O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2014

(OCTOBER)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY

MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL &OTHER L AWS, 2014 (OCTOBER)

I N D E X

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Or.—21 Rr.97,99,101,103 and Ss.2(2),115 of Civil Procedure Code, 1908,
Sameer Singh and Another Vs. Abdul Rab and Others, 2014-SCC-Online-SC-820.
DIPAK MISRA AND V. GOPALA GOWDA, JJ.

Decided on 14TH October , 2014

ISSUES; Decree—Execution

Powers of executing court to conduct necessary enquiry and adjudicate questions pertaining to right, title or interest in the property —

In the instant case, the Executing Court held that it had no jurisdiction to reopen and discuss the matter pertaining to the title of the parties in execution case at the instance of a third party — Executing court expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry — Said view fundamentally pertains to rectification of a jurisdictional error as there has been no adjudication — The decision rendered by the executing court is not a decree — The said order is revisable under S. 115 of the code — Appeal would not lie — Constitution of India, Art. 227.

Relevant Extracts:

As the factual matrix would unfurl, the executing court after receipt of the decree on 23.8.2006 issued notice to the 4th respondent by registered post and when the service was not effected, mode of publication was taken recourse to for appearance of the judgment-debtor. Eventually, the execution case was fixed for ex parte hearing on 9.3.2007 on the petition of the assignee-decree-holder. After following the procedure, the scheduled property was put up for sale by way of auction and ultimately Abdul Rafai, respondent No. 2, purchased the property and pursuant to the order of the Court took over possession of the said immovable property.

As the factual narration would further undrape, at the said juncture, the present appellants filed an application under Order XXI, Rules 97, 99 and 101 of the Code of Civil Procedure (C.P.C) contending, inter alia, that the disputed property originally belonged to the 4th respondent who had borrowed a sum of Rs. 14,571/- from his deceased father, Gopal Singh, by depositing the sale deeds of the said property on 18.2.1971 at Calcutta and had delivered

possession of the said property to Gopal Singh on 19.2.1971 in lieu of interest of said borrowed amount. When he failed to pay the borrowed sum, the 4th respondent agreed to transfer the said property for a consideration of Rs. 25,000/- to Gopal Singh after adjusting the borrowed amount i.e Rs. 14,571/-. Regard being had to the said arrangement, Gopal Singh had paid the balance amount of Rs. 10,429/- and accordingly an agreement for sale was executed. When the 4th respondent did not honour his part of the contract, Gopal Singh instituted Title Suit No. 43 of 1974 in the Court of Sub Judge-I, Jamshedpur against the 4th respondent and eventually the said suit was decreed by the Second Additional Sub Judge-I on 14.5.1977 Thereafter, a case was filed and in pursuance of the decree a sale deed was executed on 10.10.1982 in favour of the father of the appellants through Court and he was put in possession through Nazir of the Civil Court in respect of the property in question, and after the demise of Gopal Singh, the appellants, being sons, inherited the said property and remained in possession having right, title and interest till 27.4.2008 when all of a sudden, respondent No. 2 through the help of Nazir took delivery of the property after dispossessing the appellants therefrom. On an inquiry being made, they came to know under what circumstances they had been dispossessed by the Nazir. The application further asserted that the schedule of property which had been appended to Execution Case No. 24 of 2006 had been deliberately added though the 4th respondent had no concern with the same. It was also put forth that an order of attachment was published in a local daily 'Uditwani' dated 23.10.1982 in respect of the scheduled property by the High Court of Calcutta in Suit No. 480 of 1971 and the father of the appellants coming to know of the same had filed an objection before the High Court which after considering the objection and taking note of the right, title and interest of the father of the appellants had released the said property from attachment but the 1st respondent by suppressing all the facts got the said schedule of property attached and put the same in auction and respondent No. 2 who was set up by the respondent No. 1 became the purchaser of the property. In essence, it had been pleaded that respondent Nos. 1 and 2 had colluded to put the property to auction which did not belong to the respondent No. 4 and was not meant for attachment and sale, for it had been already released by the High Court of Calcutta and, in any case, the respondent No. 4 had no concern with the said property. In the application it was prayed that the appellants, the applicants in the court below, should be put in possession of the scheduled property and the respondents be restrained from changing the nature and character of the property till the

adjudication of the application. The said application was resisted by respondent Nos. 1 and 2, the opposite parties No. 1 and 2 before the executing court, on many a ground and basically reasseverating the facts how the decree had been passed by the High Court of Calcutta and how there had been a deed of assignment and further the fairness of procedure adopted in putting the property to auction and the eventual sale.

The executing court framed two issues which read as follows:-

"I. Whether the transferee executing court has jurisdiction to adjudicate the present petition filed by the applicants under order XXI rules 97, 99 and 101 C.P.C?

II. Whether the applicants are entitled to get as relief in claim in their application?"

The learned Single Judge accepted the preliminary objection on the foundation that dispute between parties regarding jurisdiction of executing court could be determined under Order XXI, Rule 100 of C.P.C and that when a decision had been rendered on that score it would be a deemed decree under Order XXI, Rule 103 of C.P.C and hence, the writ petition was not maintainable. Expression of aforesaid view entailed dismissal of the writ petition. Hence, the present appeal by special leave.

We have heard Mr. Saurabh S. Sinha, learned counsel for the appellants and Mr. Jayesh Gaurav, learned counsel for the respondents. Assailing the impugned order it is contended by Mr. Sinha that the learned Single Judge has failed to appreciate the language employed in Order XXI, Rules 97 to 103 which commands the executing court to adjudicate the controversy pertaining to all the aspects and, therefore, when the executing Court has only opined that it has become functus officio, the said order cannot be treated as a decree. It is urged by him that the said order tantamounts to refusal of exercise of jurisdiction duly vested in a Court and, therefore, such an error has to be rectified in exercise of the power of superintendence by the High Court under Article 227 of the Constitution of India. It is his further submission that the view expressed by the High Court is fallacious as far as its understanding of the ratio of the decision in *Babulal* v. *Raj Kumar*[1]. To pyramid the submission that there has to be an adjudication as warranted in law, learned counsel has placed reliance on *Ghasi Ram* v. *Chait Ram Saini*[2] and *Ram Kumar Tiwari* v. *Deenanath*[3]

To appreciate the submissions raised at the Bar, it is necessary to appreciate the whole gamut of provisions contained in Order XXI, Rules 97 to 103 of CPC and the fundamental objects behind the same. Rule 97 deals with resistance or obstruction to possession by the holder of a decree for possession or the purchaser of any such property sold in execution of a decree. It empowers such a person to file an application to the Court complaining of such resistance or obstruction and requires the Court under sub-rule (2) to adjudicate upon the application in accordance with the provisions provided therein. Rule 99 deals with dispossession by decree-holder or purchaser. It stipulates that where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the 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. The Court is obliged to adjudicate such an application. Thus this rule, as is manifest, includes any person other than the judgment-debtor. Rule 101 deals with the questions to be determined. It provides that 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 an application and not by a separate suit and for the said purpose, the executing court has been conferred the jurisdiction to decide the same. Rule 100 deals with orders to be passed upon application complaining of dispossession. It is apt to reproduce the said rule:-

> "Rule 100. Order to be passed upon application complaining of dispossession.- Upon the determination of the questions referred in Rule 101, the Court shall, in accordance with such determination,-
>
> make an order allowing the application and directing that the applicant be put into possession of the property or dismissing the application; or
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> (b) pass such order as, in the circumstances of the case, it may deem fit."

The court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained Code, enjoins the executing court to

adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing court. Order XXI, Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree. If a court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under Article 227 of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it.

Whether the executing court, in the obtaining circumstances, has correctly expressed the view that it has become functus officio or not and thereby it has jurisdiction or not, fundamentally pertains to rectification of a jurisdictional error. It is so as there has been no adjudication. If a subordinate court exercises its jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order under Section 115 of the Code is revisable. The High Court has fallen into error by opining that the decision rendered by the executing court is a decree and, therefore, an appeal should have been filed, and resultantly allow the appeal and set aside the impugned order. In *Ghasi Ram* case while making a distinction between the provisions prior to the amendment brought in 1976 in CPC and the situation after the amendment, a two-Judge Bench observed thus:-

> "**The position has changed after amendment of the Code of Civil Procedure by the Amendment Act of 1976. Now, under the amended provisions, all questions, including right, title, interests in the property arising between the parties to the proceedings under Rule 97, have to be adjudicated by the executing court itself and not left to be decided by way of a fresh suit."**

Whether the executing court, in the obtaining circumstances, has correctly expressed the view that it has become functus officio or not and thereby it has jurisdiction or not, fundamentally pertains to rectification of a jurisdictional error. It is so as there has been no adjudication. If a subordinate court exercises its jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order under Section 115 of the Code is revisable as has been held in *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury*. The same principle has been reiterated in *Keshardeo Chamria* v. *Radha Kissan Chamria*[5] and *Chaube Jagdish Prasad* v. *Ganga Prasad Chaturvedi*[6]. Needless to emphasise, the said principle is well-settled. After the amendment of Section 115, C.P.C w.e.f 1.7.2002, the said power is exercised under Article 227 of the Constitution as per the principle laid down in *Surya Dev Rai* (supra). Had the executing court apart from expressing the view that it had become functus officio had adjudicated the issues on merits, the question would have been different, for in that event there would have been an adjudication.

