Case Laws of Supreme Court of India & different High Courts

JHARKHAND STATE LEGAL SERVICES AUTHORITY

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Year of Publication : **January, 2016**

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Printed & Distributed by :
Jharkhand State Legal Services Authority (JHALSA)
NYAYA SADAN, Near A.G. Office, Doranda, Ranchi
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IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

SUO MOTU WRIT PETITION
(CRIMINAL) NO. 24 OF 2014

In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News

dated 23.01.2014

J U D G M E N T

P.Sathasivam, CJI.

1) This Court, based on the news item published in the Business and Financial News dated 23.01.2014 relating to the gang-rape of a 20 year old woman of Subalpur Village, P.S. Labpur, District Birbhum, State of West Bengal on the intervening night of 20/21.01.2014 on the orders of community panchayat as punishment for having relationship with a man from a different community, by order dated 24.01.2014, took suo motu action and directed the District Judge, Birbhum District, West Bengal to inspect the place of occurrence and submit a report to this Court within a period of one week from that date.

2) Pursuant to the direction dated 24.01.2014, the District Judge, Birbhum District, West Bengal along with the Chief Judicial Magistrate inspected the place in question and submitted a Report to this Court. However, this Court, on 31.01.2014, after noticing that there was no information in the Report as to the steps taken by the police against the persons concerned, directed the Chief Secretary, West Bengal to submit a detailed report in this regard within a period of two weeks. On the same day, Mr. Sidharth Luthra, learned Additional Solicitor General was requested to assist the Court as amicus in the matter.

3) Pursuant to the aforesaid direction, the Chief Secretary submitted a detailed report dated 10.02.2014 and the copies of the same were provided to the parties. On 14.02.2014, this Court directed the State to place on record the First Information Report (FIR), Case Diaries, Result of the investigation/Police Report under Section 173 of the Code of Criminal Procedure, 1973 (in short 'the Code'), statements recorded under Section 161 of the Code, Forensic Opinion, Report of vaginal swab/other medical tests etc., conducted on the victim on the next date of hearing.

4) After having gathered all the requisite material, on 13.03.2014, we heard learned amicus as well as Mr. Anip Sachthey, learned counsel for the State of West Bengal extensively and reserved the matter.

Discussion:

5) Mr. Sidharth Luthra, learned amicus having perused and scrutinized all the materials on record in his submissions had highlighted three aspects viz. (i) issues concerning the investigation; (ii) prevention of recurring of such crimes; and (iii) Victim compensation; and invited this Court to consider the same.

Issues concerning the investigation:

6) Certain relevant issues pertaining to investigation were raised by learned amicus. Primarily, Mr. Luthra stated that although the FIR has been scribed by one Anirban Mondal, a resident of Labpur, Birbhum District, West Bengal, there is no basis as to how Anirban Mondal came to the Police Station and there is also no justification for his presence there. Further, he stressed on the point that Section 154 of the Code requires such FIR to be recorded by a woman police officer or a woman officer and, in addition, as per the latest amendment dated 03.02.2013, a woman officer should record the statements under Section 161 of the Code. While highlighting the relevant provisions, he also submitted that there was no occasion for Deputy Superintendent of Police to re-record the statements on 26.01.2014, 27.01.2014 and 29.01.2014 and that too in gist which would lead to possible contradictions being derived during cross-examinations. He also drew our attention to the statement of the victim under Section 164 of the Code. He pointed out that mobile details have not been obtained. He also brought to our notice that if the Salishi (meeting) is relatable to a village, then the presence of persons of neighbouring villages i.e., Bikramur and Rajarampur is not explained. Moreover, he submitted that there is variance in the version of the FIR and the Report of the Judicial Officer as to the holding of the meeting (Salishi) on the point whether it was held in the night of 20.01.2014 as per the FIR or the next morning as per the Judicial Officer's report, which is one of the pertinent issues to be looked into. He also submitted that the offence of extortion under Section 385 of the Indian Penal Code, 1860 (in short 'the IPC') and related offences have not been invoked. Similarly, offence of criminal intimidation under Section 506 IPC and grievous hurt under Section 325 IPC have not been invoked. Furthermore, Sections 354A and 354B ought to have been considered by the investigating agency. He further pointed out the discrepancy in the name of accused Ram Soren mentioned in the FIR and in the Report of the Judicial Officer which refers to Bhayek Soren which needs to be explained. He also submitted that the electronic documents (e-mail) need to be duly certified under Section 65A of the Indian Evidence Act, 1872. Finally, he pointed out that the aspect as to whether there was a larger conspiracy must also be seen.

7) Mr. Anip Sachthey, learned counsel for the State assured this Court that the deficiency, if any, in the investigation, as suggested by learned amicus, would be looked into and rectified. The above statement is hereby recorded. Prevention of recurring of such crimes:

8) Violence against women is a recurring crime across the globe and India is no exception in this regard. The case at hand is the epitome of aggression against a woman and it is shocking that even with rapid modernization such crime persists in our society. Keeping in view this dreadful increase in crime against women, the Code of Criminal Procedure has been specifically amended by recent amendment dated 03.02.2013 in order to advance the safeguards for women in such circumstances which are as under:-

> *"154. Information in cognizable cases.—*
>
> *(1) x x x*
>
> *Provided that if the information is given by the woman against whom an offence under Section 326A, Section 326B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been*

committed or attempted, then such information shall be recorded, ***by a woman police officer or any woman officer:***

Provided further that:--

(a) in the event that the person against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information ***shall be recorded by a police officer, at the residence of the person*** *seeking to report such offence* ***or at a convenient place of such person's choice****, in the presence of an interpreter or a special educator, as the case may be;*

(2) x x x

(3) x x x"

"161.—Examination of witnesses by police:-

(1) x x x

(2) x x x

(3) x x x

Provided further that the statement of a woman against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code is alleged to have been committed or attempted ***shall be recorded, by a woman police officer or any woman officer.****"*

"164.—Recording of confessions and statements.—

5A In cases punishable under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, sub-Section (1) or sub-Section (2) of Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E, or Section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-Section (5), as soon as the commission of the offence is brought to the notice of the police:"

*"**164 A. Medical examination of the victim of rape.-***

(1) *Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours*

from the time of receiving the information relating to the commission of such offence.

(2) *The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:--*

(i) *the name and address of the woman and of the person by whom she was brought;*

(ii) *the age of the woman;*

(iii) *the description of material taken from the person of the woman for DNA profiling;*

(iv) *marks of injury, if any, on the person of the woman;*

(v) *general mental condition of the woman; and (vi) other material particulars in reasonable detail,*

(3) *The report shall state precisely the reasons for each conclusion arrived at.*

(4) *The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.*

(5) *The exact time of commencement and completion of the examination shall also be noted in the report.*

(6) *The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of subsection (5) of that section. (7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.*

Explanation--For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53."

9) The courts and the police officialss are required to be vigilant in upholding these rights of the victims of crime as the effective implementation of these provisions lies in their hands. In fact, the recurrence of such crimes has been taken note of by this Court in few instances and seriously condemned in the ensuing manner.

10) In **Lata Singh vs. State of U.P. and Ors.**, (2006) 5 SCC 475, this Court, in paras 17 and 18, held as under:

"17. *The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or*

threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such intercaste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

18. *We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism."*

11) In **Arumugam Servai vs. State of Tamilnadu**, (2011) 6 SCC 405, this Court, in paras 12 and 13, observed as under:-

"12. *We have in recent years heard of "Khap Panchayats" (known as "Katta Panchayats" in Tamil Nadu) which often decree or encourage honour killings or other atrocities in an institutionalised way on boys and girls of different castes and religion, who wish to get married or have been married, or interfere with the personal lives of people. We are of the opinion that this is wholly illegal and has to be ruthlessly stamped out. As already stated in Lata Singh case, there is nothing honourable in honour killing or other atrocities and, in fact, it is nothing but barbaric and shameful murder. Other atrocities in respect of personal lives of people committed by brutal, feudal-minded persons deserve harsh punishment. Only in this way can we stamp out such acts of barbarism and feudal mentality. Moreover, these acts take the law into their own hands, and amount to kangaroo courts, which are wholly illegal.*

13. *Hence, we direct the administrative and police officials to take strong measures to prevent such atrocious acts. If any such incidents happen, apart from instituting criminal proceedings against those responsible for such atrocities, the State Government is directed to immediately suspend the District Magistrate/Collector and SSP/SPs of the district as well as other officials concerned and charge-sheet them and proceed against them departmentally if they do not (1) prevent the incident if it has not already occurred but they have knowledge of it in advance, or (2) if it has occurred, they do not promptly apprehend the culprits and others involved and institute criminal proceedings against them, as in our opinion they will be deemed to be directly or indirectly accountable in this connection."*

12) Likewise, the Law Commission of India, in its 242nd Report on Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition) had suggested that:

> **"11.1** *In order to keep a check on the high-handed and unwarranted interference by the caste assemblies or panchayats with sagotra, inter-caste or inter-religious marriages, which are otherwise lawful, this legislation has been proposed so as to prevent the acts endangering the liberty of the couple married or intending to marry and their family members. It is considered necessary that there should be a threshold bar against the congregation or assembly for the purpose of disapproving such marriage / intended marriage and the conduct of the young couple. The members gathering for such purpose, i.e., for condemning the marriage with a view to take necessary consequential action, are to be treated as members of unlawful assembly for which a mandatory minimum punishment has been prescribed.*
>
> **11.2** *So also the acts of endangerment of liberty including social boycott, harassment, etc. of the couple or their family members are treated as offences punishable with mandatory minimum sentence. The acts of criminal intimidation by members of unlawful assembly or others acting at their instance or otherwise are also made punishable with mandatory minimum sentence.*
>
> **11.3** *A presumption that a person participating in an unlawful assembly shall be presumed to have also intended to commit or abet the commission of offences under the proposed Bill is provided for in Section 6.*
>
> **11.4** *Power to prohibit the unlawful assemblies and to take preventive measures are conferred on the Sub-Divisional / District Magistrate. Further, a SDM/DM is enjoined to receive a request or information from any person seeking protection from the assembly of persons or members of any family who are likely to or who have been objecting to the lawful marriage.*
>
> **11.5** *The provisions of this proposed Bill are without prejudice to the provisions of Indian Penal Code. Care has been taken, as far as possible, to see that there is no overlapping with the provisions of the general penal law. In other words, the criminal acts other than those specifically falling under the proposed Bill are punishable under the general penal law.*
>
> **11.6** *The offence will be tried by a Court of Session in the district and the offences are cognizable, non-bailable and non-compoundable.*
>
> **11.7** *Accordingly, the Prohibition of Interference with the Freedom of Matrimonial Alliances Bill 20 has been prepared in order to effectively check the existing social malady."*

13 It is further pertinent to mention that the issue relating to the role of Khap Panchayats is pending before this Court in **Shakti Vahini vs. Union of India and Others** in W.P. (C) No. 231 of 2010.

14) Ultimately, the question which ought to consider and assess by this Court is whether the State Police Machinery could have possibly prevented the said occurrence. The response is certainly a 'yes'. The State is duty bound to protect the Fundamental Rights of its citizens;

and an inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the States incapacity or inability to protect the Fundamental Rights of its citizens.

15) In a report by the Commission of Inquiry, headed by a former Judge of the Delhi High Court Justice Usha Mehra (Retd.), (at pg. 86), it was seen (although in the context of the NCR) that police officers seldom visit villages; it was suggested that a Police Officer must visit a village on every alternate days to "instill a sense of security and confidence amongst the citizens of the society and to check the depredations of criminal elements."

16) As a long-term measure to curb such crimes, a larger societal change is required via education and awareness. Government will have to formulate and implement policies in order to uplift the socio-economic condition of women, sensitization of the Police and other concerned parties towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women.

Victim Compensation:

17) No compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victim's fundamental right, the State is duty bound to provide compensation, which may help in the victim's rehabilitation. The humiliation or the reputation that is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.

18) In 2009, a new Section 357A was introduced in the Code which casts a responsibility on the State Governments to formulate Schemes for compensation to the victims of crime in coordination with the Central Government whereas, previously, Section 357 ruled the field which was not mandatory in nature and only the offender can be directed to pay compensation to the victim under this Section. Under the new Section 357A, the onus is put on the District Legal Service Authority or State Legal Service Authority to determine the quantum of compensation in each case. However, no rigid formula can be evolved as to have a uniform amount, it should vary in facts and circumstances of each case. In the case of **State of Rajasthan vs. Sanyam, Lodha,** (2011) 13 SCC 262, this Court held that the failure to grant uniform ex-gratia relief is not arbitrary or unconstitutional. It was held that the quantum may depend on facts of each case.

19) Learned amicus also advocated for awarding interim compensation to the victim by relying upon judicial precedents. The concept of the payment of interim compensation has been recognized by this Court in **Bodhisattwa Gautam vs. Miss Subhra Chakraborty,** (1996) 1 SCC 490. It referred to Delhi Domestic Working Women's Forum vs. Union of India and others to reiterate the centrality of compensation as a remedial measure in case of rape victims. It was observed as under:-

> *"If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme."*

20) This Court, in **P. Rathinam vs. State of Gujarat,** (1994) SCC (Crl) 1163, which pertained to rape of a tribal woman in police custody awarded an interim compensation of Rs. 50,000/- to be paid by the State Government. Likewise, this Court, in **Railway Board vs. Chandrima Das**, (2000) 2 SCC 465, upheld the High Court's direction to pay Rs. 10

lacs as compensation to the victim, who was a Bangladeshi National. Further, this Court in SLP (Crl.) No. 5019/2012 titled as Satya Pal Anand vs. State of M.P., vide order dated 05.08.2013, enhanced the interim relief granted by the State Government from Rs. 2 lacs to 10 lacs each to two girl victims.

21) The Supreme Court of Bangladesh in **The State vs. Md. Moinul Haque** and Ors. (2001) 21 BLD 465 has interestingly observed that "victims of rape should be compensated by giving them half of the property of the rapist(s) as compensation in order to rehabilitate them in the society." If not adopting this liberal reasoning, we should at least be in a position to provide substantial compensation to the victims.

22) Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case. Mr. Anip Sachthey, learned counsel for the State submitted a report by Mr. Sanjay Mitra, Chief Secretary, dated 11.03.2014 on the rehabilitation measures rendered to the victim. The report is as follows:-

"GOVERNMENT OF WEST BENGAL HOME DEPARTMENT

Report on the Rehabilitation Measures

Reference: Suo Motu Writ Petition No. 24 of 2014

Subject: PS Labpur, District Birbhum, West Bengal Case No. 14/2014 dated 22.01.2014 under section 376D/341/506 IPC.

In compliance with the order passed by the Hon'ble Supreme Court during the hearing of the aforesaid case on 4th March, 2014, the undersigned has reviewed the progress of rehabilitation measures taken by the State Government agencies. The progress in the matter is placed hereunder for kind perusal. 1. A Government Order has been issued sanctioning an amount of Rs.50,000/- to the victim under the Victim Compensation Scheme of the State Government. It is assured that the amount will be drawn and disbursed to the victim within a week.

2. *Adequate legal aid has been provided to the victim.*

3. 'Patta' in respect of allotment of a plot of land under 'Nijo Griha Nijo Bhumi Scheme' of the State Government has been issued in favour of the mother of the victim.

4. Construction of residential house out of the fund under the scheme 'Amar Thikana' in favour of the mother of victim has been completed.

5. Widow pension for the months of January, February and March, 2014 has been disbursed to the mother of the victim.

6. Installation of a tube well near the residential house of the mother of the victim has been completed.

7. Construction of sanitary latrine under TSC Fund has been completed.

8. The victim has been enrolled under the Social Security Scheme for Construction Worker.

9. Antyodaya Anna Yojna Card has been issued in favour of the victim and her mother.

10. Relief and Government relief articles have been provided to the victim and her family.

The State Government has taken all possible administrative action to provide necessary assistance to the victim which would help her in rehabilitation and reintegration.

(Sanjay Mitra)
Chief Secretary"

23) The report of the Chief Secretary indicates the steps taken by the State Government including the compensation awarded. Nevertheless, considering the facts and circumstances of this case, we are of the view that the victim should be given a compensation of at least Rs. 5 lakhs for rehabilitation by the State. We, accordingly, direct the Respondent No. 1 (State of West Bengal through Chief Secretary) to make a payment of Rs. 5 lakhs, in addition to the already sanctioned amount of Rs. 50,000, within one month from today. Besides, we also have some reservation regarding the benefits being given in the name of mother of the victim, when the victim herself is a major (i.e. aged about 20 years). Thus, in our considered view, it would be appropriate and beneficial to the victim if the compensation and other benefits are directly given to her and accordingly we order so.

24) Further, we also wish to clarify that according to Section 357B, the compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A or Section 376D of the IPC.

25) Also, no details have been given as to the measures taken for security and safety of the victim and her family. Merely providing interim measure for their stay may protect them for the time being but long term rehabilitation is needed as they are all material witnesses and likely to be socially ostracized. Consequently, we direct the Circle Officer of the area to inspect the victim's place on day-to-day basis.

Conclusion:

26) The crimes, as noted above, are not only in contravention of domestic laws, but are also a direct breach of the obligations under the International law. India has ratified various international conventions and treaties, which oblige the protection of women from any kind of discrimination. However, women of all classes are still suffering from discrimination even in this contemporary society. It will be wrong to blame only on the attitude of the people. Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner. Thus, we implore upon the State machinery to work in harmony with each other to safeguard the rights of women in our country. As per the law enunciated in Lalita Kumari vs. Govt. of U.P & Ors 2013 (13) SCALE 559, registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and the Police officers are duty bound to register the same.

27) Likewise, all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, are statutorily obligated under Section 357C

to provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Sections 326A, 376, 376A, 376B, 376C, 376D or Section 376E of the IPC.

28) We appreciate the able assistance rendered by Mr. Sidharth Luthra, learned ASG, who is appointed as amicus curiae to represent the cause of the victim in the present case.

29) With the above directions, we dispose of the suo motu petition.

(P. SATHASIVAM)

(SHARAD ARVIND BOBDE)

(N.V. RAMANA)

NEW DELHI;

MARCH 28, 2014.

❑❑❑

State of Punjab Vs. Saurabh Bakshi

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.520 OF 2015
(Arising out of S.L.P. (Crl.) No. 5825 of 2014)

State of Punjab ... Appellant
Versus
Saurabh Bakshi ... Respondent

J U D G M E N T

DIPAK MISRA, J.

Long back, an eminent thinker and author, Sophocles, had to say:

"Law can never be enforced unless fear supports them."

Though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today's society. It is the duty of every rightthinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If any one defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardizo "Justice, though due to the accused, is due to the accuser too". And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices. We are constrained to commence with this prologue because we are required to deal with the concept of adequacy of quantum of sentence imposed by the High Court under Section 304A of the Indian Penal Code (IPC) after maintaining the conviction of the respondent of the said offence as the prosecution has proven the charge that the respondent has caused death of two persons by rash and negligent driving of a motor vehicle.

2. The facts which are necessitous to be stated are that on 14.6.2007 Jagdish Ram and his nephew, Shavinder Kumar @ Tinku, sister's son, had proceeded from Sangrur to Patiala in their Maruti car bearing registration PB-11-M- 8050. The said vehicle was also followed by Ramesh Chand in another Maruti car bearing registration no. PB-09-C-6292. Be it noted that all of them had gone to house of one Des Raj at Sangrur in connection with matrimonial

alliance of Shavinder Kumar alias Tinku. The vehicle that was driven by Tinku was ahead of Ramesh's at a distance of 25/30 kadams. After they reached some distance ahead of the bus stand village Mehmadpur about 2.00 p.m. an Indica car bearing registration no. HR-02-6800 came from the opposite side at a very high speed and the driver of the said car hit straightaway the car of Jagdish and dragged it to a considerable distance as a result of which it fell in the ditches. Ramesh Chand, who was following in his car, witnessed that his brother-in-law and nephew had sustained number of injuries and their condition was critical. A police ambulance came to the spot and the injured persons were taken to Rajindra Hospital, Patiala where Jagdish and Shavinder Kumar succumbed to injuries. In view of the said incident as FIR was lodged by Ramesh Chand, brother-inlaw of Jagdish and accordingly a crime under Section 279/304A was registered against the respondent for rash and negligent driving. The learned trial Magistrate, Patiala framed charges for the offences punishable under Section 279/304A IPC to which the respondent pleaded not guilty and claimed to be tried. The prosecution in order to prove its case examined six witnesses. The learned Addl. Chief Judicial Magistrate, Patiala vide judgment and order dated 23.4.2012 convicted the respondent for the offences punishable under Section 304A IPC and sentenced him to undergo rigorous imprisonment for a period of one year and pay a fine of Rs.2000/- with a default clause. On an appeal being preferred, the learned Addl. Sessions Judge, Patiala dismissed the appeal by judgment and order dated 6.9.2013.

3. As the factual matrix would unveil the respondent being grieved by the aforesaid conviction and the sentence preferred Criminal Revision No. 2955 of 2013 and the High Court while disposing off the Criminal Revision addressed to the quantum of sentence and in that context observed that:-

> *"...the legal heirs of Jagdish Ram have been awarded a sum of Rs.7,30,000/- as compensation by the MACT and Rs.12,07,206/- to the legal heirs of Swinder Kumar @ Tinku by the MACT. The FAO Nos. 5329 and 5330 are pending in this Court. In compliance of order dated 19.9.2013, the petitioner has deposited Rs.85,000/- before the trial court as compensation to be paid to the LRs of deceased Jagdish Ram and Swinder Kumar @ Tinku. The compensation shall be divided as Rs.50,000/- to the LRs of Swinder Kumar @ Tinku and Rs.35,000/- to the LRs of Jagdish Ram. The receipt is taken on record. As per custody certificate petitioner Saurabh Bakshi has undergone 24 days as on 30.9.2013 out of one year."*

Being of this view the High Court upheld the conviction and reduced the sentence, as has been stated before, to the period already undergone. Hence, the State is in appeal.

4. At this juncture, it is essential to state that the respondent who had initially wanted to argue the matter inperson had agreed to be assisted by a counsel and accordingly this court had appointed Ms. Meenakshi Arora, learned senior counsel to assist the court in the matter.

5. We have heard Mr. V. Madhukar, learned Additional Advocate General and Ms. Meenakshi Arora, learned senior counsel for the respondent.

6. It is submitted by Mr. Madhukar that when the prosecution had been able to establish the charges leveled against the respondent and both the trial court and the appellant court had maintained the sentence there was no justification on the part of the High Court to reduce the sentence to the period already undergone solely on the basis that the respondent had

paid some compensation. It is his further submission that keeping in view the gravity of the offence that two deaths had occurred the High Court should have kept itself alive to the nature of the crime and should have been well advised not to interfere with the quantum of sentence. He has commended us to the decisions in State of **Punjab v. Balwinder Singh and Others**[1] and **Guru Basavaraj Alias Benne Settappa v. State of Karnataka**[2].

7. Ms. Meenakshi, learned senior counsel, per contra, has contended that the respondent was quite young at the time the accident took place and it may be an act of negligence, but the contributory facet by the Maruti car driver cannot be ruled out. That apart, there are mitigating circumstances for reduction of the sentence and in the obtaining factual matrix the High Court has appositely adopted corrective machinery which also reflects the concept of proportionality. The learned senior counsel would also submit that when the High Court has exercised the discretion which is permissible under Section 304A this court should be slow to interfere. It is urged by her that when the compensation had been paid, the High Court has kept in view the aspect of rehabilitation of the victim and when that purpose have been sub-served the reduction of sentence should not be interfered with. The learned senior counsel has drawn inspiration from **Gopal Singh v. State of Uttarakhand**[3] and a recent judgment in Criminal Appeal No. 290 of 2015 titled **State of M.P. v. Mehtaab**[4].

8. At the outset, it is essential to note that the respondent stood convicted by the trial court as well by the appellate court. The findings recorded by the said two courts are neither perverse nor did they call for interference in exercise of the revisional jurisdiction. The High Court as we notice has been persuaded by the factum of payment of compensation by the respondent herein, amounting to Rs.85,000/- to the LRs of deceased Jagdish Ram and his nephew and the said compensation had been directed to be paid by virtue of the order dated 19.9.2013 passed by the High Court. It is submitted by Ms. Arora that apart from the young age of the respondent at the time of occurrence the aforesaid aspect would constitute the mitigating factor. In Mehtaab's case a two-Judge Bench was dealing with the case under Section 304A IPC wherein the respondent was convicted under Section 304A IPC and 337 IPC and sentenced to undergo one year and three months rigorous imprisonment respectively. The High Court had reduced the sentence to 10 days. It is apt to note here that in that case the deceased had received injuries due to shock of electric current. The court took note of the submission of the learned counsel for the State and proceeded to opine as follows:-

> **"7.** *Learned Counsel for the State submitted that the accused Respondent had installed a transformer in his field and left the electric wires naked which was a negligent act. The deceased Sushila Bai died on account of the said naked wire which had high voltage and was not visible in the dark. The offence having been fully proved by the evidence on record, the High Court was not justified in reducing the sentence to 10 days which was not just and fair. Even if liberal view on sentence of imprisonment was to be taken, the High Court ought to have enhanced the sentence of fine and awarded a reasonable compensation as a condition for reduction of sentence.*

1 (2012) 2 SCC 182

2 (2012) 8 SCC 734

3 (2013) 7 SCC 545

4 2015 (2) SCALE 386

8. *We find force in the submission. It is the duty of the Court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and the society. It is also the duty of the court to duly consider the aspect of rehabilitating the victim. Unfortunately, these factors are missing in the impugned order. No cogent reason has been assigned for imposing only 10 days sentence when an innocent life has been lost."*

After so stating the court referred to the decision in **Suresh v. State of Haryana**[5] and enhanced the compensation taking note of the financial capacity of the accused respondent therein, and directed as follows:-

"10. As already observed, the Respondent having been found guilty of causing death by his negligence, the High Court was not justified in reducing the sentence of imprisonment to 10 days without awarding any compensation to the heirs of the deceased. We are of the view that in the facts and circumstances of the case, the order of the High Court can be upheld only with the modification that the accused will pay compensation of Rs. 2 lakhs to the heirs of the deceased within six months. In default, he will undergo RI for six months. The compensation of Rs. 2 lakhs is being fixed having regard to the limited financial resources of the accused but the said compensation may not be adequate for the heirs of the deceased. In such situation, in addition to the compensation to be paid by the accused, the State can be required to pay compensation Under Section 357-A. As per judgment of this Court in Suresh (supra), the scheme adopted by the State of Kerala is applicable to all the States and the said scheme provides for compensation upto Rs. 5 lakhs in the case of death. In the present case, it will be appropriate, in the interests of justice, to award interim compensation of Rs. 3 lakhs Under Section 357-A payable out of the funds available/to be made available by the State of Madhya Pradesh with the District Legal Services, Authority, Guna. In case, the accused does not pay the compensation awarded as above, the State of Madhya Pradesh will pay the entire amount of compensation of Rs. 5 lakhs within three months after expiry of the time granted to the accused."

