Thangal, as per which the mosque was to be managed by the committee elected by local residents. The appellants' contention is that even if there was any customary right vested with the respondents, it was breached by the formation of the committee and passing of the compromise decree. However, subsequently, the respondents filed civil suit O.S. No. 1/1998 before the Waqf Tribunal, Kavarathi praying for a declaration that the office of mutawalli of the Jumah mosque is vested with the Pattakal family. Initially, the suit was decreed in their favour, but the High Court on appeal remanded it back to the Waqf Tribunal for fresh disposal.

After remand, the Waqf Tribunal by its judgment dated 20.05.2006 held that there was no evidence to show that the mosque was being managed by an elected committee. Though the Tribunal declared that the compromise deed in O.S. No. 10/1974 was void, as no application was made for leave of the Court, and the respondents' family was not given notice as required under Order XXIII Rule 3B of the Civil Procedure Code (for short "CPC"), it found that the respondents, on their part, had not produced any positive evidence to show that Ubaidulla was the first mutawalli of the Jumah mosque, and that the customary right to the office of mutawalli was vested with their family i.e. Pattakal family. Rather, the right to manage the mosque was vested with the local residents. Hence, it dismissed the suit and directed the parties along with the Waqf Board to draft a scheme for the management of the mosque. Against this judgment, the respondents filed a revision petition before the High Court.

The High Court in the impugned judgment found that there was no evidence to show that anyone apart from the respondents had functioned as mutawalli of the mosque at any point of time. It held that the committee in existence from 1966-1972 was only a committee for overseeing the repairs and maintenance of the mosque, and not for management thereof, and agreed with the Tribunal's reasoning with respect to the compromise decree being void. On this basis, it decreed that the office of mutawalli was vested with the respondents by custom.

Hence, these appeals had been preferred by the various appellants before the Supreme Court.

Observations and Decision

The Hon'ble Court observed that in the present case, the following two issues arose for consideration before it:-

Firstly, whether the High Court exceeded the scope of its revisional jurisdiction; and

Secondly, whether the respondents have pleaded and proved that they have a customary right to the office of mutawalli in the Jumah mosque.

Regarding the first issue, the Hon'ble Court referred to the judgment of the Constitution Bench of the Supreme Court in ***Hindustan Petroleum Corporation Ltd v. Dilbahar Singh***[13] and held that it is well settled that ordinarily, while revisional jurisdiction does not entitle the High Court to interfere with all findings of fact recorded by lower Courts, the High Court may correct a finding of fact if it has been arrived at without consideration of material evidence, is based on misreading of evidence, is grossly erroneous such that it would result in miscarriage of justice, or is otherwise not according to law. The Hon'ble Court also referred the case of ***Ram Dass v. Ishwar Chander***[14] and further held that importantly, the scope of such revisional jurisdiction is wider when the High Court is vested with the power to examine the legality or propriety of the lower Court's order under the statute from which the revisional power arises. In such a situation, the High Court may also examine the correctness of findings of fact, and re-appraise the evidence. In light of these principles, the Hon'ble Court held as follows :-

> *"The High Court noted that the findings of the Tribunal contradicted its earlier observations, and held that since the mosque was constructed as long ago as in the seventh century, no evidence other than the historical material on record could be obtained to show, that in all probability, Ubaidulla had indeed constructed the mosque. There could not be specific or direct evidence of the donation of land for constructing the mosque, or of the construction of mosque itself, and so on. The Court was rightly of the opinion the Tribunal need not have probed further for positive proof after noting all the historical facts proved. Thus, it is evident that the High Court in the impugned judgement has not entered into a rehearing or reassessment of the findings of fact arrived at by the Wakf Tribunal. Rather, the Court has rightly noted that the Tribunal did not apply the appropriate standard of proof to be applied in a civil suit, i.e. the standard of preponderance of probability. Therefore, it cannot be said that the High Court exceeded the scope of its revisional jurisdiction in any manner."*

Regarding the second issue, the Hon'ble Court relied *inter alia* on the Gazette which recorded that Ubaidulla was the first musaliyar in Androtт and is buried in the Androtт mosque. The Hon'ble Court referring to the case of ***Bala Shankar Mana Shankar Bhattjeev. Charity Commissioner, Gujarat State***[15], held that the Gazette is an official record evidencing public affairs, and its genuineness ispresumed under Section 81 of the Evidence Act, 1872. Moreover,under Section 35 of the Evidence Act, an entry made by theGazetteer in discharge of his official duty is a relevant fact. Anyfact recorded by the Gazetteer may also be considered as expertopinion under Section 45 of the Evidence Act. Therefore, thecontents of the Gazette can be taken into account to discover thehistorical materials contained therein, which the Court mayconsider in conjunction with other evidence and circumstances inadjudicating a dispute, even if it may not be conclusive evidence of the fact-in-issue and the same cannot be challenged on the ground that it is not a recent publication.

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[13] (2014) 9 SCC 78.
[14] (1988) 3 SCC 131.
[15] 1994 Suppl. (2) SCR 687.

