REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1266 OF 2011
[Arising out of SLP (Crl.) No.628 of 2008]

Senior Intelligence Officer … Appellant

Versus

Jugal Kishore Samra … Respondent

J U D G M E N T

AFTAB ALAM, J.

1. Leave granted

2. This appeal is directed against the judgment and order of the Andhra Pradesh High Court dated March 22, 2007 in Crl. R.C. No.300 of 2007 by which the High Court dismissed the criminal revision filed by the appellant and affirmed the order of the Metropolitan Sessions Judge dated December 15, 2006, directing that any interrogation of the respondent may be held only in the presence of his advocate.

3. The facts and circumstances in which this appeal arises need to be noticed first. On July 20, 2006, the officers of the Directorate of Revenue Intelligence (for short "DRI") Hyderabad, raided the premises of M/s Hy-Gro Chemicals Pharmatek Private Ltd. and found a shortage of 250kgs of

Dextropropoxyphene Hydrochloride (DPP HCL). DPP HCL is a manufactured narcotic drug as specified in Government of India's notification S.O. 826(E), dated November 14, 1985, at Serial no.87.

4. C.K. Bishnoi (accused no.1) and P.V.Satyanarayana Raju (accused no.2), the Managing Director and the Production Manager, respectively, of M/s Hy-Gro Chemicals Pharmatek Private Ltd., admitted that the drug was clandestinely cleared to M/s J. K. Pharma Agencies, New Delhi, of which the respondent, Jugal Kishore Samra and his brother, Ramesh Kumar Samra (accused no.3) happen to be the partners. On the next day, i.e., July 21, 2006, a search was carried out at the Cargo Complex of the Indira Gandhi International Airport, New Delhi, and five drums containing DPP HCL were discovered. On examination of the cargo it was found that the contraband was manufactured by M/s Hy-Gro Chemicals Pharmatek Pvt. Ltd. and was sent to M/s J.K. Pharma Agencies by wrongly declaring the consignment as 5-Amino Salicylic Acid. The Directorate of Revenue Intelligence registered a case against C.K. Bishnoi, P.V.Satyanarayana Raju and Ramesh Kumar Samra for the offences punishable under sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

5. While the statements of accused no.1 and accused no.2 had already been recorded under section 67 of the NDPS Act, the DRI officials summoned the respondent and his brother (accused no.3). According to the respondent, on November 5, 2006, when he, accompanied by his brother and

another person arrived at the DRI office in, Hyderabad, at 10:30pm, they were tortured by the DRI Officials. Unable to withstand the torture, the respondent suffered a heart attack and was moved to a hospital. The respondent was discharged on November 7, 2006 and advised complete bed rest for a month. But he went directly to the DRI Office to enquire about the whereabouts of his brother. He was kept waiting for 2 days and was also given threats of third degree methods. On November 9, 2006, en route to the DRI Office, the respondent developed chest pain and was again hospitalized till November 11, 2006.

6. In this background, the respondent filed an application for anticipatory bail under section 438 of the Code of Criminal Procedure which was allowed by the Metropolitan Sessions Judge by order dated December 1, 2006, **on the ground that the respondent was not shown as an accused in the case** and, therefore, the bar under section 37 of the NDPS Act did not apply to him and further, the medical record filed by the respondent showed that he had been suffering from heart disease and had already undergone heart surgery on two occasions.

7. After the grant of anticipatory bail, the respondent filed another application under section 438(2) of the Cr .P. C. for modification of the order of anticipatory bail to the extent that the interrogation and examination of the respondent be conducted in the presence of his advocate and a cardiologist. The Metropolitan Sessions Judge, by order dated December 15,

2006, partly allowed the application of the respondent after perusing the medical record and holding that the presence of an advocate at the time of interrogation of the respondent by the DRI officials is necessary to ensure free and fair interrogation.

8. Aggrieved by the order of the Metropolitan Sessions Judge dated December 1, 2006, the appellant moved the Andhra Pradesh High Court in Crl. M.P. No.5772 of 2006 praying for cancellation of the anticipatory bail granted to the respondent. The High Court found no merit in the petition and dismissed it by order dated January 31, 2007.