9. In our considered view the decision in the said case has to be confined to the facts of that case. It cannot be said as a proposition of law that whenever an accused offers acceptable compensation for rehabilitation of a victim, regardless of the gravity of the crime under Section 304A, there can be reduction of sentence.

10. In this context, we may refer with profit to the decision in Balwinder Singh (supra) wherein the High Court had allowed the revision and reduced the quantum of sentence awarded by the Judicial Magistrate, First Class, for the offences punishable under Section 304A, 337, 279 of IPC by reducing the sentence of imprisonment already undergone that is 15 days. The court referred to the decision in **Dalbir Singh v. State of Haryana**[6] and reproduced two paragraphs which we feel extremely necessary for reproduction:-

5 Crl Appeal No. 420 of 2012, decided on 28.11.2014

6 (2000) 5 SCC 82

> **"1.** *When automobiles have be come death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.*
>
> ** * **
>
> **13.** *Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles."*

11. In **B. Nagabhushanam v. State of Karnataka**[7] the appellant was directed to undergo simple imprisonment for six months for the offences punishable under Section 304A IPC. The two-Judge Bench referred to Dalbir Singh (supra) and declined to interfere with the quantum of sentence. Be it stated, in the said case a passage from **Ratan Singh v. State of Punjab**[8] was quoted:-

> *"Nevertheless, sentencing must have a policy of correction. This driver, if he has to become a good driver, must have a better training in traffic laws and moral responsibility, with special reference to the potential injury to human life and limb. Punishment in this area must, therefore, be accompanied by these components. The State, we hope, will attach a course for better driving together with a livelier sense of responsibility, when the punishment is for driving offences. Maybe, the State may consider, in case of men with poor families, occasional parole and reformatory courses on appropriate application, without the rigour of the old rules which are subject to Government discretion."*

7 (2008) 5 SCC 730

8 (1979) 4 SCC719

12. In Guru Basavaraj (supra) the appellant was found guilty for the offences punishable under Sections 337, 338, 279 and 304A IPC and sentenced to suffer simple imprisonment of six months and to pay a fine of Rs.2000/- and in default to suffer simple imprisonment of 45 days. The two-Judge Bench after placing reliance on **State of Karnataka v. Krishna**[9], **Sevaka Perumal v. State of T.N.**[10], **Jashubha Bharatsinh Gohil v. State of Gujarat**[11], **State of Karnataka v. Sharanappa Basanagouda Aregoudar**[12] and **State of M.P. v. Saleem**[13] opined that there is a constant concern of the court on imposition of adequate sentence in respect of commission of offences regard being had to the nature of the offence and demand of the conscience of the society. There has been emphasis on the concern to impose adequate sentence for the offence punishable under Section 304A IPC. The Court has observed that it is worthy to note that in certain circumstances, the mitigating factors have been taken into consideration but the said aspect is dependent on the facts of each case. As the trend of authorities would show, the proficiency in professional driving is emphasised upon and deviation therefrom that results in rash and negligent driving and causes accident has been condemned. In a motor accident, when a number of people sustain injuries and a death occurs, it creates a stir in the society; sense of fear prevails all around. The negligence of one shatters the tranquility of the collective. When such an accident occurs, it has the effect potentiality of making victims in many a layer and creating a concavity in the social fabric. The agony and anguish of the affected persons, both direct and vicarious, can have nightmarish effect. It has its impact on the society and the impact is felt more when accidents take place quite often because of rash driving by drunken, negligent or, for that matter, adventurous drivers who have, in a way, no concern for others. Be it noted, grant of compensation under the provisions of the Motor Vehicles Act, 1988 is in a different sphere altogether. Grant of compensation under Section 357(3) CrPC with a direction that the same should be paid to the person who has suffered any loss or injury by reason of the act for which the accused has been sentenced has a different contour and the same is not to be regarded as a substitute in all circumstances for adequate sentence. Thereafter, the Court proceeded to observe:-

> **"32.** *We may note with profit that an appropriate punishment works as an eyeopener for the persons who are not careful while driving vehicles on the road and exhibit a careless attitude possibly harbouring the notion that they would be shown indulgence or lives of others are like "flies to the wanton boys". They totally forget that the lives of many are in their hands, and the sublimity of safety of a human being is given an indecent burial by their rash and negligent act.*
>
> **33.** *There can hardly be any cavil that there has to be a proportion between the crime and the punishment. It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate punishment cannot be lightly ignored."*

Being of this view, the Court declined to interfere.

9 (1987) 1 SCC 538

10 (1991) 3 SCC 471

11 (19940 4 SCC 353

12 (2002) 3 SCC 738

13 (2005) 5 SCC 554

13. In **Siriya v. State of M.P.**[14] it has been held as follows:-

> *"Protection of society and stamping out* criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be."

14. In **Alister Anthony Pareira v. State of Maharashtra**[15] while emphasizing on the inherent danger the Court observed thus:-

> *"39. Like Section 304-A, Sections 279, 336, 337 and 338 IPC are attracted for only the negligent or rash act. The scheme of Sections 279, 304-A, 336, 337 and 338 leaves no manner of doubt that these offences are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. These sections make punishable the acts themselves which are likely to cause death or injury to human life."*

15. While dealing with the policy of sentencing in Gopal Singh (supra) the two-Judge Bench quoted a paragraph from **Shailesh Jasvantbhai v. State of Gujarat**[16] which is as follows:-

> *"7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a crosscultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: 'State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."*

In the said case it has been laid as follows:-

14 (2008) 8 SCC 72

15 (2012) 2 SCC 648

16 (2006) 2 SCC 359

> *"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect — propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor selfadhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment."*

16. In **Shyam Narain v. State (NCT of Delhi)**[17] though in a different context while dealing with the issue of sentencing it has been stated that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

17. In the instant case the factum of rash and negligent driving has been established. This court has been constantly noticing the increase in number of road accidents and has also noticed how the vehicle drivers have been totally rash and negligent. It seems to us driving

17 (2013) 7 SCC 77

in a drunken state, in a rash and negligent manner or driving with youthful adventurous enthusiasm as if there are no traffic rules or no discipline of law has come to the centre stage.

The protagonists, as we perceive, have lost all respect for law. A man with the means has, in possibility, graduated himself to harbour the idea that he can escape from the substantive sentence by payment of compensation. Neither the law nor the court that implements the law should ever get oblivious of the fact that in such accidents precious lives are lost or the victims who survive are crippled for life which, in a way, worse then death. Such developing of notions is a dangerous phenomenon in an orderly society. Young age cannot be a plea to be accepted in all circumstances. Life to the poor or the impecunious is as worth living for as it is to the rich and the luxuriously temperamental. Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. In our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system. In our view, the sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months.

18. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a non-challant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the lawmakers should scrutinize, re-look and re-visit the sentencing policy in Section 304A, IPC. We say so with immense anguish.

19. Resultantly, the appeal is allowed to the extent indicated above and the respondent be taken into custody forthwith to suffer the remaining period of sentence.

[DIPAK MISRA]

[PRAFULLA C. PANT]

NEW DELHI

MARCH 30, 2015.

❑❑❑

Vijayan Vs. Sadanandan K. & Anr.

IN THE SUPREME COURT OF INDIA
CIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION
(Crl.)No.3220 of 2008

Vijayan ... Petitioner
Vs.
Sadanandan K. & Anr. ... Respondents

Coram :
(ALTAMAS KABIR, CYRIAC JOSEPH, JJ)

J U D G M E N T

ALTAMAS KABIR, J.

1. In this Special Leave Petition we are called upon to consider whether a default sentence can be imposed when compensation is awarded under Sub- Section (3) of Section 357 of the Code of Criminal Procedure.

2. In the instant case, the petitioner stood convicted by the Judicial Magistrate, First Class, Court-II, Pathanamthitta, of an offence under Section 138 of the Negotiable Instruments Act, 1881, and sentenced to undergo simple imprisonment for one year and to pay a sum of Rs.8,25,000/- as compensation to the complainant/Respondent No.1 herein under Section 357(3) of the Code of Criminal Procedure, (Cr.P.C.in short) and in default to undergo simple imprisonment for a further period of six months. On appeal (Criminal Appeal no.41/2006), the Additional District and Sessions Judge by her order dated 27th March, 2007 confirmed the judgment of conviction and sentence passed by the learned Magistrate. In revision, being Criminal Revision Petition No.1836 of 2007-D, the Kerala High Court by its judgment dated 28th May, 2007, while upholding the conviction, modified the sentence from imprisonment for a year to imprisonment till the rising of the Court and to pay a compensation of Rs.8,25,000/- to the complainant underSection 357(3) Cr.P.C. and in default to undergo Simple Imprisonment for six months.

3. It is the said order of the Kerala High, which has been impugned in the instant Special Leave Petition.

4. Dr. K.P. Kailasanatha Pillay, learned Advocate for the petitioner, questioned the judgment of the High Court mainly on the ground that the High Court had erred in law in confirming the default clause made by the Trial Court while directing compensation to be paid under Section 357(3) Cr.P.C. According to Dr. Pillay, though Section 357(1) Cr.P.C., inter alia, provides for the disbursement of fine imposed by way of compensation, Sub-Section (3), merely empowers the Court when it imposes a sentence of which fine does not form a part, to order the accused person to pay, by way of compensation, such amount as may be specified in the order, to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. Dr. Pillay submitted that in the absence of any specific provision with regard to default in payment of compensation which

was distinctly different from imposition of fine by way of a penalty, the High court had wrongly confirmed the default sentence imposed by the learned Magistrate and upheld by the learned Sessions Judge.

5. Dr. Pillay submitted that according to the scheme of the Criminal Procedure Code, if any amount is to be recovered on account of default in payment of fine, it would have to be done in accordance with the provisions of Section 421 Cr.P.C. which provides for issue of warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender and in the alternative, by issuance of warrant to the Collector of the district, authorizing him to realize the amount as arrears of land revenue from the movable or immovable property or both, of the defaulter. Dr. Pillay also urged that the provisions of Section 431, which is another mode for recovery of amounts payable as fine, does not, however, cover cases involving the recovery of compensation payable under Section 357(3) and therefore, the only mode available to the Court to recover any defaulted amount by way of compensation is to take recourse to the provisions ofSection 421 Cr.P.C.

6. In support of his submissions, Dr. Pillay referred to the decision of this Court in **Dilip S. Dahanukar v Kotak Mahindra Co. Ltd. & Anr.** [(2007) 6 SCC 528], wherein, while considering the difference between the provisions of Section 357(1)(b) and Section 357(3) Cr.P.C., i.e., the difference between "fine" and "compensation" this Court observed that the distinction between Sub- Sections (1) and (3) of Section 357 is apparent as Sub-Section (1) provides for application of an amount of fine towards the purposes indicated while imposing a sentence of which fine forms a part, whereas Sub-Section (3) is applicable in a situation where the Court imposes a sentence of which fine does not form a part of the sentence. This Court went on to observe that when fine is not imposed, compensation can be directed to be paid for loss or injury caused to the complainant by reason of commission of offence and while Sub- Section (1) of Section 357provides for application of the amount of fine, Sub-Section (3) of Section 357 seeks to achieve the same purpose.

7. In this regard, Dr. Pillay also referred to and relied upon a recent decision of this Court in Ettappadan Ahammedkutty @ Kunhappu v E.P. Abdullakoya @ Kunhi Bappu & Anr. in Criminal Appeal No.1013 of 2007, where the same question as raised in this Special Leave Petition fell for consideration and the said appeal was disposed of by the following order:

> *"Compensation can be directed to be paid both in terms of sub-section (1) of Section 357 of the Code of Criminal Procedure as also sub-section (3) thereof. However, while exercising jurisdiction under sub-section (3) of Section 357, no direction can be issued that in default to pay the amount of compensation, the accused shall suffer simple imprisonment. Such an order could have been passed only in terms of sub-section (1) of Section 357. If the compensation directed to be paid by the Court in exercise of its jurisdiction under sub-section (3) of Section 357 Cr.P.C. is not deposited, the same can be realised as fine in terms of Section 421 of the Code. We are, therefore, of the opinion that that part of the impugned order whereby and whereunder the appellant has been directed to undergo imprisonment for a period of one month, in the event of default to pay compensation under sub-section (3) of Section 357, is set aside. Rest of the order of the High Court is upheld."*

8. Dr. Pillay also referred to and relied on a Single Bench decision of the Kerala High Court in **Rajendran v Jose** [2002 (1) Crimes 653], where it was held that in order to recover compensation awarded if it remained unpaid, the Trial Magistrate could take steps under Section 421 or underSection 431 Cr.P.C. to recover the compensation, but the order directing the petitioner to undergoimprisonment in case of default in payment of compensation was unsustainable.

9. Dr. Pillay urged that in view of the law as laid down by this Court in the case of Ettappadan Ahammedkutty (supra), the High Court was clearly wrong in upholding the default sentence in case of non-payment of the compensation amount directed to be paid.

10. On behalf of the Respondent No.l, it was submitted by Mr. Raghenth Basant, learned Advocate, that the judgment of the High Court impugned in this Petition did not warrant any interference since the question involved had been settled by this Court as early as in 1998 in the case of **Hari Singh v Sukhbir Singh** [(1998) 4 SCC 551], wherein it was, inter alia, held that since the imposition of compensation under Section 357(3) Cr.P.C. was on account of social concern, the Court could enforce the same by imposing sentence in default, particularly when no mode had been prescribed in the Code for recovery of sums awarded as compensation in the event the same remained unpaid. Mr. Basant also referred to the decision of this Court in **Sugnathi Suresh Kumar v Jagdeeshan** [(2002) 2 SCC 420], where the aforesaid views were reiterated and it was stated in paragraph 11 of the said judgment as follows :-

> *"11. When this Court pronounced in Hari Singh v. Sukhbir Singh (supra) that a Court may enforce an order to pay compensation "by imposing a sentence in default" it is open to all Courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a larger Bench of this Court. Hence learned Single Judge of High Court of Kerala has committed an impropriety by expressing that the said legal direction of this Court should not be followed by the subordinate Courts in Kerala. We express our disapproval of the course adopted by the said Judge in Rajendran v. Jose 2001 (3) Kerala Law Times 431. It is unfortunate that when the Sessions Judge has correctly done a course in accordance with the discipline the Single Judge of the High Court has incorrectly reversed it."*

11. It was also urged that the decision in Dilip S. Dahanukar's case (supra), referred to on behalf of the petitioner, had no application to the issues involved in the present case since in the said case the issue was whether Sub-Section (2) of Section 357 could be applied in cases where compensation is awarded under Sub-Section (3) thereof and it was urged that the provisions of Sub-Section (2) would be applicable even in cases where compensation is awarded under Section 357(3). It was submitted that the said decision was not an authority for the proposition that default sentence could be imposed where compensation is awarded under Section 357(3) Cr.P.C.

12. As far as two other decisions in Ettappadan Ahamedkutty's case (supra) and Balraj's case (supra), relied on by learned counsel for the Petitioner, the same did not also deal with the question as to whether a default sentence can be imposed when compensation is awarded underSection 357(3) Cr.P.C., which is the focal question as far as this case is concerned.

13. Mr. Basant submitted that Section 431 Cr.P.C. provides that any money (other than a fine) payable by virtue of any order made under the Code and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine. Mr. Basant submitted that in that view of the matter, compensation awarded under Section 357(3) Cr.P.C. could also be recovered under Section 431 Cr.P.C. read with Section 421 Cr.P.C., which provides the methods for recovery of fine imposed by the Court from the accused. In this connection, reference was also made to Sections 64 to 70 of the Indian Penal Code (IPC), which empower the Court to impose a default sentence in case of non-payment of fine. It was submitted that default sentence is not a substantive sentence under the IPC and it comes to an end the moment fine is paid by the accused. It was submitted that Section 53 IPC deals with various punishments that can be imposed on the accused, but default sentence is not one of the sentences mentioned in Section 53. Mr. Basant added that Section 30 Cr.P.C. also recognizes the power of the Court to impose a default sentence on non- payment of fine. Referring to the decision of this Court in Shantilal v State of Madhya Pradesh [(2007) 11 SCC 243], Mr. Basant submitted that it had been held in the said case that a default sentence is not a sentence as such, but a penalty which a person incurs on non-payment of fine. Special reference was made to paragraph 31 of the judgment which reads as follows :-

> *"31. The next submission of the learned counsel for the appellant, however, has substance. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or `otherwise'. A terms of imprisonment ordered in default of payment of fine stands on a different footing."*

The same view was expressed earlier by this Court in **Kuldip Kaur v Surinder Singh** [(1989) 1 SCC 405], where it was held that a default sentence is a mode of enforcing recovery of amount imposed by way of compensation.

14. It was submitted that if default sentence is taken to be a mode of recovery, then Sections 64 to70 IPC would be applicable even in cases where compensation is awarded to the victim underSection 357(3) Cr.P.C. It was further submitted that while Section 431 states that an amount other than a fine is recoverable as if it were a fine, a fine could also be recoverable either underSection 421 Cr.P.C. by attachment of movable and immovable property or under Sections 64 to 70IPC and Section 30 Cr.P.C. It was submitted that the said modes of enforcement were also available in respect of compensation directed to be paid under Section 357(3) Cr.P.C. in the light of the provisions of Section 431 thereof.

15. Mr. Basant concluded on the note that since the powers of the Magistrate were restricted to awarding a maximum fine of Rs.5,000/-, which was subsequently enhanced to Rs. 10,000/- in 2005, the maximum fine that can be imposed by a Magistrate is only Rs. 10,000/-. However, in view of the provisions for awarding compensation under Section 357(3) Cr.P.C., where the power to award compensation is unlimited, the Magistrate can take recourse to the provisions of Section 357(3) Cr.P.C. to meet a particular situation to ensure that justice is done to the parties.

16. It was submitted that in view of what has been stated hereinbefore, in appropriate cases the Courts are competent to impose a default sentence where compensation is awarded under Section 357(3) Cr.P.C.

17. We have carefully considered the submissions made on behalf of the respective parties. Since a decision on the question raised in this petition is still in a nebulous state, there appear to be two views as to whether a default sentence on imprisonment can be imposed in cases where compensation is awarded to the complainant under Section 357(3) Cr.P.C. As pointed out by Mr. Basant in Dilip S. Dahanukar's case (supra), the distinction between a fine and compensation as understood under Section 357(1)(b) and Section 357(3) Cr.P.C. had been explained, but the question as to whether a default sentence clause could be made in respect of compensation payable under Section 357(3) Cr.P.C, which is central to the decision in this case, had not been considered.

18. In the decision in Rajendran's case (supra), the learned Single Judge of the Kerala High Court had held that in order to recover compensation which remains unpaid, the Trial Magistrate couldtake steps under Section 421 or Section 431 Cr.P.C. to recover the same, though ultimately it was held that imprisonment in case of default of such payment was not sustainable.

19. In our view, the provision for grant of compensation under Section 357(3) Cr.P.C. and the recovery thereof makes it necessary for the imposition of a default sentence as was held by this Court firstly in Hari Singh's case (supra) and thereafter in Sugnathi Suresh Kumar's case (supra). In our view, the law has been correctly stated in the said two decisions. As we have mentioned hereinbefore, when the decision of this Court in Hari Singh's case (supra) was holding the field, the learned Single Judge of the High Court had wrongly relied on the decision of the Kerala High Court in Rajendran's case (supra). The power to impose a default sentence in case of non-payment of compensation under Section 357(3) Cr.P.C. has been duly recognized by this Court and the arguments advanced to the contrary on behalf of the Petitioner must, therefore, be rejected.

20. Section 357 Cr.P.C. bears the heading "Order To Pay Compensation". It includes in sub-Section (1) the power of the Court to utilize a portion of the fine imposed for the purpose of compensating any person for any loss or injury caused by the offence. In addition, Sub-Section (3) provides that when a sentence is imposed by the Court, of which fine does not form a part, the Court may, while passing judgment, order the accused person to pay by way of compensation such amount as may be specified in the order to the person who suffers any loss or injury by reason of the act for which the accused person has been so sentenced. It is true that the said provision does not include the power to impose a default sentence, but read with Section 431Cr.P.C. the said difficulty can be overcome by the Magistrate imposing the sentence. To appreciate the said legal position, the provisions of Section 431 are set out hereinbelow:-

> *"431. Money ordered to be paid recoverable as fine. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:*
>
> *Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of section*

421, after the words and figures "under section 357", the words and figures "or an order for payment of costs under section 359" had been inserted."

Section 431 makes it clear that any money other than a fine payable on account of an order passed under the Code shall be recoverable as if it were a fine which takes us to Section 64 I.P.C.

21. Section 64 IPC makes it clear that while imposing a sentence of fine, the Court would be competent to include a default sentence to ensure payment of the same. For the sake of reference,Section 64 IPC is set out hereinbelow:-

"64. Sentence of imprisonment for non- payment of fine.--In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

22. The provisions of Sections 357(3) and 431 Cr.P.C., when read with Section 64 IPC, empower the Court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same. The observations made by this Court in Hari Singh's case (supra) are as important today as they were when they were made and if, as submitted by Dr. Pillay, recourse can only be had to Section 421 Cr.P.C. for enforcing the same, the very object of Sub-Section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory.

23. Having regard to the views expressed hereinabove, we hold that while awarding compensation under Section 357(3) Cr.P.C., the Court is within its jurisdiction to add a default sentence of imprisonment as was held in Hari Singh's case (supra).

24. The Special Leave Petition is accordingly dismissed.

25.The time for making the deposit is extended by three months from today.

(ALTAMAS KABIR)

(CYRIAC JOSEPH)

New Delhi Dated: 05.05.2009

Hari Kishan & Anr vs Sukhbir Singh

Supreme Court of India
Hari Kishan & Anr vs Sukhbir Singh & Ors on 25 August, 1988
DATE OF JUDGMENT25/08/1988

1988 AIR 2127,
1988 SCR Supl. (2) 571, 1988 SCC (4) 551, 1988 SCALE (2)426

Hari Kishan & Anr. ... Appelent
Vs.
Sukhbir Singh & Ors. ...Respondent

ACT:

Criminal Procedure Code, 1973: Section 357-order to pay compensation-All Courts to exercise this power liberally to meet ends of justice-Reasonable period for payment may be given-If necessary payment by installments. Probation of Offenders Act, 1958: Many offenders-Not dangerous criminals- Weak characters who have surrendered to temptation or provocation-Court placing such offenders on probation-Protects them from possible contamination by prison.

HEADNOTE:

Seven persons were convicted under sections 307/149, 325/l49, 3231/149 and 148 IPC and sentenced to undergo R.Z. from one year to three years. The High Court acquitted two of all charges, and five of the offence under s. 307/149 while maintaining their conviction and sentence under s. 325/149, s. 323/149 and s. 148. They were however released on probation of good conduct. Each one of them was ordered to pay compensation of Rs. 2,500 to Joginder who was seriously injured and whose power of speech was permanently impaired. Before this Court the appellant contended that the intention of the five accused was obviously to commit murder of Joginder and their acquittal under s. 3O7 IPC was perverse. Disposing of the appeal, it was,

HELD:

(1) Under s. 307 IPC what the Court has to see is whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge must be such as is necessary to constitute murder. Without this ingredient being established there can be no offence of"attempt to murder". Under s. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. In this case, the respondents had no intention to commit murder. They had no motive either.

(2) Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders on probation the Court encourages their own sense of responsibility for their future and protects them from the stigma and possible contamination of prison.

(3) In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. The accused had no intention to commit murder of any person. Therefore, the extension

of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate.

(4) Section 357 empowers the Court to award compensation to victims while passing judgment of conviction. This power of Courts to award compensation to victims is not ancillary to other sentences but it is in addition thereto. This power is intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is recommended to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

(5) The payment by way of compensation must be reasonable. What is reasonable may depend upon the facts and circumstances of each case, e.g. the nature of crime, the justness of claim by the victim and the ability of the accused to pay etc. On these considerations the Court enhanced the compensation to Rs. 50,000. [578A-B]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 74 & 75 of 1986. From the Judgment and Order dated 13.11.1984 of the Punjab and Haryana High Court in Crl. Appeal No. 128-SP of 1984. R.L. Kohli, R.C. Kohli and D.D. Sharma for the Appellant in Crl. A. No. 74 of 1984. D.S. Tewatia and Mahabir Singh for the appellant in Crl. A. No. 75 of 1984. U.R. Lalit, R.S. Yadav and H.M. Singh for the Respondents.

The Judgment of the Court was delivered by PG NO 573 JAGANNATH SHETTY, J. These two appeals, by special leave, are directed against a judgment of the High Court of Punjab & Haryana in Criminal Appeal No. 128-SP of 1984. The common respondents in the appeals. were prosecuted for various offenses in the court of Additional Sessions judge, Faridkot. By judgment dated February 28,1984 learned Judge convicted and sentenced the accused as follows:

“Keeping in view the circumstances of the case and the part played by each of them I, hereby sentence Sukhbir, Sukhpal and Surat Singh accused to undergo R.I. for four years u/s 307/149IPC. Each of Om Pal, Dhan Pal, Mannu and Siri Chand are ordered to undergo R.I. for three year. u/s 307/149 IPC.

Each of the seven accused are further ordered to undergo R.I. for one year 148 IPC, two years R.I. u/s 325 149 IPC and one year R. I. s/u 323/149 IPC.

Keeping in view the circumstances of the case. all the sentences shall run concurrently. ‘’ The accused appealed t the High Court challenging the conviction and sentence. The High Court by the judgment under appeals acquitted Sukhpal Singh and Surat singh of all charges by giving them the benefit of doubt. The other accused who are respondents herein are also acquitted of the offence under s. 307/149 and s. 148 IPC. There conviction and sentence under s. 325/149,323/149 and s. 148 IPC are however. maintained. They are released on probation of good conduct. Each one of them, is ordered to pay compensation of Rs. 2,500 to Joginder who was seriously injured in the incident. In default to pay the compensation they are directed to serve their sentence. The operative portion of the judgment runs like this:

“There is no previous history of enmity between to parties. The occurrence is the outcome of a sudden flare up. I think, these five appellants namely Sukhbir Singh Dhanpal, Mannu, Siri Chand and Om Pal are entitled their benefit under s. 360 Cr. P.C. Consequently, I suspend their sentence under s. 325/149, 323/149 and s. 148 IPC and order that the appellants namely Sukhbir Singh,

Dhan Pal Mannu. Siri Chand and Om Pal be released on probation on their entering into bonds of Rs.3,000 each with one surety in the like amount for a period of one year, to the satisfaction of the trial PG NO 574 court, undertaking to appear in the court to receive the sentence during the said period whenever called upon to do so and in the meantime to keep peace and be of good behavior. However, each one of the appellant would pay Rs.2,500 as compensation payable to Joginder injured. Compensation if not paid within two months, the appellants namely Sukhbir Singh, Dhanpal. Mannu, Siri Chand and Om Pal would be called upon to serve their sentence. But for this modification, appeal fails and is hereby dismissed. In view of s. 12 of the Probation of Offenders Act, no disqualification would attach to the appellants due to this conviction.

