HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

1. S.B. Criminal Appeal No. 279/1990

The State of Rajasthan

----Appellant

Versus

1. Devendra @ Baba S/o Ram Singh, Resident of New Abadi, Laturpura, Tahan, Rakabgank, Agra (UP) **(Now deceased)**
2. Amarnath @ Bhagat S/o Chhidda, resident of Dabali, Thana Malpura, District Agra (UP)
3. Nihal Singh S/o Mungaram, R/o Dheemarpura, Thana Iradat Nagar, District Agra (UP).

----Accused-Respondents

Connected With

2. S.B. Criminal Appeal No. 400/1990

The State of Rajasthan

----Appellant

Versus

1. Devendra @ Baba S/o Ram Singh, Resident of New Abadi, Laturpura, Tahan, Rakabgank, Agra **(Now deceased)**
2. Amarnath @ Bhagat S/o Chhidda, resident of Dabali, Thana Malpura, District Agra
3. Nihal Singh S/o Mungaram, R/o Dheemarpura, Thana Iradat Nagar, District Agra.

----Accused-Respondents

3. S.B. Criminal Appeal No. 424/1990

The State Of Rajasthan

----Appellant

Versus

1. Bhagat @ Amarnath S/o Chhidda, resident of Dabali, District Agra UP
2. Baba @ Devendra son of Ramsingh, resident of Bundu katra Nai Abadi, Agra (UP) **(Now deceased)**
3. Pappu @ Karan Singh, S/o Gurucharan, resident of Awagarh, UP

----Respondent

4. S.B. Criminal Appeal No. 61/1990

1. Nihal Singh Son of Shri Moonga Ram, resident of Dheemarpura, PS Iradatnagar, District Agra (UP)

2. Shri Niwas Son of Sampat Ram, resident of Samor PS Rajukhera, District Dholpur

3. Diwan Singh son of Sukhram, resident of Banwari PS Sikandara, District Agra (UP)

4. Bhagat @ Amarnath son of Chidda, resident of Dabli, PS Malpura, District Agra (UP)

5. Baba @ Devendra son of Ramsingh, resident of Bundukatra PS Rakabganj, District Agra (UP) **(Now deceased)**

----Accused-Appellants

Versus

The State of Rajasthan

----Respondent

For Appellant(s)	:	Mr. Sher Singh Mahla, PP (for respondent in Appeal No.61/1990)
For Respondent(s)	:	Mr. Vinit Sharma for Mr. B.M. Sharma (for appellants in Appeal No.61/1990)

HON'BLE MR. JUSTICE SUDESH BANSAL

Judgment

Reserved on: **24/04/2024**

Pronounced on: **18th/06/2024**

BY THE COURT

1. With consent of counsel for accused and Public Prosecutor, all four appeals have been heard together and would stand decided by this common judgment.

2. Record of each case including the impugned judgment, has been scanned and gone through.

3. State's Appeal No.279/1990 filed under Section 378 CrPC, arises out of an FIR No.8/1988 registered at Police Station Roopbas, District Bharatpur on 17.01.1988 for offences under Sections 395 and 397 IPC in respect of incident of dacoity

allegedly committed in the mid night of 16-17th January, 1988. After investigation, charge-sheet against three accused namely Devendra @ Baba, Amarnath @ Bhagat and Nihal Singh was filed, whereupon Sessions Case No.52/1988 came to be registered and after trial, all three accused persons have been acquitted of charge for offences under Sections 395 and 397 IPC extending benefit of doubt vide judgment dated 30.06.1989 passed by the Sessions Court of Special Judge, Dacoity Affected Areas, Bharatpur. Hence, against the judgment of acquittal, State has preferred this criminal appeal.

4. State's Appeal No.400/1990 arises out of FIR No.43/1988 registered at Police Station Roopbas, District Bharatpur by one Brijendra Singh Jat, on 19.03.1988 for offences under Section 395 and 397 IPC in respect of incident of dacoity allegedly occurred in the mid night of 18-19th March 1988 at Nangla Haveli. In this FIR, during investigation three accused namely Devendra @ Baba, Amarnath @ Bhagat and Nihal Singh, who have been arrested in FIR No.8/1988 at same Police Station Roopbas on 10.05.1988 were also arrested in the present FIR as well. After filing of charge-sheet, Sessions Case No.53/1988 was registered and the Court of Special Judge, Dacoity Affected Area, Bharatpur, after appreciation of prosecution evidence, acquitted all three accused vide judgment dated 29.06.1989 having concluded that identification of accused persons to be involved in the incident of dacoity in the mid night of 18-19th March, 1988 is not established beyond reasonable doubt and it is also not proved that which

deadly weapon was used by which offender, accordingly offences under Sections 395 and 397 IPC were not proved against accused. Hence, challenging the judgment of acquittal dated 29.06.1989, State has preferred this criminal appeal.

5. State's Appeal No.424/1990 has arisen out of FIR No.69/1988 registered at Police Station, Sewar, District Bharatpur for offences unders 395, 397 and 412 IPC in respect of incident of dacoity allegedly occurred in the mid night of 9-10th April, 1988 at village Dhanagarh. In this FIR, during investigation four accused persons namely Devendra @ Baba, Amarnath @ Bhagat, Nihal Singh and Pappu @ Karan Singh were arrested and after filing of charge-sheet, Sessions Case No.51/1988 was registered. All four accused have been given benefit of doubt and acquitted by the Court of Special Judge, Dacoity Affected Areas, Bharatpur vide judgment dated 16.01.1990. Hence, against the judgment of acquittal, State has preferred this criminal appeal, but in the appeal, acquittal of only three accused namely Devendra @ Baba, Amarnath @ Bhagat and Pappu @ Karan Singh has been challenged and no appeal against acquittal of co-accused Nihal Singh has been filed as he has not been made party respondent in this appeal. It is to be noted that as far as three accused namely Devendra @ Baba, Amarnath @ Bhagat and Nihal Singh are concerned, they all had similar charges for offences under Section 395 and 397 IPC and were arrested in the present FIR on 29.04.1988 i.e. on the next date, when these three accused had already been arrested on 28.04.1988 in connection with FIR

No.87/1988 registered at Police Station, Sewar, Bharatpur for offences under Sections 399, 402 IPC and 3/25 of the Arms Act. The test identification parade of three accused in the present FIR No.69/1988 was conducted on 02.05.1988. As far as fourth accused Pappu @ Karan Singh is concerned, he was arrested on 08.05.1988, for charge of offence under Section 412 IPC only on apprehension that the looted jewellery by dacoits were allegedly to be sold to him, as informed by arrested dacoits Devendra @ Baba and Nihal Singh.

