GENERAL OFFICER COMMANDING

v.

CBI AND ANR.

(Criminal Appeal No. 257 of 2011)

MAY 1, 2012

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

ARMED FORCES J & K (SPECIAL POWERS) ACT, 1990:

ss.4, 6 - Powers conferred on the officers of Armed forces - Scope of.

s.7 - Interpretation of - Held: The scheme of the Act provides protection to Army personnel in respect of anything done or purported to be done in exercise of powers conferred by the Act - s.7 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government - The term "institution" contained in s.7 means taking cognizance of the offence and not mere presentation of chargesheet by the investigating agency - Therefore, chargesheet against the army personnel cannot be filed without prior sanction of the Central Government - This protection is available only when the alleged act done by the army personnel is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act - The question to examine as to whether the sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation - The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject - In such a situation the court would not proceed without sanction of the competent statutory authority - Code

A *of Criminal Procedure, 1973 - s.197 - General Clauses Act, 1897 - s.3(22) -Army Act, 1950.*

CODE OF CRIMINAL PROCEDURE, 1973: Institution of a case - Meaning of - Held: The term 'institution' has to be
B *ascertained taking into consideration the scheme of the Act/ Statute applicable - So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C.*

C *GENERAL CLAUSES ACT, 1897: s.3(22) - Good faith - Held: A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. - He is to perform his duty according to the expectation of the office and the nature of the post for the*
D *reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him - Good faith is defined in s.3(22) to mean a thing which is, in fact, done honestly, whether it is done negligently or not - Anything done with due care and attention, which is not*
E *malafide, is presumed to have been done in good faith - Good faith and public good are though questions of fact, are required to be proved by adducing evidence.*

ARMY ACT, 1950: s.125 - Exercise of option under - Held: The stage of making option to try an accused by a court-
F *martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges - If the Army chooses, it can prosecute the accused through court-martial instead of going through the criminal court - Once the option is made that accused is to be tried by*
G *a court-martial, further proceedings would be in accordance with the provisions of s.70 of the Army Act and for that purpose, sanction of the Central Government is not required.*

WORDS AND PHRASES:

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'Cognizance', 'prosecution', 'suit', 'legal proceedings', and expression 'institution of case' - Meaning of. A

Except', 'purport', 'good faith' - Meaning of.

"Legal proceedings" and "judicial proceedings" - Distinction between. B

The prosecution case was that in fake encounters, few civilians were killed by the army officers. The CBI was asked to conduct the investigation. The CBI conducted the investigation and filed charge-sheet against the army officers. The Magistrate granted opportunity to Army to exercise the option as to whether the competent authority would prefer to try the case by way of court martial by taking over the case under the provisions of Section 125 of the Army Act, 1950. The Army officers filed an application before the Magistrate that no prosecution could be instituted except with the previous sanction of the Central Government in view of the provisions of Section 7 of the Armed Forces J & K (Special Powers) Act, 1990 and, therefore, the proceedings be closed by returning the charge-sheet to the CBI. The Magistrate dismissed the application holding that it was for the trial court to find out whether the action complained of falls within the ambit of the discharge of official duty or not. The Sessions Court dismissed the revision. It, however, directed the Magistrate to give one more opportunity to the Army officials for exercise of option under Section 125 of the Army Act. The High Court affirmed the decisions of lower courts and held that the very objective of sanction is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties. C D E F G

In the instant appeals, it was contended that Section H

A 7 of the Act 1990 provides that no prosecution, suit or legal proceeding shall be instituted without prior sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of powers conferred under the Act; that the prosecution B would be deemed to have instituted/initiated at the moment the charge-sheet is filed and received by the court and such an acceptance/receipt is without jurisdiction; and that the previous sanction of the competent authority is a pre-condition for the court in C taking the charge-sheet on record if the offence alleged to have been committed in discharge of official duty and such issue touches the jurisdiction of the court.

Disposing of the appeals, the Court

D HELD: 1.1. The Armed Forces J & K (Special Powers) Act, 1990 confers certain special powers upon members of the Armed Forces in the disturbed area in the State of J & K. The disturbed area is defined and there is no dispute that the place where the incident occurred stood E notified under the Act 1990. Section 4 of the Act 1990 confers special powers on the officer of armed forces to take measures, where he considers it necessary to do so, for the maintenance of public order. However, he must give due warning according to the circumstances and F even fire upon or use force that may also result in causing death against any person acting in contravention of law and order in the disturbed area and prohibit the assembly of five or more persons or carrying of weapons etc. Such an officer has further been G empowered to destroy any arms dump, arrest any person without warrant who has committed a cognizable offence and enter and search without warrant any premises to make any arrest. Section 6 of the Act 1990 requires that such arrested person and seized property

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be handed over to the local police by such an officer. [Para 9] [627-H; 628-A-D]

1.2. Section 7 of the Act 1990 provides for umbrella protection to the Army personnel in respect of anything done or purported to be done in exercise of powers conferred by the Act. The scheme of the Act requires that any prosecution, suit or legal proceeding instituted against any Army official working under the Act 1990 has to be subjected to stringent test before any such proceeding can be instituted. Section 7 is required to be interpreted keeping the said objectives in mind. The 'prosecution' means a criminal action before the court of law for the purpose of determining 'guilt' or 'innocence' of a person charged with a crime. Civil suit refers to a civil action instituted before a court of law for realisation of a right vested in a party by law. The phrase 'legal proceeding' connotes a term which means the proceedings in a court of justice to get a remedy which the law permits to the person aggrieved. It includes any formal steps or measures employed therein. It is not synonymous with the 'judicial proceedings'. Every judicial proceeding is a legal proceeding but not vice-versa, for the reason that there may be a 'legal proceeding' which may not be judicial at all, e.g. statutory remedies like assessment under Income Tax Act, Sales Tax Act, arbitration proceedings etc. So, the ambit of expression 'legal proceedings' is much wider than 'judicial proceedings'. The expression 'legal proceeding' is to be construed in its ordinary meaning but it is quite distinguishable from the departmental and administrative proceedings. The terms used in Section 7 i.e. suit, prosecution and legal proceedings are not inter-changeable or convey the same meaning. The phrase 'legal proceedings' is to be understood in the context of the statutory provision applicable in a particular case, and considering the preceding words used therein. Legal

A proceedings' means proceedings regulated or prescribed by law in which a judicial decision may be given; it means proceedings in a court of justice by which a party pursues a remedy which a law provides, but does not include administrative and departmental proceedings. B The provision of Section 7 of the Act 1990 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government. Therefore, chargesheet cannot be instituted without prior sanction of the Central Government. The C use of the words 'anything done' or 'purported to be done' in exercise of powers conferred by the Act 1990 is very wide in its scope and ambit and it consists of twin test. Firstly, the act or omission complained of must have been done in the course of exercising powers conferred D under the Act, i.e., while carrying out the duty in the course of his service and secondly, once it is found to have been performed in discharge of his official duty, then the protection given under Section 7 must be construed liberally. Therefore, the provision contained E under Section 7 of the Act 1990 touches the very issue of jurisdiction of launching the prosecution. [Paras 10, 11, 12] [628-D-E; 629-B-H; 630-A; 631-A-E]

Assistant Collector of Central Excise, Guntur v. Ramdev Tobacco Company, **AIR 1991 SC 506;** *Maharashtra Tubes* F *Ltd. v. State Industrial & Investment Corporation of Maharashtra Ltd. & Anr.* **(1993) 2 SCC 144: 1993 (1) SCR 340;** *S.V. Kondaskar, Official Liquidator v. V.M. Deshpande, I.T.O. & Anr.* **AIR 1972 SC 878: 1972 (2) SCR 965;** *Babulal v. M/s. Hajari Lal Kishori Lal & Ors.* **AIR 1982 SC 818: 1982** G **(3) SCR 94;** *Binod Mills Co. Ltd., Ujjain v. Shri. Suresh Chandra Mahaveer Prasad Mantri, Bombay* **AIR 1987 SC 1739: 1987 (3) SCR 247 - relied on.**

2. INSTITUTION OF A CASE:

H **The meaning of the term 'institution' has to be**

ascertained taking into consideration the scheme of the Act/Statute applicable. The expression may mean filing/ presentation or received or entertained by the court. Mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. Thus, the expression "Institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C. [Paras 13, 20, 21] [631-F; 634-B-D]

M/s. Lakshmiratan Engineering Works Ltd. v. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur & Anr. **AIR 1968 SC 488;** *Lala Ram v. Hari Ram,* **AIR 1970 SC** *1093 Hindustan Commercial Bank Ltd. v. Punnu Sahu (dead) through LRs.* **AIR 1970 SC 1384;** *Martin and Harris Ltd. v. VIth Additional District Judge & Ors.* **AIR 1998 SC 492;** *Jamuna Singh & Ors. v. Bhadai Shah* **AIR 1964 SC 1541** *Satyavir Singh Rathi ACP & Ors. v. State through CBI* **(2011) 6 SCC 1: 2011 (6) SCR 138;** *Kamalapati Trivedi v. The State of West Bengal* **AIR 1979 SC 777: 1979 (2) SCR 717;** *Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors.* **AIR 1976 SC 1672: 1976 (0) Suppl. SCR 524;** *Narsingh Das Tapadia v. Goverdhan Das Partani & Anr.* **AIR 2000 SC 2946: 2000 (3) Suppl. SCR 171 - relied on.**

3. SANCTION FOR PROSECUTION:

3.1. The protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge

A of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public B servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. Use of the expression "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it C should have been done in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in D discharge of official duty. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty, then it must be held to be official to which applicability of Section 197 Cr.P.C. cannot be disputed. The question to examine as to whether the E sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation. There is a marked distinction in the stage of investigation and prosecution. The prosecution starts when the F cognizance of offence is taken. The cognizance is taken of the offence and not of the offender. The sanction of the appropriate authority is necessary to protect a public servant from unnecessary harassment or prosecution. Such a protection is necessary as an assurance to an G honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralises the honest officer. However, performance of public duty under colour of duty cannot be camouflaged to commit a crime. The public duty may H provide such a public servant an opportunity to commit

crime and such issue is required to be examined by the sanctioning authority or by the court. It is quite possible that the official capacity may enable the pubic servant to fabricate the record or mis-appropriate public funds etc. Such activities definitely cannot be integrally connected or inseparably inter-linked with the crime committed in the course of the same transaction. Thus, all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. In fact, the issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts complained of are in dereliction of the duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative. It is so, for the reason that the power of the State is performed by an executive authority authorised in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article 162 thereof. In broad and literal sense `cognizance' means taking notice of an offence as required under Section 190 Cr.P.C. `Cognizance' indicates the point when the court first takes judicial notice of an offence. The court not only applies its mind to the contents of the complaint/police report, but also proceeds in the manner as indicated in the subsequent provisions of Chapter XIV of the Cr.P.C. [Paras 22-24, 39] [634-E-H; 635-A-B; D-H, 636-A-E; 646-D-F]

R. Balakrishna Pillai v. State of Kerala & Anr. **AIR 1996 SC 901: 1995 (6) Suppl. SCR 236;** *S.K. Zutshi & Anr. v. Bimal Debnath & Anr.* **AIR 2004 SC 4174;** *Center for Public Interest Litigation & Anr. v. Union of India & Anr.* **AIR 2005 SC 4413: 2005 (4) Suppl. SCR 77;** *Rakesh Kumar Mishra*

A *v. State of Bihar & Ors.* **AIR 2006 SC 820: 2006 (1) SCR 124;** *Anjani Kumar v. State of Bihar & Ors.* **AIR 2008 SC 1992: 2008 (6) SCR 912;** *State of Madhya Pradesh v. Sheetla Sahai & Ors.* **(2009) 8 SCC 617: 2009 (12) SCR 1048;** *Bhanuprasad Hariprasad Dave & Anr. v. The State of Gujarat*
B **AIR 1968 SC 1323: 1969 SCR 22;** *Hareram Satpathy v. Tikaram Agarwala & Ors.* **AIR 1978 SC 1568: 1979 (1) SCR 349;** *State of Maharashtra v. Dr. Budhikota Subbarao* **(1993) 3 SCC 339: 1993 (2) SCR 311;** *Anil Saran v. State of Bihar & Anr.* **AIR 1996 SC 204: 1995 (3) Suppl. SCR 58;**
C *Shambhoo Nath Misra v State of U.P. & Ors.* **AIR 1997 SC 2102: 1997 (2) SCR 1139;** *Choudhury Parveen Sultana v. State of West Bengal & Anr.* **AIR 2009 SC 1404: 2009 (1) SCR 99;** *State of Punjab & Anr. v. Mohammed Iqbal Bhatti* **(2009) 17 SCC 92: 2009 (11) SCR 790;** *The State of Andhra*
D *Pradesh v. N. Venugopal & Ors.* **AIR 1964 SC 33: 1964 SCR 742;** *State of Maharashtra v. Narhar Rao* **AIR 1966 SC 1783: 1966 SCR 880;** *State of Maharashtra v. Atma Ram & Ors.* **AIR 1966 SC 1786;** *Prof. Sumer Chand v. Union of India & Ors.* **(1994) 1 SCC 64: 1993 (2) Suppl. SCR 123;** *State of*
E *Orissa & Ors. v. Ganesh Chandra Jew* **AIR 2004 SC 2179: 2004 (3) SCR 504;** *P. Arulswami v. State of Madras* **AIR 1967 SC 776: 1967 SCR 201;** *Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan & Ors.* **AIR 1998 SC 1524: 1997 (5) Suppl. SCR 524;** *Matajog Dobey v. H.C. Bhari* **AIR 1956 SC 44: 1955 SCR 925;** *Sankaran Moitra v. Sadhna Das*
F *& Anr.* **AIR 2006 SC 1599: 2006 (3) SCR 305;** *Rizwan Ahmed Javed Shaikh & Ors. v. Jammal Patel & Ors.* **AIR 2001 SC 2198: 2001 (3) SCR 766;** *S.B. Saha & Ors. v. M.S. Kochar* **AIR 1979 SC 1841: 1980 (1) SCR 111;** *Parkash Singh Badal & Anr. v. State of Punjab & Ors.* **AIR 2007 SC**
G **1274: 2006 (10) Suppl. SCR 197;** *P.K. Choudhury v. Commander,* **48 BRTF (GREF) (2008) 13 SCC 229: 2008 (4) SCR 976;** *Nagraj v. State of Mysore* **AIR 1964 SC 269: 1964 SCR 671;** *Naga People's Movement of Human Rights v. Union of India* **AIR 1998 SC 431: 1997 (5) Suppl. SCR**
H **469;** *Jamiruddin Ansari v. Central Bureau of Investigation &*

Anr. **(2009) 6 SCC 316: 2009 (7) SCR 759**; *Harpal Singh v. State of Punjab* **(2007) 13 SCC 387: 2007 (12) SCR 830**; *Rambhai Nathabhai Gadhvi & Ors. v. State of Gujarat* **AIR 1997 SC 3475: 1997 (3) Suppl. SCR 356**; *State of H.P. v. M.P. Gupta* **(2004) 2 SCC 349: 2003 (6) Suppl. SCR 541**; *R.R. Chari v. The State of Uttar Pradesh* **AIR 1951 SC 207: 1991 (1) SCC 57**; *State of W.B. & Anr. v. Mohd. Khalid & Ors.* **(1995) 1 SCC 684: 1994 (6) Suppl. SCR 16**; *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr.* **AIR 2012 SC 1185: 2012 (3) SCC 64**; *Bhushan Kumar v. State (NCT of Delhi)* **(2012) 4 SCALE 191**; *State of Uttar Pradesh v. Paras Nath Singh* **(2009) 6 SCC 372: 2009 (8) SCR 85 - relied on.**

3.2. Section 7 of the Act 1990, puts an embargo on the complainant/investigating agency/person aggrieved to file a suit, prosecution etc. in respect of anything done or purported to be done by a Army personnel, in good faith, in exercise of power conferred by the Act, except with the previous sanction of the Central Government. Three expressions i.e. 'except', 'good faith' and 'purported' contained in the said provision require clarification/elaboration. (i) Except : To leave or take out: exclude; omit; save Not including; unless. The word has also been construed to mean until. Exception - Act of excepting or excluding from a number designated or from a description; that which is excepted or separated from others in a general rule of description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention or leaving out of consideration. (ii) Purport : Purport means to present, especially deliberately, the appearance of being; profess or claim, often falsely. It means to convey, imply, signify or profess outwardly, often falsely. In other words it means to claim (to be a certain thing, etc.) by manner or appearance; intent to show; to mean; to intend. Purport also means 'alleged'. 'Purporting' - When power is given

A to do something 'purporting' to have a certain effect, it will seem to prevent objections being urged against the validity of the act which might otherwise be raised. Thus when validity is given to anything 'purporting' to be done in pursuance of a power, a thing done under it may have B validity though done at a time when the power would not be really exercisable. 'Purporting to be done' - There must be something in the nature of the act that attaches it to his official character. Even if the act is not justified or authorised by law, he will still be purporting to act in C the execution of his duty if he acts on a mistaken view of it." So it means that something is deficient or amiss: everything is not as it is intended to be. [Paras 42, 43] [647-F-H; 648-A-H; 649-A-B]

Azimunnissa and Ors. v. The Deputy Custodian, D *Evacuee Properties, District Deoria and Ors.* AIR 1961 SC 365: 1961 SCR 91; *Haji Siddik Haji Umar & Ors. v. Union of India* AIR 1983 SC 259: 1983 (2) SCR 249 - relied on.

Dicker v. Angerstein, 3 Ch D 600 - referred to.