Sd/-K.P.S.Sandhu Judge"

Dt. November 13, l984 In these appeals, there is no serious dispute with regard to acquittal of Sukhpal Singh and Surat Singh. The prosecution case that they were armed with Barchha has not been proved. There was no incised injury on the victim or any of the prosecution witnesses. Their participation in the commission of crime therefore appears to be doubtful. The High Court was justified in acquitting them. Counsel for the appellants are, however, vary critical of the order of High Court with regard to the remaining accused. It is urged that the High Court was too much charitable to, them. The intention of accused was obviously to commit murder of joginder. Their acquittal under s. 307 IPC is characterised as perverse. At any rate, it is said that they ought not have been put on probation. It is an abuse of the process of Court. They should have been properly sentenced by term of imprisonment and fine. It is also urged that Joginder has sustained permanent disability due to head injury and no amount of compensation would be adequate for him except severe punishment to the accused as a general deterrence. Counsel for the accused on the other hand, seeks to support the order of the High Court in every respect.

In the light of the submissions, three questions arise consideration (i) whether the respondents are not guilty of the offence under s. 307/149 IPC; (ii) whether the High Court was justified in extending the benefit of s. 360 Cr.P.C. and releasing the accused on probation of good conduct; and (iii) whether the compensation awarded to PG NO 575 Joginder could be legally sustained, and if so, what should be the proper compensation ?

For a proper consideration of these questions, we may summarise briefly the factual background: The rival parties in this case are collaterals. On September 28, 1982 at about 8/9 a.m. they had an altercation near the tubewell belonging to Hari Kishan. Joginder is the son of Hari Kishan. Virender another injured in this case is nephew of Hari Kishan. Hari Kishan was sitting near his tubewell. Virender and Joginder were sowing Berseem crop. The accused carne from the side of the tubewell. They were armed with Ballams and Dangas. One of them raised a Lalkara at which the accused attacked Virender and Joginder. In the brawl that followed some of the accused were also injured. The injured were removed to Civil Hospital, Ballabgarh. The Medical Officer there referred them to Safdarjung Hospital, New Delhi. Finally., they landed themselves at the AIIMS, New Delhi. They were examined by the Doctors. Virender was found to have two injuries caused by blunt weapons. Joginder was found to have head injury. Amongst the accused Siri Chand, Dhan Pal, Om Pal and Sukhbir Singh were injured. They were medically examined in AIIMS or Safdarjung Hospital, New Delhi. Siri Chand had four injuries including a fracture caused by blunt weapon. that has been proved by Dr. Rita Sood (DW1). Dhan Pal and Om Pal each had four injuries but simple. They were also, caused by blunt weapons. Dr. V.K. Dhingra (DW 2) has spoken to that. Sukhbir singh had one incised wound on his person. Dr.Anurag Saxena (DW 3) has testified. On the first question as to acquittal of the accused under s.3O7/149 IPC,

some significant aspects may be borne in mind. Under s.307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge or the accused must be such as is necessary constitute' murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under s. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used. motive for the crime,severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration it,determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it.

PG NO 576 They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but not provoked or tempted to use the cutting edge of the weapon. It is very very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under s. 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under s. 307 IPC.

The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct ? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case. the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not shown to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore,the extension of benefit of the beneficial legislation applicable to first offenders cannot be said to be inappropriate.

This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs. 2,500 as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to s. 357 Cr. P.C. Section 357, leaving aside the unnecessary, provides : "357. Order to pay compensation :

(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part,the Court may. when passing judgment. order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution; PG NO 577

(b) in the payment to any person of compensation for any loss or injury caused by the offence. when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

XXXXX XXXXX XXXX XXXXX XXXXX XXXXX (3) When a Court imposes a sentence, of which fine does not not form a part, the Court may, when passing judgment.

order the accused person to pay, by way of compensation. such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the

accused person has been so sentenced. (4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter. the Court shall take into account any sum paid or recovered as compensation under this section."

Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case. we are not concerned with sub-section (1). We are concerned only with sub-section (3). It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to re-assure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent. a constructive approach to, crimes. It is indeed a step forward in our criminal justice system. We, therefore,recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

PG NO 578 The payment by way of compensation must, however, be reasonable What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default.

Joginder in this case is an unfortunate victim. His power of speech has been permanently impaired. Doctor has certified that he is unable to speak and that is why he has not stepped into the witness box for the prosecution. The life long disability of the victim ought not to be bye-passed by the Court. He must be made to feel that the Court and accused have taken care of him. Any such measure which would give him succor is far better than a sentence by deterrence.

The compensation awarded by the High Court, in our opinion, appears to be inadequate having regard to the nature of injury suffered by Joginder. We have ascertained the means of accused and their ability to pay further sum to the victim. We are told that they are not unwilling to bear the additional burden. Mr. Lalit learned counsel said that his clients are willing to pay any amount determined by this Court. It is indeed a good gesture on the part of counsel and his clients.

With due regard to all the facts and circumstances of the case, we consider that Rs.50,000 compensation to Joginder would meet the ends of justice. We direct the respondents to pay the balance within two months in equal proportions.

The order of the High Court is modified only to the extent of Compensation as indicated above and in all other respects it is kept undisturbed. The appeals are accordingly disposed of.

R.S.S. Appeals disposed of.

Guriya Swayam Sevi Sansthan Thru' Its President Vs. Union of India Thru' Principal Secy. & 5 Others

HIGH COURT OF JUDICATURE AT ALLAHABAD
Chief Justice's Court AFR

PUBLIC INTEREST LITIGATION (PIL) No. - 4579 of 2015

Petitioner :- Guriya Swayam Sevi Sansthan Thru' Its President

Respondent :- Union Of India Thru' Principal Secy. & 5 Others

Counsel for Petitioner :- Raj Kumar

Counsel for Respondent :- C.S.C.,A.S.G.I./2015/0033,Pradeep Singh Sisodia,Ram Dular

HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD,CHIEF JUSTICE

HON'BLE MANOJ KUMAR GUPTA,J.

This writ petition has been filed in the public interest by an organization which is active in the fight against human trafficking, especially forced labour and commercial sexual exploitation of minor girls and children in the State of Uttar Pradesh. The relief which has been sought is a mandamus for the enforcement of Rule 7 (4) of the Protection of Children from Sexual Offences Rules 20121 by constituting a Victims Compensation Fund under Section 357-A of the Code of Criminal Procedure, 1973.

Rule 7 (4) of the Rules reads as follows:

"7. Compensation -

(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-sections (2) and (3) of Section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offences, or any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted Human Immunodeficiency Virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government."

In response to the direction of the Court, the Principal Secretary (Home) filed a counter affidavit stating that in implementation of the provisions of Rule 7(4), the State Government had notified a Victims Compensation Fund and the Governor had notified the Uttar Pradesh Rani Laxmibai Mahila Samman Kosh Niyamawali, 2015 on 6 February 2015. Accordingly, a Government Order was issued on 16 April 2015 to all the District Magistrates, the Senior Superintendents of Police and Superintendents of Police for the implementation of Rule 7(4). It was envisaged that the review of offences/compensation in different districts be conducted in the monthly meeting of the District Monitoring Committees together with the District Judge. The State Government has allocated a budget of Rs.2 crores by a Government Order dated 1 April 2015 for the financial year 2015-16. The fund is to be operated by the Secretary of the State Legal Services Authority and a decision was taken to transfer the fund at a meeting held on 16 April 2015 by the Principal Secretary (Home).

When the petition came up before this Court for further hearing on 4 May 2015, this Court observed that there was a glaring lapse in defining the offences covered by the Victims Compensation Fund. This was because only offences under Sections 4, 6 and 14 of the Protection of Children from Sexual Offences Act 20122 were covered. Offences of sexual assault under Section 7 (punishable under Section 8), of aggravated sexual assault under Section 9 (punishable under Section 10) and of sexual harassment under Section 11 (punishable under

Section 12) were not covered by the Victims Compensation Fund. By an order dated 4 May 2015, we observed whether this was an inadvertent mistake or otherwise, this should be rectified at the earliest. The State Government was directed to inform the Court of the remedial steps which have been taken to rectify this glaring omission so as to bring the offences under Sections 7, 9 and 11 of the Act within the purview of the Victims Compensation Fund.

In pursuance of the direction which was issued by the Court, the Principal Secretary (Home) has filed an affidavit stating that in order to bring all six Sections, namely Sections 4, 6, 7, 9, 11 and 14 of the POSCO Act, 2012 within the purview of the U.P. Victims Compensation Scheme 2014, it has been decided to place the matter before the Cabinet for approval. The Court has been informed that the matter is under process and the entire exercise would be completed shortly. In the meantime, the budgetary allocation of Rs.2 crores has already been transferred to the Secretary of the U.P. State Legal Services Authority, Lucknow. A direction has also been issued to all the District Magistrates as well as the Senior Superintendents of Police/Superintendents of Police on 18 May 2015 for implementing and monitoring the beneficial provisions contained in the scheme so as to provide compensation to the victims from the allocated fund.

The State Government has responded to the direction of this Court by rectifying the omission of the offences under Sections 7, 9 and 11 of the Act from the purview of the fund. The matter has already been forwarded to the Cabinet and the entire process is expected to be completed shortly. The direction which was issued by the Court on 4 May 2015 shall now be operative as the final decision in these proceedings. There is absolutely no reason or justification to exclude offences under Sections 7, 9 and 11 from the purview of the fund in addition to the provisions of Sections 4, 6 and 14. All the victims of these offences would be in need of beneficial rehabilitation. The setting up of the fund is an important instrument of ensuring rehabilitative relief to the victims of these offences.

Consequently, the State Government shall now abide by the statement and complete the exercise within a period of two months from today. The fund has been placed under the control of the Secretary of the State Legal Services Authority, Lucknow. The Registrar General shall forward a copy of this order to the Secretary of the State Legal Services Authority expeditiously so that due and proper steps can be taken for compliance and for ensuring that the modalities for the disbursement of compensation to child victims are duly formulated in accordance with the scheme and necessary remedial steps are taken for the disbursement of compensation as awarded. In the event that in future it becomes necessary to increase the budgetary allocation, the Secretary of the State Legal Services Authority shall route such a request through the Registrar General to the State Government for necessary steps as may be deemed appropriate.

However, should it become necessary for the petitioner to file further proceedings, in the light of the experience gained, it is needless to add that it would be open to the petitioner to move this Court in appropriate proceedings. The petitioner has rendered commendable assistance to the Court in these proceedings by highlighting an important public issue in the public interest petition for which the Court would record its appreciation.

The petition is, accordingly, disposed of. There shall be no order as to costs.

Order Date :- 26.5.2015 (Dr.D.Y.Chandrachud,C.J.)

RK (M.K. Gupta,J.)

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"A" through her Father "F" Vs. State of U.P. Thru Prin. Secy., Med. & Health Ser. & Ors.

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Writ Petition No.8210 (M/B) of 2015 A.F.R.

"A" through her Father "F"
Versus
State Of U.P. Thru Prin. Secy., Med. & Health Ser. & Ors.

Hon'ble Shabihul Hasnain, J.

Hon'ble D. K. Upadhyaya, J.

(DELIVERED BY SHABIHUL HASNAIN, J.)

Considering the nature of issue engaging attention of this Court in this matter, the cause title of this case will now be read as under:-

"A" through her father "F"

Vs.

State of U.P. through Secretary,

Medical and Health Services and other.

Office to make necessary amendments.

This matter arises out of a petition filed by a minor rape victim through her father, who has been named "A" by this Court. Originally, she had prayed that his Court may direct the opposite parties to terminate the pregnancy of the petitioner forthwith. She had also prayed that the opposite parties be directed to conduct DNA test of the foetus for the purpose of evidence and the trial.

It is necessary to give factual matrix of the case and subsequent developments in brief to understand the matter in proper perspective. A named F. I. R. was lodged by the father of the victim against the accused (hereinafter they will be known as "F" for father and "M" for the accused. These names are being given by the Court to keep the identity of the victim, her family and the accused under cover). It is mentioned in the F.I.R. that "A" was raped on 17.2.2015. The age of the victim was about 13 years. The First Information Report was registered under Sections 376, 506 IPC and Section 3/4 of Prevention of Children from Sexual Offenses Act, 2012 on 8.7.2015 (case crime No., district and the location is not being given in the interest of justice). The F.I.R. was lodged with delay due to the reason that the poor child did not tell about the incident to her parents under threat extended by "M" that in case the matter is reported to the father they will both be killed. The matter came to light when "A" complained of pain in the abdomen and was taken to the medical hospital by her sister.

After registration of the F.I.R., medical examination of the petitioner was conducted by the Doctor on 8.7.2015 itself. She was found to be pregnant for 21 weeks and two days. Her age

was found to be 12 years. The statement of the victim was recorded under Section 161 and 164 Cr.P.C. She corroborated the version of the first information report. She narrated that on 17.2.2015 at about 11.30 p.m. when she was returning from Tilak ceremony, "M" caught hold of her and dragged her to the back of a temple and forcibly committed rape upon her, as a result of which she became pregnant. She has narrated that force was used and she was stopped from shouting by "M". After investigation the police submitted charge sheet against "M" before the Magistrate on 18.3.2015 and "M" was sent to jail.

According to the mark-sheet of class V issued by a local school, her date of birth is 15.10.2001 which makes her 13 years of age on the date of occurrence. According to the radiological examination her age was found to be about 12 years on the date of the occurrence.

In paragraph 13 of the petition, it has been averred that application was moved for termination of pregnancy medically by competent authority i.e. Chief Medical Officer of the District. It is further mentioned that the application was moved before the Juvenile Justice Board of the District with the prayer to accord necessary permission. It has been categorically stated that permission was refused but we do not have any document to substantiate this statement. However, postal receipts have been attached wherein applications have been found to be sent to the Juvenile Justice Board as well as Chief Medical Officer of the District. We are not sure whether such application ever reached the authorities concerned and were on record or not? However, since no relief could be obtained by the petitioner, she approached this Court through the present petition on 3.9.2015.

The matter came up before this Court on 7.9.2015. The matter was argued passionately and it was submitted that unfortunately a minor girl has been subjected to horrendous and despicable act against her will. It was pleaded that on social, moral, physical and psychological basis it will be most appropriate that permission may be granted to the petitioner to abort the child scientifically. It was forcefully argued that if the pregnancy is continued and child is to be born it would be a continued reminder of horrible incident in the life of a minor girl whose entire life is before her. If the pregnancy is allowed to be terminated it might be possible for the girl to forget the unfortunate incident by the passage of time otherwise instead of one, two lives will be spoiled.

Reliance was placed on a recent decision of Supreme Court in the matter of Chandra Kant Jayanti Lal Suther and another Vs. State of Gujrat passed on 28.7.2015 in Special Leave to Appeal (Crl.) No.(s) 6013/2015. Since the victim belongs to a small District adjoining Lucknow where medical facilities are not upto mark, this Court decided that the victim should be treated at Lucknow. So we directed King George's Medical University, Lucknow to constitute a team of three senior most teachers/ doctors of the concerning department to examine the petitioner. They were required to evaluate the seriousness as to the threat to her life and also about the impact of continued pregnancy on the mental health of the victim. It was directed that in case the aforesaid doctors form an opinion that termination of pregnancy is safely possible, they will perform necessary surgery/operation. This was to be done with the consent of victim's father for the same. In case of abortion, the authorities of the medical university were required to preserve the tissue from the foetus. It was further directed that Medical University shall take care of her stay as indoor patient and medical expenses shall be borne by the medical university to be reimbursed later by the State Government. The case was ordered to be listed on 15th September, 2015.

When the case was taken up on 15th September, 2015, a report from the medical university dated 10.9.2015 was placed before the Court which was sent in a sealed envelop. The relevant portion of the report sent by the medical university is being reproduced for appreciating the matter. The names of doctors etc. and other details are not being given for the purpose of maintaining secrecy about the identity of the girl.

"Committee members examined, evaluated and discussed the case thoroughly. Relevant investigations and Ultra Sonographic examinations were done and report is being sent on the basis of clinical and Sonographic examination and other investigations. She is a case of 7 and ½ months(30-32 weeks) pregnancy and is due for delivery in approximately 3rd week of November, 2015. At present apart from being a teenage pregnancy, which even though itself is a higher risk factor but there is no other factor which may endanger the physical health of the girl. There is no threat to her life at the moment.

The team of doctors is of the opinion that pregnancy should be continued as the termination/ discontinuation of pregnancy at this point of time will lead to delivery of life preterm baby. At the moment there is no indication of any surgery for delivery.

Patient should be provided ante-natal care for well being of the mother as well as fetus. No decision about time and mode of delivery would be taken at the appropriate time.

The patient is being advised and provided following treatment;

Inj Tet boxoid 1 AMP/1ML stat

Tab Iron 1x daily

calcium supplementation 500 mg. 1X BD for supplementation

As discussed above, the girl is being admitted in Queen Marry's Hospital pending the direction and decision of the court for further action."

On 15.9.2015 the medical report was taken on record. After the report of the medical university nothing remained to be adjudicated or decided by this Court. However, counsel for the petitioner made a fervent plea that the case may not be dismissed as infructuous on that date and he may be given a chance to study the report as well. It was submitted that he would like to address the Court further after going through the communication by the medical university. The Court fixed 23.9.2015 for this purpose.

On 23.9.2015 counsel for the petitioner submitted that the victim and her family members are devastated by the medical report. He submitted that the victim/would be mother, being minor, was not capable of looking after herself, what to say of the child to be born. At the same time, father of the victim is not willing to keep the would be born child with them at any cost. If forced they might abandon not only the would be born child but also the victim to her fate. The counsel also appealed to the Court to look into this matter from the point of view of Article 21 of the Constitution of India. He pleaded that not only the minor rape victim but also "would be born child" had a right to live a life of dignity and liberty. Right of the victim to live with dignity can never be doubted, at the same time, the "child to be born" would also become natural citizen of this country from the moment of his or her birth.

Article 5 of the Constitution of India reads as under:-

"5. Citizenship at the commencement of the Constitution:- At the commencement of this

Constitution every person who has his domicile in the territory of India and

(a) who was born in the territory of India; or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years preceding such commencement, shall be a citizen of India."

The counsel argued that even this child needs the protection of the Court. It was argued that the guarantees given in Article 21 of the Constitution of India should be procured for the victim and her child if not by the State then by the courts. It was pleaded that such hapless, helpless and innocent victim of brutality, abject poverty and insensitive attitude of the society deserves attention and consideration by the highest Court of the State. The court cannot shut its eyes towards the tragedy which has befallen upon a citizen of this country and is likely to fall on a would be citizen of this country on her/his arrival in this world. After hearing the arguments of the petitioner counsel this Court passed following order on 23.9.2015:-

"Medical report sent by the doctors of Medical College is taken on record.

Considering the facts and circumstances of the case and its ramification for the Society at large, we feel that this matter needs further consideration by this Court. Accordingly, the Court appoints Sri Jaideep Narain Mathur, Senior Advocate, to be assisted by counsel of his choice, to assist us in this matter so that proper order can be passed for the future of unfortunate girl. Further, let notice be issued to Avadh Bar Association through its President to allow any other Advocate, who wants to assist sincerely, earnestly and honestly in this matter. Issue notice to Member Secretary, State Legal Services Authority, Lucknow, also to assist in the matter.

List this case on 7.10.2015 as fresh.

It is further directed that the victim-petitioner shall not be relieved from the Medical College and shall be taken care of by them until further orders of this Court.

Order Date :- 23.9.2015 "

On 7.10.2015 the matter was heard for quite some time and following orders were passed:-

Heard Sri J. N. Mathur, Senior Advocate assisted by Sri Ravi Tilhari and Sri Madhav as amicus curiae at great length, Sri Mohsin Iqbal, learned counsel for the petitioner and Mrs. Bulbul Godiyal, learned Additional Advocate General for the State.

Mr. Mathur has submitted that so far as compensation is concerned, the State Government has formulated a scheme known as Uttar Pradesh Victim Compensation Scheme. Section 2 (d) of the said scheme defines a victim as under:

"(d) "victim" means a person who himself has suffered a loss or injury as a result of crime and requires rehabilitation, and includes his dependent family members."

The Court expressed its anxiety as to whether this definition will also cover the 'would be born child' whose mother is refusing to bring him/her up in future. The father of the petitioner has already stated that he does not want anything to do with the child who is likely to be born. In this case the child becomes the 'second victim' in itself.

After arguments were heard the Court has formulated few questions and has sought assistance on these issues:-

What is the status of a would be born child out of a relationship which is based on denial from both the parties ? There was no consent between the biological father and mother of the child for his/her birth. There was no marriage and even live-in relations was not existing. In such a situation, what rights will accrue to a child who will be a citizen of this country from the moment of its birth in the State of India. Does he not have a right to live a life of liberty with dignity as guaranteed under Article 21 of the Constitution of India.

Can he claim legitimacy in society ? How is the society expected to treat the child ? Is the society not bound to respect the child simply as a citizen of this country and not a product of shame ? Can he claim rights through inheritance in the property of his rapist father ? Most important aspect is the responsibility of the State viz.-a.-viz. the unfortunate victim and the most unfortunate child. Is it not the responsibility of the State to protect the life and liberty of a girl who has been put to this trauma and hardship because the State failed to protect her ?

The Court showed its anxiety as to how this child has to be brought-up in view of the fact that the mother is denying to keep him/her with herself ? Can the child be given in valid adoption through legal methods ? Can the government be required to pay for the education and rehabilitation/well being of the child till he attains the age of majority independent of his/her mother's companionship ? Sri Mathur submitted that by a harmonious reading of Section 21 of the Guardians and Wards Act, Section 6 of Hindu Adoption and Maintenance Act, 1956 along with other legal and statutory provisions, a method can be put in place for a valid legal adoption of the would be born child. Mr. Mathur assured the Court that he will come back tomorrow with all the queries raised by the Court.

Mrs. Bulbul Godiyal, learned Additional Advocate General submitted that the State Government is not taking this case as an adversarial litigation. She assured that the government will come out with all possible help for the victim mother as well as would be born child.

List/put up this case tomorrow at 2 'O' clock for further hearing.

Order Date :- 7.10.2015"

On 8.10.2015 an amendment application along with an impleadment application were filed. By the impleadment application the following parties were added:-

"5. Principal Secretary, Women and Child Welfare, Civil Secretariat, Lucknow.

6.State Legal Services Authority

7.Child Welfare Committee, Lucknow."

By the amendment application following prayers were added:-

"b(i). issue a writ, order or direction in the nature of mandamus commanding the opposite parties to grant compensation to the petitioner in the light of Section 357-A Cr.P.C. read with the Uttar Pradesh Victim Compensation Scheme, 2014, framed under section 357-A Cr.P.C."

b(ii). issue a writ, order or direction in the nature of mandamus commanding the opposite parties to provide rehabilitation to the petitioner and to the petitioner's child to be born in the best interest of both the petitioner and child to be born.

b(iii). issue a writ, order or direction in the nature of mandamus commanding the opposite party no.7 i.e. Child Welfare Committee, Lucknow to take such steps for the care and protection of the child to be born to the petitioner and to allow the child to remain in a Children Home till

he/she is taken in adoption by suitable person in accordance with law."

Supplementary affidavit by the counsel for the petitioner and counter affidavit by the Chief Standing counsel were filed on 9.10.2015. Both these documents were taken on record. By the supplementary affidavit two facts were brought on record by way of paragraph No.s 3 and 4 of the supplementary affidavit which are reproduced as under:-

"3. That on 8.10.2015 at about 4.30 p.m., a penal of Lawyers, consisting with Mr. J. N. Mathur, Senior Advocate Mr. Madhav Chaturvedi, Advocate, Mr. R. N. Tilhari, Advocate, Mr. Kazim Ibrahim, Advocate and petitioner's counsel Mr. Mohsin Iqbal, Advocate, had gone to meet with the petitioner at King George Medical University, Lucknow, to know about her willingness about the adoption of child, who is likely to be born within a month.

4.That before the aforesaid Advocates, the petitioner has given her consent, saying that she is not mentally and physically capable to take the responsibility of upcoming child, as such she has no objection, if the child is given in adoption."

The matter was finally heard in great detail on 9.10.2015 and the the judgment was reserved.

Before the judgment could be pronounced, an application was moved on 28th October, 2015 by the amicus curiae informing the fact that contrary to the expectations of the medical doctors, who attended the victim, a girl child was delivered on 26th October, 2015. On the said application this Court, under the orders of Senior Judge, assembled on 28th October, 2015 and passed the following order:-

"This Bench has been constituted on the application moved by the Amicus Curie, Sri Jaideep Narain Mathur, Senior Advocate on account of some developments which have taken place since the date judgement was reserved in this matter. The application has been moved along with an affidavit informing the Court that though the expected date of delivery as declared by the doctor attending the victim was last week of November, 2015, however, the same was preponed and through surgical operation a girl child was born on 26.10.2015.

There is an affidavit by the Amicus Curie earlier making a statement to the effect that the victim and her parents had informed him personally that they do not want to keep with them the child born on account of the unfortunate incident. They have consented that provision for adoption may be resorted to for giving the child in adoption. This fact has been reiterated by learned counsel for petitioner as well.

It has been informed that the girl child born on 26.10.2015 was not well and has been kept in Neonatal Intensive Care Unit of the Pediatrics Department of K.G.M.U. She is likely to remain there till the doctors declare her fit to be moved out of the hospital.

The Court directs that till doctors feel that the child as well as the mother need medical care, the Medical College will take the responsibility of their welfare, feeding, medicines and other facilities as has been done earlier.

List this case on 03.11.2015 at 3.00 p.m for pronouncement of judgement.

