Bijender Vs. State

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SooperKanoon Citation : sooperkanoon.com/1171282

Court : Delhi

Decided On : Sep-19-2014

Judge : Pradeep Nandrajog

Appellant : Bijender

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment Reserved on : September 11, 2014 Judgment Pronounced on : September 19, 2014 + CRL.A.857/2011 BIJENDER Represented by: .....Appellant Dr.Vijendra Mahndiya, Advocate with Ms.Pallavi Awasthi and Mr.Jaideep Bhati, Advocates versus STATE Represented by: ..... Respondent Mr.Lovkesh Sawhney, APP Insp.C.M.Meena, Addl.SHO, PS Kalyan Puri CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA PRADEEP NANDRAJOG, J.

1. Process of criminal law was set into motion when at around 07.20 P.M. on December 15, 2009, HC Durvesh Kumar PW-1, recorded DD No.17A, Ex.PW-1/A, noting therein that the wireless operator has informed that a gun-shot has been fired at a person by his brother at house bearing Municipal No.B-58-59, Gali No.6, Amar Vihar, Karawal Nagar, Delhi.

2. Being handed over a copy of DD No.17A, accompanied by Ct.Rajesh PW-12, ASI Habib Ahmed PW-21, proceeded to Gali No.6, Amar Vihar, Karawal Nagar where they learnt that a gun-shot has been fired at a person named Ajeet (hereinafter referred to as the Deceased) at his house, address whereof was B-56, Gali No.6, Amar Vihar, Karawal Nagar. After sometime, Insp.C.M.Meena PW-19 and HC Ramesh Chand PW-13, also reached the spot.

3. In the meantime, a PCR van reached the spot and removed the deceased to GTB Hospital where the deceased was brought dead as recorded in the MLC Ex.PW-19/A-1.

4. At the spot, Parvita PW-2, daughter-in-law of the deceased, was present and claimed to have knowledge about the incident of firing of gun-shot at the deceased. Insp.C.M.Meena PW-19, recorded the statement Ex.PW-2/A of Parvita and made an endorsement Ex.PW-19/A thereunder at 23:55 hours on December 15, 2009. He handed over the same to HC Ramesh Chand PW-13 for FIR to be registered. HC Ramesh Chand took the rukka to PS Karawal Nagar where SI Mohammad Shamim PW-6, recorded the FIR No.134/2009, Ex.PW-6/A.

5. The statement Ex.PW-2/A of Parvita, in Hindi, loosely translated reads as under:

I am a housewife and reside at the house bearing Municipal No.B-56, Gali No.6, Amar Vihar, Karawal Nagar, Delhi with my family. My father-in-law Ajeet has two brothers namely, Ram Niwas @ Bhola and Bijender (appellant). My one unclein-law Ram Niwas @ Bhola resides at village Gadi Katiya PS Loni District Ghaziabad U.P. and second uncle-in-law Bijender resides at Mukand Vihar Karawal Nagar. There were strained relations between my father-in-law Ajeet and uncle father-inlaw Bijender over the property situated in village. Bijender was selling the property in village and was not giving share to my father-in-law and other uncle-in-law Ram Niwas @ Bhola as a reason whereof there was enmity between my father-in-law and Bijender. Today, I was present at my house with my family and my father-in-law was having dinner with our tenant Amar Nath s/o Sh. Rattan Lal in the adjoining room when at about 07.00 P.M. my uncle-in-law Bijender came to our house and put a country made pistol (katta) on the temple (kanpati) of my

father-in-law who was having dinner and fired a shot upon which my father-in-law fell on the floor and blood started oozing out from his body. We tried to catch hold of Bijender but he pushed us and fled from there. This incident was also witnessed by my younger sister-in-law Rekha aged 14 years. Due to hoopla a crowd gathered at their house and our tenant made a call to the police. A police vehicle took my father-in-law to GTB Hospital. We have now learnt that my father-in-law has died. My uncle-in-law has fired a shot at my father-in-law over property dispute. A legal action be taken against him. I have read and heard my statement and the same is correct.

6. Few hours thereafter, Insp.C.M.Meena recorded statement Mark P- 2/A of Parvita under Section 161 Cr.P.C. wherein she stated that on December 15, 2009 the appellant had come to their house in his Indica car bearing No.DL5B9970which was parked by him in the street outside their house. While he was trying to escape from their house the keys of car of appellant had fallen in their house.

7. Parvita PW-2, handed over a key ring containing two keys to Insp.C.M.Meena PW-19, who seized the same vide memo Ex.PW-2/B. An Indica car bearing No.DL5B9970(stated to have been belonging to the appellant by the family members of the deceased) was parked outside the house of the deceased and the same was seized by Insp.C.M.Meena vide memo Ex.PW-19/H.

8. Insp.C.M.Meena thoroughly checked/examined the place of occurrence i.e. the room in the house of deceased where the deceased was shot and found a spent bullet on the sofa lying in said room and seized the same vide memo Ex.PW-19/G.

9. Insp.C.M.Meena also recorded the statements Mark P-3/B and Mark P-8/A of Rekha, daughter of the deceased and Amar Nath, tenant of the deceased, respectively wherein they also stated that the appellant had put a country made pistol on the temple of the deceased and fired a shot upon him and that the keys of car of appellant had fallen in the place of occurrence (house of the deceased) while he was trying to escape from there.

10. In addition thereto, Insp.C.M.Meena recorded the statement Mark P-4/2 of Anil, son of the deceased, under Section 161 Cr.P.C. wherein he stated that there were inimical relations between his family and appellant over property. On December 15, 2009 at about 07.00 P.M. he was standing in the street outside his house when the appellant came to his house in his Indica car. The appellant parked his car in the street outside their house. The moment appellant entered their house he heard the sound of firing of shot and shouts coming from his house. He went towards his house and saw that the appellant was running and his wife Parvita, sister Rekha and tenant Amar Nath were trying to stop him. He also tried to stop the appellant but he managed to flee from there.

