IMPORTANCE OF MARSHALLING AND APPRECIATION OF EVIDENCE IN CRIMINAL TRIALS IN INDIA: AN ANALYSIS

Dr. Meena Ketan Sahu[1]

I. Introduction

Judge is the backbone of system of dispensation of justice. Marshalling and appreciation of evidence is the backbone of a judgment or order. A judgment or order lacking in proper marshalling and appreciation cannot stand on its legs. The quality of the judgment or order ultimately depends upon proper marshalling and appreciation of evidence. Though having pivotal importance, these two expressions have no where been defined either in Evidence Act or in CPC/Cr. P.C. The approach of the Judge while preparing a judgment or order should be to properly scan and appreciate the evidence which in turn requires proper marshalling of evidence. Relying upon the significance and importance of marshalling and appreciation of evidence the Hon'ble Apex Court in *Rang Bahadur Singh V. State of U.P.*[2] has held which is as follows:

> "The time-tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits."

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[1] Reader, P.G.Department of Law, Sambalpur University

[2] AIR 2000 SC 1209.

In another decision in *State of U.P. V. Ram Veer Singh and Another*[3] the Hon'ble Apex Court has held as follows:

> "The golden thread which runs through the web of administration of justice in criminal cases is that if two view are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not."

The entire issue relating to appreciation and marshalling can be examined from the following four angles:

1. Concept of marshalling and appreciation.
2. Relevant legal provisions.
3. Fundamental principles of Apprcciation of evidence.
4. Specific Principles of appreciation of evidence.

II. Marshalling and Appreciation of evidence: Conceptual Analysis

In common parlance, marshalling of evidence is the skill of picking up various pieces of evidence on a particular disputed point and putting them together so as to analyse them for arriving at a conclusion. Therefore, when proceeding to marshal evidencc, a Judge must have

[3] 2007 (6) Supreme 164.

clear picture of various disputed points regarding which the evidence has to be marshalled. Unless the Judge has a clear-cut idea about the points on which he has to appreciate the evidence, the exercise of marshalling of evidence can never he properly performed.

The skill of marshalling can be explained by way of an example. In a case relating to an offence under Section 376, IPC, i.e rape, the issue relating to the age of prosecutrix may be one of the important issues particularly when consent of the prosecutrix is the main defence. In such a situation, the prosecutor may allege that at the time of incident the prosecutrix's age was 14 years, while the defence may come forward with a plea that her age was 17 years. The evidence regarding age in such a situation may consist of oral testimony of prosecutrix, her parents, brother etc., scientific evidence based on ossification examination, documentary evidence in the shape of school leaving certificate and birth certificate and physical evidence on the basis of physical examination by a doctor.

In order to arrive at a conclusion about the age, all the evidence has to be picked up and put together and then appreciated systematically. This is one example. There may be numerous such example. A judge who is not adequately skilled in the art of marshalling may go to examine the evidence on the aforesaid point, not conjointly but in a casual manner in the chronological order of the witnesses. The effort on the part of the judge, however, should be to put together the evidence on a particular point because that helps in developing a proper and complete picture on that issue.

Appreciation of evidence, again is a skill which has to be developed by gradual practice. The expression 'appreciation' in the context of our present discussion means analysing and assessing the

worth, value and quality of a particular piece of evidence. Basically, it has nothing to do with admissibility. Once a piece of is found to be relevant and admissible, the judge is required to examine its quality by skillfully analysing it. It is not bare reproduction of the evidence rather it is systematic, scientific and methodical evaluation of evidence.

III. Relevant provisions

Though we do not find a particular provision in Evidence Act directly providing in respect of appreciation of evidence but there are provisions in the Evidence Act which do have a close bearing on this issue.

Section-3, Indian Evidence Act.

The First and foremost provision being Section 3 which defines 'proved' 'disproved ' and ' not proved'. One noteworthy feature of the definition of the expressions, 'proved' and 'disproved' is the factor of probability of a particular fact to the satisfaction of the prudent man. This signifies the importance of test of probability. Here it can be stated that Section 3 itself does not make any distinction between proof of a fact in a Civil and a Criminal case, rather basic principle regarding the proof of a fact is one and the same. In practice, however, it is well settled that in civil cases facts are to be proved on the basis of preponderance of probabilities while in criminal cases the guilt of the accused has to be proved beyond reasonable doubt.

Section 114 , Indian Evidence Act.

The next provision of Evidence Act which invites our attention in this connection is Section 114 which says that the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common cause of natural events,

human conduct and pub ic and private business in relation to the facts of a particular case. This again goes to indicate that the Court has always to take into consideration the common course of natural events, human conduct and public and private business. Illustrations appended to the section further go to indicate how the rule incorporated in Section 114 has to be applied while making certain inference on the basis of certain proved facts. This is but a method of appreciating a particular fact situation on the anvil of natural events, human conduct, public and private business.

