

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: December 08, 2009
Judgment delivered on : January 29, 2010

+ **CRIMINAL APPEAL NO.219/1996**

ABDUL RASHID

..... APPELLANT

Through: Mr. S.K. Sharma, Advocate with
Mr. Dhruv Kumra, Advocate

Versus

STATE (GOVT. OF NCT OF DELHI)

..... RESPONDENT

Through: Mr. Pawan Sharma, Standing
Counsel

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment dated 10.09.1996 in Sessions Case No.14/95 arising out of the FIR No.426/84 P.S. Kalyan Puri vide which the appellant has been convicted on the charges under Section 148 IPC and Section 302/397 and 436 IPC read with Section 149 IPC and also the consequent order on sentence dated 12.09.1996.

2. Briefly put, case of the prosecution is that in the aftermath of the assassination of the Prime Minister Smt. Indira Gandhi, violent anti-Sikh riots erupted in Delhi, which continued for a few days from 31.10.1984 onwards. On 02.11.84, at around 5:30 pm, a telephonic information was received at Police Station Kalyan Puri through Inspector Rajesh of PCR that the Additional Commissioner of Police Shri Nikhil Kumar had intimated on telephone that a massacre was going on in Block No.32, Trilok Puri and the police force may be sent there. The information was recorded in the daily diary as DD No.12A dated 02.11.84 and the copy of the DD report was entrusted to SI Man Phool Singh, who immediately proceeded for the place of occurrence along with Constable Pat Ram. The SHO and the other staff also reached Block No.32 Trilok Puri in an official vehicle, where they found houses No.123, 124, 484 and 485, besides many other houses, on fire. One Sucha Singh and Lacha Singh were found there in injured condition and they were removed to the hospital. In the meanwhile, some senior officers also reached at the spot of occurrence with additional force and about 107 rioters were rounded up. The women and children belonging to the Sikh community were also sent to the Police Station. Some other injured persons, who were found at the spot, were sent to the hospital. SI Man Phool Singh met the complainant Rijju Singh at the spot of occurrence and recorded his statement, which disclosed the commission of various offences punishable under Section 147/148/149/436/304/323 IPC. SI Man Phool Singh appended his

endorsement to the statement of the complainant Rijju Singh and sent it to the Police Station for the registration of the case and on the basis of said statement, formal FIR No.426/84 was recorded at the Police Station Kalyan Puri. We may note the complaint of Rijju Singh was specific to the incident relating to his family and the murder of his brother-in-law Lakha Singh. Besides the above said specific allegations, Rijju Singh also made general allegations pertaining to the loss of life and property caused by the rioters to several Sikh families.

3. Subsequent to the riots, Justice Rang Nath Misra Commission was constituted by the Government to inquire into the various aspects of the riots including the role of the police. The Commission invited petition/affidavit from dissatisfied victims of riots. Baujhi Bai, PW6 also submitted her affidavit Ex.PW4/A to the Commission on 09.09.1985. In the aforesaid affidavit, she averred that on 01.11.1984, a mob of rioters led by the Block Pradhan Ram Pal Saroj of Block No.32, Trilok Puri came at her house. She, her son Inder Singh and his wife Raj Rani requested Ram Pal Saroj to save them, but Ram Pal Saroj responded that he was not concerned whether they live or die. By that time, three/four police Constables came there and told her son Inder Singh to go inside and thereafter he closed the door of the house from outside. The said police officials told the mob that there were Sikhs inside the house and thus the mob forced open the door. The appellant Abdul Rashid and Nisar Ahmed @ Hansar were leading said mob. Her daughters-in-law prayed for mercy, but they were dragged

aside and the mob started looting their house. She further averred in the affidavit that thereafter the aforesaid mob caught hold of the male members and started dragging and beating them. When they started beating Inder Singh, he tried to escape, but he was caught and thereafter the mob put a burning quilt on him and when Baujhi Bai tried to remove that burning quilt, she was beaten and pushed away. The mob also assaulted her son Gopal Singh with lathies and he was thrown on a burning rickshaw. Thereafter, the mob found that her husband was hiding on the roof. They uttered the words "*Budhey Tu Kaise Bacha*" and killed him on the roof itself.

