

(2014) 04 CHH CK 0041

In the Chhattisgarh High Court

Case No : Criminal Appeal Nos. 883, 921, 943, 993, 999 of 2011, 5, 10, 11, 24, 25, 35, 42, 79, 87, 103, 105, 114, 173, 246, 294, 616, 617, 724 and 854 of 2012

Tijau Ram

APPELLANT

Vs

State of C.G.

RESPONDENT

Date of Decision : 17-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161 313 401
Penal Code, 1860 (IPC) — Section 141 142 147 148 149

Citation : (2014) 1 CG.L.R.W. 427 : (2014) 4 CGLJ 393

Hon'ble Judges : T.P. Sharma, J;Chandra Bhushan Bajpai, J

Bench : Division Bench

Advocate : Arun Kochar, Sudhir Verma, Malay Shrivastava, Rajendra Tripathi, Ashok Soni, Anju Ahuja, Malay Kumar Bhaduri, C.R. Sahu, J.N. Nande, K.K. Dewangan, Devesh Chand Verma, Sachin Singh Rajput, S.C. Verma, Vimlesh Bajpai, Pradeep Rajgir, Rajkamal Singh, M.K. Baeg and Pawan Kesharwani, Advocate for the Appellant; Ramakant Mishra, Deputy Advocate General, Suryakant Mishra and Sameer Behar, Panel Lawyers, Advocate for the Respondent

Judgement

T.P. Sharma, J.

1. Cr. A. Nos. 883/2011, 921/2011, 943/2011, 993/2011, 999/2011, 5/2012, 10/2012, 11/2012, 24/2012, 25/2012, 35/2012, 42/2012, 79/2012, 87/2012, 103/2012, 105/2012, 114/2012, 173/2012, 246/2012, 294/2012, 617/2012, 724/2012 & 854/2012 filed against the judgment dated 4-11-2011 passed by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the Special Act"), Raipur in Special Sessions Trial No. 47/2008 and Cr. A. No. 616/2012 filed against the judgment dated 4-11-2011 passed by the Special Judge under the Special Act, Raipur in Special Sessions Trial No. 83/2008 relating to same incident alleged to have been committed by members of Scheduled Caste against another member of Scheduled Caste are being disposed of by this common judgment. By filing Cr. A.

Nos. 883/2011, 921/2011, 943/2011, 993/2011, 999/2011, 5/2012, 10/2012, 11/2012, 24/2012, 25/2012, 35/2012, 42/2012, 79/2012, 87/2012, 103/2012, 105/2012, 114/2012, 173/2012, 246/2012, 294/2012, 617/2012, 724/2012 & 854/2012, the appellants have challenged legality and propriety of the judgment of conviction and order of sentence dated 4-11-2011 passed by the Special Judge under the Special Act, Raipur in Special Sessions Trial No. 47/2008, whereby & whereunder learned Special Judge, while acquitting the appellants and other co-accused of the charge under the Special Act, after holding the appellants guilty for forming unlawful assembly armed with deadly weapons having common object to commit murder of Dhakendra Bharadwaj @ Bholaram, causing grievous injuries to Ramlal @ Sugriv (PW-11) & Usha Bai (PW-2), causing simple injuries to Kum. Chandni (PW-3) and causing mischief by fire in furtherance of common object of the unlawful assembly, convicted & sentenced them as below:--

2. By filing Cr. A. Nos. 616/2012 appellants Chintaram Dhruv & Heera Lal have challenged legality and propriety of the judgment of conviction and order of sentence dated 4-11-2011 passed by the Special Judge under the Special Act, Raipur in Special Sessions Trial No. 83/2008, whereby & whereunder learned Special Judge while acquitting them of the charge under the Special Act, convicted & sentenced them in the following manner:--

3. Conviction of the appellants is impugned on the ground that without there being an iota of evidence, the trial Court has convicted and sentenced the appellants and thereby committed illegality.

4. As per case of the prosecution, on 11-1-2008 unfortunate deceased Dhakendra Bharadwaj @ Bholaram, Ex-Sarpanch of Village, was sitting near a pond between Village Phulwari, Police Station Suhela and Village Newari along with Chandu Sahu and Sugriv @ Ramlal (PW-11). Local annual market "Madai" was scheduled during aforesaid period at Village Newari adjoining to Village Phulwari. Members of adjoining villages Phulwari & Newari were invited in aforesaid festival, but deceased Dhakendra Bharadwaj @ Bholaram was not invited. The appellants along with other persons about 200 in number rushed towards the deceased, they were holding stick, they chased the deceased & witness Ramlal @ Sugriv (PW-11) towards Village Phulwari, Sugriv jumped in the pond and deceased Dhakendra Bharadwaj @ Bholaram rushed and managed to enter his house. Usha Bai (PW-2), wife of the deceased, closed and locked the gate of the shop of the deceased with a view to block the entry of assailants in her house. The mob entered the house of the deceased and damaged household articles of the deceased. The deceased came out from his house and rushed towards house of Khuman Singh to save himself. The appellants encircled the deceased and pelted stones on him, assaulted him with stick & battleaxe and ultimately, killed him. Thereafter, they dragged the body of the deceased in front of his house and took out the household articles TV, fan, cycle, motorcycle, fridge, mattress, table cloth, Diwan in front of his house and set the articles

ablaze. They also threw the body of the deceased on the burning fire and also threw dry grass upon the body of the deceased. The incident was regularly witnessed by Rajiv Kumar (PW-1), nephew of the deceased, from the pond, he was following the mob from the pond to the last place of incident. The appellants also caused grievous injuries to Usha Bai (PW-2), wife of the deceased, Ramlal @ Sugriv (PW-11) and Kum. Chandni (PW-3). The police was informed by telephone and they reached to the spot. At about 10.15 a.m. Rajiv Kumar (PW-1) lodged dehati nalishi vide Ex. P-1. Dehati morgue was recorded vide Ex. P-2.

5. The Investigating Officer after summoning the witnesses vide Ex. P-3 prepared inquest over the dead body of the deceased vide Ex. P-4. Burnt dead body was sent for autopsy to Government Hospital, Simga.

6. Injured Kum. Chandni (PW-3) was sent for medical examination. She was examined by Dr. K. Israni (PW-5) in Grasim Cement Hospital vide Ex. P-8 who found one lacerated wound over left hand of 1.5 cm. Injured Kum. Chandni (PW-3) was also examined by Dr. Kavita Lohani (PW-7) at Medical College Hospital at Raipur (MEKAHARA), who conducted X-ray vide Ex. P-14 but did not notice any injury or fracture.

7. Injured Ramlal @ Sugriv (PW-11) was sent for medical examination and he was examined by Dr. K. Israni (PW-5) vide Ex. P-9 who found one incised wound over head and abrasion over right hand. He was referred to the Medical College, Raipur, Dr. Kavita Lohani (PW-7) also examined injured Ramlal @ Sugriv (PW-11) vide Ex. P-16 and noticed fracture of vertebral bone.

8. Injured Usha Bai (PW-2) was examined by Dr. K. Israni (PW-5) vide Ex. P-10 who noticed head injury, internal bleeding and she was also referred to the Medical College, Raipur. Dr. Kavita Lohani (PW-7) also examined injured Usha Bai (PW-2) vide Ex. P-15 and noticed fracture of left ring finger.

9. Dr. R.K. Singh (PW-6) conducted autopsy of the burnt dead body of Dhakendra Bharadwaj @ Bholaram vide Ex. P-12, along with Dr. Ulhas Gonnade and found following symptoms and injuries:---

? Body is in at places showing crumpling due to heat and available layers are charred due to burns, some strain particles present on body at places.

? Body present in one segment from cervical 4th vertebra to toes tips left side and on left upper limb to tips of layers while on right side, right upper limb is missing and right side from below junctional area of upper 1/3 of right thigh to lower part is missing.

? A small pieces of tissues with multiple fractures of bones and brain showing cooked pasty mass like tissue in crumpled soft tissues. Bone pieces in this crumpled mass could be identified as skull bone pieces.

? Cervical vertebra (available parts) show burnt effects on their surface and show broken effects on available upper part, lower part is in continuity with thoracic

vertebra. Part of trachea, bronchus and bronchitis, oesophagus part against the available vertebra lower 1/2 part present, they also show superficially burnt effects. Few black carbon soots present in the available respiratory tube in upper 1/2 part of available part and also in the available part of oesophagus. Soft tissues available as deserted at these parts show on their upper part crumpled effects due to burns and on their surface show burning effects. Right clavicle not found, left clavicle found broken and burnt. Left shoulder soft tissues present in burnt condition.

Chest, abdomen, pelvic:--

? More depth of burns seen on right lateral & posterior part exposing at few places ribs and on lower part, liver right lobe and parts of intestinal lobes which show partly burn effect muscle in right side at most parts show burnt effect while on left side and on mid-line extending the subcutaneous tissues at most places present showing burnt effects. Muscle above show cooking effects due to heat skin splitting present on chest, right side flank upper chest also cut at few places with regular margin. Pericardium dry.

? Heart partly dried. Coronary arteries are patent. Both sides heart chambers are practically empty but for little cherry red colour blood. Heart healthy. Lungs partly dried, congested with little fatty fluids in dependent posterior parts. Fracture of body of sternum complete transverse and fracture of right side practically all ribs at two planes present with corresponding ecchymosis in the chest wall. Right side ribs at few places partly burnt.

? Liver partly dried and burnt as descended spleen dry. Kidneys are partly dry but congested. Stomach partly cooked and contains little brownish liquid.

Small intestine:--

? Contains little yellow digested food wall partly cooked. Large intestine contains little faecal matter. Urinary bladder practically empty, partly dry. Penis & scrotum partly dry shrunk due to burns. Internal sex organs partly dry. Aorta smooth contains cherry red colour blood little quantity. Vertebra show on back slight heat effects except dejected rest healthy. Right scapula partly burnt and broken. On surface of abdomen and pelvis partly burnt hair present.

Limbs:--

? Left upper limb present with burnt effect on subcutaneous tissues and muscles. At places bones also exposed. Left humerus fractured. Left radius and left ulna fractured irregularly at one plane at junctional part of lower 1/3 and upper 2/3 area. Left clavicle burnt and broken. Left lower limb at most parts laterally muscles exposed and burnt while medially it is less burnt. Right side upper limb is missing. Right thigh upper 1/3 part present show muscles burnt and bone (femur) at this part irregularly broken. Buttocks muscles burnt superficially as well as on back muscles exposed and burnt. Left thigh back muscles exposed burnt and crumpled. Left sole partly less burnt medially while laterally more

burnt.

Head & face:--

? Head and face were practically absent but for a little dried partly cooked due to heat, brain tissue present in multiple pieces of skull bone parts are within burnt and torn meanings . Muscles and sole tissues are seen crumpled. Major parts of head missing including face. Blood is cherry red to cherry brown in colour and partly solidified at places. Body of sternum fixed. Vertebra at lumbar show little flattering effects.

10. Finally, FIR was registered vide Ex. P-18 and morgue was registered vide Ex. P-19. Patwari prepared spot map vide Exs.P-5 & P-6. Panchnama was prepared vide Ex. P-7. Gameshwar Prasad (PW-10) also sustained injuries and he was also sent for medical examination vide Ex. P-21. Last panchnama Ex. P-24 was prepared. Spot was examined. Bloodstained stone, pieces of bricks, wooden pieces, block shoe, teeth removed from jaw, soil, three burnt cycles, one burnt motorcycle, one burnt cooler, three burnt boxes, burnt table, two burnt table fans, one burnt lantern, burnt mattress, burnt pieces of wooden plank, steel drum, burnt ash, coal & other burnt articles, one plastic chappal, shoe, pots, camera, damaged pieces of TV, broken bangles, bloodstained cloths founds near the place of incident were seized vide Exs. P-35, P-36, P-37 & P-38.

11. During the course of investigation, after accused Tijau Ram Sahu was taken into custody, he made disclosure statement of battleaxe vide Ex. P-39 and same was recovered at his instance vide Ex. P-48. Accused Neelkamal made disclosure statement of money vide Ex. P-29 and Cr. A. No. 20,760/- was recovered at his instance vide Ex. P-30. Accused Yogesh Kumar Sahu made disclosure statement of Cr. A. No. 10,000/- vide Ex. P-31 and same was recovered at his instance vide Ex. P-32. Accused Ukeshwar Sahu made disclosure statement of Cr. A. No. 5,000/- vide Ex. P-33 and same was recovered at his instance vide Ex. P-34. One stick was seized from accused Santram vide Ex. P-40. One stick was seized from accused Balla Ram vide Ex. P-41. Accused Netram made disclosure statement of battleaxe vide Ex. P-44A and same was recovered at his instance vide Ex. P-47. One stick was seized from accused Hirderam vide Ex. P-42. One stick was seized from accused Lomus vide Ex. P-43. One stick was seized from accused Dashrath Kumar vide Ex. P-44. Accused Tukaram made disclosure statement of sickle vide Ex. P-45 and same was recovered at his instance vide Ex. P-53. One stick was seized from accused Shivcharan Sahu vide Ex. P-42. One stick was seized from accused Chintaram vide Ex. P-49. One stick was seized from accused Balla Vishwakarma vide Ex. P-50. One stick was seized from accused Bhupendra Sahu vide Ex. P-51. One stick was seized from deceased accused Vijay Yadav vide Ex. P-52.