Order Date :- 28.10.2015"

At the very outset, we may record our appreciation that the State Government did not contest this matter as an adversarial litigation. Mrs. Bulbul Godiyal, Additional Advocate General, on behalf and on the instructions of the State Government, informed the Court that the State Government will cooperate in the discussions as well as implementation of the directions given to the State Government. It is a remarkable departure in the history of such litigations as we have seen that in the judgments right from Rudal Sah Vs. State of Bihar (1983) 4 SCC 141 upto the recent days the State has contested paying any compensation. It is further appreciated that a sum of Rs.3,00,000/- has already been released in favour of the victim by State Government though the judgment was still pending. Since there is no adversarial litigation, therefore, no argument and counter argument are required to be placed on record. Both the sides tried to place the laws, facts and possible solutions before the Court.

We may hasten to add that the observations, opinions and conclusions drawn in the following discussion will be only for the purpose of welfare of the victim and her child. It will not be used for affecting the trial of the accused which is an independent judicial exercise of a criminal court. We are only going by the facts that a minor has been forced into sexual intercourse. Since she is minor, her consent, if any, is meaningless. Further, her pregnancy cannot be denied and the birth of a child is also a fact not denied by any one. Since State has filed charge sheet for rape, they cannot take a stand otherwise. The trial court shall not be influenced by this judgment at all and decide the case on its own merit.

We will like to go about relevant aspects of this case in following manner:-

(A) What are the social and legal ways to help the victim of rape in re-rehabilitating her psychologically, socially, economically and culturally ? What monetary help/compensation can be provided on a short term and long term basis ?

(B) How can the second victim i.e. the child born out of this unfortunate biological relationship be given its due on her becoming natural citizen of this country by birth; How the rights under the constitution be procured for it?

(C)Is there a valid legal system wherein the child can be adopted by a suitable family through various government agencies or N.G.O.s ?

(D) Does the child have any right of inheritance in the property of the accused ?

(E) What are the rights of a rape victim viz-a-viz article 21 of the Constitution of India and what is the responsibility of the State in protecting the life and liberty of its citizens in general and women and children in particular ?

(F) What is the responsibility of the society towards rape victims and their children ?

The concept of rehabilitation emanates from the concept of right to life. Hon'ble Supreme Court in number of cases has declared that right to life does not merely mean animal existence but means some thing more, namely, the right to live with human dignity. Rehabilitation in common parlance will mean to ensure all those facilities of life which were being enjoyed by the person who has been uprooted from a particular environment. Right to life has to be understood in its full import.

In the matter of Chairman, Railway Board Vs. Chandrima Das, (2002) 2 SCC 465, the Supreme Court has observed:-

"32. The word "LIFE" has also been used prominently in the Universal Declaration of Human

Rights, 1948. [See: Article 3 quoted above]. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in Kubic Darusz vs. Union of India & Ors. (1990) 1 SCC 568 = AIR 1990 SC 605. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country.

33. Let us now consider the meaning of the word "LIFE" interpreted by this Court from time to time. In Kharak Singh vs. State of U.P., AIR 1963 SC 1295 = 1964 (1) SCR 332, it was held that the term "life" indicates something more than mere animal existence. [See also : State of Maharashtra vs. Chandrabhan Tale, AIR 1983 SC 803 = 1983 (3) SCR 337 = (1983) 3 SCC 387]. The inhibitions contained in Article 21 against its deprivation extends even to those faculties by which life is enjoyed. In Bandhua Mukti Morcha vs. U.O.O., AIR 1984 SC 802 = 1984 (2) SCR 67 = (1984) 3 SCC 161, it was held that the right to life under Article 21 means the right to live with dignity, free from exploitation. [See also: Maneka Gandhi vs. U.O.O., AIR 1978 SC 597 = 1978 (2) SCR 621 = (1978) 1 SCC 248 and Board of Trustees of the Port of Bombay vs. Dilip Kumar Raghvendranath Nadkarni, AIR 1983 SC 109 = 1983 (1) SCR 828 = (1983) 1 SCC 124].

The right to life has been explained in Fancies Coralie Vs. Union Territory of India (1981) 1 SCC 608 by the statement (Any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21.

In the same case, Hon'ble P. N. Bhagwati, J. held as under:

"we think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

In the present case, the Court emphasizes on damages or injuries to the "faculty of a person."

The amicus curie has informed this Court about his personal experience when he visited the hospital on the direction of this Court. He has made a statement at Bar that the condition of the girl was so bad that it brought tears in the eyes of Senior Advocate along with other persons in the hospital. She is barely 30 kilograms of weight, totally unable to understand what was happening around her, inconsolable and suffering of typically "Rape Trauma Syndrome". This syndrome has been medically defined in a journal and we quote:-

"No person exposed to severe trauma is immune to suffering and the signs of that suffering are referred to as symptoms. When these symptoms can be grouped as a pattern over time, they are referred to as a syndrome. Once the pattern becomes entrenched or unlikely to change, and affect a person's functioning in a permanent way it is referred to as a disorder and is regarded as a mental illness.

Rape Trauma Syndrome "RTS" is the medical term given to the response that survivors have to

rape. It is very important to note that RTS is the natural response of a psychologically healthy person to the trauma of rape so these symptoms do not constitute a mental disorder or illness.

The most powerful factor in determining psychological suffering or damage is the character of the traumatic event itself. Individual personality characteristics count for little in the face of overwhelming events. Physical harm or injuries are also not as great a factor since individuals with little or no physical harm may yet be severely affected by their exposure to a traumatic situation. Before looking at the effects of rape it is therefore important to first examine the character of the trauma that is rape.

Not only is there the element of surprise, the threat of death and the threat of injury, there is also the violation of the person that is synonymous with rape. This violation is physical, emotional and moral and associated with the closest human intimacy of sexual contact. The intention of the rapist is to profane this most private aspect of the person and render his victim utterly helpless. The character of the event is thus connected to the perpetrator's apparent need to terrorise, dominate and humiliate the victim. The victim is therefore most likely to see his actions as motivated by deliberate malice, a malice impossible for her to understand. Rape by its very nature is intentionally designed to produce psychological trauma. It is form of organised social violence comparable only to the combat of war, being but the private expression of the same force. We get nowhere in our understanding of Rape Trauma Syndrome if we think of rape as simply being unwanted sex. Where combat veterans suffer Post Traumatic Stress Disorder, rape survivors experience similar symptoms on a physical, behavioural and psychological level. Some of the symptoms are present immediately after the rape while other only appear at a later stage."

This Court along with the amicus curie and his team can only wish that the minor girl may come out of this trauma and lead a normal life. The Court will try whatever is legally possible to help a citizen; rather two citizens, both females, namely, mother and child live a life as envisaged by the framers of the constitution by enacting Article 14 and 21 of the Constitution of India.

In Collins Dictionary of the English Language, the meaning or the word ''rehabilitate' is given as under:-

" to help a person (who is physically or mentally disabled or has just been released from prison) to readapt to society or a new job as by vocational guidance, retraining or therapy...."

By rehabilitation what is meant is not to provide shelter alone. The real purpose of rehabilitation can be achieved only if those who are sought to be rehabilitated are provided with shelter, food and other necessary amenities of life. It would be too much to contend, much less to accept, that providing medical facilities would not come within the concept of the word ''rehabilitation." [Collectors of 24 Pargana and ors ..Vs..Lalit Mohan (1986) 2 SCC 138 Para 13]

While dealing with the matter of rehabilitation monetary compensation comes as the first and foremost requirement. Of course, it is not 'be all and end all' of the matter but it is still a very important requirement. We will, therefore, first explore what monetary benefits can be given to the victim under existing laws. Other requirements can be discussed subsequently.

Right of a Victim to be compensated for the sufferings of the Offence is also recognized under the Code of Criminal Procedure. Section 357 Cri.P.C. provides for payment to any person of compensation for any loss or injury caused by the offence, out of the amount of fine where a Court imposes a sentence of fine or a sentence including the sentence of death of which fine

forms a part and where a Court imposes a sentence of which fine does not form a part, the court may ,when passing the judgment, order the accused person to pay by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

The Legislature by means of the Code of Criminal Procedure (Amendment) Act 5 of 2009 inserted new section 357-A which inter alia provides that every State Government in coordination with the Central Government shall prepare a Scheme, called "Victim Compensation Scheme" for providing funds for the purpose of compensation to the victim or his dependents who has suffered loss and injury as the result of crime and who require rehabilitation.

Section 357-A (3) provides that if the trial court at the conclusion of the trial is satisfied that the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. Sub-Section 2 provides that whenever a recommendation has been made by the court for compensation, the District Legal Services Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the Victim Compensation Scheme. Sub-Section (4) further provides that where the offender is not traced or identified but the victim is identified and where no trial takes place, the victim or his dependent may make an application to the State or the District Legal Service Authority for award of compensation. Under sub-section 5, the State and the District Legal Service Authority shall on receipt of recommendation on an application received under sub-section (1) after due enquiry, award adequate compensation by completing the enquiry within two months. Sub-section (6) further provides that the State or the District Legal Service Authority may, to alleviate the suffering of the victim, order for immediate first-aid facility or medical benefits to be made available to the victim free of cost or any other interim relief as such authority may deem fit.

In Suresh Vs. State of Hariyana 2015 (2) SCC 227, Hon'ble Supreme Court has held that the object and purpose of the provision of Section 357-A, is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated. It recognizes compensation as one of the methods of protection of the victim. Relying upon previous judgment in Abdul Rashid Vs. Odisha, reported in 2013 SCC OnLine Ori 493, it was held that punishment of guilty is not the only step in providing justice to the victim. Victim expects a mechanism or rehabilitative measures including monetary compensation. Such compensation has to be directed to be paid in public law remedy with reference to Article 21. In numerous cases, to do justice to the Victim, payment of monetary compensation as well as rehabilitation has been directed. It has also been held that expanding scope of Article 21 is not limited only to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by individual without any role of the State or its functionary.

These provisions of Sections 357 & 357-A received attention of the Hon'ble Supreme Court in many decisions including Ankush Shivaji Gaikwad Vs. State of Maharastra (2013) 6 SCC 770, Gang rape ordered by Village Kangaroopur in West Bengal in re (2014) 4 SCC 786; Mohd. Haroon Vs. Union of India (2014) 5 SCC 252 and Laxmi Vs. Union of India (2014) 4 SCC 427. All these judgments recognize compensation as one of the most effective protections for the victims as held in the case of Suresh (supra).

In exercise of its powers under Section 357-A Cr. P.C. the State of U.P. has framed "The Uttar Pradesh Victim Compensation Scheme 2014" for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of crime and who require rehabilitation.

Para 2 (d) of the Scheme defines Victim as follows:

"victim means a person who himself has suffered loss or injury as a result of crime and requires rehabilitation and includes his dependent family members."

We may add here that this definition of victim should also include the child born out of illegal act of sexual abuse with minor. The new born child is a victim in the sense that she/he is forced to live a life of shame and stigma without his/her fault. She/he is brought in this world destined to suffer because while the father refuses to lend his name to the child, the mother abandons her/him for social reasons. Injury to reputation is a violation of right to live with dignity. The child is the victim of circumstances. She/he definitely suffers injury of being left in this world to fend for himself without any support. She/he requires rehabilitation, therefore, we have termed the child born on 26.10.2015 as a second victim in our discussion.

Para 4 of the Scheme provides for the eligibility of a victim for the grant of compensation. Para 5 lays down the procedure for grant of compensation. Sub para (5), provides that the quantum of compensation to be awarded to the Victim or his dependent shall not exceed the maximum limit as per schedule 1. Sub-para (6) provides that the amount of compensation decided under the Scheme shall be disbursed to the victim or his dependents as the case may be from the funds namely ''victim compensation fund' established under Para 3. It also makes provision for interim and final assistance. Such financial assistance shall be remitted in the Bank Account of the applicant i.e. Victim or the dependent as the case may be. However, in cases where the person affected is a minor, the amount shall be remitted to the bank account of the parent or guardian after the concerned authority i.e. District Legal Services Authority is satisfied about proper utilization of the compensation amount. Para 6 lays down the principles governing the determination of assistance to the affected person.

Under the aforesaid Scheme of 2014, as per schedule 1, the maximum limit of compensation which may be provided to the victim of rape is Rs. 2 Lac. Besides, for loss or injury causing severe mental agony to the victim of the crime, maximum of Rs. 1 lac can also be awarded under this head. Further, in view of paragraph 5(4) of the scheme keeping in view the particular vulnerability and special need of the affected person in certain cases the State/ District Legal Services Authority, as the case may be will have the power to provide additional assistance of Rs.25,000/- subject to a maximum of Rs. 1,00,000/- in the case where (a) the affected person is a minor girl requiring specialized treatment and care.

Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 framed under Protection of Children from Sexual Offences Act, 2012 also provides for grant of compensation, interim and final, to the victims on the recommendation of the special courts constituted under the Act under the circumstances mentioned therein.

Any useful discussion on the issue of life and liberty and the responsibility of the State will not be complete without referring to some more paragraphs from the case of Chairman, Railway Board Vs. Chandrima Das (supra) wherein Hon'ble Supreme Court while dealing with the matter of human rights has referred to the domestic as well as international concept of human

rights as under:-

"20. We will come to the question of Domestic Jurisprudence a little later as we intend to first consider the principles and objects behind Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10th December, 1948. The preamble, inter alia, sets out as under:

"Whereas recognition of the INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential to promote the development of friendly relations between nations.

Whereas the people of the United Nations have in the Charter affirmed their faith in fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL RIGHTS OF MEN AND WOMEN and have determined to promote social progress and better standards of life in larger freedom. Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge."

21. Thereafter, the Declaration sets out, inter alia, in various Articles, the following:

"Article 1--All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2--Every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.

Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

Article 3--Everyone has the right to life, liberty and security of person.

Article 5--No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7--All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 9--No one shall be subjected to arbitrary arrest, detention or exile."

22. Apart from the above, the General Assembly, also while adopting the Declaration on the Elimination of Violence against Women, by its Resolution dated 20th December, 1993, observed in Article 1 that, "violence against women" means any act of gender-based violence that results

in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." In Article 2, it was specified that, "violence against women shall be understood to encompass, but not be limited to:

(a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

23. In Article 3, it was specified that "women are entitlted to the equal enjoyment and protection of all human rights, which would include, inter alia,:

(a) the right to life, (b) the right to equality, and

(c) the right to liberty and security of person.

24.The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

25.Lord Diplock in Salomon v. Commissioners of Customs and Excise [1996] 3 All ER 871 said that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specfic treaty obligations. So also, Lord Bridge in Brind v. Secretary of State for the Home Department [1991] 1 All ER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

26.The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated :

"Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."

But this situation may not really arise in our country.

27.Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State."

The power to grant compensation to the victim for violation of fundamental rights especially right to life and personal liberty under Article 226 of the Constitution of India is well recognized and independent of the provisions of Sections 357 and 357-A Cri. P.C. or/and any scheme framed in pursuance to or independent thereof. These provisions and the Victim Compensation Scheme may at best be considered as the State recognizing its duty to compensate the victim of offence to some extent, as the cases like the present one no compensation would be adequate to compensate the victim. It may also be considered as the State recognizing its liability to pay the victim, for its fault in protecting the rights of the individual by providing safety and security against commission of crime. Commission of offence, even where it is only against an individual, has its effect on the society. The offence of rape, like many other offences, is against the society. The State has the responsibility to punish the wrong doer/the guilty and on its failure, also to see that the victim of offence is not only compensated by the State for the loss and injury suffered but also for rehabilitation of the Victim irrespective of the fact whether the offender is convicted or acquitted and also in those cases where the offender could not be identified and no trial takes place but the victim is identified.

Amount of compensation is to be determined by the court depending upon the facts and circumstances of the case; the nature of the crime and the justness of the claim. It must be reasonable depending upon the relevant factors. In Suresh Vs. State of Hariyana (supra) it was held that the gravity of offence and need of the victim are some of the guiding factors apart from such other factors as may be found relevant in the facts and circumstances of individual cases.

Thus we see that there is a statutory right of compensation available to the petitioner and she may avail of the same. But we sadly observe that such compensation may be too little and come too late in the life of a victim and thus be of no immediate use for her. We need not give any direction in this regard. The mechanism will take its own course.

Additional Advocate General Mrs. Bulbul Godiyal has submitted that apart form victim compensation scheme, as discussed above, the State Government has notified Uttar Pradesh Rani Lakshami Bai Mahila Samman Kosh Rules, 2015 (hereinafter referred to as Samman Kosh Rules). This has been notified on 6.2.2015. She has also informed that Rs.3 lakhs have been issued and the petitioner has been given this amount under this Samman Kosh Rules itself.

The Court appreciates the notification of these Rules which are quite exhaustive. Under this scheme "U.P. State Women's Empowerment Mission" has been constituted vide a G.O.dated January 7, 2015. Under this mission, a "State Monitoring Committee" has been constituted which is to be chaired by the Chief Secretary through a Government Order dated 7.1.2015. Further a "District Steering Committee" under the Chairmanship of the District Magistrate has also been established as per the G.O.dated 16.1.2015. Three annexures have been appended to these Rules.

Annexure-1 : Facilities provided under the fund for victims of

Crimes against women.

Annexure-2 : Deals with eligibility.

Annexure-3 : Public contributions to the fund.

Clause 10 of these Rules speaks of a 'Sanctioning Authority', powers of which are quoted below

(a) The District Steering Committee is the Sanctioning Authority for reliefs from the Fund which are mentioned in Annexure-1 & 2, upto a limit of Rs.10 lakhs only. For reliefs amounting to more than Rs.10 lakhs, the recommendations would be submitted online, for approval of the State Monitoring Committee.

(b) The Sanctioning Authority for projects listed in Annexure-3 is the State Monitoring Committee.

Clause 12 of these Rules reads as under :

Process flow with respect to cases defined in Annexure-1:

For funding under Annexure 1, no application is required to be made.

(a) Process for payment of compensation :

(1)Authorised District Police Officer will feed online the FIR and other details of the Victim and digitally sign the record.

(2)Such signed record will then be automatically displayed, both in the inbox of the Designated Signatory of the District Steering Committee, as well as in the inbox of the Authorised Medical Officer.

(3)The Authorised Medical Officer will then feed the medical report online and digitally sign the record. Such completed record will be forwarded online to the District Steering Committee for approval.

(4)The Designated signatory will obtain the approval of the Chairman of the District Steering Committee in the prescribed format, downloadable from the website, along with signatures of the District Superintendent of Police.

(5)The same would be scanned, uploaded on the website and forwarded with the recommendation for payment, under the digital signatures of the Designated Signatory, to the FMU.

(6)On the basis of records recommended by the District Steering Committee, the demand will be generated through Web Portal by FMU. Accordingly, the fund will be transferred through PFMS Systems directly to the account of the beneficiaries, information of which would also be given to the District Steering Committee and S.P.of the district.

(b) Process for availing of medical facilities :

(1) Victims of violence (as per part A list in Annexure-1) may approach any Government Hospital/Government Medical College/State Medical Autonomus bodies/State Medical Universities for initial treatment. To facilitate such treatment, wherever investigations are not available in the Government Hospitals/Government Medical Colleges but available in the Private Sector, procedures laid down in Annexure-1 will be followed.

(2) Referral medical treatment, if required, can only be availed on specific recommendation

of treating Doctor, certified by Chief Medical Superintendent of District Hospital/Medical Superintendent of Government Medical College/Institution.

(3) If a beneficiary is required to be treated at any identified Government. Referral Hospital (as in Annexure-1)/accredited Private Hospital under these Rules, then the details of the Referral Form, containing clear recommendation regarding requirement of such treatment, will be entered in the Web Portal by the 1lk0 efgyk ,oa cky fodkl -3 Authorised Medical Officer of the District Hospital/District Medical College (format of Referral Form for Annexure-1, will be issued by the Department of Medical Health/Medical Education.) A copy of Referral Form will be given to the beneficiary to facilitate identification.

(4) The digitally signed medical report along with the Referral Form, will be displayed in the inbox of the Referral Hospital/Institution, along with details of the beneficiary.

(5) When the beneficiary approaches the Referral Centre, the copy of Referral Form should be produced for easy identification.

(6) To ensure cashless treatment to the beneficiary, the Referral Centre would raise a bill in her name for those medical treatments which are not available free in the Centre, on the basis of the treatment given to her.

(7) The Authorised Medical Officer of the Referral Central will digitally sign the medical reports of the beneficiary and forward it online to the FMU.

(8) On receipt of records from Referral Hospital, the demand will be generated through Web Portal by FMU. Accordingly, the fund will be transferred through PFMS System directly to the account of the Referral Hospitals.

(9) Alternatively, as cashless treatment is to be provided to the beneficiaries, Imprest Money, if required, would be provided, on the basis of specific requirement raised by the Department of Medical Health and Department of Medical Education.

(10) In such case, the details of beneficiaries treated and the expenditure against treatment of each would be mandatorily displayed in the Fund web portal, by the Referral Centre.

(11) Detailed procedures for payment would be drawn up by Department of Women's Welfare, in consultation with Department of Medical Health and Department of Medical Education.

(12) The responsibility of submitting the names of Authorised Medical Officers, for each identified Referral Medical Institution/Hospital/Medical College, as well as the District Government Hospitals and their contact details will lie with the Department of Medical Health and the Department of Medical Education. This information is essential to provide login and digital signatures for Authorised Medical Officers to enable their access to the Web Portal of the Fund.

c) Process for availing of educational facilities :

(1) In case the victims/minor children of victims require educational assistance, which is not available free under any Government programme, online application would be made to the District Steering Committee, which upon satisfaction of the genuineness of the case, will recommend the case to the FMU, in prescribed format, for payment of the required assistance. Accordingly, the demand will be generated through Web Portal by FMU and the fund will be transferred through PFMS System directly to the account of the Educational Institutions.

Clause 13 of these Rules reads as under :

Process flow with respect to cases defined in Annexure-2:

For funding related to Annexure 2,eligible persons under this category may avail of Medical/ Educational assistance from the Fund with ID proof, bearing photograph, of being a Social Pensioner/any other approved category:

(a) Process for availing of medical facilities the process :

To avail of the facilities, the beneficiary would first show the ID proof, bearing photograph, of being a social pensioner/any other approved category, at the time of registration in the Registration counter of the hospital. The rest of the process would be the same as in 12 b above.

(b) Process for availing of educational facilities:

Applications will be made online in prescribed format in instances where beneficiaries require educational assistance, which is not available free under any Government Programme. Process will be the same as in '12-c' above.

Thus we see that the 'Victim Compensation Scheme 2014' as well as 'Rani Laxmi Bai Mahila Samman Kosh Rules, 2015' are two systems where some monetary respite to the victim is available. We, however, feel that the question of Rehabilitation of the minor victim and her baby girl still remains to be answered satisfactorily. We will now consider the laws, guidelines and the process for adoption as a first measure.

In Lakshmi Kant Pandey Vs. Union of India, 1994 (2) SCC 244 the Hon'ble Supreme Court held that every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents.

Before proceeding further, it is relevant to mention that the petitioner (a minor girl of 13 years) in the affidavits filed in the writ petition has stated that she is not mentally and physically capable to take the responsibility of the upcoming child and she has no objection if the child is given in adoption. In paragraphs5,7and 8 it has been stated that the petitioner's father, due to financial constraints and social issues on account of the unfortunate incident which occurred to the petitioner, is also not ready to take the responsibility of the newly born child. It has also been stated that the child after birth, may be handed over to such person/NGO, social Institution, who are interested to adopt the child for her welfare. The same stand was taken by the petitioner and her parents when the Amicus Curie personally met the petitioner with her parents. The petitioner has given birth to the child on 26.10.2015. The stand of the petitioner and her parents is still the same as informed by the learned Counsel for the petitioner.

In view of the above it is relevant to refer to certain legal provisions and the Schemes relating to adoption.

The Hindu Adoption and Maintenance Act 1956:

Section 5 provides that the adoption shall be regulated by Chapter 2 of the Act. It provides that no adoption shall be made after the commencement of the Act by or to a Hindu except in accordance with the provisions contained in that chapter and any adoption made in contravention of such provisions shall be void.

Section 5 (2) provides that an adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

Section 6 provides for the requisites of a valid adoption. Those requisites are (1) the person adopted has the capacity and also the right, to take in adoption; (2) the person giving in adoption has the capacity to do so; (3) the person adopted is capable of being taken in adoption; and (4) the adoption is made in compliance with the other conditions mentioned in chapter II.

Section 9 provides about the persons capable of giving in adoption. Sub-Section (1) provides that "No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption". Sub-Section (2) provides that "subject to the provisions of sub-section (4) the father or the mother if alive shall have equal right to give a son or daughter in adoption, provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Sub-Section (4) provides for the circumstances under which guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself. Those circumstances are where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known.

Section 9 (5) Explanation (ia) defines ''guardian' to mean a person having the care of the person of a child or of both his person and property and includes (a) a guardian appointed by the Will of the child's father or mother and (b) a guardian appointed or declared by a court.

Section 10 provides for the persons who may be adopted. It provides that "No person shall be capable of being taken in adoption unless the following conditions are fulfilled namely (i) he or she is a Hindu (ii) he or she has not already been adopted (iii) he or she has not been married, unless there is a custom or usage, applicable to the parties which permits persons who are married being taken in adoption; and (iv) he or she has not completed the age of 15 years unless there is a custom or usage applicable to the parties which permits persons who have completed the age of 15 years being taken in adoption.

Section 11 lays down certain conditions which must be complied with in every adoption for a valid adoption. Section 12 provides for the adoption and Section 15 provides that No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth. Section 16 (1) raises presumption as to registered document relating to adoption and it is relevant to mention that sub-section (2) inserted in the State of Uttar Pradesh provides that in case of an adoption made on or after 1.1.1977 no court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of child in adoption, except through a document recording an adoption made and signed by the person giving and the person taking the child in adoption and registered under any law for the time being in force.

Thus the child may be given in adoption by the father or the mother, with the consent of the other, where taking of such consent is possible. A guardian, having the care of the child, is also competent to give the child in adoption under the circumstances mentioned under section 9 (4), one of which is that the child has been abandoned by the father or/and mother.

A question that arises is as to whether a minor mother has the capacity to give her child in adoption. For this purpose it is relevant to refer to the provisions of The Hindu Minority and Guardianship Act, 1956

Section-4: Definitions:

In this Act,-

(a) "minor" means a person who has not completed the age of eighteen years.

(b) "guardian" means a person having the care of the person of a minor or of his property, or of both his person and property, and includes -

(i). a natural guardian,

(ii). a guardian appointed by the will of the minor's father or

mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

(c). "natural guardian" means any of the guardians mentioned in Section6.