4. On the recommendation of Rang Nath Misra Commission, a Committee comprising of Justice Jain and Shri Agrawal was constituted to go through the affidavits filed by various victims and make recommendations regarding the registration and investigation of cases pertaining to specific incidents. The Committee, on consideration of the above affidavit of Baujhi Bai and the investigation file of Case FIR No.426/84 P.S. Kalyan Puri found that the Investigating Officer, apart from recording the statement of PW6 Baujhi Bai in respect of the incident in hand had not examined any other witness. Therefore, considering that the investigation done was perfunctory, the Committee recommended further investigation into the allegations vide letter Ex.PW3/A. Pursuant to the recommendation, further investigation in the matter was conducted by the Riots Cell constituted in this regard.

5. During further investigation, the statements of Raj Rani PW5, Baujhi Bai PW6 and Devi Kaur PW7 were recorded under Section 161 Cr.P.C. wherein they more or less supported the averments made in the affidavit of Baujhi Bai. On conclusion of investigation, a supplementary charge sheet under Section 137(8) in respect of case FIR No.426/84 P.S. Kalyan Puri was filed.

6. The learned Trial Court, on consideration of the challan, charged the appellant and his co-accused persons for the offences punishable under Section 147 IPC, 302 read with Section 149 IPC, 436 read with Section 149 IPC, 395 read with Section 149 IPC. The appellant and his co-accused persons pleaded innocence and claimed trial.

7. In order to bring home the guilt of the appellants, prosecution examined as many as 13 witnesses. The material witnesses being the purported eye witnesses, PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur.

8. The co-accused Ram Pal Saroj died during the trial, as such proceedings against him stood abated. The learned Trial Court, on conclusion of trial, found the appellant Abdul Rashid guilty for the offences punishable under Section 148 IPC, 302 read Section 149 IPC, 397 and 436 IPC read with Section 149 IPC and convicted him accordingly. The co-accused Nisar Ahmed @ Hansar, however, was given benefit of doubt and acquitted.

9. The case of the prosecution rests mainly on the eye witness account given by PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur.

10. PW5 Raj Rani has stated that in November, 1984, she was living with her family members namely, Baujhi Kaur (mother-in-law), Devi Kaur(sister-in-law), Vidya Kaur (sister-in-law), Jeevan Singh (father-in-law), Inder Singh (husband) and four children. On 01.11.84, at around 4:00 pm, a 3000 to 4000 number strong mob came to their house. The members of the mob were carrying lathies, stones and swords etc. The mob entered their house after breaking open the door and started looting the household goods. Thereafter, they asked them to go out and assured that they would not cause any harm to the ladies and children, but would not spare the male members. The mob then started beating her husband Inder Singh and father-in-law Jeevan Singh with lathies and when they became unconscious, the mob poured kerosene oil over them and set them on fire. She further stated that out of the aforesaid mob, she was able to identify Ram Pal Saroj, Hansar @ Nasir and the appellant Abdul Rashid. She identified Abdul Rashid and Ram Pal Saroj in the court, but failed to identify Hansar @ Nasir. We may note at this juncture that PW5 Raj Rani has not stated anything about presence of her two brothers-in-law Gopal Singh and Makhan Singh at the time of incident or their having been beaten and killed by the rioters in her presence.

11. PW6 Baujhi Bai has stated that on the fateful day at around 4:00 pm, she was present in her house along with her husband Jeevan Singh (deceased) and sons Inder Singh (deceased), Gopal Singh (deceased) and Makhan Singh (deceased) when a huge mob of rioters entered their house after breaking open the door. She has stated that they set their house on fire with the help of kerosene oil and when they came out of burning house, she noticed that members of the crowd were carrying Churras, knives and "dandas" etc. Accused Ram Pal Saroj (since deceased) was leading the crowd and on his instigation, the rioters killed her husband and three sons with churras, swords and iron rods and thereafter set them on fire after pouring petrol over them. She further stated that her household goods were looted. Her daughter-in-law Devi Kaur and Raj Rani ran away from the house after the killing and she remained there outside the house near the burnt bodies of her husband and sons till 10:00 pm. Though PW6 Baujhi Bai identified Ram Pal Saroj in the court, she expressed her inability to identify the appellant Abdul Rashid and the other co-accused. She further stated that she had submitted the affidavit Ex.PW4/A before the Commission. Though in her examination-in-chief, she did not say anything about the appellant Abdul Rashid being one of the rioters who had killed her husband and sons, but in the cross-examination she denied the suggestion on behalf of the appellant Abdul Rashid that she had named Abdul Rashid as one of the rioters because he was the youth Congress leader at that time.