12. After autopsy, viscera was preserved, sealed and seized vide Ex. P-59. Seized articles were examined by the doctors and finally sent for chemical examination to the Forensic Science Laboratory, Raipur vide Exs.P-55 & P-56. The FSL, Raipur

affirmed presence of blood on the articles seized from the spot except on plain soil and plain cotton vide Ex. P-60. The prosecution has also collected caste certificates of deceased Dhakendra, Kum. Chandni (PW-3), Sugriv @ Ramlal (PW-11) and Gameshwar Prasad (PW-10) as Articles A-1 to A-5. Statements of the witnesses were recorded under Section 161 of the CrPC.

13. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Baloda Bazaar, who committed the case (Special S.T. No. 47/2008) to the Court of Special Judge under the Special Act, Raipur, and another case relating to accused/offenders belonging to Scheduled Caste was committed to the Court of Sessions, Raipur. Learned Special Judge received the aforesaid case on transfer for trial.

14. In order to prove the guilt of the accused persons in Special Sessions Trial Nos. 47/2008 & 83/2008, the prosecution examined twenty-six witnesses. The accused persons were examined under Section 313 of the Cr.P.C. in which they denied the circumstances appearing against them, pleaded innocence and false implication in the crime in question. They have also examined defence witness No. 1 K.P. Shukla (DW-1), Assistant Sub Inspector. The Court has also examined five Court witnesses namely Gangaram Sahu (CW-1), Mehtarin Bai (CW-2), Bodhiram (CW-3), Sadharam (CW-4) and Tirbati Bai (CW-5).

15. Accused took defence in trial that deceased Dhakendra was a man of criminal antecedents and bad criminal character. As many as 19 criminal cases including the cases of preventive action have been registered against the deceased vide Exs. D-1C to D-10C and numbers of cases have also been registered against witness Ramlal (PW-11). Also specific defence has been taken that Villages Phulwari & Newari are adjoining villages, a pond and mela ground (madai) is situate between two villages. Madai/annual customary market mela of both the villages was scheduled on 10-1-2008 when the incident took place and 11-1-2008 was also a day of mela. People joined in the mela. Deceased Dhakendra, the Ex-Sarpanch, was having grudge that he was not invited by the mela committee. He was making resistance on the mela path/road near the pond. Even he had collected wood and other articles which he ignited for obstructing the villagers from enjoying the mela on which a mob of about 200 persons got annoyed, came and tried to remove him to clear the obstruction. He rushed towards his house. The mob chased him up to some extent. The accused have also taken defence that they have not caused any injury to Usha Bai (PW-2), Kum. Chandni (PW-3) and Ramlal @ Sugriv (PW-11), they have not caused homicidal death of deceased Dhakendra, they have not committed mischief by fire and they have not set the household articles of the deceased on fire.

16. After providing opportunity of hearing to the parties, while acquitting 28 accused persons, the trial Court has convicted and sentenced the appellants vide aforesaid two impugned judgments in Special Sl. Nos. 47/2008 & 83/2008.

17. We have heard learned counsel for the parties, perused the judgments and records of both the cases.

18. Mr. S.C. Verma, learned counsel for the appellants in Cr. A. No. 5/2012, vehemently argued that as on the date of incident, Ex-Sarpanch deceased Dhakendra was not invited by the mela/madai committee, he was annoyed and on 11-1-2008 at morning along with Chandu Sahu & Sugriv @ Ramlal (PW-11), he was objecting and restraining the villagers who were going to enjoy the madai, they were also making obstruction by setting wood and other articles on fire that too on the road. Deceased Dhakendra & Sugriv @ Ramlal were men of criminal antecedents. The villagers enjoying the madai on noticing the mischief rushed towards the pond where the deceased along with Chandu Sahu & Sugriv @ Ramlal was making obstruction to the villagers. The deceased and his friends on seeing the mob rushed away from the spot. Mob chased them and the deceased entered in his house to take shelter, thereafter, the mob scattered & disbursed and after disbursing & scattering of mob, some persons who were more annoyed by the act of the deceased and his friends committed second part of incident. As per case of the prosecution, a group of persons i.e. the mob of about 200 persons chased the deceased up to his house, thereafter, some persons entered into the house of the deceased, they dragged him out then other group of persons assaulted him, thereafter, other group set the household articles on fire. Mr. S.C. Verma further argued that the mob initially chasing the deceased was not having any common object, even there was no occasion for forming unlawful assembly with any common object, but the mob was having its common object to remove the obstruction from the road which was created by the deceased and his friends, they were having lawful right to remove such obstruction and they have succeeded in removing such obstruction. The mob or all the appellants had not formed any unlawful assembly, there was no common unlawful object of such mob or gathering of persons. Object of the persons changed at the time of entering into the house of the deceased, dragging him out and thereafter causing injury. All the appellants were not members of that group, even it was not possible to become members of that group especially in the light of the act attributed. Evidence adduced on behalf of the prosecution reveals that certainly the appellants were present near by the place of incident, they were mute spectators like other villagers and residents of Village Phulwari and they have not actively participated. The prosecution has examined material witnesses Rajiv Kumar (PW-1), Usha Bai (PW-2), Kum. Chandni (PW-3), Gameshwar Prasad (PW-10) & Ramlal @ Sugriv (PW-11), the eyewitnesses, who are close relatives of the deceased. As per their evidence, they have witnessed the incident from quite long distance and they were not in a position to witness the complete incident. Rajiv Kumar (PW-1) has specifically deposed that the mob was having sticks, thereafter, this witness, Usha Bai (PW-2), Kum. Chandni (PW-3) & Gameshwar Prasad (PW-10) have further deposed that the persons have caused injuries by battleaxe. They have not deposed as to when the persons took battleaxe especially when they were not holding the same at the time of chasing

the deceased from pond. Even as per case of the prosecution, the mob came to the mela. Normally, villagers use to keep stick/staff with them, but keeping battleaxe or dangerous weapon that too at a public place when it was controlled by public officer, was not natural. Case of the prosecution clearly reveals that some persons have taken dangerous weapons when the deceased came out from his house. That part of incident is clearly separable from chasing of mob and setting the articles on fire. Even if case of the prosecution is considered as proposed, then there may be five different acts by five different groups of persons distinguishable from each other. Therefore, all the appellants cannot be held liable for commission of all the acts. As per evidence of Rajiv Kumar (PW-1), mob was chasing the deceased and this witness was also accompanying/following the mob. If evidence of Rajiv Kumar (PW-1) is considered, then he was also a member of the unlawful assembly and would be liable for commission of all the offences. In these circumstances, his evidence would be the evidence of an accomplice/co-accused and same cannot be considered against other co-accused especially when same is exculpatory in nature. Evidence adduced on behalf of the prosecution clearly distinguishes and separates the five distinct acts distinguishable from each other. On the basis of evidence of the prosecution, present appellants and other appellants may be considered as members of mob having its common object only to remove obstruction from road which by itself is not an offence. The prosecution has utterly failed to prove the formation of unlawful assembly in its inception and its continuance up to causing death of the deceased and commission of the offence of mischief by fire. The prosecution is required to prove its case beyond all the shadows of doubt, the accused were not under obligation to prove their defence or innocence. Bald statements of witnesses are not sufficient for drawing definite inference against any of the accused. From the evidence of the prosecution it appears that some persons have caused homicidal death of the deceased under provocation when they were provoked by the deceased, but the prosecution has failed to prove as to who were the assailants and have caused homicidal death of the deceased. Omnibus and bald statements of the witnesses even who were not in a position to witness the incident especially, second to fifth parts of the incident are not safe for basing conviction of the appellants i.e. entire members of the village.

19. Mr. Sudhir Verma, learned counsel for appellants No. 2 to 5 in Cr. A. No. 883/2011, by adopting the arguments advanced on behalf of Mr. S.C. Verma, submitted that Rajiv Kumar (PW-1), nephew of the deceased, has lodged dehati nalishi vide Ex. P-1 on 11-1-2008 at 10.15 a.m. and he has also lodged morgue vide Ex. P-2. In Ex. P-2 only the names of four persons and others has been mentioned. At the time of lodging morgue, Rajiv Kumar (PW-1), who has claimed that he is eyewitness, has not named the present appellants or other appellants except four persons. Although he was having opportunity to name all the persons, but for the reasons best known to him he has not named all persons, which clearly reveals that only four persons were present at the time of incident and not the all appellants. His omnibus statement is not sufficient for drawing

any definite conclusion. The witnesses have not named appellant No. 2 Kheduram in their deposition. Virtually, the prosecution has not collected any evidence against appellant No. 2 Kheduram.

20. Mr. Rajkamal Singh & Mr. M.K. Baeg, learned counsel for the appellants in Cr. A. No. 943/2011, in addition to the arguments of Mr. S.C. Verma and adopting the same submitted that evidence of the prosecution witnesses clearly reveals that there were three separate and distinguishable incidents first part chasing of mob, second part injury to the deceased, Usha Bai (PW-2) & Kum. Chandni (PW-3), third part setting the household articles ablaze, fourth part chasing the deceased and fifth part causing fatal injuries to him in front of the house of Khuman and throwing his body in fire. All five parts are separable and distinguishable from each other and there was no unlawful assembly, no common object and the appellants were not members of others parts of the incident. The prosecution has utterly failed to bring them liable for second to fifth parts.

21. Mr. Malay Kumar Bhaduri, learned counsel for the appellant in Cr. A. No. 993/2011, in addition to the arguments advanced on behalf of Mr. S.C. Verma submitted that this is a case in which as per the prosecution, 77 persons have committed the offence and the prosecution has produced Rajiv Kumar (PW-1) as star witness of the case. As per evidence of Rajiv Kumar (PW-1), he has witnessed the incident from first place of incident i.e. near the pond up to charring of the body of the deceased. It was obligatory upon Rajiv Kumar (PW-1) to make specific allegation against each of the assailants and was also obligatory upon him to explain the role of each person. In para 32 of his evidence, he has deposed that he has not named Ballaram, Neelkamal, Punaram, Hriday Ram, Hernial and Eelaram in his FIR and dehati nalishi. He has also admitted that at the time of lodging dehati nalishi, he was knowing the names of all accused, but he did not name all accused which shows that naming of all accused as assailants is an afterthought. Mr. Malay Kumar Bhaduri further submitted that evidence adduced on behalf of the prosecution may be sufficient for creating suspicion against the appellant, but is not sufficient for his conviction.

22. Mr. Malay Kumar Bhaduri placed reliance in the matter of Bhargavan and Others Vs. State of Kerala, in which the Supreme Court has held that mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 of the IPC. Mr. Malay Kumar Bhaduri further placed reliance in the matter of Badal Murmu and Others Vs. State of West Bengal, in which the Supreme Court has held that in absence of specific role of the appellants, in absence of specific finding relating to injury sufficient for causing death and availability of axe with the appellants who did not use the same shows that they have not shared common object to murder the deceased, therefore, their conviction is not sustainable under Section 302 of the IPC with the aid of Section 149 of the IPC. Mr. Malay Kumar Bhaduri also placed reliance in the matter of Eknath Ganpat Aher and Others Vs. State of Maharashtra and

Others, in which the Supreme Court of India has held that in absence of evidence of specific role, acquittal of some accused makes the other accused entitled for same benefit. The Supreme Court has further held that in case of rivalry between two groups there is general tendency to implicate the rival group, therefore, the Court is required to have a minute scrutiny of evidence. Mr. Malay Kumar Bhaduri relied upon the matter of Mohan Singh and Others Vs. State of Madhya Pradesh, in which the High Court of Madhya Pradesh has held that mere presence of a person without any proof by direct evidence or circumstantial evidence about his knowledge of common object of unlawful assembly and if such person has not taken any part by act or gesture, the said person cannot be convicted with the aid of Section 149 of the IPC.