In view of the forgoing analysis, we conclude and hold that the High Court has fallen into error by opining that the decision rendered by the executing court is a decree and, therefore, an appeal should have been filed, and resultantly allow the appeal and set aside the impugned order. The High Court shall decide the matter as necessary under Article 227 of the Constitution of India. As a long span of time has expired we would request the High Court to dispose of the matter within a period of three months. There shall be no order as to costs

Cases referred:-

1. Ghasi Ram V. Chait Ram Saini (1998)-6-SCC-200
2. Ram Kumar Tiwari V. Deenanath-AIR-2002-Chhatttisgarh-1.
3. Rajeswari V. S.N. Kulasekaran-2006-4-SCC-412.
4. Joy Chand Lal Babu V.Kamalaksha Chaudhury-AIR-1949-PC-239.
5. Keshardeo Chamria V. Radha Kissan Charmria-AIR-1953-SC-23.
6. Chaube Jagdish Prasad V. Ganga Prasad Chaturvedi-AIR-1959-SC-492.

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Sec.-3 of Civil Procedure Code, 1908,
Vishwa Lochan Madan Vs. Union of India & Others., AIR-2014 Supreme Court-2957.
CHANDRAMAULI Kr. PRASAD AND PINAKI CHANDRA GHOSE, JJ.

Decided on 7TH July , 2014

ISSUES: A fatwa is an opinion, only an expert is expected to give—It is not a decree, not binding on the Court or the State or the individual—It is not sanctioned under the Constitution scheme. Court—Dar-ul-Qazas and Nizam-e-Qaza—Is neither created nor sanctioned by any law made by competent legislature—Has no authority to enforce its opinion or fatwa—As such Dar-ul-Qazas and Nizam-e-Qaza do not satisfy fundamentals of judicial system—Fatwas issued by such bodies have no legal sanctity and cannot be enforced by any legal process—Cannot be said that that Dar-ul-Qazas and Nizam-e-Qaza are running a parallel judicial system.

Muslim law—Shariat Courts—Not Court established by law—Not part of the corpus juris of State—Opinion expressed has no legal sanctity—Not enforceable.

The adjudication by a legal authority sanctioned by law is enforceable and binding and meant to be obeyed unless upset by an authority provided by law itself. The power to adjudicate must flow from a validly made law. Persons deriving benefit from the adjudication must have the right to enforce it land the person required to make provision in terms of adjudication has to comply that and on its failure consequences as provided in law is to ensue. These are the fundamentals of any legal judicial system, Dar-ul-Qaza is neither created nor sanctioned by any law made by the competent legislature. Therefore, the opinion or the Fatwa issued by Dar-ul-Qaza or for that matter anybody is not adjudication of dispute by any authority under a judicial system sanctioned by law. A Qazi or Mufti has no authority or powers to impose his opinion and enforce his Fatwa on any one by any coercive method. In fact, whatever may be the status of Fatwa during Mogul or British Rule, it has no place in

independent India under our Constitutional scheme. It has no legal sanction and cannot be enforced by any legal process either by the Dar-ul-Qaza issuing that or the person concerned or for that matter anybody. The person or the body concerned may ignore it land lit will not be necessary for anybody to challenge it before any court of flaw. It can simply be ignored. In case any person or body tries to impose it, their act would be illegal. Dar-ul-Qazas and Nizam-e-Qaza cannot be said to be running a parallel judicial system.

A Fatwa is an opinion, only an expert is expected to give. It is not a decree, not binding on the court or the State or the individual. It lis not sanctioned under our Constitutional scheme. But this does not mean that existence of Dar-ul-Qaza or for that matter practice of issuing Fatwas are themselves illegal. It is informal justice delivery system with an objective of bringing about amicable settlement between the parties. It is within the discretion of the persons concerned either to accept, ignore or reject it. However, as the Fatwa gets strength from the religion; it causes serious psychological impact on the4 person intending not to abide by that. Having regard to the fact that a Fatwa has the potential of causing immense devastation, issuance of Fatwa on rights, status and obligation of individual Muslim would not be permissible. Unless asked for by the person concerned or in case of incapacity, by the person interested. Fatwas touching upon the rights of an individual at the instance of rank strangers may cause irreparable damage and therefore, would be absolutely uncalled for. It shall be in violation of basic human rights. It cannot be used to punish innocent.

Order-41, Rr-17,17(2) & 19 of Civil Procedure Code,1908.

Harbans Pershad Jaiswal (D) by LRs Vs. Urmila Devi Jaiswal (D) by LRs. AIR-2014 Supreme Court-3032.

SURINDER SINGH NIJJAR AND A.K.SIKRI, JJ.

Decided on 21ST April , 2014

ISSUES: Appeal—Nobody appeared on behalf of respondents—Order allowing it ex-parte—Was proper—Cannot be set aside in absence of sufficient cause for non-appearance. Non-appearance by appellant—Appeal could not have been heard on merits—Court could only dismiss it in default—No sufficient cause was shown for non-appearance by appellants—Thus even if order of High Court deciding said appeal on merits was treated as not proper and substituted it with order dismissing said appeal in default—There is no reason to recall order dismissing appeal in default.

The plea of the appellants was that in the absence of their counsel, appeal filed by them could not have been decided on merits and the only course open to the Court was to dismiss the appeal in default, as that is the only permissible course of action provided inn Order-XLI, Rule-17 of the Code of Civil Procedure in such an eventuality. This argument, however, did not impress the High Court. A perusal of the order of the High Court would also demonstrate that the High Court was not impressed with the argument that non-appearance of the counsel for the appellants was bona fide or there was sufficient cause shown for the counsel's absence. In fact, a perusal of docket proceeding lin appeal of the respondents indicated that another single Judge had heard common arguments in both appeals on an earlier occasion and even the judgment was reserved. However, owing to the fact that he was subsequently appointed as Chairman, Andhra Pradesh Administrative Tribunal and could not deliver the judgment, the appeals were directed to be listed for hearing afresh. The record was not showing as to who was represented appellants at that time and advanced the arguments. Therefore, the appellants could not feign absence of their earlier counsel Ms. .B. Shalini Saxena. In any case, as pointed out above, the High Court found that

there was no sufficient cause shown for non-appearance of Ms. B. Shalini Saxena.

Reverting to the facts of the present case, as already pointed out above, the respondent had filed the Suit seeking partition of two properties claiming half share each in both these properties mentioned in Schedules-A and B. The trial court had decreed the Suit in respect of Schedule-B property but dismissed the same qua Schedule-A property. Both the parties had gone in appeal. In so far as appeal of the respondent is concerned, the same has been allowed ex-parte as nobody appeared on behalf of the appellants. This course of action was available to the High Court as sub-rule(2) of Order-XLI,Rule-17 categorically permits it. Though the appellants moved application for setting aside this order, the same was dismissed on the ground that no reasonable or sufficient cause for non-appearance was shown. Therefore, this part of the order of the High Court is without blemish and is not to be interfered with. Appeal their against is dismissed. In so far as appeal of the appellants against grant of preliminary decree in respect of Schedule-B is concerned, it could not have been heard on merits in the absence of the appellant. The Court could only dismiss it in default.

Having said so, the question that arises is that even if the appeal was to be dismissed in default, whether that order warranted to be recalled on application made by the appellants. As is clear from the reading of Rule-19 of Order-XLI, the appellants were supposed to show sufficient cause for their non-appearance. The High Court has given categorical finding that no such cause is shown. The learned senior counsel for the appellants did not even address on this aspect or argued that the reason given by the appellant in the application filed before the High Court for non-appearance amounted to sufficient cause and the order of the High Court is erroneous on this aspect. As a result, even if we treat the order of the High Court deciding the appeal of the appellants on merits was not proper and proceed further by substituting it with the order dismissing the said appeal in default, we do not find any reason to recall the order dismissing the appeal in default.

As a consequence, these appeals fail and are hereby dismissed.

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Sections-320,482 of Criminal Procedure Code,1974

Yogendra Yadav & Ors. Vs. The State of Jharkhand & Anr., AIR-2014 Supreme Court-3055.

Smt. RANJANA PRAKASH DESAI AND N.V. RAMANA, JJ.

Decided on 21ST July , 2014

ISSUES;- Compounding of offences—Inherent powers—FIR lodged against appellants for offences under Ss.326 and 307 of Penal Code which are non-compoundable offences—Affidavit filed by complainant stating about filing of compromise petition—Also stating that appellants are neighbours and that they are living peacefully—In view of compromise, proceedings against appellants, quashed.

Offences which are non-compoundable cannot be compounded by the court. Courts draw the power of compounding offences from Section-320 of the Code. The said provision has to be strictly followed. However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section-482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each. Offences which involve moral turpitude, grave offences like rape, murder etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace. In the

present case, affidavit has been filed by complainant stating that a compromise petition has been filed in the lower court. It is further stated that he and the appellants are neighbours, that there is harmonious relationship between the two sides and that they are living peacefully. He has further stated that he does not want to contest the present appeal and he has no grievance against the appellants.

Now, the question before this Court is whether this Court can compound the offences under Section-326 and 307 of the IPC which are non-compoundable. Needless to say that offences which are non-compoundable cannot be compounded by the court. Courts draw the power of compounding offences from Section-320 of the Code. The said provision has to be strictly followed (Guan Singh V. State of Punjab). However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section-482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of leach case. Offences which involve moral turpitude, grave offences like rape, murder etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High Court is convinced that the offences are entirely personal inn nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends so justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace.