12. PW7 Devi Kaur, another eye witness, has stated in the court that in November, 1984, she was living at House No.32/1, Trilok Puri with her family, including father-in-law Jeevan Singh, mother-in-law Baujhi Bai, husband Makhan Singh, Jeth Inder Singh, Devar Gopal Singh and Nanad (husband's sister) Gopi Kaur. She also stated that on 01.11.84 at about 4:00 pm, a 300/400 number strong mob, including Ram Pal Saroj (since deceased), Hansar @ Nisar (acquitted) and the appellant Abdul Rashid came to their house. They were carrying "dandas", churras, knives and petrol etc. The accused persons along with other rioters caught hold of the male members of the family, including her husband, Devar, Jeth, father-in-law and assaulted them with iron rods, churras and knives etc. and killed them. Thereafter, the mob burnt their bodies by pouring petrol upon them. She further stated that the mob dragged them out of the house and then looted their house and burnt it. She, Vidya Kaur, Devi Kaur and Raj Rani ran away, but her mother-in-law remained behind with the dead bodies. She further stated that she knew above named three accused persons since before as they were residents of the same lane in which she was living.

13. The appellant in his statement under Section 313 Cr.P.C. denied the prosecution case. According to him, he was not in the group of rioters and actually he was not in Delhi at the relevant time. In defence, the appellant examined DW1 Padam Sharma who has deposed that on 27/28.10.84, he had arranged a car for the appellant from Shakarpur taxi stand for enabling him to take a Sikh brother to

U.P. The appellant left in the car in the morning of 30.10.84 and came back on 04.11.84. DW2 Mohd Hanif is running a Madarsa at Mauza Anup Pur Dibai, District Ghaziabad, U.P. According to him, on 01.11.84 at about 10:00 am, the appellant met him in connection with the treatment of his brother who on checking was found to be behaving like a mad man. The witness has stated that he gave three "Taveez" to the appellant for his ailing brother. The appellant stayed with them for three days and on the fourth day, when the condition of his brother did not improve, he advised the appellant to show his brother to some Doctor.

14. Learned counsel for the appellant has submitted that case of the prosecution is based upon the purported eye witness account given by PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur, who are not reliable witnesses as their testimonies suffer from contradictions and infirmities. He has submitted that learned Trial Court has failed to appreciate that the name of the appellant Abdul Rashid as one of the mob of the rioters surfaced for the first time in the affidavit of PW6 Baujhi Bai Ex.PW4/A, which is stated to have been submitted before Justice Rang Nath Misra Commission constituted by the Government to inquire into 1984 riots, including the role of the police. Learned counsel has contended that admittedly prior to the filing of said affidavit, the statements of PW6 Baujhi Bai and PW5 Raj Rani were recorded during the investigation of the case FIR No.426/84 on 17.11.84 and 06.12.84 respectively and in those statements neither

Baujhi Bai nor Raj Rani named the appellant as one of the members of the mob of rioters though they had named some other persons whom they were able to identify in the mob. Learned counsel further submitted that perusal of the letter Ex.PW3/A addressed by the Secretary of Justice Jain-Sh. Agrawal Committee to the Administrator, Union Territory of Delhi dated 05.04.91 reveals that in the said letter there was no comment made upon the fairness of the investigation as regards the recording of the correct statement of the witness Baujhi Bai, but it was only stated that the investigation was done in perfunctory manner inasmuch as that no effort was made by the Investigating Officer to examine any other ocular witness to corroborate the testimony of Baujhi Bai. Thus, it is argued that since the name of Abdul Rashid as being part of the mob was not mentioned by Baujhi Bai and Raj Rani in their statements earlier made to the police, it is not safe to rely upon the testimony of the prosecution witnesses, who are also related to each other.