6. Criminal Appeal No.61/1990 has been jointly filed by five accused-appellants under Section 374 CrPC which arises out of FIR No.87/1988 registered at Police Station, Sewar, District Bharatpur for offences under Sections 399, 402 IPC and Section 3/25 of the Arms Act. This FIR was registered by police official, in-charge of Police Station, who received a secret information in the night of 28.04.1988 about 8:30 PM that 5-6 miscreants have been assembled at village-Garhi Jalim Singh and making a preparation for committing dacoity at the house of Ramsahay Gurjar on the occasion of marriage of his daughter. Police party conducted a raid and arrested six accused persons namely Devendra @ Baba, Amarnath @ Bhagat, Nihal Singh, Shri Niwas, Diwan Singh and Krishan Kumar on the spot in the night of 28.04.1988 itself. After arrest, charge-sheet was filed against them and Sessions Case No.50/1988 came to be registered, but one of accused Krishan Kumar absconded, therefore, the trial of criminal case against other five accused, who were in custody was separated. Three charges were framed against them: Charge No.1:- Accused

persons assembled for the purpose of committing dacoity?; Charge No.2:- The act and conduct of accused persons amount to make preparation for committing dacoity?; Charge No.3:- Accused persons were in possession of firearms and cartridge in breach of Section 3 of the Arms Act? The Court of Special Judge, Dacoity Affected Area, Bharatpur, conducted trial of Sessions Case No.50/1988 and vide judgment dated 08.02.1990, convicted and sentenced all five accused as under:-

> U/s.399 IPC- five years rigorous imprisonment, fine of Rs.50/-, in default one month rigorous imprisonment.
> U/s.402 IPC- five years rigorous imprisonment, fine of Rs. 50/-, in default one month rigorous imprisonment.
> U/s.25(1B)(a)- one year rigorous imprisonment, fine of Rs.50/-, in default one month rigorous imprisonment.
>
> All sentences were ordered to run concurrently.

Hence, against the judgment of conviction and sentence, all five accused have jointly preferred this criminal appeal.

7. Having noticed the factual matrix of each case, it is clear that there was allegation of involvement of more than five miscreants but arrested three accused namely (i) Devendra @ Baba, (ii) Amarnath @ Bhagat and (iii) Nihal Singh are common in all four appeals and their arrest is inter-linked in all such four criminal cases. These three accused were first arrested on 28.04.1988 in connection with FIR No.87/1988 at Police Station, Sewar for offences under Sections 399, 402 IPC and Sections 3/25 of the Arms Act and thereafter, while they were in custody in that FIR, they were also shown arrested in previously registered three FIRs as well on the basis of apprehension of being involved in earlier

registered three FIRs of dacoity and later on test identification parade was conducted in other three FIRs separately i.e. in FIR No.69/1988 at Police Station, Sewar, Bharatpur registered on 09.04.1988, in FIR No.8/1988 registered on 17.01.1988 at Police Station Roopbas, Bharatpur and in FIR No.43/1988 registered on 19.03.1988 at Police Station Roopbas, Bharatpur.

8. During course of appeals, on asking about the status report of accused-persons, the SHO Police Station Roopbas vide report dated 15.02.2024 has informed that the accused Devendra @ Baba has passed away in the year 2009 and others are alive. None of near relative of deceased accused Devendra @ Baba has come forward seeking for impleadment, therefore, appeals qua accused Devendra @ Baba stand abated in view of Section 394 CrPC.

S.B. Criminal Appeal No.61/1990:

9. Let first of all the discussion be made about legality and propriety of the judgment of conviction dated 08.02.1990 passed in Sessions Case No.50/1988, which is under challenge in Criminal Appeal No.61/1990, jointly filed by five accused-appellants, arises out of FIR No.87/1988 registered at Police Station Sewar, District Bharatpur for offences under Sections 399, 402 IPC and Section 3/25 of the Arms Act.

9.1 Prosecution story, in this criminal case, in brief, is that in-charge of Police Station, Sewar namely Ramswaroop Yadav, a Police Officer (PW-8) received a secret information at about 8:30 PM on 28.04.1988 that 5-6 miscreants armed with deadly weapon assembled in the Jungle of village-Garhi Jalim Singh and were

planning to commit dacoity in the house of Ramsahay Gurjar. After receiving such information, in-charge Ramswaroop Yadav sent two police personnel namely Umed Singh (PW-7) and Satish Kumar (PW-1) to verify the secret information, who after visiting the site and noticing presence of 5-6 miscreants sitting there, confirmed the correctness of secret information to Ramswaroop Yadav. Then, a report (Ex-P22) was registered in the *Rojnamcha* at about 10:30 PM; information to the Circle Police Officer was given and Ramswaroop after constituting two teams of police personnel under his supervision, marched a raid at the spot to nab miscreants. They left Police Station at about 11:00 PM and after leaving their vehicles at a distant place, reached nearby the spot, where miscreants were found sitting and murmuring. In-charge Mr. Ramswaroop Yadav over heard them to make a preparation for dacoity. The miscreants, having seen the police, attempted to flee away, but they have been surrounded by the police team so could not succeed to run away and immediately six miscreants were taken in custody at the spot along with firearms and ammunition in their possession. Fard Japti (Ex-P8 to Ex-P13) to seize firearms and cartridges recovered from each offender were prepared. Through Ex-P1 to Ex-P6, all six offenders were arrested. Near about 100 yards away, a vehicle car, Registration No.UPG 3036 was found parked which was also seized through seizure memo (Ex-P14). Then police party returned at Police Station, Sewar at about 2:15 PM along with six arrested offenders. The seized firearms and ammunition were deposited in Malkhana and FIR

(Ex-P18) was registered for offences under Sections 399, 402 IPC and 3/25 of the Arms Act and investigation was initiated.