Learned counsel for the parties have requested this Court that the impugned order be set aside as the High Court has not noticed the correct position in law in regard to quashing of criminal proceedings when there is

a compromise. Affidavit has been filed in this Court by complainant-Anil Mandal, who is respondent No.2 herein. In the affidavit he has stated that a compromise petition has been filed in the lower court. It is further stated that he and the appellants are neighbours, that there is harmonious relationship between the two sides and that they are living peacefully. He has further stated that he does not want to contest the present appeal and he has no grievance against the appellants. Learned counsel for the parties has confirmed that the disputes between the parties are settled that parties are abiding by the compromise deed and living peacefully.

In view of the compromise and in view of the legal position which we have discussed hereinabove, we set aside the impugned order dated 04/07/2012 and quash the proceedings in S.C.No.9/05 pending on the file of 2nd Additional Sessions Judge, Godda. The appeal is disposed of.

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Section-167 of Criminal Procedure Code,1974

Union of India through CBI Vs. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav, AIR-2014 Supreme Court-3036.

DIPAK MISRA AND N.V. RAMANA, JJ.

Decided on 30TH June , 2014

ISSUES; Statutory bail—Grant of –Initial period for filing charge-sheet is 90 days—Prosecution neither filed charge-sheet prior to date of expiry of 90 days—Nor filed an application for extension of its time—Asking accused to file a rejoinder affidavit to application for extension of time filed subsequently—Is improper –Application for statutory bail has to be decided on same date it is filed.

In the present case, respondent arraigned as an accused for offences punishable under Ss.302,304,353,323,149,145 and 147 of Penal Code and under Sec.27 of Arms Act and under Sec.49(2)(b) of POTA was arrested in course of investigation and was sent to Judicial Custody prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. After the accused-respondent filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. The day the accused filed the application for benefit of the default provision as engrafted under proviso to sub-section(2) of Section-167 Cr.P.C. the Court required the accused to file la rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section-167(2) Cr.P.C.. It could be said that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. Thus, the order of the High Court in overturning the order refusing bail and extending the benefit to the respondent is proper.

When the charge-sheet is not filed and the right has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. The accused can avail his liberty only by filing application stating that the statutory period for filing of the challan has expired, the same has not yet been filed and an indefeasible right has accrued in his favour and further he is prepared to furnish the bail bond. Once such an application is filed, it is obligatory on the part of the Court to verify from the records as well as from the public prosecutor whether the time has expired and the charge-sheet has been filed or not or whether an application for extension which is statutorily permissible, has been filed.

Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the accused-respondent filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr. P. K. Dey, learned counsel for the appellant would submit that the same is permissible in view of the decision in Bipin Shantilal Panchal (AIR-1996-SC-2897) (supra) but on a studied scrutiny of the same we find the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the Statute i.e.,180 days. It did not address the issue what could be the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to sub-section(2) of Section-167 CrPC the Court required the accused to file la rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under section-167(2) Cr.P.C. We have

no hesitation in saying that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the so confers on him. Law has no prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it laws entitled to do so in law but made all adroit attempts to redeem the cause by its conduct.

In view of our aforesaid premised reasons we do not find any error in the order of the High Court in overturning the order refusing bail and extending the benefit to the respondent and, accordingly, the appeal fails and is hereby dismissed.

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Sec.-311 of Criminal Procedure Code, 1974,

Mannan Sk & Ors. Vs. State of West Bengal & Anr., AIR-2014 Supreme Court-2950.

SMT. RANJANA PRAKASH DESAI, AND N.V. RAMANA, JJ.

Decided on 3RD July , 2014

ISSUES: Recalling of witnesses—Power under Sec.311 is wide—Recalling is whether for filling up of lacuna or for just decision of case—Depends on facts and circumstances of each case.

Investigating Officer recorded statement of deceased—Deceased died after recording statement—Said statement inadvertently not brought on record—Prosecution wanted to treat it as dying declaration—Made application for recall of investigating officer after one month of his re-examination—It cannot be said that it was for filling lacuna—Moreover it would cause no prejudice to accused since he was knowing about the statement.

Witness once recalled—Does not prevent his further recall.

Fact that witness was once recalled does not prevent his further recall does not put any such limitation on the Court. He can still be recalled if his evidence appears to the Court to be essential to the just decision of the case.

In the instant case the Investigating Officer stated in the court that he had recorded the statement of deceased 'R'. Thus, this fact was known to the defence. He was cross-examined by the defence. Inadvertently, the said statement was not brought on record through Investigating Officer. 'R' died after the said statement was recorded. The said statement, therefore, became very vital to the prosecution. It is obvious that the prosecution wants to treat it as a dying declaration. Undoubtedly, therefore, it is an essential material to the just decision of the case. Though, the fact of the recording of this statement is deposed to by Investigating Officer, since due to oversight it was not brought on

record, application was made under Section-311 praying for recall of Investigating Officer. This cannot be termed as an inherent weakness or a latent wedge in the matrix of the prosecution case. No material lis tried to be brought on record surreptitiously to fill-up the lacuna. Since the accused knew that such a statement was recorded by Investigating Officer, no prejudice can be said to have been caused to the accused, who will undoubtedly get a chance to cross-examine him.

Secc.311 is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to lit to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it lis for just decision of a case depends on facts and circumstances of each case. In all cases it lis likely

to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

In the ultimate analysis we must record that the impugned order merits no interference. We must, however, clarify that oversight of the prosecution is not appreciated by us. But cause of justice must not be allowed to suffer because of the oversight of the prosecution. We also make it clear that whether deceased Rupchand Sk's statement recorded by PW.15-SI Dayal Mukherjee is la dying declaration or not, what is its evidentiary value are questions on which we have not expressed any opinion. If any observation of ours directly or indirectly touches upon this aspect, we make it clear that it is not our final opinion. The Trial Court seized of the case shall deal with it independently. In the result, the appeal lis dismissed. Needless to say that the interim orders passed by this Court on 15.10.2012, 03.05.2013 and 27.01.2014 staying the impugned order dated 11.05.2012 passed by the Calcutta High Court in CRR No.2385 of 2011 are vacated. The trial court shall proceed with the case and ensure that it is concluded at the earliest.

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Section-173 & 190(1)(d) of Cr.P.C.,

State of NCT of Delhi Vs. Sanjay, (2014)-59-OCR (SC)-522.

M.Y.EQBAL AND PINAKI CHANDRA GHOSE, JJ.

Decided on 4TH September, 2014

ISSUES: Cognizance of any offence punishable under the MMRD Act only upon a written complaint made by a person authorized in this behalf—Section 22 of the Act is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the river bed—Prohibition contained in Section-22 of the Act against prosecution of a person except on a complaint made by the officer is attracted only when such person sought to be prosecuted for contravention of Section-4 of the Act and not for any act or omission which constitute an offence under Indian Penal Code.

FACTS: FIR registered at police station for offences under Section-379/114/120-B/34,IPC on allegation that appellant was involved in illegal mining of sand from the Yamuna basin—FIR was registered by the police suo motu having come to know that some persons were removing and selling sand from the Yamuna Basin—On raid committed by the police, they found one bumper filled with sand—Because of non-production of any documents and valid papers, the digging equipments were seized and taken into possession and persons were arrested—FIR was registered on charges of illegal mining under Sections-379/114,IPC besides being cognizable offence under section-21(4) of the MMRD Act—Appellants challenged registration of case on the ground inter-alia that offence if at all committed, cognizance would have been taken under provisions of MMRD Act, that too on the basis of complaint to be filed under Section-22 of the Act by an authorized officer—Petition filed for quashing the FIR—Conflicting views taken by Gujarat High Court, Delhi High Court, Kerala High Court, Calcutta High Court, Madras High Court and Jharkhand High Court—Whether provisions contained in Sections-21, 22 and other Sections of MMRD Act operate as bar against prosecution of a person who has been charged with allegations which constitute offences under Section-379/114 and other provisions of Indian Penal Code.

Considering the princip0les of interpretation and the wordings used in Section-22, in our considered opinion, the provision is not a complete and absolute bar for taking action by the police for illegal and dishonestly committing theft of minerals including sand from the river bed. However, there may be situation where a person without any lease or license or any authority enters into river and extracts sands, gravels and other minerals and remove or transport those minerals in a clandestine manner with an intent to remove dishonestly those minerals from the possession of the State, is liable to be punished for committing such offence under Sections-378 and 379 of the Indian Penal Code.

From a close reading of the provisions of MMDR Act and the offence defined under Section-378, IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section-4 of the Act is an offence punishable under Section-21 of the MMDR Act, whereas dishonestly removing sand, gravels and other minerals from the river, which is the property of the State, our of State's possession without the consent, constitute an offence of theft.