Here reference to illustration (b) of Section 114 of Evidence Act is opposite which says that an accomplice is unworthy of credit unless corroborated in material particulars. This rule, however, stands diluted by Section 133 which says that a conviction is not illegal merely because it proceeds from an uncorroborated testimony of an accomplice. If we can say so, Section 133 is the only provision in the Evidence Act which demands corroboration. In no other case, corroboration is rule of law though in various situations corroboration is insisted upon by way of rule of caution or rule of prudence. The question arises whether Section 114 Illus. (b) and Section 133 are mutually conflicting? Though, it appears to be so on its very face but what can be deduced from the conjoint reading of these two provisions is that framers of the Act did repose more confidence in the wisdom and experience of a Judge rather than in the dead letters of law.[4]

Section 118, Indian Evidence Act.

[4] Ved Prakash, "*Legal Issues-An Anthology*" First Edition, 2009,Suvidha Law House Pvt. Ltd, Bhopal, p. 144

Section 118 is another provision which again has to be kept in mind while appreciating the evidence because it envisages the twin conditions for a person to be competent witnesses-

Firstly, the person understands the questions put to him; and

Secondly, such person possesses faculty to give rational answers to such questions.

No general qualification or disqualification has been stipulated in Section 118 and it is left to the discretion of the Judge to decide on the basis of the understanding of the witness about his competence. Therefore, to say that particular witness being police officer may not be fully competent or reliable is something against the spirit of Section 118.

Section 134, Indian Evidence Act.

Section 134 of the Evidence Act which enacts the basic rule of evidence that no particular number of witnesses shall in any case be necessary for the proof of a fact. This rule must be seen in the background of pleas which are raised before the Courts that a particular witness cannot be relied upon because he/she has not been supported or corroborated by any other witness. Section 134 gives a clear cut message in this respect. It is the duty of Judge to record a finding on a disputed point by weighing evidence and not by counting the number of witnesses because it is the quality and not the quantity of the evidence which matters.[5]

[5] Maqsoodan and others v. State of U.P, AIR 1983 SC 126.

In *Masalti v. Sta. · of M.P.*,[6] the Apex Court somehow expressed that where the Criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be ascertained only after it is supported by two or three or more witnesses to provide a consistent account of the incident. However, the Apex Court in *Krishna Mochi v. State of Bihar*,[7] observed that the aforesaid desirability may be a matter of prudence but such a requirement can never be said to be inviolable.

III. Principles of appreciation of Evidence

Going by the parameters which are there in the definition of 'proved' and 'disproved' as contained in Section 3 of the Indian Evidence Act, we find that the evidence of a witness has to be judged by the Court on the touchstone of probabilities. As stated in *Dalbir Singh and others v. State of Punjab*,[8] no hard and fast rule can be laid down about appreciation of evidence and every case has to be judged on the basis on its own facts. However, there are certain principles, which have long been discussed and debated regarding appreciation of evidence, like rule of proof by preponderance of probabilities, rule of proof beyond reasonable doubt, maxim 'falsus in uno falsus in omnibus' and oft repeated saying 'let hundred guilty persons be acquitted but not a single innocent person be convicted' and separating the grain form chaff'.

In fact, we started developing our judicial frame of mind considering and contemplating all these principles. We have also applied them one way or the other as per our own perceptions regarding

[6] AIR 1965 SC 202.
[7] (2002) 6 SCC 81.
[8] AIR 1987 SC 1328.

their utility true perspective, it is but necessary to examine them in the light of various pronouncement of the superior Courts.

IV. Proof beyond Reasonable Doubt

The first principle of criminal jurisprudence is that in a criminal case, the guilt of an accused should be proved beyond reasonable doubt. But then question arises, what the expression 'proof beyond reasonable doubt' does really convey. Attempting to draw the meaning of expression 'reasonable doubt' , the Apex Court expressed in *State of West Bengal v. Orilal Jaiswal*,[9] that reasonable doubt is simply that degree of doubt which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated and that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence.

The concept of 'reasonable doubt' was further explained by the Supreme Court in *Such Singh v. State of Punjab,*[10] to the effect that a reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense.

Dealing with the issue long back Their Lordships of the Supreme Court observed in *Inder Singh v. State (Delhi Admn.)*[11] (Krishna Iyer, J) that proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human process. In *Shardul Singh v. State of Haryana*, [12] the Apex Court, sounding a note of caution against demand of implicit proof in a criminal case, observed that there cannot

[9] (1994) 1 SCC 73.
[10] AIR 2003 SC 3617.
[11] (1978) 4 SCC 161
[12] (2002) 8 SCC 372.

.be a prosecution case with a cast-iron perfection in all respects and it is obligatory for the Courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution. What is to be insisted upon is not implicit proof.