23. Mr. Arun Kochar, learned counsel for appellant No. 1 Tijau Ram in Cr. A. No. 883/2011, and Mrs. Anju Ahuja, learned counsel for appellant Netram in Cr. A. No. 42/2012, in addition to the arguments advanced by previous counsel, vehemently argued that omnibus allegation has been made against appellants Tijau Ram & Netram and the prosecution has utterly failed to prove the case against these appellants. Mr. Arun Kochar and Mrs. Anju Ahuja further argued that although names of appellants Netram & Tijau Ram have been mentioned in morgue Ex. P-2 and dehati nalishi Ex. P-1, but only mentioning the names that too of members of rival group is not sufficient for their conviction. They also argued that it was obligatory upon the prosecution to prove specific case against the appellants. As per dehati nalishi, the assailants were holding stones, sticks & battleaxe, but dehati nalishi or morgue did not reveal as to who was holding battleaxe and who was holding stick, it was not the case that all members were holding battleaxe. As per case of the prosecution, some were holding battleaxe which may be easily identifiable, but for the reasons best known to Rajiv Kumar (PW-1), he has not named the persons who were holding battleaxe, even in para 7 of his evidence he has not named as to who were holding battleaxe. As per para 7 of his evidence, all accused were chasing the deceased and were holding stick (lathi danda). As per his evidence, there was no break during the course of incident and there was no opportunity for taking rod, battleaxe, crowbar, but as per his evidence, accused persons have caused injury by stick, rod, crowbar & battleaxe. This is also not the case that they have taken aforesaid deadly weapons from the house of the deceased or the deceased and his family members were keeping aforesaid deadly weapons. Even there was no opportunity for taking such deadly weapons from any place. These evidences show that either Rajiv Kumar (PW-1) has not witnessed the incident and he is falsely implicating the accused persons including the present appellants. All of a sudden in para 8 of his evidence, he has stated that the appellants were holding battleaxe which did not find support from Ex. P-1 dehati nalishi and Ex. P-2 morgue in absence of corroboration from his previous document/statement. Even it is contrary to para 7 of his evidence and this part of evidence is not reliable. Even the autopsy surgeon has not clearly opined that the injury found on the body of the deceased has been caused by sharp edged weapon. It was the duty

of the prosecution to prove aforesaid facts. In absence of such proof, benefit will go to the appellants, not to the prosecution. Mr. Arun Kochar and Mrs. Anju Ahuja also submitted that para 8 of the evidence of Rajiv Kumar (PW-1) relating to cutting of hand, leg and neck was contrary to medical evidence. As per autopsy report Ex. P-12 and evidence of Dr. R.K. Singh (PW-6), especially para 1, he has noticed that brain and scalp were damaged, he has not deposed that they were chopped. As per para 23 of the evidence of Rajiv Kumar (PW-1), he has not stated the fact as to who has caused injury to which body part of the deceased. This is missing even in his statement recorded under Section 161 of the CrPC. In para 24, he has further deposed that although he has witnessed the incident, but he has not deposed that his uncle deceased Dhakendra sustained injuries on which part of his body. He has also deposed that he has not stated as to which injury was caused by which of the accused. In para 50, he has further deposed that there were photos of deceased Dhakendra and witness Sugriv @ Ramlal (PW-11) kept in the police station, though he has not admitted the criminal antecedents and bad character of the deceased. Mr. Arun Kochar and Mrs. Anju Ahuja contended that by examining K.P. Shukla (DW-1), Assistant Sub Inspector, defence has proved the fact that as many as 19 criminal cases have been registered the deceased. They further contended that Usha Bai (PW-2), wife of the deceased, has deposed in paras 47 & 52 of her evidence that she did not know who has caused injury to her husband and even she did not know the assailants who were residents of other village. Daughter of the deceased Kum. Chandni (PW-3) has also admitted in paras 27 & 58 of her evidence that even it was not possible to witness the incident from the place where she was standing and it was not possible to witness the complete incident. Mr. Arun Kochar and Mrs. Anju Ahuja also contended that evidence adduced on behalf of the prosecution is contrary relating to weapons, witnessing the incident and the act attributed to the present appellants, therefore, appellants Tijauram & Netram are entitled for acquittal.

24. Mr. Arun Kochar placed reliance in the matter of Hallu and Others Vs. State of Madhya Pradesh, in which the Supreme Court has held that correct approach to analyze the evidence is the fact that who has lodged FIR and whether he has lodged FIR on the basis of his personal knowledge and if yes, then the evidence finds support from the FIR can be considered and in case of two views from the evidence of the prosecution witnesses, the Court is required to accept the view contrary to the accused and not the prosecution. Mr. Arun Kochar further placed reliance in the matter of Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra, in which the Supreme Court has held that in case of unlawful assembly, evidence of victim party and evidence against rival group can be stamped as interested witnesses, it requires close scrutiny. The Supreme Court has further held that act relating to commission of main offence is required to be analyzed minutely to fasten liability upon other persons.

25. Mr. B.D. Guru, learned counsel for the appellant in Cr. A. No. 10/2012, in addition to the arguments advanced by aforesaid counsel, submitted that in

absence of proof of formation of unlawful assembly and common object that too for causing murder of deceased Dhakendra and knowledge of common object to all accused, conviction of the appellant under Section 302 of the IPC with the aid of Section 149 of the IPC is not sustainable under the law.

26. Mr. Ashok Soni, learned counsel for the appellants in Cr. A. No. 24/2012, in addition to the arguments advanced by previous counsel, submitted that Usha Bai (PW-2) has specifically deposed in paras 24 & 50 of her evidence that the appellants are residents of other village therefore, she did not know them, as such her evidence is of no use. Mr. Ashok Soni placed reliance in the matter of Eknath Ganpat Aher (supra) which has been earlier relied upon by Mr. Malay Kumar Bhaduri while arguing in Cr. A. No. 993/2011.

27. Mr. Malay Shrivastava, learned counsel for the appellants in Cr. A. Nos. 11/2012 & 173/2012, in addition to the arguments advanced on behalf of previous counsel, submitted that evidence of star witness Rajiv Kumar (PW-1) does not inspire confidence and is not trustworthy, his evidence is not safe to rely and he has intentionally implicated his rival group. Rajiv Kumar (PW-1) is relative of the deceased. There were independent witnesses and their presence has been admitted by the Investigating Officer G.S. Shukla (PW-25), who has explained that on the ground that witnesses present were belonging to the caste of the accused persons and there was no chance of corroboration from them, therefore, he has not examined them and has not shown them as witnesses. Mr. Malay Shrivastava further submitted that it was the duty of the investigating officer to ignore their evidence only on the ground that they were members of same caste and if it is considered that on the ground that other persons present were members of caste of the appellants, then the evidence of Rajiv Kumar (PW-1), Usha Bai (PW-2) & Kum. Chandni (PW-3) who are members of the caste of the deceased and close relatives of the deceased, is also required to be ignored. The prosecution cannot be permitted to apply pick and choose theory.

28. Mr. C.R. Sahu, learned counsel for the appellants in Cr. A. Nos. 999/2011, 921/2011, 79/2012 & 724/2012, submitted that he is adopting the arguments advanced on behalf of previous counsel and further submitted that evidence of the prosecution is not sufficient for holding all appellants guilty and the act shown by the prosecution is not the single act, but this is distinct act distinguishable from each other, all accused cannot be held liable for commission of all offences or the commission of murder of deceased Dhakendra. It was not obligatory upon the prosecution to separate the distinct offence and file charge sheet against the distinct assailants relating to their distinct act and to adduce evidence specific in nature instead of adducing omnibus and bald evidence.

29. Mr. J.N. Nande, learned counsel for the appellants in Cr. A. No. 87/2012 and for appellant No. 1 Puneet Sahu in Cr. A. No. 114/2012, in addition to the arguments advanced by aforesaid counsel, submitted that omnibus and bald statements of the witnesses are not sufficient for drawing definite conclusion, Rajiv Kumar (PW-1), Usha Bai (PW-2) & Kum. Chandni (PW-3) have not named

all appellants, even Usha Bai (PW-2) & Kum. Chandni (PW-3) were not in a position to name all appellants on the ground that the appellants are not residents of their village. It was incumbent upon the prosecution to conduct test identification parade to ensure that who were assailants. In absence of conduction of test identification parade, it is fatal to the prosecution and entitles the appellants for acquittal.

30. Mr. K.K. Dewangan, learned counsel for the appellants in Cr. A. No. 35/2012 and for appellants No. 2 & 3 in Cr. A. No. 114/2012, submitted that he is adopting the arguments advanced on behalf of other counsel. He further submitted that evidence of Rajiv Kumar (PW-1), alleged star witness, does not inspire confidence and is not trustworthy.

31. Mr. D.C. Verma, learned counsel for the appellant in Cr. A. No. 103/2012, submitted that para 24 of the evidence of Rajiv Kumar (PW-1), para 52 of the evidence of Usha Bai (PW-2) and para 2 of the evidence of Kum. Chandni (PW-3) are sufficient to demonstrate the picture of the prosecution that these witnesses were not in a position to identify as to who were assailants, who were holding what weapon and who had caused injury to the deceased, inter alia, their evidences are negative and do not disclose that the appellants were assailants, they were holding specific weapon and they have caused injuries and death of the deceased. These parts of the evidence are sufficient for rejecting the case of the prosecution.

32. Mr. S.S. Rajput, learned counsel for the appellants in Cr. A. Nos. 105/2012 & 294/2012, submitted that appellant Kansram, aged about 65 years, uses spectacles of high power, he is not in a position to see without the aid of spectacles and he is not in a position to run on account of his old age, even it was not possible for him to chase the deceased or accompany the mob on account of his old age and weak eyesight which has been admitted by Rajiv Kumar (PW-1) & Kum. Chandni (PW-3), but only on the ground that he is member of caste of other appellants he has been falsely implicated.

33. Mr. Vimlesh Bajpai, learned counsel for the appellants in Cr. A. No. 25/2012, submitted that he is adopting the arguments advanced by previous counsel.

34. Mr. Pradeep Rajgir, learned counsel for the appellant in Cr. A. No. 246/2012, while adopting the arguments advanced on behalf of previous counsel, submitted that evidence of Rajiv Kumar (PW-1), who has not specified the names of all assailants in his statement recorded under Section 161 of the CrPC and dehati nalishi, has deposed that he has identified the appellants in the Court which is contrary to his previous statement and is not safe to rely.

35. Mr. Pawan Kesharwani, learned counsel for the appellants in Cr. A. Nos. 616/2012, 617/2012 & 854/2012, adopting the arguments advanced on behalf of previous counsel submitted that the prosecution has utterly failed to prove the case against his appellants along with other appellants.

36. On the other hand, Mr. Ramakant Mishra, learned Deputy Advocate General for the State/respondent, vehemently opposed the appeals and submitted that by examining Rajiv Kumar (PW-1), Usha Bai (PW-2) & Kum. Chandni (PW-3), eyewitnesses, the prosecution has proved its case beyond all shadow of doubt. All the offences were committed in series and closely associated and connected with each other. The offences are not distinct or distinguishable. Firstly, all the appellants formed unlawful assembly, their common object was to cause homicidal death amounting to murder of Dhakendra, to damage his property and to cause injuries to other witnesses, and in furtherance of common object, they have committed aforesaid offences. Even otherwise, once unlawful assembly having its common object is formed then any further act or overt act of any member of unlawful assembly is of no use, the only requirement is whether any member of unlawful assembly has committed the offence in furtherance of common object or not. Mr. Ramakant Mishra further submitted that after close scrutiny of evidence adduced on behalf of the prosecution supported by documentary evidence, the trial Court has rightly convicted and sentenced the appellants as aforementioned.

37. As per oral and documentary evidence and submissions of counsel for both the parties, homicidal death of deceased Dhakendra has not been substantially disputed on behalf of the appellants, on the other hand, it is also established by the evidence of Rajiv Kumar (PW-1), Usha Bai (PW-2), Kum. Chandni (PW-3), Dr. R.K. Singh (PW-6) & autopsy report Ex. P-12 that death of the deceased was homicidal in nature.

38. Grievous injuries caused to Usha Bai (PW-2) & Ramlal @ Sugriv (PW-11) have also not been disputed on behalf of the appellants, on the other hand, it is established by evidence of Usha Bai (PW-2), Ramlal @ Sugriv (PW-11), Dr. K. Israni (PW-5) & Dr. Kavita Lohani (PW-7), injury reports Exs. P-9 & P-10 and X-ray reports Exs. P-15 & P-16 that injuries found over the bodies of Usha Bai (PW-2) & Ramlal @ Sugriv (PW-11) were grievous in nature. Simple injuries caused to Kum. Chandni (PW-3) have also not been disputed on behalf of the appellants and stand established by evidence of Kum. Chandni (PW-3), Dr. K. Israni (PW-5) and injury report Ex. P-9.