9.2 During investigation, offenders who were acknowledged to belong to different caste and community and were found residents of different Districts, could not divulge any justifiable explanation for their assembling in lonely place of Jungle of village-Garhi Jalim Singh, that too having equipped with unauthorized deadly weapons, hence, it was concluded by the Investigating Officer after the investigation that they were assembled there in Jungle and were planning to commit a dacoity in the house of Ramsahay Gurjar, on the occasion of marriage at his home and accordingly offences under Sections 399, 402 IPC and 3/25 of the Arms Act were held proved against them and charge-sheet for such offences was filed.

9.3 It appears that one of accused Krishan Kumar somehow absconded from the custody, therefore, the trial of criminal case qua other five arrested accused-appellants who were in custody namely Devendra @ Baba, Amarnath @ Bhagat, Nihal Singh, Shri Niwas, Diwan Singh was separated and on denial of charges framed against them, they pleaded not guilty, hence, the criminal trial was commenced. Three charges which were framed by the Sessions Court against accused appellants are as under:-

> "Charge No.1:- Accused persons assembled for the purpose of committing dacoity?;
>
> Charge No.2:- The act and conduct of accused persons amount to make preparation for committing dacoity?;

Charge No.3:- Accused persons were in possession of firearms and cartridge in breach of Section 3 of the Arms Act?"

9.4 In order to establish charges framed against accused appellants, prosecution examined Satish Kumar (PW-1), Shyam Babu (PW-2), Anand Prakash (PW-3), Harish Chandra (PW-4), Maharaj Singh (PW-5), Hukum Singh (PW-6), Umed Singh (PW-7) and in-charge Ramswaroop Yadav (PW-8). Documents Exhibit P1 to Exhibit P18 were relied upon.

9.5 It is noteworthy that except two independent witnesses namely Maharaj Singh (PW-5) and Hukum Singh (PW-6), all other witnesses of prosecution are police personnel and investigation was carried out by in-charge Ramswaroop Yadav (PW-8) who himself got the secret information.

9.6 It is noteworthy that both independent witnesses namely Maharaj Singh (PW-5) and Hukum Singh (PW-6) have not supported the story of prosecution to seize firearms and ammunition from the possession of accused-appellants on the spot on 28.04.1988, they have turned hostile. Thus, in order to establish charge No.3, the only evidence of prosecution is statements of police personnel who themselves have prepared the seizure memos. As far as seized four wheeler (car) is concerned, no direct nexus of accused-appellants with the vehicle has come on record except the fact that one Murarilal Prajapat had moved an application on 30.04.1988 to get release the vehicle on supurdagi, stating inter alia, that vehicle belongs to him and accused Shri Niwas had borrowed the vehicle from him on

14.04.1988 for three days for the purpose of his relative's marriage. As per record, vehicle was released to Murarilal Prajapat on 04.05.1988. As far as proving of charge No.1 and 2 is concerned, which pertains to assembling of accused at lonely place of Jungle and making preparation to commit dacoity, there is only evidence of in-charge Ramswaroop Yadav (PW-8), who states to hear the muttering between accused persons to make a plan to commit dacoity. Apart from PW-8, PW-1 Satish Kumar, PW-2 Shyam Babu, PW-3 Anand Prakash and PW-7 Umed Singh have also deposed their statements in the same tune, though, it is not case of prosecution in the FIR (Ex P-18).

9.7 Learned Sessions Court *ispe dixit* has relied upon the evidence of police personnel and drawn an inference that there seems no justified reason to discard the evidence of policemen and to presume that the police team would implicate accused-appellants in the present criminal case without any just cause. Learned Sessions Court held that non supporting of the prosecution story by the two independent witnesses i.e. Maharaj Singh (PW-5) and Hukum Singh (PW-6) does not render the case of prosecution weak, to establish charges. The Sessions Court further observed that accused-appellants could not sufficiently explained the reason of assembling at a lonely place in the Jungle and that too equipped with deadly weapons, therefore, it would be proper to believe the story of prosecution that all accused were assembled there only for the purpose of making a preparation to commit dacoity at the house of Ramsahay Gurjar. The Sessions Court finally convicted all accused appellants for three charges

mentioned hereinabove vide judgment dated 08.02.1990 and by a separate order of even date, sentenced accused-appellants as indicated hereinabove.

10.1 Learned counsel for accused-appellants vehemently argued that the story unfolded by the prosecution is inherently improbable as it is difficult to believe that offenders were talking about their plan to commit dacoity in such a loud voice, that too at the nick of moment, when the police party reached there and their conversation was heard by police officials that too from a distance.

10.2 Learned counsel further contended that it is also impracticable that six miscreants who were armed with deadly weapons neither offered any resistance nor caused any injury to any of the police personnel, before they were apprehended and surrounded by the police team to nab them along with firearms and ammunition, which were allegedly found in their possession in huge quantity.

10.3 Learned counsel further contended that the police personnel, who deposed their evidence in support of prosecution case were team members of in-charge Ramswaroop Yadav (PW-8) and conducted raid in his supervision and Mr. Ramswaroop himself carried out and conducted the investigation, therefore, in such totality of facts and circumstances, learned Sessions Judge has committed grave illegality and perversity in placing implicit reliance on the evidence of police personnel as much as in holding that charges are proved beyond any doubt on the basis of evidence of police officials only.

10.4 Learned counsel for accused further contended that looking to antecedents of the accused, in a usual round-up of anti social elements, accused were apprehended and were falsely implicated in the present case, which is nothing but contains a stereotype story.

10.5 Learned counsel has urged that there is no reliable and trustworthy evidence of prosecution to prove the guilt of accused-appellants for charges framed against them, hence, the prayer of learned counsel for accused-appellants is that charges against accused-appellants have not been proved beyond reasonable doubt, as such extending benefit of doubt, the conviction of accused appellants be quashed and they may be acquitted of charges levelled against them.