E 4. GOOD FAITH:

4.1. A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. He is to perform his duty according to the expectation of the office and the nature F of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him. Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done G negligently or not. Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalize. Good faith and public good are though the question of fact, it H required to be proved by adducing evidence. The facts

of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to be distinguished from the manner in which it has been administered or performed. Then comes the issue of such a duty being performed in good faith. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or ill will. The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the duty so performed are such for which an official stands excused by reason of his office or post. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important. A sudden decision to do something under authority or the purported exercise of such authority may not necessarily be predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an

A official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and unscrupulous persons. The official may in his defence perform a duty which can be on account of some miscalculation or B wrong information but such a duty cannot be labelled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motives and was not connected with the discharge of any official duty. Thus, an act which may appear to be wrong C or a decision which may appear to be incorrect is not necessarily a malicious act or decision. The presumption of good faith therefore can be dislodged only by cogent and clinching material and so long as such a conclusion is not drawn, a duty in good faith should be presumed D to have been done or purported to have been done in exercise of the powers conferred under the statute. There has to be material to attribute or impute an unreasonable motive behind an act to take away the immunity clause. It is for this reason that when the authority empowered to grant sanction is proceeding to exercise its discretion, E it has to take into account the material facts of the incident complained of before passing an order of granting sanction or else official duty would always be in peril even if performed bonafidely and genuinely. [Paras 44-51] [649-E-H; 650-A; 651-B-H; 652-A-H]

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Madhavrao Narayanrao Patwardhan v. Ram Krishna Govind Bhanu & Ors. AIR 1958 SC 767: 1959 SCR 564; *Madhav Rao Scindia Bahadur Etc. v. Union of India & Anr.* AIR 1971 SC 530: 1971 (3) SCR 9; *Sewakram Sobhani v.* G *R.K. Karanjiya, Chief Editor, Weekly Blitz & Ors.* AIR 1981 SC 1514; *Vijay Kumar Rampal & Ors. v. Diwan Devi & Ors.* AIR 1985 SC 1669; *Deena (Dead) through Lrs. v. Bharat Singh (Dead) through LRs. & Ors.*, (2002) 6 SCC 336: 2002 (1) Suppl. SCR 289; *Goondla Venkateshwarlu v. State of Andhra* H *Pradesh & Anr.* (2008) 9 SCC 613: 2008 (12) SCR 608;

Brijendra Singh v. State of U.P. & Ors. **AIR 1981 SC 636 - relied on.**

4.2. The protection and immunity granted to an official particularly in provisions of the Act 1990 or like Acts has to be widely construed in order to assess the act complained of. This would also include the assessment of cases like mistaken identities or an act performed on the basis of a genuine suspicion. Therefore, such immunity clauses have to be interpreted with wide discretionary powers to the sanctioning authority in order to uphold the official discharge of duties in good faith and a sanction therefore has to be issued only on the basis of a sound objective assessment and not otherwise. Use of words like 'No' and 'shall' in Section 7 of the Act 1990 denotes the mandatory requirement of obtaining prior sanction of the Central Government before institution of the prosecution, suit or legal proceedings. The conjoint reading of Section 197(2) Cr.P.C. and Section 7 of the Act 1990 would show that prior sanction is a condition precedent before institution of any of the said legal proceedings. Under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act 1990, the investigating agency/complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly. Thus, the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible

A connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the B public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without C sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The D question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred "absolute power" on the statutory authority to accord sanction or E withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority. Thus, sanction of the Central Government is required in the facts and circumstances of the case and the court F concerned lacks jurisdiction to take cognizance unless sanction is granted by the Central Government. [Paras 52-56] [653-A-D; 654-C-H; 655-A-E]

5. The CJM Court gave option to the higher G authorities of the Army to choose whether the trial be held by the court-martial or by the criminal court as required under Section 125 of the Army Act. File notings of Army Authorities revealed their decision that in case it is decided by this Court that sanction is required and the Central Government accords sanction, option would be H

availed at that stage. Thus, Military Authority may ask the criminal court dealing with the case that the accused would be tried by the court-martial in view of the provisions of Section 125 of the Army Act. However, the option given by the Authority is not final in view of the provisions of Section 126 of the Army Act. Criminal court having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned to be proceeded according to law or to postpone the proceedings pending reference to the Central Government, if that criminal court is of the opinion that proceedings be instituted before itself in respect of that offence. Thus, in case the criminal court makes such a request, the Military Officer either has to comply with it or to make a reference to the Central Government whose orders would be final with respect to the venue of the trial. Therefore, the discretion exercised by the Military Officer is subject to the control of the Central Government. Such matter is being governed by the provisions of Section 475 Cr.P.C. read with the provisions of the J & K Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1983. Rule 6 of the said Rules, 1983, provides that in case the accused has been handed over to the Army authorities to be tried by a court-martial, the proceedings of the criminal court shall remain stayed. Rule 7 thereof, further provides that when an accused has been delivered by the criminal court to the Army authorities, the authority concerned shall inform the criminal court whether the accused has been tried by a court-martial or other effectual proceedings have been taken or ordered to be taken against him. If the Magistrate is informed that the accused has not been tried or other effectual proceedings have not been taken, the Magistrate shall report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.

A **Under Section 125 of the Army Act, the stage of making option to try an accused by a court-martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges. Section 7 of the Act 1990 does not contain non-obstante clause.**
B **Therefore, once the option is made that accused is to be tried by a court-martial, further proceedings would be in accordance with the provisions of Section 70 of the Army Act and for that purpose, sanction of the Central Government is not required. [Paras 57-58, 62, 64] [655-E-**
C **H; 656-A-F; 657-F-G; 658-C-D]**

Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya **AIR 1972 SC 2548;** *Balbir Singh & Anr. v. State of Punjab* **1994 (5) Suppl. SCR 422;** *Ram Sarup v. Union of India & Anr.* **AIR 1965 SC 247;** *Union of India & Ors. v. Major*
D *A. Hussain* **AIR 1998 SC 577 - relied on.**

6. Sum up:

(i) The conjoint reading of the relevant statutory
E **provisions and rules make it clear that the term "institution" contained in Section 7 of the Act 1990 means taking cognizance of the offence and not mere presentation of the chargesheet by the investigating agency.**

F **(ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the chargesheet and not after the cognizance of the offence is taken by the court.**

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(iii) Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.

(iv) In case option is made to try the accused by a
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court-martial, sanction of the Central Government is not required. [Para 66] [658-F-H; 659-A-C]

7. In view of that, the following directions are passed:

I The competent authority in the Army shall take a decision within a period of eight weeks from today as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately thereafter.

II In case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously.

III In case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government for grant of sanction within four weeks from the receipt of such option and in case such an application is filed, the Central Government shall take a final decision on the said application within a period of three months from the date of receipt of such an application.

IV In case sanction is granted by the Central Government, the criminal court shall proceed with the trial and conclude the same expeditiously. [Para 67] [659-D-H; 670-A-B]

Case Law Reference:

AIR 1991 SC 506	relied on	Para 12
1993 (1) SCR 340	relied on	Para 12
1972 (2) SCR 965	relied on	Para 12
AIR 1982 SC 818	relied on	Para 12
AIR 1987 SC 1739	relied on	Para 12

A	AIR 1968 SC 488	relied on	Para 14
	AIR 1970 SC 1093	relied on	Para 15
	AIR 1970 SC 1384	relied on	Para 16
B	AIR 1998 SC 492	relied on	Para 17
	AIR 1964 SC 1541	relied on	Para 18
	2011 (6) SCR 138	relied on	Para 18,25
	1979 (2) SCR 717	relied on	Para 19
C	1976 (0) Suppl. SCR 524	relied on	Para 19
	2000 (3) Suppl. SCR 171	relied on	Para 20
	1995 (6) Suppl. SCR 236	relied on	Para 22
D	AIR 2004 SC 4174	relied on	Para 22
	2005 (4) Suppl. SCR 77	relied on	Para 22
	2006 (1) SCR 124	relied on	Para 22
E	2008 (6) SCR 912	relied on	Para 22
	2009 (12) SCR 1048	relied on	Para 22
	1969 SCR 22	relied on	Para 23
	1979 (1) SCR 349	relied on	Para 23
F	1993 (2) SCR 311	relied on	Para 23
	1995 (3) Suppl. SCR 58	relied on	Para 23
	1997 (2) SCR 1139	relied on	Para 23
G	2009 (1) SCR 99	relied on	Para 23
	2009 (11) SCR 790	relied on	Para 25
	1964 SCR 742	relied on	Para 24
H	1966 SCR 880	relied on	Para 25

AIR 1966 SC 1786	**relied on**	**Para 25**	A
1993 (2) Suppl. SCR 123	**relied on**	**Para 25**	
2004 (3) SCR 504	**relied on**	**Para 26**	
1967 SCR 201	**relied on**	**Para 26**	B
1997 (5) Suppl. SCR 524	**relied on**	**Para 27**	
1955 SCR 925	**relied on**	**Para 28,56**	
2006 (3) SCR 305	**relied on**	**Para 29, 56**	
2001 (3) SCR 766	**relied on**	**Para 29**	C
1980 (1) SCR 111	**relied on**	**Para 30**	
2006 (10) Suppl. SCR 197	**relied on**	**Para 31**	
2008 (4) SCR 976	**relied on**	**Para 32**	D
1964 SCR 671	**relied on**	**Para 33**	
1997 (5) Suppl. SCR 469	**relied on**	**Para 34**	
2009 (7) SCR 759	**relied on**	**Para 35**	E
2007 (12) SCR 830	**relied on**	**Para 36**	
1997 (3) Suppl. SCR 356	**relied on**	**Para 37**	
2003 (6) Suppl. SCR 541	**relied on**	**Para 38**	F
1991 (1) SCC 57	**relied on**	**Para 39**	
1994 (6) Suppl. SCR 16	**relied on**	**Para 39**	
2012 (3) SCC 64	**relied on**	**Para 40**	
(2012) 4 SCALE 191	**relied on**	**Para 40**	G
2009 (8) SCR 85	**relied on**	**Para 41**	
1961 SCR 91	**relied on**	**Para 43**	
1983 (2) SCR 249	**relied on**	**Para 43**	H

A	**1959 SCR 564**	**relied on**	**Para 44**
	1971 (3) SCR 9	**relied on**	**Para 44**
	AIR 1981 SC 1514	**relied on**	**Para 44**
B	**AIR 1985 SC 1669**	**relied on**	**Para 44**
	2002 (1) Suppl. SCR 289	**relied on**	**Para 44**
	2008 (12) SCR 608	**relied on**	**Para 44**
	AIR 1981 SC 636	**relied on**	**Para 44**
C	**AIR 1969 SC 414**	**relied on**	**Para 59**
	AIR 1972 SC 2548	**relied on**	**Para 60**
	1994 (5) Suppl. SCR 422	**relied on**	**Para 61**
D	**AIR 1965 SC 247**	**relied on**	**Para 61**
	AIR 1998 SC 577	**relied on**	**Para 65**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 257 of 2011 etc.

E

From the Judgment & Order dated 10.07.2007 of the High Court of Jammu & Kashmir in 561A 78 & 80 of 2006.

WITH

F Crl. Appeal No. 55 of 2006.

P.P. Malhotra, Mohan Parasaran, H.P. Raval, ASG, M.S. Ganesh, Ashok Bhan, D.L. Chidananda, B.K. Prasad, Anil Katiyar, D.S. Mahra, R. Ayyam Perumal, Sukun K.S. Chandele, P.K. Dey, Dr. Chaudhary Shamsuddin Khan, Arvind Kumar G Sharma for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Criminal Appeal No. 257 of H 2011 has been preferred against the impugned judgment and

order dated 10.7.2007 passed by the High Court of Jammu and Kashmir in Petition Nos. 78 and 80 of 2006 under Section 561-A of the Code of Criminal Procedure, (J&K) (hereinafter called as `Code') by which the High Court upheld the order dated 30.11.2006 passed by the Additional Sessions Judge, Srinagar in File No. 16/Revision of 2006, and by the Chief Judicial Magistrate, Srinagar dated 24.8.2006, rejecting the appellant's application for not entertaining the chargesheet filed by the Central Bureau of Investigation (hereinafter called 'CBI').

2. Brief facts relevant to the disposal of this appeal are as under:

A. In Village Chittising Pora, District Anantnag, J&K, 36 Sikhs were killed by terrorists on 20.3.2000. Immediately thereafter, search for the terrorists started in the entire area and 5 persons, purported to be terrorists, were killed at village Pathribal Punchalthan, District Anantnag, J & K by 7 Rashtriya Rifles (hereinafter called as `RR') Personnel on 25.3.2000 in an encounter.

B. In respect of killing of 5 persons by 7 RR on 25.3.2000 at Pathribal claiming them to be responsible for Sikhs massacre at Chittising Pora, a complaint bearing No. 241/GS(Ops.) dated 25.3.2000 was sent to Police Station Achchabal, District Anantnag, J&K by Major Amit Saxena, the then Adjutant, 7 RR, for lodging FIR stating that during a special cordon and search operation in the forests of Panchalthan from 0515 hr. to 1500 hrs. on 25.3.2000, an encounter took place between terrorists and troops of that unit and in that operation, 5 unidentified terrorists were killed in the said operation. On the receipt of the complaint, FIR No. 15/2000 under Section 307 of Ranbir Penal Code (hereinafter called 'RPC') and Sections 7/25 Arms Act, 1959 was registered against unknown persons. A seizure memo was prepared by Major Amit Saxena (Adjutant) on 25.3.2000 showing seizure of arms and ammunition from all the 5 unidentified terrorists killed in the aforesaid operation which included AK-47 rifles (5), AK-47 Magazine rifles (12),

A radio sets (2), AK-48 ammunition (44 rounds), hand grenades (2) detonators (4) and detonator time devices (2). The said seizure memo was signed by the witnesses Farooq Ahmad Gujjar and Mohd. Ayub Gujjar, residents of Wuzukhan, Panchalthan, J & K.

B

C. The 7 RR deposited the said recovered weapons and ammunition with 2 Field Ordnance Depot. However, the local police insisted that the Army failed to hand over the arms and ammunition allegedly recovered from the terrorists killed in the encounter, which tantamounts to causing of disappearance of C the evidence, constituting an offence under Section 201 RPC. In this regard, there had been correspondence and a Special Situation Report dated 25.3.2000 was sent by Major Amit Saxena, the then Adjutant, to Head Quarter-I, Sector RR stating that, based on police inputs, a joint operation with STF was D launched in the forest of Pathribal valley on 25.3.2000, as a consequence, the said incident occurred. However, it was added that ammunition allegedly recovered from the killed militants had been taken away by the STF.

E D. There had been long processions in the valley in protest of killing of these 5 persons on 25.3.2000 by 7 RR alleging that they were civilians and had been killed by the Army personnel in a fake encounter. The local population treated it to be a barbaric act of violence and there had been a demand of F independent inquiry into the whole incident. Thus, in view thereof, on the request of Government of J & K, a Notification dated 19.12.2000 under Section 6 of Delhi Police Special Establishment Act, 1946 (hereinafter called as `Act 1946') was issued. In pursuance thereof, Ministry of Personnel, Government G of India, also issued Notification dated 22.1.2003 under Section 5 of the Act 1946 asking the CBI to investigate four cases including the alleged encounter at Pathribal resulting in the death of 5 persons on 25.3.2000.

E. The CBI conducted the investigation in Pathribal H incident and filed a chargesheet in the court of Chief Judicial

Magistrate-cum-Special Magistrate, CBI, (hereinafter called the 'CJM') Srinagar, on 9.5.2006, alleging that it was a fake encounter, an outcome of criminal conspiracy hatched by Col. Ajay Saxena (A-1), Major Brajendra Pratap Singh (A-2), Major Sourabh Sharma (A-3), Subedar Idrees Khan (A-4) and some members of the troops of 7 RR were responsible for killing of innocent persons. Major Amit Saxena (A-5) (Adjutant) prepared a false seizure memo showing recovery of arms and ammunition in the said incident, and also gave a false complaint to the police station for registration of the case against the said five civilians showing some of them as foreign militants and false information to the senior officers to create an impression that the encounter was genuine and, therefore, caused disappearance of the evidence of commission of the aforesaid offence under Section 120-B read with Sections 342, 304, 302, 201 RPC and substantive offences thereof. Major Amit Saxena (A-5) (Adjutant) was further alleged to have committed offence punishable under Section 120-B read with Section 201 RPC and substantive offence under Section 201 RPC with regard to the aforesaid offences.

F. The learned CJM on consideration of the matter, found that veracity of the allegations made in the chargesheet and the analysis of the evidence cannot be gone into as it would tantamount to assuming jurisdiction not vested in him. It was so in view of the provisions of Armed Forces J & K (Special Powers) Act, 1990 (hereinafter called 'Act 1990'), which offer protection to persons acting under the said Act.

G. The CJM, Srinagar, granted opportunity to Army to exercise the option as to whether the competent military authority would prefer to try the case by way of court-martial by taking over the case under the provisions of Section 125 of the Army Act, 1950 (hereinafter called the `Army Act'). On 24.5.2006, the Army officers filed an application before the court pointing out that no prosecution could be instituted except with the previous sanction of the Central Government in view

of the provisions of Section 7 of the Act 1990 and, therefore, the proceedings be closed by returning the chargesheet to the CBI.

H. The CJM vide order dated 24.8.2006 dismissed the application holding that the said court had no jurisdiction to go into the documents filed by the investigating agency and it was for the trial court to find out whether the *action complained of falls within the ambit of the discharge of official duty or not.* The CJM himself could not analyse the evidence and other material produced with the chargesheet for considering the fact, as to whether the officials had committed the act in good faith in discharge of their official duty; otherwise the act of such officials was illegal or unlawful in view of the nature of the offence.

I. Aggrieved by the order of CJM dated 24.8.2006, the appellant filed revision petition before the Sessions Court, Srinagar and the same stood dismissed vide order dated 30.11.2006. However, the revisional court directed the CJM to give one more opportunity to the Army officials for exercise of option under Section 125 of the Army Act.

J. The appellant approached the High Court under Section 561-A of the Code. The Court vide impugned order dated 10.7.2007 affirmed the orders of the courts below and held that the very objective of sanctions is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties. However, it has to be examined as to whether their action falls under the Act 1990. The CJM does not have the power to examine such an issue at the time of committal of proceedings. At this stage, the Committal Court has to examine only as to whether any case is made out and, if so, the offence is triable by whom.

Hence, this appeal.

3. Criminal Appeal No. 55 of 2006 has been preferred against the impugned judgment and order dated 28.3.2005 passed by the High Court of Guwahati in Criminal Revision No.117 of 2004 by which it has upheld the order of the Special Judicial Magistrate, Kamrup dated 10.11.2003 rejecting the application of the appellant seeking protection of the provisions of Section 6 of the Armed Forces (Special Powers) Act, 1958 (hereinafter called the `Act 1958') in respect of the armed forces personnel.

4. Facts and circumstances giving rise to this appeal are as under:

A. In order to curb the insurgency in the North-East, the Parliament enacted the Act 1958 authorising the Central Government as well as the Governor of the State to declare, by way of Notification in the official Gazette, the whole or part of the State as disturbed area. Section 4 of the Act 1958 conferred certain powers on the Army personnel acting under the Act which include power to arrest without warrant on reasonable suspicion, destroy any arms, ammunitions dumped and hide out, and also to open fire or otherwise use powers even to the extent of causing death against any person acting in contravention of law and order and further to carry out search and seizure. The entire State of Assam was declared disturbed area under the Act 1958 vide Notification dated 27.11.1990 and Army was requisitioned and deployed in various parts of the State to fight insurgency and to restore law and order.