Section-6:Natural guardians of a Hindu minor:-

The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are -

(a) in the case of a boy or an unmarried girl- the father, and after him the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b). in the case of an illegitimate boy or an illegitimate unmarried girl the mother, and after her, the father;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this Section-

(a). if he has ceased to be a Hindu, or

(b). if he has completely and finally renounced the world by becoming a hermit (vanaparastha) or ascetic (yati or sanyasi)

Explanation:- In this section, the expression "father" and "mother" do not include a step-father and a step-mother.

In view of the above provisions, it has been submitted by the amicus curiae that in the case of an illegitimate boy or an illegitimate unmarried girl the mother is the natural guardian. Expression ''Illegitimate' refers to a child born not out of a marriage wed-lock.

Thus, the petitioner is the natural guardian of her child under section 6 (ia). She may also be covered under clause (a) in view of the fact that it provides ''mother to be the natural guardian after father. The expression ''after' as interpreted in the case of Githa Hariharan Vs. Reserve Bank of India AIR, 1999 SC 1149 means ''in the absence of' and the word ''absence' refers to father's absence from the care of minor's person or property for any reason whatsoever. Otherwise if ''after' is read to mean a disqualification of a mother to act as guardian during life time of the father the same would violate one of the basic principles of the our Constitution i.e. gender equality.

Section 21 of the Guardian and Wards Act also provides as under:-

Section-21 Capacity of minors to act as guardians:

"A minor is incompetent to act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family."

Thus the minor mother is competent to act as guardian of her child. She has the capacity to give the child in adoption.

In the present case the petitioner by means of the affidavits expressed her willingness that the child may be given in adoption and neither she nor her parents are ready to take care of the child for the reasons disclosed in the affidavits.

The Juvenile Justice (Care and Protection of the Children) Act, 2000 has been enacted for Juveniles in conflict with law and children in need of care and protection.

Section 2 (aa) defines "adoption" to mean the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship;

Clause (j) defines "guardian in relation to a child" to mean his natural guardian or any other person having the actual charge or control over the child and recognized by the competent authority as a guardian in course of proceedings before that authority;

Chapter III deals with "child in need of care and protection".

Section 2(d) defines "Child in need of care and protection." Section 2(d) is quoted below:

Section-2(d) "child in need of care and protection" means a child, -

(i) who is found without any home or settled place or abode and without any ostensible means of subsistence,

[(ia) who is found begging, or who is either a street child or a working child]

(ii) who resides with a person (whether a guardian of the child or not) and such person -

(a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or

(b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in que3stion being killed, abused or neglected by that person,

(iii) who is mentally or physically challenged or ill children or children suffering from terminal

diseases or incurable diseases having no one to support or look after,

(iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,

(v) who does not have parent and no one is willing to take care of or whose parents have abandoned [or surrendered] him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,

(vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,

(vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,

(viii) who is being or is likely to be abused for unconscionable gains,

(ix) who is victim of any armed conflict, civil commotion or natyural calamity;

The newly born child of the victim is clearly a child in need of care and protection as per Section 2(d) (iv) and Section 2(d) (v).

Section 29 provides for Child Welfare Committee, which reads as under:-

(1) The State Government may, (within a period of one year from the date of commencement of the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, by notification in the Official Gazette constitute for every district), one or more child Welfare Committees for exercising the powers and discharge the duties conferred on such Committee in relation to child in need of care and protection under this Act.

(2). The Committee shall consist of a chairperson and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on matters concerning children.

(3). The qualifications of the chairperson and the members, and the tenure for which they may be appointed shall be such as may be prescribed.

(4). The appointment of any member of the Committee may be terminated after holding inquiry, by the State Government, if-

(i). he has been found guilty of misuse of power vested under this Act;

(ii). he has been convicted of an offence involving moral turpitude, and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

(iii). he fails to attend the proceedings of the Committee for consecutive three months without any valid reason or he fails to attend less than three fourth of the sitting in a year.

(5) The Committee shall function as a bench of magistrates and shall have the powers conferred by the Code of Criminal procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a judicial Magistrate of the first class.

Chapter IV deals with rehabilitation and Social Reintegration

Section 40 provides for the Process of rehabilitation and social reintegration which reads as under:-

The rehabilitation and social reintegration of a child shall begin during the stay of the child in

a children's home or special home and the rehabilitation and social reintegration of children shall be carried out alternatively by (i) adoption, (ii) foster care, (iii) sponsorship, and (iv) sending the child to an after-care organization.

Section 41(2) provides that the adoption shall be resorted to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

Section 42 provides that foster care may be used for temporary placement of those infants who are ultimately to be given for adoption.

The Central Government, Ministry of Child & Women Development, in pursuance of the powers conferred by Section 41 (3) of the Juvenile Justice (Care & Protection of Children) Act, 2000, has notified the "Guidelines Governing Adoption of Children, 2015", to provide for the Regulation of adoption of orphan, abandoned or surrendered children.

The expressions orphan, abandoned and surrendered have been defined under the Guidelines 2015 which are as under:-

Para 2 (2) defines abandoned as under:-

"abandoned' means an unaccompanied and deserted child as declared abandoned by the Child Welfare Committee after due inquiry;

Para 2 (23) defines of Orphan as under:

"Orphan" means a child (i) who is without parents or legal guardian; or (ii) whose parents or legal guardian is not willing to take, or capable of taking care of the child;

Para 2 (33) defines surrenders child as follows:-

"Surrendered child" means a child who in the opinion of the child welfare committee is relinquished on account of physical emotional and social factors beyond the control of the parent or legal guardian;

The newly born child is a ''child in need of care and protection' and falls within the expression ''Surrendered or orphan child'. The necessary directions for her rehabilitation including adoption are thus required to be issued to the competent authority under the JJ Act read with the Guidelines 2015 in the welfare of the child.

It is relevant to note that after the judgment in the case of Lakshmi Kant Pandey Vs. Union of India, 1994 (2) SCC 244 law relating to adoption has been remarkably developed which has been elaborately discussed in a latest pronouncement of the Hon'ble Supreme Court in Shabnam Hashmi Vs. Union of India and others, 2014 (4) SCC 1, which is quoted hereunder:

"4. The decision of this Court in Lakshmi Kant Pandey is a high watermark in the development of the law relating to adoption. Dealing with inter country adoptions, elaborate guidelines had been laid down by this Court to protect and further the interest of the child. A regulatory body i.e. Central Adoption Resource Agency (For short "CARA") was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as intra country adoptions. The said norms have received statutory recognition on being notified by the Central Government under Rule 33 (2) of the Juvenile Justice (Care and protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several States under the Rules framed by the States in exercise of

the rule making power under Section 68 of the JJ Act, 2000.

5. A brief outline of the statutory developments in the sphere concerned may now be sketched. In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short the JJ Act, 1986) deal with only neglected and delinquent juveniles while the provision of the 1986 Act dealing with delinquent juveniles are relevant for the present, all that was contemplated for a "neglected juvenile" is custody in a Javenile Home or an order placing such a juvenile under the care of a parent guardian or other person who was willing to ensure his good board . The JJ Act, 20000 introduced a separate chapter i.e. Chapter IV under the head "Rehabilitation and Social reintegration": for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after care organization Section 41 contemplates adoption through it makes it clear that the primary responsibility for providing care and JJ Act, 2000, deals with alternative methods of rehabilitation, namely, foster care sponsorship and being looked after by an after care organization.

6. The JJ Act, 2000, however, did not define "adoption" and it is only by the Amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2, (aa) "adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship."

7. In fact Section 41 of the JJ Act 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the Court of the District Judge, Family Courts and the City Civil Court (Rule 33(5). Substantial charges were made in the other sub sections of Section 41 of the JJ Act, 200. CARA as an institution received statutory recognition and so did the guidelines framed by it and notified by the Central Government (Section 41(3).

8. In exercise of the rule-making power vested by Section 68 of the JJ Act, 2000, The JJ Rules 2007 have been enacted. Chapter V of the said Rules deals with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000 were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules 20007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the State have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the State concerned.

9.Rule 33(3) and 33(4) of the JJ Rules contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption the Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption and lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an after care organization. Whatever the Rules do not provide for, are supplemented by the CARA Guidelines of 2011 which additionally provide measures for post-adoption follow up and maintenance of date of adoptions."

It will be useful to quote Article 19, 20, 21(a) and 39 of the Convention on the Rights of the Child, 1989 adopted by Resolution 44/25 of the General Assembly of the United Nations on

20th November, 1989:-.

"Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;....

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

With this discussion the Court is satisfied that a valid legal system is available to allow the girl child to be given in adoption and we propose to direct accordingly.

One of the questions which this Court was also proposing to consider is the question relating to rights of inheritance of the newly born child in the property of her father. It may be noted here

that no meaningful argument was put forward in this regard. Reference was however made to the definition clause of Hindu Succession Act, 1956, but that is not enough to deal with the subject.

We may observe here that in the matter relating to inheritance, the manner of birth of a person is irrelevant; the rights of inheritance of a person are governed by the Personal law to which the person is subject irrespective of the manner of birth of the person. It is irrelevant as to whether the newly born child of a rape victim is born out of consexual sex or otherwise. It is thus noted that the rights of inheritance of the newly born child would be governed by her Personal Law and for that purpose she would be treated as an illegitimate child of her biological father.

Notwithstanding the aforesaid observations, it is relevant to note that firstly this question does not really need a judicial pronouncement in the present case for the reason that if the newly born child is given in adoption, she will not have any rights of inheritance in the property of her biological father. Secondly, even if the child is not taken in adoption by any one, no directions of the Court would be required and she would inherit the property of her biological father by operation of the personal law by which she is governed. Thirdly, any direction to inherit property of her father would be fraught with grave consequences in the event the father starts claiming some special reproach privileges over the minor like rights of visitation or custody. In the present circumstances, we feel that this is not desirable. Further, since the criminal trial is yet to commence against the alleged biological father, there is a possibility that a direction relating to inheritance in his property may be used by the accused in some form as his defence or even otherwise during his trial.

There is yet another aspect of this matter The rights of inheritance in the property of a biological parent is a complex Personal Law right which is guided by either legislation or custom It may not be possible to judicially lay down any norm or principle for inheritance by a minor who is born as a result of rape. Such attempt by the Court would amount to legislation by judicial pronouncement and would operate as precedent in times to come. It would not therefore be desirable to venture into this field and accordingly we leave it open for the appropriate legislature to deal with this complex social issue.

This view is supported by the observations of the Hon'ble Supreme Court in the matter of Shabnam Hashmi v. Union of India and others.

"16..... While it is correct that the dimensions and perspectives of the meaning and content of the fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a fundamental, in our considered view, will have to await a dissipation of the conflicting thought processes in this of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view.....We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable."

Amicus curiae Sri Jaideep Narain Mathur has also informed that a number of N.G.Os, which are dealing with welfare of women and children in general, have approached him to offer help and assistance in this matter. Though they have not been able to move formal impleadment applications in the petition but they have assured all assistance of counselling to the victim from time to time, taking her to their organization for a change of scene from the home, making

friendly gestures towards the girl to help her, overcome the shock and the rejection of the society in general. They have also offered that they will help in adoption process wherever the need be. They have submitted that they are the organizations which have done a lot of work for the benefit of women who have been rendered homeless by their in-laws or husbands, the women who have suffered domestic violence along with their children. They have also worked in riot affected areas and have sufficient experience in understanding the psyche of such victims. If the Court permits they are willing to lend their help to the best of their ability. The Court welcomes the offer of such organizations.

We will request the amicus curiae Sri Jaideep Narain Mathur to remain in touch with the family of the victim and in case of need, be their friend, philosopher and guide. He may also guide these N.G.Os in helping the victim and the family in a manner which is suitable, appropriate and permissible in the interest of the mother and the child. He will ensure that the N.G.Os will not use the victim or the child for publicity purpose. The amicus curiae is not only a designated Senior Advocate, a former Additional Advocate General of this Court and respected member of the Bar but also a 3rd generation lawyer and a prominent citizen of this city. We can trust his wisdom and intention to ensure the welfare of the child and mother.

In the peculiar circumstances of this case, Sri Mathur may move appropriate application for any direction if he so feels. We permit him in the interest of justice, to ensure that commitment of Article 21 of the Constitution towards these two helpless and hapless citizen of this country, is fulfilled. We thus allow that an application will be permissible in this case despite the fact that this matter is being finally decided by this judgment. In routine matters decision of Sri Mathur will be final. He will act as an officer of the Court even after judgment is pronounced.

It will not be out of place to ponder why, despite innumerable pronouncements of the Indian judiciary regarding rape, as well as scheme for compensation, do we find that upto mark legislation has not come forward on the question of rehabilitation. One reason for this lack of legislation is perhaps the fact that no study has ever been undertaken by any study group or research centre. Cases of rape and sexual violence against women and children are increasing throughout India inspite of post 'Nirbhaya' amendments in criminal law in 2013 and enactments of other legal statutes, we feel that law fixing only an amount of compensation is not enough. Perhaps, whole picture has never been comprehended by the legislative machineries. There is no data bank on various aspects of rape, rape victims, behaviors of children born out of rape, choice of victim to live with the child or to abandon it, the number of abandoned children and so on and so forth. It would help the legislature in bringing up proper legislation for rehabilitation of children born out of rape as well as the rape victims. We find that in developed countries, studies are and have been made on the basis of data collected throughout the length and breadth of their countries. These things have become fairly simple with the advent of computers and electronic instruments. This data can also bring a complete and a clearer picture before the society. The society may then rise to the need for proper legislation for rehabilitation.

One, Shauna R. Prewitt in her Article 'Giving Birth to a "Rapist's Child" : A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape' published in Georgetown Law Journal 'Vol.98:827, has made the following observations which we find very relevant in the present context and we quote :

"Pregnancy from rape occurs with "significant frequency". Of the estimated 12% of adult women in the United States that have experienced at least one rape in their lifetime, 4.7% of these rapes

result in pregnancy. Therefore, based on a 1990 study estimating that 683,000 women over the age of eighteen were raped in that year, conceivably 32,000 rape-related pregnancies occur annually. A separate study conducted in 2000 estimated that,given the decline in the incidence of rape, 25,000 pregnancies following the rape of adult women occur annually.

It is difficult to determine with certainty the outcome of the approximately 25,000 to 32,000 rape-related pregnancies that occur in the United States each year. One study found that 50% placed their infants for adoptions, and 32.3% of raped women kept their infants. Another study, conducted in a separate year, found markedly different results, concluding that 26% of women pregnant through rape underwent abortions. Of the 73% of women who carried their pregnancies to term, 36% placed their infants for adoption, and 64% of women raised the children they conceived through rape."

We do not claim that Indian society can be compared to any other society in the world. The reactions of rape victims, children born out of rape and the society in general is definitely going to be different from one country to another because of its cultural, educational, economic and other factors. At the same time, data can help in making the picture clearer to the citizens of the country like India.

Awareness about such social evils is also right of the people of India. We, therefore, put on record our anxiety and request that the government may conduct or cause to be conducted a socio-psychological study based on appropriate survey on the number of rapes, number of children born out of rape, number of abandoned children, reactions of the victims, ways and means to counter the trauma of rape and the choice of the rape victims as to what are their expectations for rehabilitation and other related and ancillary issues.

In view of the discussions made above, the scheme of compensation and various provisions available in different Statutes for adoption and the arguments of amicus curiae along with a number of other public spirited lawyers, we feel that the ends of justice will be met by issuing following directions to the opposite parties:-

(1)We direct and allow the Child Welfare Committee of District Lucknow to take over the cause of adoption of the child born to "A" on 26th October, 2015, who is presently in the care of Paediatrics Department of King George's Medical University, Lucknow. The Department shall handover the child as and when the doctors find that the child is medically fit to be handed over to the committee. The committee shall, thereafter, act in the manner provided in the judgment. The Member Secretary of the State Legal Services Authority in consultation with the amicus curiae shall supervise the process of adoption.

(2)As soon as "A" regains her mental balance and equilibrium, she will be allowed admission in a proper class in an appropriate school. The first and foremost preference should be given to any Kasturba Gandhi Girls' School. These are residential schools in which girls are allowed to stay and taken care of completely. They are given food, shelter, books, uniforms and matterial for recreation also. If "A" or her parents approach the authorities of Kasturba Gandhi Residential School of her choice, admission should be allowed to her. If an application is made to the Basic Shiksha Adhikari of the District it shall be his duty to ensure admission of "A" in one of the best run schools of Kasturba Gandhi Residential Schools of the District.

(3)If "A" chooses not to go to residential school then a Government Girls' Inter College of her choice will allow her admission without insisting on any entrance examination or the criteria of

selection on merit basis. The State Government should ensure that education is provided free of costs to "A". She will be allowed full freeship of fees and other charges whatsoever.

(4)It shall be the duty of the Principal of the college concerned to ensure that the teachers of the college, staff and the students do not discriminate her in any manner. All possible mental, moral and psychological help should be given by the teachers to help her gain strength to face the challenges of life. The principal should also ensure that the past life of "A" is not propagated and she is treated as another normal student of the school.

(5)If "A" wants to continue her studies after 10+2 Standard (Intermediate), admission should be given to her in any government degree college with full free ship of fee. This will continue till graduation.

(6)In addition to payment of Rs.3,00,000/- as compensation under Rani Lakshmi Bai Mahila Samman Kosh Rules, 2015, the State Government shall make a fixed deposit of a sum of Rs.10,00,000/- (Rupees Ten lacs) in favour of "A" in any nationalized bank which will be given to her only when she reaches the age of 21 years. The District Magistrate of the District where the family of "A" chooses to live henceforth will ensure that bank account is opened in the name of "A" in any nationalized bank, chosen by her father. It is made clear that at the maturity of the aforesaid fixed deposit, only "A" will be entitled to get the money.

(7)Superintendent of Police of the District where "A" and her family choose to reside will ensure the safety, security and dignity of the family. No one from the society should be allowed to degrade, discriminate or excommunicate the victim or her family on the ground of unfortunate incident of rape.

(8)If "A" applies for any apprenticeship in any available scheme or in any vocational course of any Government department or any other instrumentality of the State, preference should be given to her in such matters.

(9)After attaining the age of majority, some suitable job be also provided to her according to her ability / qualifications. Such security of job is the surest way of bringing her up in the main stream once again. When occasion arises the petitioner shall have the liberty of moving an application to the Chief Secretary of the State to ensure that a suitable job is provided to her.

(10)The N.G.O.s or any other agency which wants to help the victim and her family in any manner, will be welcome to do so and earn the appreciation of this Court as well as of the society in general.

Before parting we would like to observe that there are questions and solutions which are not in the realm of the Courts. The Courts have their own limitations. All solutions and answers cannot be given by the courts. There are certain social problems and issues which have to be answered by the society itself. It is for the society to decide as to how it wants to treat a rape victim. We should remember that rape is a crime beyond the control of a victim. This tragedy can strike any family. It is not something for which the victim has to be blamed. The whole society should come forward in defence and help of the poor traumatized victim of rape. The society will have to learn to manage their response towards a victim without forgetting that tragedy can befall on one's own head. When women are respected and promoted by the society as a whole only then a society can be called truly free and liberated. The question of rehabilitation of a rape victim can best be answered by the people and the masses and not by the courts alone. We, therefore, leave this question of rehabilitation of "A" open to the masses whose love and affection can save

two normal lives from becoming two negative characters of the society in future. They should be accepted; not haunted by the society. The Court has played its role within the parameters of law. Now it is the turn of the seekers of justice from the courts i.e. people of India to see and show their response to the victims of their society.

Lastly, we record our deep appreciation for the assistance provided by amicus curiae Sri Jaideep Narain Mathur, Senior Advocate and Sri Ravi Nath Tilhari, who have put in a lot of work in this regard. We also record our appreciation to his other colleague Sri Madhav Chaturvedi. President of the Oudh Bar Association Sri H.G.S.Parihar, Senior Advocate and Sri Gaurav Mehrotra, have also addressed the Court and placed number of judgments before it. None of these counsel have accepted any remuneration for this work. The Court is pleased to note that at least this section of the society has started feeling its responsibility towards good cause of helping people in need. Sri Mohsin Iqbal, counsel for petitioner and Mrs. Bulbul Godiyal, Additional Advocate General have also worked very hard and deserve appreciation from the Court, which we hereby accord.

Let a copy of this judgment and order be placed before the Chief Secretary, State of U.P. for necessary action.

Order Date: 03.11.2015.

Irfan/RKM.

Arsheeran Bahmeech Vs. State (Government of NCT of Delhi)

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(CRL) 1820/2015

Judgment dated 7th October, 2015

ARSHEERAN BAHMEECH ..... Petitioner

Through : Mr.Hasan Anzar, Ms.Samana Suhail and Mr.Samiullah Mirza, Advs.

versus

STATE (GOVERNMENT OF NCT OF DELHI) ..... Respondent

Through : Mr.Rahul Mehra, CGSC (Crl.), Mr.Amrit Singh, Mr.Shekhar Budakoti and Mr.Sanyog Bahadur, Advs. for State along with Inspr.K.L. Yadav and W/ASI Urmila, P.S. Chanakya Puri. Ms.Swati Sukumar, Adv. for Paripoorna Jeevan Shelter Home. Ms.Somy Harshan, Welfare Officer, Paripurna Jeevan Shelter Home. Ms.Shohini Banerjee, Support Person for Child.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

1. Present writ petition has been filed by petitioner under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure seeking a direction to the respondents to release her minor daughter from Paripurna Jeevan Shelter Home and produce her before this Court.

2. The facts of this case reveal a very sad state of affairs.

3. By the present petition, the petitioner complains that her daughter, who is stated to be sixteen years of age, is in wrongful confinement and custody of Paripurna Jeevan Shelter Home on the strength of an order passed by the Child Welfare Committe constituted by the National Capital Territory of Delhi.

4. As per the petition, the daughter of the petitioner was missing from her house w.e.f. 17.3.2015. At the instance of Noor Islam, one of the sons of the petitioner, FIR No.63/15 was lodged under Section 363 of the Indian Penal Code at Police Station Chanakya Puri. Upon investigation, the parents of the minor daughter were called to Police Station. They found their daughter under the influence of the Investigating Officer and a man known as Amit Kumar. One of the sons of the petitioner, namely, Mustafa, was also arrested by the Police officers of Police Station Chanakya Puri, when the petitioner learnt that her minor daughter had complained that her own brother, Mustafa, had raped her. Statement of the minor daughter of the petitioner was also recorded before the Court. The daughter of the petitioner was also produced before the Child Welfare Committee at Mayur Vihar (respondent no.2 herein) in the month of March, 2015. Since then, the minor daughter has been housed in Paripoorna Jeevan Homes for Girls, Karol Bagh, New Delhi, under the orders of respondent no.2. The petitioner has sought her release being the natural guardian.

5. We may notice that the statement of the minor daughter of the petitioner was initially recorded under Section 164 of the Code of Criminal Procedure. In her statement, she had shown no interest to return to her house and in fact expressed her desire to stay at a place where she could live in peace.

6. We have heard learned counsel for the petitioner, counsel for the Paripoorna Jeevan Homes for Girls, the minor daughter of the petitioner, the Welfare Officer and Support Person.

7. Today, the minor daughter of the petitioner is present in Court along with Ms.Somy Harshan, Child Welfare Officer, and Ms.Shohini Banerjee, Support Person. The minor daughter of the petitioner has expressed her desire to join her parents. We had postponed this request of the minor daughter, as her statement before the trial court had not been recorded. We are informed by counsel for the parties that examination-in-chief and cross-examination of the minor daughter of the petitioner stand concluded.

8. Learned counsel for the State, counsel appearing for the Paripoorna Jeevan Homes for Girls, Karol Bagh, New Delhi, the Welfare Officer and Support Person, who have counselled the minor daughter of the petitioner, submit that the minor daughter of the petitioner should be handed back to the petitioner, however, with certain conditions.

9. On a query raised by the Court, we are informed that the accused, Mustafa, brother of the child, is in judicial custody and the co-accused, Amit Kumar, is on bail. Another son of the petitioner is stated to be residing separately.

10. It may be noticed that the UN Office on Drugs and Crime, Vienna, UN, New York 2009 has published 'The UN Model Law on Justice in matters involving Child Victims and Witnesses of Crime' wherein Guidelines for recording of evidence of vulnerable witnesses in criminal matters have been formulated to enable them to give their best evidence in criminal proceedings. Paras 15 and 16 of the guidelines provide for 'Appointment of Guardian ad litem' and 'Duties of Guardian ad litem', respectively, read as under:

> **"15.** *Appointment of Guardian ad litem.- The Court may appoint any person as guardian ad litem as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests after considering the background of the guardian ad litem and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian ad litem may be a member of bar / practicing advocate, except a person who is a witness in any proceeding involving the child.*
>
> **16.** *Duties of guardian ad litem: It shall be the duty of the guardian ad litem so appointed by court to:*
>
> **(i)** *attend all depositions, hearings, and trial proceedings* in which a vulnerable witness participates.
>
> **(ii)** *make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of the proceedings on the child.*
>
> **(iii)** *explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved;*

(iv) *assist the vulnerable witness and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;*

(v) *remain with the vulnerable witness while the vulnerable witness waits to testify;"*

11. Additionally, as per guideline no.17, a vulnerable witness would be entitled to legal assistance.

12. Having regard to the facts of the present case, taking into consideration the submission made by counsel for the parties and in view of the Guidelines for recoding of evidence of vulnerable witnesses in criminal matters, we direct that the custody of the minor daughter of the petitioner shall be handed over to the petitioner forthwith, however, having regard to the guidelines for recording of evidence of vulnerable witnesses in criminal matters, more particularly guidelines no.15 and 16, which are reproduced in the paragraphs aforegoing, we appoint Ms.Somy Harshan, Welfare Officer, as a guardian ad litem for the minor daughter of the petitioner. Ms.Somy Harshan would be entitled to take all necessary steps to safeguard the interest of the minor daughter of the petitioner. She would be guided by Rule 16 of the aforestated guidelines. In view of Guidelines no.17, we authorise Ms.Somy Harshan, guardian ad litem, to approach the Delhi High Court Legal Aid Society for legal assistance for the minor daughter of the petitioner. We are also informed that an NGO being 'Counsel to Secure Justice' is providing legal assistance to the daughter of petitioner. We further direct the parents of the minor daughter to permit and grant free access to the minor daughter to visit a counsellor once in every two weeks for a period of two months and thereafter once in a month or as and when the child deems proper.

13. We also direct W/ASI Urmila, No.4284/D, P.S. Chanakya Puri, to visit the house of the petitioner once in fifteen days for a period of two months to make an assessment of the well being of the minor daughter of the petitioner and in case she finds that the child is being harassed she would be entitled to approach the Welfare Officer for proper remedy. W/ASI Urmila will submit a report to the concerned SHO.