Long back Viscount Simon, J. observed that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of innocent". Referring to this statement, Hon'ble Krishna Iyer, J.observed in *Shivaji Sahebrao Bobade and another v. State of Maharashtra*,[13] that the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt.

V. Proof beyond reasonable doubt not proof beyond any shadow of doubt: Supreme Court

Holding that the requirement in criminal cases for the prosecution to prove the case beyond doubt does not imply that the case should be proved beyond a shadow of doubt, the Supreme Court in a recent decision *Iqbal Moosa Patel v. State of Gujarat*[14] quoted Lord Denning

[13] AIR 1973 sc 2622.
[14] Judgement pronounced on 12 January, 2011.

to state that "Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law". The Court also quoted its earlier decision to the effect that "One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish".

The Court *inter alia* observed as under:

That brings us to the question whether the appellants could be given the benefit of doubt having regard to the nature of the evidence adduced by the prosecution against them. We do not think that the appellants have made out a case for grant of any such benefit. It is true that the prosecution is required to establish its case beyond a reasonable doubt, *but that does not mean that the degree of proof must be beyond a shadow of doubt*. The principle as to what degree of proof is required is stated by Lord Denning in his inimitable style in *Miller v. Minister of Pensions*[15] :

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence 'of course, it is possible but not in the least probable,' the case is proved beyond reasonable doubt....

[15] (1947) 2 ALL ER 272

It is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land."

Reference may also be made to the decision of this Court in *Sucha Singh & Anr. v. State of Punjab*[16] where this Court has reiterated the principle in the following words:

> ".....Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law.[17] Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish."

[16] (2003) 7 SCC 643.
[17] Gurbachan Singh v. Satpal Singh, AIR 1990 SC 209.

In the light of the aforesaid pronouncements, it can well be said that the rule of proof beyond reasonable doubt should be applied by the Courts with objectivity and pragmatism.

VI. 'Falsus in Uno Falsus in Omnibus'

The maxim 'falsus in uno falsus in omnibus' means false in one thing, false in everything. In our country, most of the witnesses, for one party of the other, while giving out substantial truth, introduce exaggerations or add embroidery to their statements. If Courts were to act upon the above maxim, it will be very difficult, if not impossible, to decide majority of cases correctly.

In view of a number of pronouncements of the Apex Court, now it is well settled that this maxim, which is neither a sound rule of law nor a rule of practice, is not applicable as far as criminal jurisprudence of our country is concerned.[18] The skill of appreciation of evidence itself demands for disengaging truth from the falsehood, therefore, wholesome rejection of the testimony of a witness because some or the other part of his statement has not been found to be true, may lead to injustice.

In *Ugar Ahir v. State of Bihar*,[19] the Supreme Court observed that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroidery or embellishments. It is, therefore, the duty of the Court to scrutinize the evidence carefully. In *State of U.P V. Anil Singh*,[20] again it was observed by the Supreme Court that invariably the witnesses add embroidery to the prosecution story, perhaps for the fear of being

[18] Jakki @ Selvaraj v. State, 2007 Cr. L.J 1671 (SC)
[19] AIR 1965 SC 2777.
[20] AIR 1988 SC 1998.

disbelieved, but that is no ground to throw the case overboard, if true, in the main.

While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly, necessary for the Court to scrutinize the evidence more particularly, keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole, and evaluate them to find out whether it is against the general tenor of the evidence given by the witness as to render it unworthy of belief.

Apart from the above, the issue relating to appreciation of evidence, may further be examined with respect to the following, which are of recurring importance, may also be examined:

(i) First information report,
(ii) Statement recorded under Section 161 Cr. P.C and
(iii) Injuries of the accused.

First Information Report

First Information Report recorded under Section 154, Cr.P.C happens to be the earliest version brought to the notice of police regarding commission of cognizable offence. It has two-fold objectives-firstly, to obtain early information of the alleged criminal activity and to record the circumstances before forgotten or embellished and; secondly, to put the criminal law into the motion.[21]

Being the first information regarding a cognizable offence, F.I.R must be clear and complete cryptic and anonymous telephonic message not

[21] Wilayat Khan v. State of U.P, air 1953 SC 122.

clearly specifying cognizable offence cannot be treated as first information report and the mere fact that the information was the first in point of time does not by itself clothe it with the character of first information report. The question whether or not a particular report constitutes first information report has to be determined on the basis of relevant facts and circumstances of each case.[22]

F.I.R happens to be an integral part of evidence in every criminal trial. It may be by a person who is the victim, an eye witness or even by a person who might have heard about the incident and is not a witness because Section 154, Cr. P.C does not require that the report must be given by a person who has personal knowledge of the incident reported. The section speaks of an information relating to the commission of a cognizable offence given to an Officer –in-Charge of a police station.[23]