Sub-section-(1A) of Section-4 of the MMDR Act puts a restriction in transporting and storing any mineral otherwise than in accordance with the provisions of the Act and the rules made thereunder. In other words no person will do mining activity without a valid lease or license. Section-21 is a penal provision according to which if a person contravenes the provisions of Sub-section (1A) of Section-4 shall be prosecuted and punished in the manner and procedure provided in the Act. Sub-section(6) has been inserted in Section-4 by amendment making the offence cognizable notwithstanding anything contained in the Code of Criminal Procedure, 1973. Section-22 of the Act puts a restriction on the Court to take cognizance of any offence punishable under the Act or any rule made thereunder except upon a complaint made by a person authorized in this behalf. It is very important to note that Section-21 does not begin with a non-obstants clause. Instead of the words " notwithstanding anything contained in any law for the time being in force

no Court shall take cognizance…..", the Section begins with the words " no Court shall take cognizance of any offence." Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such person. In other words, in a case where there is a theft of sand and gravels from the Government land, the police can register a case, investigate the same and submit a final report under Section-173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section-190 (1)(d) of the Code of Criminal Procedure.

After giving our thoughtful consideration in the matter, in the light of relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Indian Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the river beds without consent, which is the property of the State, is a distinct offence under the IPC. Hence, for the commission of offence under Section-378 Cr.P.C. on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMRD Act. Consequently the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the concerned Magistrates to proceed accordingly.

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Criminal Trial,

Mahavir Singh Vs. State of Haryana., (2014)-59-OCR (SC)-481.

Dr. B.S.CHAUHAN AND A.K. SIKRI, JJ.

Decided on 23RD May, 2014

ISSUES: Appreciation of evidence—Minor discrepancies—Bound to occur in any trial—Have to be ignored.

A large number of issues have been raised by learned counsel for the appellant particularly that independent witness had not been examined. Various issues have been raised regarding recovery of clothes of Suraj Mal, recovery of V-shaped chappals, serious discrepancies in the inquest report and recovery of the cloth of the appellant. In the Trial Court, no question had been put to Ramphal (PW.15), the Investigating Officer or Lokhpal Singh (PW.11), ASI or any other material witness who could furnish explanation for such discrepancies.

In the instant case, we had gone through the cross-examination of witnesses who could furnish an explanation for the discrepancies pointed out by learned counsel for the appellant. However, we came to the conclusion that the defence had never put any question in these regards to the material witness who could furnish the explanation for the same. So the chain of all the circumstantial evidence is complete and no link is missing and the accused persons shad an opportunity to commit the murder of the deceased.

"17. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the Court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect

the core of the prosecution case, should not be made a ground on which the evidence can rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labeled as omissions or contradictions." The omissions which amount to contradictions in material particulars i.e. materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. Where the omission(s) amount to contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the Court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.

Both the Courts below after appreciating the evidence on record held the appellant guilty of the offences. In view of the above, the appeal is devoid of merit and it is accordingly dismissed.

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Section-389 of Code of Criminal Procedure, 1973,

Sunil Kumar Vs. Vipin Kumar and Ors., (2014)-59-OCR (SC)-336.

DIPAK MISRA AND V. GOPALA GOWDA, JJ.

Decided on 7TH August, 2014

ISSUES:- Bail during pendency of appeal—Exercise of discretionary power under Section-389 Cr.P.C.

Facts:- Prosecution case that appellant, who laws at the time of incident, studying in an Engineering College, was dragged by respondents-2 and 3 into their house and they began to assault him—Hearing the cries, appellant's father and brother arrived at the scene to rescue him and in the scuffle which ensued both the father and brother of appellant got injured which led to consequential death of appellant's brother—Trial Court convicted and sentenced respondents-2 and 3 for offences under Section-302 and 307 read with 34,IPC—Convicted respondents-2 and 3 filed counter case alleging that appellant and his deceased brother had barged into their house and attempted to sexually abuse a lady in their house and this very criminal behaviour of appellant and his deceased brother gave rise to scuffle between the parties which resulted in death of brother of appellant—Appellant was however acquitted of offences under Section-376/51, 323 and 324,IPC—Respondents-2 and 3 filed appeal against their conviction while revision was filed against acquittal of appellant for offence under Section-376 IPC—Application for bail filed by respondents-2 and 3 in the appeal was allowed—High Court had taken into consideration all the relevant facts including the fact that the chance of appeal being heard in the near future is extremely remote—Whether the High Court has rightly applied its discretionary power under Section-389 Cr.P.C. to enlarge respondents on bail.

It is against this enlargement of the respondent Nos.2 and 3 on bail by the High Court that the appellant has appealed before us. It has been contended by the learned senior counsel appearing on behalf of the State that the High Court erred in granting bail to the respondents in exercise of

power under Section-389 of CrPC without assigning any legal and acceptable reason being oblivious to the nature and gravity of the offence, the evidence being led thereof and the punishment awarded by the Trial Court. It was further contended by the learned senior counsel that the deceased and the father of the appellant were assaulted with repeated blows on chest, head and shoulder. This is to say that the deceased was assaulted mercilessly by the respondents. Therefore, they do not deserve to be enlarged on bail by the High Court.

We have heard the rival legal contentions raised by both the parties. We are of the opinion that the High Court has rightly applied its discretionary power under Section-389 of CrPC to enlarge the respondents on bail. Firstly, both the Criminal Appeal and Criminal Revision filed by both the parties are pending before the High Court which means that the convictions of the respondents are not confirmed by the appellate Court. Secondly, it is an admitted fact that the respondents had been granted bail earlier and they did not misuse the liberty. Also, the respondents had conceded to the occurrence of the incident though with a different version. We are of the opinion that the High Court has taken into consideration all the relevant facts including the fact that the chance of the appeal being heard in the near future is extremely remote, hence, the High Court has released the respondents on bail on the basis of sound legal reasoning. We do not wish to interfere with the decision of the High Court at this stage. The appeal is dismissed accordingly.

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Section-300, Exceptions-5,304-1 & 302,309 of I.P.C.1860,

Narendra Vs. State of Rajasthan., (2014)-59-OCR (SC)-486.

T.S. THAKUR AND R. BANUMATHI, JJ.

Decided on 2ND September, 2014

ISSUES;- Suicide pact—Act of accused causing death of deceased in furtherance of understanding between them to commit suicide—Consent of deceased—Onus of proving consent of deceased is on the accused—Exception-5 to Section-300,IPC must receive a strict and not a liberal interpretation.

FACTS- Deceased, sister of PW.3, got married to one 'MS' but due to differences with her husband, she left her matrimonial home—Prosecution case that while staying at her parents' house, deceased developed intimacy with the accused appellant—About three months prior to the incident, deceased and accused eloped and returned to the village after 10-15 days—Since the deceased and accused were of the same gotra, their relationship was not accepted by the villagers—On 19.3.2003, parents of deceased and PW.3 went for work and PW.3 was also not at home—Deceased was all alone at her home and at about 2.30 p.m., on returning home, PW.3 found the main gate closed, and despite calling, the gate was not opened from inside—PW.3 entered into the interior open floor of the house through the outer wall, wherefrom he saw deceased and accused standing in a room with closed door—PW.3 saw the accused with a sword in his hand accused inflicted sword blows on deceased and caused stab injuries on her chest and abdomen—On hearing the arm raised by PW.3, neighbours and others came to the place of occurrence and door of the room was opened—Deceased was found on the floor with stab injuries bleeding all over and accused was also found having stab wounds in his abdomen—Defence case that accused and deceased were in love which was not accepted by the villagers and hence they tried to commit suicide in which accused survived and the deceased died—Trial Court convicted the accused-appellant under Section-309 IPC—On appeal, High Court confirmed the conviction and sentence imposed on appellant under Sections-302 and 309 IPC—Defence version of suicide pact

probabilized by facts and circumstances of the case-Whether the homicide falls under Excception-5 to Sections-300 IPC—Held,Yes—Whether conviction of appellant is to be modified under Section-304 Part-I IPC.

The essential facts are not in dispute. That deceased Nathi after leaving her matrimonial house, while she was residing at her maternal home, she has developed love and intense relationship with the accused Narendra. There is adequate evidence which clearly show the love affair between the deceased and the accused. Since the deceased and the accused were of the same gotra, their relationship was not accepted by the villagers. PW.3 admits that Nathi and accused were in love and that Nathi and the accused eloped and lived together for about 10-15 days. A panchayat was convened after Nathi returned home. In his evidence PW.3 stated that Nathi having left her previous husband, wanted to marry the accused, but to Gotra of both being one the marriage could not be held. As their desire of marriage was not accepted by the villagers, perhaps accused and the deceased were dejected.

In the present case, in our view, there are formidable circumstance discernible from the evidence which probablise the defence version which are as under;-

(a) Deceased Nathi and the accused were in love and they were intending to get married. Since they belonged to the same gotra, their relationship was not accepted by the villagers and they objected to the same;

(b) About three months prior to the incident, Nathi and accused left the village and lived together for about 10-15 days and thereafter Nathi returned to her matrimonial house;

(c) On 19.3.2003, the parents of the deceased went for work and PW.3 was also engaged in some events pertaining to Holi festival and Nathi laws alone in the house;

(d) When the accused came to the house of the deceased, he was not armed; he had taken the sword from inside the room of the house;

(e) PW.3, nowhere stated that at the time of the incident his sister quarreled with the accused. When the accused inflicted sword blows, deceased Nathi had not raised any alarm nor sho9uted for help;

(f) The accused was also having the stab injuries on his person.

In the present case, the accused has taken the defence plea of suicide pact even in the Trial Court while being questioned under Section-313 CrPC. The defence version is probabilized by the above facts and circumstances of the case. The death of deceased was not premeditated and the act of the accused causing death of Nathi, in our view, appears to be in furtherance of the understanding between them to commit suicide and the consent of the deceased and the act of the accused falls under Exception-5 of Section-300 IPC. Since the accused intentionally caused the death, the appellant is found guilty under Section-304 Part-I IPC. The appellant is stated to be in custody for more than 10 years.