11. On the other hand, learned counsel appearing for and on behalf of State, has supported the impugned judgment of conviction and submitted that accused appellants were found planning to commit dacoity and were arrested red handed along with firearms and ammunition at the spot, therefore, the Sessions Court has rightly held accused-appellants guilty for charges framed against them and the conviction of accused may not be faulted.

12. Having considered rival contentions made by learned counsels appearing on behalf of both parties and after going through the material on record, this Court finds that the Sessions Court has given extraneous weightage to the evidence of police personnel despite of the fact that two independent and material

witnesses namely Maharaj Singh and Hukum Singh (PW-5 and PW-6) have not supported the prosecution case and were declared hostile. From perusal of the impugned judgment as a whole, it appears that the Sessions Court has presumed and drawn an adverse inference against accused-appellants to be involved in making a preparation for dacoity in the house of Ramsahay Gurjar, by providing immense weightage on the fact that accused persons could not sufficiently explain their assembling at lonely place in Jungle equipped with deadly weapons and thus, the conviction of accused-appellants for offences under Sections 399 and 402 IPC seems to be based on assumptions and presumptions rather than being based on any cogent or convincing evidence of prosecution to establish charges framed against accused-appellants beyond doubt.

13. In the opinion of this Court, considering overall facts and circumstances of the present case, the conviction of accused-appellants made by the Sessions Court placing reliance on the testimony of police officials only and by drawing presumption against accused for their guilt is neither proper nor in accordance with law and, therefore, is not liable to be sustained, so far as the conviction for offences under Sections 399 and 402 is concerned.

14. This Court finds support to its conclusion by the judgment of Coordinate Bench delivered in case of **Raghuveer Singh Vs. State of Rajasthan: Criminal Appeal No.1274/2017** decided vide judgment dated 20.02.2018. The Coordinate Bench has heavily placed reliance on the celebrated judgment of the Hon’ble

Supreme Court delivered in case of **Chaturi Yadav Vs. State of Bihar [AIR 1979 SC 1412]** wherein the conviction of accused-appellants under Sections 399 and 402 IPC was set aside and following observations were made by the Apex Court. The relevant portion of judgment, para No.4 is being extracted herein for ready reference:-

> "The Courts below have drawn the inference that the appellants were guilty under both the offences merely from the fact that they had assembled at a lonely place at 1 AM, and could give no explanation for their presence at that odd hour of the night. Mr. Misra appearing for the appellant submitted that taking the prosecution case at its face value, there is no evidence to show that the appellants had assembled for the purpose of committing a dacoity or they had made any preparation for committing the same. We are of the opinion that the contention raised by the learned counsel for the appellants is well founded and must prevail. The evidence led by the prosecution merely shows that eight persons were found in the school premises. Some of them were armed with guns, some had cartridges others ran away. The mere fact that these persons were found at 1 AM, does not, by itself, prove that the appellants had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. The High Court itself has in its judgment observed that the school was quite close to the market, hence, it is difficult to believe that the appellants would assemble at such a conspicuous place with the intention of committing a dacoity and would take such a grave risk. It is true that some of the appellants who were caught hold of, by the Head Constable are alleged to have made the statement before him that they were going to commit a dacoity but this statement being clearly inadmissible has to be excluded from consideration. In this view of the matter there is no legal evidence to support the charge under Sections 399 and 402 against the appellants. The possibility that the appellants may have collected for the purpose of murdering somebody or committing some other offence cannot be safely eliminated. In these circumstances, therefore, we are unable to sustain the judgment of the High Court."

Having pondered over various other judgments of other High Courts as well, the Coordinate Bench of this Court held that in absence of evidence of any other independent witness, it is not safe to rely upon the testimony of witnesses of police officials for convicting accused-appellants, specially when the possibility cannot be ruled out that the accused who were involved in other cases can be taken into custody as easy targets and thereafter a case can be coined upon them. Finally the Coordinate Bench extended benefit of doubt to accused-appellants and acquitted them of charges for offences under Sections 399, 402 IPC and Section 3/25 of the Arms Act.

15. In somewhat similar circumstances, the Hon'ble Supreme Court in case of **Jasbir Singh Vs. State of Haryana [2015 (5) SCC 762]**, allowed the appeal; conviction and sentence recorded against accused-appellant under Section 399, 402 IPC and Section 3/25 of the Arms Act was set aside taking note of facts apparent from the evidence on record. Few of the relevant categories, formed by the Supreme Court in para No.12, which attracts in the case at hand are as under:-

> 12. Strangely, even after observing as above, the High Court has believed the prosecution story in respect of offences punishable under Sections 399 and 402 IPC, and one in respect of offence punishable under Section 25 of the Arms Act. The High Court has erred in law in not taking note of the following facts apparent from the evidence on record:
>
> (i) .....
>
> (ii) Complainant (PW-6) has himself investigated the crime, as such, the credibility of the investigation is also doubtful in the present case, particularly, for the reason that except the police

> constables, who are subordinate to him, there is no other witness to the incident.
>
> (iii) It is not natural that the six accused, four of whom were armed with deadly weapons, neither offered any resistance nor caused any injury to any of the police personnel before they are apprehended by the police.
>
> (vi) .....
>
> (v) It is hard to believe that the Appellant and three other did not try to run away as at the time of noon they must have easily noticed from a considerable distance that some policemen are coming towards them. (It is not the case of the prosecution that police personnel were not in uniform.)"
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> (underline is mine)

16. Reliance can also be placed on the judgment dated 10.01.2020 passed by the Coordinate Bench of Rajasthan High Court at Principal Seat Jodhpur in **Criminal Appeal No.455/2005: Amit Singh Vs. State of Rajasthan**, wherein the conviction of accused-appellants holding them guilty for charges under Section 399 and 402 IPC was set aside and though the conviction for offences under Sections 3/25 and 4/25 of the Arms Act was affirmed because the personal search of accused-appellants was undertaken and proved, however, benefit of probation was extended.