Observing that the office of mutawali can be customary and that Muslim law does not recognize an inherent right of succession to the office of mutawalli, the Hon'ble Court observed that several High Courts and various scholars on Muslim law have opined that such a right may be shown on the basis of certain exceptions, which includes the creation of a custom to that effect and held that a claim of hereditary succession may be accepted if it is founded in a direction to that effect by the waqif (i.e. the founder of the waqf) and such a direction may be presumed from a practice of successive appointments made from amongst the waqif's family members.The Hon'ble Court also held that the Waqf Act, 1995 itself acknowledges that a waqf may have a hereditary mutawalli which is evident from the proviso to Section 69(2) of the Act. The Hon'ble Court, thus, held :-

> *"24. Thus, we may conclude that while no person can claim the office of mutawalli merely by virtue of being an heir of the waqif or the original mutawalli, if they can show through a long-established usage or custom that the founder intended that the office should devolve through hereditary succession, such usage or custom should be followed. Additionally, the practice would have to comply with the requirements which are generally applicable while proving a custom, i.e. it must be specifically pleaded, and should be ancient, certain, invariable, not opposed to public policy, and must be proved through clear and unambiguous evidence."*

In the present case, according to the Hon'ble Court, it is proved that the practice of succession of the respondents to the office of mutawalli of the Jumah mosque has been in existence since antiquity, and is certain and invariable.Referring to Section 4 of the Kazis Act and also appreciating the evidences in the case, the Hon'ble Court was of the opinion that the appellants' contention that the post of Kazi and mutawalli was the same in Lakshadweep islands and therefore if the respondents have lost the right to one office, they cannot claim the other is only partly correct because the distinction between the Kazi and mutawali came into existence only in 1970 after the coming into force of the Kazis Act in Lakshadweep and in the present case, the respondents in their plaint had clearly stated that they are claiming the office of "mutawalli-cum-Traditional Kazi" of the Jumah mosque specifically whereas the Kazis Act pertains to the appointment of a Kazi for a local area where his presence may be required for performing certain rites and ceremonies.

The Hon'ble Court further held regarding customary right that in any event, a singular artificial break or gap in the exercise of a customary right, that too by executive orders, would not lead to abrogation of the customary right itself, unless such break constitutes a recurring infringement or leads to conferment of title in the opposite party and on this ground as per the evidences adduced, the appellant's argument failed.

Regarding the contention of the Appellants that the violations of Order XXIII Rule 3B, CPC while passing the compromise decree dated 16.02.1981 in O.S. No. 10/1974 are merely procedural and do not vitiate the decree, the Hon'ble Court expressed its disagreement and observed that the object of Order I Rule 8 is to facilitate the decision of questions in which a large number of persons are interested without recourse to ordinary procedure. Per Order

XXIII Rule 3B, in order to compromise in a representative suit, it is necessary to obtain the leave of the Court. Before grant of leave to compromise, the Court needs to give notice in such a manner as it may think fit, to such persons as may appear to it to be interested in the suit. The Hon'ble Court further held :-

> *"It is pertinent to note that it is not clear whether the suitin O.S. No. 10/1974 was filed under Order I Rule 8 or not. Evenassuming that we accept the respondents' contention that thesaid suit was not strictly filed under Order I Rule 8, it would beregarded in the nature of a representative suit for the purposes ofExplanation (c) to Order XXIII Rule 3B. Explanation (c) providesthat the term 'representative suit' includes suits where thecompromise decree passed therein becomes binding on personsnot named as parties to the suit. In O.S. No. 10/1974, PattakalKoyammakoya was representing the respondent family's interestsin his capacity as Karanavan of the family. Hence the compromisedecree, if upheld, would prejudice the family's customary right tothe office of mutawalli and the terms thereof would become finaland binding by virtue of Section 96(3), CPC. Thus, it is clear thatthe two conditions mentioned supra in relation to representativesuits have to be complied with if the compromise decree passed inO.S. No. 10/1974 is to be held valid."*

The Hon'ble Court held that the parties to the decree did not obtain leave of the court and did not give notice to other persons who were interested in the suit, i.e., members of the Pattakal family, as required under Order XXIII Rule 3B.Such violations of Order XXII Rule 3-B cannot be said to be merely procedural, and go to the root of the matter since they deprive the affected parties of the chance to question the terms of the compromise that they are going to be bound by and since the essential conditions had not been fulfilled, the compromise decree cannot be said to be valid. The Hon'ble Court also found that the compromise decree is also illegal insofar as it fails to comply with Section 60 of the Wakf Act, 1954, which provides that no suit in any Court by or against the mutawalli of a wakf relating to the rights of the mutawalli shall be compromised without the sanction of the Wakf Board.

Based on the discussions made hereinabove, the Hon'ble Court dismissed the appeals and confirmed the impugned judgment and order.

5. *Municipal Corporation of Delhi v. Surender Singh and Others, (2019 SCC OnLine SC 954)*

Decided on : - 01.08.2019

Bench :- 1. Hon'ble Ms. Justice R. Banumathi
2. Hon'ble Mr. Justice A.S. Bopanna

(It is not a rule of universal application that whenever vacancies exist persons who are in the merit list per force have to be appointed. If the employer fixes the cut-off position the same is not to be tinkered with unless it is totally irrational or tainted with malafides.)

Facts

The DelhiSubordinate Services Selection Board ("DSSSB" for short)had issued an Advertisement bearing No.1/2006 forappointment of Assistant Teacher (Primary) in theschools of the appellant herein, namely, the MunicipalCorporation of Delhi ("MCD" for short). The candidates selected through the said process was to be sent to the appellant-MCD on getting the request from them through the Competent Authority. The DSSSB had also the right to fix the period for which the panel would be valid. In the Mode of Selection indicated in the Advertisement No.1/2006, a discretion was provided to the DSSSB to fix the minimum qualifying marks for selection for each category in order to achieve qualitative selection and to pick up the best talent available. The same was contained in Clause 25, while Clause 26 provided that the marks obtained by the candidates in a written examination will not be disclosed in any case.