9. Here it may be noted that on the same day, i.e. January 31, 2007, another bench of the Andhra Pradesh High Court allowed another petition (Crl. M.P. No.5880 of 2006) filed by the appellant and cancelled the bail granted to the respondent's brother, Ramesh Samra by the Metropolitan Sessions Judge on December 19, 2006. Challenging the order of the High Court, however, Ramesh Kumar Samra, came to this Court in SLP (Crl.) No.1077/07. The special leave petition was allowed and by order dated December 10, 2009 this Court set aside the order of the High Court. The bail of Ramesh Kumar Samra too was, thus, restored.

10. Coming back to the case of the respondent, aggrieved by the order of the Metropolitan Sessions Judge dated December 15, 2006 directing for the respondent's interrogation to take place only in presence of his lawyer, the appellant sought to challenge it in revision before the High Court in Crl. R.

C. No.300 of 2007. The High Court dismissed the revision petition by order dated March 22, 2007, upholding the order of the Sessions Judge and observing as follows:

> "9. In the present case, on account of the apprehension of the respondent, the lower court permitted the Advocate to be present during the course of interrogation. But the Advocate was directed not to interfere during the course of interrogation. The purpose of the respondent requesting the presence of the Advocate is only on account of the apprehension that the Investigating Officers are likely to apply third degree methods like physical assault, etc., therefore, the learned Sessions Judge passed the impugned order.
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> 10. It is an undisputed fact that application of third degree method to the accused is prohibited and interrogation of the accused is a right provided to the Investigating Officer to elicit certain information regarding the commission of the offence. Though the Advocate was permitted to be present during the course of interrogation, he was prevented from interference during the course of interrogation. When the police do not resort to apply third degree methods, there cannot be any problem for them to interrogate the respondent to elicit necessary information relating to the above crime in the presence of his Advocate.
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> 11. After considering the above aspects, I am of the view that the order passed by the learned Sessions Judge is in no way affecting the right of the Investigating Officer to interrogate the respondent in the presence of his Advocate, therefore, I do not find any merit in this Revision Case."

11. Now, the matter has been brought to this Court by the appellant in appeal by grant of leave. At the special leave petition stage, the Court had made the direction that interrogation of the respondent can be carried out in accordance with the direction of the High Court. We are, however, informed

that the respondent has not been interrogated so far and the appellant is awaiting the order of the Court on his appeal.

12. Mr. K. T. S. Tulsi, Senior Advocate, appearing for the respondent stoutly defended the order passed by the Sessions judge and affirmed by the High Court. He invoked the rights guaranteed under Articles 20(3), 22(1) and 22(2) of the Constitution of India to justify the respondent's plea that his interrogation can take place only in presence of his lawyer. In support of the submission he placed great reliance on a decision by a bench of three judges of this Court in *Nandini Satpathy* v. *P. L. Dani*, (1978) 2 SCC 424.

13. Nandini Satpathy, a former Chief Minister of the State of Orissa was named as one of the accused in a case registered under sections 5 (2) read with section 5 (1) (d) & (e) of the Prevention of Corruption Act, 1947, and under sections 161, 165 and 120B and 109 of the Penal Code on the allegation of amassing assets disproportionate to her known and licit sources of income. For interrogation in connection with that case she was sent a long questionnaire along with summons to appear before the investigating officer on the fixed date and time and to answer those questions. She did not appear before the investigating officer as required by the summons where-upon the investigating officer filed a complaint against her under section 179 of the Penal Code. The Sub-Divisional Judicial Magistrate took cognizance of the offence and issued process against her. Questioning the order of the magistrate as violative of her right to silence she challenged it first before

the High Court of Orissa and on being unsuccessful there brought the matter to this Court.

14. The decision of the Court in the case of *Nandini Satpathi* was delivered by Justice Krishna Iyer and it is a fine example of his Lordship's inimitable polemical style of writing. The boldness of *Miranda* v. *Arizona*, (1966) 384 US 436 as an instance of judicial innovation and positivism was still quite fresh and taking *Miranda* as a source of inspiration, Iyer J., pondered over issues of Judicial philosophy and speculated about the frontiers to which he would have liked to expand the constitutional guarantee under Article 20(3), maintaining, of course, the fine balance between the rights of the individual and the social obligation "to discover guilt, wherever hidden, and to fulfill the final tryst of the justice system with the society.