17. It would not be out of place to make a reference of judgment dated 25.04.2022 delivered by the High Court of Madhya Pradesh in **Criminal Appeal No.1243 of 2009 titled Rajendra @ Raja Vs. The State of Madhya Pradesh** wherein the Court dealt with a criminal appeal against the judgment of conviction of appellants for offences punishable under Sections 399 and 402 IPC as also under Section 25(1B)(a) of the Arms Act. The Court noted that

"Admittedly, police arrested accused persons at night time and incident has taken place at night, but there is no evidence available on record to show that there was any source of light available on the spot. It is very strange to gather as to how the police officials identified accused persons in the dark night." The Court finally held that the prosecution verification lacks genuineness and authenticity. The Court observed that the prosecution verification appears to be unnatural as it is quite improbable that the police party could have heard any such conversation of appellants that they were saying that they would commit dacoity. It was observed that even otherwise, mere alleged conversation hardly fulfills the necessary ingredients of offence under Sections 399 and 402 IPC.

The High Court of Madhya Pradesh relied upon the judgment delivered by the High Court of Orissa, Cuttack delivered in case of **Jaganath Mundari Vs. State of Odisha, JCRLA No.75 of 2016**, wherein in para No.9 the High Court held as under:-

> "9. Section 399 of the Indian Penal Code deals with making preparation to commit dacoity and section 402 of the Indian Penal Code deals with assembling for purpose of committing dacoity. There is manifestly a distinction between the offences under section 399 and section 402 of the Indian Penal Code. The offence under section 402 of the Indian Penal Code is complete as soon as five or more persons assemble together for the purpose of committing a dacoity. Preparation for committing a dacoity may take place before or after the dacoits assemble together. Preparation consists in devising or arranging the means necessary for the commission of an offence. Though the offence falling under section 402 of the Indian Penal Code and the offence falling under section 399 of the Indian Penal Code would

probably involve almost similar ingredients, the only difference is that under section 402 of the Indian Penal Code, mere assembly without any preparation is enough to attract the offence, whereas section 399 of the Indian Penal Code is attracted only if some additional steps are taken in Criminal Appeal No.1243/2009 the course of preparation. In an identical factual scenario, in the case of **Chaturi Yadav and others Vrs. State of Bihar reported in [A.I.R. 1979 Supreme Court 1412]**, wherein the accused persons were found assembled at a lonely place in the school premises, who were detected by the police patrol party and on seeing the police party, some of the accused persons ran away but some of the accused persons were caught and from their possession, guns and live cartridges were found and they were found guilty by the learned trial Court under sections 399/402 of the Indian Penal Code and their conviction were confirmed in appeal by the Patna High Court but their Special Leave to Appeal was allowed by the Hon'ble Supreme Court and the judgment of the conviction was set aside and the appellants were acquitted of all the charges."

(underline is mine)

The ratio decidendi expounded in the above referred judgments squarely applicable to facts of the present case as well, since the story of prosecution is substantially similar stereotype.

18. Having considered the totality of facts and circumstances, culled out from the record in the present Criminal Appeal No.61/1990 as also considering the case on the touchstone of case law referred hereinabove, this Court is of the considered view that it is not safe to rely upon the testimony of police officials to establish charges No.1 and 2 against accused-appellants beyond reasonable doubt, more so when both independent and material witnesses namely Maharaj Singh (PW-5) and Hukum Singh (PW-6) have turned hostile and have not supported the prosecution case

as much as the prosecution story itself does not inspire confidence and cannot be believed to be free from exaggeration and embellishment, hence, this Court deems it just and proper to extend the benefit of doubt to accused-appellants and acquit them of charges No.1 and 2 framed against them in the present case.

19. As far as charge No.3 is concerned, from the *Fard Japti* (Ex P-8 to P-12), firearms and cartridges were recovered from the possession of each and every accused appellant and no license to possess such firearms or ammunition was found in favour of accused. In view of recovery of firearms and ammunition from the possession of accused-appellants, there is no reason to disbelieve establishment of charge No.3 against them and therefore, the conviction of accused-appellants for offences under Section 3/25 of the Arms Act is hereby maintained. The Sessions Court awarded the sentence under Section 25(1-B)(a) wherein at the relevant point of time it means prior to amendment dated 14.12.2019, the period of punishment is provided for one year, but which may extend to three years. Nevertheless, as per proviso, the sentence period may be reduced for a term of less than one year in any adequate and special reasons. It is not the case of prosecution that firearms and ammunition were used by accused-appellants to cause hurt to police personnel. Accused-appellants were arrested on 28.04.1988 and after passing of the judgment impugned dated 08.02.1990, sentence of accused appellant No.1 Nihal Singh was suspended on 07.03.1990. Thus, from 28.04.1988 to 07.03.1990, accused Nihal Singh remained in custody in the present criminal case. Accused appellant No.2 Shri Niwas was released on bail

during trial on 14.07.1988 and after his conviction vide impugned judgment, he was again arrested and granted bail on 15.02.1990. Accused appellant No.3 Diwas Singh remained in custody from 29.04.1988 to 15.07.1988 and after his conviction vide impugned judgment, his sentence was suspended on 28.02.1990. Accused appellant No.4 Amarnath @ Bhagat remained in police custody and judicial custody from 29.04.1988 to 16.01.1990 and after his conviction vide impugned judgment, his sentence was suspended by the Appellate Court vide judgment dated 07.03.1990. Accused appellant No.5 Devendra @ Baba, though, now has died, but he remained in custody from 28.04.1988 to 15.02.1990. The incident in question is of 28.04.1988 it means of about 36 years and during this period, accused-appellants have suffered immense mental agony and trauma to face criminal trial as also the present criminal appeal is pending since 1990, therefore, considering all such mitigating circumstances and the quantum of punishment provided for offence under Section 25(1-B)(a) of the Arms Act, this Court deems it just and proper to reduce the sentence period to the period already undergone by accused-appellants.