B. On 22.2.1994, the 18th Battalion of Punjab Regiment was deployed in Tinsukhia District of Assam to carry out the counter insurgency operation in the area of Saikhowa Reserve Forest. The said Army personnel faced the insurgents who opened fire from an ambush. The armed battalion returned fire and in the process, some militants died. The Battalion continued search at the place of encounter and consequently, 5 bodies of the militants alongwith certain arms and ammunitions were recovered. In respect of the said incident, an FIR was lodged

A at P.S. Doom Dooma. Local Police also visited the place on 23.2.1994 and 1.3.1994 and investigated the case. The incident was investigated by the Army under the Army Court of enquiry as provided under the Army Act. Two Magisterial enquiries were held as per the directions issued by the State Government
B and as per the appellant, the version of the Army personnel was found to be true and a finding was recorded that 'the counter insurgency operation was done in exercise of the official duty'.

C. Two writ petitions were filed before the High Court by the non-parties alleging that the Army officials apprehended 9
C individuals and killed 5 of them in a fake encounter. The High Court directed the CBI to investigate the matter.

D. The CBI completed the investigation and filed chargesheet against 7 Army personnel in the Court of Special
D Judicial Magistrate, Kamrup under Section 302/201 read with Section 109 of the Indian Penal Code, 1860 (hereinafter called `IPC'). The Special Judicial Magistrate issued notice dated 30.5.2002 to the appellant i.e. Army Headquarter to collect the said chargesheet. The appellant requested the said Court not
E to proceed with the matter as the action had been carried out by the Army personnel in performance of their official duty and thus, they were protected under the Act 1958 and in order to proceed further in the matter, sanction of the Central Government was necessary. The learned Special Judicial
F Magistrate rejected the case of the appellant vide order dated 10.11.2003. Being aggrieved, the appellant preferred the revision petition which has been rejected vide impugned order dated 28.3.2005 by the High Court.

Hence, this appeal.

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5. As the facts and legal issues involved in both the appeals are similar, we decide both the appeals by a common judgment taking the Criminal Appeal No. 257 of 2011 as a leading case.

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6. Shri Mohan Parasaran and Shri P.P. Malhotra, learned Addl. Solicitor Generals appearing on behalf of the Union of India and Army personnel, have contended that mandate of Section 7 of the Act 1990 is clear and it clearly provides that no prosecution shall be instituted and, therefore, cannot be instituted without prior sanction of the Central Government. It is contended that the prosecution would be deemed to have instituted/initiated at the moment the chargesheet is filed and received by the court. Such an acceptance/receipt is without jurisdiction. The previous sanction of the competent authority is a pre-condition for the court in taking the chargesheet on record if the offence alleged to have been committed in discharge of official duty and such issue touches the jurisdiction of the court.

7. On the other hand, Shri H.P. Raval, learned ASG, Shri Ashok Bhan, learned senior counsel appearing on behalf of the CBI, and Mr. M.S. Ganesh appearing for the interveners (though application for intervention not allowed) have vehemently opposed the appeals contending that the institution of a criminal case means taking cognizance of the case, mere presentation/ filing of the chargesheet in the court does not amount to institution. The court of CJM has not taken cognizance of the offence, therefore, the appeals are premature. Even otherwise, killing innocent persons in a fake encounter in execution of a conspiracy cannot be a part of official duty and thus, in view of the facts of the case no sanction is required. The appeals are liable to be dismissed.

8. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

9. The matter is required to be examined taking into consideration the statutory provisions of the Act 1990 and also considering the object of the said Act. It is to be examined as to whether the court, after the chargesheet is filed, can entertain the same and proceed to frame charges without previous sanction of the Central Government. The Act 1990 confers

A certain special powers upon members of the Armed Forces in the disturbed area in the State of J & K. The disturbed area is defined and there is no dispute that the place where the incident occurred stood notified under the Act 1990. Section 4 of the Act 1990 confers special powers on the officer of armed B forces to take measures, where he considers it necessary to do so, for the maintenance of public order. However, he must give due warning according to the circumstances and even fire upon or use force that may also result in causing death against any person acting in contravention of law and order in the C disturbed area and prohibit the assembly of five or more persons or carrying of weapons etc. Such an officer has further been empowered to destroy any arms dump, arrest any person without warrant who has committed a cognizable offence and enter and search without warrant any premises to make any D arrest. Section 6 of the Act 1990 requires that such arrested person and seized property be handed over to the local police by such an officer.

10. Section 7 of the Act 1990 provides for umbrella protection to the Army personnel in respect of anything done E or purported to be done in exercise of powers conferred by the Act. The whole issue is regarding the interpretation of Section 7 of the Act 1990, as to whether the term *'institution'* used therein means filing/presenting/submitting the chargesheet in the court or taking cognizance and whether the court can F proceed with the trial without *previous sanction* of the Central Government.

11. The analogous provision to Section 7 of the Act 1990 exists in Sections 45(1) and 197(2) of the Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). The provisions G of Section 7 of the Act 1990 are mandatory and if not complied with in letter and spirit before institution of any suit, prosecution or legal proceedings against any persons in respect of anything done or purported to be done in exercise of the powers conferred by the Act 1990, the same could be rendered invalid H

and illegal as the provisions require the previous sanction of the Central Government before institution of the prosecution.

According to the appellants, institution of prosecution is a stage prior to taking cognizance and, therefore, the word *'institution'* is different from the words taking *'cognizance'*.

The scheme of the Act requires that any legal proceeding instituted against any Army official working under the Act 1990 has to be subjected to stringent test before any such proceeding can be instituted. Special powers have been conferred upon Army officials to meet the dangerous conditions i.e. use of the armed forces in aid of civil force to prevent activities involving terrorist acts directed towards overawing the government or striking terror in people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people. Therefore, Section 7 is required to be interpreted keeping the aforesaid objectives in mind.

12. The 'prosecution' means a criminal action before the court of law for the purpose of determining 'guilt' or 'innocence' of a person charged with a crime. Civil suit refers to a civil action instituted before a court of law for realisation of a right vested in a party by law. The phrase 'legal proceeding' connotes a term which means the proceedings in a court of justice to get a remedy which the law permits to the person aggrieved. It includes any formal steps or measures employed therein. It is not synonymous with the 'judicial proceedings'. Every judicial proceeding is a legal proceeding but not vice-versa, for the reason that there may be a 'legal proceeding' which may not be judicial at all, e.g. statutory remedies like assessment under Income Tax Act, Sales Tax Act, arbitration proceedings etc. So, the ambit of expression 'legal proceedings' is much wider than 'judicial proceedings'. The expression 'legal proceeding' is to be construed in its ordinary meaning but it is quite distinguishable from the departmental and administrative proceedings, e.g. proceedings for registration of trade marks etc. The terms used in Section 7 i.e. suit, prosecution and legal

A proceedings are not inter-changeable or convey the same meaning. The phrase `legal proceedings' is to be understood in the context of the statutory provision applicable in a particular case, and considering the preceding words used therein. In *Assistant Collector of Central Excise, Guntur v. Ramdev* B *Tobacco Company,* AIR 1991 SC 506, this Court explained the meaning of the phrase "other legal proceedings" contained in Section 40(2) of the Central Excises and Salt Act, 1944, wherein these words have been used after suit and prosecution. The Court held that these words must be read as ejusdem C generis with the preceding words i.e. suit and prosecution, as they constitute a genus. Therefore, issuance of a notice calling upon the dealer to show cause why duty should not be demanded under the Rules and why penalty should not be imposed for infraction of the statutory rules and enjoin of D consequential adjudication proceedings by the appellate authority would not fall within the expression "other legal proceedings" as in the context of the said statute. 'Legal proceedings' do not include the administrative proceedings.

In *Maharashtra Tubes Ltd. v. State Industrial &* E *Investment Corporation of Maharashtra Ltd. & Anr.,* (1993) 2 SCC 144, this Court dealt with the expressions 'proceedings' and 'legal proceedings' and placed reliance upon the dictionary meaning of expression 'legal proceedings' as found in Black Law Dictionary (Fourth Edition) which read as under:

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> "Any proceedings in court of justice ... by which property of debtor is seized and diverted from his general creditors .... This term includes all proceedings authorised or sanctioned by law, and brought or instituted in a court of G justice or legal tribunal, for the acquiring of a right or the enforcement of a remedy."

The Court came to the conclusion that proceedings before statutory authorities under the provisions of the Act do not amount to legal proceedings.

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'Legal proceedings' means proceedings regulated or prescribed by law in which a judicial decision may be given; it means proceedings in a court of justice by which a party pursues a remedy which a law provides, but does not include administrative and departmental proceedings. (See also: *S. V. Kondaskar, Official Liquidator v. V.M. Deshpande, I.T.O. & Anr.*, AIR 1972 SC 878; *Babulal v. M/s. Hajari Lal Kishori Lal & Ors.*, AIR 1982 SC 818; and *Binod Mills Co. Ltd., Ujjain v. Shri. Suresh Chandra Mahaveer Prasad Mantri, Bombay*, AIR 1987 SC 1739).

The provision of Section 7 of the Act 1990 prohibits institution of legal proceedings against any Army personnel without prior sanction of the Central Government. Therefore, chargesheet cannot be instituted without prior sanction of the Central Government. The use of the words 'anything done' or 'purported to be done' in exercise of powers conferred by the Act 1990 is very wide in its scope and ambit and it consists of twin test. Firstly, the act or omission complained of must have been done in the course of exercising powers conferred under the Act, i.e., while carrying out the duty in the course of his service and secondly, once it is found to have been performed in discharge of his official duty, then the protection given under Section 7 must be construed liberally. Therefore, the provision contained under Section 7 of the Act 1990

(i) <u>INSTITUTION OF A CASE:</u>

13. The meaning of the aforesaid term has to be ascertained taking into consideration the scheme of the Act/ Statute applicable. The expression may mean filing/ presentation or received or entertained by the court. The question does arise as to whether it simply means mere presentation/filing or something further where the application of the mind of the court is to be applied for passing an order.

14. In *M/s. Lakshmiratan Engineering Works Ltd. v. Asst. Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur*

A *& Anr.,* AIR 1968 SC 488, this Court dealt with the provisions of U.P. Sales Tax Act, 1948 and rules made under it and while interpreting the proviso to Section 9 thereof, which provided the mode of filing the appeal and further provided that appeal could be "entertained" on depositing a part of the assessed/admitted B amount of tax. The question arose as what was the meaning of the word 'entertain' in the said context, as to whether it meant that no appeal would be received or filed or it meant that no appeal would be admitted or heard and disposed of unless satisfactory proof of deposit was available. This Court held that C dictionary meaning of the word 'entertain' was either 'to deal with' or 'admit to consideration'. However, the court had to consider whether filing or receiving the memorandum of appeal was not permitted without depositing the required amount of tax or it could not be heard and decided on merits without D depositing the same. The court took into consideration the words 'filed or received' in Section 6 of the Court Fees Act and held that in the context of the said Act it would mean 'admit for consideration'. Mere filing or presentation or receiving the memorandum of appeal was inconsequential. The provisions provided that the appeal filed would not be admitted for E consideration unless the required tax was deposited.

15. In *Lala Ram v. Hari Ram,* AIR 1970 SC 1093, this Court considered the word 'entertain' contained in the provisions of Section 417(4) of the Code of Criminal Procedure, F 1898 (analogous to Section 378 Cr.P.C.) providing for the period of limitation of 60 days for filing the application for leave to appeal against the order of acquittal. Thus, the question arose as to whether 60 days are required for filing/presenting the application for leave to appeal or the application should be G heard by the court within that period. This Court held that in that context, the word 'entertain' meant 'filed or received by the court' and it had no reference to the actual hearing of the application for leave to appeal. So, in that context 'entertain' was explained to receive or file the application for leave to appeal.

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16. In *Hindustan Commercial Bank Ltd. v. Punnu Sahu (dead) through LRs.*, AIR 1970 SC 1384, this Court dealt with the expression 'entertain' contained in the proviso to Order XXI Rule 90 Code of Civil Procedure, 1908 as amended by the High Court of Allahabad and rejected the contention that it meant initiation of the proceeding and not to the stage when the court takes up the application for consideration, observing that 'entertain' means to "adjudicate upon" or "proceed to consider on merits". A B

17. In *Martin and Harris Ltd. v. VIth Additional District Judge & Ors.*, AIR 1998 SC 492, while dealing with the provisions of Section 21(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, the word "entertain" was interpreted as considering the grounds for the purpose of adjudication on merits i.e. thereby taking cognizance of an application by the statutory authority. The Court rejected the contention that the term 'entertain' contained in the said statutory provision was synonymous with the word 'institute'. C D

18. In *Jamuna Singh & Ors. v. Bhadai Shah,* AIR 1964 SC 1541, this Court dealt with the expression 'institution of a case' and held that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. Section 190(1) Cr.P.C. contains the provision for taking cognizance of offence (s) by Magistrate. Section 193 Cr.P.C. provides for cognizance of offence (s) being taken by courts of Sessions on commitment to it by a Magistrate duly empowered in that behalf. E F

This view has been reiterated, approved and followed by this Court in *Satyavir Singh Rathi, ACP & Ors. v. State through CBI,* (2011) 6 SCC 1. G

19. A similar view has been reiterated by this Court in *Kamalapati Trivedi v. The State of West Bengal,* AIR 1979 SC 777, observing that when a Magistrate applies his mind under Chapter XVI, he must be held to have taken cognizance of the H

A offences mentioned in the complaint. Such a situation would not arise while passing order under Section 156(3) Cr.P.C. or while issuing a search warrant for the purpose of investigation. In *Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors.*, AIR 1976 SC 1672, this Court held that
B 'institution' means taking cognizance of the offence alleged in the chargesheet.

20. Mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. (Vide: *Narsingh Das Tapadia v. Goverdhan Das Partani & Anr.*, AIR
C 2000 SC 2946).

21. Thus, in view of the above, it is evident that the expression "Institution" has to be understood in the context of the scheme of the Act applicable in a particular case. So far
D as the criminal proceedings are concerned, "Institution" does not mean filing; presenting or initiating the proceedings, rather it means taking cognizance as per the provisions contained in the Cr.P.C.

E **(ii) <u>SANCTION FOR PROSECUTION:</u>**

22. The protection given under Section 197 Cr.P.C. is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or
F purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they
G choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. Use of the expression *"official*
H *duty" implies that the act or omission must have* been done

by the public servant in the course of his service and that it should have been done in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those *acts or omissions* which are done by a public servant in discharge of official duty. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged **had reasonable connection** with discharge of his duty, then it must be held to be official to which applicability of Section 197 Cr.P.C. cannot be disputed. (See: *R. Balakrishna Pillai v. State of Kerala & Anr.,* AIR 1996 SC 901; *S.K. Zutshi & Anr. v. Bimal Debnath & Anr.,* AIR 2004 SC 4174; *Center for Public Interest Litigation & Anr. v. Union of India & Anr.,* AIR 2005 SC 4413; *Rakesh Kumar Mishra v. State of Bihar & Ors.,* AIR 2006 SC 820; *Anjani Kumar v. State of Bihar & Ors.,* AIR 2008 SC 1992; and *State of Madhya Pradesh v. Sheetla Sahai & Ors.,* (2009) 8 SCC 617).

23. The question to examine as to whether the sanction is required or not under a statute has to be considered at the time of taking cognizance of the offence and not during enquiry or investigation. There is a marked distinction in the stage of investigation and prosecution. The prosecution starts when the cognizance of offence is taken. It is also to be kept in mind that the cognizance is taken of the offence and not of the offender. The sanction of the appropriate authority is necessary to protect a public servant from unnecessary harassment or prosecution. Such a protection is necessary as an assurance to an honest and sincere officer to perform his public duty honestly and to the best of his ability. The threat of prosecution demoralises the honest officer. However, performance of public duty under colour of duty cannot be camouflaged to commit a crime. The public duty may provide such a public servant an opportunity to commit crime and such issue is required to be examined by the sanctioning authority or by the court. It is quite possible that the official capacity may enable the pubic servant to fabricate the record or mis-appropriate public funds etc. Such activities

definitely cannot be integrally connected or inseparably interlinked with the crime committed in the course of the same transaction. Thus, all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of requirement of sanction. (Vide: *Bhanuprasad Hariprasad Dave & Anr. v. The State of Gujarat,* AIR 1968 SC 1323; *Hareram Satpathy v. Tikaram Agarwala & Ors.,* AIR 1978 SC 1568; *State of Maharashtra v. Dr. Budhikota Subbarao,* (1993) 3 SCC 339; *Anil Saran v. State of Bihar & Anr.,* AIR 1996 SC 204; *Shambhoo Nath Misra v State of U.P. & Ors.,* AIR 1997 SC 2102; and *Choudhury Parveen Sultana v. State of West Bengal & Anr.,* AIR 2009 SC 1404).

24. In fact, the issue of sanction becomes a question of paramount importance when a public servant is alleged to have acted beyond his authority or his acts complained of are in dereliction of the duty. In such an eventuality, if the offence is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, grant of prior sanction becomes imperative. It is so, for the reason that the power of the State is performed by an executive authority authorised in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article 162 thereof. (See : *State of Punjab & Anr. v. Mohammed Iqbal Bhatti,* (2009) 17 SCC 92).

25. In *Satyavir Singh Rathi,* (Supra), this Court considered the provisions of Section 140 of the Delhi Police Act 1978 which bars the suit and prosecution in any alleged offence by a police officer in respect of the act done under colour of duty or authority in exercise of any such duty or authority without the sanction and the same shall not be entertained if it is instituted more than 3 months after the date of the act complained of. A complaint may be entertained in this regard by the court if instituted with the previous sanction of the administrator within

one year from the date of the offence. This Court after considering its earlier judgments including *Jamuna Singh* (supra); *The State of Andhra Pradesh v. N. Venugopal & Ors.*, AIR 1964 SC 33; *State of Maharashtra v. Narhar Rao,* AIR 1966 SC 1783; *State of Maharashtra v. Atma Ram & Ors.*, AIR 1966 SC 1786; and *Prof. Sumer Chand v. Union of India & Ors.*, (1994) 1 SCC 64, came to the conclusion that the prosecution has been initiated on the basis of the FIR and it was the duty of the police officer to investigate the matter and to file a chargesheet, if necessary. If there is a discernible connection between the act complained of by the accused and his powers and duties as police officer, the act complained of may fall within the description of colour of duty. However, in a case where the act complained of does not fall within the description of colour of duty, the provisions of Section 140 of the Delhi Police Act 1978 would not be attracted.