14. We request Mr.Mehra, learned Standing counsel for the State, to explain the directions passed by this Court in this order to the parents and other family members of the minor daughter, who are present in Court today.

15. Petition stands disposed of in above terms.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 07, 2015

❑❑❑

Mohini Vs The State (Govt. of Nct Of Delhi) & Ors

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 26.08.2015
Judgment Pronounced on:14.09.2015

W.P.(C) 3754/2015

MOHINI...Petitioner
Versus
THE STATE (GOVT. OF NCT OF DELHI) & ORS...Respondents

CORAM:
(HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE JAYANT NATH)

JAYANT NATH, J.

1. The present writ petition is filed seeking a writ of mandamus/directions to direct respondent No.3, namely, Delhi State Legal Services Authority to award maximum suitable compensation with interest under the Delhi Victim Compensation Scheme 2011 for the loss of life suffered in a road accident by the husband of the petitioner. A declaration is also sought that Section 4 of the said scheme is unconstitutional.

2. The brief facts giving rise to filing of the present writ petition are that the husband of the petitioner, namely, Shri Gopal Singh Chauhan on 03.09.2012 met with a road accident with an unknown vehicle on Rafi Marg, New Delhi. He expired on 08.09.2012. An FIR under Section 279/338/304A IPC was registered at P.S.Tughlak Road. The accident was caused by some unidentified/unknown vehicle and the accused/driver of the offending vehicle could not be traced. An untraced report was filed in the concerned court which was accepted on 29.01.2013.

3. It is urged that the petitioner who is the wife of the deceased, due to the sudden demise of her husband, suffered grave pain, agony and loss of support as the deceased was the sole bread earner of his family. The deceased has left behind the petitioner-his wife, one daughter and two sons. After the accident, the Special Divisional Magistrate sanctioned an amount of Rs.25,000/- to the petitioner on 23.01.2013.

4. The petitioner thereafter made an application to respondent No.3 for compensation of Rs.5 lacs under the Delhi Victim Compensation Scheme, 2011. Respondent No.3 vide order dated 28.01.2015 held that in exercise of powers under Sections 161/163 of the Motor Vehicles Act, the SDM Chankya Puri has already sanctioned a sum of Rs.25,000/- to the petitioner and hence in terms of Section 4 of the Scheme the petitioner is ineligible for grant of compensation. The application of the petitioner was dismissed. Hence, the petitioner has filed the present writ petition.

5. We have heard the learned counsel for the petitioner and perused the record.

6. Learned counsel for the petitioner relies upon the judgments in the case of Suresh and Anr. vs. State of Haryana, (2015) 2 SCC 277, Kamla Devi vs. Govt. of NCT of Delhi & Anr., 2004 (76) DRJ 739 and New India Sugar Mills Ltd. vs. Commissioner of Sales Tax, Bihar, AIR

1963 SC1207 to contend that respondent No.3 has wrongly not given compensation to the petitioner on a misreading of the Scheme.

7. On 01.05.2015, this Court gave an opportunity to the respondents to file their counter affidavit. On 28.07.2015, neither counter affidavit was filed nor anybody appeared for the respondents. Same was the position when the matter was listed on 26.08.2015. Hence, on that day, seeing the lackadaisical approach of the respondent towards this case we heard the arguments of the learned counsel for the petitioner and reserved orders.

8. The controversy centres around the Delhi Victim Compensation Scheme 2011 (hereinafter referred to as 'Scheme') which has been framed in exercise of powers under Section 357A of Cr.P.C.

9. Section 357A of Cr.P.C. reads as follows:

"Section 357A Victim Compensation Scheme

1. Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

2. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)

3. If the trial Court, at the conclusion of the trial, is satisfied that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

4. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

5. On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months."

10. The Scheme provides for a victim's compensation fund which applies to victims and their dependents who have suffered loss or injury or require rehabilitation as a result of the offence committed. The Schedule to the Scheme provides a minimum limit of compensation of Rs.3 lacs and a maximum limit of Rs.5 lacs where loss of life occurs. The victim or the dependent would be eligible for grant of compensation provided they have not been compensated for the loss or injury under any other scheme of the Central Government or the Government of NCT of Delhi. The Scheme also provides that compensation can be recommended by the court under Section 357 A of Cr.P.C. or on an application to be made by the victim or his/her dependent under Section 357A(4) of Cr.P.C.

11. In the present case, the Delhi State Legal Services Authority/Respondent No.3 declined to award any compensation under the Scheme in view of clause 4 of the Scheme. Clause 4 of the scheme reads as follows:-

"4. Eligibility for compensation- The victim or his dependent(s) shall be eligible for the grant of compensation after satisfying the criteria that he/she should not have been compensated for the loss or injury under any other scheme of the Central Government or the Government of National Capital Territory of Delhi."

12. Reference may also be had to Clause 5 of the Scheme which reads as follows:-

"5. *Procedure for grant of compensation.- (1) Wherever, a recommendation is made by the court for compensation under sub-sections (2) and (3) of Section 357A of the code, or an application is made by any victim or his/her dependent(s), under sub-section (4) of Section 357A of the Code, 1973 to the Delhi Legal Services Authority, it shall examine the case and verify the contents of the claim with regard to the loss or injury or rehabilitation as a result of the crime and may also call for any other relevant information necessary for consideration of the claim from the concerned.*

(2) *The inquiry as contemplated under Sub-section (5) of Section 357A of the Code, 1973 shall be completed expeditiously and the period in no case shall exceed beyond sixty days from the receipt of the claim/petition.*

(3) *After consideration of the matter, the Delhi Legal Services Authority, upon its satisfaction, shall decide the quantum of compensation to be awarded to the victim or his/her dependent(s) on the basis of loss or injury or requirement for rehabilitation, medical expenses to be incurred on treatment and such incidental charges, such as funeral expenses etc.*

Provided that - (1) the quantum of compensation to be awarded to be victim or his/her dependent(s) shall not be less or more than what is provided in the Schedule (2), if at a later date, compensation awarded by the court is more than the maximum limit, the amount of compensation paid shall be adjusted.

13. The relevant clause of the schedule reads as follows:-

SCHEDULE

Sl.No.	Particulars of loss or injury	Minimum Limit of Compensation	Maximum Limit of compensation
1.	Loss of life	Rs.3.00 Lakh	Rs.5.00 Lakh

14. The issue is as to whether the order passed by respondent No.3 is in accordance with clause 4 and 5 read with the aforesaid schedule of the scheme and whether respondent No.3 is correctly interpreting Clause 4 of the Scheme. Clause 4 disqualifies an applicant if "he has been compensated for loss or injury" under same other scheme. What would the phrase "has been compensated for the loss or injury" imply?

15. We may first look at the object and purpose of such schemes. This was noted by the Supreme Court in the case of **Suresh and Anr. vs. State of Haryana**(supra) in which the Supreme Court held as follows:-

"13. *It would now be appropriate to deal with the issue. The provision has been incorporated in the Code of Criminal Procedure vide Act 5 of 2009 and the*

amendment duly came into force in view of the Notification dated 31-12-2009. The object and purpose of the provision is to enable the Court to direct the State to pay compensation to the victim where the compensation Under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated. The provision was incorporated on the recommendation of 154 Report of Law Commission. It recognises compensation as one of the methods of protection of victims. The provision has received the attention of this Court in several decisions including Ankush Shivaji Gaikwad v. State of Maharashtra, Gang-Rape Ordered by Village Kangaroo Court in W.B., In re, Mohd. Haroon v. Union of India and Laxmi v. Union of India.

14. *In* **Abdul Rashid v. State of Odisha and Ors.** *to which one of us (Goel, J.) was party, it was observed:*

> *6. Question for consideration is whether the responsibility of the State ends merely by registering a case, conducting investigation and initiating prosecution and whether apart from taking these steps, the State has further responsibility to the victim. Further question is whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will punish the guilty and compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution, apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to victim. Victim expects a mechanism for rehabilitative measures, including monetary compensation. Such compensation has been directed to be paid in public law remedy with reference to Article 21. In numerous cases, to do justice to the victims, the Hon'ble Supreme Court has directed payment of monetary compensation as well as rehabilitative settlement where State or other authorities failed to protect the life and liberty of victims."*

16. The provision of Section 357A(1) Cr.PC shows that it provides that the victim/dependent shall receive adequate compensation. Section 357A (3) provides that where the trial court concludes that the compensation awarded under Section 357 is not adequate, it may make a recommendation for compensation. Section 357A (5) Cr.P.C. provides that the District Legal Services Authority after due enquiry will award "adequate compensation". The stress is on "adequate compensation".

17. What would the term adequate compensation envisage? The Supreme Court in the case of Sarla Verma vs. DTC, (2009) 6 SCC 121 while interpreting the Motor Vehicles Act interpreted "just compensation" to be adequate compensation as follows:-

> **"8...** *Just compensation is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source*

of profit. Assessment of compensation though involving certain hypothetical considerations, should nevertheless be objective. Justice and justness emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision making process and the decisions. While it may not be possible to have mathematical precision or identical awards, in assessing compensation, same or similar facts should lead to awards in the same range. When the factors/inputs are the same, and the formula/legal principles are the same, consistency and uniformity, and not divergence and freakiness, should be the result of adjudication to arrive at just compensation."

18. We may also, to interpret Clause 4 of the Scheme, look at the relevant judgments on interpretation. Reference may be had to the case of Deputy Chief Controller of Imports and Exports, New Delhi vs. K.T.Kosalram and Ors, AIR 1971 SC1283 where the Supreme Court while interpreting import control order held as follows:-

"In our opinion dictionary meanings, however, helpful in understanding the general sense of the words, cannot control where the scheme of the statute or the instrument considered as a whole clearly conveys a somewhat different shade of meaning. It is not always a safe way to construe a statue or a contract by dividing it by a process of etymological dissection and after separating words from their context to give each word some particular definition given by lexicographers and then to reconstruct the instrument upon the basis of those definitions. What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject-matter, the purpose or the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved. Words are after all used merely as a vehicle to convey the idea of the speaker or the writer and the words have naturally, therefore, to be so construed as to fit in with the idea which emerges on a consideration of the entire context."

19. Reference may also be had to the case of New India Sugar Mills Ltd. vs. Commissioner of Sales Tax, Bihar(supra) where in para 11 the Supreme Court held as follows:-

It is a recognised rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning, the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its power invalid. If the narrow and technical concept of sale is discarded and it be assumed that the Legislature sought to use the expression sale in a wider sense as including transactions in which property was transferred for consideration from one person to another without any previous contract of sale, it would be attributing to the Legislature an intention to enact legislation beyond its competence. In interpreting a statute the Court cannot ignore its aim and object...."

20. In view of the above legal position, Clause 4 of the Scheme has to be interpreted so as not to defeat the object of the Scheme. The Scheme read with Section 357A of Cr.P.C. envisages that the victim or the dependent should receive just compensation. To knock out an applicant under the Scheme merely because some meagre or token compensation

was receivedby the applicant under some other statutory provisions would be unfair and contrary to the very object of the Scheme. Clause 4 is added to ensure that no victim or dependent gets a bonanza or largesse. It is not intended to inflict injury. Clause 4 has to be read conjointly and would have to take its colour from Section 357A Cr.P.C. read with Clause 5 and Schedule to the Scheme. Reading Clause 4 of the Scheme in this manner would mean that the victim can be said to "have been compensated for the loss and injury" from some other scheme when he has received compensation equivalent to or more than what is the minimum stipulated in the Schedule to the Scheme. Such an applicant would not be entitled to receive any compensation under the present Scheme. However, where the amount received is less than the minimum stipulated under the Schedule, it cannot be said that he has been compensated for the loss and injury and the concerned authority shall grant appropriate compensation under the Scheme but taking into account the amount of compensation already received by the victim/dependent.

21. In view of the above, we set aside the order of respondent No.3 dated 28.01.2015 under the Delhi Victim Compensation Scheme, 2011. We direct respondent No.3 to re-consider the matter in the light of the interpretation of Clause 4 of the Scheme as stated above. Needless to add respondent No.3 would take into account the sum of Rs.25,000/- already received by the petitioner earlier. Respondent No. 3 shall take steps within two months from today.

22. The appeal is allowed on the above terms.

JAYANT NATH, J

CHIEF JUSTICE

SEPTEMBER 14, 2015/rb/n

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Mohd. Kaleem Vs. State Of U.P.

CRIMINAL APPEAL No. - 1726 of 2012

Appellant :- Mohd. Kaleem

Respondent :- State Of U.P.

Counsel for Appellant :- Jail Appeal (In Person),Anil Kumar,U C Chaturvedi,U.C.Saxena

HON'BLE SUDHIR KUMAR SAXENA,J.

1. It is a case where appellant has been found guilty of causing grievous injuries to Haseen Abbas in an acid attack. He was sentenced to 10 years R.I, under Sections 307/506 I.P.C. in addition to total fine of Rs. 12,000/-. However, no compensation has been awarded under Section 357 of Cr.P.C.

2. He has served out more than five years in jail. There is no possibility of appeal being heard in near future on account of large number of pendency. Perusal of record shows that re-analysis of evidence is needed.

3. Consequently, in the circumstances of the case, I find it a fit case where appellant can be directed to be released on bail.

4. Appellant is directed to be released on bail on execution of bail bonds to the satisfaction of the court/CJM concerned. Copy of the bail bonds will be sent to this Court.

5. While appellant cries for bail having served more than half of the sentence awarded, what disturbs the mind of Court is sufferings of the victim. Victim Abbas has sustained serious burn injuries. He has assisted the court by appearing in court as witness but he got nothing from judicial administration. No compensation has been awarded by the trial court to the victim while convicting the appellant. More so because appellant is poor person having no means even to contest this case (this appeal has been filed as jail appeal). While appellant will be roaming after bail, victim is left to fend for himself with a scarred and charred body negotiating ridiculous, contemptuous or sympathetic looks. Victim has suffered 50% burn injury. His face, neck, upper abdomen, left hand and foot have been badly burnt.

6. It is high time victim of offence is also taken care of. Feeling of victory of justice lurking in his mind will be a subterfuge unless adequate steps for rehabilitation are taken. Remedial steps have to be taken for all acid victims because they endure those sufferings everyday for whole life and wrong done to them would haunt every time. Trial court should have come forward to help victim. Criminal justice system has to take care of both accused as well as victim.

7. So far as victim is concerned, Hon'ble Apex Court in the case of Laxmi Vs. Union of India & Others reported in (2014) Supreme Court Cases, 427, has held that victim of acid attack is entitled to compensation. Section 357-B Cr.P.C. specifically contemplates payment of compensation to victim of acid attack. This amount ought to have been determined by the court which has not been done. As such, victim with his corroded body is standing helpless facing puns, mocks and snides from people. His plight needs to be examined in some detail in the background of statutes.

8. Hon'ble Apex Court in the above case has chalked out a mechanism whereunder DLSA will work out the amount of compensation. Relevant paragraph of the order passed by a Bench of Apex Court, headed by Hon'ble Madan B. Lokur J., is being reproduced below:

> *"We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs. 3 lakhs by the State Government/Union Territory concerned as the after-care and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs. 2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance with the above direction."*

9. State of U.P. has also come out with a Scheme known as 'Victim Compensation Scheme, 2014' which, in fact, is in compliance of order passed by Apex Court. In this Scheme a maximum sum of Rs. 3,00,000/- (three lacs) is provided as compensation for victim of acid attack.

10. Under the Scheme, registration of F.I.R. will give rise to a claim to compensation which, of course, will be determined according to mechanism provided in the Scheme. Thus, even if offence is committed before the date of launch of Scheme, if F.I.R. is lodged and process of criminal justice administration is set in motion subsequent thereto, in appropriate cases victim will be entitled to compensation under the Scheme. Intention of Scheme is to compensate the victim who suffers on account of failure of State to provide protection.

11. State Government has allocated rupees two crores in 'Victim Compensation Scheme, 2014' for payment of compensation which has to be paid on the approval of the UPSLSA by DLSA. Assistant Account Officer Sri M.Y. Ansari posted with UPSLSA and Sri S.N. Agnihotri, Member Secretary have stated that there will not be delay in disbursement of amount of compensation.

12. Home Department of State Government has acted with due promptness and alacrity in complying with the directions of Apex Court and this court, which requires a note of appreciation.

13. Now that Scheme is there, money is available, can victim of this case be helped in the light of directive of Apex Court. Thus, questions to be considered are whether compensation to a victim can be granted by this court in appeal and that too at an interim stage. For examining these issues, little background and history of the law relating to compensation has to be looked into.

14. Sri Jyotindra Mishra, Former Advocate General, Sri Anil K. Tripathi, Advocate have assisted the Court. Mr. Anil Kumar appeared for appellant. Sri Rishad Murtaza, learned Government Advocate has also candidly placed the entire law without being guided by the brief, he held for.

15. Section 357 Cr.P.C. provides that trial court at the time of conclusion can grant compensation to the victim. Section 357 Cr.P.C. is being reproduced hereinbelow:

"357. Order to pay compensation.

(1) *When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-*

(a) *in defraying the expenses properly incurred in the prosecution;*

(b) *in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;*

(c) *when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;*

(d) *when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.*

(2) *If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.*

(3) *When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.*

(4) *An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.*

(5) *At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."*

16. Despite there being above provision, trial courts are reluctant to award compensation. Noticing this inhibition, Hon'ble Apex Court in the case of Hari Krishna and State of Haryana vs. Sukhbir Singh [(1988) 4 SCC 551], has made following observations:-

"Section 357 of the Cr.P.C. is an important provision but Courts have seldom invoked it. This Section of law empowers the Court to award compensation while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of the accused. This power to award compensation is not ancillary to other sentences but is in addition thereto. It is a measure of responding appropriately

to crime as well as reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We therefore recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way." (emphasis supplied)

17. Even this reminder did not evince any interest in the courts and apathy continued.

18. Matter was examined in great detail in the case of Smt. Nilabati Behera vs. State of Orissa [(1993)2 SCC 746]. This was a landmark judgment which evolved a theory of compensation for the constitutional torts. This case deals with the public and private law remedies for infringement of fundamental rights of the citizens. While on one hand, it deals with the dereliction of duty by a public servant, which contemplates action against the State under Article 32 and 226 of the Constitution of India, on the other hand, it emphasizes on the government's liability under the law of tort. This case indeed, draws a distinction between the liability of the State to pay compensation in cases where grave violation of fundamental rights is involved and the liability of the State arising in action for tort. This liability is based on the principle of public law and is governed by the principle of strict liability. Wherever there is an infringement of fundamental rights, 'Act of State' or sovereign immunity has not been held to be applicable as they are 'constitutional torts'. The aim of awarding compensation to an individual aggrieved by the tort action by the officials' violation of constitution is to compensate for some of the individuals past injury and deter future deprivations of these rights. Persons' life and liberty is guaranteed by Article 21 of the Constitution of India as such, the State or the Officer responsible for infringement of the above Article is liable to pay compensation.

19. In fact, compensation is manifestation of exemplary damages against the State for the dereliction of duty on the part of State Officials which has led to violation of the fundamental rights of the victim. Hon'ble Apex Court in the above case, instead of relegating the petitioner to file an action for damages, considered and upheld petitioner's claim under Article 32 of the Constitution for damages for violation of the fundamental rights.

20. In the case of Baldev Singh vs. State of Punjab [(1995) 6 SCC 593], Hon'ble Apex Court has held that order of compensation would be more appropriate instead of sentence of imprisonment. It has thus advanced the theory of compensation.

21. In the case of Vijayan vs. Sadanandan K and another [(2009) 6 SCC 652], it was held that default in payment of compensation authorizes the Court to order a default sentence under Section 357 (3) and Section 431 Cr.P.C. read with Section 64 I.P.C.

22. In a recent judgment given in the case of Ankush Shivaji Gaikwad vs. State of Maharastra [(2013) 6 SCC 770], need to have a paradigm shift in the approach towards victims of crimes has been recommended. Relevant paras of the judgment are being reproduced below:

"The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid 1960s and gained momentum in the decades that followed.

Interestingly the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on 'Victim Restitution in Criminal Law Process: A Procedural Analysis' sums up the historical perspective of the concept of restitution in the following words:

Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offence. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the state gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."

23. The question is whether duty of the State ends merely by registering a case, conducting investigation and initiating prosecution. Does State have any further responsibility towards victim ? Victim of crime or kith and kin have legitimate expectation that the State will punish the guilty and award compensation. Acquittal may take place for many number of reasons. Even in some cases, trial may not have commenced but victim is there, who expects a system for rehabilitation and compensation. That criminal law is not concerned with compensation no more holds the field, as there is feeling all over the world that Courts are neglecting the victims. The above mentioned judgments tend to change the scenario and Courts have shown sense of urgency and keenness in rehabilitation process. Recent Studies in criminology and penology would reveal that humanitarianism is permeating into penology and the Courts are expected to discharge their due roles.

24. In fact, the purpose of such restitution is not to compensate the victim but to protect the offender from violent retaliation by the victim or the community. When compensation is not fully available from the offender or other sources, the State should endeavor to provide financial compensation to the victims, who have suffered significant bodily injury needing physical or mental help, as a result of serious crimes to protect its subjects owing to failure of State.

25. In the case of Manohar Singh vs. State of Rajasthan and Ors. [2015 (89) ACC 266 (SC)], Hon'ble Apex Court has observed that punishment to the accused is one aspect, determination of just compensation to the victim is the other. Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors, while under Section 357 Cr.P.C., financial capacity of the accused has to be kept in mind under Section 357-A Cr.P.C., compensation should be invoked out of the State funds to meet out the requirement of just compensation.

26. Since Section 357 Cr.P.C. was not capable of taking care of all the victims of crime, as compensation could have been granted only on the conclusion of trial, legislature intervened and Section 357-A Cr.P.C. was inserted on 31.12.2009. Said provision casts a duty upon the States to formulate a Victim Compensation Scheme. In 2013, Sections 357-B

and 357-C Cr.P.C. were added. Section 357-A, 357-B & 357-C Cr.P.C. are being reproduced below :-

"[357-A. Victim compensation scheme. - *(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.*

(2) *Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).*

(3) *If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.*

(4) *Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.*

(5) *On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.*

(6) *The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."]*

357-B. Compensation to be in addition to fine under Section 326-A or Section 376-D of Indian Penal Code. -The compensation payable by the State Government under section 357-A shall be in addition to the payment of fine to the victim under section 326-A or section 376-D of the Indian Penal Code (45 of 1860).

357-C.- Treatment of victims.- All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326-A, 376, 376-A, 376-B, 376-C, 376-D or section 376-E of the Indian Penal Code, and shall immediately inform the police of such incident."

27. Section 357-A Cr.P.C. was added on the recommendation of the Law Commission of India as need to rehabilitate the victim was gaining ground.

28. From the above discussion, it can be safely culled out that compensation to victim has become a rule, whether recourse is had to Section 357 or 357-A Cr.P.C. Needless to say that Hon'ble Apex Court in the case of Ankush Shivaji Gaikwad (supra) has held that it is the duty of the court to apply its mind to the question of compensation in every case. Para 66 of the judgment is being reproduced below :

> *"66. To sum up: while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family."*

29. Now the question is whether an appellate court can award compensation. Section 357 (4) itself provides that order of compensation can be passed by an appellate court as well as revisional court. Moreover, appeal being continuation of trial, appellate court can exercise all the powers which are vested in the trial court.

30. In the case of Subhash Chandra vs. S.M. Agarwal [1984 Criminal Law Journal 481], Hon'ble Apex Court in para 7, while interpreting the word ''judicial proceeding' holds appeal to be continuation of trial. Paragraph 7 of the judgment is being reproduced below :

"Bawa Gurcharan Singh, learned counsel for the petitioner, also invited our attention to Section 2 (C)(ii) of Contempts of Courts Act wherein a publication which prejudices or interferes or tends to interfere with, the due course of any judicial proceedings, has been defined as criminal contempt. His contention that by using the words 'judicial proceeding' the Legislature has done away with the distinction between trial and appeal and has in its wisdom chosen to use the words. 'judicial proceedings' which are wider in sweep and which we (by?) fair construction would mean even the appeal which is a continuation of the trial, to our mind appears to be well founded. It would thus be seen that respondent no. 1 went to the media to give interview in respect of a case which was pending trial before this court and the contents of the interview would show that it had not only a tendency and capacity to cause prejudice but it did make it difficult for the court to deal with the case in the manner which law and justice would require of it."

31. While Section 357 Cr.P.C. specifically refers to the trial court, appellate court and revisional court, Section 357-A(2) Cr.P.C. refers only to 'court'. The intention of legislature appears to aim at helping the victims whether trial has commenced or not or whether trial has resulted in acquittal or conviction. This departure manifests the intention of legislature that 'court' occurring in Section 357-A(2) includes Remand Magistrate, trial court, appellate court or revisional court.

32. The Idea, indeed, is to help the victim at whatever stage his plight is noticed either on the motion of victim (including kith and kin) or otherwise. What is sine qua non for

Section 357-A Cr.P.C. is a crime and a victim. These provisions have been enacted to ensure restoration, reparation and rehabilitation of the victim.

33. In these circumstances, giving the restricted meaning to the word ''Court' occurring in Section 357-A (2) Cr.P.C. would tantamount to frustrate the purpose of the amendment as victim will remain victim, whether he/she is before the DLSA, SLSA, trial court or appellate court.

34. Hon'ble Apex Court in the case of Manohar Singh vs. State of Rajasthan (supra) has given a clear hint, making Section 357-A Cr.P.C. applicable. Relevant paragraph of the judgment is being reproduced below :

> *"We find that the Court of Sessions and the High Court have not fully focused on the need to compensate the victim which cannot be taken to be integral to just sentencing. Order of sentence in criminal case needs due application of mind. The court has to give attention not only to the nature of crime, prescribed sentence, mitigation and aggravating circumstances to strike just balance in needs of society and fairness to the accused, but also to keep in mind the need to give justice to victim of crime. In spite of legislative changes and decisions of this court, this aspect at times escapes attention. Rehabilitating victim is as important as punishing the accused. Victim's plight cannot be ignored even when a crime goes unpunished for want of adequate evidence."*

35. It is, thus, evident that appellate court can exercise the powers under Section 357 Cr.P.C. as well as 357-A Cr.P.C., for ensuring rehabilitation of the victim.

36. This leads to another question whether the amendments made in the year 2013 and 2009 are retrospective in nature ? Needless to say that the amendment is beneficial in nature. It considers the victim as a unit, which requires rehabilitation including first-aid facility, medical benefits and any other interim relief. The emphasis is on 'alleviating the sufferings' of the victim. Section 357-A Cr.P.C. would apply even if the case results in an acquittal. Section 357-A Cr.P.C. applies to a case where offenders are not traced or identified or compensation granted by the trial court under Section 357 Cr.P.C. is inadequate or where trial resulted in acquittal. This provision refers to something that happened in past. It is, thus, obvious that date of offence has no connection with the benefits made available under the Scheme.