20. Consequently, the conviction and sentence of accused-appellants in Sessions Case No.50/1988 arisen out of FIR No.87/1988 registered at Police Station Sewar, District Bharatpur for offence under Section 399 and 402 IPC is set aside and they are acquitted of charges No.1 and 2 framed against them. The conviction of accused-appellants for charge No.3 under Section 25(1-B)(a) of the Arms Act is maintained, but their sentence period is reduced to the period already undergone. As far as the

appeal qua accused-appellant No.5 Devendra @ Baba is concerned, it is declared abated due to his death during appeal. Accordingly, the present criminal appeal No.61/1990 stands partly allowed.

S.B. Crl. Appeals No.279/1990, 400/1990 and 424/1990:

21. In these all three appeals, accused-respondents were charged for offences under Sections 395 and 397 IPC and have been acquitted by the Sessions Court after extending benefit of doubt about their identification either through test identification parade or through the recovered articles of dacoity. In appeal No.424/1990, one of accused-respondent No.3 Pappu @ Karan Singh was charged for offence under Section 412 IPC for dishonestly receiving articles stolen in the commission of dacoity but his arrest and charge could not prove beyond reasonable doubt, accordingly, he has also been acquitted.

22. It is noteworthy that these three appeals arise out FIRs, lodged on the basis of report submitted by the victim after commission of offence of dacoity at three different places and period. It is not the case of prosecution that any accused allegedly involved in the incident of dacoity was caught red handed on the spot, but the case of prosecution is wholly based on the identification of accused either by witnesses of prosecution or through articles allegedly stolen in dacoity and recovered later on which were identified by witnesses of prosecution. In all three cases, the identification of accused respondents to be involved in

incidents of dacoity has not been found to be proved beyond reasonable doubt, therefore, accused-respondents have been acquitted by the Sessions Court.

23. Learned Public Prosecutor contended that the test identification parade of accused-respondents in these three cases was conducted in presence of Magistrate Shri Mithlesh Kumar Sharma in accordance with the procedure known to law, but the Sessions Court committed perversity in not placing reliance on such test identification parades. He further contended that by the recovered stolen articles as well, the identification of accused-respondents is also proved, therefore, findings of acquittal are perverse and be reversed and accused-respondents be convicted and suitably punished.

24. Per contra, counsel for accused-respondents vehemently repelled the argument of learned Public Prosecutor and submitted that the Sessions Court, after thorough analysis of the evidence of each and every witness of prosecution, recorded fact finding to the effect that identification of accused-respondents has not been established beyond doubt. Such fact findings are in accordance with law, as discussed and referred by the Sessions Court in impugned judgments and such findings, on the basis of which accused have been acquitted, are not required to be interfered with lightly, merely by drawing an another inference and interpretation of the prosecution evidence. Learned counsel for accused-respondents submits that findings arrived at by the Sessions Court is one of the possible view which is based on just

and proper interpretation of evidence, hence, in such eventuality the Appellate Court is not required to take a contrary view just to convert findings of acquittal into conviction. Thus, his prayer is to dismiss all three appeals filed by the State.

25. (a) In appeal No.279/1990, incident of dacoity is of mid night of 16-17th January, 1988 for which report was submitted by one of victim Daluram on 17.01.1988. As per prosecution case, 10-12 dacoits committed the offence of dacoity in mid night of 16-17th January, 1988 at about 12 AM in the houses of Daluram, Ratan and Sumera and looted huge jewellery articles and other valuables.

As far as incident of dacoity is concerned, same has been held proved beyond doubt, but involvement of accused-respondents in commission of such dacoity has not been proved by the prosecution beyond reasonable doubt.

(b) In this case accused-respondents were arrested on 10.05.1988 through arrest memo (Ex-P13, P-14 and P-15) and their test identification parade was conducted on 19.05.1988 in presence of Judicial Magistrate Shri Mithlesh Kumar Sharma (PW-4). The prosecution witnesses PW-1 Daluram, PW-2 Ratan Singh, PW-3 Sumera, PW-5 Dropati, PW-6 Biri Singh identified accused-respondents, but there is no basis of their identification. Their statements that accused-respondents were recognized by them at the time of incident in the flash light of torches does not inspire confidence. Other part of evidence to identify the accused in the light of Lantern and earthen lamp is also not believable since there

is no such content finds place in initial report nor such evidence stand corroborated by their statements, recorded by police under Section 161 CrPC. None of prosecution witness, depicted the body structure, physical built, height and facial features of accused to the police, therefore, the approach of the Sessions Court to consider their evidence of identification parade with suspicion cannot be said to have erred, more so, it is a case where accused-respondents had already been arrested in another criminal case arises out of FIR No.87/1988 at Police Station, Sewar on 28.04.1988 and while they were in custody in that case, they have been arrested in the present FIR also, which was previously registered. The Sessions Court, in the judgment impugned dated 30.06.1989, has discussed the evidence of each prosecution witness before forming an opinion for not treating his/ her evidence to be reliable and trustworthy to identify accused-respondents. No perversity in such appreciation of evidence by the Sessions Court has been pointed out.

(c) As far as identification of accused-respondents through the recovered stolen articles in the incident of dacoity is concerned, the chain of evidence to prove matching of stolen articles with the articles produced from Malkhana before the concerned Tehsildar is not available on record. The Sessions Court has noted that the person(s), who are witness to keep the recovered stolen articles of dacoity in sealed cover before opening the seal at the time of matching articles have not been produced by the prosecution, as such it is doubtful that the recovered articles were same articles to that of stolen articles of dacoity. It was also noted by the Sessions

Judge that the site map where the stolen articles were recovered was not prepared by the prosecution, which is lacking on the part of prosecution evidence.

26. (a) In criminal appeal No.400/1990, incident of dacoity was occurred in the night of 18.03.1988 at about 11:30 PM in the house of Brijendra, Parmoli, Gopi Kamal and Ram singh etc. at Nangla Haveli and according to prosecution 14-15 dacoits were involved to commit such offence, who looted jewellery, cash and other valuables. The report was submitted by one of victim Brijendra Singh Jat on 19.03.1988.

(b) Accused-respondents were arrested in respect of this incident of dacoity, since they were already in custody in connection with FIR No.87/1988 at Police Station, Sewar and the test identification parade of accused persons in the present criminal case was conducted on 16.05.1988.