26. This Court in *State of Orissa & Ors. v. Ganesh Chandra Jew,* AIR 2004 SC 2179, while dealing with the issue held as under:

> "..... It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. *There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty.* If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant." (Emphasis added)

A (See also: *P. Arulswami v. State of Madras,* AIR 1967 SC 776).

27. This Court in *Suresh Kumar Bhikamchand Jain v. Pandey Ajay Bhushan & Ors.,* AIR 1998 SC 1524, held as B under:

> ".....The legislative mandate engrafted in sub-section (1) of Section 197 debarring a Court from taking cognizance of an offence except with a previous sanction of the concerned Government in a case where the acts C complained of are alleged to have been committed by public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from his office save by or with the sanction of the Government touches the jurisdiction of D the Court itself. It is a prohibition imposed by the statute from taking cognizance, the accused after appearing before the Court on process being issued, by an application indicating that Section 197(1) is attracted merely assists the Court to rectify its error where E jurisdiction has been exercised which it does not possess. In such a case there should not be any bar for the accused producing the relevant documents and materials which will be ipso facto admissible, for adjudication of the question as to whether in fact Section 197 has any application in F the case in hand. It is no longer in dispute and has been indicated by this Court in several cases that the question of sanction can be considered at any stage of the proceedings." (Emphasis added)

28. In *Matajog Dobey v. H.C. Bhari,* AIR 1956 SC 44, the G Constitution Bench of this Court held that requirement of sanction may arise at any stage of the proceedings as the complaint may not disclose all the facts to decide the question of immunity, but facts subsequently coming either to notice of the police or in judicial inquiry or even in the course of H

prosecution evidence may establish the necessity for sanction. The necessity for sanction may surface during the course of trial and it would be open to the accused to place the material on record for showing what his duty was and also the acts complained of were so inter-related or inseparably connected with his official duty so as to attract the protection accorded by law. The court further observed that difference between "acting or purporting to act" in the discharge of his official duty is merely of a language and not of substance.

On the issue as to whether the court or the competent authority under the statute has to decide the requirement of sanction, the court held:

> "Whether sanction is to be accorded or not is a matter for the government to consider. *The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the Court,* which is the ascertainment of the true nature of the act.....There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation." (Emphasis added)

29. In *Sankaran Moitra v. Sadhna Das & Anr.,* AIR 2006 SC 1599, this Court held as under :

> "The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or

A in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the
B Code could not be attracted."

(See also: *Rizwan Ahmed Javed Shaikh & Ors. v. Jammal Patel & Ors.,* AIR 2001 SC 2198).

30. In *S.B. Saha & Ors. v. M.S. Kochar,* AIR 1979 SC
C 1841, this Court dealt with the issue elaborately and explained the meaning of "official" as contained in the provisions of Section 197 Cr.P.C., observing:

"In considering the question whether sanction for
D prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged..... The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code,
E are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the
F same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official
G duty, which is entitled to the protection of Section 197 (1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision."

H 31. In *Parkash Singh Badal & Anr. v. State of Punjab &*

Ors., AIR 2007 SC 1274, this Court reiterated the same view while interpreting the phrase "official duty", as under:

> "...Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned....."

32. In *P.K. Choudhury v. Commander,* 48 BRTF (GREF), (2008) 13 SCC 229, this Court dealt with the issue wherein an Army officer had allegedly indulged in the offence punishable under Section 166 IPC - public servant disobeying law, with intent to cause injury to any person and Section 167 IPC - public servant framing incorrect document with intention to cause injury, and as to whether in such an eventuality sanction under Section 197 Cr.P.C. was required. The Court held as under:

> "As the offences under Sections 166 and 167 of the Penal Code have a direct nexus with commission of a criminal misconduct on the part of a public servant, indisputably an order of sanction was prerequisite before the learned Judicial Magistrate could issue summons upon the appellant."

The Court further rejected the contention that sanction was not required in view of the provisions of Sections 125 and 126 of the Army Act, which provided for a choice of the competent authorities to try an accused either by a criminal court or proceedings for court-martial. Section 126 provides for the power of the criminal court to require delivery of offender. The

A Court held that in case the competent authority takes a decision that the accused was to be tried by ordinary criminal court, the provisions of the Cr.P.C. would be applicable including the law of limitation and the criminal court cannot take cognizance of offence if it is barred by limitation. In case, the delay is not B condoned, the court will have no jurisdiction to take the cognizance. Similarly, unless it is held that a sanction was not required to be obtained, the court's jurisdiction will be barred.

33. This Court in *Nagraj v. State of Mysore*, AIR 1964 SC 269, held that:

C

"The last question to consider is that if the Court comes at any stage to the conclusion that the *prosecution could not have been instituted without the sanction of the Government,* what should be the procedure to be followed D by it, i e., whether the Court should discharge the *accused or acquit him of the charge* if framed against him or just *drop the proceedings and pass no formal order of discharge or acquittal as contemplated in the case of a prosecution under the Code.* The High Court has said that E when the Sessions Judge be satisfied that the *facts proved bring the case within the mischief of S. 132 of the Code* then he is at liberty to reject the complaint holding that it is *barred by that section.* We consider this to be the right order to be passed in those circumstances. It is not F essential that the Court must pass a formal order *discharging or acquitting the accused. In fact no such order can be passed. If S. 132 applies, the complaint could not have been instituted without the sanction of the Government and the proceedings on a complaint so instituted would be void, the Court having no jurisdiction* G *to take those proceedings. When the proceedings be void, the Court is not competent to pass any order except an order that the proceedings be dropped and the complaint is rejected."* (Emphasis added)

H 34. In *Naga People's Movement of Human Rights v.*

Union of India, AIR 1998 SC 431, the Constitution Bench of this Court while dealing with the issue involved herein under the provisions of Section 6 of the Armed Forces (Special Powers) Act, 1958, held as under:

> "Under Section 6 protection has been given to the persons acting under the Central Act and it has been prescribed that no prosecution, suit or other legal proceeding shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by the said Act except with the *previous sanction* of the Central Government. *The conferment of such a protection has been assailed on the ground that it virtually provides immunity to persons exercising the powers conferred under Section 4 inasmuch as it extends the protection also to "anything purported to be done in exercise of the powers conferred by this Act".* It has been submitted that adequate protection for members of armed forces from arrest and prosecution is contained in Sections 45 and 197 CrPC and that a separate provision giving further protection is not called for. It has also been submitted that even if sanction for prosecution is granted, the person in question would be able to plead a statutory defence in criminal proceedings under Sections 76 and 79 of the Indian Penal Code. The protection given under Section 6 cannot, in our opinion, be regarded as conferment of an immunity on the persons exercising the powers under the Central Act. Section 6 only gives protection in the form of *previous sanction* of the Central Government *before* a criminal prosecution or a suit or other civil proceeding is *instituted against such person.* Insofar as such protection against prosecution is concerned, the provision is similar to that contained in Section 197 CrPC which covers an offence alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty". Section 6 only extends this protection in the matter

A of institution of a suit or other legal proceeding.

xx xx xx

In order that the people may feel assured that there is an effective check against misuse or abuse of powers B by the members of the armed forces it is necessary that a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act should be thoroughly inquired into and, if it is found that there is substance in the allegation, the victim should be suitably C compensated by the State and the requisite sanction under Section 6 of the Central Act should be granted for institution of prosecution and/or a civil suit or other proceedings against the person/persons responsible for such violation." (Emphasis added)

D

35. In *Jamiruddin Ansari v. Central Bureau of Investigation & Anr.*, (2009) 6 SCC 316, this Court while dealing with the provision of Maharashtra Control of Organised Crime Act, 1999 (hereinafter called as 'MCOCA') held that:

E "As indicated hereinabove, the provisions of Section 23 are the safeguards provided against the invocation of the provisions of the Act which are extremely stringent and far removed from the provisions of the general criminal law. If, as submitted on behalf of some of the respondents, it F is accepted that a private complaint under Section 9(1) is not subject to the rigours of Section 23, then the very purpose of introducing such safeguards lose their very raison d'être. At the same time, since the filing of a private complaint is also contemplated under Section 9(1) of G MCOCA, for it to be entertained it has also to be subject to the rigours of Section 23. Accordingly, in view of the bar imposed under sub-section (2) of Section 23 of the Act, the learned Special Judge is precluded from taking cognizance on a private complaint upon a separate inquiry H under Section 156(3) CrPC. The bar of Section 23(2)

continues to remain in respect of complaints, either of a private nature or on a police report.

In order to give a harmonious construction to the provisions of Section 9(1) and Section 23 of MCOCA, upon receipt of such private complaint the learned Special Judge has to forward the same to the officer indicated in clause (a) of sub-section (1) of Section 23 to have an inquiry conducted into the complaint by a police officer indicated in clause (b) of sub-section (1) and only thereafter take cognizance of the offence complained of, if sanction is accorded to the Special Court to take cognizance of such offence under sub-section (2) of Section 23." (Emphasis added)

36. This Court in *Harpal Singh v. State of Punjab*, (2007) 13 SCC 387, while dealing with the provision of Section 20A(2) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter called 'TADA') held as under:

"The important feature which is to be noted is that the prosecution did not obtain sanction of the Inspector General of Police or of the Commissioner of Police for prosecution of the appellant under TADA at any stage as is required by Section 20-A(2) of TADA. The trial of the appellant before the Designated Court proceeded without the sanction of the Inspector General of Police or the Commissioner of Police. In absence of previous sanction the Designated Court had no jurisdiction to take cognizance of the offence or to proceed with the trial of the appellant under TADA".(Emphasis added)

37. In *Rambhai Nathabhai Gadhvi & Ors. v. State of Gujarat*, AIR 1997 SC 3475, this Court while dealing with the same provisions of TADA, held that:

"...Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the Court in order to

A enable the Court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the Court is forbidden from taking cognizance
B of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction."

C 38 In *State of H.P. v. M.P. Gupta,* (2004) 2 SCC 349, this Court while dealing with the issue held as under:

"Use of the words *"no" and "shall" makes it abundantly clear that the bar on the exercise of power of the court to*
D *take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of."*(Emphasis added)

39. In broad and literal sense 'cognizance' means taking
E notice of an offence as required under Section 190 Cr.P.C. `Cognizance' indicates the point when the court first takes judicial notice of an offence. The court not only applies its mind to the contents of the complaint/police report, but also proceeds in the manner as indicated in the subsequent provisions of Chapter XIV of the Cr.P.C. (Vide: *R.R. Chari v. The State of*
F *Uttar Pradesh,* AIR 1951 SC 207; and *State of W.B. & Anr. v. Mohd. Khalid & Ors.,* (1995) 1 SCC 684).

40. In *Dr. Subramanian Swamy v. Dr. Manmohan Singh & Anr.,* AIR 2012 SC 1185, this Court dealt with the issue
G elaborately and explained the meaning of the word 'cognizance' as under:

"In legal parlance cognizance is 'taking judicial notice by the court of law', possessing jurisdiction, on a cause or
H matter presented before it so as to decide whether there

is any basis for initiating proceedings and determination of the cause or matter judicially." (Emphasis added)

(See also: *Bhushan Kumar v. State (NCT of Delhi),* (2012) 4 SCALE 191)

41. In *State of Uttar Pradesh v. Paras Nath Singh,* (2009) 6 SCC 372, this Court explained the meaning of the term 'the very cognizance is barred' as that the complaint cannot be taken notice of or jurisdiction or exercise of jurisdiction or power to try and determine causes. In common parlance, it means taking notice of. The court, therefore, is precluded from entertaining a complaint or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

42. The relevant provisions in the Cr.P.C. read as under:

"45(1)- Notwithstanding anything contained in Sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

197(2)- No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

Section 7 of the Act 1990, puts an embargo on the complainant/investigating agency/person aggrieved to file a suit, prosecution etc. in respect of anything done or *purported* to be done by a Army personnel, in *good faith,* in exercise of power conferred by the Act, *except* with the previous sanction of the Central Government.

43. Three expressions i.e. 'except', 'good faith' and

A 'purported' contained in the aforesaid provision require clarification/elaboration.

(i) Except :

To leave or take out: exclude; omit; save

B

Not including; unless. The word has also been construed to mean until.

Exception - Act of excepting or excluding from a number designated or from a description; that which is excepted C or separated from others in a general rule of description; a person, thing, or case specified as distinct or not included; an act of excepting, omitting from mention or leaving out of consideration.

D (ii) Purport :

Purport means to present, especially deliberately, the appearance of being; profess or claim, often falsely. It means to convey, imply, signify or profess outwardly, often E falsely. In other words it means to claim (to be a certain thing, etc.) by manner or appearance; intent to show; to mean; to intend.

Purport also means 'alleged'.

F **'Purporting'** - When power is given to do something 'purporting' to have a certain effect, it will seem to prevent objections being urged against the validity of the act which might otherwise be raised. Thus when validity is given to anything 'purporting' to be done in pursuance of a power, G a thing done under it may have validity though done at a time when the power would not be really exercisable. (Dicker v. Angerstein, 3 Ch D 600)

'Purporting to be done' - There must be something in the nature of the act that attaches it to his official character. H

Even if the act is not justified or authorised by law, he will still be purporting to act in the execution of his duty if he acts on a mistaken view of it."

So it means that something is deficient or amiss: everything is not as it is intended to be.

In *Azimunnissa and Ors. v. The Deputy Custodian, Evacuee Properties, District Deoria and Ors.* AIR 1961 SC 365, Constitution Bench of this court held:

"The word 'purport' has many shades of meaning. It means *fictitious, what appears on the face of the instrument; the apparent and not the legal import* and therefore *any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable*.....Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so." (Emphasis added)

(See also: *Haji Siddik Haji Umar & Ors. v. Union of India,* AIR 1983 SC 259).

(iii) <u>GOOD FAITH:</u>

44. A public servant is under a moral and legal obligation to perform his duty with truth, honesty, honour, loyality and faith etc. He is to perform his duty according to the expectation of the office and the nature of the post for the reason that he is to have a respectful obedience to the law and authority in order to accomplish the duty assigned to him. Good faith has been defined in Section 3(22) of the General Clauses Act, 1897, to mean a thing which is, in fact, done honestly, whether it is done negligently or not. Anything done with due care and attention, which is not malafide, is presumed to have been done in good faith. There should not be personal ill-will or malice, no intention to malign and scandalize. Good faith and public good are though the question of fact, it required to be proved by adducing

A evidence. (Vide: *Madhavrao Narayanrao Patwardhan v. Ram Krishna Govind Bhanu & Ors.*, AIR 1958 SC 767; *Madhav Rao Scindia Bahadur Etc. v. Union of India & Anr.*, AIR 1971 SC 530; *Sewakram Sobhani v. R.K. Karanjiya, Chief Editor, Weekly Blitz & Ors.*, AIR 1981 SC 1514; *Vijay Kumar Rampal* B *& Ors. v. Diwan Devi & Ors.*, AIR 1985 SC 1669; *Deena (Dead) through Lrs. v. Bharat Singh (Dead) through LRs. & Ors.*, (2002) 6 SCC 336; and *Goondla Venkateshwarlu v. State of Andhra Pradesh & Anr.*, (2008) 9 SCC 613).

C In *Brijendra Singh v. State of U.P. & Ors.*, AIR 1981 SC 636, this Court while dealing with the issue held:

> ".....The expression has several shades of meanings. In the popular sense, the phrase 'in good faith' simply means "honestly, without fraud, collusion, or deceit; really, actually, D without pretence and without intent to assist or act in furtherance of a fraudulent or otherwise unlawful scheme". (See Words and Phrases, Permanent Edition, Vol. 18A, page 91). Although the meaning of "good faith" may vary in the context of different statutes, subjects and situations, E honest intent free from taint of fraud or fraudulent design, is a constant element of its connotation. Even so, the quality and quantity of the honesty requisite for constituting 'good faith' is conditioned by the context and object of the statute in which this term is employed. It is a cardinal F canon of construction that an expression which has no uniform, precisely fixed meaning, takes its colour, light and content from the context."

45. For the aforesaid qualities attached to a duty one can attempt to decipher it from a private act which can be secret G or mysterious. An authorised act or duty is official and is in connection with authority. Thus, it cannot afford to be something hidden or non-transparent unless such a duty is protected under some law like the Official Secrets Act.

H 46. Performance of duty acting in good faith either done

or purported to be done in the exercise of the powers conferred under the relevant provisions can be protected under the immunity clause or not, is the issue raised. The first point that has to be kept in mind is that such a issue raised would be dependent on the facts of each case and cannot be a subject matter of any hypothesis, the reason being, such cases relate to initiation of criminal prosecution against a public official who has done or has purported to do something in exercise of the powers conferred under a statutory provision. The facts of each case are, therefore, necessary to constitute the ingredients of an official act. The act has to be official and not private as it has to be distinguished from the manner in which it has been administered or performed.

47. Then comes the issue of such a duty being performed in good faith. 'Good faith' means that which is founded on genuine belief and commands a loyal performance. The act which proceeds on reliable authority and accepted as truthful is said to be in good faith. It is the opposite of the intention to deceive. A duty performed in good faith is to fulfil a trust reposed in an official and which bears an allegiance to the superior authority. Such a duty should be honest in intention, and sincere in professional execution. It is on the basis of such an assessment that an act can be presumed to be in good faith for which while judging a case the entire material on record has to be assessed.

48. The allegations which are generally made are, that the act was not traceable to any lawful discharge of duty. That by itself would not be sufficient to conclude that the duty was performed in bad faith. It is for this reason that the immunity clause is contained in statutory provisions conferring powers on law enforcing authorities. This is to protect them on the presumption that acts performed in good faith are free from malice or illwill. The immunity is a kind of freedom conferred on the authority in the form of an exemption while performing or discharging official duties and responsibilities. The act or the

A duty so performed are such for which an official stands excused by reason of his office or post.

49. It is for this reason that the assessment of a complaint or the facts necessary to grant sanction against immunity that the chain of events has to be looked into to find out as to B whether the act is dutiful and in good faith and not maliciously motivated. It is the intention to act which is important.