11. On December 16, 2009 at about 2.20 P.M. Dr.Juthika Debbarma PW-5, conducted the post-mortem of the dead body of the deceased and prepared the post-mortem report Ex.PW-5/A. Being relevant, we note the following portion of the post-mortem report Ex.PW-5/A:

Time since death About eighteen hours. Cause of death Shock due to hemorrhage as a result of injury to major blood vessels of the neck. All the injuries are antemortem in nature and is sufficient to cause death in ordinary course of nature. The injuries are caused by missile of rifled firearm weapon. External antemortem Injuries:i) Firearm entry wound, oval in shape measuring 0.9 cm x 0.3 cm present on the lateral aspect of right side of neck, just below the right angle of mandible with abraded margin all around the wound, 9 cm from midline and 7.5 cm above the right clavicle. (C) Internal Examinations: III. Abdomen and other Stomach Full of semi-digested food.

(Emphasis Supplied) 12. Since the family members of the deceased had indicted the appellant as the assailant of the deceased the police set out to apprehend him but he i.e. the appellant could not be found.

13. On December 19, 2009 the appellant surrendered at Karkardooma District and was arrested. Insp.C.M.Meena interrogated the appellant in the presence of Ct.Raj Kumar PW-16. Appellant made a disclosure statement Ex.PW-16/B informing therein that he can get recovered the country made pistol used by him in murdering the deceased from a forest in Meerut.

14. The next day i.e. December 20, 2009, Insp.C.M.Meena again interrogated the appellant in the presence of Ct.Raj Kumar PW-16. Appellant made a (second) disclosure statement Ex.PW-16/C informing therein that he can get recovered the country made pistol used by him in murdering the deceased from his house. Thereafter the appellant led Insp.C.M.Meena and Ct.Raj Kumar to a room on the first floor of his house and got recovered a country made pistol from a drawer in a bed lying in said house. The country made pistol got recovered by the appellant was opened and an empty cartridge case was found therein. Insp.C.M.Meena seized the aforesaid country made pistol and empty cartridge case vide memo Ex.PW-16/E.

15. Insp.C.M.Meena sent the spent bullet seized from the place of occurrence, the country made pistol recovered at the instance of appellant and empty cartridge case found therein to FSL for ballistic examination. Vide FSL reports Ex.PW-18/A and B, it was opined that the country made pistol recovered at the instance of the appellant is in normal working condition; spent bullet seized from the place of occurrence was discharged through the country made pistol recovered at the instance of the appellant and empty cartridge case found in the country made pistol recovered at the instance of the appellant was fired through said pistol.

16. Armed with the aforesaid material, a challan was filed charging the appellant of having murdering the deceased.

17. Before noting the evidence led at the trial, we note that before filing of challan by the police in the present case Anil Kumar PW-4, son of the deceased, had filed an application Ex.PW-4/B through advocates Hans Raj Singh and S.K.Gill in the Court of Sonu Agnihotri, Metropolitan Magistrate, Karkardooma Courts as also made a complaint Ex.PW-4/C to the Deputy Commissioner of Police (North-East), Seelampur, Delhi stating therein that on December 15, 2009 the appellant had murdered his father i.e. the deceased and that the Investigating Officer (Insp.C.M.Meena) is conducting defective investigation in the case to shield the appellant as he is hand in gloves with the appellant.

18. At the trial, the prosecution examined 21 witnesses. We need not note in detail the testimonies of the witnesses associated with the investigation of the case for

they have deposed on the lines, of factual narratives, noted by us in the foregoing paragraphs, but would be highlighting such testimonies or other evidence which needs to be brought out for evaluating the creditworthiness of the evidence led at the trial.

19. On September 22, 2010 Parvita PW-2, the star witness of the prosecution was examined. Parvita deposed on the lines of her earlier statement Ex.PW-2/A. Additionally, she deposed that the key ring of the appellant containing two keys had fallen at the place of occurrence while appellant was trying to escape from the place of occurrence and she had handed over the same to the police. The police had recorded her statement Ex.PW-2/A and the same bears her signatures. The examination-in-chief of Parvita PW-2, could not be concluded on September 22, 2010 as key ring handed over by Parvita to the police was not produced from Malkhana on said day.

20. Thereafter Parvita was examined on January 18, 2011 i.e. after a period of about four months from the date when she was first examined, on which day she took a somersault by stating that on December 15, 2009 she had not seen the appellant coming to her house and firing a shot at the deceased. Additionally, she stated that the police had obtained her signatures on a blank paper and that she did not make the statement Ex.PW-2/A to the police.

21. Being relevant, we note the following portion of the cross- examination/re-examination of Parvita by the accused and prosecutor respectively:

xxx by Sh. Durgesh Pal Advocate for the accused. It is correct that there was no dispute between the accused and the deceased related to the village propertyIt is correct that there is a distance between the kitchen and the room in which my father-in-law was having dinner and the same was not visible from the kitchenIt is correct that I have not given any statement to the policeOn 15.12.2009 my husband Anil was not at home. It is correct that whatever I stated before the court on 22.9.2010 was due to pressure on me by the police. Re-examination by Ld. Addl. P.P. for State. I do not know the name of the police man who had pressured me to give the statement. The said policeman had met me on the earlier date at the time of recording my statement. I have stated before the court that I was being

pressured by the police to give the statement which I have on 22.09.2010. The court told me that I should lodge a complaint to the police. I never went to the police station thereafter as I did not know the name of that policeman. I have also not made any complaint or telegram before any senior police officers including, ACP and DCP. It is wrong to say that the statement given by me on 22.09.2010 was my true statement and whatever I am saying today in court is false.

(Emphasis Supplied) 22. Rekha PW-3, the daughter of the deceased, turned hostile and did not support the case of the prosecution that she had witnessed the appellant firing a shot at the deceased. She denied having made any statement to the police in said regard. Be it noted here that Rekha stated that she did not see anyone firing at the deceased as there was no electricity in the room where the deceased was shot at that time.