37. In the case of Bashir @ N.P. Bashir vs. State of Kerala [(2004) 3 SCC 609], the Supreme Court of India discussed the earlier judgments of Ratan Lal vs. State of Punjab and T. Barai vs. Henry and held as follows:

> **"10.** *In Ratan Lal vs. State of Punjab it was unequivocally declared by this Court that an ex post facto criminal law, which only mollifies the rigor of law is not hit by Article 20 (1) of the Constitution and that if a particular law makes provision to that effect, though retrospective in operation, it would still be valid.*
>
> **11.** *In T. Barai vs. Henry Ah Hoe this view was reiterated and it was emphasized that if an amending Act reduces the punishment for an offence, there is no reason why the accused should not have the benefit of such reduced punishment. Relying on Craies on Statute law (7th Edn. Pp. 387-88), this Court (AIR at p. 157, para 22) said: (SCC p.9, para 22)*

> The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common sense."

38. All the statutes must be interpreted as prospective unless declared retrospective specifically by the statute or by a necessary intendment. Construction which promotes the purpose of legislation should be preferred to a literal construction. Any construction which results in injustice has to be avoided.

39. Moreover, in the case of Suresh and Anr. vs. State of Haryana (supra), Hon'ble Apex Court underlined the object of Section 357-A Cr.P.C. as under :

> *"The object and purpose of Section 357-A Cr.P.C. is to enable the court to direct the state to pay compensation to the victim where the compensation under Section 357 Cr.P.C. is not adequate or where the cases ended in acquittal or discharge and the victim is required to be rehabilitated."*

40. In view of the above, it is found that Section 357-A Cr.P.C. is retrospective contemplating compensation in the cases pending on or before 31.12.2009 and appellate court is competent to grant compensation under Section 357-A Cr.P.C.

41. Next question is whether compensation can be awarded at the interim stage. Section 357 Cr.P.C. contemplates an award of compensation at the conclusion of trial. This power has been given to appellate court and revisional court also under Section 357 (4) Cr.P.C. It is vehemently submitted by Sri Anil Tripathi that settled principle of law is that if an authority has the power to pass a final order, it also has power to pass interim or such other order necessary for effective exercise of power, unless specifically prohibited, Section 357 (2) Cr.P.C. places a restriction. In the High Court appeals ordinarily take more than ten years for decision. Can rehabilitation of victim, wait for such a long period ? Can the agony of the victim be left to continue for such a long period without genuine redressal ? Would not rehabilitation, if it comes at all, become meaningless after such a long lapse of time ? Would it not lead to psychological frustration for hapless victim ? Medical treatment, restoration or rehabilitation are the immediate requirements. If a victim is made to wait for 20-30 years for rehabilitation, purpose of the Scheme would vanish as all the appeals cannot be disposed of expeditiously.

42. Under Section 357-A Cr.P.C., payment of compensation is not dependent upon financial capacity of the accused. Of course, under Section 357 Cr.P.C., it is a relevant consideration. Section 357-A (6) enables State or District Legal Services Authority to provide such interim relief as deemed fit, for 'alleviating the sufferings' of victim. Key word ''alleviating the suffering' occurs in the provision and therefore provision is to be interpreted keeping in mind the above objectives. Provision seeks to help the victim recover in the aftermath of the crime and ensure that victim does not have to wait till the end of the judicial proceedings to receive the amount of compensation.

43. It is settled ever since the formation of modern State that security of persons and property of the people is an essential function of the State. Hon'ble Apex Court in its judgment in Shailesh Jasvantbhai Vs. State of Gujrat reported in [(2006) 2 SCC 359] said that "the law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State." But when the State fails

to protect the person or property of its people, whose guardian it actually is, then it must come forward to compensate the hapless victim so as to alleviate his/her sufferings. The process to compensate for 'alleviating the suffering' must ensue from the moment the State's failure has occurred first, that is, when the violation of a person's rights has occurred and criminal prosecution got initiated and this is, indeed, the reason because of which the concept of 'interim compensation' came into being. The needs and rights of the unfortunate victim of crime should receive attention on priority in the overall response to crime. One recognized method of protection of victims is, indeed, compensation to victims of crime. Although, the needs of victims and their family are extensive and varied but interim compensation might come as a strong bullwork of social and economic justice which is a pious aspiration of our constitutional jurisprudence and aspiring egalitarian society.

44. In the case of Suresh and Anr. Vs. State of Haryana [2015 (2) SCC 227], following important observations have been made by the Hon'ble Apex Court:-

> *"Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357A has been introduced in the Cr.P.C. and a Scheme has been framed by the State of Odisha called 'The Odisha Victim Compensation Scheme, 2012'. Compensation under the said Section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings."* (emphasis mine)

45. Case of State of Madhya Pradesh vs. Mehtab [2015 (5) SCC 197] is a case where offence was committed in the year 1997 and court has awarded a sum of Rs. 3,00,000/- as interim compensation under Section 357-A Cr.P.C. Relevant para of the judgment is being reproduced below :

> *"The order of the High Court can be upheld only with the modification that the accused will pay compensation of Rs. 2 lakhs to the heirs of the deceased within six months. In default, he will undergo RI for six months. The compensation of Rs. 2 lakhs is being fixed having regard to the limited financial resources of the accused but the said compensation may not be adequate for the heirs of the deceased. In the interest of justice, interim compensation of Rs. 3 lacs is also awarded under Section 357 A Cr.P.C. payable out of the funds available to be made available by State of M.P. In case the accused does not pay the compensation awarded, the State of M.P. will pay the entire amount of compensation of Rs. 5 lakhs."*

46. It is thus manifest that statute has recognized the right of an interim relief to a victim. How this right is to be bestowed has to be seen from the provision itself which states that DLSA or State Level Authority would award the compensation on the recommendation of the

court. Since power has been given to DLSA/SLSA which are manned by Judges, chances of misuse of power or arbitrariness are minimum. As held earlier, court includes the appellate court. As such, appellate court can also recommend payment of interim compensation to the victim.

47. From the above, it is manifest that legislature enabled the court to order interim compensation, either on the application or on its own motion, which will of course, be subject to final compensation being determined later on.

48. Hon'ble Apex Court has specifically clarified that compensation can be awarded at an interim stage and gravity of offence and need of victim will be some of the guiding factors. In fact, in the year 1996 itself, Hon'ble Apex Court in the case of Bodhi Satwa Gautam vs. Subra Chaturvedi [(1996) 1 SCC 490] had recognized the jurisdiction of the courts to pay interim compensation as part of overall jurisdiction. Relevant para of the judgment is being reproduced below :

"When the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which also be provided in the scheme for rape victims to be evolved by the Union of India pursuant to directions of the Supreme Court in Delhi Domestic Working Women Forum case. On the basis of principles set out in that decision the jurisdiction to pay interim compensation shall be treated to be part of over all jurisdiction of the courts trying the offences of rape which, is an offence against basic women rights as also the fundamental right of principal liberty of life. Besides the Supreme Court has the inherent jurisdiction to pass any order it considers fit and proper in the interest of justice or to do complete justice between the parties."

49. The above discussion may be summarized as under:

1) Every victim of crime is entitled to compensation, which will be granted on the application of the victim or on the recommendation of the court.

2) The 'court' occurring in Section 357-A(2) Cr.P.C. includes the trial court, appellate court or revisional court.

3) Section 357-A Cr.P.C. is retrospective in nature and therefore, date of offence has no relevance, so far as applicability of provision is concerned, subject to other conditions being fulfilled.

4) So far as right of victim to get compensation is concerned, compensation can be recommended by trial court, appellate court as well as revisional court under Section 357-A Cr.P.C.

5) Interim compensation can also be ordered during pendency of the trial, appeal or revision under Section 357-A Cr.P.C.

6) Compensation will be payable as per the terms of Scheme framed under Section 357-A Cr.P.C.

7) It is the duty of every court to consider the question of awarding the compensation, and for awarding or refusing court is supposed to record reasons. Application of mind to such a question is duty of the court. Gravity of the offence and need of the victim would be some of the guiding factors. Rehabilitation of victim in order to alleviate

his/her suffering would be the principle area to be concentrated upon by the DLSA or SLSA.

50. From the above discussion, it is manifest that under Section 357 Cr.P.C. whereby trial court or appellate court were capable to give compensation out of amount of fine or otherwise to the victim at the conclusion of the trial or appeal as the case may be, there has been a departure in this scheme of compensation with the intervention of the legislature which has brought in place Section 357-A Cr.P.C. to take care of the victims whether trial has commenced or not, accused are identified or not or whether trial has resulted in acquittal. Power under Section 357-A can also be exercised when it is found that compensation awarded by the trial court is inadequate. Thus, this provision provides for additional mechanism to take care of the victim irrespective of identity of the offender or pendency of judicial proceeding. This has been done to ensure the dignity of individual (victim) contemplated in Preamble as well as Article 38 and 41 of the Constitution of India. This newly added provision has to be interpreted in the light of these provisions.

51. Discussion made above, shows that under Section 357-A Cr.P.C., trial court, appellate court or revisional court can order compensation either on its own motion or on the application of victim. This can be done even during the pendency of trial, appeal or revision and courts are not supposed to wait till conclusion of proceeding as victim is not supposed to wait for medical aid, rehabilitation, restoration till decision of trial/appeal which may take more than 20 years. Interim compensation can also be granted in accordance with the Scheme, 2014 which provides for granting of interim compensation which will be in consonance with Section 357-A Cr.P.C. as well as decisions of Hon'ble Apex Court.

52. Power to grant interim compensation can be exercised in the same manner as it is exercisable while ordering final compensation. Moreover, Section 357(2) Cr.P.C. places embargo on the compensation which was to be paid out of the fine imposed under Section 357(1) of Cr.P.C. Compensation payable under Section 357-A Cr.P.C. is altogether different although adjustable at the final stage. Thus, it can be safely held that appropriate appellate court at any interim stage, including stage of granting bail, can direct payment of compensation.

53. In future, such amount will be placed at the disposal of UPSLSA after necessary grant from legislature, so as to create a corpus with a view to meet the growing number of claims.

54. Since statutory Scheme in Uttar Pradesh has come into place, DLSA/SLSA would consider application in the light of Scheme which provides for compensation only in respect of certain specified offences, offences under the POCSO Act have been included in Schedule by means of amendment in pursuance of directions of this Court but certain offences still remained beyond its purview which require attention of the State Government i.e. offences relating to property and person i.e. offences under Sections 436, 377, 326 I.P.C. etc. State Government is directed to consider the inclusion of other offences also within the ambit of the Scheme so that there remains no ambiguity although these offences are referable to 'loss or injury' occurring in the scheme.

55. Member Secretary, SLSA would impress upon the State Government for rationalizing the payment of compensation so far as acid attacks are concerned as directed by Hon'ble Apex Court in W.P. (Crl.) No. 129 of 2006 (Laxmi vs. Union of India and Ors.) in its order (relating to amount of compensation to be made available to each victim of acid attack). Scheme

2014 provides for maximum three lacs to victim of acid attack contrary to dictate of Apex Court.

56. With the advent of Victim Compensation Scheme, 2014, DLSA/SLSA will be flooded with claims for compensation. All the DLSAs do not have full time Secretaries. To fully effectuate the Scheme and keeping in view the time limit prescribed by the Scheme itself and Hon'ble Apex Court in the case of Laxmi Devi(supra) need to have full time Secretary in DLSAs has become imminent. Civil Judge (Senior Division) who works as Secretary DLSA is already preoccupied with judicial work, being holder of parent court, Member Secretary, SLSA will take up the matter with the State Govt. for creation of posts of full time Secretaries in all the DLSAs of State. State Government would do well to act with all promptness for ensuring success of its Scheme.

57. Submission of Sri Anil Tripathi that State Government should be authorized to recover the amount of compensation from the offender is although attractive but is left upon to the wisdom of legislature for consideration. DLSAs and SLSA would ensure that claims are not collusive, fake or fictitious.

58. So far as instant case is concerned, having considered the F.I.R., injury report and other material especially the poor condition of accused, Court directs DLSA, Lucknow to recommend payment of Rs. 3,00,000/- (three lacs) as compensation to Haseen Abbas, victim, enabling UPSLSA to pass order for payment of compensation.

59. Copy of this order be sent to Registrar General, Principal Secretary Home, Principal Secretary Law, Senior Registrar Lucknow Bench and Member Secretary UPSLSA for compliance.

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Sathyan vs Yousu

Kerala High Court

Sathyan vs Yousu on 27 September, 2006

Equivalent citations: IV (2007) BC 1, 2007 CriLJ 2590, 2006 (4) KLT 923

Author: R Basant

Bench: R Basant

ORDER R. BASANT, J.

1. Does the criminal court have the power to direct payment of interest on the amount of compensation directed to be paid under Section 357(3) of the Cr.P.C? This interesting question arises for consideration in this Revision Petition which is directed against a concurrent verdict of guilty, conviction and sentence in a prosecution under Section 138 of the N.I. Act.

2. The cheque is for an amount of Rs. 25,000/- and bears the date 1.11.2004. Signature in the cheque is admitted. Notice of demand succeeded in evoking only Ext. P1 reply notice. No payment was made. The complainant examined himself as PW1 and proved Exts. P1 to P5. The accused did not adduce any oral evidence. He proved Exts. D1 & D2. The accused raised a plea that the cheque was not issued for the due discharge of any legally enforceable debt/liability; but was issued only as security in a transaction between the wife of the accused and the complainant.

3. The courts below concurrently came to the conclusion that the complainant has succeeded in establishing all ingredients of the offence punishable under Section 138 of the N.I. Act Accordingly they proceeded to pass the impugned concurrent judgments. The petitioner faces the sentence of imprisonment till rising of court. There is a further direction under Section 357(3) of the Cr.P.C. to pay an amount of Rs. 25,000/- along with interest at the rate of 12% per annum from 1/11/04 -the date of the cheque.

4. Called upon to explain the nature of challenge which the petitioner wants to mount against the impugned concurrent judgments, the learned Counsel for the petitioner does not strain to assail the verdict of guilty and conviction. I am satisfied that the stand taken by the learned Counsel for the petitioner is an informed and fair one. I find the verdict of guilty and conviction to be absolutely justified and unexceptionable.

5. The learned Counsel for the petitioner raises two contentions. Firstly, it is contended that the sentence imposed is excessive. Secondly it is contended that powers under Section 357(3) Cr.P.C. do not justify a direction to recover interest on the principal amount of compensation. The counsel contends that the power of the court under Section 357(3) Cr.P.C is only to direct payment of a specific amount and there can be no direction for payment on any interest on such specific amount directed to be paid.

6. I find merit in the prayer for leniency. I have already adverted to the principles governing imposition of sentence in a prosecution under Section 138 of the N.I. Act in the decision reported in Anilkumar v. Shammy 2002 (3) KLT 852. I am not satisfied that there are any compelling circumstances available in this case which would justify the imposition of any deterrent substantive sentence of imprisonment on the petitioner. Leniency can be shown

on the question of sentence. But at the same time the courts cannot ignore the plight of the respondent/complainant who has been compelled to fight three rounds of legal battle and to wait from 2004 for the redressal of his genuine grievance.

7. The interesting legal question that has been raised is whether a direction can be issued underSection 357(3) of the Cr.P.C. to pay as compensation interest on the amount shown in the cheque. The courts below have directed payment of the principal amount due under the cheque i.e., Rs. 25,000/- along with interest at the rate of 12% per annum from 1/11/04 till the date of realisation. The learned Counsel for the petitioner contends that such a direction is legally impermissible and unacceptable.

8. The question raised is interesting. The learned Counsel were requested to research and make detailed submissions. I place on record my appreciation of the assistance rendered by Mr. V.N. Shankerjee, the young counsel who was requested to assist this Court as amicus curiae.

9. The first question raised is whether all amounts which can be directed to be paid as compensation out of the fine amount under Section 357(1) of the Cr.P.C. can be directed to be paid under Section 357(3) of the Cr.P.C. also. I extract Section 357(1) of the Cr.P.C. below:

357. Order to pay compensation.--

(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a Civil Court.

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act. 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death.

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted the in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

Section 357(1) of the Cr.P.C. speaks of imposition of fine and a direction to pay compensation out of such fine imposed. Clauses (a) to (d) of Section 357(1) show that the fine amount can be applied to the various purposes enumerated in those Clauses (a) to (d).

10. We now come to Section 357(3) of the Cr.P.C. which I extract below:

357. Order to pay compensation.-- (1)

XXX XXX XXX

XXX XXX XXX

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may. when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(emphasis supplied) When it comes to Section 357(3) of the Cr.P.C, the court is invested with powers to direct the accused person to pay, by way of compensation, such amount as may be specified to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. Though Section 357(3) of the Cr.P.C. does not repeat the heads under which the amounts can be directed to be paid as compensation, the conclusion appears to me to be inevitable that all such payments which are contemplated under Clauses (a) to (d) of Section 357(1) of the Cr.P.C. can also be directed to be paid when it comes to issue of a direction under Section 357(3) of the Cr.P.C. Clauses (a) to (d) deal with various losses which may be suffered by a victim of the crime and the general words employed in Section 357(3) must certainly take in all the amounts which are enumerated as payable under Clauses (a) to (d) ofSection 357(1) of the Cr.P.C.

11. The counsel point out, and I am in agreement with them, that the observations in para-33 of the decision of the Supreme Court in Arun Garg v. State of Punjab 2004 (3) KLT 435 (SC) : (2004) 8 SCC 251 is authority for the proposition, that only such amounts can be directed to be paid which a civil court is competent to direct payment. The language of Section 357(1) and (3) read along with Section 357(5) of the Cr.P.C. must make the position very clear. Unless the amount is claimable in a civil suit a direction under Section 357(1) or Section 357(3) of the Cr.P.C. for payment of compensation cannot be issued.

12. It is next suggested that payment of any uncertain amount cannot be directed. Direction to pay interest without specifying the precise quantum cannot be held to be an amount specified and hence it cannot fall within Section 357(3) of the Cr.P.C. it is urged. I have considered this contention. The expression "such amount as may be specified" appearing in Section 357(3) of the Cr.P.C. cannot certainly suggest or convey that direction for payment of interest at the specified rate on a specified amount will cease to be an amount "as may be specified" for the purpose ofSection 357(3) of the Cr.P.C. That would continue to be an amount specified, though the amount payable as such in figures is not specified and only the basis on which such amount is to be ascertained is specified. There is no uncertainty whatsoever in the impugned direction. The amount due on any given date can be ascertained specificallyTherefore the said expression "such amount as maybe specified" appearing in Section 357(3) of the Cr.P.C. cannot lead the court to the conclusion that a direction to pay interest is impermissible.

13. A contention is raised that in order to be payable under Section 357(3) of the Cr.P.C. the recipient must have either suffered loss or injury by reason of the act for which the accused person has been so sentenced. The counsel builds up an argument that where an offence underSection 138 of the N.I Act is committed, the payee or the holder in due course cannot be said to have suffered any loss or injury by reason of the act for which the accused person has been sentenced. I find this contention to be unacceptable. When the cheque is dishonoured on the ground of insufficiency of funds etc., and payment is

not made despite service of notice of demand, as insisted by Section 138 of the N.I. Act, certainly the payee or the holder in due course suffers loss by reason of the act for which the accused person has been sentenced. He has not obtained payment which he is in law entitled to on account of the culpable conduct of the accused. He is hence entitled for compensation. As has already been noted, the precise offence under Section 138 of the N.I. as embodied in the body of Section 138 of the N.I. Act is committed when the cheque is "returned by the bank unpaid". The proviso only enumerates the pre-conditions for a valid prosecution. But the precise offence is stipulated in the body of Section 138of the N.I. Act which is nothing but dishonour of the cheque

14. When dishonour of the cheque takes place certainly the holder is entitled to be compensated. This is crystal from Section 30 of the N.I. Act which reads as follows:

> **30.** Liability of drawer.-- The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by the drawer as hereinafter provided.
>
> In the event of dishonour by the drawee, the holder (payee, his order or bearer) is certainly entitled to be compensated by the drawer of the cheque. "Payee" includes the holder and the compensation payable in case of dishonour of a promissory note, bill of exchange or cheque must be computed as per the rules in Section 117 of the Act.

15. This Court had occasion earlier in Anilkumar v. Shammy 2002 (3) KLT 852 to consider the same question. The question was answered in para-14 in the following words:

14 The contention that Section 357(3) of the Criminal Procedure Code permits payment of "compensation" only and that the amount due under the cheque cannot be reckoned as compensation for the purpose of Section 357(3) does not also appeal to me at all. According to me the expression "compensation" is used under Section 357(3) not in any technical sense, and must certainly include payment due to the victim under the cheque in respect of which the offence under Section 138 of the Negotiable Instruments Act is committed. It is unnecessary, considering the purpose which Section 357(3) has to serve, to import any special or technical meaning to the expression "compensation" used there.

16. In that case the play of Sections 30 and 117 of the N.I. Act was omitted to be considered. I extract Section 117 of the N.I. Act below:

> **117.** Rules as to compensation -- The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque by any party liable to the holder or any indorsee, shall be determined by the following rules-
>
> **(a)** the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it;
>
> (b) xxx xxx xxx
>
> **(c)** an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at eighteen per centum per annum from the date of payment until tender or realisation thereof, together with all expenses caused by the dishonour and payment:

(d) xxx xxx xxx

(e) xxx xxx xxx.

(emphasis supplied)

((b), (d) and (e) omitted as not particularly relevant in the context)

The relevant clauses are: Sections 117(a) and 117(c). Section 117(c) of the N.I. Act is not applicable to a drawer and it is applicable only to an indorser. Section 117(a) of the N.I. Act stipulates that the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it. The crucial question is whether interest can be said to be "the amount due upon the instrument". It will be proper straightaway to refer toSection 80 of the N.I. Act which deals with payment of interest when no rate of interest is specified. I extract Section 80 of the NI Act below:

80. Interest when no rate specified.-- When no rate of interest is specified in the instrument interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of eighteen per centum per annum, from the date at which the same ought have been paid by the party charged, until tender or realisation of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

17. Section 80 of the N.I. Act is applicable to all instruments. There is no definition for the expression "instrument" in the N.I. Act. But the expression "negotiable instrument" is defined inSection 13 of the N.I. Act. The "instrument" referred to in Section 80 of the N.I. Act must necessarily refer to "negotiable instruments" which by definition means a promissory note, bill of exchange or cheque payable either to order or to bearer. The cheque is hence a negotiable instrument and consequently an instrument to which Section 80 of the N.I. Act would apply.

18. How is the expression "amount due upon the instrument" to be construed? No specific precedent on this aspect is shown. But the commentaries reveal that the amount due upon the instrument must include the interest payable under Sections 79 and 80 of the N.I. Act. Bhashyam and Adiga's "The Negotiable Instruments Act" in the 17th Edition at page 629 speaks thus on the question:

The amount due on the instrument is not merely the principal sum thereon, but also includes interest as calculated according to the rules in Sections 79 and 80, ante. It would have been better, if the section mentioned interest specifically, when interest is reserved that rate is payable. of Bills of Exchange Act, Section 57(1)(B); Re Gillespie (1886) 18 QBD 286 : 56 LT 599.

I am in complete agreement with this proposition. The expression 'amount due upon the instrument' cannot be read down to mean 'the amount shown as payable in the instrument'. Going by the context, purpose, purport and the language of the provision such reading down is impermissible. It must be given a reasonable and purposive interpretation to include the payable also.

19. It will be apposite in this context to ascertain the very concept of interest in law. In Halsbury's Laws of England "interest" is stated to be the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In

Corpus Juris Secundum "interest" is stated to be the compensation allowed by law; fixed by the parties, for the use or forbearance of money, or as damages for its detention; compensation paid for the use of money and payment of a reasonable sum for the loss of use of money. "Interest" has also been defined as the rental price of money; a measure of compensation to which an obligee is entitled; the natural growth or incident of money etc. It is an accretion to or an increment to the principal fund earning it, it is further observed. A Division Bench of this Court in George v. Daniel 1993 (2) KLT 77 has observed in para-6 that:

> *Thus interest is the compensation for the use or delay in the payment of money belonging to another person. Interest may be awarded when there is an agreement for the payment of interest or when interest is payable by the usage of trade or under the provisions of any substantive law, as for instance under Section 80 of the Negotiable Instruments Act.*
>
> *(emphasis supplied) The conclusion is thus inevitable from fundamental concepts interest is nothing but compensation payable for amounts retained unjustifiably without payment. In that view of the matter also interest is compensation and direction can be issued under Section 357(3)of the Cr.P.C. for payment of interest.*

20. It therefore follows that under Section 117(a) of the N.I. Act the amount due upon the instrument would include the amount payable under Section 80 of the N.I. Act. We have precedents in Joseph v. Chandran 1989 (2) KLT 414 and KA. Lona v. Dada Haji Ibrahim Hilari & Co. which lay down specifically that Section 80 of the N.I. Act is applicable to bills of exchange and promissory notes The decision in P. Mohan v. Basavaraju refers to the liability under Section 80 to pay interest on the amount due under a cheque. As already adverted to the "instrument" means negotiable instrument which includes a cheque. Therefore there can be no doubt on the proposition that Section 80 is applicable to cheques as well. The simple fact that other sections in that Chapter - Sections 78, 79 and 81 of the N.I. Act are differently worded is no reason to conclude that Section 80 is not applicable to cheques. Section 78 specifically refers to all negotiable instruments - promissory note, bills of exchange or cheque. Section 79 deals with promissory note or bill of exchange. Section 78 deals with instruments in general and Section 81again refers to promissory note, bill of exchange or cheque i.e., all instruments. The mere fact that. Section 80 has employed the expression "instrument" cannot, in these circumstances, lead the court to the conclusion that the liability to pay interest under Section 80 of the N.I. Act will not cover a cheque.

21. We now come to the next question - as to the rate at which such interest can be directed to be paid. Merely because interest at the rate of 18% per annum can be claimed under Section 80, it is not essential that a court much less a criminal court which need only ensure just compensation should direct payment at that rate. When the matter goes to a civil court, for the pre-litigation period, interest at the rate specified in Section 80 may be payable. But that does not necessarily oblige the criminal court to direct payment of interest at the full rate of interest mentioned inSection 80. The court can ascertain the loss which the complainant would suffer/has suffered on account of the delay in payment and appropriate rate of interest can be directed to be paid, conscious of the stipulation under Section 80. Consistent with the rate of interest payable by the nationalised banks, I am

satisfied that a direction for payment of interest at the rate of 8% per annum shall serve the ends of justice eminently.