50. A sudden decision to do something under authority or the purported exercise of such authority may not necessarily be C predetermined except for the purpose for which the official proceeds to accomplish. For example, while conducting a raid an official may not have the apprehension of being attacked but while performing his official duty he has to face such a situation at the hands of criminals and unscrupulous persons. D The official may in his defence perform a duty which can be on account of some miscalculation or wrong information but such a duty cannot be labelled as an act in bad faith unless it is demonstrated by positive material in particular that the act was tainted by personal motives and was not connected with the E discharge of any official duty. Thus, an act which may appear to be wrong or a decision which may appear to be incorrect is not necessarily a malicious act or decision. The presumption of good faith therefore can be dislodged only by cogent and clinching material and so long as such a conclusion is not drawn, F a duty in good faith should be presumed to have been done or purported to have been done in exercise of the powers conferred under the statute.

51. There has to be material to attribute or impute an unreasonable motive behind an act to take away the immunity G clause. It is for this reason that when the authority empowered to grant sanction is proceeding to exercise its discretion, it has to take into account the material facts of the incident complained of before passing an order of granting sanction or else official duty would always be in peril even if performed H bonafidely and genuinely.

52. It is in the aforesaid background that we wish to record that the protection and immunity granted to an official particularly in provisions of the Act 1990 or like Acts has to be widely construed in order to assess the act complained of. This would also include the assessment of cases like mistaken identities or an act performed on the basis of a genuine suspicion. We are therefore of the view that such immunity clauses have to be interpreted with wide discretionary powers to the sanctioning authority in order to uphold the official discharge of duties in good faith and a sanction therefore has to be issued only on the basis of a sound objective assessment and not otherwise.

53. Use of words like 'No' and 'shall' in Section 7 of the Act 1990 denotes the mandatory requirement of obtaining prior sanction of the Central Government before institution of the prosecution, suit or legal proceedings. From the conjoint reading of Section 197(2) Cr.P.C. and Section 7 of the Act 1990, it is clear that prior sanction is a condition precedent before institution of any of the aforesaid legal proceedings.

54. To understand the complicacy of the issue involved herein, it will be useful to compare the relevant provisions of different statutes requiring previous sanction.

CRIMINAL PROCEDURE CODE, 1973	**PREVENTION OF CORRUPTION ACT, 1988**	**ARMED FORCES (SPECIAL POWERS) ACT, 1990**
197. Prosecution of Judges and Public servants.- (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is	**19. Previous sanction necessary for prosecution.-** (1) No court shall take cognizance of an offence punishable under Sections 7,10,11,13 and 15 alleged to have been committed by a public servant, except with the previous sanction.	**7. Protection to persons acting under Act.-** No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government,

accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction.	(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government.	against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act. ....

Thus, it is evident from the aforesaid comparative chart that under the provisions of Cr.P.C. and Prevention of Corruption Act, it is the court which is restrained to take cognizance without previous sanction of the competent authority. Under the Act 1990, the investigating agency/complainant/person aggrieved is restrained to institute the criminal proceedings; suit or other legal proceedings. Thus, there is a marked distinction in the statutory provisions under the Act 1990, which are of much wider magnitude and are required to be enforced strictly.

55. Thus, in view of the above, the law on the issue of sanction can be summarised to the effect that the question of sanction is of paramount importance for protecting a public servant who has acted in good faith while performing his duty. In order that the public servant may not be unnecessarily harassed on a complaint of an unscrupulous person, it is obligatory on the part of the executive authority to protect him. However, there must be a discernible connection between the act complained of and the powers and duties of the public servant. The act complained of may fall within the description of the action purported to have been done in performing the official duty. Therefore, if the alleged act or omission of the public servant can be shown to have reasonable connection inter-relationship or inseparably connected with discharge of his

duty, he becomes entitled for protection of sanction. If the law requires sanction, and the court proceeds against a public servant without sanction, the public servant has a right to raise the issue of jurisdiction as the entire action may be rendered void ab-initio for want of sanction. Sanction can be obtained even during the course of trial depending upon the facts of an individual case and particularly at what stage of proceedings, requirement of sanction has surfaced. The question as to whether the act complained of, is done in performance of duty or in purported performance of duty, is to be determined by the competent authority and not by the court. The Legislature has conferred "absolute power" on the statutory authority to accord sanction or withhold the same and the court has no role in this subject. In such a situation the court would not proceed without sanction of the competent statutory authority

56. The present case stands squarely covered by the ratio of the judgments of this Court in *Matajog Dobey* (Supra) and *Sankaran Moitra* (Supra). Thus, we have no hesitation to hold that sanction of the Central Government is required in the facts and circumstances of the case and the court concerned lacks jurisdiction to take cognizance unless sanction is granted by the Central Government.

57. The CJM Court gave option to the higher authorities of the Army to choose whether the trial be held by the court-martial or by the criminal court as required under Section 125 of the Army Act. Mr. P.P. Malhotra, learned ASG, has submitted the original file of the Army Authorities before the court, File notings reveal their decision that in case it is decided by this Court that sanction is required and the Central Government accords sanction, option would be availed at that stage.

58. Military Authority may ask the criminal court dealing with the case that the accused would be tried by the court-martial in view of the provisions of Section 125 of the Army Act. However, the option given by the Authority is not final in view of the provisions of Section 126 of the Army Act. Criminal court

A having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned to be proceeded according to law or to postpone the proceedings pending reference to the Central Government, if that criminal court is of the opinion that proceedings be B instituted before itself in respect of that offence. Thus, in case the criminal court makes such a request, the Military Officer either has to comply with it or to make a reference to the Central Govt. whose orders would be final with respect to the venue of the trial. Therefore, the discretion exercised by the Military C Officer is subject to the control of the Central Govt. Such matter is being governed by the provisions of Section 475 Cr.P.C. read with the provisions of the J & K Criminal Courts and court-martial (Adjustment of Jurisdiction) Rules, 1983.

Rule 6 of the said Rules, 1983, provides that in case the D accused has been handed over to the Army authorities to be tried by a court-martial, the proceedings of the criminal court shall remain stayed. Rule 7 thereof, further provides that when an accused has been delivered by the criminal court to the Army authorities, the authority concerned shall inform the E criminal court whether the accused has been tried by a court-martial or other effectual proceedings have been taken or ordered to be taken against him. If the Magistrate is informed that the accused has not been tried or other effectual proceedings have not been taken, the Magistrate shall report F the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.

G 59. Constitution Bench of this Court in *Som Datt Datta v. Union of India & Ors.,* AIR 1969 SC 414, held that option as to whether the accused be tried by a criminal court or court-martial could be exercised after the police has completed the investigation and submitted the chargesheet. Therefore, for making such an option, the Army Authorities do not have to wait H

till the criminal court takes cognizance of the offence or frames the charges, which commences the trial. A

60. In *Delhi Special Police Establishment, New Delhi v. Lt. Col. S.K. Loraiya,* AIR 1972 SC 2548, a similar view has been reiterated by this Court observing that relevant Rules require that an option be given as to whether the accused be tried by a court-martial or by ordinary criminal court. The Magistrate has to give notice to the Commanding Officer and is not to make any order of conviction or acquittal or frame charges or commit the accused until the expiry of 7 days from the service of notice. B C

61. In *Balbir Singh & Anr. v. State of Punjab,* (1995) 1 SCC 90, this Court dealt with the provisions of the Air Force Act, 1950; provisions of Cr.P.C. and criminal court and court-martial (Adjustment of Jurisdiction) Rules, 1952 and reiterated the same view relying upon its earlier judgment in *Ram Sarup v. Union of India & Anr.,* AIR 1965 SC 247, wherein it has been held that there could be variety of circumstances which may influence the justification as to whether the offender be tried by a court-martial or by criminal court, and therefore, it becomes inevitable that the discretion to make such a choice be left to the Military Officers. Military Officer is to be guided by considerations of the exigencies of the service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the persons against whom the offence is committed. D E F

62. Thus, the law on the issue is clear that under Section 125 of the Army Act, the stage of making option to try an accused by a court-martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges. G

63. A question has further been raised by learned counsel for the appellant that the Act 1990 is a special Act and Section 7 thereof, provides full protection to the persons who are subject to the Army Act from any kind of suit, prosecution and legal H

A proceedings unless the sanction of the Central Government is obtained . Thus, in such a fact-situation, even if the Commanding Officer exercises his discretion and opts that the accused would be tried by the court-martial, the proceedings of court-martial cannot be taken unless the Central Government
B accords sanction.

64. Learned counsel for the CBI and interveners have opposed the submission contending that in case the accused are tried in the court-martial, sanction is not required at all. The provisions of the Act 1990 would apply in consonance with the
C provisions of the Army Act. Section 7 of the Act 1990 does not contain non-obstante clause. Therefore, once the option is made that accused is to be tried by a court-martial, further proceedings would be in accordance with the provisions of Section 70 of the Army Act and for that purpose, sanction of
D the Central Government is not required. The court-martial has been defined under Section 3(VII) of the Army Act which is definitely different from the suit and prosecution as explained hereinabove, and has not been referred to in the Act 1990.

E 65. Undoubtedly, the court-martial proceedings are akin to criminal prosecution and this fact has been dealt with elaborately by this Court in *Union of India & Ors. v. Major A. Hussain,* AIR 1998 SC 577. However, once the matter stands transferred to the Army for conducting a court-martial, the court-
F martial has to be as per the provisions of the Army Act. The Army Act does not provide for sanction of the Central Government. Thus, we do not find any force in the contention raised by the appellant and the same is rejected.

66. Sum up:

G

(i) The conjoint reading of the relevant statutory provisions and rules make it clear that the term "institution" contained in Section 7 of the Act 1990 means taking cognizance of the offence and not

H

mere presentation of the chargesheet by the investigating agency.

(ii) The competent Army Authority has to exercise his discretion to opt as to whether the trial would be by a court-martial or criminal court after filing of the chargesheet and not after the cognizance of the offence is taken by the court.

(iii) Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial.

(iv) In case option is made to try the accused by a court-martial, sanction of the Central Government is not required.

67. In view of the above, the appeals stand disposed of with the following directions:

I. The competent authority in the Army shall take a decision within a period of eight weeks from today as to whether the trial would be by the criminal court or by a court-martial and communicate the same to the Chief Judicial Magistrate concerned immediately thereafter.

II. In case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded strictly in accordance with law expeditiously.

III. In case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government for grant of sanction within four weeks from the receipt of such option and in case such an application is filed,

A the Central Government shall take a final decision on the said application within a period of three months from the date of receipt of such an application.

B IV. In case sanction is granted by the Central Government, the criminal court shall proceed with the trial and conclude the same expeditiously.

D.G. Appeals disposed of.

ARJUN

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 356 of 2007)

MAY 03, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 - ss. 96 to 106, 302, 300 Exception 4 and 304 (Part I) - Right of private defence - General principles - Explained - On facts, conviction of appellant u/s. 302 for causing murder of a person and u/s. 326 for causing grievous hurt to the wife of the deceased - Case of the defence that there was a property dispute between the parties; that the appellant as well as another accused sustained injuries; and that the deceased sustained fatal injuries due to sudden fight between the parties and the accused had to ward off the attack in his self defence - On appeal, held: Evidence clearly indicate that the appellant was armed with a knife with which he inflicted serious injuries on the head of the deceased, resulting in his death and also that the appellant inflicted injuries on the wife of the deceased as well when she tried to save her husband - Further, there is nothing to show that the deceased, his wife and his son or others had attacked the appellant, nor the surrounding circumstances indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others - Mere fact that the other seven accused were acquitted or that some of the prosecution witnesses were also convicted not sufficient to hold that the appellant was not the aggressor - Plea of private defence not sustainable - Considering the background facts as well as the fact that there was no pre-meditation and the act was committed in a heat of passion and that the appellant did not take any undue advantage or acted in a cruel manner and that there was a fight between the parties, case falls under the fourth exception

to s. 300 - Thus, conviction altered from s. 302 to s. 304 Part 1 with custodial sentence of 10 years.

There were some property disputes between the appellant and 'J'. On the fateful day, when 'J' came in front of the appellant's shop, the appellant abused 'J' and later on the appellant and his brothers (accused no. 2 to 8) armed with weapons attacked 'J' and his wife-(PW 8) and his son-(PW 1). The appellant inflicted three blows on the head of 'J' with a large knife and deceased fell down. When (PW 8) intervened to rescue her husband, the appellant inflicted blows on her head, back and shoulder and when PW 10 (brother-in-law of PW 8) and his son (PW 11) came to their rescue; the appellant assaulted both of them. 'J' succumbed to his injuries. PW 1 lodged FIR. The appellant also lodged an FIR against PW 1, PW 10 and PW 11 and other persons. Thereafter, the Sessions court tried the case. The appellants contended that the parties were on inimical terms; that the appellant as well as accused no. 8 sustained injuries; that the deceased J sustained fatal injuries due to sudden fight between the parties and the accused had to ward off the attack in his self defence. The Additional Sessions Judge acquitted accused no. 8, however, convicted the appellant for the offence punishable under Section 302 IPC for murder of 'J' and for the offence punishable under Section 326 IPC for causing grievous hurt to PW 8. Aggrieved, the appellant filed an appeal and the High Court upheld the order of the conviction and sentence passed by the trial court against the appellant. The State filed an appeal against acquittal and the High Court dismissed the same. Thus, the appellant filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1 Law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99

IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in a civil case that preponderance of probabilities is in favour of his plea. Right of private defence cannot be used to do away with a wrong doer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence. [Para 12] [672-A-C]

1.2 It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. [Para 13] [672-D-E]

Munshi Ram and Ors. V. Delhi Administration AIR (1968) SC 702; *State of Gujarat v. Bai Fatima* AIR (1975) SC 1478; *State of U.P. v. Mohd. Musheer Khan* AIR (1977) SC 2226; *Mohinder Pal Jolly v. State of Punjab* AIR (1979) SC 577; *Salim Zia v. State of U.P.* AIR (1979) SC 39114 - relied on.

1.3 A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. [Para 14] [672-F-G]

1.4 Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property of the person exercising the right or of any other person, and the right may be exercised in the case

A of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to the property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private
B defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To plea a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to
C reasonable grounds for apprehending that either death or grievous hurt would be caused to him. [Para 15] [672-H; 673-A-C]

2.1 The evidence of PWs 1, 8, 10 and 11 with regard to the assault of the appellant on the deceased, was fully
D corroborated by the medical evidence as well as evidence of independent witnesses. PW 9 proved the recovery of the weapon of offence. PW 8-wife of the deceased had also sustained injuries due to the attack of the appellant, when she intervened to protect her
E husband. The facts would clearly indicate that the appellant harboured grudge against the victims in view of the property dispute. The evidence of PW 12 indicates that the deceased had sustained serious injuries on the brain. The facts would indicate that PW 1 and others had,
F in fact, obstructed the appellant but he was having a knife with which he could inflict three fatal injuries on the head of the deceased. The mere fact that the other seven accused were acquitted or that some of the prosecution witnesses were also convicted would not be sufficient to
G hold that the appellant was not the aggressor. True, there were some minor injuries on the accused and some serious injuries on PW 8 as well. Evidence of PWs 1, 8, 10 and 11 would clearly indicate that the appellant was armed with a knife and it was with that knife he had
H inflicted serious injuries on the head of the deceased and

which was the cause of death of 'J'. Further, there is also sufficient evidence to show that the appellant had inflicted injuries on the wife of the deceased as well when she tried to save her husband. The deceased was unarmed so also his wife and the son. At the same time, the accused was armed with a knife. No explanation is forthcoming either in his statement u/s 313 Cr.P.C. or otherwise as to why he was having a knife (sura) in his hand at the time of the incident. There is no evidence to show that the deceased, his wife (PW 8) or his son (PW 1) had ever attacked the accused. [Para 11] [671-B-H; 672-A]

2.2 In the instant case, as rightly held by the High Court and trial court, there is nothing to show that the deceased, his wife (PW 8), his son (PW 1) or others had attacked the appellant, nor the surrounding circumstances would indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence is, therefore, has no basis and the same is rejected. [Para 16] [673-D-E]

2.3 Considering the background facts as well as the fact that there was no pre-meditation and the act was committed in a heat of passion and that the appellant had not taken any undue advantage or acted in a cruel manner and that there was a fight between the parties, the instant case falls under the fourth exception to Section 300 IPC and thus, the conviction is altered from Section 302 IPC to Section 304 Part 1 IPC. The appellant is in custody since 30.07.2003. The custodial sentence of 10 years to the accused-appellant would meet the ends of justice and it is ordered accordingly. [Paras 17 and 18] [673-E-G]

Lakshmi Singh and Ors. v. State of Bihar **1976 (4) SCC 394:** *Darshan Singh v. State of U.P.* **2004 (7) SCC 408: 2004**

A (3) Suppl. SCR 561 - referred to.

Case Law Reference:

1976 (4) SCC 394	Referred to	Para 8
B 2004 (3) Suppl. SCR 561	Referred to	Para 8
AIR (1968) SC 702	Relied on	Para 13
AIR (1975) SC 1478	Relied on	Para 13
AIR (1977) SC 2226	Relied on	Para 13
C		
AIR (1979) SC 577	Relied on	Para 13
AIR (1979) SC 391	Relied on	Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal D No. 356 of 2007.

From the Judgment & Order dated 24.11.2006 of the High Court of Judicature at Bombay Bench at Aurangabad in Criminal Appeal No. 646 of 2006.

E Sudhanshu S. Choudhari for the Appellant.

Asha G. Nair for the Respondent.

The Judgment of the Court was delivered by

F **K.S. RADHAKRISHNAN, J.** 1. The appellant, herein, was convicted by the 2nd Ad-hoc Additional Sessions Judge for the offence punishable under Section 302 of Indian Penal Code (for short 'IPC') for murder of one Jagannath Rambhau Shirsath and for the offence punishable under Section 326 IPC for G causing grievous hurt to Muktabai, wife of deceased - Jagannath.

2. Aggrieved by the order of conviction and sentence, the appellant preferred Criminal Appeal No. 646/2004 and the State preferred Criminal Appeal No.828/2004 against acquittal H of accused No.8 - Babasaheb Maruti Shirsath before the High

Court of Bombay Bench at Aurangabad. The High Court vide its judgment dated 24.11.2006 dismissed Criminal Appeal No. 646/2004 and confirmed the conviction and sentence passed by the trial court against the appellant. Criminal Appeal No. 828/2004 preferred by the State against acquittal of accused No.8 was also dismissed by the High Court vide judgment dated 24.11.2006. Aggrieved by the judgment in Criminal Appeal No. 646/2004, this appeal has been preferred by the first accused, Arjun.