The written examination was accordingly conducted on 02.07.2006. The Advertisement no doubt did not specify any cut-off qualifying marks in the said examination. On completion of the process of the written examination, the merit list was published but neither the private respondents herein nor the other petitioners/appellants before the High Court had qualified. It is in that light the private respondents herein filed the Writ Petitions. Certain other candidates who did not qualify had also filed similar writ petitions. Hence all these writ petitions were clubbed and considered together. The writ petitions by the Respondents were dismissed and an LPA was preferred which was allowed and, therefore, the same was challenged before the Supreme Court by the Appellants.

Observations and Decision

The Hon'ble Court held that the Respondents despite being aware of the Clause providing discretion to DSSSB to fix the minimum qualifying marks, they have participated in the selection process by appearing for the qualifying examination without raising any protest. In that circumstance, the principle of approbate and reprobate would apply and the private respondents herein or any other candidate who participated in the process cannot be heard to complain in that regard.

The Hon'ble Court further referred the case of*Ashwani Kumar Singh v. U.P. Public Service*

Commission & Ors.[16] and held that it is not a rule of universal application that whenever vacancies exist persons who are in the merit list per force have to be appointed. If the employer fixes the cut-off position the same is not to be tinkered with unless it is totally irrational or tainted with malafides. The decision of the employer to appoint a particular number of candidates cannot be interfered with unless it is irrational or malafide.

Observing the aforesaid, the Hon'ble Court allowed the appeal and held :-

> *"20. In that background when the DSSSB and theappellant herein were concerned with the quality ofteachers to be recruited and had fixed a merit bar toindicate that the persons obtaining the percentage ofmarks above such bar only would be selected, theemployer cannot be forced to lower the bar and recruitteachers who do not possesses the knowledge to thedesired extent merely because certain posts hadremained vacant which in any event would be carriedover to the next recruitment.*
>
> *21. In the instant facts the details were also availablebefore the Division Bench that in between the percentageas obtained by the last selected candidate at 89.25 percent and the percentage of marks obtained by the secondprivate respondent herein at 87 per cent there were 273candidates in all in the said range. Despite theavailability of the persons who had obtained higherpercentage of marks than the second private respondentherein, the Division Bench erred in issuing direction toselect the private respondents herein. The learnedcounsel for the respondents no doubt sought to rely onthe decision of this Court in the case of U.P. Jal Nigam& Anr. (supra) which was taken note by the DivisionBench to contend that though there were othercandidates who had obtained higher percentage of marksthan the private respondents herein, the direction issuedto select the private respondents herein would not affectthe interest of the appellant MCD since at this junctureno other candidate can seek for relief, not having chosento agitate their rights at an earlier point of time and inthat circumstance the relief granted to the privaterespondents being an equitable relief does not call forinterference.*
>
> * * * * *
>
> *23. Any undue sympathy shown to the privaterespondents herein so as to direct their selection despitenot possessing the desired merit would amount tointerference with the right of the employer to havesuitable candidates and would also cause injustice to theother candidates who had participated in the process andhad secured a better percentage of marks than theprivate respondents herein but lower than the cut-offpercentage and had accepted the legal position withregard to the employer's right in selection process....."*

[16] (2003) 11 SCC 584.

6. *Manoharan v. State by Inspector of Police, (2019 SCC OnLine SC 951)*

Decided on :- 01.08.2019

Bench :- 1. Hon'ble Mr. Justice R.F. Nariman
2. Hon'ble Mr. Justice Surya Kant
3. Hon'ble Mr. Justice Sanjiv Khanna

(Balancing of aggravating circumstances with mitigating circumstances to find that the crime committed was cold blooded and involved the rape of a minor girl and murder of two children in the most heinous manner – death sentence affirmed)

Facts

This was a case of gang rape of a minor and murder of two children. The trial court in a detailed judgment ultimately held the Appellant guilty under Section 120-B, Section 364-A, Section 376, Section 302, Section 302 read with Section 34 and Section 201 of the Indian Penal Code. Under Section 376 IPC, the Appellant was awarded life sentence, and for the offence under Section 302 IPC, he was given the death sentence. The High Court of Madras, in the impugned judgment dated 24.3.2014, set aside the Appellant's conviction under Section 120-B and 364-A of the Penal Code, but confirmed the sentences under Sections 376, 302, Section 302 read with Section 34, and Section 201. After considering aggravating and mitigating circumstances, ultimately the death sentence imposed by the trial court was confirmed by the High Court. When it came to confirming the death sentence, the High Court held:—

> *"82. In this case, the aggravating circumstances are:*
>
> *(i) The offence is one of rape of a minor and murder of two children;*
>
> *(ii) The hands of 'X' were tied behind and one after the other they have raped her;*
>
> *(iii) After committing rape, cow dung powder which contains auramine and which is normally used for committing suicide was purchased from a shop and milk was purchased from another shop.*
>
> *(iv) Thereafter, they mixed the cow dung powder and milk and filled it in a water bottle and gave it to the children. Both the children drank a little bit of it and spit the balance in the car. Then the accused realised that since the children had spit the milk mixed with poison, they may not die. They wanted to make sure that the children die and so they took the children to Deepalapatti, a secluded place in the outskirts of Coimbatore District, where the P.A.P. canal flows with gusto.*
>
> *(v) They pushed one child after the other and the body of the children were recovered several kilometres away in the canal. Manoharan pushed 'Y' and the body was recovered 12 km away from Deepalapatti two days later. Here both the victims were innocent, helpless and defenceless children.*

83. MITIGATING CIRCUMSTANCES: There is nothing to suggest that Manoharan suffered from any emotional or mental imbalance or disturbance or was under any external provocation while committing this offence. As regards the chances of him not indulging in commission of such a crime again, we find that even in his letter addressed to the learned Sessions Judge, he was trying to fix the responsibility on Mohanakrishnan and was attempting to absolve himself completely of the offence. He went to the extent of even charging that the Magistrate had colluded with the police in recording the confession by seeing the videograph. There does not seem to be any remorse shown by Manoharan.