15. Learned counsel for the appellant has further submitted that PW5 Raj Rani and PW7 Devi Kaur had categorically stated that Abdul Rashid, who was identified by them in the mob, was resident of Block No.32, Trilok Puri, whereas the appellant was not residing in Block No.32, Trilok Puri at the relevant time. In support of this contention, he has relied upon the voter list of East Delhi Parliamentary Constituency for the years 1984, 1987 and 1993 wherein name of Abdul Rashid S/o Ashraf Ali, resident of House No.320, Block No.32 is mentioned at

Serial No.784 and submitted that from this it is obvious that there was one other Abdul Rashid S/o Ashraf Ali living in Block No.32 at the relevant time and, therefore, a possibility cannot be ruled out that the person named by Baujhi Bai in her affidavit Ex.PW4/A and by PW5 to PW7 during trial may be the aforesaid Abdul Rashid S/o Ashraf Ali and not the appellant, who is son of Abdul Aziz, resident of 33/55, Trilok Puri.

16. Learned counsel for the appellant has submitted that PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur are interested witnesses being closely related to each other and also the wives of the deceased Inder Singh, Jeevan Singh and Makhan Singh respectively. It was submitted that though there is no bar under law to base conviction on the testimony of interested witnesses, if found reliable, yet the rule of prudence demands that the testimony of said witnesses be approached with due care and caution. Learned counsel has argued that PW5 to PW7 are not worthy of reliance because of contradictions and infirmities in their testimonies. He has argued that case of the prosecution is that the incident took place in presence of the above referred witnesses, yet PW5 Raj Rani in her testimony has not deposed anything about the killing of her brothers-in-law Makhan Singh and Gopal Singh by the mob. He has further submitted that even regarding the identification of the accused persons, the testimony of these witnesses is at variance. PW7 Devi Kaur identified all the three accused Ram Pal Saroj, Hansar @ Nisar and Abdul Rashid and she also

claimed that she knew Hansar @ Nisar as he was well known to her “devar” Gopal Singh, whereas PW5 Raj Rani has contradicted her version by stating that the accused Hansar on trial before the court was not the same Hansar whom she saw in the crowd of rioters. Further, PW6 Baujhi Bai failed to identify either the appellant Abdul Rashid or his co-accused Hansar, though she identified the other accused Ram Pal Saroj. In view of the aforesaid contradictions, learned counsel for the appellant has urged us to conclude that the testimony of these witnesses is doubtful.

17. Besides the above arguments, it is also argued on behalf of the appellant that even the death of Jeevan Singh, Inder Singh, Makhan Singh and Gopal Singh is not established because the investigating agency has neither seized the dead bodies or their ashes, which may lead to an inference that actually the incident referred to by the witnesses did not take place and in that incident the above referred persons were killed by the mob. Learned counsel has argued that since in the aftermath of 1984 riots, the Government had announced compensation for the victims, a possibility cannot be ruled out that these witnesses have concocted the story to obtain compensation and their husbands might be alive.

18. On the other hand, learned counsel for the State has submitted that the guilt of the appellant is firmly established from the testimony of PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur, which is

consistent and of corroborative nature. Learned counsel took us through the testimony of above three ocular witnesses and submitted that they have withstood the test of cross-examination and there is no reason to suspect their testimony. So far as failure of the investigating agency to seize the burnt dead bodies of the deceased persons or their ashes is concerned, learned counsel for the State has submitted that the aforesaid factor, by no means, is of any help to the appellant and it cannot be taken as a circumstance to infer that the murders of Jeevan Singh, Inder Singh, Makhan Singh and Gopal Singh have not been established, particularly when it was an extraordinary situation prevailing at the relevant time and even the police force virtually abdicated its functions. Learned counsel for the State has submitted that it was precisely for that reason that the Government had appointed Justice Rang Nath Misra Commission. He has submitted that the deliberate failure of the police to perform its duty properly cannot be taken as a circumstance to discard testimony of the eye witnesses, if found reliable. Otherwise also, he submitted that there is no evidence on record to show that any one of the above referred victims is alive. Learned counsel for the State further submitted that the contradictions pointed out by the learned counsel for the appellant in the testimony of PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur are not so material as to discard their testimony. If Baujhi Bai, because of her weak eyesight, could not identify the appellant and his co-accused Hansar, that by itself is no reason to discard the testimony of the other