In the light of the foregoing discussion, the conviction of the appellant under Section-302 IPC is modified and the appellant is convicted under Section-304 Part-I IPC and sentenced to undergo imprisonment for the period already undergone by him and the appeal is allowed in part. The sentence of imprisonment for conviction under Section-309 IPC is ordered to run concurrently. The appellant is in jail, and he be released forthwith if not required in any other case.

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Dying declaration---Evidence Act-

Umakant & Anr. Vs. State of Chhatisgarh, 2014 (II) OLR (SC)-675.

DIPAK MISRA AND N.V.RAMANA,JJ.

Decided on 1st July, 2014.

ISSUES: Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence- Dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any term of tutoring—At the same time dying declaration has to be judged and appreciated in the light of surrounding circumstances.

The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moritusus prasumitus mennre", which means, "no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth". Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death.

In spite of all the importance attached and the sanctity given to the piece of dying declaration, Courts have to be very careful while analyzing the truthfulness, genuineness of the dying declaration and should come to a proper conclusion that the dying declaration is not a product of prompting or tutoring.

In Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:

1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

2. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

4. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.

5. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

6. A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

7. Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

8. Even if it is a brief statement, it is not to be discarded.

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted. After

considering the evidence and the judgments of the Courts below, we are of the considered opinion that the evidence available on record and 8the dying declaration does not inspire confidence in the mind of this Court to make it the basis for the conviction of the appellants. Apart from this, the High Court basing on the same dying declaration, ought not to have convicted the appellants under Section 302 IPC, when they were acquitted under Section 304-B and 498-B IPC and Sections 3 and 4 of the Dowry Prohibition Act by the High Court.

Accordingly, this Criminal Appeal is allowed. The conviction and sentence imposed by the High Court vide its judgment dated 24th September, 2010 in Criminal Appeal No. 495 of 2005, against the appellants for the offence under Section 302 r/w 34 IPC, is set aside. Consequently, the appellants shall be released forthwith, if they are not required in any other case. **(Appeal allowed)**

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Section-134 of Evidence Act , 1872,

Deny Bora Vs. State of Assam., (2014)-59-OCR (SC)-501.

DIPAK MISRA AND ABHAY MANOHAR SAPRE, JJ.

Decided on 27TH August, 2014

ISSUES: Murder of a medical practitioner by firing from point blank range—Non-examination of material witnesses, wife and daughter of deceased—Conviction based on testimony of a singular witness (PW.14)—Sustainability.

FACTS: Prosecution case that on 2.3.1991 at about 6.30 p.m., deceased, a medical practitioner, while attending to the patients in his clinic, was shot by two unidentified youths from the point blank range as a consequence of which he died—Designated Court acquitted appellant for offence under TADA Act but found him guilty under Section-302 IPC—Conviction of appellant was based on testimony of PW.14 who had come forward for recording his statement under Section-161 CrPC almost after two years and eight months—Only explanation he had given was that he was threatened by the co-accused—Accused was arrested after six years—Neither the wife nor the daughter of the deceased had been examined though they were natural witnesses—Whether prosecution had been able to establish the involvement of appellant in the crime in question—Held, No---Whether conviction of appellant as recorded by the Designated Court was sustainable.

In the case at hand the learned trial Judge has placed reliance on the evidence of PW.14 who has come forward for recording his statement under Section-161 CrPC almost after two years and eight months. The only explanation he has given is that he was threatened by the co-accused Dul Bhuyan. It is interesting to note after his statement was recorded, the accused was arrested after six years and nothing happened to him during the said period. Thus the plea of threat to keep him silent for almost two years and eight months does not inspire confidence. Apart from that, as his testimony would show the accused-appellant had enquired about the deceased and he had accompanied them to the house of the deceased on one day, when the deceased Doctor was absent. His

acquaintance with the accused-appellant was hardly a fortnight old, but he along with the appellant and another had gone to the clinic of the deceased where the other person, pretending as a patient, went inside. It is in his evidence that the accused-appellant had fired at the deceased as a result of which he fell down and died. That the said witness could keep such an incident without disclosing to anyone, defies prudence and baffles commonsense. His plea of being threatened for such a long period to have the sustained silence is unacceptable and we have no hesitation in holding that his testimony is thoroughly and wholly unreliable. Therefore, we are of considered view that the conviction recorded by the Designated Court on his testimony alone without any corroboration is totally unsustainable.

In the result, we allow the appeal and set aside the judgment of conviction. If the detention of the accused-appellant is not required in connection with any other case, he be set at liberty forthwith.

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Administration of Justice,

Hindustan Petroleum Corporation Ltd. Vs. Sanjay, 2014 (II)-CLR-(SC)-705.

R.M. LODHA, CJI, DIPAK MISRA, MADAN B. LOKUR, KURIAN JOSEPH AND S. A. BOBDE, JJ.

Decided on 27TH August, 2014

ISSUES:- Appellate and Jurisdictional jurisdiction—Appeal and revision are creatures of statute—None is inherent right of litigant—Distinction—Appeal is continuation of suit or original proceeding, revision is not—Much depends on the language of the statute conferring appellate jurisdiction and revisional jurisdiction.

This group of eleven appeals and three special leave petitions has been referred to the 5-Judge Bench to resolve the conflict into the two 3-Judge Bench decisions. It is clear that there are conflicting views of coordinate three Judge Benches of this Court as to the meaning, ambit and scope of the expression 'legality and propriety' and whether in revisional jurisdiction the High Court can re-appreciate the evidence. Hence, we are of the view that the matter needs to be considered by a larger bench since this question arises in a large number of cases as similar provisions conferring power of revision exists in various rent control and other legislations, e.g. Section-397 of the Code of Criminal Procedure. Accordingly, we direct that the papers be placed before Hon'ble The Chief Justice for constituting a larger Bench."

There are other appeals/SLPs in this group of matters, some of which arise from the Kerala Buildings (Lease and Rent Control) Act, 1965 (for short, the Kerala Rent Control Act) and the few appeals/SLPs arise from the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (for short, 'the Tamil Nadu Rent Control Act'). These appeals/SLPs following the Reference Order in Hindustan Petroleum Corporation have also been referred to the 5-Judge Bench. This is how these matters have come up before us. It is appropriate to first notice the statutory provisions pertaining to revisional jurisdiction of the High Court under the above three Rent Control Acts. These provisions are not similar to Section-115 of the Code of Civil Procedure which confers revisional jurisdiction upon the High Court in the matters arising from the Courts governed by the Code.

Before we consider the matter further to find out the scope and extent of revisional jurisdiction under the above three Rent Control Acts, a quick observation about the 'appellate jurisdiction' and 'revisional

jurisdiction' is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice-versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding as the case may be. The power of the Appellate Court is co-extensive with that of the Trial Court. Ordinarily, appellate jurisdiction involves re-hearing on facts and law but such jurisdiction may be limited by the Statute itself that provides for appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of revisional Court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the tribunal/appellate authority, the decision of the revisional Court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction.

With the above general observations, we shall now endeavour to determine the extent, scope, ambit and meaning of the terms "legality or propriety" regularly, correctness, legality or propriety" and "legality, regularity or propriety" which are used in three Rent Control Acts under consideration. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription, or doctrine, the quality of being legal. The term 'propriety' means fitness, appropriateness, aptitude, suitability, appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy. The terms 'correctness' and 'propriety' ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accordance with the principles of natural justice and fair play. We have already noted in the earlier part of the judgment that although there is some difference in the language employed by the three Tent Control Acts under consideration which provide for revisional jurisdiction but, in our view the revisional power of the High Court under these Acts is substantially similar and broadly such power has the same scope save and except the power to invoke revisional jurisdiction suo motu unless so provided expressly. None of these situates confers on revisional authority the power as wide as that of "Appellate Court or appellate authority despite the power as wider than that provided in Section-115 of the Code of Civil Procedure. The provision

under consideration does not permit the High Court to invoke the revisional jurisdiction as the cloak of an appeal in disguise. Revision does not lie under these pro visions to bring the orders of the Trial Court/Rent Controller and Appellate Court/Appellate Authority for re-hearing of the issues raised in the original proceedings.

We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on reappreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding lis based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it lis not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a Court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity.

We, thus, approve the view of this Court in 'Rukmini Amma Saradamma V. Kallyani Sulochana And Others (1993) 1 SC-499 as noted by us. The decision of this Court in Ram Dass v. Ishwar Chander and Others, AIR-1988 SC-1422 must be read as explained above. The reference is answered accordingly. Civil Appeals and Special Leave Petitions shall now be posted before the regular Benches for decision in light of the above.

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Article-32 of the Constitution of India, 1950,

Saurabh Kumar Through His Father Vs. Jailor, Koneila Jail & Anr., (2014)-59-OCR (SC)-404.

T.S.THAKUR AND N.V. RAMANA, JJ.

Decided on 22ND July, 2014

ISSUES: Petition for issue of writ of habeas corpus alleging illegal detention—Materials on record showing petitioner in judicial custody by virtue of an order of Judicial Magistrate—Relief of habeas corpus cannot be granted—Liberty reserved to petitioner to make application for release in the pending criminal Case.