84. CRIME TEST: The victim in this case were 10 and 7 years old and they were defenceless. The victim 'X' was first raped by Mohanakrishnan; Manoharan committed rape and since she cried, he committed sodomy. Since that also did not satisfy him, he masturbated in order to release his excitement in the presence of the children. They were administered poison and then to be doubly sure that they die, they were pushed into the running waters.

85. CRIMINAL TEST: Manoharan is an able bodied person and is aged about 23 years. As stated earlier, he does not seem to show any inkling of reformation. Therefore, we hold that the criminal test is also satisfied.

86. RR TEST:

This is society centric test and not judge centric test, i.e. whether the society will approve the awarding of death sentence to certain types of crime or not. In Sevaka Perumal v. State of Tamil Nadu [(1991) 3 SCC 471] the Supreme Court has said :

"The "rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act or any spur of the moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death sentence may be the most appropriate punishment for such a ghastly crime."

In this case also, the accused will be a menace to the society as could be inferred in the manner in which he raped a 10-year old child and pushed a 7-year old boy in the canal. Hence, the R.R. test is also satisfied."

Observations and Decision

The Apex Court referred to a plethora of judgments on rape and murder after referring to Macchi Singh v. State of Punjab[17]. The cases are as follows:

Mukesh* v. *State (NCT of Delhi)*,[18] *Dhananjoy Chatterjee* v. *State of West Bengal*,[19] *Laxman Naik* v. *State of Orissa*,[20] *Bantu* v. *State of U.P.*,[21] and *Rajendra Pralhadrao

[17] (1983) 3 SCC 470
[18] (2017) 6 SCC 1
[19] (1994) 2 SCC 220
[20] (1994) 3 SCC 381
[21] (2008) 11 SCC 113

***Wasnik* v. *State of Maharashtra*,[22] *Akhtar* v. *State of U.P.*,[23] *State of Maharashtra* v. *Bharat Fakira Dhiwar*,[24] *Vasanta Sampat Dupare* v. *State of Maharashtra*[25]** .

The Apex Court observed that the present case consists of a shocking crime in as much as a young 10 year old girl has first been horribly gangraped after which she and her brother aged 7 years were done away with while they were conscious by throwing them into a canal which caused their death by drowning. On the facts of the present case there was no doubt that aggravated penetrative sexual assault was committed on the 10 year old girl by more than one person. The 10 year old girl child (who was below 12 years of age) would fall within Section 5(m) of the POCSO Act.

Further, the Apex Court noted that the trial court and High Court have correctly applied and balanced aggravating circumstances with mitigating circumstances to find that the crime committed was cold blooded and involves the rape of a minor girl and murder of two children in the most heinous fashion possible. No remorse has been shown by the Appellant at all and given the nature of the crime as stated in paragraph 84 of the High Court's judgment it is unlikely that the Appellant, if set free, would not be capable of committing such a crime yet again. The fact that the Appellant made a confessional statement would not, on the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, the Apex Court confirmed the death sentence and dismissed the appeal.

[22] (2012) 4 SCC 37
[23] (1999) 6 SCC 60
[24] (2002) 1 SCC 622
[25] (2017) 6 SCC 631

7. *Ritesh Sinha v. State of Uttar Pradesh, (2019 SCC OnLine SC 956)*

Decided on :-02.08.2019

Bench :- 1. Hon'ble Mr. Justice Ranjan Gogoi
2. Hon'ble Mr. Justice Deepak Gupta
3. Hon'ble Mr. Justice Sanjiv Khanna

(Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India.)

Facts

A First Information Report was lodged by the In-charge of the Electronics Cell of Sadar Bazar Police Station located in the district of Saharanpur of the State of Uttar Pradesh, alleging that one Dhoom Singh in association with the appellant - Ritesh Sinha, was engaged in collection of money from different people on the promise of jobs in the Police. Dhoom Singh was arrested and one mobile phone was seized from him. The Investigating Authority wanted to verify whether the recorded conversation in the mobile phone was between Dhoom Singh and the appellant - Ritesh Sinha. They, therefore, needed the voice sample of the appellant and accordingly filed an application before the Chief Judicial Magistrate praying for summoning the appellant to the Court for recording his voice sample.

The CJM, Saharanpur by order dated 8th January, 2010 issued summons to the appellant to appear before the Investigating Officer and to give his voice sample. This order of the CJM was challenged before the High Court of Allahabad under Section 482 of the Code of Criminal Procedure, 1973. The High Court having negatived the challenge made by the appellant by its order dated 9th July, 2010, the present appeal was filed. The appeal was heard and disposed of by a split verdict of a two Judge Bench of the Apex Court requiring the present reference.

Two principal questions arose for determination of the appeal:

"(1) 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?

(2) 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?"

While the first question was answered in the negative by both (Hon'ble Justice Ranjana Prakash Desai and Hon'ble Justice Aftab Alam) following the ratio of the law laid down

in ***State of Bombay v. Kathi Kalu Oghad***,[26] difference of opinion occurred insofar as second question was concerned.

Observations and Decision

In response to the first question, the Apex Court supplemented its opinion with the decision in ***State of Bombay v. Kathi Kalu Oghad*** which is reproduced below:

"*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 at least 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'.*"

(emphasis supplied)

In response to the second question, namely, whether in the absence of any specific provision in the Cr.P.C. would a Court be competent to authorize the Investigating Agency to record the voice sample of a person accused of an offence, the Apex Court answered in affirmative. The Apex Court reiterated the principle that *procedure is the handmaid and not the mistress of justice* the Apex Court proceeded to refer to ***Sushil Kumar Sen* v. *State of Bihar***[27] on this point.