two witnesses, who did identify the appellant as a participant rioter. Lastly, it was submitted by learned counsel for the State that the appellant cannot take advantage of the earlier statements of Baujhi Bai and Raj Rani recorded under Section 161 Cr.P.C. because he has not confronted the witnesses with said earlier statements to seek their explanation in that regard.

19. We have considered the rival contentions of the parties and perused the material on record.

20. The main issue for determination in this appeal is whether or not the appellant Abdul Rashid was a member of the mob which indulged in rioting and committed the murder of Jeevan Singh, Inder Singh, Makhan Singh and Gopal Singh, besides indulging in looting and mischief. The prosecution in order to bring home this fact has heavily relied upon the testimony of PW5 Raj Rani, PW6 Baujhi Bai and PW7 Devi Kaur. Before taking a look on their testimony, it is important to note that initial investigation of this case was conducted by SI Man Phool Singh, who admittedly recorded the statements of PW5 Raj Rani and PW6 Baujhi Bai under Section 161 Cr.P.C. few days after the occurrence. However, subsequently, the Government appointed Justice Rang Nath Misra Commission to enquire into various aspects of riots, including the role of the police etc. and pursuant to the notice issued by the Commission, Baujhi Bai submitted an affidavit Ex.PW4/A to the Commission and the aforesaid affidavit, along with the affidavits

of others were then referred to Justice Jain and Shri Agrawal Committee to go through the affidavits and make recommendations regarding registration and investigation of the case. Perusal of said affidavit Ex.PW4/A submitted by Baujhi Bai reveals that in the aforesaid affidavit Baujhi Bai affirmed the facts regarding the murder of her husband and three sons. She also affirmed in the affidavit that the mob of rioters were led by 'Rashid Neta' and Hansar. She, however, has not referred to her statement earlier recorded under Section 161 Cr.P.C. by SI Man Phool Singh in her affidavit, nor she has stated that her statement was not correctly recorded by SI Man Phool Singh. Ex.PW3/A is the letter written by the Secretary to Justice Jain-Sh. Agrawal Committee. In para 3 of the letter it is, inter alia, stated thus:

"3. The scrutiny of the relevant police records revealed that Smt. Bhoji Bai, the Deponent, was examined under Section 161 Cr.P.C. by the Investigating Officer in Case F.I.R. No.426/84 Police Station Kalyanpuri and she has been cited as a prosecution witness in the charge sheet filed in the Court. It is, however, noticed that no effort was made by the Investigating Officer to examine any other ocular witness to corroborate the testimony of Smt. Bhoji Bai. The investigation is thus casual and perfunctory in a case of such a heinous nature."

21. Actual finding of the Justice Jain-Sh. Agrawal Committee has not been placed on record by the prosecution. On perusal of the above mentioned facts narrated in the letter Ex.PW3/A, it appears that Justice Jain-Sh. Agrawal Committee recommended further investigation in this case on a solitary ground that investigation was conducted in casual and perfunctory manner. There is nothing in the letter on the record to