23. Being relevant, we note the following portion of the cross- examination of Rekha PW-3, by the prosecutor:

XXX by Sh.Mukul Kumar, Ld. Addl. P.P. for State. There are two rooms in the ground floor of H. No.B-56, Karawal Nagar and two rooms on the first floor. Kitchen is situated on the ground floor of the house. The Dining table is also placed on the ground floor of the house. Our tenant Amar Nath is residing in the room of the ground floor since about the last six months On 15.12.09, I was present in my house at about 7:00 P.M/8:00 P.M. and it was Tuesday. It is correct that Anil, myself and my bhabhi Pravita and my late father Ajit, my mother Munesh and my tenant Amar Nath were all present in the house. Photographs Ex.PW-3/1 to Ex.PW-3/7 are photographs of our house. There is no darkness visible in the photographs. It is correct that my late father Ajit Singh was having meals (dinner) in the house. It is also correct that the blood which is shown in the photographs also is of my father. .It is correct that my tenant Amar Nath had made a call to the police There is no confrontation or enmity between my father and the accused in relation to distribution of ancestral property. On 15.12.09, my bhabhi had cooked the dinner. My tenant Amar Nath was serving dinner to my late father at about 7:00 P.M. It is correct that Amar Nath himself was also having his dinner. It is also correct that my brother Anil was standing outside in the gali outside the house..It is

correct that my brother Anil rushed inside the house of hearing noise and commotion. I cannot say whether the keys of the vehicle of the accused had fallen down inside my house as he was trying to ran away..I have falsely stated in my statement to the police that accused Bijender had fired on my father Ajit Singh.

(Emphasis Supplied) 24. Be it noted here that Rekha PW-3, was not cross-examined by the appellant.

25. Anil PW-4, the son of the deceased, also turned hostile and did not support the case of the prosecution that on December 15, 2009 at about 07.00 P.M. he had seen the appellant going to the room where the deceased was having dinner and soon thereafter he heard the sound of firing of shot from said room and appellant escaping from there and his wife Parvita, sister Rekha and tenant Amar Nath trying to stop the appellant. He stated that he was standing in the street outside his house at the time of incident and has no knowledge as to who had fired a shot at the deceased. His wife Pravita, sister Rekha and tenant Amar Nath were present in his house at the time of incident.

26. Being relevant, we note the following portion of the cross- examination of Anil PW-4, by the prosecutor and the appellant:

XXX by Sh. Mukul Kumar, Ld. Addl. P.P. for State. On 15.12.2009, only my father (deceased) tenant Amar Nath, my mother Munesh and my sister Rekha were only present in the house and none other was present..Some neighbor might have called the police and Amar Nath might have called the police. There was no dispute or any enmity between my father and accused in respect of division of ancestral property left behind my father. I do not know whether my chacha accused Bijender is owning a INDICA car. My Chacha accused Bijender might have come to my house on his Indica Car No.9970. Accused Bijender might have to my house at B-56 Karawal Nagar when he would have come to know that we had visited his house but could not meet him. It is correct that when my Chacha accused Bijender had entered my house B-56, Karawal Nagar, and soon after he entered the house, there was loud noise of Gun Fire and I immediately rushed inside the house. I do not know whether my Chacha was still inside the house but when I entered the house, my father was bleeding profusely and there was also

loud cries. (rona chillana). I had moved an application in the court of Sh.Sonu Agnihotri Ld. M.M. on 24.2.2010. The application is Ex.PW-4/B which bears my signatures at point A that of my counsel Sh. S.K. Gill at point-B. The next on the application was 4.3.2010. It is correct that on both the dates I along with my counsel were present in the court. It is also correct that on 15.3.2010 also I was present in the court along with my Advocate Sh.S.K. Gill. My Advocate Sh.S.K. Gill Ex.PW-4/B whatever was stated by me to him. I had not stated in my application that my father was shot dead by his younger brother Bijender while he was taking food in the house. (Confronted with portion A to A-1 with application Ex.PW-4/A where it is so recorded). It is correct that I had raised lot of hue and cry in the court of Ld.MM that the police was not doing anything and was not investigating the matter properly and on the directions of the court, as per status report filed, my clothes were seized. It is correct that after the orders of court, I had handed over my clothes to the police which were then seized. I had stated in the court of Sh.Sonu Agnihotri Ld. M.M. that the contents of the application Ex.PW-4/B were not told by me or that same were incorporated by Counsel of his own. I cannot read the application and I do not know which portions are true and which portions are false. My application Ex.PW-4/B was read over by my house to me. I have never told the court of Ld. M.M. or my Advocate Sh.S.K. Gill that some of the contents of my application were false. There is another application on record Ex.PW4/C moved by me before the DCP North East, signed by me at point A and B. It is correct that in the said application I had stated that my father was shot by my chacha accused Bijender Singh while my father was taking dinner in the house.. It is correct that I had not brought to the notice of the court that my application Ex.PW4/B is a false application. x x x by Sh.M.R. Chanchal Ld. Counsel for the accused. It is correct that the complaint made to the Court of MM and to the DCP North East bear only my signatures and the contents thereof are not correct. It is correct that I was present outside the house when shot was fired at my father.

(Emphasis Supplied) 27. Dr.Juthika Debbarma PW-5, proved the post-mortem report Ex.PW-5/A of the deceased. Be it noted here that the witness was not cross-examined by the appellant.

28. Ram Niwas PW-7, brother of the deceased, also turned hostile and did not support the case of the prosecution that there were inimical relations between the deceased and appellant over property dispute.

29. Amar Nath PW-8, tenant of the deceased, also turned hostile and did not support the case of the prosecution that he had witnessed the appellant firing a shot at the deceased. He denied his presence at the house of the deceased at the time of the incident and stated that he had come to the house of the deceased at about 08.00/08.30 P.M. on December 15, 2009. He does not remember the police recording his statement on December 15, 2009 as he was under the influence of liquor.

30. Ct.Raj Kumar PW-16, deposed that on December 20, 2009 the appellant had led him and Insp.C.M.Meena to his house and got recovered a country made pistol kept under a mat from his bedroom.