39. As regards complicity of the appellants in the crime in question, as per prosecution, conviction of the appellants is substantially based on the evidences of Rajiv Kumar (PW-1), Usha Bai (PW-2), Kum. Chandni (PW-3) & Ramlal @ Sugriv (PW-11). As per their evidence, especially the evidence of Rajiv Kumar (PW-1), at the time of incident deceased Dhakendra was sitting near pond, the appellants chased him, the deceased rushed towards his house and entered into his house, the appellants followed him and broke open the doors of his house locked from inside and entered his house, they dragged the deceased and caused fatal injuries by battleaxe & stick, even they chopped his neck, hand & leg, thereafter, they took out the household articles TV, fridge, fan, motorcycle, cycle etc., from the house of the deceased, kept the same in front of his house and

burnt the same, thereafter, they threw the body of Dhakendra in the burning fire. The appellants have firstly, formed unlawful assembly near pond and completed their object finally, in front of the house of the deceased.

40. As held by the Supreme Court in Badal Murmu (supra), in absence of specific role attributed to each of the appellants, availability of axe and not using axe by the appellants and in absence of evidence of specific injury fatal to the deceased, it cannot be said that the appellants shared common object to murder the deceased and in prosecution of that common object they caused the death. In the light of aforesaid evidence, conviction was altered to Section 304 Part-II of the IPC. The Supreme Court has observed in para 10 of its judgment as follows:--

"10. As earlier noted by us, in this case none of the eye-witnesses have given specific role to any of the appellants. They have not stated which appellants gave which blow and on which part of the deceased's body. They have not stated which injury was caused by which accused. The doctor has not stated which injury was fatal. Undoubtedly, the deceased had suffered two fractures and haematoma under the scalp, but nobody has said that any particular appellant caused these injuries. It bears repetition to state that though sharp cutting weapons i.e., tangies were available, the appellants did not use them. In the peculiar facts of this case, therefore, it is not possible to hold that the appellants shared common object to murder the deceased and in prosecution of that common object they caused his death. It would not be possible to sustain their conviction for offence punishable under Section 302 read with Section 149 of the IPC. It would be just and proper to resort to Section 304, Part II of the IPC and treat the sentence already undergone by them as sentence for the said offence."

41. In the present case, any appellant has not taken the defence that dangerous weapon was available to him but he has not used the same or injury found over the body of the deceased was not fatal. Virtually, injuries found over head, hand & leg of the deceased and charring of body of the deceased were fatal. The case of Badal Murmu (supra) is distinguishable on facts to that of the present case.

42. In Eknath Ganpat Aher (supra), the Supreme Court has held that vague and omnibus statements against a mob of 75-100 persons and in case of rival groups there is chance of false implication, in case if it appears that there may be chance of false implication then the appropriate decision would be extension of the benefit of doubt. Minute scrutiny of evidence in the light of rival group is required.

43. As held by the Supreme Court in Hallu (supra), correct approach to analyze the evidence is the fact that who has lodged FIR and whether he has lodged FIR on the basis of his personal knowledge. In the present case, there is improvement in morgue, dehati nalishi and evidence of Rajiv Kumar (PW-1). In case of commission of incident by a mob of huge number of persons, it would not be possible to name all assailants in the FIR. In FIR & morgue, Exs. P-1 & P-2, respectively, after naming some assailants "and others" has been mentioned,

therefore, only on the ground that names of all assailants do not find place in the FIR, case of the prosecution cannot be rejected. The case of Hallu (*supra*) is also distinguishable on facts to that of the present case.

44. As held by the High Court of Madhya Pradesh in Mohansingh (*supra*), non-use of stick though the appellant was having shows his presence simplicitor, therefore, he cannot be made liable on the ground of his mere presence. In the present case, any of the appellants has not claimed that he was holding deadly weapon lathi or any other weapon, but he has not used the same. The case of Mohansingh (*supra*) is also distinguishable on facts to that of the present case.

45. Constitution of unlawful assembly is a question of fact and the prosecution is required to prove constitution of unlawful assembly and its common object. Unlawful assembly may be constituted at any moment and person may join unlawful assembly at any time, even at the time of causing injury, but the prosecution is required to prove the aforesaid fact by adducing cogent and reliable evidence that the persons have formed the unlawful assembly or joined in unlawful assembly having its common object and was having its common object for commission of the aforesaid offence. Mere presence as a stranger, by passer or gathered on the spot to see quarrel or the incident would not make the person liable for formation of unlawful assembly or liable for the commission of offence.

46. While dealing with the question of formation of unlawful assembly, the Supreme Court in the matter of Chandra Bihari Gautam and Others Vs. State of Bihar, has held that unlawful assembly may be constituted at any moment and even assembled of accused, but the existence of the common object of the unlawful assembly has to be ascertained in the facts and circumstances of each case. Para 6 of the said judgment reads as under:

"6. It has been argued alternatively that even if the occurrence is held to have taken place in the manner alleged by the prosecution and the accused persons were seen on spot, they cannot be convicted and sentenced as the prosecution allegedly failed to establish the accused persons. Section 149 is an exception to the criminal law whereunder a person can be convicted and sentenced for his vicarious liability only on proof of his being a member of the unlawful assembly, sharing the common object, notwithstanding as to whether he had actually participated in the commission of the crime or not. Common object does not require prior concert and a common meeting of minds before the attack. An unlawful object can develop after the accused assembled. The existence of the common object of the unlawful assembly has to be ascertained in the facts and circumstances of each case. It is true that the mere presence of the accused is not sufficient to hold them guilty for the sharing of common object as the prosecution has to further established that they were not mere by-standers but in fact were sharing the common object. When a concerted attack is made by a large number of persons, it is often difficult to determine the actual part played by each of the accused but on that account, for an offence committed by a

member of the unlawful assembly in the prosecution of the common object or for an offence which was known to be likely to be committed in prosecution of the common object, persons provide to be members cannot escape the consequences arising from the doing of that act which amounts to an offence. There may not be a common object in a sudden fight but in a planned attack on the victim, the presence of the common object amongst the persons forming the unlawful assembly can be inferred."

47. While dealing with same question, the Supreme Court in the matter of Pandurang Chandrakant Mhatre (supra) has held that conduct of each member of unlawful assembly before and at the time of attack is relevant consideration. Object of unlawful assembly is a question of fact which has to be determined keeping in view nature of assembly, arms carried by members, and behavior of members at or near scene of incident. Mere presence on the spot will not make the person liable for commission of the offence with aid of Section 149 of the IPC.

48. While dealing with same question, the Supreme Court in the matter of Masalti Vs. State of U.P., has held in para 17 as under:--

"77.....What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly."

49. While dealing with same question, the Supreme Court in the matter of Sherey and others vs. State of U.P. 1991 Supp (2) SCC 437 has held in para 4 as under:--

"4.....But when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the abovementioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also to whom over acts are attributed....."

50. While dealing with the question of need of overt act or active participation of member of unlawful assembly, the Supreme Court in the matter of Lalji and

Others Vs. State of U.P., has held that once formation of unlawful assembly is established, then no overt act or active participation of any member of unlawful assembly is required and mere meeting of five or more persons for carrying out common object involving reasonable apprehension of violence, even without doing any overt act is sufficient to constitute offence. Paras 8 and 9 of the said judgment read as under:--

"5. Section 149 IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in Section 141 IPC, an assembly of five or more persons is designated an "Unlawful Assembly", if the common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth", and "Fifth" of that section. An assembly, as the explanation to the section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behavior of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or

to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge."

51. While dealing with the question of intention/common object of unlawful assembly, the Supreme Court" in the matter of State of U.P. Vs. Dan Singh and others, has held that intent of members of assaulting party can be gathered from number and nature of injuries and arms used by them. An assembly which is initially lawful may subsequently become unlawful. Paras 30 and 31 of the said judgment read as under:--

"30. From the aforesaid facts, as found by the High Court, let us examine whether there existed any unlawful assembly and what was its common object. It is possible that there was no unlawful assembly, in existence at the time when the "doli" was stopped. Nevertheless as per the evidence of all the eyewitnesses, a large number of villagers had gathered there and they had with them lathis and sticks. According to the explanation to Section 141 IPC an assembly which is not unlawful when it assembles may subsequently become an unlawful assembly. As observed by this Court in Lalji and Others Vs. State of U.P., "that common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behavior of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case". What has happened in the present case is precisely what has been envisaged in the explanation to Section 141 IPC. With Khima Nand being injured, all hell broke loose. A cry was raised that the Doms should be burnt and killed, and this is precisely what happened. The marriage party was assaulted by the villagers. Six of the members of the marriage party were burnt, five of them having been locked inside the house of the only Dom resident of the village whose house was also burnt. Eight others were pursued and then

mercilessly beaten and were killed elsewhere in the village. We fail to appreciate how anyone, under the circumstances, can possibly come to the conclusion that an unlawful assembly having the common object of killing the Doms did not exist when fourteen people have been killed without the use of any weapon more lethal than a stick or stone. Considering the number of injuries on the persons who had died, it is evident that a large number of persons must have taken part in the assault. Even if the assembly of villagers was initially lawful, the same, undoubtedly, became unlawful when the riot started after Khima Nand was injured. All the eyewitnesses have said that fifty or more villagers had taken part in the attack. Who were members of the assembly will be considered later but what is relevant to note is that a large number of villagers were present, duly armed with lathis and sticks, when the occurrence started and except six people who were burnt, eight others were beaten to death by blows from lathis, sticks and stones. It is difficult to appreciate the conclusion of the High Court that, under the circumstances, the attackers probably had a similar object but not a common object.

31. It was sought to be contended that there is nothing to show that the unlawful assembly continued to exist during the course of the entire incident. It is not possible to accept this considering that when all that remained in the village, of the marriage party, were fourteen corpses. It is only those members of the marriage party who had run away were able to save their lives. The only conclusion which we can arrive at, in the instant case, is that there was an unlawful assembly which attacked the marriage party and which had the common object of killing them, and they succeeded in their endeavour to a large extent."

52. While dealing with the question of common object and necessity of overt act of members of unlawful assembly, the Supreme Court in the matter of Gangadhar Behera and Others Vs. State of Orissa, has held that evidence relating to common object generally not available and same has to be gathered from the act committed and result therefrom. Likewise once assembly is formed, then overt act of any member of assembly is not assembled and even an assembly which is initially lawful may subsequently become unlawful. Paras 22, 23 and 24 of the said judgment read as under:--

"22. Another plea which was emphasized relates to the question whether Section 149 IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as

specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common", it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 have to be strictly construed as equivalent to "in order to attain the common object"? It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to a certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

23. "Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behavior of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can

develop during the course of incident on the spot eo instanti.

24. Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first, offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew were likely to be committed in the prosecution of the common object. (See Chikkarange Gowda and Others Vs. State of Mysore, "

53. As held in Bhargavan, Badal, Eknath, Mohansingh, Hallu & Pandarang (supra), there cannot be straight-jacket formula for arriving at a finding as to who was the member of unlawful assembly and for what object the unlawful assembly was formed. An unlawful assembly may initially be formed for achieving any object described in Section 141 of the IPC and at subsequent stage, the object of certain members of unlawful assembly may change, in that

circumstance, the unlawful assembly may be of more than one part especially in the light of its common object as it is a matter of common knowledge that normally, the prosecution would not be in a position to lead evidence to show that firstly the assembly was gathered, they discussed the matter and decided their object, thereafter, they public the same as to what was their object and thereafter, proceed for achieving that object.

54. In the light of law as propounded by the Supreme Court in the aforesaid cases, for constitution of unlawful assembly, five or more than five members are required, their common objects must be for commission of the offence as envisaged in Section 141 of the IPC. An assembly constituted lawful may be converted into unlawful assembly at any moment. Normally the evidence relating to common object of unlawful assembly is not possible. It may be inferred from the act committed by the unlawful assembly and if result of such act is once proved that the unlawful assembly has been constituted, any overt act or active participation of any member of unlawful assembly is not necessary. All members would be liable for commission of offence or for the act committed by any member of unlawful assembly in accordance with Section 149 of the IPC.

55. Formation of unlawful assembly and its common object are matter of fact and they can be proved in following ways:--

- ? object the assembly finally achieved;
- ? mode of achievement;
- ? weapon, object or tool used, in case of technical weapon, the expertise of using or operating the same;
- ? active participation in achieving such object;
- ? passive presence as a member of assembly;
- ? presence of family member in helpless condition unable to intervene in achieving the object;
- ? mere utterance by members standing as spectators;
- ? procurement of weapon in achieving the object from any place or house;
- ? snatching the weapon from others for using the same and its use;
- ? making obstruction in intervening the incident or rescuing the victim;
- ? non-user of weapon though in possession of members;
- ? availability of weapon but its non-use;
- ? providing assistance to victim after the incident.