Further, the Apex Court observed that in the present case, in the judgment of this Court from which the reference has emanated, the view that the law on the point should emanate from the Legislature and not from the Court is founded on two main reasons, (i) 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 and (ii) if the legislature, even while making amendments in the Criminal Procedure Code (Act No. 25 of 2005), is oblivious 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 of Cr.P.C., then it may even be

[26] A.I.R. 1961 SC 1808
[27] (1975) 1 SCC 774

contended that in the larger scheme of things the legislature is able to see something which perhaps the Court is missing.

In order to answer the first reservation, the Apex Court turned to the concurring opinion of Hon'ble Justice K. C. Dasgupta in the ***State of Bombay v. Kathi Kalu Oghad*** wherein he opined that, *"it has to be noticed that Article 20(3) of our Constitution does not say that an accused person shall not be compelled to be a witness. It says that such a person shall not be compelled to be a witness against himself..... So, when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness; it cannot however be said that he has been compelled to be a witness against himself."*

So far as the second reservation is concerned the Apex court expressed an opinion that what may appear to be legislative inaction to fill in the gaps in the Statute could be on account of justified legislative concern and exercise of care and caution. However, ***when a yawning gap in the Statute, in the considered view of the Court, calls for temporary patchwork of filling up to make the Statute effective and workable and to sub-serve societal interests a process of judicial interpretation would become inevitable.***

The exercise of jurisdiction by Constitutional Courts must be guided by contemporaneous realities/existing realities on the ground. Judicial power should not be allowed to be entrapped within inflexible parameters or guided by rigid principles. True, the judicial function is not to legislate but in a situation where the call of justice and that too of a large number who are not parties to the lis before the Court, demands expression of an opinion on a silent aspect of the Statute, such void must be filled up not only on the principle of *ejusdem generis* but on the principle of *imminent necessity* with a call to the Legislature to act promptly in the matter. The Apex Court on this point referred to its decision in ***Bangalore Water Supply & Sewerage Board v. A Rajappa***[28].

Therefore, the Apex Court concluded that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in the Apex Court under Article 142 of the Constitution of India.

On the point whether a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy under Article 20(3) of the Constitution, the Apex Court opined in view of the opinion rendered by the Apex Court in ***Modern Dental College and Research Centre v. State of Madhya Pradesh***[29], ***Gobind v. State of Madhya***

[28] (1978) 2 SCC 213
[29] (2016) 7 SCC 353

Pradesh[30] and ***K.S. Puttaswamy* v. *Union of India***[31] ,the fundamental right to privacy cannot be construed as absolute and must bow down to compelling public interest.

[30] (1975) 2 SCC 148
[31] (2017) 10 SCC 1

8. *Suryakant Baburao v. State of Maharashtra and Others, (2019 SCC OnLine SC 944)*

Decided on :-30.07.2019

Bench :- 1. Hon'ble Ms. Justice R. Banumathi
2. Hon'ble Mr. Justice A.S. Bopanna

(The courts must not only keep in view the right of the accused, but must also keep in view the interest of the victim and society at large. While it is true that the sentence imposed upon the accused should not be harsh, inadequacy of sentence may lead to sufferance of the victim and the community at large.)

Facts

When Chandrakant (PW-6) was proceeding towards his land, respondent No. 2-Devraj (A1) who along with respondent No. 3-Ashish (A2) and respondent No. 4-Balaji (A3) was standing near the mobile shop of one Prahlad Joshi, asked PW-6-Chandrakant why he obstructed respondent No. 4-Balaji (A3) from spreading the rubble in his field and there was some exchange of words between them. In this quarrel, Devraj (A1) took out pistol from his waist and fired one shot at PW-6-Chandrakant on his chest. Hearing the sound, Suryakant (PW-7), Shivaji (PW-5) and others rushed to the spot. Accused Nos. 2 and 3 were alleged to be holding stick and stone respectively in their hands. When Suryakant (PW-7) tried to intervene, accused No. 1 fired a bullet from his pistol which hit on the left knee of PW-7. When Shivaji Phad (PW-5) tried to intervene, accused persons beat him with fists and kicked and also inflicted a knife blow on him causing him grievous hurt and then accused fled away. Injured PW-6 and PW-7 were taken to hospital and were given treatment. Suryakant (PW-7) lodged the complaint based on which FIR was registered under Section 307 read with Section 34 IPC, Sections 323 and 506 IPC. On completion of investigation, charge sheet was filed against the accused under Sections 307, 323 and 506 read with Section 34 IPC and under Section 4 read with Section 25 of the Arms Act. Later, charge under Section 4 read with Section 25 of the Arms Act was altered to Section 3 read with Section 25 of the Arms Act.

In the appeal filed before the High Court, the High Court affirmed the conviction of accused No. 1-Devraj under Section 307 read with Section 34 IPC but reduced the sentence of imprisonment imposed upon him to five years. Additionally, the High Court directed accused No. 1-Devraj to pay a fine of Rs. 25,000/- with default clause. The High Court also convicted accused No. 1-Devraj under Section 326 read with Section 34 IPC and reduced the sentence of imprisonment imposed upon him to the period already undergone by him and also directed to pay a fine of Rs. 15,000/- with default clause. Insofar as conviction and sentence of imprisonment under Section 323 read with Section 34 IPC, the High Court maintained the same. The High Court acquitted accused No. 2-Ashish and accused No. 3-

Balaji from the charge under Section 307 read with Section 34 IPC and instead convicted them under Section 326 read with Section 34 IPC and imposed the sentence of imprisonment to the period already undergone by them and accused Nos. 2 and 3 were directed to pay a fine of Rs. 25,000/- each with default clause. The High Court maintained the conviction and sentence of imprisonment under Section 323 IPC read with Section 34 IPC imposed upon accused No. 2-Ashish and accused No. 3-Balaji. Out of the fine amount deposited by the accused, a sum of Rs. 60,000/- was directed to be paid to PW-6-Chandrakant and a sum of Rs. 30,000/- was ordered to be paid to PW-7-Suryakant as compensation under Section 357 Cr.P.C. Being aggrieved, injured complainant-Suryakant (PW-7) has preferred this appeal.