3. The prosecution story, in a nutshell, is as follows:

The deceased Jagannath and Muktabai (PW 8) parents of Rangnath (PW 1), his brothers Ashok Gahininath and Rajendra -were all living together at Taklimanur, Taluka Pathardi, District Ahmednagar. There were some property disputes between the first accused (appellant) and the deceased - Jagannath for which the appellant had filed Civil Suit being RCS No. 291/2001 before Taluka Court for an order of injunction and possession and the court had ordered status quo. The appellant was in the army service and after retirement, about 5 to 6 years prior to the incident on 30.07.2002, he started a stationery shop at Taklimanur situated adjacent to the subject matter of the suit.

4. In the village Taklimanur, there was an annual fair on 30.07.2002. At about 4 PM, on that date when the deceased came in front of the appellant's shop, the appellant abused the deceased. Later, when the deceased, his wife - Muktabai and son Rangnath were going to Ambikanagar for worship of the Goddess, the appellant, his brothers Babasaheb (accused No.8), Buvasaheb (accused No.2), Suresh - son of Buvasaheb (accused No.7), Dnyandeo (accused No.4), Bhimrao (accused No.5), Patilba (accued No.3), Ramnath (accused No.6) attacked the deceased on the road near Tamarind tree. The appellant was armed with a large knife, accused No.3 was armed with an axe and others were carrying sticks. The appellant inflicted three blows on the head of the deceased with a large knife (Sura - Article No.13)and deceased fell down.

A When PW 8 Muktabai intervened to rescue her husband, the appellant inflicted blows on her head, back and shoulder. Again, when PW 10 Karbhari (brother-in-law of PW 8) and his son Ambadas (PW 11) came to their rescue; the appellant assaulted both of them. Due to the injuries, the deceased died B on the spot. Police arrived at the scene of occurrence; the victims were taken to the nearby hospital.

5. PW 1, son of the deceased, lodged a report of the incident with Pathardi Police Station at about 8.30PM on the date of the incident. Based on that report, Crime No. 127/2002 C was registered under Sections 147, 148, 302, 326, 324 r/w Section 149 IPC and investigation was entrusted to P.I. Randive (PW 14). Later, all the accused were arrested by 04.08.2002. The appellant made a confessional statement and produced a large knife (sura - article no.13) concealed in a pit on the bund D of the field of Ramkisan Shinde, which is near the scene of occurrence.

6. The appellant had also lodged an FIR on 30.07.2002 at 8.50 P.M. against the complainant Rangnath, Karbhari (PW E 10), Ambadas (PW 11) and other persons. The Sessions Court tried the case registered against some of the prosecution witnesses and they were convicted for offences punishable under Section 307 r/w Section 149, Section 324 r/w Section 149, Section 147, Section 148, and Section 149 IPC for five F years with fine.

7. The appellant herein took up the defence that the parties were on inimical terms since he had filed Civil Suit No. 291/ 2001 before the Civil Judge, Junior Division, Pathardi. He also stated that pressure was also exerted on him to withdraw the G civil suit. Further, it was stated that on 30.07.2002, when he was opening the shop, the deceased, PW 10 and PW 11 came in front of the shop and asked him to come out. Sensing some trouble, he accosted accused No.8, who was at the market. PW 1, by that time, also joined his father. They were armed with H weapons. Hence, he had to flee but they chased him. PW 1

inflicted a blow with Gupti on the stomach of accused No.8 near a Pipal tree and the other accused continued to assault him. Fearing that he would be killed, he snatched iron rod from the hands of Gahininath and waived iron rod in the air. PW 1 had also inflicted injury on the stomach of accused No.2 with a Gupti. In that melee, the appellant and accused no. 8 were also injured and they were taken to the nearby hospital. The appellant had sustained CLW on occipital region 2X1X1 cms and an abrasion on forearm 3X1/4 cm. Accused No.8 had sustained incised wound on the abdomen from which the intestines were protruding with omentum.

8. Learned counsel appearing for the appellant Mr. Sudhanshu S. Chaudhari submitted that the incident had occurred in front of the shop of the accused and there was previous rivalry between the parties due to the fact that he had filed civil case against the deceased and others. Learned counsel further submitted that the fact that the appellant as well as accused No.8 had also sustained injuries, would indicate that the appellant and others were also attacked by the deceased and others. Learned counsel, therefore, pointed out the fact that the appellant as well as accused No.8 had sustained injuries during the course of incident was a relevant factor which should have been taken into consideration by the courts below. Learned counsel pointed out that the above facts would also indicate that there was a fight between both the parties and the prosecution had miserably failed to explain the injuries sustained by the appellant and accused No. 8. The non-explanation on the injuries is a relevant factor which should have been taken note of for evaluating the prosecution evidence. In support of his contention, reliance was placed on judgment of this Court in *Lakshmi Singh and Ors. v. State of Bihar;* 1976 (4) SCC 394 and *Dashrath Singh v. State of U.P.;* 2004 (7) SCC 408. Learned counsel also pointed out that injuries sustained by the appellant as well as accused No.8 would positively show that the appellant was not the aggressor and, consequently, the fatal injuries sustained by the deceased was

A due to a sudden fight between the parties and the accused had to ward off the attack in his self defence. Learned counsel further pointed out that the findings rendered by the courts below that it was the appellant who was the aggressor and hence the plea of private defence was not available, was not correct.
B Further, it was pointed out that the injuries sustained by the appellant and accused No. 8 would clearly indicate that the appellant is entitled to raise the plea of private defence.

9. Learned counsel, Ms. Asha G. Nair, appearing for the State supported the conviction of the appellant by the trial judge
C as well as the High Court. Learned counsel took us elaborately to the prosecution evidence. Learned counsel pointed out that the facts narrated by PW 1 - complainant would clearly indicate that the deceased died due to the blows inflicted on his head by the accused. The other witnesses had corroborated the
D same and stated that it was the accused - appellant, who had opened the attack by inflicting blows on the head of the deceased by a large knife (sura). Reference was also made to the evidence of PW 12 - Dr. Kulkarni, the autopsy surgeon, who had stated that injury Nos. 1, 2 and 5 were caused by hard
E and sharp weapon such as Sura - article no. 13, injury no. 3 was caused by hard and blunt weapon and injury Nos. 7, 8 and 9 were caused by hard and rough surface. In his opinion, the death was caused on account of shock due to the injuries on the head and on the brain of the deceased. The plea of private
F defence, as stated by the learned counsel, is not available to the appellant. PW 1 and PW 8 had clearly stated that it was the appellant who had first inflicted three blows on the head of the deceased by a knife which was the cause of death of Jaganath.

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10. Learned counsel for the State took us to the evidence of PWs 1, 8, 10 and 11 which according to the counsel, would establish beyond doubt that it was the appellant who was the aggressor and had inflicted fatal injuries on the head of the deceased. Further, it was pointed out that the fact that all the
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accused persons including the appellant were armed with lethal weapons would clearly indicate that it was pre-planned and deliberate. The plea of private defence, it was submitted was rightly negatived by the trial court as well as the High Court.

11. We have heard the learned counsel on either side at length and critically examined the oral evidence adduced in the case. The evidence of PWs 1, 8, 10 and 11 with regard to the assault, of the appellant on the deceased, has been fully corroborated by the medical evidence as well as evidence of independent witnesses. PW 9 has proved the recovery of the weapon of offence. PW 8 - wife of the deceased had also sustained injuries due to the attack of the appellant, when she intervened to protect her husband. The facts would clearly indicate that the appellant harboured grudge against the victims in view of the property dispute. The evidence of PW 12 indicates that the deceased had sustained serious injuries on the brain. The facts would indicate that PW 1 and others had, in fact, obstructed the appellant but he was having a knife with which could inflict three fatal injuries on the head of the deceased. The mere fact that the other seven accused were acquitted or that some of the prosecution witnesses were also convicted would not be sufficient to hold that the appellant was not the aggressor. True, there were some minor injuries on the accused and some serious injuries on PW 8 as well. Evidence of PWs 1, 8, 10 and 11 would clearly indicate that the appellant was armed with a knife and it was with that knife he had inflicted serious injuries on the head of the deceased and which was the cause of death of Jagannath. Further, there is also sufficient evidence to show that the appellant had inflicted injuries on the wife of the deceased as well when she tried to save her husband. The deceased was unarmed so also his wife and the son. At the same time, the accused was armed with a knife. No explanation is forthcoming either in his statement u/s 313 Cr.P.C. or otherwise as to why he was having a knife (sura) in his hand at the time of the incident. There is no evidence to

A show that the deceased, his wife (PW 8) or his son (PW 1) had ever attacked the accused.

12. Law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99 IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in a civil case that preponderance of probabilities is in favour of his plea. Right of private defence cannot be used to do away with a wrong doer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence.

13. It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. (*Munshi Ram and Others V. Delhi Administration,* AIR (1968) SC 702; *State of Gujarat v. Bai Fatima,* AIR (1975) SC 1478; *State of U.P. v. Mohd. Musheer Khan,* AIR (1977) SC 2226 and *Mohinder Pal Jolly v. State of Punjab,* AIR (1979) SC 577 and *Salim Zia v. State of U.P.,* AIR (1979) SC 391.

14. A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.

15. Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or

property of the person exercising the right or of any other person, and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to the property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To plea a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him.

16. We are of the view that in the instant case, as rightly held by the High Court and Trial Court, there is nothing to show that the deceased, his wife (PW 8), his son (PW 1) or others had attacked the appellant, nor the surrounding circumstances would indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence is, therefore, has no basis and the same is rejected.

17. Considering the background facts as well as the fact that there was no premeditation and the act was committed in a heat of passion and that the appellant had not taken any undue advantage or acted in a cruel manner and that there was a fight between the parties, we are of the view that this case falls under the fourth exception to Section 300 IPC and hence it is just and proper to alter the conviction from Section 302 IPC to Section 304 Part 1 IPC and we do so.

18. We are informed that the appellant is in custody since 30.07.2003. In our view, custodial sentence of 10 years to the accused-appellant would meet the ends of justice and it is ordered accordingly. The appeal is accordingly disposed of, altering the sentence awarded.

N.J. Appeal disposed of.

A RASHMI REKHA THATOI & ANR.

v.

STATE OF ORISSA & ORS.

(Criminal Appeal No. 750 of 2012)

MAY 04, 2012

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[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Code of Criminal Procedure, 1973: s.438 - Bail application - High Court while entertaining applications u/s.438 C *expressing its opinion that it was not inclined to grant anticipatory bail to the accused, yet directing that on their surrender some of the accused would be enlarged on bail on such terms and conditions as may be deemed fit and proper by Magistrate concerned - Propriety of such order - Held: The* D *Court of Session or the High Court cannot pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the Magistrate may deem fit and proper - When the High Court in categorical terms expressed the view that it was not inclined* E *to grant anticipatory bail to the accused, it could not have issued such direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest - Court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order* F *must also conform to the requirement of the section and suitable conditions should be imposed - Direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law - By passing such kind of orders, the interest of the collective at large and that of the individual victim is* G *jeopardised - That apart, it curtails the power of the regular court dealing with the bail applications - A court of law has to act within the statutory command and not deviate from it - It is a well settled proposition of law what cannot be done*

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directly, cannot be done indirectly - The statutory exercise of power stands on a different footing than exercise of power of judicial review - Judging on the foundation of said well settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside - Accused persons, however, entitled to move applications for grant of bail u/s.439 which shall be considered on their own merits.

By impugned orders, the High Court while entertaining applications filed under Section 438, Cr.P.C. had expressed its opinion that it was not inclined to grant anticipatory bail to the petitioners, yet it directed that on their surrender some of the accused petitioners would be enlarged on bail on such terms and conditions as may be deemed fit and proper by concerned SDJM and cases of certain other accused persons on surrender would be dealt with on their own merits.

The question which arose for consideration in the instant appeal was whether the orders passed by the High Court were legally sustainable within the ambit and sweep of Section 438, Cr.P.C.

Disposing of the appeals, the Court

HELD: 1. Individual liberty is a very significant aspect of human existence but it has to be guided and governed by law. Liberty is to be sustained and achieved when it is sought to be taken away by permissible legal parameters. A court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy. [Para 7] [681-D-E]

2. The Court of Session or the High Court cannot pass an order that on surrendering of the accused before

A the Magistrate he shall be released on bail on such terms and conditions as the Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms expressed the view that it did not B incline to grant anticipatory bail to the accused petitioners it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the C statutory provision and in flagrant violation of the dictum laid down in the case of *Gurbaksh Singh Sibbia and the principles culled out in the case of **Savitri Agarwal. It is clear as crystal the court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the D requirement of the section and suitable conditions should be imposed. [Para 30] [693-C-F]

Gurbaksh Singh Sibbia etc. v. The State of Punjab AIR 1980 SC 1632:1980 (3) SCR 383 - followed.

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**Savitri Agarwal v. State of Maharashtra and Anr.* (2009) 8 SCC 325:2009 (10) SCR 978 - relied on.

3. The direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, F creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the G individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications. [Para 31] [694-E-F]

Dr. Narendra K. Amin v. State of Gujarat and another

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2008 (6) SCALE415; *Puran v. Rambilas and another* **(2001) 6 SCC 338: 2001 (3) SCR432 - relied on.** A

4. A court of law has to act within the statutory command and not deviate from it. It is a well settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power, a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. Judging on the foundation of said well settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside. Consequently the bail bonds of the accused persons are cancelled and they shall be taken into custody forthwith. They are, however, entitled to move applications for grant of bail under Section 439 of the Code which shall be considered on their own merits. [Paras 32- 33] [694-G-H; 695-A-D] B C D

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Bay Berry Apartments (P) Ltd. and Anr. v. Shobha and Ors. **(2006) 13SCC 737: 2006 (7) Suppl. SCR 738;** *U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey* **(2006) 1 SCC 479: 2005 (5) Suppl. SCR 609 - relied on.** F

Balchand Jain v. State of Madhya Pradesh **AIR 1976 SC 366;** *Salauddin Abdulsamad Shaikh v. State of Maharashta* **AIR 1996 SC 1042: 1995 (6) Suppl. SCR 556;** *K.L. Verma v. State and Anr.* **(1998) 9 SCC 348;** *Nirmal Jeet Kaur v. State of M. P. and Another* **(2004) 7 SCC 558: 2004 (3) Suppl. SCR 1006;** *Adri Dharan Das v. State of West Bengal* **(2005) 4 SCC 303: 2005 (2) SCR 188;** *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.* **(1980) 2 SCC 559: 1980 (3) SCR 15;** *Union of India v. Padam Narain Agarwal* **AIR 2009 SC 254: 2008 (14) SCR 179;** *State of Mahrashtra* G H

A *v. Mohd. Rashid and Anr.* **(2005) 7 SCC 56: 2005 (1) Suppl. SCR 817;** *Sunita Devi v. State of Bihar & Anr.* **(2005) 1 SCC 608: 2004 (6) Suppl. SCR 707;** *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.* **(2011) 1 SCC 694: 2010 (15) SCR 201 - referred to.**

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Case Law Reference:

1980 (3) SCR 383	**followed**	**Para 18,22,28, 29, 30**
C **AIR 1976 SC 366**	**referred to**	**Para 19**
2009 (10) SCR 978	**relied on**	**Para 22**
1995 (6) Suppl. SCR 556	**referred to**	**Para 23, 27,29**
(1998) 9 SCC 348	**referred to**	**Para 24,25,27**
D **2004 (3) Suppl. SCR 1006**	**referred to**	**Para 25,27**
2005 (2) SCR 188	**referred to**	**Para 26,28,29**
1980 (3) SCR 15	**referred to**	**Para 27**
E **2008 (14) SCR 179**	**referred to**	**Para 28**
2005 (1) Suppl. SCR 817	**referred to**	**Para 28**
2004 (6) Suppl. SCR 707	**referred to**	**Para 29**
F **2010 (15) SCR 201**	**referred to**	**Para 29**
2008 (6) SCALE 415	**relied on**	**Para 31**
2001 (3) SCR 432	**relied on**	**Para 31**
2006 (7) Suppl. SCR 738	**relied on**	**Para 32**
G **2005 (5) Suppl. SCR 609**	**relied on**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 750 of 2012 etc.

H

From the Judgment & Order dated 22.07.2011 of the High Court of Orissa at Cuttack in BLAPL No. 13036 of 2011. A

WITH

Crl. A. No. 751 of 2012.

Rekha Pandey, Ambika Das, Sailaja V. for the Appellants. B

Sandhya Goswami, M.P.S. Tomar, Jabar Singh, Jitendra Mohapatra, Chandra Bhushan Prasad, Syed Rehan for the Respondents.

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The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in both the petitions.

2. "Liberty is to the collective body, what health is to every individual body. Without health no pleasure can be tasted by D man; without Liberty, no happiness can be enjoyed by society."

Thus spoke Bolingbroke.

3. Liberty is the precious possession of the human soul. No one would barter it for all the tea in China. Not for nothing E Patrick Henry thundered:

> "Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God ! I know not what course others may take, but as for me, give F me liberty, or give me death !"

The thought of losing one's liberty immediately brings in a feeling of fear, a shiver in the spine, an anguish of terrible trauma, an uncontrollable agony, a penetrating nightmarish perplexity and above all a sense of vacuum withering the very G essence of existence. It is because liberty is deep as eternity and deprivation of it, infernal. May be for this protectors of liberty ask, "How acquisition of entire wealth of the world would be of any consequence if one's soul is lost?" It has been quite often

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A said that life without liberty is eyes without vision, ears without hearing power and mind without coherent thinking faculty.

4. Almost two centuries and a decade back thus spoke Edmund Burke: -

B "Men are qualified for civil liberty, in exact proportion to their disposition to put moral chains upon their own appetites; in proportion as their love to justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in C proportion as they are more disposed to listen to the counsel of the wise and good, in preference to the flattery of knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere and the less of it there is within, the more there must be without. It is D ordained in the eternal constitution of things that men of intemperate minds cannot be free. Their passions forge their fetters."

5. Similar voice was echoed by E. Barrett Prettyman, a E retired Chief Judge of U.S. Court of Appeals:-

"In an ordered society of mankind there is no such thing as unrestricted liberty, either of nations or of individuals. Liberty itself is the product restraints; it is inherently a composite of restraints; it dies when restraints are F withdrawn. Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint. Restraints are the substance without which liberty does not exist. They are the essence of liberty. The great problem G of the democratic process is not to strip men of restraints merely because 'they are restraints. The great problem is to design a system of restraints which will nurture the maximum development of man's capabilities, not in a massive globe of faceless animations but as a perfect H realization, of each separate human mind, soul and body;

not in mute, motionless meditation but in flashing, thrashing activity."