In brief the case of the petitioner is that he was XII pass and wanted to leave the village in search of a decent job. In that connection he made an application for passport. On 30.06.2013 the police had called the petitioner to the Police Station for enquiry on his application for passport and after reaching inside the police station he was locked up. Thereafter on 1.7.2013 early morning, the petitioner was taken to the residence of one Shri Tripathi, Judicial Magistrate who is arrayed as 6th respondent in this writ petition. There, the petitioner was beaten with lathi by DSP, Manish Kumar Suman, who is arrayed as 9th respondent herein, in the presence of the said Judicial Magistrate and it lis also alleged that while beating he was told that it is la reward for his parents for reporting or complaining against him to the Supreme Court, and insulted him by stating that low caste people should not become *malik* of the land of the upper caste people like *mausaji.* Thereafter, the petitioner was taken from the house of the Judicial Magistrate to the Koneila jail where he is kept under detention. The petitioner states that he was unnecessarily and illegally detained by the police. It is also a further case of the petitioner that the Judicial Magistrate Shri Tripathi also caused prejudice as he is out of vengeance against his parents. When they approached the local MLA, the MLA contacted the SHO of Dalsingsarai, District Samastipur, and the police informed the MLA that there is no complaint against the writ petitioner and they are going to release him

but in spite of repeated requests they have not released him. Hence, the petitioner prayed for grant of a writ of habeas corpus under Art.-32 read with Art.14,21 & 22 of the Constitution of India directing the Respondents to produce the petitioner Saurabh Kumar before this Hon'ble Court and also to direct the respondent-State to devise a way to prevent malicious arrest and detention by the police that too without maintaining necessary record and further to direct the State to pay the petitioner compensation considering that the detention is a black mark to his career prospects and future.

Two things are evident from the record. Firstly, the accused is involved in a criminal case for which he has been arrested and produced before the Magistrate and remanded to judicial custody. Secondly, the petitioner does not appear to have made any application for grant of bail, even when the remaining accused persons alleged to be absconding and remain to be served. The net result is that the petitioner continues to languish in jail. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for offences, cognizance whereof has already been taken by the competent Court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of Habeas Corpus is, in the circumstances, totally mis-placed. Having said that, we are of the view that the petitioner could and indeed ought to have filed an application for grant of bail which prayer could be allowed by the Court below, having regard to the nature of the offences allegedly committed by the petitioner land the attendant circumstances. The petitioner has for whatever reasons chosen not to do so. He, instead, has been advised to file the present petition in this Court which is no substitute for his enlargement from custody. We are also of the view that the Magistrate has acted rather mechanically in remanding the accused petitioner herein to judicial custody without so much as making sure that the remaining accused persons are quickly served with the process of the Court and/or produced before the Court for an early disposal of the matter. The

Magistrate appears to have taken the process in a cavalier fashion that betrays his insensitivity towards denial of personal liberty of a citizen who is languishing in jail because the police have taken no action for the apprehension and production of the other accused persons. This kind of apathy is regrettable to say the least. We also find it difficult to accept the contention that the other accused persons who all belong to one family have absconded. The nature of the offences alleged to have been committed is also not so serious as to probablise the version of the respondent that the accused have indeed absconded. Suffice it to say that the petitioner is free to make an application for the grant of bail to the Court concerned who shall consider the same no sooner the same is filed and pass appropriate orders thereon expeditiously.

With the above observations I agree with the order proposed by my esteemed brother.

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Art.32 of the Constitution of India,

Sanjay Gupta and Ors. Vs. State of Uttar Pradesh & Others., AIR-2014 Supreme Court-2982.

DIPAK MISRA AND V. GOPALA GOWDA, JJ.

Decided on 31ST July , 2014

ISSUE:- Public Law remedy.

Damages for violation of fundamental rights—Fire tragedy at consumer show—Show organized on Govt. ground with Govt.'s permission—Permission granted without due care and in violation of statutory requirements—Inquiry by commission pending—As an interim measure State directed to pay Rs. 5 lakhs to LR of deceased, Rs.2 lakhs each to those seriously injured and Rs.75,000/- to those with minor injury—Payments so made shall be in addition to amount already paid by State.

The 10th of April, 2006, the last day of the India Brand Consumer Show organized by Mrinal Events and Expositions at Victoria Park, Meerut, witnessed the dawn of the day with hope, aspiration, pleasure and festivity at the Victoria Park, Meerut, but, as ill-fortune (man made) would have it, as the evening set in, it became the mute spectator to a devastating fire inside the covered premises of the brand show area which extinguished the life spark of sixty-four persons and left more than hundreds as injured; and with the clock ticking, the day turned to be a silent observer of profused flow of human tears, listener of writhing pain and cry, and eventually, marking itself as a dark day of disaster in human history. Some, who were fortunate to escape death, sustained serious injuries, and some minor injuries. The cruelest day of April converted the last day of the festival of Consumer Show to that of a horrifying tragedy for the families of the persons who were charred to death, the victims who despite sustaining serious injuries did not fall prey to the claw of fatality, and the others, slightly fortunate, who had got away with minor

injuries bearing the mental trauma. The dance of death, as it appears, reigned supreme and the cruel demon of injury caused serious injuries as well as minor injuries. The assembly of pleasure paled into total despair and before the people could understand the gravity of the tragedy, it laws over, leaving the legal representatives who have lost their parents, or the parents who have forever been deprived of seeing their children, or the wives who had become widows within fraction of a minute, blaming and cursing the officials of the State Government. The contemporaneous history records it as "Great Meerut Fire Tragedy."

After the tragedy paraded at the Victoria Park a First Information Report was lodged against the accused persons under Sections-304-A, 338 and 427 of Indian Penal Code. The State Government, regard being had to the magnitude of the tragedy, vide notification No.2155/p/Chh.p-3-2006-12(51)p/2006 dated 2.6.2006, appointed Justice O.P. Garg, a former Judge of Allahabad High Court, as one man Commission under the Commissions of Enquiry Act, 1952 (for short "the Act"). The Commission was required to submit the report in respect of four issues, namely;-

1. To find out the facts, causes on account of which the aforesaid accident occurred.
2. To decide the ways and means to keep up the situation in control.
3. In respect of the aforesaid occurrence, determination of liability and the extent thereof.
4. Measures to be adopted to avoid the occurrence of such incident in future.

We are absolutely conscious about the fixation of liability, the quantification and their apportionment as has been held in Uphaar Tragedy, (AIR-2012 SC 100) and Dabwali Fire Tragedy cases. Our

direction to the State Government, at present, is only to see that the victims do not remain in a constant state of suffering and despair. We have taken note of the submission of Mr. Shanti Bhusan and observed hereinbefore that we will address the issue of maintainability of the writ petition after submission of the report. Needless to say, in any event the issue of apportionment is kept open. But the organizers cannot be allowed to remain as total strangers in this regard. In course of hearing we had observed that the organizers should deposit certain amount before the Registry of this Court and regard being had to the said observation we direct the respondents-10 to 12 to deposit a sum of Rs.30 lakhs before the Registry of this Court within a period of two months. The said amount shall be kept in a fixed deposit on an interest bearing account. We repeat at the cost of repetition that this arrangement is absolutely interim in nature and without prejudice to the contentions to be raised by the learned Additional Advocate General for the State and Mr. Shanti Bhusan, learned senior counsel for the respondent Nos. 10 to 12.

As we have fixed the date i.e. 31.1.2015 for submission of the report by the Commission, let the matter be listed on 11th February, 2015. In case the report is submitted earlier, the registry shall list the matter immediately before the Court.

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Section-123 of Transfer of Property Act, 1882,

Renikuntla Rajamma (d) by LRs. Vs. K. Sarwanamma, 2014 (II) OLR (SC)-727.

T.S.THAKUR, V.GOPALA GOWDA AND C. NAGAPPAN, JJ.

Decided on 17TH July, 2014.

ISSUES: Delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property.

Sections-122 and 123 of Transfer of Property Act, 1882-A gift made by a registered instrument duly signed by or on behalf of the donor and attested by at least two witnesses is valid, if the same is accepted by or on behalf of the done—Such acceptance must be given during the life time of the donor and while he is still capable of giving—"Transfer of possession" of the property covered by the registered instrument of the gift duly signed by the donor and attested as required is not a sine qua non for the making of a valid gift under the provisions of the Act, 1882.

The plaintiff-respondent in this appeal filed O.S.No.979 of l1989 for a declaration to the effect that revocation deed dated 5th March, 1986 executed by the defendant-appellant purporting to revoke a gift deed earlier executed by her was null and void. The plaintiff's case as set out in the plaint was that the gift deed executed by the defendant-appellant was valid in the eyes of law and had been accepted by the plaintiff when the done defendant had reserved to herself during for life, the right to enjoy the benefits arising from the suit property. The purported revocation of the gift in favour of the plaintiff-respondent in terms of the revocation deed was, on that basis, assailed and a declaration about its being invalid and ***void ab initio*** prayed for. The suit was contested by the defendant-appellant herein on several grounds including the ground that the gift deed executed in favour of the plaintiff was vitiated by fraud, misrepresentation and undue influence. The parties led evidence and went through the trial with the trial Court eventually holding that the deed purporting to revoke the gift in favour of the plaintiff was null and void. The Trial Court found that the defendant had failed to prove that the gift deed set up by the plaintiff was vitiated by fraud or undue influence or that it was a sham or nominal document. The gift, according to trial

Court, had been validly made and accepted by the plaintiff, hence, irrevocable in nature. It was also held that since the donor had taken no steps to assail the gift made by her for more than 12 years, the same was voluntary in nature and free from any undue influence, mis-representation or suspicion. The fact that the donor had reserved the right to enjoy the property during her life time did not affect the validity of the deed, opined the Trial Court.