These are some instances which play vital role in deciding whether the accused was member of unlawful assembly and whether he was member of unlawful

assembly at the time of achieving any object of unlawful assembly.

56. In the light of aforesaid proposition of law and instances relevant to conclude about formation of unlawful assembly and its common object, we have to examine the evidence adduced on behalf of the parties.

57. In order to prove formation of unlawful assembly and its object, the prosecution has examined Rajiv Kumar (PW-1), nephew of deceased Dhakendra. As per his evidence, he has witnessed the incident from its inception and he has closely witnessed different parts of incident. As per para 3 of his evidence, on 11-1-2008 at about 9 a.m. when he woke up in his house situate at Village Phulwari where the main incident took place, madai was being held at Newari in the intervening night of 10th & 11th January, 2008, he was going to madai, to take tea and on his way, he saw his uncle deceased Dhakendra, injured witness Ramlal @ Sugriv (PW-11) and Chandu Sahu sitting near the pond. After taking tea at madai, while coming back, he saw Tijauram Sahu-appellant No. 1 in Cr. A. No. 883/2011, Ilaram Sahu-acquitted accused, Ballaram Sahu - appellant No. 4 in Cr. A. No. 883/2011, Hernial Sahu - acquitted accused, Punaram Sahu-acquitted accused, Somnath Sahu - appellant No. 5 in Cr. A. No. 883/2011, Tukaram Sahu - appellant No. 3 in Cr. A. No. 883/2011, Khedu Sahu - appellant No. 2 in Cr. A. No. 883/2011, Nilkamal Sahu - acquitted accused, Kanshram Sahu - appellant in Cr. A. No. 105/2012, Yogeshwar Sahu - acquitted accused, Ugeshwar Sahu, Yogesh Sahu - acquitted accused, Parmeshwar Sahu -acquitted accused, Lomus Sahu - acquitted accused, Jagdish Sahu - appellant No. 2 in Cr. A. No. 11/2012, Netram Sahu - appellant in Cr. A. No. 42/2012, Shivcharan Sahu-appellant No. 1 in Cr. A. No. 5/2012, Deepchand Sahu - appellant No. 4 in Cr. A. No. 617/2012, Trilochan Sahu - appellant in Cr. A. No. 294/2012, Khemu Sahu - acquitted accused, Jageshwar Sahu - appellant in Cr. A. No. 10/2012, Rambharosa Sahu - acquitted accused, Ramkishun Nishad - appellant No. 3 in Cr. A. No. 617/2012, Dashrath Sahu - acquitted accused, Kejuram Sahu - appellant No. 2 in Cr. A. No. 25/2012, Chintaram Dhruv - appellant No. 1 in Cr. A. No. 616/2012, Santu Sahu - appellant No. 4 in Cr. A. No. 25/2012, Sewaram Sahu - appellant in Cr. A. No. 854/2012, Hemant Sahu - acquitted accused, Ballaram Vishwakarma - appellant No. 6 in Cr. A. No. 617/2012, Janak Vishwakarma, Jageshwar Sahu, Ghanshyam Sahu, Manoj Sahu - appellant No. 3 in Cr. A. No. 114/2012, Kamta Sahu - acquitted accused, Yunitram Sahu, Santram Sahu - appellant No. 2 in Cr. A. No. 114/2012, Gokul Sahu - appellant in Cr. A. No. 724/2012, Murari Sahu - appellant in Cr. A. No. 921/2011, Ramdayal Sahu - appellant No. 3 in Cr. A. No. 25/2012, Ramkumar Nishad - appellant No. 3 in Cr. A. No. 87/2012, Tukaram Nishad - appellant No. 4 in Cr. A. No. 87/2012, Suresh Nishad - appellant No. 1 in Cr. A. No. 87/2012, Bodhi Sahu - acquitted accused, Sadhu Sahu, Bhupendra Sahu, Ukeshwar Sahu - acquitted accused, Fattu Sahu - acquitted accused, Bhagela Sen - acquitted accused, Hiteshwar Sahu - acquitted accused, Santosh Sahu - appellant No. 1 in Cr. A. No. 24/2012, Madan Sahu - acquitted accused, Mohit Kumar Sahu - appellant in Cr. A. No. 246/2012, Heeralal Sahu - appellant No. 1 in Cr. A. No. 25/2012, Hriday Sahu - acquitted

accused, Ram Kumar Sahu - appellant in Cr. A. No. 993/2011, Rewaram Sahu - appellant in Cr. A. No. 103/2012, Mani Sahu - acquitted accused, Janak Sahu - appellant No. 2 in Cr. A. No. 24/2012, Rugu Sen - appellant No. 1 in Cr. A. No. 943/2011, Prabhu Sen - appellant No. 2 in Cr. A. No. 943/2011, Sakharam Sahu - appellant No. 2 in Cr. A. No. 35/2012, Mahendra Kumar - appellant No. 1 in Cr. A. No. 35/2012, Kaushal - acquitted accused, Ghanaram - acquitted accused, Babulal Sahu - appellant No. 1 in Cr. A. No. 999/2011, Vijay Yadav - convicted but not preferred any appeal, Gayaram Sahu - appellant No. 2 in Cr. A. No. 999/2011, Radheyshyam Sahu S/o. Bisoha Sahu - appellant No. 1 in Cr. A. No. 11/2012, Radheyshyam Sahu S/o Surihat Sahu - appellant No. 7 in Cr. A. No. 617/2012 (since deceased), Ramesh - appellant No. 2 in Cr. A. No. 87/2012, Sadhram - appellant No. 2 in Cr. A. No. 5/2012, Khilawan Yadav - appellant No. 5 in Cr. A. No. 617/2012, Heeralal Dhruv - appellant No. 2 in Cr. A. No. 616/2012, Firtu Nishad, Puneet Sahu - appellant No. 1 in Cr. A. No. 114/2012 and Agatram Sahu - appellant in Cr. A. No. 79/2012. They are known to him. Firstly, acquitted accused Iaram Sahu assaulted deceased Dhakendra by stick, then all persons started assaulting the deceased with stick. The deceased ran for rescue and they were chasing the deceased. The deceased was bleeding. The accused persons also assaulted Sugriv (PW-11)"who jumped in the pond and saved himself and he also followed the accused thereafter. As per his evidence, pond is situate between Villages Newari & Phulwari. The accused persons were chasing the deceased towards Village Phulwari where the deceased used to reside. The accused were having stick, rod, crowbar and battleaxe. Deceased Dhakendra went inside his house. Usha Bai (PW-2), wife of the deceased, locked the shutter gate from inside. This witness Rajiv Kumar (PW-1) also reached in front of the house of the deceased and was standing there. The appellants broke open the lock of shutter and entered inside the house of the deceased. They took out the household articles from the house of the deceased like TV, cooler, dressing table, beds etc., and set them ablaze. His father i.e., Gameshwar (PW-10) tried to save the articles on which appellant Somnath assaulted him by stick and he was also stained with blood. The appellants went to second floor of the house from where they dragged the deceased and assaulted him. They also assaulted Usha Bai (PW-2) and also caused incised wound over head of Chandni (PW-3) and cut her hairs. Appellant Tukaram Sahu assaulted Chandni (PW-3) by sickle. When deceased Dhakendra tried to rush towards Khuman's house, Tijau & Netram, appellants in Cr. A. Nos. 883/2011 & 42/2012 respectively, assaulted Dhakendra by battleaxe, appellant Ballaram assaulted by rod, appellant Jageshwar assaulted by stick and appellant Sakharam assaulted by stick. Tijau caused incised wound over neck of the deceased, Netram chopped his hand and also chopped his one leg, and other appellants also assaulted him, they dragged him to the place where they were burning the household articles and threw him in burning household articles. At that time, when somebody told/made noise that the deceased is still alive then the appellants threw dry-grass on the fire. Thereafter, the appellants moved in the village and threatened the villagers that if they will give evidence against them then the consequence would be the same. Rajiv

Kumar (PW-1) has further deposed that head of deceased Dhakendra was separated from the body (dhad), but hand was hanging and not completely detached, thereafter, the police party came. He has further deposed that his uncle deceased Dhakendra had telephoned the police from his house on which the police came to the village to whom he lodged dehati nalishi Ex. P-1 and morgue Ex. P-2. Injured Usha Bai (PW-2), Chandni (PW-3), Gameshwar (PW-10) and Ramlal @ Sugriv (PW-11) were sent for medical examination. The police conducted investigation. In para 11 of his evidence, he has further deposed that Khorbahara has also participated in the commission of offence, but he did not tell his name previously. He has also deposed that he told the names of all accused to the police and the police has made all persons whose names he has stated, as accused. In para 13, he has further deposed that distance between Villages Phulwari & Newari is about 100-150 meters.

58. Another injured witness Usha Bai (PW-2) has deposed that on the date of incident, her husband had gone towards the pond. She heard that the appellants were chasing her husband and abusing him in the name of caste, she saw the incident, her husband came inside the house, then she closed the shutter and locked it, at that time, her husband was stained with blood, she took him to roof. Appellant Balla broke the lock of shutter and the appellants pelted stones & bricks upon the shutter and finally, they broke the shutter. Appellants Sakharam, Tijau & Netram committed robbery of Rs. 2,50,000/- from her house, they took out motorcycle, cycle, sofa, bed, table fan, stool, Diwan, cloth, fridge, cooler and other household articles and burnt the same. Accused Sakha, Daya, Gokul, Murari, Ghanaram, Mahendra, Kaushal, Netram, Tijauram, Shivcharan, Jageshwar, Ghanshyam, Punit, Santosh Sahu, Jagdish, Balla, Puna, Gokul, Radheyshyam, Tikeshwar, Janak Sahu, Agat, Khemu, Bodhi and Trilochan went to the roof and dragged down her husband, they were assaulting him and when she tried to intervene, Gokul assaulted her over her head and others assaulted her by stick. While the appellants were dragging the deceased, he tried to rescue from their clutches and rush towards house of Khuman Sahu on which the appellants pelted stones upon him and badly injured his head. Sakharam, Balla & Puna and all others appellants surrounded him. Appellants Tijau & Netram were holding battleaxe, appellant Balla was holding stick, acquitted accused Iaram was holding sickle, Sakharam was holding crowbar and remaining accused were holding stick. Appellant Tijau chopped his neck, Netram chopped his hand then all accused dragged him and threw him in the burning fire. They shouted that the deceased was alive and again threw dry-grass and wood on fire, she became unconscious for one hour. She has seen the incident from roof. Her daughter Chandni was also on the roof. Iaram caused injury to her daughter Chandni by sickle and also cut her hairs. After some time, police came, at that time, she was stained with blood. In para 4 of her evidence she has deposed that on account of Rojgar Guarantee Scheme, some dispute took place between accused Sakharam, Taijau & Netram with her husband who was Sarpanch. Previously also they tried to assault the deceased and had also without basis lodged report against him.

59. Another injured witness Kum. Chandni (PW-3), aged about 14 years, whom the Court has examined after satisfying itself that she was able to understand the questions and able to answer the questions rationally, has deposed that she has identified all the appellants. Her father came to her house running and stained with blood from the pond, the appellants were chasing and abusing him in the name of caste, they were holding stick, battleaxe and sickle. Her mother took her father inside the room and closed the grill shutter and locked, they went on roof from where her father telephoned the police. The appellants outside the house broke the shutter and took out household articles and damaged the same. Thereafter, appellants Jageshwar, Sakharam, Netaram, Tijau, Pilaram, Tukaram, Ilaram, Balla, Puna, Nilkamal, Hriday, Gokul, Murari, Punit, Santram, Agat, Ghanshyam, Shivcharan, Ghanaram, Kaushal, Mahendra, Kanshram, Lomas, Parmeshwar, Yogesh, Yogeshwar, Vedprakash, Jagdish, Gaya, Hiteshwar, Rewa, Bodhi & Radheyshyam entered the house and came to the roof, assaulted her father by stick. When her mother tried to save, Gokul assaulted her by stick, Ilaram cut her hairs and Tukaram assaulted her twice with sickle, even he tried to assault her on her neck, but some how, she saved herself. In order to save his life, his father rushed towards the house of Khuman Singh Sahu but the appellants surrounded him and assaulted him by stick, battleaxe, bricks and stones. She has seen the incident from roof. Appellant Tijau chopped the neck of the deceased by battleaxe, Netram chopped one hand, they dragged the deceased and pushed him in the fire. They further shouted that the deceased is alive and threw wood in the fire. Appellant Santram used to come repeatedly to her house to see whether they were alive, but when he used to come, they posed themselves as unconscious, however, they have seen the incident from roof.