(c) In this criminal case as well, none of accused was caught red handed on spot and though the incident of commission of dacoity has been held proved by the prosecution, but involvement of accused-respondents in such dacoity has not been proved beyond reasonable doubt. The Sessions Judge in judgment impugned dated 29.06.1989 has taken note of the factual matrix that none of prosecution witness depicted the body structure, facial features and other identification marks, in their statements made before the police nor in the written report nor there is any mention that the accused were identified by them at the time of incident, in the flash light of torches carried by accused. The Sessions Court noted

that it is difficult to believe that the accused would throw the flash of their torches on their own faces in such a manner that they could be recognized by victims. Thus, the evidence of prosecution witnesses PW-1 Brijendra Singh, PW-2 Bhagwan Singh, PW-3 Bhajju Singh, PW-4 Parmoli and PW-10 Kiran Devi etc. was observed to be suspicious and unfounded for the purpose of identifying accused-respondents. This Court does not find any perversity in appreciation of evidence made by the Sessions Court extensively, warranting any interference with the findings of acquittal.

(d) In respect of matching of stolen jewellery articles, allegedly recovered subsequently, no description of weight, structure and other details were prescribed by the prosecution witnesses, therefore, it has rightly been held that it is not proved beyond doubt that the recovered and seized jewellery articles were same to that of stolen jewellery articles in dacoity. The prosecution evidence was observed to be lacking for not producing the chain of witness, who could prove the seal of seized articles in Malkhana, before their matching in front of Tehsildar. This Court does not find any illegality much less perversity in such fact findings which have been recorded by the Sessions Court which are otherwise also stand in consonance with the case law, reference of which has already been given in the impugned judgment, hence, no need to repeat. Thus, findings of acquittal are hereby affirmed.

27. (a) In criminal appeal No.424/1990, a written report (Ex-P5) was submitted for commission of offence of dacoity by 10-12

offenders in the mid night of 9-10 April, 1988 at about 12:30 AM in village Dhannagarh in the houses of Vasudev, Lalaram, Chhitar Singh etc. Accused-respondents herein, had already been arrested in FIR No.87/1988 on 28.04.1988 by the police of Police Station, Sewar, and then they were also arrested in this criminal case as well on 29.04.1988. Their test identification parade was conducted on 02.05.1988 in presence of Magistrate Shri Mithlesh Kumar Sharma (PW-1).

Accused Pappu @ Karan Singh was arrested on 08.05.1988, on the basis that two accused Devendra @ Baba and Nihal Singh involved in dacoity disclosed information under Section 27 of the Evidence Act that they sold few of looted jewellery articles to Karan Singh, hence, Karan Singh was also made accused in the present criminal case with the aid of Section 412 IPC.

Note:-

(b) At the outset, it is noteworthy that the case of prosecution against three accused persons namely Bhagat @ Amarnath, Baba @ Devendra and Nihal Singh is identical to be involved in dacoity equipped with deadly weapons and the evidence of prosecution against all three accused is also common and similar. All three accused have been acquitted of charges under Sections 395 and 397 IPC extending benefit of doubt by the Sessions Court vide judgment dated 16.01.1990 whereagainst the Sate has preferred the present appeal No.424/1990, but in the appeal, acquitted co-accused Nihal Singh has not been made party respondent, therefore, the judgment of acquittal qua co-accused Nihal Singh is

obviously not under challenge and same has attained finality qua co-accused Nihal Singh at least. In this view, it is not permissible for State to pursue the criminal appeal against acquittal on merits against other two accused Bhagat @ Amarnath, Baba @ Devendra, whose case is not differentiable than the case of prosecution against co-accused Nihal Singh, who was also acquitted but his acquittal has not been put to challenge by the State. On this ground alone, the State's appeal qua accused respondent Bhagat @ Amarnath fails. As far as accused respondent Baba @ Devendra is concerned, he has died during course of appeal, so the appeal qua accused Devendra @ Baba stands abated.

(c) Coming on merits as well, prosecution witnesses PW-13 Gurudayal states to know accused Bhagat @ Amarnath prior to incident and to recognize him during the incident of committing dacoity but his such evidence is not in consonance with the contents of written report, therefore, evidence of PW-13 to identify the accused Bhagat @ Amarnath has rightly been discarded by the Sessions Court. The evidence of PW-3 Samoti to see faces of accused-respondents in the ignited earthen lamp and in the flash light of torch carried by dacoits in their hands, has also rightly been disbelieved being improbable and unnatural. It is hard to believe that earthen lamp would have been left burning by dacoits nor such evidence finds corroboration from contents of the written report. There is no witness of prosecution who could told about the age, height and physical built or facial features or other identification mark of any of the accused to the police during

investigation nor any such description of accused is mentioned in the written report (Ex-P5). The theory developed by the prosecution witnesses to see faces of accused persons in the torch light carried by them is highly unbelievable as it is beyond comprehension that any accused dacoit would hold the torch in such a manner, allowing the victim to recognize his face. It is suffice to observe the general practice that the torch is carried by accused dacoits to find out valuables and not for their own peril to show their faces to victims. Thus, the evidence of prosecution witnesses to identify accused-respondents may not be held to be free from suspicion and rightly been held untrustworthy by the Sessions Court, more particularly, in the backdrop of undisputed fact that accused dacoits in number 12-13 were said to be wearing police uniform.

(d) As far as identification of accused-respondents from the stolen jewellery articles and other valuables like wrist watches etc. which have been allegedly recovered later on, is concerned, the Sessions Court has dealt with the evidence of prosecution witnesses in this respect extensively and observed that the identification of accused-respondents with the recovered articles is not proved beyond doubt. Statements of prosecution witnesses were not found to be in conformity to each other to establish the matching of stolen jewellery and other valuable articles with articles allegedly recovered. No perversity in fact findings recorded by the Sessions Judge in the impugned judgment has brought to the notice of this Court which warrant interference in

such fact findings and which are otherwise not in accordance with law.