31. In his statement under Section 313 Cr.P.C. the appellant denied everything and pleaded false implication.

32. The appellant did not lead any evidence in support of his defence.

33. Vide impugned judgment dated May 03, 2011 the learned Trial Judge has convicted the appellant for having murdered the deceased. In reaching said conclusion, the learned Trial Judge has held that:(i) somersault by Parvita in her cross-examination does not altogether wash away her testimony during examination-in-chief in view of law laid down by the Supreme Court in the decision reported as AIR 1991 SC1853 Khujji @ Surendra Tiwari v. State of M.P.; (ii) statement made by Parvita PW-2, in her examination-in-chief is creditworthy; (iii) and testimonies of Rekha PW-3 and Anil PW-4, establish the presence of appellant in the house of deceased at the time of incident; (iv) admission of Anil PW-4, in his cross-examination by prosecutor that on December 15, 2009 he had seen the appellant entering his house and soon thereafter he heard a sound of firing of shot from his house upon which he went to his house and saw the deceased bleeding profusely corroborates the case of the prosecution that the appellant had fired a shot at the deceased thereby causing his death; and (v) the

appellant has not led any evidence to substantiate the plea of alibi taken by him. Further, holding that the claim made by Insp.C.M. Meena PW-19 and Ct.Raj Kumar PW-16, that the appellant had got recovered a country made pistol from his house inspire confidence, the learned Trial Judge has convicted the appellant for having possessed an unlicensed firearm.

34. At the hearing, the learned counsel for the appellant advanced following four broad submissions:A The first submission advanced by the learned Counsel was that all the material witnesses of the prosecution viz. Parvita PW-2, Rekha PW-3, Anil PW-4, Amar Nath PW-8 and Ram Niwas PW-7 (examined by the prosecution to prove motive); having turned hostile, the prosecution has, proverbially speaking, no legs to stand. It was further argued by the learned Counsel that the learned Trial Judge committed an illegality in placing reliance on the examination-in-chief of Parvita PW-2, and ignoring that she had not supported the case of the prosecution in her cross-examination. It was submitted by the counsel that Parvita PW-2, was not worthy of reliance as she was shifting stands and there was no scale to find out which of her two statements was truthful. It was further submitted that the evidence of such a vacillating witness should be best ignored and discarded. B The second submission advanced by the learned Counsel was that statement given by Parvita PW-2, in her examination-in-chief does not inspire confidence for the reasons:- (i) Parvita had stated (in her examination-in-chief) that the appellant had fired a shot at the temple (kanpati) of the deceased whereas the post-mortem report Ex.PW-5/A of the deceased records that a firearm entry wound was found on the neck of the deceased implying thereby that a shot was fired at the neck of the deceased and (ii) Parvita had stated (in her examination-in-chief) that the appellant had fired a shot at the time when he i.e. the deceased was having dinner whereas the post-mortem report Ex.PW-5/A of the deceased shows presence of semi-digested food in the stomach of the deceased. Counsel argued that the presence of semi-digested food in the stomach of the deceased is clearly indicative of the fact that the deceased had consumed dinner much before his death and falsifies the statement of Parvita that the deceased was eating dinner at the time when the appellant had fired a shot upon him. C The third submission advanced by the learned Counsel was that the alleged recovery of the country made pistol at the instance of the appellant is most doubtful for the reasons: - (i)

Insp. C.M.Meena PW-19, deposed that the country made pistol was got recovered by the appellant from a drawer in a bed lying in his house whereas Ct.Raj Kumar PW-16, deposed that the pistol was got recovered by the appellant from under a mat; (ii) both Insp. C.M.Meena and Ct.Raj Kumar had deposed that they were accompanied by Ct.Kamal at the time of the recovery of the country made pistol by the appellant however the prosecution has not examined Ct.Kamal despite being a material witness to the recovery of the country made pistol; (iii) no public witness was associated by the police officials at the time of recovery of the country made pistol at the instance of the appellant despite there being presence of at least 2-3 public persons at the place of recovery of pistol i.e. the house of the deceased at the time of recovery as admitted by Insp.C.M.Meena; (iv) the part of disclosure statement Ex.PW-16/B of appellant that he can get recovered a country made pistol is not admissible in evidence inasmuch as the country made pistol was not recovered from the place mentioned in said disclosure statement (disclosure statement Ex.PW-16/B records that the appellant can get recover country made pistol from a forest in Meerut whereas the pistol was got recovered by the appellant from his house); and (v) second disclosure statement Ex.PW-16/C of the appellant is most doubtful as it is an undated document. D The fourth argument advanced was that Munesh, the wife of the deceased, was a material witness for the reason she could have thrown light on the incident of the murder of the deceased since the statement of Parvita PW-2, in her examination-in-chief and statements of other material witnesses of the prosecution recorded under Section 161 Cr.P.C. establish that the wife of the deceased was present in the house when the deceased was killed. Counsel argued that an adverse inference needs to be drawn against the prosecution for non-examination of the wife of the deceased in terms of illustration (g) appended to Section 114 of the Evidence Act that had the wife of the deceased been examined she would not have supported the case of the prosecution.

35. It is true that none of the alleged eye-witnesses, namely, Rekha PW-3, Anil PW-4 and Amar Nath PW-8, deposed that the appellant was the assailant of the deceased but then there is Parvita PW-2, who, as noticed above, deposed in her examination-in-chief that the appellant is the assailant of the deceased. It is no doubt true that Parvita having firmly supported the prosecution version and having

clearly implicated the appellant as the person involved in the crime wavered when crossexamined and tried to provide an escape route to the appellant by alleging that in her examination-in-chief, she had implicated the appellant at the instance of the police.

36. Should the Court, in view of somersault committed by Parvita in her cross-examination, take the evidence given by her in her crossexamination as unworthy of reliance?. Should the Court say that in view of what she has stated in her cross-examination, the involvement of the appellant in the crime stands not established?. Is it that Parvita has to be ignored as a witness unworthy of reliance?.

37. The learned Trial Judge has answered the aforesaid question(s) in negative. In so answering, the learned Trial Judge has sought sustenance from the observations of the Supreme Court in Khujjis case (supra).