Observations and decision

The Apex Court opined that a person committing an offence under Section 307 IPC can be ordered to undergo imprisonment for life. To justify conviction under Section 307 IPC, intention of causing death or that it was done with the intention of causing such injury which is likely to cause death is necessary to constitute the offence. Although the nature of injury actually caused would be of considerable assistance in coming to a finding as to the intention of the accused. Such intention may also be deduced from other circumstances.

Further, the Apex Court stated that while considering the quantum of sentence, the courts are expected to consider all relevant facts and circumstances of the case, in particular, nature of injuries caused in the occurrence and the weapon used which will have bearing on the question of sentence and the Courts are bound to impose sentence commensurate with the gravity of the offence. Considering the nature of injuries caused to PW-6-Chandrakant i.e. gun shot wounds in the chest and the opinion of Doctor that the injuries caused to PW-6 are capable of causing death, the Apex Court was of the view that the High Court was not right in reducing the sentence of first accused-Devraj.

Further, the Apex Court stated that the question of awarding sentence is a matter of discretion for the courts and has to be exercised on consideration of facts and circumstances of the case. Though the court has discretion in awarding the sentence, it should be commensurate with the gravity of the offence. The court has to record brief reasons to explain the choice of sentence.

The Apex Court then referred to ***State of Punjab v. Bawa Singh***[32], ***Ravinder Singh v. State of Haryana***[33] ,and ***Sevaka Perumal v. State of Tamil Nadu***[34] on the matter of sentencing.

In ***State of Punjab v. Bawa Singh,*** it was stated:

[32] (2015) 3 SCC 441
[33] (2015) 11 SCC 588
[34] (1991) 3 SCC 471

"undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society."

In ***Sevaka Perumal v. State of Tamil Nadu***, it was stated as follows:

"undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

The Apex Court further noted that when the trial court exercised its discretion in imposing seven years of sentence of imprisonment, the High Court ought to have kept in view the weapon used by accused No. 1 and the nature of injuries caused to PW-6-Chandrakant and the opinion of the Doctor. ***The courts must not only keep in view the right of the accused, but must also keep in view the interest of the victim and society at large.*** The courts have been consistent in approach that a reasonable proportion has to be maintained between the gravity of the offence and the punishment. ***While it is true that the sentence imposed upon the accused should not be harsh, inadequacy of sentence may lead to sufferance of the victim and the community at large.***

The Apex Court opined that the High Court was not right in reducing the sentence of imprisonment imposed upon first accused-Devraj. He was sentenced to undergo rigorous imprisonment for six years and six months. Since accused Nos. 2 and 3 were not armed with the deadly weapons, the Apex Court was not inclined to interfere with their acquittal under Section 307 read with Section 34 IPC and the reduction of sentence of imprisonment under Section 326 read with Section 34 IPC.

9. *Vijay Pandey v. State of Uttar Pradesh, (2019 SCC OnLine SC 942)*

Decided on :-30.07.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Navin Sinha

(The mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and the one tested have to be co-related.)

Facts

The appellant is stated to have been carrying a plastic flour packet in his right hand leading to recovery of 10 kgs. of opium. No independent witness from the locality was included in the investigation and all the witnesses are police officials only. The appellant assailed his conviction and sentence under Sections 8 and 15 of the of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "the NDPS Act") for 15 years along with fine of Rs. 1,50,000/- under Section 31 of the NDPS Act. The Counsel for the appellant alleged false implication and contended that he was apprehended as he stepped out of his house. Also, there was no explanation for the non-availability of any independent witness in a residential locality. There is non-compliance with Section 50 of the NDPS Act. The prosecution failed to prove that the sample produced in court was the same as seized from the appellant. Counsel for the State submitted that the appellant had a previous history of two convictions under the NDPS Act and he had been a habitual offender. Section 50 had been complied with. The Trial Court had recorded its satisfaction that the sample produced in court was the same seized from the appellant.

Observations and Decision

The Apex Court opined that the seizure was at 06.40 AM at the door step of the appellant. Therefore, the Apex Court found it difficult to believe that in a rural residential locality, the police were unable to find a single independent witness. The Apex Court noted that the High Court, despite noticing the absence of any recovery memo prepared at the time of search and seizure under Section 50 of the NDPS Act, opined that the deposition of the police witness to that effect was sufficient compliance. Though the Laboratory Report was obtained, but the identity of the sample stated to have been seized from the appellant was not conclusively established by the prosecution.

The Apex Court referred to *Mohan Lal* **v.** *State of Punjab*,[35] wherein it was stated that,

[35] (2018) 17 SCC 627

"10. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35(2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of the prosecution cannot be allowed to rest on a preponderance of probabilities."