60. Another injured witness Ramlal @ Sugriv (PW-11) has deposed that on 12th of January, he came from madai, at that time, two constables were present in front of the house of Bholaram @ Dhakendra (since deceased), they were asking Bholaram why he had not attended madai, Bholaram replied that he was not invited therefore, he had not gone to madai. He also told them that if they call him, then he will attend madai, then the police constables went to Village Nemari and other persons present also went to their house. On second day, he was going towards the pond where deceased Dhakendra was sitting with Kotwar, he wished the deceased, at the same time, he noticed that he heard the sound of "Jai Shriram" and saw that about 150 persons were standings near peepal tree, at that time, Tijau & Netram were holding battleaxe, Shivcharan was holding lathi, Gokul was holding axe, Somnath was holding wooden plank, Sakharam was holding handle of agricultural instrument and remaining persons were holding stick, battleaxe and axe. He noticed the presence of all appellants. At that time, Hiteshwar was shouting for assault, Tijau abused him, Ilaram assaulted him by stick, other persons also assaulted him, Bafra assaulted him by rod over waist then he fell down in pond and tried to save himself and pleaded to spare him, then Punit directed the appellants not to assault him, at that time, two other

persons i.e. son of Kanshram and Somnath jumped in the pond and injured his head, his teeth were also broken and he was badly injured. When he saw son of Kanshram & Somnath also inside the pond, then with a view to save himself, he swam and went towards other side of pond where Tijau was present, he caught hold of his collar and pushed him on a hard surface on which his teeth were broken. Appellant Tijau lifted him and thereafter, he did not know what has happened. As per his wife's version, he regained his consciousness in the Municipal Corporation Hospital, Raipur and subsequently, he was informed that his wife has saved him in the pond. Dharmoutin Bai (PW-13) has corroborated the evidence of Ramial (PW-11), her husband.

61. Bhupendra Kumar Bharadwaj (PW-12), son of deceased Dhakendra, has deposed that he was present on the pond at the time of incident, at that time, his father deceased Dhakendra was sitting along with Ramial (PW-11), at the same time, about 150-200 persons of Newari came there, they were holding stick, sickle & battleaxe, they started assaulting his father and his father was badly stained with blood. Gameshwar (PW-10), elder brother of the deceased, was also present on the spot, when he tried to save his brother, the accused also assaulted him. The deceased rushed towards his house. Mob assaulted Ramial (PW-11) and pushed him in the pond. This witness before the time of incident had removed his clothes and was trying to take bath in the pond, but he immediately wore clothes and went to his house. His house was locked from inside. His father deceased Dhakendra, mother Usha Bai (PW-2) and sister Chandni (PW-3) were inside the house. His another sister Sonia was standing in front of the house, he took her and went near the house of Khuman and Shiv Kumar. Persons of Newari had come near his house and surrounded the house, they were pelting bricks, stones & soil. Appellant Balla broke the lock by rod, at the same time, wife of Shiv Kumar namely Kumari Bai called him and his sister inside the house and they went inside her house. Mob was shouting "maro maro sale satnami ko" after some time, he noticed fume coming out and heard the voice that if any person will tell the incident then they will kill him also. Thereafter, the police came and he along with his sisters Sonia, Chandni and mother Usha Bai went to Grasim.

62. Other witnesses have not deposed anything relating to the incident, but have deposed about recovery of weapons from different accused persons. G.S. Shukia (PW-25) has conducted investigation and has proved the details of investigation and recovery of weapons from different accused persons.

63. In the present case, the prosecution has led evidence relating to disclosure statements of weapons and their recovery, but has failed to prove any nexus between weapons and incident by proving the presence of blood over the weapons belonging to the blood group of the deceased. Therefore, as held by the Supreme Court in the matter of Kansa Behera Vs. State of Orissa, and in absence of presence of blood that too of the blood group of the deceased on the incriminating article found in possession of the appellant, recovery of said article

cannot be the sole basis for basing conviction.

64. In the present case, the prosecution has also failed to prove such facts or other evidence to show that the witnesses have identified the weapons as the same weapons which were owned and possessed by the appellants and were in fact used by the appellants to carry out the incident. Therefore, in absence of such evidence, recovery of weapons and evidence relating to such recovery is further, of no help to any of the parties.

65. Conviction, in the present case, rests on the evidence of eyewitnesses. Evidence of Ramlal @ Sugriv (PW-11) and Dharmoutin Bai (PW-13), his wife, are related to first part of incident took place near the pond. They have not witnessed the other parts of incident committed in the house of deceased Dhakendra and in front of the house of Khuman. Bhupendra Kumar Bharadwaj (PW-12), son of the deceased, is also substantially the witness of the first part of incident. As per his evidence and evidence of other witnesses, the appellants chased his father up to his house, he was running towards his house and he entered into the house. This witness was present near the pond, he was not wearing complete clothes, he was about to take bath, thereafter, he wore complete clothes and came towards his house in full speed, at that time, he saw that the house was locked from inside and the appellants were pelting stones, Ballaram broke the lock, then he along with his sister Sonia went inside the house of Shiv Kumar, and thereafter, he has not witnessed the second part of incident. Virtually, as per his evidence, if it is relied as a complete truthful statement, then it is related only to first part of incident and not the second part. As per evidence of these witnesses and evidence of Rajiv Kumar (PW-1), firstly, the appellants assaulted Dhakendra near the pond, thereafter, they chased him up to his house, they broke the lock, went inside the house and caused injuries to him, his wife Usha Bai (PW-2) and his daughter Chandni (PW-3) and thereafter, they dragged the deceased from his house, they took him to the front of the house of Khuman where they caused fatal blow and chopped different parts of body of deceased Dhakendra, and threw the body in the burning fire.

66. Evidence of these witnesses clearly reveals that the incident was committed in more than one part viz., causing injury to Gameshwar (PW-10), Rarhlal @ Sugriv (PW-11) & deceased Dhakendra near pond thereafter, chasing the deceased up to his house, then breaking the lock, committing house trespass, causing injuries to Usha Bai (PW-2) & Chandni (PW-3), also causing injuries to deceased Dhakendra inside the house, then dragging the deceased from his house and causing fatal injuries in front of the house of Khuman thereafter, picking out the household articles of the deceased from the house of the deceased and setting them on fire, causing fatal injuries and chopping the parts of the body of the deceased in front of the house of Khuman, and last part of incident throwing the body of Dhakendra in the burning fire. First part of incident was committed near the pond where about 150-200 persons at least holding stick have caused injuries to Gameshwar (PW-10) & Ramlal @ Sugriv (PW-11)

and also caused injuries to deceased Dhakendra.

67. As per evidence, Dhakendra was badly stained with blood, he was alone and accused persons were 150. They were having sufficient opportunity and time to kill Dhakendra on the spot i.e. near the pond and also to kill Gameshwar (PW-10) & Ramlal @ Sugriv (PW-11), but they have not killed all three persons. This shows that common object of first part of incident was to cause simple and grievous injuries to Gameshwar (PW-10), Ramlal @ Sugriv (PW-11) and deceased Dhakendra. Thereafter, the mob chased the deceased, when he rushed from the spot and went inside the house, bricks & stones were pelted upon his house, lock was broken and some persons went inside the house where as per evidence of Usha Bai (PW-2) & Chandni (PW-3), persons went inside the house again assaulted the deceased and also assaulted them, they have not killed Usha Bai (PW-2) & Chandni (PW-3). Even as per evidence of Chandni (PW-3), one accused cut her hairs, but they have not caused other fatal injuries. They have also caused injuries to Dhakendra, but have not killed him inside his house. This further shows that the persons went inside the house were more than five and their common object was not to kill the deceased or any person, but was to cause grievous & simple injuries to Dhakendra, Usha Bai (PW-2) & Chandni (PW-3). In case the common object was to kill Dhakendra or Usha Bai (PW-2) and to Chandni (PW-3) there was no hurdle to the persons who entered inside the house for committing such act or even setting his house on fire and to kill the deceased by throwing him or her inside the house, but they have not caused his/her homicidal death. After this part of incident, some persons dragged Dhakendra from his house, they took him up to the house of Khuman and some persons assaulted and chopped different parts of body of the deceased in front of the house of Khuman. As per evidence of Rajiv Kumar (PW-1) and medical evidence, there is inconsistency in chopping of head because the autopsy surgeon Dr. R.K. Singh (PW-6) has not noticed chopping of head but, as per his evidence, brain was badly roasted and skull bone was badly broken, but he has not noticed separation of head from body which clearly reveals that head was not chopped from neck and all injuries were ante mortem in nature, even burn injuries were ante mortem i.e. dead body has not been burnt, but live person was thrown in the burning fire and finally, he died as a result of extensive injuries and burn injuries. This is last part of incident. All these incidents were committed one by one, but as per evidence of Rajiv Kumar (PW-1), Usha Bai (PW-2). & Chandni (PW-3) all persons have not participated in commission of all acts. Different persons were present and played role at the time of different parts of incident.

68. Defence has cross-examined Rajiv Kumar (PW-1), Usha Bai (PW-2) & Chandni (PW-3) at length. In his detailed cross-examination, Rajiv Kumar (PW-1) has admitted in para 23 of his evidence that he has not deposed in the evidence and also not told to the police as to who has caused injury by which weapon to his uncle Dhakendra. In para 24 he has further deposed that he has not stated to the police that his father i.e., Gameshwar (PW-10) also sustained injuries at the

time of incident. He has further admitted that he was standing in front of his uncle's house, but he has not deposed as to upon which part of his body his uncle sustained injuries and he has also not deposed as to who has caused injury to his uncle. In para 50 he has admitted that photo of Sugriv was placed in the police station and photo of the deceased was also kept by the police in the police station which has been subsequently removed, but he do not know whether their photos were kept because they were men of criminal antecedents.

69. Defence has also examined K.P. Shukla (DW-1), Assistant Sub Inspector and in-charge Police Station Suhela who has proved Exs. D-1 to D-10, entries of criminal register showing about 19 criminal cases registered against the deceased relating to theft, preventive proceeding, Excise Act, externment proceeding, assault, house trespass and possession of arms. These documentary evidence reveals that the deceased was a man of bad criminal antecedents and criminal character.

70. As per charge sheet, the deceased was not invited in the madai function and members of Village Newari did not like him and on account of such dispute, the incident took place. As per paras 89 & 92 of cross-examination of Rajiv Kumar (PW-1), the village was converted into cantonment and different political executives of BJP and TV channel were in the village. As per his evidence, about 150-200 persons came near the pond and chased the deceased, but only 77 persons have been impleaded as accused and remaining about 50% of the persons were not made or impleaded as accused. In case of mob of more than 50, 100, 150 or 200 persons even it was not practically possible for one person to witness all parts of incident especially when the victim was encircled or commission of incident took place inside the house, but only on the ground that the witness has not stated specific act attributed to each of the accused and weapon used by them, evidence of any witness cannot be rejected outrightly. Courts are required to scrutinize the evidence of witnesses minutely.

71. Undisputedly, Rajiv Kumar (PW-1), Usha Bai (PW-2), Chandni (PW-3), Gameshwar (PW-10), Ramlal @ Sugriv (PW-11), Bhupendra Kumar Bharadwaj (PW-12) & Dharmoutin Bai (PW-13) are relatives of the deceased and injured witnesses. Presence of injured witnesses relating to part of incident cannot be doubted. Evidence of relative witnesses cannot be rejected outrightly. Virtually, relatives are the last persons to spare the real culprit and implicate the innocent falsely.

72. While dealing with the question of evidentiary value of relative and inimical witnesses, the Supreme Court in the matter of Ramanand Yadav Vs. Prabhu Nath Jha and Others, has observed in para 15 that "But at the same time if the relatives or interested witnesses are examined, the Court has a duty to analyze the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence was biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused foundation for the same has to be laid. If the materials show that

there is partisan approach, as indicated above the Court has to analyze the evidence with care and caution."

73. While dealing with same question in the light of relationship, the Supreme Court in the matter of Mst. Dalbir Kaur and Others Vs. State of Punjab, has held in para 13 that "A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an "interested witness". The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because had some animus with the accused or for some other reason."

74. While dealing with same question the Supreme Court in the matter of Ashok Kumar Chaudhary and Others Vs. State of Bihar, has held that relationship per se does not affect credibility of witness; merely because witness happens to be a relative of victim of crime, he/she cannot be characterized as "interested" witness. The Supreme Court has observed in para 7 as follows:--

".....even otherwise it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise credit-worthy, cannot be relied upon unless corroborated by public witnesses. Insofar as the question of credit-worthiness of the evidence of relatives of the victim is concerned, it is well settled that though the Court has to scrutinize such evidence with greater care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/she cannot be characterized as an "interested" witness. It is trite that the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive."

75. In the matter of Sandeep Vs. State of Haryana etc. etc., , the Supreme Court has held that in case where victim and accused are known to witness, his evidence would be material and cannot be criticized on ground that as witness was knowing the father of the accused, he is interested witness.