suggest that the above Committee commented upon the correctness of earlier statements by Ms. Baujhi Bai recorded under Section 161 Cr.P.C., or that PW6 Baujhi Bai raised any issue in that regard before the Committee. Thus, in our considered view, the statements of Raj Rani PW5 and Baujhi Bai PW6 recorded by SI Man Phool Singh under Section 161 Cr.P.C. still remain the previous statement made by the witnesses during investigation. Unfortunately, those previous statements of Raj Rani and Baujhi Bai, which were recorded by SI Man Phool Singh under Section 161 Cr.P.C. were not placed on record as a part of the charge sheet nor those statements were supplied to the appellant or his co-accused persons. This, obviously, has resulted in a grave prejudice to the appellant. Had he been supplied with copies of said earlier statements made by Raj Rani and Baujhi Bai to the police, he probably would have confronted them with their earlier statements to shake their veracity. Since non-supply of aforesaid statements under Section 161 Cr.P.C. has left a serious gap in the evidence, we called for the complete case diary in the instant case FIR no.426/84 and on perusal of the case diaries, it transpires that PW6 Baujhi Bai, when she was examined on 17.11.84 by SI Rajender Prasad, stated that the mob of rioters consisted of Draupdi, Jagga and a 'leader' Ram Pal Saroj. She, however, did not state that she also saw Abdul Rashid (appellant) in the mob. Similarly, PW5 Raj Rani in her earlier statement under Section 161 Cr. P.C. had also not named the appellant as the member of the group of rioters and instead, she stated that the

aforesaid mob comprised of Kanak Singh, Nisar, Kadir, Abbas and Raju, son of one Chinna. Incidentally, she had also not named the appellant in her earlier statement. In view of the aforesaid mismatch between the earlier statements of PW5 Raj Rani and PW6 Baujhi Bai vis-a-vis the testimony of ocular witnesses in the court, we do not find it safe to rely upon the testimony of PW5 Raj Rani and PW6 Baujhi Bai, particularly when PW6 Baujhi Bai in her affidavit made no issue about the correctness of her earlier statement recorded during investigation.

22. Learned counsel for the State has submitted that even if the testimony of PW5 Raj Rani and PW6 Baujhi Bai is discarded because of material improvements made by them in respect of introducing the name of Abdul Rashid as a rioter, yet the guilt of the appellant is established by the testimony of PW7 Devi Kaur, who has fully supported the case of the prosecution and who has even withstood the test of cross-examination. It is true that Devi Kaur, PW7 did name and identify the appellant Abdul Rashid as one of the rioters. We, however, do not consider it safe to rely upon her sole testimony, particularly when the other two purported eye witnesses to the occurrence have been found unreliable because they have made substantial improvements in their earlier version recorded during investigation in the year 1984. Secondly, as per the record and on perusal of the case diaries, it transpires that Smt. Devi Kaur was examined for the first time by the Investigating Officer on 18.12.91 after directions for further investigation were issued by Justice Jain-Sh.

Agrawal Committee vide a letter Ex.PW3/A. Thus, it is obvious that Smt. Devi Kaur introduced the name of Abdul Rashid seven years after the occurrence, therefore, her testimony becomes suspect. We may note that since the name of Abdul Rashid came to the fore for the first time in the year 1991 after directions for further investigation were issued vide letter Ex.PW3/A, a possibility cannot be ruled out that during the said span of seven years, the witnesses might have exchanged notes with the other victims or their relatives and from their versions they might have suspected the possibility of Abdul Rashid being the part of the mob which resulted in their naming the appellant as a rioter.

23. Further, the appellant in his defence has placed on record a voter list of East Parliamentary Constituency for the year 1984, wherein the name of one other Abdul Rashid S/o Ashraf Ali, resident of House NO.320, Block No.32 is mentioned at Serial No.784. This circumstance also raises a possibility that this may be a case of mistaken identity. None of the witnesses in their statement under Section 161 Cr.P.C. has given the address of other Rashid, whom they purportedly saw amongst the rioters. A possibility cannot be ruled out that since one of the accused on trial was Abdul Rashid, the witnesses, including PW7 Devi Kaur, routinely identified the appellant as one of the rioters.

24. In view of the discussion above, we find the case of the prosecution against the appellant to be doubtful. Therefore, we are

inclined to extend the benefit of doubt to the appellant and find it difficult to sustain the impugned judgment of conviction. Appeal is accordingly accepted. Impugned judgment of conviction and order on sentence are set aside. Appellant Abdul Rashid is acquitted of the charges under Sections 147 IPC, 302 read with Section 149 IPC, 436 read with Section 149 IPC, 395 read with Section 149 IPC giving him benefit of doubt.

25. Appellant is on bail. His bail bond and surety bond stand discharged.

AJIT BHARIHOKE, J.

JANUARY 29, 2010
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SANJAY KISHAN KAUL, J.