15. At the beginning of the judgment in paragraph 10, the Court framed 10 issues that arose for consideration, three of which may have some relevance for our present purpose and those are as follows:

> "1. Is a person likely to be accused of crimes i.e. a suspect accused, entitled to the sanctuary of silence as one 'accused of any offence'? Is it sufficient that he is a potential-of course, not distant-candidate for accusation by the police?
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> 3. Does the constitutional shield of silence swing into action only in court or can it barricade the 'accused' against incriminating interrogation at the stages of police investigation?

> 7. Does 'any person' in Section 161 Criminal Procedure Code include an accused person or only a witness?"

16. At the end of a lengthy debate, the Court proceeded to answer the issues in paragraph 57, which is reproduced below:

> "57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like-not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3)."

17. It may be mentioned here that in holding, "the prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only" the decision in *Nandini Satpathy* apparently went against two earlier constitution bench decisions of this

Court in *Ramesh Chandra Mehta* v. *State of West Bengal*, 1969 (2) SCR 461 and *Illias* v. *Collector of Customs, Madras*, 1969 (2) SCR 613.

18. In *Nandini Satpathy*, the Court proceeded further, and though the issue neither arose in the facts of the case nor it was one of the issues framed in paragraph 10 of the judgment, proceeded to dwell upon the need for the presence of the advocate at the time of interrogation of a person in connection with a case. In paragraphs 61-65 of the judgment, the Court made the following observations:

> "61. It may not be sufficient merely to state the rules of jurisprudence in a branch like this. The man who has to work it is the average police head constable in the Indian countryside. The man who has to defend himself with the constitutional shield is the little individual, by and large. The place where these principles have to have play is the unpleasant police station, unused to constitutional nuances and habituated to other strategies. Naturally, practical points which lend themselves to adoption without much sophistication must be indicated if this judgment is to have full social relevance. In this perspective we address ourselves to the further task of concretising guidelines.
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> 62. Right at the beginning we must notice Article 22(1) of the Constitution, which reads:
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> > No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
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> The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under

circumstances of near custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a-legal practitioner of his choice.

63. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The *Miranda* decision has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

64. Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

65. We realize that the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous. The police need not wait for more than for a reasonable while for an advocate's arrival. But they must invariably warn –and record that fact- about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgment."

19. It is on these passages in *Nandini Satpathy* that Mr. Tulsi heavily relies and which practically forms the sheet-anchor of his case.

20. The difficulty, however, is that *Nandini Satpathy* was not followed by the Court in later decisions. In *Poolpandi & Ors* v. *Superintendent, Central Excise & Ors.*, (1992) 3 SCC 259, the question before a three judge bench of this Court was directly whether a person called for interrogation is entitled to the presence of his lawyer when he is questioned during the investigation under the provisions of the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. On behalf of the persons summoned for interrogation, strong reliance was placed on *Nandini Satpathy*. The Court rejected the submission tersely observing in paragraph of 4 of the judgment as follows:

> "4. Both Mr. Salve and Mr. Lalit strongly relied on the observations in *Nandini Satpathy* v. *P.L. Dani*, (1978) 2 SCC 424. We are afraid, in view of two judgments of the Constitution Bench of this Court in *Ramesh Chandra Mehta* v. *State of W.B.*, (1969) 2 SCR 461, and *Illias* v. *Collector of Customs, Madras*, (1969) 2 SCR 613, the stand of the appellant cannot be accepted. The learned counsel urged that since *Nandini Satpathy case* was decided later, the observations therein must be given effect to by this Court now. There is no force in this argument."

21. Further, in paragraph 6 of the judgment, the Court referred to the Constitution Bench decision in *Ramesh Chandra Mehta* and observed as follows:

> "6. Clause (3) of Article 20 declares that no person accused of any offence shall be compelled to be a witness against himself.