6. Keeping the cherished idea of liberty in mind, the fathers of our Constitution engrafted in its Preamble: "Liberty of thought, expression, belief, faith and worship." After a lot of debate in the Constituent Assembly, Article 21 of the Constitution came into existence in the present form laying down in categorical terms that no person shall be deprived of his life and personal liberty except according to the procedure established by law.

7. We have begun with the aforesaid prologue, as the seminal question that falls for consideration in these appeals is whether the High Court, despite the value attached to the concept of liberty, could afford to vaporise the statutory mandate enshrined under Section 438 of the Code of Criminal Procedure (for short 'the Code'). It is not to be forgotten that liberty is not an absolute abstract concept. True it is, individual liberty is a very significant aspect of human existence but it has to be guided and governed by law. Liberty is to be sustained and achieved when it sought to be taken away by permissible legal parameters. A court of law is required to be guided by the defined jurisdiction and not deal with matters being in the realm of sympathy or fancy.

8. Presently to the narration. In these two appeals arising out of SLP No. 7281 of 2011 and 7286 of 2011, the challenge is to the orders dated 22.07.2011 and 05.08.2011 in BLAPL No. 13036 of 2011 and 12975 of 2011 respectively passed by the High Court of Judicature of Orissa at Cuttack in respect of five accused persons under Section 438 of the Code pertaining to offences punishable under Section 341/294/506 and 302 read with Section 34 of the Indian Penal Code (for short "the IPC") in connection with Binjharpur PS Case No. 88/2011 corresponding to GR Case No. 343 of 2011 pending in the Court of learned SDJM, Jajpur.

A 9. The present appeals have been preferred by the sister of the deceased and the complainant, an eye witness, seeking quashing of the orders on the foundation that the High Court has extended the benefit of Section 438 (1) of the Code in an illegal and impermissible manner.

B 10. The facts that had formed the bedrock in setting the criminal law in motion need not be stated, for the nature of orders passed by High Court in both the cases have their own peculiarity. If we allow ourselves to say they have the enormous potentiality to create colossal puzzlement as regards the C exercise of power under Section 438 of the Code.

11. While dealing with the case of accused Uttam Das and Ranjit Das, vide order dated 22.07.2011 the High Court, as stated, perused the case file and passed the following order.

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"Considering the facts and circumstances of the case and the materials available on record, this Court is not inclined to grant anticipatory bail to the petitioners. *This court directs that if petitioner No. 1 Uttam Das surrenders* E *before the learned S.D.J.M., Jajpur and moves an application for bail in the aforesaid case, in such event the learned S.D.J.M. shall release him on bail on such terms and conditions as he may deem fit and proper.*

So far as petitioner No. 2 Ranjit Das is concerned, F this court directs him to surrender before the learned S.D.J.M., Jajpur and move an application for bail in connection with the aforesaid case, in such event his application shall be considered by the learned S.D.J.M., on its own merits.

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The Bail Application is accordingly disposed of."

[Underlining is ours]

12. In the case of the other accused persons, namely,

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Abhimanyu Das, Murlidhar Patra and Bhagu Das the High Court on 05.08.2011 passed the order on following terms.

> "Considering the facts and circumstances of the case this Court is not inclined to grant anticipatory bail to the petitioners. Since there are some materials against Bhagu Das @ Sanjit Kumar Das petitioner No. 3, this Court directs that in case petitioner No. 3 surrenders before the leaned S.D.J.M., Jajpur and moves an application for bail, the learned S.D.J.M. shall consider and dispose of the same on its own merit in accordance with law.
>
> *So far as the prayer for bail of petitioner Nos. 1 and 2 is concerned since one of the co-accused namely, Uttam Das has been released on bail in pursuance of order dated 02.07.2011 passed by this Court in BLAPL No. 13036 of 2011 and petitioner Nos. 1 and 2 stands on similar footing with co-accused Uttam Das, this Court directs that in case petitioner Nos. 1 and 2 surrender before the learned S.D.J.M., Jajpur and move an application for bail, the learned S.D.J.M., shall release them on bail on such terms and conditions as he may deem fit and proper with further condition that petitioner Nos. 1 and 2 shall give an undertaking before the Court below that they will not commit any similar type of offence.* In case any complaint is received against them that will amount to cancellation of bail"
>
> [Emphasis supplied]

13. On a perusal of both the orders it is perceivable that the commonality in both the orders is that while the High Court had expressed its opinion that though it is not inclined to grant anticipatory bail to the petitioners yet it has directed on their surrender some of the accused petitioners would be enlarged on bail on such terms and conditions as may be deemed fit and proper by the concerned Sub Divisional Judicial Magistrate

A and cases of certain accused persons on surrender shall be dealt with on their own merits.

14. The learned counsel for the petitioner has contended that the High Court has gravely flawed in passing such kind of orders in exercise of power under Section 438 of the Code B which the law does not countenance and, therefore, they deserved to be lancinated. It is his further submission that when the accused persons are involved in such serious offences the High Court could not have dealt with them by taking recourse to an innovative method which has no sanction in law.
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15. The learned counsel for the respondent made a very feeble attempt to support the orders.

16. The pivotal issue that emanates for consideration is D whether the orders passed by the High Court are legitimately acceptable and legally sustainable within the ambit and sweep of Section 438 of the Code. To appreciate the defensibility of the order it is condign to refer to Section 438 of the Code which reads as follows.

E **"438. Direction for grant of bail to person apprehending arrest.**--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this F section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

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(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

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(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -

(i) a condition that the person shall make himself

A available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case
B so as to dissuade him from disclosing such facts to the court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the court;

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(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted -under that section.

(3) If such person is thereafter arrested without warrant by
D an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first
E instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1)."

17. The aforesaid provision in its denotative compass and
F connotative expanse enables one to apply and submit an application for bail where one anticipates his arrest in a non-bailable offence. Though the provision does not use the expression anticipatory bail, yet the same has come in vogue by general usage and also has gained acceptation in the legal
G world.

18. The Constitution Bench in *Gurbaksh Singh Sibbia etc. v. The State of Punjab*[1], has drawn a distinction between an order of ordinary bail and order of anticipatory bail by stating

H 1. AIR 1980 SC 1632.

that the former is granted when the accused is in custody and, therefore, means release from the custody of the Police, and the latter is granted in anticipation of arrest and hence, effective at the very moment of arrest. It has been held therein, an order of anticipatory bail constitutes, so to say, an insurance against Police custody falling upon arrest for offences in respect of which the order is issued. Their Lordships clarifying the distinction have observed that unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.

19. The Constitution Bench partly accepted the verdict in *Balchand Jain v. State of Madhya Pradesh*[2] by stating as follows:-

> "We agree, with respect, that the power conferred by S. 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Ss. 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection."

20. Thereafter, the larger Bench referred to the concept of liberty engrafted in Article 21 of the Constitution, situational and circumstantial differences from case to case and observed that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. However, it cannot

2. AIR 1976 SC 366.

A be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. The Constitution Bench also opined the Court has to take into B consideration the combined effect of several other considerations which are too numerous to enumerate and the legislature has endowed the responsibility on the High Court and the Court of Session because of their experience.

C 21. The Constitution Bench proceeded to state the essential concept of exercise of jurisdiction under Section 438 of the Code on following terms:-

> "Exercise of jurisdiction under Section 438 of Code of Criminal Procedure is extremely important judicial function D of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications."

E 22. In *Savitri Agarwal v. State of Maharashtra and Anr.*[3], the Bench culled out the principles laid down in *Gurbaksh Singh* (supra). Some principles which are necessary to be reproduced are as follows:-

> " (i) Before power under Sub-section (1) of Section 438 F of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough G for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable

H 3. (2009) 85 SCC 325..

offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the Section.

ii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage."

23. At this juncture we may note with profit that there was some departure in certain decisions after the Constitution Bench decision. In *Salauddin Abdulsamad Shaikh v. State of Maharashta*[4], it was held that it was necessary that under certain circumstances anticipatory bail order should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular court to deal with the matter on appreciation of material placed before it.

24. In *K. L. Verma v. State and Anr.*[5], it was ruled that limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to

4. AIR 1996 SC 1042.

5. (1998) 9 SCC 348.

A move the court for regular bail and to give the regular court sufficient time to determine the bail application. It was further observed therein that till the bail application is disposed of one way or the other, the Court may allow the accused to remain on anticipatory bail.

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25. In *Nirmal Jeet Kaur v. State of M. P. and Another*[6], the decision in K. L. Verma's case (supra) was clarified by stating that the benefit of anticipatory bail may be extended few days thereafter to enable the accused persons to move the High Court if they so desire.

C

26. In *Adri Dharan Das v. State of West Bengal*[7], a two-Judge Bench while accepting for grant of bail for limited duration has held that arrest is a part of the process of investigation intended to secure several purposes. The D accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be E necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons, arrest may become F inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the G arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in

6. (2004) 7 SCC 558.

H 7. (2005) 4 SCC 303.

the investigation, which cannot, at any rate, be done under Section 438 of the Code.

27. After analysing the ratio in the cases of *Salauddin Abdulsamad Shaikh* (supra), *K. L. Verma* (supra), *Nirmal Jeet Kaur* (supra), *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.*[8] the Bench opined thus:-

> "14. After analyzing the crucial question is when a person is in custody, within the meaning of Section 439 of the Code, it was held in *Nirmal Jeet Kaur's* case (supra) and *Sunita Devi's* case (supra) that for making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in *Salauddin's* case (supra) the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.
>
> 15. If the protective umbrella of Section 438 is extended beyond what was laid down in *Salauddin's* case (supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner."

28. In *Union of India v. Padam Narain Agarwal*[9] this Court while dealing with an order wherein the High Court had directed that the respondent therein shall appear before the concerned customs authorities in response to the summons issued to them and in case the custom authorities found a non-bailable against

8. (1980) 2 SCC 559.

9. AIR 2009 SC 254.

A the accused persons they shall not arrest without ten days prior notice to them. The two-Judge Bench relied on the decisions in *Gurbaksh Singh Sibbia* (supra), *Adri Dharan Das* (supra), and *State of Mahrashtra v. Mohd. Rashid and Anr.*[10] and eventually held thus:-

B

> "In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law. *Firstly,* the order passed by the High Court is a *blanket* one as held by the Constitution Bench of this Court in Gurbaksh
> C Singh and seeks to grant protection to respondents in respect of *any non-bailable offence. Secondly,* it illegally obstructs, interferes and curtails the authority of Custom Officers from exercising statutory power of arrest a person said to have committed a non-bailable offence by
> D imposing a condition of giving *ten days prior notice,* a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Custom Authorities is, therefore, liable to be set aside and is hereby set aside."

E

29. Be it noted, the principle of grant of anticipatory bail for a limited duration in cases of *Salauddin Abdulsamad Shaikh* (supra), *K. L. Verma* (supra), *Adri Dharan Das* (supra), *Sunita Devi v. State of Bihar & Anr.*[11] was held to be contrary
F to the Constitution decision in *Gurbaksh Singh Sibbia's* case (supra) by a two-Judge Bench in *Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors.*[12] and accordingly the said decisions were treated as per incurium. It is worth noting though the Bench treated Adri Dharan Das (supra) to be per
G incuriam, as far as it pertained to grant of anticipatory bail for limited duration, yet it has not held that the view expressed therein that the earlier decisions pertaining to the concept of

10. (2005) 7 SCC 56.

11. (2005) 1 SCC 608.

H 12. (2011) 1 SCC 694.

deemed custody as laid down in *Salauddin Abdulsamad Shaikh* (supra) and similar line of cases was per incuriam. It is so as the controversy involved in *Siddharam Satlingappa Mhetre* (supra) did not relate to the said arena.

30. We have referred to the aforesaid pronouncements to highlight how the Constitution Bench in the case of *Gurbaksh Singh Sibbia* (supra) had analysed and explained the intrinsic underlying concepts under Section 438 of the Code, the nature of orders to be passed while conferring the said privilege, the conditions that are imposable and the discretions to be used by the courts. On a reading of the said authoritative pronouncement and the principles that have been culled out in *Savitri Agarwal* (supra) there is remotely no indication that the Court of Session or the High Court can pass an order that on surrendering of the accused before the Magistrate he shall be released on bail on such terms and conditions as the learned Magistrate may deem fit and proper or the superior court would impose conditions for grant of bail on such surrender. When the High Court in categorical terms has expressed the view that it not inclined to grant anticipatory bail to the accused petitioners it could not have issued such a direction which would tantamount to conferment of benefit by which the accused would be in a position to avoid arrest. It is in clear violation of the language employed in the statutory provision and in flagrant violation of the dictum laid down in the case of *Gurbaksh Singh Sibbia* (supra) and the principles culled out in the case of *Savitri Agarwal* (supra). It is clear as crystal the court cannot issue a blanket order restraining arrest and it can only issue an interim order and the interim order must also conform to the requirement of the section and suitable conditions should be imposed. In the case of *Gurbaksh Singh Sibbia* (supra) the Constitution Bench has clearly observed that exercise of jurisdiction under Section 438 of the Code is an extremely important judicial function of a judge and both individual and

25. 1950 SCR 88.

26. (1994) 3 SCC 1.

A society have vital interest in the orders passed by the court in anticipatory bail applications.

31. In this context it is profitable to refer to a three-Judge Bench decision in *Dr. Narendra K. Amin v. State of Gujarat and another*[13]. In the said case a learned Judge of the Gujarat B High Court cancelled the bail granted to the appellant therein in exercise of power under Section 439(2) of the Code. It was contended before this Court that the High Court had completely erred by not properly appreciating the distinction between the parameters for grant of bail and cancellation of bail. The Bench C referred to the decision in *Puran v. Rambilas and another*[14] wherein it has been noted that the concept of setting aside an unjustified, illegal or perverse order is totally different from the cancelling an order of bail on the ground that the accused has misconducted himself or because of some supervening D circumstances warranting such cancellation. The three-Judge Bench further observed that when irrelevant materials have been taken into consideration the same makes the order granting bail vulnerable. In essence, the three-Judge Bench has opined that if the order is perverse, the same can be set at naught by the E superior court. In the case at hand the direction to admit the accused persons to bail on their surrendering has no sanction in law and, in fact, creates a dent in the sacrosanctity of law. It is contradictory in terms and law does not countenance paradoxes. It gains respectability and acceptability when its F solemnity is maintained. Passing such kind of orders the interest of the collective at large and that of the individual victims is jeopardised. That apart, it curtails the power of the regular court dealing with the bail applications.

G 32. In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is a well settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory

13. 2008 (6) SCALE 415.

H 14. (2001) 6 SCC 338.

power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in *Bay Berry Apartments (P) Ltd. and Anr. v. Shobha and Ors.*[15] and *U.P. State Brassware Corporation Ltd. and Anr. v. Uday Narain Pandey*[16].

33. Judging on the foundation of aforesaid well settled principles, the irresistible conclusion is that the impugned orders directing enlargement of bail of the accused persons, namely, Uttam Das, Abhimanyu Das and Murlidhar Patra by the Magistrate on their surrendering are wholly unsustainable and bound to founder and accordingly the said directions are set aside. Consequently the bail bonds of the aforenamed accused persons are cancelled and they shall be taken into custody forthwith. It needs no special emphasis to state that they are entitled to move applications for grant of bail under Section 439 of the Code which shall be considered on their own merits.

34. The appeals are accordingly disposed of.

D.G. Appeals disposed of.

15. (2006) 13 SCC 737.

16. (2006) 1 SCC 479.

A NEEL KUMAR @ ANIL KUMAR

v.

THE STATE OF HARYANA

(Criminal Appeal No. 523 of 2010)

B MAY 7, 2012

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - ss. 302, 376(2)(f) and 201 - Rape C *and murder -Allegation that appellant raped his 4 year old daughter and thereafter murdered her - FIR lodged by victim's mother (i.e. appellant's wife) -Trial court enumerated number of incriminating circumstances against the appellant and convicted him - High Court affirmed the conviction - On* D *appeal, held: Appellant was guardian of the child and was duty bound to safeguard the victim - He kept mum and did not give any information to any law enforcing agency or even to the mother of the victim - If somebody else would have committed the offence it was but natural that appellant would have taken* E *steps to initiate legal action to find out the culprit - Silence on his part in spite of such grave harm to his daughter was again a very strong incriminating circumstance against him - The provisions of s.106 of the Evidence Act, 1872 were fully applicable in this case - A shirt and pant belonging to* F *appellant recovered on the basis of his disclosure statement and taken into possession were sent to the FSL for examination - Report of FSL showed that shirt and pant of the appellant were stained with blood - However, no explanation was given by appellant as to how the blood was present on* G *his clothes - Recovery of incriminating material at his disclosure statement, duly proved, was a very positive circumstance against him - No cogent reason to take a view different from the view taken by the courts below - Conviction accordingly upheld - Evidence Act, 1872 - s.106.*

H

Sentence / Sentencing - Father (appellant) raping and murdering his 4 year old daughter - Conviction of appellant u/ss. 302, 376(2)(f) and 201 IPC and death sentence imposed by Courts below - Conviction upheld by Supreme Court - Question regarding imposition of death sentence on appellant - Held: So far as the sentence part is concerned, the case does not fall within the rarest of rare cases - But, considering the nature of offence, age and relationship of the victim with the appellant and gravity of injuries caused to her, appellant cannot be awarded a lenient punishment - In the facts and circumstances of the case, death sentence set aside and life imprisonment imposed, however, appellant directed to serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release - Penal Code, 1860 - ss. 302, 376(2)(f) and 201.