Further, the Apex Court opined that the failure of the prosecution in the present case to relate the seized sample with that seized from the appellant makes the case no different from failure to produce the seized sample itself. ***In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested have to be co-related.***

The observations in ***Vijay Jain* v. *State of Madhya Pradesh***,[36] was considered relevant :

> *"10. On the other hand, on a reading of this Court's judgment in Jitendra's case, we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in the case of Ashok (supra), this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant."*

The Apex Court also referred to ***Ashok alias Dangra Jaiswal* v. *State of Madhya Pradesh***[37] wherein it was stated:

[36] (2013) 14 SCC 527
[37] (2011) 5 SCC 123

"12. *Last but not the least, the alleged narcotic powder seized from the possession of the accused, including the appellant was never produced before the trial court as a material exhibit and once again there is no explanation for its non-production. There is, thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused.*"

The conviction by the Trial Court which was upheld by the High Court was found unsustainable by the Apex Court and was accordingly set aside. The appellant was acquitted.

10. *Mauji Ram v. State of Uttar Pradesh, (2019 SCC OnLine SC 933)*

Decided on :-29.07.2019

Bench :- 1. Hon'ble Mr. Justice Abhay Manohar Sapre
2. Hon'ble Ms. Justice Indu Malhotra

(Need for assigning the reasons while granting bail, reiterated)

Facts

Respondent No. 2 in all the appeals, namely, Subhash, Kartar, Sohit, Amarjeet, Soran Bhati, Lilu@Mahendra and Ashu @ Ashish (total-7), herein after collectively referred to as "respondents" are facing trial for commission of the offences punishable under Sections 147, 148, 149, 302, 120-B, 307, 323, 506 and 427 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") which arise out of Crime No. 608/2018 registered with P.S. Dadri, District Gautam Buddha Nagar (UP) pending in the Court of I/C Sessions Judge, Gautam Budh Nagar. These respondents were apprehended for committing the murder of one - Sumit Kumar-son of the appellant-Complainant.

The respondents (accused persons) after they were apprehended applied for grant of bail before the Sessions Court in the aforementioned trial. The Sessions Judge by order rejected the bail applications of the respondents. The respondents felt aggrieved by the rejection of their bail applications and filed the bail applications under Section 439 of the Criminal Procedure Code, 1973 (hereinafter referred to as "the Code") in the High Court of Allahabad. By impugned orders, the High Court allowed the bail applications and accordingly directed release of the respondents on bail on their furnishing security and bail bonds to the satisfaction of the Sessions Judge.

It is against these orders of the High Court, the father of the deceased has felt aggrieved and filed the appeals questioning the legality and correctness of the impugned orders.

Observations and decision

The Apex Court opined that the High Court committed jurisdictional error in passing the impugned order because while passing the impugned order, the High Court did not assign any reason whatsoever as to on what grounds, even though of a *prima facie* nature, it considered just and proper to grant bail to the respondents.

The Apex Court stated that, *" time and again this Court has emphasized the need for assigning the reasons while granting bail (see Ajay Kumar Sharma v. State of U.P.,[38] Lokesh Singh v. State of U.P.,[39] & Dataram Singh v. State of U.P.,[40] .) Though it may not be necessary to give categorical finding while granting or rejecting the*

[38] (2005) 7 SCC 507
[39] (2008) 16 SCC 753
[40] (2018) 3 SCC 22

bail for want of full evidence adduced by the prosecution as also by the defence at that stage yet it must appear from a perusal of the order that the Court has applied its mind to the relevant facts in the light of the material filed by the prosecution at the time of consideration of bail application. It is unfortunate that neither the law laid down by this Court, nor the material filed by the prosecution was taken note of by the High Court while considering the grant of bail to the respondents."

On the perusal of the FIR and keeping in view the antecedents of the accused persons which were brought on record by the State in their counter affidavit and keeping in view the manner in which the offence under Section 302 IPC was committed, the Apex Court was *prima facie* of the view that this was not a fit case for grant of bail to the accused persons (respondent No. 2 in all the appeals). The bail applications filed by the respondents (accused persons) were dismissed.

11. Union of India v. Yasmeen Mohammad Zahid @ Yasmeen, (2019 SCC OnLine SC 957)

Decided on :- 02.08.2019

Bench :- 1. Hon'ble Mr. Justice R.F. Nariman
2. Hon'ble Ms. Justice Indu Malhotra

(No room for invoking sympathetic considerations where the intensity of participation and involvement in terrorist activities were clearly made out)

Facts

A preliminary investigation was undertaken in pursuance of a complaint which revealed that 14 persons had left India to join Islamic State of Iraq and Seria (ISIS) which is declared to be a terrorist organisation (Serial No. 38 in the First Schedule to the UAPA). During the course of investigation, A2-Yasmeen was arrested on 01.08.2016 at Indira Gandhi International Airport, New Delhi while she was attempting to travel to Afghanistan along with her child. According to the prosecution, there was a criminal conspiracy between original Accused No. 1 (husband of A2 Yasmeen) and A2-Yasmeen from 2015 pursuant to which conspiracy A1 and A3 to A15 left India and joined ISIS in Afghanistan; and A2-Yasmeen was an active participant supporting terrorist activities of ISIS; and she had raised funds to further the activities of ISIS and had received funds which were utilised for supporting the activities of ISIS.

Out of 15 accused named in the charge-sheet all the other accused were declared to be absconding and A2-Yasmeen alone was sent up for trial for the offences punishable under Section 120B IPC, Section 125 IPC and under Sections 38, 39 and 40 of the UAPA.

The judgment and order passed by the High Court of Kerala gave rise to the two appeals, one by Union of India against acquittal of A2-Yasmeen in respect of offences punishable under Section 125 of the Indian Penal Code ("IPC" for short), Sections 39 and 40 of the Unlawful Activities (Prevention) Act, 1967 (UAPA for short) and also against reduction in sentence ordered by the High Court for offences under Section 120B of IPC and Section 38 of the UAPA, while said A2- Yasmeen was in appeal against her conviction and sentence under Section 120B IPC and Section 38 of the UAPA.