Chapter-VII of the Transfer of Property Act, 1882 deals with gifts generally and, *inter alia*, provides for the mode of making gifts. Section-122 of the Act defines 'gift' as a transfer of certain existing movable or immovable property made voluntarily and without consideration by one person called the donor to another called the done and accepted by or on behalf of thee done. In order to constitute a valid gift, acceptance must, according to this provision, be made during the life time of the donor and while he is still capable of giving. It stipulates that a gift is void if the done dies before acceptance. Section-123 regulates mode of making a gift and, *inter alia*, provides that a gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. In the case of movable property, transfer either by a registered instrument signed as aforesaid or by delivery is valid under Section-123. Section-123 may at this stage be gainfully extracted;-

"123. ***Transfer how effected***—For the making of a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered."

The matter can be viewed from yet another angle. Section-123 of the T.P. Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of moveable property. In so far as the gifts of immovable property are concerned Section-123

makes transfer by a registered instrument mandatory. This is evident from the use of word "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to that requirement the second part of Section-123 dealing with gifts of movable property, simply requires that gift of movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned, the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property.

In the case at hand as already noticed by us, the execution of registered gift deed and its attestation by two witnesses is not in dispute. It has also been concurrently held by all the three courts below that the done had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the done. What is retained is only the right to use the property during the life time of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor. The High Court was in that view perfectly justified in refusing to interfere with the decree passed in favour of the done. This appeal accordingly fails and is hereby dismissed but the circumstances without any orders as to costs. (Appeal Dismissed).

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Gift-- Muhammadan Law-

V. Sreeramachandra Avadhani(D) by L.Rs. Vs Shaik Abdul Rahim & Anr. 2014 (II)-OLR(SC)-637**.**

JAGDISH SINGH KHEHAR AND ROHINTON FALI NARIMAN,JJ.

Decided on 21st August, 2014

ISSUES: A gift has to be unconditional—Conditions expressed in a gift, are to be treated as void—A conditional gift is valid, but the conditions are void.

The gift of the corpus has to be unconditional—Conditions are however permissible, if the gift is merely of a usufruct—The gift of a usufruct can validly impose a limit in point of time—In a gift which contemplates the transfer of the corpus, there is no question of such transfer being conditional—The transfer is absolute—Conditions imposed in a gift of the corpus, are void—The transfer of the corpus refers to a change in ownership, while the transfer of usufruct refers to a change in the right of its use/enjoyment etc.

Parameters for gifts are clear and well defined—Gifts pertaining to the corpus of the property are absolute—Where a gift of corpus seeks to impose a limit, in point of time (as a life interest), the condition is void—All other conditions, in a gift of the corpus are impermissible.

FACTS: Sheikh Hussein was married to Banu Bibi. During the subsistence of his matrimonial ties, Sheikh Hussein executed a gift deed on 26.04.1952, whereby a "tiled house" with open space in Survey No.883 in Eluru town, West Godavari District, Andhra Pradesh was gifted in favour of his wife Banu Bibi.

It is not a matter of dispute, that Banu Bibi enjoyed the immovable property gifted to her, during the lifetime of her husband Sheikh Hussein. Sheikh Hussein died in 1966. Even after the demise of Sheikh Hussein, Banu Bibi continued to exclusively enjoy the said immovable property. On 02.05.1978, Banu Bibi sold the gifted immovable property, to V.Sreeramachandra Avadhani. The vendee

V.Sreeramachandra Avadhani is the appellant before this Court (through his legal representatives).

Banu Bibi died on 17.02.1989. On her demise, the respondents before this Court - Shail Abdul Rahim and Shaik Abdul Gaffoor issued a legal notice to the vendee. Through the legal notice, they staked a claim on the abovementioned gifted immovable property. In the notice, the respondents asserted, firstly, that Banu Bibi had only a life interest in the gifted immovable property; and secondly, the respondents being the legal representatives of Sheikh Hussein (who had gifted the immovable property to Banu Bibi) came to be vested with the right and title over the gifted immovable property, after the demise of Banu Bibi. The vendee, V.Sreeramachandra Avadhani repudiated the assertions made in the legal notice dated 22.03.1989, through his response dated 16.04.1989.

Having realized that the vendee would not part with the immovable property purchased by him from Banu Bibi, the respondents preferred a suit bearing O.S.No.256 of 1989, before the Subordinate Judge, Eluru, West Godavari District, Andhra Pradesh. In the suit, the respondents sought a declaration of title, over the "tiled house" with open space, gifted by Sheikh Hussein to his wife Banu Bibi. In addition, the respondents sought recovery of possession, and also ***mesne profits,*** from the vendee V. Sreeramachandra Avadhani. The above Original Suit filed on 13.11.1989 was contested. A written statement was filed on 19.07.1990.

The Principal Senior Civil Judge, Eluru, West Godavari District, Andhra Pradesh dismissed the original suit on 19.08.1998. Relying on the judgment rendered by the Privy Council in Nawazish Ali Khan v. Ali Raza Khan, AIR 1948 PC 134, the trial court arrived at the conclusion, that the gift deed executed by Sheikh Hussein on 26.04.1952 transferring immovable property in favour of his wife Banu Bibi, was valid. It was also concluded, that the gifted immovable property came to

be irrevocably vested in the donee Banu Bibi. That apart, the trial court held, that Sheikh Hussein had gifted the corpus of the immovable property to his wife Banu Bibi. Based on the aforesaid, it was further concluded, that all the conditions expressed by the donor Sheikh Hussein, in the gift deed dated 26.04.1952, depriving the donee of an absolute right/interest in the gifted property, were void. The trial court clearly expressed, that the gift deed dated 26.04.1952, was not in the nature of a usufruct.

It is the bounden duty of the plaintiffs to prove that, they have inherited the property as the legal heirs of Shaik Hussain Saheb, as his wife has no right to alienate the property Exs. A-1 and B-5 which is one and the same document is the crucial document to determine the main issue in this suit. A perusal of the said document clearly shows the fact that in the said settlement deed dated 26-4-1952 which was executed by Shaik Hussain Sahab in favour of his wife Bhanubibi he has specifically mentioned that, she has no right to alienate the property and she can enjoy the property as she likes and after her death it would devolved upon her children if she has got children and if she has not children, the heirs of Shaik Hussain Saheb would inherit the same. It is clearly mentioned in the said documents as follows:

"During your life time you shall not alienate this property in favour of any body and after your life time this property shall devolve upon your off spring and if you have no children the same shall return back to me or to my near successors with absolute rights of enjoyment and dispossession by way of gift, sale etc."

A perusal of the consideration recorded by the High Court reveals, that the High Court also did not examine the nature and effect of the gift. It did not take into consideration, whether the gift was in respect of the corpus of the immovable property, or its usufruct. The High Court also did not take into consideration, the judgment rendered by the Privy Council in Nawazish Ali Khan's case (supra)(which was relied upon by the trial court). The controversy was again disposed of, on the basis

of a literal interpretation of the terms and conditions expressed in the gift deed (dated 26.04.1952).

Learned counsel for the appellants placed reliance, on the different aspects of Muhammadan Law on the subject of gifts (hiba). In this behalf reference was first of all placed on "Asaf A.A. Fyzee Outlines of Muhammadan Law", (fifth edition, edited and revised by Tahir Mahmood, Oxford University Press). On the subject of "conditional gifts", the fundamentals/principles of Muhammadan Law as have been explained in the treatise are extracted hereunder:

"Gifts with conditions

In hiba, the immediate and absolute ownership in the substance or corpus of a thing is transferred to a donee; hence where a hiba is purported to be made with conditions or restrictions annexed as to its use or disposal, the conditions and restrictions are void and the hiba is valid. The Fatawa Aamgiri says:

All 'our' masters are agreed that when one has made a gift and stipulated for a condition that is fasid or invalid, the gift is valid and the condition void. It is a general rule with regard to all contracts which require seisin, such as gift and pledge, that they are not invalidated by vitiating conditions.

Reliance was also placed on "Mulla's Principles of Mahomedan Law" (nineteenth edition, by M.Hidayatullah and Arshad Hidayatullah) and our attention was drawn to the following narration:

"Gift with a condition.- When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no conditions were attached to it(s).

"All our masters are agreed that when one has made a gift and stipulated for a condition that is fasid or invalid, the gift is valid and the condition is void".

Gift of a life-estate--Life estates were considered to come under this principle with the result that the donee took an absolute interest. But in Amjad Khan's case (1929) 56 I.A.213, 4 Luck.305 the Judicial Committee did not regard the principle as applicable to the facts. See sec.55 and the cases there cited. "An amree (life grant) is nothing but a gift and a condition; and the condition is invalid; but the gift is not rendered null by involving an invalid condition". Hedaya, 489. In a later case the Privy Council (Nawazish Ali Khan v. Ali Raza Khan (1948) 75 I.A.62, (48) A.PC.134) observed that there was no such thing as life estate or vested remainder in Mahomedan Law as understood in English Law, but a gift for life would be construed as an interest for life in the usufruct.