The issue relating to appreciation of F.I.R can be examined from the following main perspectives:

Firstly, contents of F.I.R,

Secondly, nature and use of F.I.R,

Thirdly, effect of delay in lodging F.I.R

1. Contents of F.I.R.

It has been repeatedly said that F.I.R is not an encyclopaedia and account of everything that had happened is not required to be given in it.[24]

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[22] Tapinder Singh v. State of Punjab, AIR 1970 SC 1566.
[23] AIR 1974 SC 1936.
[24] Bhopat Singh Kishan Singh v. Tapan Kumar Singh, (2003) 6 SCC 173

Elaborating this legal position, the Supreme Court held in *Baldev Singh v. State of Punjab*,[25] that only the essential or broad picture need to be stated in the F.I.R and all minute details need not be mentioned therein. It is not as if it were an 'encyclopaedia' of the occurrence. It may not be even necessary to catalogue the overt acts therein. Non-mentioning of some facts or vague reference to some others is not fatal. In *Rattan Singh v. State of H.P*,[26] it was observed that Criminal Courts should not be fastidious with mere omissions in first information statement, since such statements cannot be expected to be a chronicle of every detail of what happened, nor to contain an exhaustive catalogue of the events which took place. The person who furnishes first information to authorities might be fresh with the facts but he need not necessarily have the skill or ability to reproduce details of the entire story without anything missing there from. Some may miss even important details in a narration.

2.Nature and Use

F.I.R is not a substantive piece of evidence. As held in *Shankar v. State of U.P*,[27] unless a First Information Report can be tendered in evidence under any provision contained in Chapter II of the Evidence Act, such as a dying declaration falling under Section 32 (1) as to the cause of the informant's death, or as part of the informant's conduct under Section 8, it can ordinarily be used only for the purpose of corroborating, contradicting or discrediting its author, respectively under Sections 157, 145 and 155, Evidence Act, subject to the condition that he/she has been examined. Clearly enough, it cannot be used to corroborate, contradict or discard the evidence of any other witness.

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[25] AIR 1996 SC 372
[26] (1997) 1 Supreme (Cr.) 4
[27] A.I.R 1975SC 757.

In *George v. State of Kerala*,[28] where trial Court used the F.I.R for discarding the evidence of PW-3 and PW-4, who were not the informant, the Apex Court held that it was legally impermissible. Likewise in *Hasib v. State of Bihar*,[29] use of F.I.R to corroborate a witness, who was not its author, was held to be wrong.

3. Use against Accused

As F.I.R can be used only to contradict its maker in the manner as provided in Section 145 of the Evidence Act or to corroborate him as envisaged in Section 157 if the Evidence Act, it cannot be used against the accused when he happens to be the person at whose instance it was recorded unless he offers himself to be examined as a witness.[30]

In *Faddi v. State of Madhya Pradesh*,[31] it has been held by the Apex Court that if the F.I.R given by the accused contains any admission as defined in Section 17 of the Evidence Act, then there is no bar in using such admission against the maker thereof under Section 21 of the Evidence Act provided it is not inculpatory in nature. In *Aghnoo Nagesta v. State of Bihar,* [32] it was further pointed out that where it is difficult to separate the exculpatory portion then the whole report has to be excluded.

Delay in lodging F.I.R

No doubt, the promptness in lodging F.I.R justifies the inference that the report was not a concocted story but as pointed out in *Amar Singh v. Balwinder Singh & Others*,[33] there is no hard and fast

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[28] A.I.R 1998 SC 1376.
[29] AIR 1972 SC 283.
[30] Nisar Ali v. State of U.P, A.I.R1957 SC 366.
[31] (1964) 6 SCR 312.
[32] (1996) 1 SCR 134.
[33] (2003) 2 SCC 518.

rule that delay in lodging the F.I.R would automatically render the prosecution case doubtful. It was expressed by Their Lordships that it necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the F.I.R which may cast doubt about the veracity of the prosecution of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the F.I.R.[34]

The Hon'ble Apex Court in *Dilawar Singh V. State of Delhi*[35] has held that, "In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case."

VI. Conclusion and Suggestion

As far as the above discussion and decisions of the Apex Court is concerned, the following suggestions are made for the Court while appreciating evidence which plays a prominent role in deciding a case

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[34] Ved Prakash, "*Legal Issues-An Anthology*" First Edition, 2009, Suvidha Law House Pvt. Ltd, Bhopal, P. 154.
[35] 2007 (12) SCC 641

and pronouncing judgment which determines guilt or innocence of a person who is alleged to have committed a crime.

Proof need not be perfect.

It is pertinent to mention here that credibility of testimony depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is urged that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction.[36]

Degree of probability cannot be expressed in units

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice.

[36] Inder Singh v. State (Delhi Administration), AIR 1978 SC 1091