38. Let us visit the facts of Khujjis case. The case set out by the prosecution against Khujji was that he and his companions had murdered the deceased and that 3 persons; namely, Komal Chand PW-1, Kishan Lal PW-3 and Ramesh PW-4, had seen him attack the deceased. During investigation, the said three witnesses had made statements that they had seen Khujji attack the deceased. However, while deposing in the Court, Kishan Lal PW-3 and Ramesh PW-4 did not support the case of the prosecution regarding the identity of Khujji as the assailant. Though Komal Chand PW-1 identified Khujji as the assailant during the examination-in-chief, but resiled from the same during cross-examination which was conducted about one month after the examination-in-chief. The trial court rejected the testimony of Kishan Lal and Ramesh in its entirety. The learned Trial Judge also rejected the testimony of Komal Chand on the ground that he was a chance witness, but convicted Khujji on the basis of other incriminating evidence against him. In an appeal filed by Khujji, dismissing the same and notwithstanding the fact that Komal Chand took a somersault vis--vis his cross-examination, the High Court relied upon the examination-in-chief to sustain Khujjis conviction. In doing so, the High Court held :(i) there was evidence on record to suggest that Komal Chand had been won over or succumbed to the threats extended to him by Khujji in the interregnum period between the recording of his examination-in-chief

and cross-examination, inasmuch as Kishan Lal had deposed that he was severely beaten on the night previous to his appearance in the court as a witness; and (ii) there was intrinsic material in the examination-in-chief of Komal Chand to establish that Khujji was the assailant.

39. Khujji challenged the legality of the judgment of the High Court before the Supreme Court. As regards the testimony of Kishan Lal and Ramesh, the Supreme Court noted that the said witnesses had supported the case of the prosecution as regards time, place and manner of the incident and had deviated from the same as regards the identity of the assailant. It was held by the Supreme Court that in view of the legal position that the testimony of a witness, declared hostile, is not wholly effaced from the record and that the part of the testimony of such a witness which is otherwise acceptable can be acted upon, the trial court committed an illegality in rejecting the testimony of Ramesh and Kishan Lal in its entirety and ought to have relied upon the same insofar they supported the case of the prosecution with respect to the time and place of the incident as also the manner of the assault. As regards the deposition of Komal Chand it was held by the Supreme Court that the High Court had rightly placed reliance on the statements made by Komal Chand in his examination-in-chief, particularly when the explanation given by him for wriggling out of the said testimony was flimsy. It would be apposite to note the following observations made by the Supreme Court:

On the basis of this statement Mr Lalit submitted that the evidence regarding the identity of the appellant is rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification by such a wavering witness. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in crossexamination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in

concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor is his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the appellant and his companions. We are, therefore, not impressed by the reasons which weighed with the trial court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the assailants.

40. It is significant to note that in Khujjis case (supra) notwithstanding the somersault taken by the witness during cross-examination, the Supreme Court placed reliance upon the statement given by the said witness in his examination-in-chief in view of the facts:(i) there was evidence on record to suggest that the witness had been won over or succumbed to the threats in the interregnum period between the recording of the examination-in-chief and cross-examination; (ii) there was intrinsic material in the examination-in-chief of the witness to establish that the statement given by the witness in his examination-in-chief was true; and (iii) the explanation given by the witness to wriggle out of the statement given by him in his examination-in-chief was flimsy.

41. We now turn to the facts of the present case.

42. Let it be emphasized that the examination-in-chief of Parvita PW- 2, was (partly) conducted on September 22, 2010. Unfortunately, the examination-in-chief of the witness could not be completed on said day and she was ultimately examined on January 18, 2011 i.e. after a gap of about 4 months from the date when her examination-in-chief was first recorded by the Trial Court. This, we feel, provided scope for maneuvering. The only explanation that the witness gave for making a somersault was that she was pressurized by the police to implicate the appellant in her examination-in-chief conducted on September 22, 2010. No complaint has been lodged by Parvita regarding pressure exerted upon her by the police to implicate the appellant. Let us for a moment assume that Parvita was under some kind of pressure from the police but in that event, she ought to have

complained to the learned Additional Sessions Judge about the same. She could also make a complaint to the superior officers of the police. We say so for the reason that if she could muster courage to tell the court during the course of her cross-examination conducted on January 18, 2011 that she had implicated the appellant in her examination-in-chief on the asking of the police, she could also gather the same strength during recording of her examination-in-chief. It was not the case of Parvita that in the intervening period of 4 months, the police officers who were pressuring him got transferred from the police station and she was therefore relieved from the pressure upon her.

43. A microscopic look at the testimonies of Parvita PW-2, Rekha PW- 3, Anil PW-4 and Amar Nath PW-8, is suggestive of the fact that the said witnesses were not speaking truthfully when examined at the trial (crossexamined in case of Parvita).

44. Parvita PW-2, stated in her cross-examination that her husband Anil was not present in the place of occurrence i.e. the house of the deceased at the time of occurrence. Whereas both Rekha PW-3 and Anil PW-4, have deposed that Anil was standing in the street outside his house (place of occurrence) at the time of occurrence and Anil immediately rushed inside his house on hearing the sound of firing of shot.

45. Amar Nath PW-8, the tenant of the deceased, has denied his presence at the house of deceased at the time of occurrence. Rekha PW-3, has deposed in categorical terms that Amar Nath was serving dinner to the deceased at the time when the deceased was shot dead. Even Anil PW-4, has deposed about the presence of Amar Nath in the house in question at the time of occurrence.

46. Most significantly, Anil PW-4, admitted having filed/made applications Ex.PW-4/B and Ex.PW-4/C to the Learned Magistrate and Deputy Commissioner of Police respectively wherein it was stated that the appellant had fired a shot at the deceased thereby causing his death. However, Anil attempted to disown said application/complaint by stating that the contents of said application/complaint were not told by him to his advocate Sh.S.K. Gill but incorporated by the advocate/typist on his own. It is highly unbelievable that the advocate/typist had incorporated the contents of the application/complaint on their own, particularly

when we find that Anil had not informed the Learned Magistrate before whom the application Ex.PW-4/B was listed that the contents of the application Ex.PW-4/B have not been told by him to his advocate.