76. While dealing with aforesaid question, the Supreme Court in the matter of Sharad Birdhichand Sarda Vs. State of Maharashtra, has held that close relatives of the victim have tendency to exaggerate or add facts, Court should examine their evidence with great care and caution. Para 48 of the judgment of the Apex Court in the above cited case reads thus,

"48. Before discussing the evidence of the witnesses we might mention a few preliminary remarks against the background of which the oral statements are to be considered. All persons to whom the oral statements are said to have been made by Manju when she visited Beed for the last time, are close relatives and friends of the deceased. In view of the close relationship and affection any

person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it."

77. In the light of aforesaid proposition of law, the Courts are required to scrutinize the evidence of relative and inimical witnesses minutely with great care and caution before accepting it.

78. Evidence adduced on behalf of the prosecution reveals that statements of Gameshwar (PW-10), Ramlal @ Sugriv (PW-11), Bhupendra Kumar Bharadwaj (PW-12) & Dharmoutin Bai (PW-13) are relevant for first part of incident took place near the pond. Evidence of Usha Bai (PW-2) & Chandni (PW-3), who were present inside the house and did not come out from the house are relevant relating to the incident which took place inside their house and the incident relating to their house i.e. causing injury to them and to deceased Dhakendra, drugging Dhakendra from their house and taking out the household articles for burning. As per evidence of Usha Bai (PW-2), she was unconscious for some time. Evidence relating to causing fatal injuries and throwing the body of deceased Dhakendra upon burning fire and evidence of Rajiv Kumar (PW-1) relating to all parts of incident including last part i.e. causing fatal injuries, chopping parts of body of the deceased and throwing his body upon burning fire are also relevant. Usha Bai (PW-2) & Chandni (PW-3) have not named all appellants and they have also deposed that the appellants are residents of another Village Newari, therefore, they are not in a position to identify them.

79. Usha Bai (PW-2) has deposed in para 19 of her evidence that 200-300 persons were chasing her husband. In para 47, she has also admitted that she does not know who has assaulted her husband. In para 52, she has further admitted that the assailants were residents of Newari, therefore, she did not identify them.

80. Chandni (PW-3) has deposed in para 27 of her cross-examination that she was unconscious and unable to understand the incident. She has further admitted in para 58 of her evidence that it was not possible to watch the incident.

81. As per evidence of Usha Bai (PW-2) & Chandni (PW-3), huge number of persons entered in house and caused the incident, therefore, it was not possible for them to watch each and every part of incident or to ensure who has entered in the house and has committed what part of incident. However, evidence of

Rajiv Kumar (PW-1), Gameshwar (PW-10), Ramlal @ Sugriv (PW-11), Bhupendra Kumar Bharadwaj (PW-12) & Dharmoutin Bai (PW-13) reveals that all appellants were present near the pond, they caused simple & grievous injuries to deceased Dhakendra, Gameshwar (PW-10) & Ramlal & Sugriv (PW-11), but did not kill them or Dhakendra though they were having opportunity to kill Dhakendra who was alone and accused persons were at least more than 50. As per evidence of Usha Bai (PW-2), appellant Balla broken the lock of shutter by rod and appellants Sakham, Tijau & Netram entered into the house. Appellants Sakha, Daya, Gokul, Murari, Ghanaram, Mahendra, Kaushal, Netram, Tijauram, Shivcharan, Jagdishwar, Ghanshyam, Punit, Santosh Sahu, Jagdish Balla, Puna, Gokul, Radheyshyam, Tikeswar, Janak Sahu, Agat, Khemu, Bodhi & Trilochan went inside her house and dragged her husband, they also assaulted her. As per para 3 of the evidence of Chandni (PW-3). Jagdishwar, Sakham, Netram, Tijau, Pilaram, Tukaram, Ilaram, Tukaram, Balla, Puna, Neelkamal, Hriday, Gokul, Murari, Punit, Santram, Agat, Ghanshyam, Shivcharan, Ghanaram. Kaushal, Mahendra, Kansram, Lomus, Parmeshwar, Yogesh, Yogeshwar. Vedprakash, Jagdish, Gaya, Hiteswar, Rewa, Bodhi & Radheyshyam entered into her house and went up to the roof and assaulted her father by lathi and rod, they also assaulted her mother and committed the incident. As per para 8 of the evidence of Rajiv Kumar (PW-1) who was present outside the house, Tijau & Netram assaulted deceased Dhakendra by battleaxe, Ballaram assaulted by rod, Jagdishwar & Sakham assaulted by stick, thereafter, Tijau chopped his neck, Netram chopped his hand & leg, they dragged him and threw him in the burning fire. Although these witnesses have implicated other accused persons, but evidence of these witnesses reveal that different parts of incidents have been committed by different accused not by all appellants. These witnesses along with other witnesses were present near the place of incident.

82. Mere presence and acting as silent spectator cannot be considered as overt act or association and furtherance of common object of unlawful assembly. Evidence of Rajiv Kumar (PW-1), Usha Bai (PW-2), Chandni (PW-3), Gameshwar (PW-10), Ramlal @ Sugriv (PW-11), Bhupendra Kumar Bharadwaj (PW-12) & Dharmoutin Bai (PW-13) clearly reveals that initially, 150-200 persons were present near the pond, they have caused simple and grievous injuries to three persons, they were having sufficient opportunity to kill those persons, but they have not killed them. This shows that common object of unlawful assembly formed near the pond was to cause simple & grievous injuries to deceased Dhakendra, Gameshwar (PW-10) & Ramlal @ Sugriv (PW-11), but not to commit murder of deceased Dhakendra.

83. The mob further chased the deceased up to his house, at that time also they were having sufficient opportunity to kill, but they have not caused any injury during the course of chasing up to the house of the deceased. It further shows that common object of the mob was not to commit murder of the deceased, but to restrain him from going towards a particular side i.e. towards the madai and to prevent him from making any obstruction or annoyance to villagers.

84. Third part of incident took place near the house of the deceased when some persons broke the lock and entered in the house of the deceased and also caused grievous injuries to Usha Bai, simple injuries to Chandni and also injuries to deceased Dhakendra. As per evidence of Usha Bai (PW-2) & Chandni (PW-3) and even Rajiv Kumar (PW-1), who was not in a position to witness the incident committed inside the house, group of persons whose names were mentioned by Usha Bai (PW-2) in para 9 of her evidence and by Chandni (PW-3) in para 3 of her evidence entered into the house of the deceased, they were holding weapons and were having sufficient opportunity to commit homicidal death of Dhakendra or to cause fatal injuries to Usha Bai (PW-2) & Chandni (PW-3), but they have not caused homicidal death of deceased Dhakendra. Even they were having sufficient time to cause more injuries to Chandni, but except cutting hairs and causing one lacerated wound of 1.5 c.m. over her right elbow joint, they have not caused further injury which shows the common object of the persons present inside the house of the deceased.

85. After dragging the deceased out of house up to the front of the house of Khuman, fatal injuries were caused to the deceased and finally, his body was thrown in the burning fire. Some other persons have took the household articles and set the articles on fire.

86. As per evidence of material witness Rajiv Kumar (PW-1), who was in a position to witness the last part of incident, fatal injuries to the deceased were caused by Tijauram, Netram, Ballaram, Jageshwar and Sakharam, they had caused injuries over neck and chopped hand & leg. Although he has deposed that Tijau has caused cut injury on neck, but it was not chopping of neck. As per autopsy report, the deceased was alive and he also sustained ante mortem burn injuries. Causing fatal injuries by dangerous weapons and throwing the body in the burning fire are definitely the act of causing homicidal death of the deceased amounting to murder. As per nutshell evidence of Rajiv Kumar (PW-1), who has deposed in para 8 that at the time of causing such fatal injuries and throwing, the body of the deceased in burning fire, appellants Tijauram, Netram, Ballaram, Jageshwar & Sakharam have played vital role, they have simultaneously caused fatal injuries and have thrown the body in burning fire resulting into roasting of body and death of the deceased and at that time, they were five in number.

87. Aforesaid evidence is sufficient for drawing an inference that common object of appellants Tijauram, Netram, Ballaram, Jageshwar & Sakharam developed on the spot i.e., in front of the house of Khuman and in furtherance of their common object all these five appellants participated in commission of offence, caused fatal injuries, threw the body in the burning fire and caused death of deceased Dhakendra. This part of incident was not in association of other accused/appellants.

88. Only deposing "all appellants present, all were shouting, all were chasing, all entered into the house" is not sufficient to drag all appellants in commission of heinous offence. If these witnesses were in a position to witness the incident and

tell the names of assailants, then not naming other persons by using the words "accused persons" is not sufficient for dragging them into the commission of all parts of the incident. Last part of the incident is quite distinguishable and separable from other parts.

89. This is criminal prosecution. The prosecution is required to prove its case beyond all shadows of doubt and is required to prove the guilt of each and every appellant. Mere omnibus allegation is not sufficient for fastening criminal liability upon all the accused persons. The prosecution was also under obligation to prove formation of unlawful assembly and its common object.

90. As per aforesaid discussion, common object of the assembly was not to commit homicidal death amounting to murder of the deceased in its inception but it developed on last part of the incident committed in front of the house of Khuman where only five persons actively participated in the aforesaid act of causing fatal injuries and throwing the body upon fire. Subsequent act is of no help i.e. even other persons including the witnesses were not in a position to save the life of the deceased when badly injured body was thrown into the burning fire. Therefore, if persons shout that he is still alive and threw some article or shout that save him, will not help to any side. After throwing the body on burning fire, nobody was in a position to save the deceased. Virtually, the offence of murder has been completed after causing fatal injuries and throwing the body upon burning fire.

91. As discussed above, the incident took place in five stages viz.,

? formation of unlawful assembly and causing simple & grievous injuries to deceased Dhakendra, Gameshwar (PW-10) & Ramlal @ Sugriv (PW-11) near the pond;

? formation of unlawful assembly for restraining the deceased from going towards madai;

? formation of unlawful assembly for committing house breaking and causing grievous & simple injuries to deceased Dhakendra, Usha Bai (PW-2) & Chandni (PW-3) inside the house.

? formation of unlawful assembly for committing mischief by fire; and

? formation of unlawful assembly for causing fatal injuries and throwing the body upon burning fire and committing homicidal death of the deceased.

92. Common object of all parts of incident is not one and same. Common object of first part was causing simple & grievous injuries, second part was for restraining the deceased, third part was committing house breaking and causing simple & grievous injuries, fourth part was committing mischief by fire relating to property and fifth part was causing homicidal death amounting to murder of deceased Dhakendra.

93. In the light of scrutiny of evidence by the trial Court and in view of aforesaid

discussion and on scrutiny, homicidal death amounting to murder of deceased Dhakendra has been committed by five appellants namely Tijauram, Netram, Ballaram Sahu, Jageshwar Sahu & Sakharam after forming unlawful assembly having its common object to commit murder of deceased Dhakendra.

94. In the light of dicta of the Supreme Court in the cases as discussed above, the evidence led in the case reveals that:

? Tijauram - appellant No. 1 in Cr. A. No. 883/2011, Netram - appellant in Cr. A. No. 42/2012, Ballaram Sahu - appellant No. 4 in Cr. A. No. 883/2011, Jageshwar Sahu - appellant in Cr. A. No. 10/2012 and Sakharam - appellant No. 2 in Cr. A. No. 35/2012 along with other appellants formed unlawful assembly armed with deadly weapons and caused grievous injuries to Ramlal @ Sugriv (PW-11), simple injuries to Gameshwar (PW-10) and multiple injuries i.e., grievous injuries to deceased Dhakendra Bharadwaj @ Bholaram near pond.

? All the appellants chased the deceased and restrained him from going towards madai. They chased the deceased up to his house and when he entered the house, huge number of appellants namely Sakha, Daya, Gokul, Murari, Mahendra, Netram, Tijau, Shivcharan, Jageshwar, Ghanshyam, Punit, Santosh Sahu, Jagdish, Balla, Gokul, Radheyshyam, Tikeswar, Janak, Agat, Trilochan, Pilaram, Tukaram, Tukaram, Kanshram, Gaya, Rewa, Chintaram Dhruv & Heera Lal who were present on the spot committed the offence of housebreaking and caused grievous injuries to Usha Bai (PW-2) & deceased Dhakendra and simple injuries to Chandni (PW-3) after forming unlawful assembly having its common object to commit housebreaking, causing grievous injuries to Usha Bai and simple injuries to Chandni and also committed mischief by fire punishable under Sections 427 & 435 of the IPC.