It does not refer to the hypothetical person who may in the future be discovered to have been guilty of some offence. In *Ramesh Chandra Mehta* case, the appellant was searched at the Calcutta Airport and diamonds and jewelleries of substantial value were found on his person as also currency notes in a suitcase with him, and in pursuance to a statement made by him more pearls and jewellery were recovered from different places. He was charged with offences under the Sea Customs Act. During the trial, reliance was placed on his confessional statements made before the Customs authorities, which was objected to on the ground that the same were inadmissible in evidence *inter alia* in view of the provisions of Article 20(3). While rejecting the objection, the Supreme Court held that in order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person, it has to be established that when he made the statement in question, he was a person accused of an offence. Pointing out to the similar provisions of the Sea Customs Act as in the present Act and referring to the power of a Customs Officer, in an inquiry in connection with the smuggling of goods, to summon any person whose attendance he considers necessary to give evidence or to produce a particular document the Supreme Court observed thus: (pp.469-70)

> "The expression 'any person' includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected or infringing the provisions of the Sea Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of Customs when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the

> person of any offence punishable at a trial before a Magistrate."
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> The above conclusion was reached after consideration of several relevant decisions and deep deliberation on the issue, and cannot be ignored on the strength of certain observations in the judgment by three learned Judges in Nandini Satpathy case which is, as will be pointed out hereinafter, clearly distinguishable."

22. An argument in support of the right of the persons called for interrogation was advanced on the basis of Article 21 of the Constitution. The Court rejected that submission also observing in paragraph 9 of the judgment as follows:

> "9. Mr. Salve has, next, contended that the appellant is within his right to insist on the presence of his lawyer on the basis of Article 21 of the Constitution. He has urged that by way of ensuring protection to his life and liberty he is entitled to demand that he shall not be asked any question in the absence of his lawyer. The argument proceeds to suggest that although strictly the questioning by the Revenue authorities does not amount to custodial interrogation, it must be treated as near custodial interrogation, and if the same is continued for a long period it may amount to mental third degree. It was submitted by both Mr. Salve and Mr. Lalit that the present issue should be resolved only by applying the 'just, fair and reasonable test', and Mr. Lalit further added that the point has to be decided in the light of the facts and circumstances obtaining in a particular case and a general rule should not be laid down one way or the other. Mr. Salve urged that when a person is called by the Customs authorities to their office or to any place away from his house, and is subjected to intensive interrogation without the presence of somebody who can aid and advise him, he is bound to get upset, which by itself amounts to loss of liberty. Reference was made by the learned counsel to the minority view in *Re Groban*, 352 US 330, 1 L Ed 2d 376, declaring that it violates the protection guaranteed by the Constitution for the State to compel a person to appear alone before any law

> enforcement officer and give testimony in secret against his will."

23. Referring to the facts in *Re Groban* and the view taken in the minority judgment in the case the decision in *Poolpandi* observed in paragraph 10 as follows:

> "10…..We do not share the apprehension as expressed above in the minority judgment in connection with enquiry and investigation under the Customs Act and other similar statutes of our country. There is no question of whisking away the persons concerned in these cases before us for secret interrogation, and there is no reason for us to impute the motive of preparing the groundwork of false cases for securing conviction of innocent persons, to the officers of the state duly engaged in performing their duty of prevention and detection of economic crimes and recovering misappropriated money justly belonging to the public. Reference was also made to the observation in the judgment in *Carlos Garza De Luna, Appt*. v. *United States*, American Law Reports 3d 969, setting out the historical background of the right of silence of an accused in a criminal case. Mr. Salve has relied upon the opinion of Wisdom, Circuit Judge, that the history of development of the right of silence is a history of accretions, not of an avulsion and the line of growth in the course of time discloses the expanding conception of the right than its restricted application. The Judge was fair enough to discuss the other point of view espoused by the great jurists of both sides of Atlantic before expressing his opinion. In any event we are not concerned with the right of an accused in a criminal case and the decision is, therefore, not relevant at all. The facts as emerging from the judgment indicate that narcotics were thrown from a car carrying the two persons accused in the case. One of the accused persons testified at the trial and his counsel in argument to the jury made adverse comments on the failure of the other accused to go to the witness box. The first accused was acquitted and the second accused was convicted. The question of the right of silence of the accused came up for consideration in this set up. In the cases before us the persons concerned are not accused and we do not find any justification for "expanding" the right

> reserved by the Constitution of India in favour of accused persons to be enjoyed by others."