22. I am of opinion that such direction for payment of interest would serve the interests of justice certainly. This Court does now deal with the revision petitions filed as early as in 1996. Directions for payment of lump sum amount as compensation without any direction for payment of interest does work out injustice and amount to a premium for the defaulters who succeed in their attempts to drag on the proceedings. The direction to pay interest at a reasonable rate on the principal amount due under the cheque, I am satisfied, shall eminently cater to the needs of justice.

23. In the result:

(a) This revision petition is allowed in part.

(b) The verdict of guilty, conviction and sentence imposed on the petitioner under Section 138 of the N.I. Act are upheld.

(c) But the direction to pay compensation is modified and it is directed that the petitioner shall pay the amount of Rs. 25,000/- along with interest at the rate of 8% per annum from 1/11/04 to the date of payment. In default of payment, the petitioner shall undergo simple imprisonment for a period of two months.

24. The petitioner shall have time till 30/11/2006 to pay the amount and avoid the default sentence. The petitioner shall appear before the learned Magistrate on or before 30/11/2006 to serve the modified sentence hereby imposed. Till then, the sentence shall not be executed.

❑❑❑

C.Ganga vs Lakshmi

Kerala High Court

C.Ganga vs Lakshmi Ammal on 31 March, 2008

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Crl Rev Pet No. 15 of 2008()

1. C.GANGA, W/O DEVANAND, ... Petitioner
Vs
2. LAKSHMI AMMAL, ... Respondent

2. THE STATE OF KERALA, REPRESENTED BY

For Petitioner :SRI.V.SETHUNATH

For Respondent : No Appearance

The Hon'ble MR. Justice R.BASANT

Dated :31/03/2008

O R D E R

R.BASANT, J.

Crl.R.P.No.15 of 2008

Dated this the 31st day of March 2008

O R D E R

Are the criminal courts jurisdictionally competent to impose a sentence of imprisonment in default of a direction to pay compensation under Section 357(3) Cr.P.C? What is the correct law on the point? Is the law declared in Harikrishnan and State of Haryana v. Sukhbir Singh & others[AIR 1988 SC 2127] reiterated unambiguously in Suganthi Suresh Kumar v. Jagdeeshan [AIR 2002 SC 681], in any way altered by the subsequent decision of the Supreme Court in Ettappadan Ahammedkutty @ Kunhappu v. E.P.Abdullakoya @ Kunhi Bappu and Another 2008(1)KLT 851 SC? Will it now be lawful for the Magistrates to impose such a default sentence?

2. The question appears to be a vexing one and it appears that there is absolute confusion in the subordinate judiciary about the correct law that ought to be followed. I deem it my duty to help the subordinate judiciary to ascertain the law with clarity. Such confusion cannot be permitted to continue. The question came up for consideration in many cases and all counsel who wanted to advance arguments were permitted to advance such arguments before me in this case on that aspect. All of them have been heard and permitted to assist this court. Two young counsel of this court, Sri.Jawahar Jose and Sri.C.V.Manu Vilsan were also requested to look up the matter in detail and assist the court as amicus curiae. They have certainly done justice to the assignment given to them by this court and I place on record my appreciation for the work done by them.

3. There can be no doubt whatsoever that a direction for payment of compensation to the victim can be issued by a Magistrate under Section 357(3) Cr.P.C. It is also well settled by now that such a direction can be issued for payment of amounts beyond the maximum fine which a Magistrate can impose under Section 29 of the Cr.P.C. The last trace of doubt, if any, on this aspect is laid to rest by the decision in Bhaskaran vs.Balan 1999 (3) KLT 440 (SC). The supreme Court observes so in paragraph 30 and 31 of the said decision.

> **"30.** *It is true, if a judicial magistrate of first class were to order compensation to be paid to the complainant from out of the fine realised the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of Rupees five thousand.*
>
> **31.** *However, the magistrate in such cases can alleviate the grievance of the complainant by making resort to S.357(3) of the Code. It is well to remember that this Court has emphasized the need for making liberal use of that provision. [Hari Krishnan and State of Haryana v. Sukhbir Singh and Ors. JT 1988(3) sc 11]. No limit is mentioned in the sub-section and therefore, a magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a court of magistrate of first class in respect of a cheque which covers an amount exceeding Rs.5,000/- the court has power to award compensation to be paid to the complainant."*

4. The next question is whether a default sentence can be imposed for failure to comply with the direction under Section 357(3) Cr.P.C. I shall first try to analyse the provisions of Code to ascertain whether such a power is available to the court. I shall proceed to consider precedents on the point later.

5. I must readily confess that I have not been able to place my finger on any provisions of the Code which specifically declares that such a default sentence can be imposed. Section 357(3)Cr.P.C only directs that when a court imposes a sentence of which fine does not form a part, the court may, when passing judgment order the accused person to pay by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the Act for which the accused persons have been so sentenced. Significantly, Section 357(3) Cr.P.C does not speak of the manner in which the direction can be enforced.

6. It is pointed out to me by the amicus curiae that in so far as directions for payment of compensation and cost under Sections 358 and 359 Cr.P.C are concerned there are specific provisions therein which stipulate that if payment is not made of such amounts a default sentence can be imposed. But in so far as Section 357(3) Cr.P.C is concerned, no such specific stipulation is seen made.

7. We now come to the manner in which such amount can be recovered. Section 431 Cr.P.C deals with the recovery of amounts other than fine. It reads as follows:

> **431** *Money ordered to be paid recoverable as a fine:-Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine:*

8. Reading Section 357(3) Cr.P.C and Section 431, it is evident that the amount of compensation directed to be paid under Section 357(3) Cr.P.C though not a fine will have to be recovered "as if it were a fine". Non fine is deemed to be a fine for the purpose of recovery under Section 431Cr.P.C. An amount of compensation ordered is no fine; but the law mandates in Section 431 that the courts must recover the same by deeming it to be a fine - "as if it were a fine". That is the mandate of Section 431 Cr.P.C.

9. The fiction is to be employed and must continue till the purpose of the fiction is exhausted. The fiction is pressed into service to facilitate recovery. Until the recovery is made, the deeming provision - the legal fiction - that compensation must be deemed to be fine must remain. All methods of recovery of fine must hence be held to be available for recovery of deemed fines also.

10. Section 421(1) Cr.P.C deals with the procedure for recovery of the fine amount. It reads as follows:

S.421. Warrant for levy of fine.- (1) When an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under Section 357.

11. While it is true that Section 421 enumerates the procedure for recovery of the fine amount, it must be noted that Section 421 does not at all fetter the option of the Magistrate to impose a default sentence. It is not the law that a Magistrate has to exhaust the procedure under Section 421 Cr.P.C before imposing or executing a default sentence. Nor is it the law that the liability for the fine amount being recovered under Section 421 Cr.P.C would come to an end in all cases as soon as the default sentence is undergone. Wherever the legislature wanted attempt for recovery under Section 421(1) Cr.P.C to be exhausted before imposing a default sentence, it has been made clear in the statutory provision itself. Reference to the language of Section 125(3) Cr.P.C andSection 3(4) of the Muslim Women (Protection of Rights on Divorce) Act in this context relevant. A default sentence under Section 125(3) of the Code of Criminal Procedure and Section 3(4) of the Muslim Women (Protection of Rights on Divorce) Act can be imposed only if the maintenance amount remains "unpaid after the execution of the warrant" for levying such amount. Not so in the case of fines stricto senso or deemed fines under Section 431 Cr.P.C. That appears to me to be significant.

12. That takes me to the next question as to where one can locate the legal authority for imposing a default sentence for non payment of fine (or deemed fine). A default sentence

it must be noted is no punishment under law. Section 53 I.P.C deals with the various punishments that can be imposed. Imprisonment in default of payment of fine is not a punishment prescribed underSection 53 I.P.C. It speaks only of five punishments (after deletion of the third clause) and significantly imprisonment in default of fine is not a punishment stipulated under the Indian Penal Code. No punishment can be imposed unless such punishment is reckoned as a punishment under the Indian Penal Code.

13. What then is the legal authority for imposing and the character of a default sentence - be it for non-payment of fine or deemed fine? It is here that we come to the relevant stipulations under the I.P.C and the Cr.P.C. Section 64 to Section 70 I.P.C deal with imposition of the sentence of imprisonment for non- payment of fine. I extract them below:

64. Sentence of imprisonment for non- payment of fine.- [In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable [with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,] it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a communication of a sentence.

65. Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.- The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

66. Description of imprisonment for non- payment of fine:- The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

67. Imprisonment for non-payment of fine, when offence punishable with fine only.- If the offence be punishable with fine only, [the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

68. Imprisonment to terminate on payment of fine.- The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. Termination of imprisonment on payment of proportional part of fine - If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminable.

70. Fine leviable within six years, or during imprisonment. Death not to discharge property from liability.- The fine, or any part thereof which remains unpaid, may be levied at any

time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts."

14. In the Cr.P.C, we get the relevant stipulations in Section 30 which is extracted below:

> **30.** *Sentence of imprisonment in default of fine.- (1) The Court of a Magistrate m a y award such term of imprisonment in default of payment of fine as is authorised by law:*
>
> *Provided that the term-*
>
> **(a)** *is not in excess of the powers of the Magistrate under Section 29;*
>
> **(b)** *shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.*
>
> **(2)** *The imprisonment awarded under this Section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate underSection 29.*

15. An analysis of the above provisions clearly reveals that default sentence is certainly not a punishment. It is only a method of enforcement of the direction for payment of amounts directed to be paid as fine. Wherever the Criminal Court has the jurisdictional competence to impose a fine, Sections 64 to 70 I.P.C and Section 30 Cr.P.C stipulate that the Court can recover the same by imposition of a default sentence. Section 25 of the General Clauses Act is also relevant in this context. The jurisdiction to impose a default sentence is only incidental to the power to impose a fine and the duty of the court to recover the same. It would be idle to look for a different provision to clothe the court with power to impose a default sentence. If there is power/jurisdiction to impose a fine there is the power, jurisdiction, responsibility and duty on the court to recover the same. The power to impose a default sentence is only incidental to such duty. The defaulter is compelled to pay such fine under the threat of detention. Until payment is made, such detention may be ordered to continue subject to the maximum period prescribed by Sections 64 to 70 I.P.C and Section 30 Cr.P.C. Imprisonment in default is no punishment. Detention in prison to enforce payment of amounts due is a concept known to the civil law of execution of decrees or orders. It is no punishment. It is only a step/method to compel payment. As soon as payment is made the imprisonment terminates also. Provisions of Sections 64 to 70 I.P.C and Section 30 Cr.P.C must certainly apply whether they be fines stricto senso or deemed fines as stipulated under Section 431 Cr.P.C as both amounts are to be recovered. The deeming under Section 431 Cr.P.C is pressed into service to facilitate recovery. It must continue till recovery is completed. Whether fine or deemed fine, Sections 64 to 70 I.P.C and Section 30 Cr.P.C must have application. The point is that the default sentence is not a punishment stricto senso. It is only a method of enforcement of a direction for payment of fine.

16. If that be so, when Section 431 stipulates that the amounts/deemed fines are to be recovered as fines, provisions relating to imposition of default sentence to enforce

recovery of the amounts must apply to such deemed fines also. It therefore appears to be very clear and easy to conclude that default sentence is not a punishment and that the same is only a method of recovery of fine/deemed fine. If it is no punishment and it is only a method of recovery, the fiction employed under Section 431 Cr.P.C must apply and all courses which are available for recovery of fine amount must apply for recovery of non-fines - but deemed fines, under Section 431 Cr.P.C.

17. The contention that framer of the Code of Criminal Procedure which stipulates in Sections 358and 359 that a default sentence can be imposed for non-payment of amounts under those Sections has not thought it fit to incorporate such a provision in Section 357(3) is impressive at the first blush but cannot obviously stand closer and careful scrutiny. Sections 64 to 70 I.P.C andSection 30 Cr.P.C cannot help to identify the maximum default sentence that can be imposed on a non accused, against whom alone directions under Sections 358 and 359 can be imposed. That, to mind clearly explains why the framers of the Code incorporated such provisions in Sections 358and 359 Cr.P.C. So far as the directions under Section 357 (3) Cr.P.C is concerned the framers of the Code evidently knew that the deeming done under Section 431 Cr.P.C would entail the application of Sections 64 to 70 I.P.C and Section 30 Cr.P.C and it was obviously felt that it was not necessary to incorporate identical provisions in Section 357(3) Cr.P.C as in Section 358 orSection 359 Cr.P.C.

18. Thus from first principles and from the provisions of the Code I find it easy to come to the conclusion that an amount directed to be paid under Section 357(3) Cr.P.C must be deemed to be a fine for the purpose of recovery under Section 431 Cr.P.C and once so deemed provisions relating to imposition of default sentence for non payment of fine under the I.P.C and the Cr.P.Cmust apply for the recovery of such deemed fines also.

19. I shall now refer to the precedents on this aspect. In Shanthilal v. State of M.P. [2008(1) SCC CRL, the Supreme Court observed thus in paragraph 31.

> *31. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in apeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount."*

20. The Supreme Court in Kuldip Kaur V.Surinder Singh [1989(1) SCC 405] had occasion to consider the very specific aspect in paragraphs 5 and 6 and had proceeded to observe that the imposition of sentence in default of payment is only a mode of enforcing recovery of the amount. Sentencing a person to jail (for default in payment of the amount due) is a "mode of enforcement" declared the Supreme Court in paragraph 6. The Supreme Court in that case was considering a direction to undergo default sentence under Section 125(3) Cr.P.C and the question was whether such sentence would wipe off the liability.

21. The conclusion therefore appears to be easy and unmistakable that the jurisdiction to impose default sentence is only incidental to the duty and powers to recover the fine amount directed to be paid. Such sentence imposed is only a mode of enforcement of the

direction to pay fine. Because of the deeming fiction under Section 431 Cr.P.C deemed fine can also be recovered as if it were fine and hence all 'modes of enforcement' of a direction to pay fine are available to a court to recover deemed fines under Section 431 Cr.P.C also.

22. Having thus come to such conclusion from principles, statutory provisions and precedents I shall now advert to the specific decisions of the Supreme Court on the question as to how an amount directed to be paid under Section 357(3) Cr.P.C is to be recovered. It will be apposite first of all to take note of the decision in Harikrishnan and State of Haryana v. Sukhbir Singh & others [AIR 1988 SC 2127] where the court considered the manner in which a direction for payment of compensation can be recovered. That was the decision of a two Judge bench. The court said so in paragraphs 10 and 11.

> **10.** *Sub-section (1) of S.357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-section(1). We are concerned only with Sub Section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructuve the victim crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.*
>
> **11.** *The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default.* (emphasis supplied)

23. We are also now concerned only with Sub.Section 3. It is held unambiguously in Harikrishnan that the court may enforce the order under Section 357(3) Cr.P.C by imposing sentence in default.

24. What I want to note particularly is that the learned Judges were specifically dealing withSection 357(3) Cr.P.C and had declared unambiguously that the court may enforce the order by imposing sentence in default. The principles of victimology have also got to be borne in mind. Criminal justice is not only punitive; but is certainly restitutive also. This has been declared by the Supreme Court and the High Courts repeatedly. We can ill-afford to ignore the plight of the third party in every crime - the victim of the crime. He deserves to be compensated. He deserves to be assured that the system has not forgotten him.

It follows that a toothless direction underSection 357(3) Cr.P.C is unlikely to achieve this result. The decision of the two Judge Bench in Harikrishnan clearly shows that a direction for payment of compensation under Section 357(3)Cr.P.C can be enforced by imposing a sentence in default.

25. Even after the decision in Harikrishnan, it appears that there were lingering doubts in the minds of the courts as to whether such a default sentence can be imposed. The Supreme Court in Harikrishnan had not discussed the jurisprudential basis on which such a direction can be issued. That evidently led to a lot of confusion and in the Kerala High Court itself, we find many decisions in which different views were taken by Judges holding the opinion that a default sentence cannot be imposed when attempt is made to recover compensation under Section 357(3)Cr.P.C. See the following decisions:

1. Rajendran v. Jose [2001 (3) KLT 431]

2. Radhakrishnan Nair v. Padmanabhan [2000(2) KLJ 349]

3. Siby v. Vilasini 1998(2) KLT 462

26. The confusion, if any on this aspect was, according to me, laid to rest by another two Judge Bench of the Supreme Court itself in Suganthi. A learned Judge of this court had taken the view that default sentence cannot be imposed. The Supreme Court expressed in unambiguous terms that such a view is impermissible. I need only extract paragraphs 8 to 10 of the decision in Suganthi to remove the last trace of doubt if any on this aspect.

8. *It is impermissible for the High Court to overrule the decision of the Apex Court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Art.141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neotia v. Union of India, AIR 1988 SC 1353 that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.*

9. *That apart, S.431 of the Code has only prescribed that any money (other than fine) payable by virtue of an order made under the Code shall be recoverable" as if it were a fine". Two modes of recovery of the fine have been indicated in S.421(1) of the Code. The proviso to the sub-section says that if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant for levy of the amount.*

10. *When this Court pronounced in Hari Singh v. Sukhbir Singh (supra) that a court may enforce an order to pay compensation "by imposing a sentence in default" it is open to all courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a larger Bench of this Court. Hence learned Single Judge of High Court of Kerala has committed an impropriety by expressing that the said legal direction of this Court should not be followed by the subordinate courts in Kerala. We express our disapproval of the course adopted by the said Judge in Rajendran v. Jose, 2001(3) Kerala Law Times 431. It is unfortunate*

that when the Sessions Judge has correctly done in a course in accordance with the discipline the single Judge of the High Court has incorrectly reversed it."

(emphasis supplied)

27. In the light of the unambiguous pronouncement in Suganthi explaining Harikrishnan no surviving doubt can linger in the minds of the judicial functionaries as to whether such a default sentence can be imposed or not. The Supreme Court has declared in Suganthi that the said legal position declared in Harikrishnan shall continue to hold good until it is overruled by a larger Bench of this court. Accordingly criminal courts have thereafter been imposing such default sentence.

28. I must say that the jurisdiction to impose such default sentences for non-payment of the compensation amount has helped considerably in doing justice to the victim as also the offender in many cases. Section 138 of the Negotiable Instruments Act was introduced by the Parliament in 1988 and with one stroke what was hitherto only a moral or civil wrong got transformed into a culpable penal offence. Conscience of the courts was not satisfied that deterrent substantive sentence of imprisonment would be justified in such cases. Courts have been resorting to the methodology of imposing a substantive sentence of imprisonment till rising of court coupled with a direction that the accused must undergo a default sentence if payment is not made. Thereby in the initial twilight period of enforcement of such a new penal provision, justice was worked out by not compelling the offender to serve any deterrent substantive sentence of imprisonment, ensuring at the same time that he makes amends for his culpable indiscretion by making payments to compensate the victim.

29. It is at this juncture that we have to consider the latest decision of another two Judge bench of the Supreme Court in Ettappadan Ahammedkutty @ Kunhappu v. E.P.Abdullakoya @ Kunhi Bappu and Another 2008(1)KLT 851 SC. I extract the entire decision below.

"Leave granted.

Compensation can be directed to be paid both in terms of sub-section (1) of Section 357 of the Code of Criminal Procedure as also sub-section (3) thereof. However, while exercising jurisdiction under sub- section (3) of Section 357, no direction can be issued that in default to pay the amount of compensation, the accused shall suffer simple imprisonment. Such an order could have been passed only in terms of sub- section (1) of Section 357. If the compensation directed to be paid by the court in exercise of its jurisdiction under sub-section (3) of Section 357 Cr.P.C is not deposited, the same can be realised as fine in terms of Section 423 of the Code. We are, therefore, of the opinion that that part of the impugned order whereby and whereunder the appellant has been directed to undergo imprisonment for a period of one month, in the event of default to pay compensation under sub-section (3) of Section 357, is set aside. Rest of the order of the High Court is upheld.

The appeal is disposed of with the aforementioned observations." (emphasis supplied)

30. Does the decision in Ahammedkutty offset and dislodge the dictum in Harikrishnan and Suganthi ? This is the problem posed before me. This is the dilemma before the courts below.

31. It is not necessary for me in this case to advert to specific precedents regarding the binding nature of such a later precedent. My attention has been drawn to the decisions in

1. Mamaleshwar Prasad & Another v. Kanhaiya Lal (Dead) [1975(2) SCC 232] Paragraph 7

2. Government of A.P & Another v. B.Sathyanarayana Rao [2004(4) SCC 262] Paragraph 8

3. Nirmaljeet Kaur v. State of M.P. & Another [2004(7) SCC 558] Paragraph 21

4. Central Board of Dawoodi Bohra Community & Another v. State of Maharashtra & Another[AIR 2005 SC 752] Paragraph 7

32. The law of precedents appears to be clear. I may only attempt to reiterate the same from principle and precedent. The following principles appear to be settled beyond controversy.

(i) The law declared by the Supreme Court, under Article 141 of the Constitution of India, is binding on all other courts.

(ii) Conflict between two decisions cannot be lightly inferred or assumed. Every attempt must be made by the courts to harmonise the various binding precedents. It will have to be assumed and presumed that, though not specifically referred to, the court was aware of all binding precedental dicta and statutory provisions.

(iii) If there be, and if only there be, unavoidable and irreconcilable and inescapable conflict, the question of which decision to follow and which to be reckoned as binding would arise. Then the decision of the larger bench must be followed. The position is the same whether the larger bench is prior or later in point of time. In such a situation the fact that the larger bench does not refer to the earlier decision of the smaller bench is irrelevant.

(iv) A smaller bench or a co-ordinate bench cannot lay down a legal proposition different from an earlier binding decision of a larger or co-ordinate bench. If there be disagreement, the smaller bench must follow the earlier binding decision and a co-ordinate bench is bound to refer the matter to a larger bench for its decision. The smaller bench if it disagrees can at best only request the Chief Justice to invoke his powers to place the matter before a larger bench. Consequently it must be assumed and presumed that no smaller or co- ordinate bench ever lays down or intends to lay down a principle contrary to the binding decision of an earlier larger or co-ordinate bench.

(v) If a smaller or co-ordinate bench refers to the decision of an earlier larger bench or co-ordinate bench and takes a decision explaining the same, such explanation/ understanding of the larger/co- ordinate bench decision by such smaller or co-ordinate bench shall be followed later by all smaller or co-ordinate benches unless they resort to the course of reference as indicated in (iv) above.

(vi) If any smaller or co-ordinate bench unfortunately overlooks or omits to refer to an earlier binding precedent of a larger or co-ordinate bench and a conflict of the nature referred to in proposition (i) exists such later decision has no binding sway and must be reckoned as rendered per incurium. Such decisions per incurium cannot be followed. Subordinate courts with respect must choose to follow the earlier binding

precedents notwithstanding the later per incurium decision of the smaller or co-ordinate bench.

33. The counsel contend that the decision in Ahammedkutty unfortunately does not refer to Harikrishnan and Suganthi and the contra legal position taken in Ahammedkutty cannot be held to be of much binding value. In paragraph 7 of Mamaleshwar Prasad and Another v. Kanhaiya Lal (Dead) Through L.Rs. [1975(2) SCC 232] it is observed so by the three Judge Bench of the Supreme Court in the following words.

> *"Certainty of the law, consistency of rulings and comity of courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. The Court does not intend to detract from the rule that in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents." (emphasis supplied)*

34. The counsel contend that inasmuch as Ahammedkutty does not refer to earlier binding precedents in Harikrishnan and Suganthi it must be held to be a decision rendered per incurium and hence not binding under Article 141 of the Constitution of India

35. I do note that unfortunately Harikrishnan and Suganthi were not brought to the notice of their lordships of the two judge bench when Ahammedkutty was decided. There is irreconcilable and head on conflict between the dicta in them. It is impossible to harmonise the conflicting stands taken in the said two decisions. Proposition (vi) explained above has to apply and the subordinate courts can only follow Harikrishnan and Suganthi until as stated in Suganthi a larger bench of the Supreme Court chooses to overrule the dictum.

36. Perhaps one way of looking at the whole issue is that in an appropriate case it is open to a court not to impose a default sentence. Merely because Sections 64 to 70 I.P.C and Section 30Cr.P.C permits and enables imposition of a default sentence, it is not invariable that such a default sentence ought to be imposed in all cases. But I must hasten to add that ordinarily and normally, and in the absence of exceptional and compelling reasons, no court should issue a toothless direction under Section 357(3) Cr.P.C. That option - not to impose a default sentence must be invoked only in exceptional cases and in the teeth of compelling reasons.

37. It is therefore declared that Harikrishnan and Suganthi will have to be followed by all subordinate courts in Kerala notwithstanding Ahammedkutty and that the criminal courts are competent to impose a default sentence while directing payment of compensation under Section 357(3) Cr.P.C.

38. Coming to the facts of the case, the petitioner was found guilty, convicted and sentenced under section 138 of the Negotiable Instruments Act to undergo simple imprisonment for a period of six months. He was further directed to pay an amount of Rs.1,00,000/- as compensation to the complainant under section 357(3) Cr.P.C. In appeal, the learned Sessions Judge allowed the appeal in part. Conviction was confirmed. Sentence was altered. The accused was sentenced to undergo imprisonment till rising of court. Further, he was directed to pay an amount of Rs.1,00,000/- as compensation and in default to undergo simple imprisonment for a period of six months. The verdict of guilty and conviction are

not assailed on any ground. But it is contended that the default sentence imposed is not justified in the light of the decision in Ahammedkutty .

39. I have already taken the view that in the light of Harikrishnan and Suganthi , the decision in Ahammedkutty cannot have the sway of a binding precedent. Imposition of the default sentence is thus found to be valid and legal. I am, in these circumstances, satisfied that the impugned appellate judgment does not warrant any interference.

41. Counsel prays that a short further time may be granted to the petitioner to raise the compensation amount, pay the same and avoid the default sentence. Proceedings were initiated as early as in 2004. The cheque bore the date 15.11.03.

I do not find much merit in the prayer for any further time for making the payment but however, I am satisfied that there can be a direction that the sentence shall not be executed till 2.5.08. On or before that date, the petitioner shall appear before the learned Magistrate for execution of the sentence.

39. This revision petition is in these circumstances dismissed with the above observations/ directions.

40. Issue copy of this order to all criminal courts in the State.

(R.BASANT, JUDGE) jsr

R.BASANT, J.

CRL.M.CNo.

ORDER 21ST DAY OF MAY2007

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JHARKHAND STATE LEGAL SERVICES AUTHORITY
NYAYA SADAN, Near A.G. Office
Doranda, Ranchi
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