47. It is but obvious that the witnesses; Parvita PW-2, Rekha PW-3, Anil PW-4 and Amar Nath PW-8, were not speaking truthfully when examined at the trial (cross-examined in case of Parvita). But, truth has an uncanny habit of coming out the least when it is expected to. Anil PW-4, has admitted the presence of the appellant in the house in question at the time of occurrence in his cross-examination. Not only this, Anil has admitted in his cross-examination that he had heard sound of firing of a shot soon after the appellant had entered his house on December 15, 2009. Even Rekha PW-3, has admitted subtly in her cross-examination that the appellant was present at the house in question and was escaping from there by stating that I cannot say whether the keys of the vehicle of the accused had fallen down inside my house as he was trying to run away. The aforesaid admissions made by Anil PW-4 and Rekha PW-3, in their respective cross-examinations, that the appellant was present in the house in question at the time of occurrence, Anil had heard sound of firing of a shot soon after the appellant had entered the house in question and that the appellant was escaping from the house in question coupled with the fact that Anil had filed/made applications Ex.PW-4/B and Ex.PW-4/C to the Learned Magistrate and the Deputy Commissioner of Police respectively wherein it was stated that the appellant had fired a shot at the deceased corroborates the statement given by Parvita PW-2, in her examination-in-chief, that the appellant is the assailant of the deceased. Indeed, the Investigating Officer was partisan. He did not investigate the case properly. There is no evidence led by the prosecution because the Investigation Officer did not visit the office of the Registration Authority under the Motor Vehicles Act and seize the record pertaining to the registration of the Indica Car No.DL5B9970 The said car was admittedly seized outside the house of the deceased. Further, the key of the car handed over by Parvita to the Investigating Officer which was seized vide memo Ex.PW-2/B was not attempted to be proved as that of the car in question. Thus, vital and relevant evidence to firstly link the key to the car, from which the only inference would be that since the key was found inside the house it was brought by the person who drove the car to the house and thus prove the

presence of the person in the house where the deceased was shot. But we hasten to add a word of caution. This would not mean that the deposition of Parvita PW-2 regarding appellants presence in the house has to be overlooked and that of Anil PW-4 during cross examination that soon after appellant entered their house there was loud noise of gun fire.

48. The statement given by Parvita in her examination-in-chief also gets corroborated by the fact that the FSL report Ex.PW-18/A has opined that the spent bullet recovered from the house in question was fired from the country made pistol recovered at the instance of the appellant. (We shall be dealing little later with the submissions advanced by the counsel for the appellant relating to recovery of country made pistol at the instance of the appellant).

49. In view of law laid down by the Supreme Court in Khujjis case (supra) and the fact that the statement given by Parvita PW-2, in her examination-in-chief that the appellant is the assailant of the deceased gets corroborated and the explanation given by Parvita to wriggle out of the statement given by her in her examination-in-chief is flimsy, we strongly feel inclined to accord with the learned Trial Judge that when Parvita implicated the appellant in her examination-in-chief, she was stating the truth and that when she resiled in her cross-examination it was not for her newly found respect for truth. We feel that it was the fear of the appellant. She along with others was a witness to a nerve-wrecking experience. The appellant had walked in their house and fired a shot at the deceased thereby causing his death. This was enough to instill fear in the witnesses. It is therefore no surprise to us that the other eye-witnesses declined to implicate the appellant as the assailant of the deceased. And let us also not be oblivious to the present day scenario. There being virtually no protection to the witnesses, criminal facing trial or apprehending prosecution loses no opportunity to either intimidate witnesses or win them over. Fearful of reprisal, the witnesses to the incident are too scared to come to the forefront. Hence, we feel Parvita PW-2, did initially muster courage to implicate the appellant as the culprit, it was no small a feat. She cannot, in our view, be branded as unworthy of reliance. It is true that the courage which she exhibited did not last long. We feel the gap of four months did the trick. Truth, so boldly proclaimed, became casualty in cross-examination. We propose to uphold

her statement in her examination-in-chief that the appellant is the assailant of the deceased. Truth has to prevail.

50. A comparable situation also arose before a Division Bench of this Court in the decision reported as 2005 (84) DRJ430Abdul Murasalin v. State. In the said case, three accused trespassed into the house of one Shama Parveen. Two accused were armed with revolvers and the third accused was having a knife. After having robbed Shama Parveen and her colleague Salvinder, the accused started outraging the modesty of Shama Parveen which evoked protest from Salvinder who questioned them as to why they were molesting her when they had even taken away all her valuables. On that, one of the accused asked him to keep shut and at the same time fired a shot at his forehead consequent to which he fell on the bed and died. Shama Parveen and the other alleged eye-witnesses though lending their full support to the prosecution version that there was robbery and murder, turned hostile on the crucial question of identification of the accused. However, one eye-witness Mohd Jamail PW-20, in his examination-in-chief fully supported the prosecution version and identified the accused as those involved in the commission of robbery and murder in the house of Shama Parveen but turned hostile in his cross-examination which was conducted two months after the recording of his examination-in- chief. After holding that no worthwhile explanation was given by the witness for resiling from the statement given by him in his examination-in-chief, the Division Bench placed reliance upon the deposition of the witness in his examination-in-chief and convicted the accused. It was further held by the Division Bench that the facts that the accused refused to participate in the Test Identification Parade without any justifiable reason, a country made pistol along with live cartridges was recovered from the possession of the two accused and that a gold chain and wrist watch belonging to Shama Parveen was recovered from the third accused lend due corroboration to the deposition of Mohd Jamail in his examination-in-chief that the accused were involved in the commission of robbery and murder in the house of Shama Parveen.