? Other appellants were present near the house of the deceased, some were taking out the household articles, some entered the house of the deceased and some were instigating them, at that juncture, any appellant has not disassociated himself from the unlawful assembly. Even they had obstructed or objected other appellants who were causing injury and damaging the property.

? Thereafter, appellants Tijauram, Netram, Ballaram Sahu, Jageshwar Sahu & Sakharam chased/dragged the deceased from his house up to the house of Khuman, at that time, they were holding deadly weapons battleaxe, crowbar, rod and stick. In front of the house of Khuman, these five appellants chopped leg & hand and also assaulted over neck and caused fatal injuries, thereafter, they threw the body in burning fire. This part of incident is quite separable from other parts of incident. Last part of incident was committed by five persons who were holding deadly weapons. As per evidence of the prosecution witnesses, others were either not holding any weapon or were holding stick, but they have not caused any injury by stick, at this stage. The prosecution has also not proved the association of remaining convicted appellants i.e. 50 out of 55 in causing fatal injuries and throwing the body in burning fire which shows the presence of other

appellants as spectators and their reluctance in active participation. Till that juncture, unlawful assembly had not used dangerous weapon and not chopped leg or had not caused vital injuries, it was the sudden act of five persons, even other appellants were not having any opportunity to join with these five appellants for committing last part of incident. It appears that it was a quick action finished within few minutes and finally, the body was thrown on burning fire. As per autopsy report, burn injuries were ante mortem i.e. alive Dhakendra was thrown in fire. It was only by five appellants and not by all appellants. After throwing the body on fire it was not possible for any person to save him. This part of incident clearly reveals that five persons all of a sudden in disassociation with other appellants have formed unlawful assembly having their object to commit murder of deceased Dhakendra and in furtherance of common object, they caused fatal injuries mercilessly and thereafter, they threw the injured mercilessly on fire. All these acts also show that these five appellants were having knowledge that by their act, injured Dhakendra will die and would not be saved.

? In absence of any evidence of active participation, participation, association or joining of other appellants in last part of incident, except five appellants, other appellants cannot be held liable for formation of unlawful assembly having its common object to commit homicidal death amounting to murder of deceased Dhakendra. However, causing grievous & simple injuries near pond, chasing the deceased up to his house, breaking door of house, entering house by number of appellants, causing grievous & simple injuries, making the deceased badly stained with blood, creating circumstances for leaving house by the deceased to save his life, removing household articles out of the house and burning the same show that other appellants along with these five appellants have formed unlawful assembly having its common object to commit mischief by fire, to commit house breaking and to cause simple & grievous injuries, and at the time of causing such injuries by number of persons that too when the deceased was alone and helpless and was badly stained with blood, other appellants were having knowledge that by their act, the deceased may die. These circumstances and evidence adduced on behalf of the prosecution are sufficient to establish the fact that except five appellants the act attributed to remaining appellants is not the offence of murder committed in furtherance of common object of unlawful assembly punishable under Section 302 read with Section 149 of the IPC, but the act attributed to them squarely falls within the ambit of Section 304 Part-1 read with Section 149 of the IPC.

95. After appreciating the evidence available on record, while acquitting some accused and convicting all appellants for causing homicidal death amounting to murder in furtherance of common object under Section 302 read with Section 149 of the IPC along with conviction for committing other offences, the trial Court has not considered the material evidence distinguishable and separable from other parts of incidents committed only by five persons armed with dangerous weapons not in association with other appellants, and thereby

committed an illegality. The trial Court was under obligation to scrutinize the evidence minutely, but has failed to appreciate and discharge its duty and thereby committed illegality.

96. After close scrutiny of evidence, we are of the considered view that appellants Tijauram, Netram, Ballaram Sahu, Jageshwar Sahu & Sakharam had committed the offence punishable under Sections 452/ 149, 427/ 149, 435/ 149, 325/ 149, 325/ 149, 323/ 149, 147/ 149, 148/ 149 & 302/ 149 of the IPC. Remaining appellants namely Kheduram Sahu, Tukaram Sahu (Tukesh), Somnath, Murari Sahu, Rugu Sen, Prabhu Sen, Ramkumar Sahu, Babulal Sahu, Gayaram, Shivcharan, Sadhram, Radheyshyam Sahu, Jagdish Sahu, Santosh Sahu, Janakram Sahu, Heeralal Sahu, Keju Sahu, Ramdayal Sahu, Santuram Sahu, Mahendra Sahu, Agatram, Suresh Nishad, Ramesh Kumar, Ramkumar Nishad, Tuka Nishad, Rewaram Sahu, Kansram Sahu, Puneet Sahu, Santram, Manoj Sahu, Janak Lohar, Mohitram Sahu, Trilochan Sahu, Chintaram Dhruv, Heeralal, Bhupendra Sahu, Sadhuram, Ramkishnu, Deepchand Sahu, Khilawan Yadav, Balla Vishwakarma, Gokulram Sahu & Sewaram Sahu had committed the offence punishable under Sections 452/ 149, 427/ 149, 435/ 149, 325/ 149, 325/ 149, 323/ 149, 147/ 149 & 148/ 149 of the IPC.

97. Consequently, Cr. A. Nos. 883/2011, 921/2011, 943/2011, 993/2011, 999/2011, 5/2012, 10/2012, 11/2012, 24/2012, 25/2012, 35/2012, 42/2012, 79/2012, 87/2012, 103/2012, 105/2012, 114/2012, 173/2012, 246/2012, 294/2012, 616/2012, 617/2012, 724/2012 & 854/2012, are partly allowed.

? Conviction and sentences of Tijauram-appellant No. 1 in Cr. A. No. 883/2011, Netram - appellant in Cr. A. No. 42/2012, Ballaram Sahu - appellant No. 4 in Cr. A. No. 883/2011, Jageshwar Sahu-appellant in Cr. A. No. 10/2012 & Sakharam - appellant No. 2 in Cr. A. No. 35/2012 under Sections 452/ 149, 435/ 149, 427/ 149, 325/ 149, 325/ 149, 323/ 149, 147, 148 & 302/ 149 of the IPC are hereby maintained.

? Conviction and sentences of Kheduram Sahu - appellant No. 2 in Cr. A. No. 883/2011, Tukaram Sahu (Tukesh) - appellant No. 3 in Cr. A. No. 883/2011, Somnath - appellant No. 5 in Cr. A. No. 883/2011, Murari Sahu - appellant in Cr. A. No. 921/2011, Rugu Sen - appellant No. 1 in Cr. A. No. 943/2011, Prabhu Sen - appellant No. 2 in Cr. A. No. 943/2011, Ramkumar Sahu-appellant in Cr. A. No. 993/2011, Babulal Sahu - appellant No. 1 in Cr. A. No. 999/2011, Gayaram - appellant No. 2 in Cr. A. No. 999/2011, Shivcharan - appellant No. 1 in Cr. A. No. 5/2012, Sadhram - appellant No. 2 in Cr. A. No. 5/2012, Radheyshyam Sahu - appellant No. 1 in Cr. A. No. 11/2012, Jagdish Sahu - appellant No. 2 in Cr. A. No. 11/2012, Santosh Sahu - appellant No. 1 in Cr. A. No. 24/2012, Janakram Sahu - appellant No. 2 in Cr. A. No. 24/2012, Heeralal Sahu - appellant No. 1 in Cr. A. No. 25/2012, Keju Sahu - appellant No. 2 in Cr. A. No. 25/2012, Ramdayal Sahu - appellant No. 3 in Cr. A. No. 25/2012, Santuram Sahu - appellant No. 4 in Cr. A. No. 25/2012, Mahendra Sahu -appellant No. 1 in Cr. A. No. 35/2012, Agatram - appellant in Cr. A. No. 79/2012, Suresh Nishad - appellant No. 1 in Cr.

A. No. 87/2012, Ramesh Kumar - appellant No. 2 in Cr. A. No. 87/2012, Ramkumar Nishad - appellant No. 3 in Cr. A. No. 87/2012, Tuka Nishad - appellant No. 4 in Cr. A. No. 87/2012, Rewaram Sahu - appellant in Cr. A. No. 103/2012, Kansram Sahu - appellant in Cr. A. No. 105/2012, Puneet Sahu - appellant No. 1 in Cr. A. No. 114/2012, Santram - appellant No. 2 in Cr. A. No. 114/2012, Manoj Sahu - appellant No. 3 in Cr. A. No. 114/2012, Janak Lohar - appellant in Cr. A. No. 173/2012, Mohitram Sahu - appellant in Cr. A. No. 246/2012, Trilochan Sahu - appellant in Cr. A. No. 294/2012, Chintaram Dhruv - appellant No. 1 in Cr. A. No. 616/2012, Heeralal - appellant No. 2 in Cr. A. No. 616/2012, Bhupendra Sahu - appellant No. 1 in Cr. A. No. 617/2012, Sadhuram - appellant No. 2 in Cr. A. No. 617/2012, Ramkishnu - appellant No. 3 in Cr. A. No. 617/2012, Deepchand Sahu - appellant No. 4 in Cr. A. No. 617/2012, Khilawan Yadav - appellant No. 5 in Cr. A. No. 617/2012, Balla Vishwakarma - appellant No. 6 In Cr. A. No. 617/2012, Gokulram Sahu - appellant in Cr. A. No. 724/2012 & Sewaram Sahu - appellant in Cr. A. No. 854/2012 under Sections 452/ 149, 435/ 149, 427/ 149, 325/ 149, 325/ 149, 323/ 149, 147 & 148 of the IPC are hereby maintained. Their conviction under Section 302/ 149 of the IPC is altered into Section 304 Part-1/ 149 of the IPC. Considering the act attributed to them, they are hereby sentenced to R1 for eight years. They are in custody. They will be entitled for set-off of the period of detention.

98. While hearing and deciding aforesaid criminal appeals, we have noticed disturbing feature of the case that one accused Ilaram Sahu, S/o. Tijauram Sahu, arrayed as accused No. 58 in the judgment of the trial Court has been acquitted on the ground that his name has not been mentioned in the first information report, though Rajiv Kumar (PW-1) has named him in his supplementary statement recorded under Section 161 of the Cr. PC. as Ex. D-2 after 3 days of incident. As per evidence of Rajiv Kumar (PW-1), Usha Bai (PW-2) and Kum. Chandni (PW-3) - injured child witness, Ilaram Sahu caused injury to Kum. Chandni (PW-3) inside her house and had cut her hairs. Many persons were present at the time of incident and name of accused Ilaram Sahu did not find place in dehati nalishi Ex. P-1 and morgue Ex. P-2. In the light of non-mentioning the name of Ilaram Sahu in dehati nalishi Ex. P-1 and morgue Ex. P-2, the trial Court has acquitted him along with some other co-accused persons whose names do not find place in dehati nalishi Ex. P-1 and morgue Ex. P-2. There is consistency in the evidence of witnesses relating to the act attributed to Ilaram Sahu, but there is omnibus statement relating to other acquitted co-accused.

99. Mere non-mentioning of name in the FIR could not be the sole ground for acquittal of the person playing specific and vital role in commission of offence especially in the light of dicta of the Supreme Court in the matters of Eqbal Baig Vs. State of Andhra Pradesh, and Goura Venkata Reddy Vs. State of Andhra Pradesh, .

100. It is trite to say that mention of accused's name in the FIR is neither sine qua non for his conviction nor the FIR is required to be the encyclopedia of the

entire events. FIR is not substantive evidence and cannot be used for contradicting testimony of ocular witness except that it may be used for contradicting informant of the FIR. Recording of FIR is only the first step/stage on the setting up of law into motion after the police comes to know/is informed of the commission of cognizable offence. There are multiple limitations of comprehension, communication, articulation, understanding, etc., of the informant as well as the recipient of information and any unintentional bona fide slip/error in recording of FIR cannot be and should not be fatal to the prosecution if the case of the prosecution is otherwise proved and is sound.

101. Unfortunately, the victim or the State had not assailed the judgment of acquittal of Ilaram Sahu.

102. In the light of aforesaid facts and circumstances and legal position, we are constrained to exercise the revisional jurisdiction and take suo motu cognizance in terms of Section 401 of the CrPC against acquitted accused Ilaram Sahu, S/o Tijauram Sahu. Registry is directed to separately register a criminal revision against the acquittal of Ilaram Sahu, S/o. Tijauram Sahu, arrayed as accused No. 58 in the judgment of the trial Court making the accused/non-applicant and victim Kum. Chandni (PW-3), daughter of deceased Dhakendra, party in the revision. Issue notice to the non-applicant and the victim. Notice be made returnable within four weeks. It be mentioned in the notice to the victim that she may avail legal services of the Advocate provided by the Chhattisgarh High Court Legal Services Committee, if she needs. Revision be listed after service of notice. Registry is further directed to tag record of the trial Court with the revision so registered.