24. In the end, the Court allowed the appeal filed by the Revenue authorities in the case in which the High Court had directed for interrogation to take place in presence of the advocate and dismissed all the other appeals in the batch on behalf of the individuals in whose cases the High Court had declined to give any such direction.

25. It is seen above that the respondent applied for and got anticipatory bail on the premise that he was not an accused in the case. There was no change in his position or status since the grant of bail till he was summoned to appear before the DRI officers. On the facts of the case, therefore, it is futile to contend that the respondent is entitled, as of right, to the presence of his lawyer at the time of his interrogation in connection with the case. Moreover, the respondent's plea for the presence of his lawyer at the time of his interrogation clearly appears to be in teeth of the decision in *Poolpandi*. Nonetheless, Mr. Tulsi contended that the respondent's right was recognized by this Court and preserved in *Nandini Satpathy* and the decision in *Poolpandi* has no application to the present case. According to Mr. Tulsi, the respondent is summoned for interrogation in connection with a case registered under the NDPS Act, which Mr. Tulsi called a "regular criminal" case, while *Poolpandi* was a case under the Customs Act and so were the two cases before the constitution bench in *Ramesh Chandra Mehta* and in

Illias that formed the basis of the decision in *Poolpandi*. In our view, the distinction sought to be drawn by Mr. Tulsi is illusory and non-existent. The decision in *Poolpandi* was in cases under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. Both these Acts have stringent provisions regarding search, seizure and arrest and some of the offences under each of these two Acts carry a punishment of imprisonment up to 7 years. We, therefore, fail to see, how a case registered under NDPS Act can be said to be a "regular criminal" case and the cases under the Customs Act and the Foreign Exchange Regulation Act, not as criminal cases.

26. In view of the clear and direct decision in *Poolpandi*, we find the order of the High Court, affirming the direction given by the Sessions Judge clearly unsustainable.

27. We may, however, at this stage refer to another decision of this Court in *D.K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416. In this case, the Court, extensively considered the issues of arrest or detention in the backdrop of Articles 21, 22 and 32 of the Constitution and made a number of directions to be followed as preventive measures in all cases of arrest or detention till legal provisions are made in that behalf. The direction at serial number 10 in paragraph 35 is as follows:

> "(10). The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."

28. Strictly speaking the aforesaid direction does not apply to the case of the respondent, because he being on bail cannot be described as an arrestee. But, it is stated on behalf of the respondent that he suffers from heart disease and on going to the DRI office, in pursuance to the summons issued by the authorities, he had suffered a heart attack. It is also alleged that his brother was subjected to torture and the respondent himself was threatened with third degree methods. The medical condition of the respondent was accepted by the Metropolitan Sessions Judge and that forms one of the grounds for grant of anticipatory bail to him. Taking a cue, therefore, from the direction made in *DK Basu* and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation.

29. The order passed by the Metropolitan Sessions Judge and affirmed by the High Court is substituted by the aforesaid directions made by us.

30. Before closing the record of the case, we may state that arguments were advanced before us, when does a person called for interrogation in connection with a case ceases to be a mere provider of relevant information

or a witness and becomes an accused entitled to the Constitutional protections. Arguments were also addressed on Article 20(3), 22(1) and 22(2) and section 161 of the Cr.P.C. But, in the facts of the case we see no reason to go into those questions and we are satisfied that the present case is fully covered by the three judge bench decision of this Court in *Poolpandi*.

31. In the result, the orders passed by the High Court and the Metropolitan Session Judge are set aside and the appeal is allowed to the extent indicated above.

.....J
(AFTAB ALAM)

.....J
(R.M. LODHA)

New Delhi,
July 5, 2011.