51. Before concluding the discussion on the first submission, we would like to quote following observations of Supreme Court in the decision reported as (2002) 2 SCC646Ambika Prasad v. State (Delhi Administration):

It is also to be pointed out that PW4Vikram Singh (informant) who had lodged FIR immediately was under constant threat and was compelled not to speak the truth despite the fact that he was the brother of the deceased. Other witnesses also turned hostile including PW6Prem Singh, son of Pratap Singh and PW8Rattan Singh, which indicates, as observed by the High Court, that the accused party was stronger in terms of money power and muscle power. At this stage, we would observe that the Sessions Judge ought to have followed the mandate of Section 309 Cr PC of completing the trial by examining the witnesses from day to day and not giving a chance to the accused to threaten or win over the witnesses so that they may not support the prosecution. It appears from the record that the examination-in-chief of PW4Vikram Singh was over on 6-2-1984. The counsel representing Ambika Prasad requested the Court that because of his uncle's demise, he would not be in a position to cross-examine the witness and, therefore, recording of further cross-examination might be adjourned. Thereafter, the witness was cross-examined in the month of July 1985. In our view, this is highly improper. Even if the request for adjournment of the learned Counsel for the accused was accepted, the cross-examination ought not to have been deferred beyond two or three days.

52. We expect that in future the learned Trial Courts would honour the dictum laid down by Supreme Court in Ambika Prasad's case (supra) and would make an endeavour to examine the material witnesses of the prosecution on a day to day basis.

53. It is settled legal position that unless the conflict between medical and ocular evidence is of irreconcilable opposites, credence and preference has to be given to ocular evidence subject to the caution that the ocular evidence should not be in conflict with fundamental facts. (See the decision of Supreme Court reported as 2005 Crl.LJ4111 State of Punjab v. Hakam Singh).

54. In the present case, Parvita PW-2, had stated in her examination-in- chief that the appellant had put a country made pistol on the temple (kanpati) of the deceased and fired a shot upon him. The post-mortem report Ex.PW-5/A of the deceased records that a firearm entry wound was found on the neck of the

deceased. The variance pointed out by the counsel between the statement of Parvita PW-2, and post-mortem report Ex.PW-5/A is explainable. The possibility that when the appellant had put a country made pistol on the temple of the deceased surely he i.e. the deceased would have maneuvered himself in order to save his life and thus the shot got fired at the neck of the deceased in this hustle-bustle cannot be ruled out.

55. On the issue of presence of semi-digested food in the stomach of the deceased, suffice would it be to state that the witnesses in India speak somewhat blurred. It is possible that the doctor who conducted the postmortem i.e. Dr. Juthika Debbarma PW-5, wanted to write presence of undigested food in the stomach of the deceased and ended up writing presence of semi-digested food instead of undigested food. In any case, the appellant has not cross-examined the doctor on the aspect of presence of semi-digested food in the stomach of the deceased.

56. In any case, the state of the contents of the stomach found at the time of post-mortem is not a safe guide for determining the time of death of a person. In this regards, we also note following observations made by a Division Bench of Bombay High Court in Crl.A. No.616/2004 titled Sanjay vs. State of Maharashtra decided on October 16, 2007:

Turning to the second limb of the argument based on the opinion of the autopsy surgeon, we may recall the dictum that, in case of a conflict between the ocular testimony and the medical evidence, the ocular evidence prevails unless it belies the fundamental facts. In case of variance between the medical evidence and ocular evidence, the ocular evidence should be separately assessed to ascertain its probative value. If the ocular evidence inspires confidence it would take precedence over the medical evidence which does not provide data with mathematical precision. Estimation of time based on the contents of the stomach depends on too many variables. The Medical Jurists concede that the estimation can only be tentative. This factor must also be considered. There can be supervening circumstances which might provide an explanation. All this data is not always available in record. In this background, the principle is evolved that if the

ocular evidence is satisfactory and inspires confidence, it should take precedence over the medical evidence. The Apex Court was dealing with similar set of circumstances in 2003 Cri LJ2011 State of U.P. Vs. Rasid & Ors. In that case the eye witnesses testified that the incident had taken place at 9.30 a.m. The High Court, however, considered the medical evidence in the form of contents of the stomach for coming to the conclusion that the incident could not have taken place at 9.30 a.m. as testified to by the eye witnesses. After confirming the truthfulness of the evidence of the eye witnesses, the Apex Court observed: Herein we must notice that the High Court has also relied upon the medical evidence to show that the dead bodies of Nasir and Chheddan contained semi-digested food when the post-mortem was conducted, therefore, the High Court inferred that the incident in question must have occurred much before these two deceased had an opportunity to answer the call of nature. This is a probability which can be utilised for the purpose of determining the time of incident provided there is no other acceptable evidence. Then again we must notice before the court decides to determine the time of death based on the stomach contents of the deceased, the court should first find out whether there is material to show on record as to the possibility of the deceased having or not having an opportunity to go to answer the call of nature before his/her death. It is not as if every human being without exception goes to ease himself first thing at daybreak, there may be innumerable reasons not to do so, therefore, presence of semi-digested food in the stomach of the deceased is not an absolute proof of the fact that the deceased must have died before daybreak. While we do agree that this can be a factor to be taken into consideration it cannot be such a prime factor as to overrule the acceptable oral evidence which is available on record. We also have to notice that the medical evidence tendered by PW7does not in fact support either of the sides because the doctor has said specifically from the appearance of rigor mortis that the death could have occurred at 9.30 a.m. on 20.2.1982. In the cross examination, he accepted the suggestion that the same could have occurred even earlier basing his opinion on the stomach contents, therefore, in the present case the medical evidence does not help the court to come to a positive conclusion as to the time of death. Therefore, on reappraisal of the evidence on record, we are of the opinion that the prosecution in this case has established by oral evidence that the incident

had actually occurred at about 9.30 a.m. and we find no reason why we should disbelieve the oral evidence in this regard especially because of the evidence of the independent injured witnesses like PW11and other two independent witnesses PWs 4 and 12 in regard to the timing of the incident.