Observations and Decision

The Apex Court observed that the evidence on record established that A1 was propagating the ideology of IS and advocating, among other things, war against non-Muslims; that the classes were attended by A2-Yasmeen; that the videos relating to such speeches were found

on her person when she was arrested; and that she was attempting to go to Afghanistan at the instance of A1. These features definitely point the existence of *mens rea*. The Courts below were therefore absolutely right in recording conviction against A2 in respect of offences under Section 120B IPC and Section 38 of the UAPA.

The Apex Court opined that the acquittal in respect of charges under Sections 39 and 40 of UAPA was rightly recorded by the High Court as none of the requisite elements of section 39 and 40 of the UAPA were established against her.

However, the Apex Court clarified the scope of section 38 and 39 of the UAPA. The Apex Court noted that the scope of these two Sections and their fields of operation are different. ***One deals with association with a terrorist organisation with intention to further its activities while the other deals with garnering support for the terrorist organisation, not restricted to provide money; or assisting in arranging or managing meetings; or addressing a meeting for encouraging support for the terrorist organisation***.

Regarding the quantum of sentence in respect of offences where A2-Yasmeen has been found guilty, the Apex court said that the material on record indicated the role played by A2-Yasmeen. Even at the time of her arrest, while leaving for Afghanistan, certain objectionable material was found on her person. The intensity of her participation and involvement were clearly made out. In the circumstances, there was no room for invoking sympathetic considerations. The quantum of sentence imposed by the trial court was found to be correct and adequate. Therefore, the Appeal preferred by the Union as regards reduction of sentence awarded to A2-Yasmeen for offences under Section 120B IPC and Section 38 of the UAPA was allowed. The order passed by the High Court in that behalf was set aside and the sentence imposed by the trial court in respect of offences under Section 120B IPC and Section 38 of the UAPA against A2 was restored.

12. *Shashi Bhusan Prasad v. Inspector General Central Industrial Security Force and Others, (2019 SCC OnLine SC 952)*

Decided on :-01.08.2019

Bench :- 1. Hon'ble Mr. Justice N.V. Ramana
2. Hon'ble Mr. Justice Mohan M. Shantanagoudar
3. Hon'ble Mr. Justice Ajay Rastogi

(Acquittal by the Court of competent jurisdiction in a judicial proceeding does not ipso facto absolve the delinquent from the liability under the disciplinary jurisdiction of the authority.)

Facts

A criminal case was instituted against the appellant under Section 25(1) of the Arms Act while serving as Constable in Central Industrial Security Force Unit, and he was arrested on 30th November, 1992 on the allegation that he had provided a country made revolver to one Subash Chandra Agarwalla, who murdered his aunt with it, giving rise to Sessions Trial No. 188/41 of 1993. At the same time, for a gross misconduct being committed by him in discharge of his duties, disciplinary proceedings were initiated against him by serving a Memorandum along with the charge-sheet dated 9th February, 1993 under Rule 34 of CISF Rules, 1969. In the disciplinary inquiry, the Inquiry Officer recorded a finding of guilt and the charge against the delinquent appellant stood proved .The Disciplinary Authority concurred with the finding recorded by the Inquiry Officer and while upholding the guilt inflicted him with a penalty of dismissal from service vide Order dated 21st May, 1994. However, the Sessions Trial No. 188/41 of 1993 was also proceeded against him. But since the material prosecution witnesses stood hostile, he was acquitted by the competent Court of jurisdiction vide judgment dated 12th September, 1995.

Being dissatisfied with the order of dismissal passed by the Disciplinary Authority, the appellant preferred departmental appeal primarily on the ground that since he has been acquitted in the criminal case which is based on the same set of facts and evidence, the order of dismissal passed by the Disciplinary Authority is not legally sustainable. The appeal was rejected by the appellate authority vide order dated 24th April, 1996 which was further assailed before the Revisional Authority which was also dismissed. That came to be challenged in a Writ Petition before the High Court under Articles 226 and 227 of the Constitution of India. The High Court of Orissa after examining in totality the facts and circumstances of the case, dismissed the writ petition vide judgment dated 17th July, 2008 which became a subject matter of appeal before the Apex Court.

Observations and Decision

The Apex Court observed that the facts which have been inquired in a disciplinary inquiry and in the judicial proceedings undisputedly were based on different allegations and the set of evidence were not based on the same facts and circumstances and in the given situation, the very submission made by the appellant of taking the benefit of acquittal in a judicial proceedings instituted against him on the plea of having nexus with the disciplinary inquiry lost its foundation.

The Apex Court referred to ***Depot Manager A.P. State Road Transport Corporation v. Mohd. Yousuf Miya***[41] wherein the scope of departmental enquiry and judicial proceedings and the effect of acquittal by a criminal Court has been examined by a three Judge Bench of the Apex Court.

The Apex court also referred to another three judge bench decision in ***Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Limited, Haldia***[42] wherein it was held:

"The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused "beyond reasonable doubt", he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability". Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside."

In agreement with the above two judgments the Apex Court in this case held :

"it is fairly well settled that two proceedings criminal and departmental are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on an offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service Rules. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. Even the rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused beyond reasonable doubt, he cannot be convicted by a Court of law whereas in the departmental enquiry, penalty can be imposed on the delinquent on a finding recorded on the basis of 'preponderance of probability'.

[41] (1997) 2 SCC 699
[42] (2005) 7 SCC 764

Acquittal by the Court of competent jurisdiction in a judicial proceeding does not ipso facto absolve the delinquent from the liability under the disciplinary jurisdiction of the authority.

The Apex Court noted that the charge levelled against the appellant in the criminal case and departmental proceedings were on different sets of facts and evidence having no nexus/co-relationship. The appeal was dismissed.