(e) In respect of recovering the stolen jewellery articles from the possession of accused Karan Singh is concerned, who was arrested in the present criminal case with the aid of Section 412 on the information divulged by accused Nihal Singh and Devendra @ Baba, it has been noted by the Sessions Judge that in the written report or in statements of prosecution witnesses before the police, there is no specific identification marks or description of structure, weigh etc. of the stolen jewellery articles, hence, it is not safe to hold that the recovered articles are not same to that of stolen articles during dacoity. In this way, the arrest of accused Karan Singh and charge for offence under Section 412 IPC against him was held doubtful by the Sessions Court. This Court does not find any illegality or perversity in such finding.

(f) In this view on merits as well, findings of acquittal recorded by the Sessions Court against accused respondents in present cases do not warrant interference by this Court in exercise of its appellate jurisdiction.

28. In respect of acquittal of accused-respondents of charge under Section 397 IPC in all three cases, the Sessions Court has noted in the impugned judgment that it is not established by the prosecution evidence that which accused was holding which deadly weapon used in the offence of commission of dacoity and it is also not established that injuries received by the injured were inflicted by whom and weapon of which accused was used. In absence of

any specific evidence, the charge for offence under Section 397 IPC cannot be held proved and therefore, this Court is not inclined to interfere with the impugned judgment of acquittal of accused-respondents.

29. Since all three criminal appeals have been preferred by the State, challenging findings of acquittal of accused-respondents, therefore, it would be appropriate to elucidate the legal position with regard to interference and scope of the Appellate Court to interfere against the judgment of acquittal of accused. In case of **Mookkiah Vs. State of Tamil Nadu, [2013 (2) SCC 89]**, the Hon'ble Supreme Court taking note of series of previous decisions of the Apex Court observed and held as under:-

> "3…….. as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be re-appreciate the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal.
>
> [Vide State of Rajasthan Vs. Sohan Lal and Others [(2004) 5 SCC 573]"
>
> (underline is mine)

30. In case of **Madhya Pradesh Vs. Ramesh [(2011) 4 SCC 786]**, the Supreme Court considered the scope and interference in appeal against the judgment of acquittal and held as under:-

"15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate Court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said appeal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

(emphasis supplied)

31. In case of **Minal Das Vs. State of Tripura [(2011) 9 SCC 479]**, the Hon'ble Supreme Court reiterated the similar proposition in following words:-

"14. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/ report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

(emphasis supplied)

32. In case of **Rohtash Vs. State of Haryana [(2012) 6 SCC 589]**, the Supreme Court held as under:-

> "27. The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of innocence. Interference in a routine manner good reasons for interference. (Vide **State of Rajasthan Vs. Talevar [(2011) 11 SCC 666]** and **Govindaraju Vs. State [(2012) 4 SCC 722]**)
>
> (emphasis supplied)

33. Similar proposition of law in respect of scope and interference by the Appellate Court against the judgment of acquittal, has been reiterated by the Supreme Court in case of **Khekh Ram Vs. State of Himachal Pradesh [(2018) 1 SCC 202]** wherein in para No.25, following observations were made:-

> "25. The elaboration of the facts in the decisions cited at the Bar has been to underline the factual setting in which reversal of the orders of acquittal had been interfered with by this Court. Though, it is no longer res integra that an order of acquittal, if appealed against, ought not to be lightly interfered with, it is trite as well that the appellate court is fully empowered to review, reappreciate and reconsider the evidence on record and to reach its own conclusions both on questions of fact and on law. As a corollary, the appellate court would be within its jurisdiction and authority to dislodge an acquittal on sound, cogent and persuasive reasons based on the recorded facts and the law applicable. If only when the view taken by the trial court in ordering acquittal is an equally plausible and reasonable one that the appellate court would not readily substitute the same by another view available to it, on its independent appraisals of the materials on record. This legally acknowledged restraint

> on the power of the appellate court would get attracted only if the two views are equally plausible and reasonable and not otherwise. If the view taken by the trial court is a possible but not a reasonable and not otherwise. If the view taken by the trial court is a possible but not a reasonable one when tested on the evidence on record and the legal principles applied, unquestionably it can and ought to be displaced by a plausible and reasonable view by the appellate court in furtherance of the ultimate cause of justice. Though no innocent ought to be punished, it is equally imperative that a guilty ought not to be let off casually lest justice is a casualty."
>
> (emphasis supplied)

34. Having elucidated the proposition of law as settled by the Hon'ble Supreme Court in various decisions, few of them are referred hereinabove, it can be presumed to be a settled proposition of law that the Appellate Court should not ordinarily set aside the judgment of acquittal, and interference in a routine manner is not warranted merely for the reason that an another view is possible, usually such approach by the Appellate Court to interfere with findings of acquittal should be avoided unless there are compelling circumstances and good reasons warranting interference with findings of acquittal to achieve ultimate cause of justice.

35. Having examined the present three appeals filed by the State, on the touchstone of settled legal proposition, this Court does not find any exceptional circumstance or any other good reason to interfere with impugned judgments of acquittal of accused respondents of charges for offence under Sections 395 and 397 IPC. Accordingly, all three appeals stand dismissed.

36. The net outcome of discussion made hereinabove is that three criminal appeals No.279/1990, 400/1990 and 424/1990 preferred by the State against the judgment of acquittal are hereby dismissed. The criminal appeal No.61/1990 filed by and on behalf of accused-appellants succeeds partly and their conviction and sentence for offences under Sections 399 and 402 IPC is hereby set aside by extending benefit of doubt. The conviction of accused-appellants for offence under Section 3/25 of the Arms Act is maintained and sentence awarded under Section 25(1-B)(a) of the Arms Act is reduced to the period already undergone for reasons indicated in para 20 of this judgment.

37. Due to death of one of accused-respondent Devendra @ Baba, his appeal and appeals qua him are declared abated. Other four accused namely Nihal Singh, Shri Niwas, Diwan Singh and Bhagat @ Amarnath are acquitted of charges No.1 and 2, and for charge No.3, the sentence is reduced to the period already undergone. They need not to surrender and their bail bonds stand discharged.

38. Record of the trial Court be sent back forthwith along with copy of this order.

39. A copy of this judgment be placed in each file.

(SUDESH BANSAL),J

NITIN/