24. In the present case on the basis of the contents of the stomach the autopsy surgeon has opined that the death must have taken place about six hours after the last meal. Contention of learned Counsel for the appellants that the prosecution witnesses have suppressed genesis of the occurrence and the defence adopted by the accused that the murder is committed by the prosecution witnesses and they are falsely implicated on account of the enmity, are based on the opinion of the autopsy surgeon regarding the time of death. We have noticed that the trial judge has referred to the commentary on the topic from Modi's Medical Jurisprudence and the authorities cited by the parties. Commenting on the topic "Time since death" (page

449) the Author in his book "Modi's Medical Jurisprudence and Toxicology (Twenty third edition) has mentioned that (i) warmth or cooling of the body; (ii) the absence or presence of cadaveric hypostasis; (iii) rigor mortis (iv) progress of decomposition and the contents of the stomach are generally considered for determination of the time of death. The author has made it clear that the period of digestion varies from 2.5 to 6 hours depending upon the nature of the food consumed. It is also made clear that some times the digestion may continue after the death. On an average the time required for digestion is taken to be six hours. We may reiterate that unless the medical evidence belies fundamental facts it cannot override ocular evidence which is found to be truthful. This aspect is elaborated in 2004 Cri LJ2490 Ram Bali Vs. State of U.P. In para 10 of the report the court observed:

10. Even otherwise, the plea that the medical evidence is contrary to the ocular evidence has also no substance. It is merely based on the purported opinion expressed by an author. Hypothetical answers given to hypothetical questions, and mere hypothetical and abstract opinions by textbook writers, on assumed facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent.

The time taken normally for digesting of food would also depend upon the quality and quantity of food as well, besides others. It was required to be factually proved as to the quantum of food that was taken, atmospheric conditions and such other relevant factors to throw doubt about the correctness of time of occurrence as stated by the witnesses. Only when the ocular evidence is wholly inconsistent with the medical evidence the court has to consider the effect thereof. This Court in Pattipati Venkaiah v. State of A.P. observed that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of. In Nihal Singh v. State of Punjab it was indicated that the time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.

57. Regarding the discrepancy pointed by the counsel for the appellant between the testimonies of Insp.C.M.Meena PW-19 and Ct.Raj Kumar PW-16, regarding the place of the recovery of the country made pistol at the instance of the appellant, suffice it to state that it is possible that the pistol was kept concealed under a mat in a drawer in a bed lying in the house of the appellant. That Ct.Raj Kumar PW-16, was stickler for details and thus deposed that the pistol was recovered from under a mat while Insp.C.M.Meena deposed that pistol was recovered from a drawer is explainable. In any case, the discrepancy pointed out by the counsel is not of such a kind that it would discredit the testimonies of Insp. C.M. Meena PW-19 and Ct.Raj Kumar PW-16, on the point of recovery of the country made pistol at the instance of the appellant,; particularly when we find that the testimonies of Insp.C.M. Meena PW-19 and Ct.Raj Kumar PW-16, otherwise inspire confidence.

58. On the issue of non-joining of public witnesses at the time of 19 and Ct.Raj Kumar PW-16, have deposed that none of the public persons present at/around the house of the appellant came forward to participate in the recovery proceedings. In this view of the matter, nonjoining of the public persons at the time of recovery is not fatal to the case of the prosecution regarding the recovery of a country made pistol at the instance of the appellant.

59. The submission regarding inadmissibility of disclosure statement Ex.PW-16/B is unmindful of the fact that subsequent to the making of disclosure statement Ex.PW-16/B the appellant had made another disclosure statement Ex.PW-16/C wherein he had stated that he can get recovered the country made pistol used by him in murdering the deceased from his house. Further, the submission that the disclosure statement Ex.PW-16/C is an undated document is factually incorrect for the disclosure statement Ex.PW-16/C is not an undated document but bears the date of December 20, 2012.

60. Lastly, we deal with the submission(s) relating to non-examination of Ct.Kamal (stated to have been associated with recovery of country made pistol at the instance of appellant) and Munesh, wife of the deceased, (stated to have been present at the place of occurrence i.e. house of the deceased at the time of occurrence) by the prosecution.

61. Who is a material witness?. What is the effect of non- examination of material witness on the veracity of the case set up by the prosecution against an accused?.

62. The answer to the aforesaid questions lies in the following observations made by Supreme Court in the decision reported as AIR "So is the case with the criticism leveled by the High Court on the prosecution case finding fault therewith for nonexamination of independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference

against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, nonexamination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The Court of facts must ask itself -- whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses....."

63. Tested on the aforesaid anvil of law, can it be said that the wife of the deceased was a material witness?.

64. Merely because of the fact that the wife of the deceased was present in the house in question around the time of the murder of the deceased, it cannot be assumed that she was a material witness for the possibility that the wife of the deceased was sleeping or was busy in some household work around the time of the murder of the deceased or because of any other reason could not acquire any knowledge about the events which happened around the time of the murder of the deceased cannot be ruled out. In the absence of any material on record pointing towards the fact that the wife of the deceased had any knowledge regarding the events which happened around the time of the wife of the deceased it cannot be said that the wife of the deceased was a material witness.

65. Be that as it may, merely because a material witness is not examined by the prosecution, a criminal court would not lean to draw an adverse inference that if he was examined, he would have given a contrary version. The illustration (g) appended to Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to

draw the adverse inference merely on the strength of non- examination of a witness even if the witness is a material witness. The afore-noted observations of the Supreme Court in Takhajis case (supra) also bring out that the non-examination of a material witness is not fatal in every case. It is only in cases where there is an infirmity or doubt in the case set up by the prosecution that the non-examination of material witness assumes significance. Thus, non-examination of Ct.Kamal or the wife of the deceased (even assuming she was a material witness) would not be fatal to the case of the prosecution for the prosecution is able to establish the guilt of the appellant beyond any reasonable doubt.

66. In view of above discussion, the present appeal is dismissed.

67. Two copies of the decision be sent to the Superintendent Central Jail Tihar. One for his record and the other to be supplied to the appellant.

68. TCR be returned. (PRADEEP NANDRAJOG) JUDGE (MUKTA GUPTA) JUDGE SEPTEMBER19 2014 mamta/skb