`Life estate' in the sense, that is, the transfer of the ownership of the property itself limited to the life of the donee, with a condition that the donee would have no right of alienation is not recognised by Mahomedan Law. But the view that once prevailed to the effect, that under the Mahomedan Law, a life interest with such a condition is nothing but a gift with a repugnant condition, when the condition must fail and the gift must prevail as an absolute one, is no longer good law in view of later decisions of the Privy Council."

It would be pertinent to mention, that our attention was not invited to any contrary legal view, expressed either by the Privy Council, or by any other Court.

Learned counsel for the appellants also placed reliance on a "Digest of Moohummudan Law", by Neil B.E.Baillie (part first, second edition, London: Smith, Elder & Co., 1875). The relevant extract of the text relied upon is being reproduced hereunder:

"Gift is of two kinds, tumleek (already described), and iskat, which means literally, `to cause to fall', or extinguish. The legal effects of gift are-1st. That it establishes a right of property in the donee, without being obligatory on the donor; so that the gift may be validly

resumed or cancelled. 2nd. That it cannot be made subject to a condition; though if a gift were made with an option to the donee for three days, and were accepted before the separation of the parties, it would be valid. And 3rd That it is not cancelled by vitiating conditions; so that if one should give his slave on condition of his being emancipated, the gift would be valid, and the condition void."

A perusal of the above text inter alia reveals, that under Muhammadan Law, a gift has to be unconditional. Therefore, conditions expressed in a gift, are to be treated as void. A conditional gift is valid, but the conditions are void.

Learned counsel for the appellants then invited our attention to another part of the "Digest of Moohummudan Law" by Neil B.E.Baillie, dealing with "of the effect of a condition in the gift". The text relied upon is being reproduced hereunder:

"When a slave or a thing is given on a condition that the donee shall have an option for three days, the gift is lawful if confirmed by him before the separation of the parties; and if not confirmed by him till after they have separated, it is not lawful. But when a thing is given on a condition that the donor shall have an option for three days, the gift is valid, and the option void; because gift is not a binding contract, and therefore does not admit of the option of stipulation. A person says to another, `I have released thee from my right against thee, on condition that I have an option,' the release is lawful, and the option void.

A man to whom a thousand dirhems are due by another says to him, `When the morrow has come the thousand is thine,' or `thou art free from it,' or `When thou hast paid one-half the property then thou art free from the remaining half,' or `the remaining half is thine,' the gift is void.' But if he should say, `I have released you on condition that you emancipate your slave,' or `Thou art released on condition of thy emancipating him by my releasing thee,' and he should say, `I have accepted,' or `I have emancipated him,' he would be released from the debt.

All `our' masters are agreed that when one has made a gift and stipulated for a condition that is fasid, or invalid, the gift is valid and the condition void; as if one should given another a female slave, and stipulate `that he shall not sell her,' or `shall make her an com-i-wulud,' or `shall sell her to such an one,' or `restore her to the giver after a month,' the gift would be valid, and all the conditions void'. Or if one should give a mansion, or bestow it in alms, on condition `that the done shall restore some part of it,' or `give some part of it is iwuz, or exchange,' the gift would be lawful and the condition void.' It is a general rule with regard to all contracts which require seisin, such as gift and pledge, that they are not invalidated by vitiating conditions."

Having concluded that the donor Sheikh Hussein through the gift deed dated 26.04.1952, had transferred the corpus of the immovable property to his wife Banu Bibi, it is natural to conclude that the gift deed executed in favour of Banu Bibi, was valid. Likewise, while applying the principles of Muhammedan Law expressed in recognized texts, and the decision of the Privy Council in Nawazish Ali Khan's case (supra) it is inevitable to hold, that all conditions depicted in the gift deed dated 26.04.1952, which curtail use or disposal of the property gifted are to be treated as void. In the above view of the matter, the conditions depicted in the gift deed, that the donee would not have any right to gift or sell the gifted property, or that the donee would be precluded from alienating the gifted immovable property during her life time, are void. Similarly, the depiction in the gift deed, that the gifted immovable property after the demise of the donee, would devolve upon her off spring and in the event of her not bearing any children, the same would return back to the donor or to his successors, would likewise be void.

Having held that the gift deed dated 26.04.1952 irrevocably vested all rights in the immovable property in Banu Bibi, it is natural for us to conclude, that the sale of the gifted immovable property by Banu Bibi to V. Sreeramachandra Avadhani on 02.05.1978, was legal

and valid. Consequently, the claim of the respondents to the gifted property, on the demise of Banu Bibi on 17.02.1989, is not sustainable in law.

For the reasons recorded hereinabove, the instant appeal is allowed. The order passed by the trial court dated 19.08.1998 is affirmed. The orders passed by the First Appellate Court dated 05.01.2004, and by the High Court dated 02.08.2004, are set aside.

There shall be no order as to costs. (Appeal allowed)

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Divorce—Hindu Law

Dipanwita Roy Vs Ronobroto Roy. 014-SCC-On Line-SC-831.

JAGDISH SINGH KHEHAR AND R. K. AGRAWAL,JJ.

Decided on 15th October, 2014

ISSUES : Dissolution of the marriage on the ground of Adultery and accusations of extra marital relationship levelled against the wife.

Establishment of infidelity — Husband alleged that the child begotten by his wife was not his and sought a DNA test. The appellant-wife given liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. Presumption of the nature contemplated in S. 114 of the Indian Evidence Act to be drawn against the wife in event of her refusal for test.

Facts : The petitioner-wife Dipanwita Roy and the respondent-husband Ronobroto Roy, were married at Calcutta. Their marriage was registered on 9.2.2003 The present controversy emerges from a petition filed under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act') by the respondent, inter alia, seeking dissolution of the marriage solemnised between the petitioner-wife and the respondent-husband, on 25.1.2003

One of the grounds for seeking divorce was, based on the alleged adulterous life style of the petitioner-wife. For his above assertion, the respondent-husband made the following allegations in paragraphs 23 to 25 of his petition:

> "23. That since 22.09.2007 the petitioner never lived with the respondent and did not share bed at all. On a very few occasion since then the respondent came to the petitioner's place of residence to collect her things and lived there against the will of all to avoid public scandal the petitioner did not turn the respondent house on those occasion.
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> 24. That by her extravagant life style the respondent has incurred heavy debts. Since she has not disclosed her present address to bank and has only given the address of the petitioner. The men and collection agents of different banks are frequently visiting the petitioner's house and harassing the petitioner. They are looking for the respondent for recovery of their dues. Notice from Attorney Firms for recovery of due from the

respondent and her credit card statements showing heavy debts are being sent to the petitioner's address. The respondent purchased one car in 2007 with the petitioner's uncle, Shri Subrata Roy Chowdhary as the guarantor. The respondent has failed to pay the installments regularly.

25. That the petitioner states that the respondent has gone astray. She is leading a fast life and has lived in extra marital relationship with the said Mr. Deven Shah, a well to do person who too is a carrier gentlemen and has given birth to a child as a result of her cohabitation with Shri Deven Shah. It is reported that the respondent has given birth to a baby very recently. The respondent is presently living at the address as mentioned in the cause title of the plaint."

The above factual position was contested by the petitioner-wife in her reply wherein she, inter alia, submitted as under:

"That the statements made in paragraph Nos. 5 and 6 of the plaint are admitted by the respondent to the extent that the daughter namely "Biyas" is residing in the custody of the respondent's mother with the arrangement of the petitioner and as a result of which the petitioner used to come at his mother in law's place and spending days therein and the respondent used to spend time with him and carrying on their matrimonial obligation which includes co-habitation.

A perusal of the written statement filed on behalf of the petitioner-wife reveals that the petitioner-wife expressly asserted the factum of cohabitation during the subsistence of their marriage, and also denied the accusations levelled by the respondent-husband of her extra marital relationship, as absolutely false, concocted, untrue, frivolous and vexatious. In order to substantiate his claim, in respect of the infidelity of the petitioner-wife, and to establish that the son born to her was not his, the respondent-husband moved an application on 24.7.2011 seeking a DNA test of himself (the respondent-husband) and the male child born to the petitioner-wife. The purpose seems to be, that if the DNA examination reflected, that the male child born to the petitioner-wife, was not the child of the respondent-husband, the allegations made by the respondent-husband in paragraphs 23 to 25 of the petition, would stand substantiated.

We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleric Acid

(DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g, if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. …..Its corollary is that the burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband."

Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA test. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that the High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court overlooked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court."

It is therefore apparent, that despite the consequences of a DNA test, this Court has concluded, that it was permissible for a Court to permit the holding of a DNA test, if it was eminently needed, after balancing the interests of the parties. Recently, the issue was again considered by this Court in *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*, (2014) 2 SCC 576, wherein this Court held as under:

Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had not any access to his wife at the time when the child could have been begotten. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstances, which would give way to the other is a complex question posed before us.

We may remember that Section-112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section-112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While truth of the fact is known, in our opinion there is no need or room for any presumption. Where there is evidence to the contrary, the presumption id rebuttable and must yield to prove. The interest of justice lis best served by ascertaining the truth and the Court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct. The later must prevail over the former.

We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not

really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. “Truth must triumph” is the hallmark of justice.” This Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge, a presumption under Section 112 of the Indian Evidence Act.

The question that has to be answered in this case, is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.

We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife

liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

> "114. Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
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> Illustration (h) - That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.

The instant appeal is disposed of in the above terms.

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