Sentence / Sentencing - Death sentence - When warranted - Held: The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability - Before opting for death penalty the circumstances of the offender also require to be taken into consideration alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception - The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime - The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option is exercised - For awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances - As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

A *Code of Criminal Procedure, 1973 - s.313 - Statement under - Duty of accused - Held: It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement u/s.313 CrPC - Keeping silent and not furnishing any explanation for such circumstance is an* B *additional link in the chain of circumstances to sustain the charges against him.*

The prosecution case was that the appellant raped his 4 year old daughter and thereafter killed her. The C **appellant's wife (PW.3) lodged the FIR giving the complete version regarding both the criminal acts i.e. rape as well as murder. The trial court enumerated incriminating circumstances against the appellant as under: (i) The victim was in custody of appellant; (ii) No explanation from the side of appellant as to how such severe injuries** D **were suffered by the victim and how she met with death as these facts were in his special knowledge alone. (III) Non information of the crime by appellant to the police or other members of the family; (iv) Recovery of blood stained clothes of the victim and the appellant from** E **possession of appellant on his disclosure statement; (v) presence of blood on the clothes of appellant and no explanation thereof; (vi) abscondence of appellant after the occurrence and (vii) strong motive against appellant for murder as charges of rape were being raised against** F **him and accordingly convicted the appellant under Sections 302, 376(2)(f) and 201 IPC and awarded death sentence. The High Court affirmed the conviction of the appellant as also the death sentence. Hence the present appeal.**

G **Disposing of the appeal, the Court**

HELD: 1. The provisions of Section 106 of the Indian Evidence Act, 1872 were fully applicable in this case. Appellant was guardian of the child and was duty bound H **to safeguard the victim. The accused had kept mum and**

had not given any information to any law enforcing agency or even to the mother of the victim. It comes out from the statement of PW.3 that the information about rape and murder to her was telephonically given by co-accused 'R'. If somebody else would have committed the offence it was but natural that appellant must have taken steps to initiate the legal action to find out the culprit. The silence on his part in spite of such grave harm to his daughter is again a very strong incriminating circumstance against him. The High Court has agreed with the findings recorded by the trial court and confirmed the death sentence after re-appreciating the evidence. The courts below have taken a correct view so far as the application of Section 106 of the Evidence Act is concerned. [Paras 16, 17] [709-C-G]

Prithipal Singh & Ors. v. State of Punjab & Anr. (2012) 1 SCC 10; *Santosh Kumar Singh v. State through CBI* (2010) 9 SCC 747: 2010 (13) SCR 901 and *Manu Sao v. State of Bihar* (2010) 12 SCC 310: 2010 (8) SCR 811 - relied on.

State of West Bengal v. Mir Mohammad Omar & Ors. etc.etc. AIR 2000 SC 2988: 2000 (2) Suppl. SCR 712; *Sahadevan @ Sagadevan v. State rep. by Inspector of Police, Chennai* AIR 2003 SC 215: 2003 (1) SCC 534 - referred to.

2. A shirt and pant belonging to the appellant recovered on the basis of his disclosure statement (Ext. P23) and taken into possession vide Memo Ext. P25 were sent to the FSL for examination. Report of FSL (Ext.P18) shows that shirt and pant of the appellant were stained with blood. However, no explanation has been given by the appellant as to how the blood was present on his clothes. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 Cr.P.C. Keeping silence and not furnishing any explanation for such circumstance is an additional link in the chain of

A **circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement, duly proved, is a very positive circumstance against him. There is no cogent reason to take a view different from the view taken by the courts below. [Paras**
B **18, 19, 20] [710-F-G; 711-A-D]**

Pradeep Singh v. State of Rajasthan **AIR 2004 SC 3781: 2004 (10) SCC 743 and** *Aftab Ahmad Anasari v. State of Uttaranchal* **AIR 2010 SC 773: 2010 (1) SCR 1027 - relied**
C **on.**

3.1. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender also require to be taken into consideration
D **alongwith the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally**
E **inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be**
F **struck between the aggravating and mitigating circumstances before option is exercised. [Para 21] [711-E-G]**

3.2. It is evident that for awarding the death sentence, there must be existence of aggravating circumstances
G **and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand. There is no reason to disbelieve the above evidence and circumstances nor there is any reason to**
H **doubt the commission of offence by the appellant and the**

recovery of incriminating material on his disclosure statement. The incriminating circumstances taken into consideration by the courts below can reasonably be inferred. However, so far as the sentence part is concerned, the case does not fall within the rarest of rare cases. But, considering the nature of offence, age and relationship of the victim with the appellant and gravity of injuries caused to her, appellant cannot be awarded a lenient punishment. In the facts and circumstances of the case, the death sentence is set aside and life imprisonment is imposed, however, the appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release. [Paras 24, 27] [713-D-G; 714-C]

State of Maharashtra v. Goraksha Ambaji Adsul **AIR 2011 SC 2689: 2011 (9) SCR 41;** *Bachan Singh v. State of Punjab* **AIR 1980 SC 898;** *Machchi Singh & Ors. v. State of Punjab* **AIR 1983 SC 957: 1983 (3) SCR 413;** *Devender Pal Singh v. State NCT of Delhi & Anr.* **AIR 2002 SC 1661: 2002 (2) SCR 767;** *Haresh Mohandas Rajput v. State of Maharashtra* **(2011) 12 SCC 56;** *Swami Shraddananda @ Murali Manohar Mishra v. State of Karnataka* **AIR 2008 SC 3040: 2008 (11) SCR 93** *Ramraj v. State of Chattisgarh* **AIR 2010 SC 420: 2009 (16) SCR 367 - relied on.**

Case Law Reference:

(2012) 1 SCC 10	**relied on**	**Para 17**
2000 (2) Suppl. SCR 712	**referred to**	**Para 17**
2003 (1) SCC 534	**referred to**	**Para 17**
2010 (13) SCR 901	**relied on**	**Para 17**
2010 (8) SCR 811	**relied on**	**Para 17**
2004 (10) SCC 743	**relied on**	**Para 19**

A	**2010 (1) SCR 1027**	**relied on**	**Para 19**
	2011 (9) SCR 41	**relied on**	**Para 22**
	AIR 1980 SC 898	**relied on**	**Para 22**
B	**1983 (3) SCR 413**	**relied on**	**Para 22**
	2002 (2) SCR 767	**relied on**	**Para 22**
	2011 (12) SCC 56	**relied on**	**Para 23**
	2008 (11) SCR 93	**relied on**	**Para 25**
C	**2009 (16) SCR 367**	**relied on**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 523 of 2010.

D From the Judgment & Order dated 17.07.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 268/DB of 2009 in Murder Reference No. 1/09.

Shekhar Prit Jha, Vikrant Bhardwaj for the Appellant.

E Kamal Mohan Gupta, Sanjeev Kumar, Gaurav Teotia for the Respondent.

The Judgment of the Court was delivered by

F **DR. B. S. CHAUHAN, J.** 1. This criminal appeal has been preferred against the judgment and order dated 17.7.2009 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 268-DB of 2009, by which it has affirmed the conviction of the appellant under Sections 302/ 376(2)(f) and 201 of Indian Penal Code, 1860 (hereinafter G referred as 'IPC') and accepted the death reference made by the Additional Sessions Judge, Yamuna Nagar at Jagadhari vide judgments and orders dated 2.3.2009/6.3.2009 and confirmed the sentence of death.

H

2. Facts and circumstances giving rise to this appeal are that :

A. Smt. Roopa Devi (PW.3) wife of Neel Kumar @ Anil Kumar – appellant, had gone to her parental home at village Kesri alongwith her minor son on 26.6.2007 leaving her two children i.e. Sanjana, daughter, 4 years old and Vishal, son, 2 years old at her matrimonial home with her husband – appellant. She had to return back on the same day but could not return and stayed at her parental home. On the same day, she received information by telephone at 4.00 p.m. from her brother-in-law Ramesh Kumar that her husband had committed rape upon her 4 years old daughter Sanjana. Roopa Devi (PW.3) came back to her matrimonial home on the next day i.e. 27.6.2007 alongwith 5-7 persons including her family members and neighbours and found her daughter Sanjana, victim, in an injured condition. The Panchayat was convened to resolve the problems. However, the Panchayat could not resolve the dispute, therefore, Roopa Devi (PW.3), complainant, returned to her parental home alongwith accompanying persons leaving her injured daughter Sanjana and son Vishal in the custody of the appellant at her matrimonial home. Roopa Devi (PW.3) wanted to take her injured daughter for medical help, but the appellant and his family members restricted her and even tried to snatch her 15 days old son from her.

B. Roopa Devi (PW.3) received a telephone call again from her brother-in-law Ramesh Kumar on 28.6.2007 informing her that appellant had killed her daughter Sanjana. She came there alongwith her brother Gulla (PW.4) and lodged the report to P.S. Bilaspur against the appellant for committing the rape on her 4 years old daughter Sanjana on 26.6.2007 and against her brother-in-laws and appellant for committing her murder on 27/28.6.2007 and concealing her dead body. Thus, on her complaint, a case under Sections 376(2)(f), 302, 201/34 IPC vide FIR No. 91 dated 28.6.2007 at Police Station Bilaspur (Haryana) was registered.

A C. Immediately, thereafter, on the same day i.e. 28.6.2007, on the application moved by the Investigation Officer, the Deputy Commissioner, Yamuna Nagar, authorised Shri Narender Singh, SDM, Jagadhari to pass an order of exhumation of the dead body from the graveyard and on such B order being passed, the dead body was recovered from the graveyard. It was photographed and an inquest report was prepared. Dead body was sent for post-mortem examination. The requisite plan of place of recovery of dead body was prepared. The Investigating Officer inspected the place of C occurrence on 29.6.2007 and prepared the site plan. The appellant and his brothers were arrested on 30.6.2007. Appellant was medically examined and on his disclosure statement, the Investigating Officer recovered one blood stained bed sheet from his house and further a gunny bag containing D one Pajama, blood stained piece of cloth, pant, shirt and one pillow from a rainy culvert near Majaar of Peer on Kapal Mochan Road (Exts. P-23 and P-25).

D. After filing the chargesheet, the case was committed to the Court of Sessions and on conclusion of the trial, the E learned Sessions Judge vide judgment and order dated 2.3.2009 acquitted all other co- accused but convicted the appellant under Sections 302, 376(2)(f) and 201 IPC and vide order dated 6.3.2009 awarded death sentence under Section 302 IPC, life imprisonment under Section 376(2)(f) IPC and F rigorous imprisonment for 3 years for the offence under Section 201 IPC.

E. Being aggrieved, the appellant preferred Criminal Appeal No. 268-DB of 2009 in the High Court of Punjab and G Haryana at Chandigarh, which was dismissed by the impugned judgment and order dated 17.7.2009 confirming the death sentence upon reference.

Hence, this appeal.

H 3. Mr. Shekhar Prit Jha, learned counsel appearing for the

appellant, has submitted that appellant has falsely been enroped in the offence by the complainant Roopa Devi (PW.3) as the relationship between the husband and wife had been very strained. Even, subsequently, she filed divorce petition against the appellant. It is quite unnatural that once the complainant Roopa Devi (PW.3) had come from her parental house to her matrimonial home, then, on being informed about the rape by the appellant upon their minor daughter of 4 years of age, the complainant would go back to her parental house leaving the girl in the custody of the appellant and that too, when she was suffering from serious vaginal injuries. Since, the evidence of the complainant and her brother Gulla (PW.4) has been disbelieved in respect of four brothers of the appellant and they have been acquitted, the same evidence could not have been relied upon for convicting the appellant. When the complainant left for her parental house on 27.6.2007, the children had been in the custody of appellant's brother Ramesh Kumar and, therefore, there was no possibility of the appellant committing Sanjana's murder. It is by no means a case which falls in the category of rarest of rare cases warranting the death sentence. The appeal deserves to be allowed.

4. On the contrary, Mr. Kamal Mohan Gupta, learned counsel appearing for the respondent State, has vehemently opposed the appeal contending that the appellant has committed most heinous crime, if he can commit the rape of his own 4 years old daughter, the society cannot be safeguarded from such a person. The manner in which the offence has been committed and the nature of injuries caused to the prosecutrix makes it evident that it is a rarest of rare case wherein no punishment other than death sentence could be awarded, thus, the appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. Smt. Roopa Devi (PW.3), complainant has lodged the

A FIR dated 28.6.2007, giving the complete version regarding both the criminal acts i.e. rape as well as murder of Sanjana. This witness also gave details of the Panchayat convened to resolve the dispute and as the same was not resolved, Roopa Devi (PW.3), complainant, went back to her parental home
B leaving the two minor children with appellant. She came back on receiving the information about the death of her daughter next day and lodged the complaint. On the basis of the said complaint, FIR was registered on 28.6.2007 at 3.20 p.m. and investigation ensued. There is evidence on record to show that
C after getting the permission on the order of Deputy Commissioner, Yamuna Nagar, the SDM concerned passed the order of exhumation of the dead body of Sanjana and it was sent for post-mortem examination. The post-mortem report suggested the following injuries on her body:

D "Lacerated wound present in vagina extending from anus to urethral opening admitting four fingers of size 6 x 4 cms. Underlying muscles and ligaments were exposed and anus was also torned and on dissection uterus was perforated in the abdomen".

E

7. The prosecution case has been supported by Gulla (PW.4), brother of the complainant, and further got support from the contents of the divorce petition filed by Roopa Devi (PW.3) complainant, subsequently, wherein it had clearly been stated
F that the appellant had raped and murdered their 4 years old daughter Sanjana and in that respect, the case was pending in the criminal court. The recoveries had been made by Shri Suraj Bhan (PW.17), Investigating Officer on the basis of disclosure statement made voluntarily by the appellant.

G 8. Accused Ramesh Kumar, brother of the appellant who had also faced trial had supported the case of the prosecution to the extent that he informed Roopa Devi (PW.3), complainant at Kesri about the commission of rape by the appellant on his daughter and further deposed that on hearing such a news she
H had come to Bilaspur.

9. Dr. Ashwani Kashyap (PW.2) conducted autopsy on the dead body of the deceased victim and as per his testimony and the post- mortem report (Ext.P3) the cause of death was asphyxia because of throttling which was ante-mortem in nature and sufficient to cause death in ordinary course of events. He also found vaginal and anal wounds on the deceased.

10. Dr. Rajeev Mittal (PW.1) medically examined the appellant and as per his report there was no external injury on the genitals of the appellant. However, he opined that mere absence of injury on private parts of the appellant was no ground to draw an inference that he had not committed forcible sexual intercourse with the victim.

11. Mukesh Garg (PW.11), Sarpanch of village Bilaspur has stated that the S.H.O. has narrated the facts of the case to him and the exhumation of the dead body from the graveyard was done in pursuance of the order of the SDM, Jagadhari. The dead body had been buried by Neel Kumar (appellant) after committing rape and murder of the victim. Thus, this witness was associated in the investigation at the time of exhumation of the dead body.

12. Narender Singh (PW.12), SDM proved the report of ex-humation of the dead body (Ext. P11) and stated that he carried out the same on getting the direction from the Deputy Commissioner. Ish Pal Singh (PW.15), Head Constable and Joginder Singh (PW.16) have supported the prosecution case being the witnesses of arrest and recovery of incriminating material at the voluntary disclosure statement of the appellant.

13. Madan (PW.14) was examined by the prosecution as an eye-witness for the murder of Sanjana. However, he turned hostile and he did not support the case of the prosecution.

14. Suraj Bhan (PW.17), Investigating Officer deposed that he had recovered the dead body from the graveyard on the written permission of the SDM and the same was sent for the

A post-mortem after preparing the inquest report under Section 174 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') He had recorded the statement of witnesses under Section 161 Cr.P.C. He inspected the spot of occurrence on 29.6.2007, prepared the site plan and on the next day i.e. on B 30.6.2007, arrested the appellant alongwith his brothers. It was at that time the appellant in interrogation made disclosure statement (Ext. P-23) and in pursuance thereof, he recovered the incriminating material as referred to hereinabove. The said articles were taken into possession vide recovery memo Ext. C P-25 and sent for FSL report. Subsequently, the positive report was received.

15. The trial court found the testimonies of Roopa Devi (PW.3) complainant, Gulla (PW.4), maternal uncle of the victim, Dr. Ashwani Kashyap (PW.2), Dr. Rajiv Mittal (PW.1) fully D reliable and came to the conclusion that it was quite natural that Sanjana deceased could have made oral dying declaration before her mother Roopa Devi (PW.3), complainant. However, even if it is ignored, there were various circumstances against the appellant. The court enumerated the said incriminating E circumstances as under:

(I) The victim was in the custody of accused Neel Kumar @ Anil Kumar.

F (II) No explanation from the side of this accused as to how such severe injuries were suffered by the victim and how she met with death as these facts were in his special knowledge alone.

(III) Non information of the crime by the accused to the G police or other members of the family.

(IV) Recovery of the blood stained clothes of the victim and the accused from the possession of accused on his disclosure statement.

H

(V) Presence of blood on the clothes of the accused and no explanation thereof. A

(VI) Abscondance of the accused after the occurrence.

(VII) Strong motive against the accused for murder as charges of rape were being raised against him. B

16. The learned Sessions Court further remarked that as the victim was in the custody of the appellant, there had been no explanation from the side of the accused as to how such severe injuries were suffered by the victim and how she met C with death as these facts were in his special knowledge alone. The provisions of Section 106 of the Indian Evidence Act, 1872 (hereinafter called 'Evidence Act') were fully applicable in this case. Appellant was guardian of the child and was duty bound to safeguard the victim. The accused had kept mum and had D not given any information to any law enforcing agency or even to the mother of the victim. It comes out from the statement of Roopa Devi (PW.3) that the information about rape and murder to her was telephonically given by co-accused Ramesh Kumar. If somebody else would have committed the offence it was but E natural that appellant Neel Kumar@ Anil Kumar must have taken steps to initiate the legal action to find out the culprit. The silence on his part in spite of such grave harm to his daughter is again a very strong incriminating circumstance against him.

The High Court has agreed with the findings recorded by F the trial court and confirmed the death sentence after re-appreciating the evidence.

17. In our opinion, the courts below have taken a correct view so far as the application of Section 106 of the Evidence G Act is concerned. This Court in *Prithipal Singh & Ors. v. State of Punjab & Anr.* (2012) 1 SCC 10, considered the issue at length placing reliance upon its earlier judgments including *State of West Bengal v. Mir Mohammad Omar & Ors. etc.etc.*, AIR 2000 SC 2988; and *Sahadevan @ Sagadevan v. State* H

A *rep. by Inspector of Police, Chennai,* AIR 2003 SC 215 and held as under:

> "That if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused".

(See also: *Santosh Kumar Singh v. State through CBI,* (2010) 9 SCC 747; and Manu *Sao v. State of Bihar,* (2010) 12 SCC 310).

Thus, findings recorded by the courts below in this regard stand fortified by the aforesaid judgments.

18. A shirt and pant belonging to the appellant recovered on the basis of his disclosure statement (Ext. P23) and taken into possession vide Memo Ext. P25 were sent to the FSL for examination. Report of FSL (Ext.P18) shows that shirt and pant of the appellant were stained with blood. However, no explanation has been given by the appellant as to how the blood was present on his clothes.

19. In *Pradeep Singh v. State of Rajasthan* AIR 2004 SC 3781, accused had not given any explanation for the presence