2024 INSC 788

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 213 OF 2020

VISHWAJEET KERBA MASALKAR ...APPELLANT(S)

VERSUS

STATE OF MAHARASHTRA ...RESPONDENT(S)

J U D G M E N T

B.R. Gavai, J.

1. The present appeal challenges the final judgment and order dated 23rd July 2019, passed by the Division Bench of the High Court of Judicature at Bombay in Confirmation Case No. 2 of 2016 filed by the State of Maharashtra, by which it upheld the separate orders of conviction and sentence dated 26th August 2016 and 31st August 2016 passed by the Additional Sessions Judge, Pune[1] in Sessions Case No.64 of 2013, thereby convicting the appellant for the offences punishable under Sections 302, 307 and 201 of the

[1] **Hereinafter referred to as "the trial court".**

Indian Penal Code, 1860[2] and sentencing him to death along with a fine of Rs. 5,000/- for the offence punishable under Section 302 of IPC, rigorous imprisonment for ten years along with fine of Rs. 10,000/- for the offence punishable under Section 307 of IPC and rigorous imprisonment of three years along with a fine of Rs. 5,000/- for the offence punishable under Section 201 of IPC.

2. Shorn of details, the facts leading to the present appeal are as under:

2.1 On 4th October 2012, the official at the police control room was informed by the appellant about a robbery at his house situated at Champaratna Society, Uday Baug, Wanwadi, Pune and that his mother-Shobha Masalkar, wife-Archana Masalkar and two-year old daughter-Kimaya Masalkar had been killed. The appellant further informed that his neighbourer-Madhusudhan Kulkarni (PW-12) had also been injured. This information was transmitted to Bajirao Dadoba Mohite ACP CID (PW-14), who was on duty at Wanawadi Police Station, Pune, who lodged a complaint.

[2] **Hereinafter referred to as "IPC".**

2.2 Based on the complaint of the appellant, a First Information Report No.196 of 2012 was registered for commission of an offence punishable under Sections 302 and 397 of the IPC against unknown persons. It was stated by the appellant in the complaint that one gold chain of 8 Tolas, one gold Mangalsutra, cash amount of Rs.7,000/-, 3 small rings and 2 almond shaped pendants having total value of Rs.3,07,000/- were stolen. The three dead bodies were sent to the hospital for post-mortem and the neighbourer Madhusudan Kulkarni (PW-12) was also sent to the hospital for medical treatment. The panchnama of the place of the incident was recorded after Bajirao Dadoba Mohite ACP CID (PW-14) had visited the place of occurrence.

2.3 While recording the spot panchnama, it was observed by Bajirao Dadoba Mohite (PW-14) that there were no signs of forced entry on both the doors as well as the safety doors of the flat of the appellant. A gold Mangalsutra, 3 small gold rings, 2 gold almond shaped pendants and cash amount of Rs. 7,000/- in one red coloured money purse hidden behind a photo frame hanging on the wall of the flat were also found by Bajirao Dadoba Mohite (PW-14). Another ash-coloured

money purse was found in the flat as well. At the place of the incident, near the main door of the flat of the appellant, few pieces of bangles that were stained with blood and one blood stained odhani were also found.

2.4 During investigation, it was revealed that appellant had a love affair with one Gauri Londhe (PW-2). It was stated by the appellant's paramour Gauri Londhe (PW-2) that, when she came to know about the appellant's marriage, she refused to marry him but the appellant was ready to leave his wife and daughter in order to marry her. It was also seen through the CCTV footage of the Saipras Society, which was adjoining the flat of the appellant, that at 03:22 PM, appellant's mother (Shobha Masalkar) was seen going towards the flat and at 04:28 PM, the appellant was seen going out on his motorcycle. Based on these facts, the appellant was suspected to have committed the murders by the police and so he was arrested on 5th October 2012.

2.5 Post-Mortem of the three deceased persons was conducted. In the post-mortem, it was opined that the cause of death of the appellant's daughter (Kimaya Masalkar) was asphyxia due to smothering, the cause of death of the

appellant's wife (Archana Masalkar) was traumatic and hemorrhagic shock due to head injury and the cause of death of the appellant's mother (Shobha Masalkar) was hemorrhagic shock due to head injury.

2.6 The appellant made a disclosure about keeping his blood-stained clothes and Mangalsutra of his wife at a place in M.I.D.C., Hadapsar Area, Pune and he further disclosed about throwing the hammer, used for committing the crime, in a canal after keeping it in a blue bag. Another disclosure was made by the appellant about a consent letter for divorce by his wife which was found in a drawer inside his house.

2.7 After completion of the investigation, charge-sheet was filed against the appellant for the offences punishable under Sections 302, 307 and 201 of the IPC in the Court of Judicial Magistrate, First Class, Cantonment Court, Pune. Since the case was exclusively triable by the Sessions Court, it was committed to the Sessions Court for trial. Charges were framed against the appellant by the trial court for the commission of the offences punishable under Sections 302, 307 and 201 of IPC.

2.8 To bring home the guilt of the accused, the prosecution examined 16 witnesses. At the conclusion of the trial, the trial court found that the prosecution had proved the guilt of the accused beyond reasonable doubt.

2.9 Vide judgment and order dated 26th August 2016, the appellant was convicted for the offences punishable under Sections 302, 307 and 201 of IPC and vide order dated 31st August 2016 he was sentenced to death along with a fine of Rs. 5,000/-, in default whereof to suffer rigorous imprisonment of one year for the offence punishable under Section 302 of IPC; rigorous imprisonment for ten years along with fine of Rs. 10,000/-, in default whereof rigorous imprisonment of one year for the offence punishable under Section 307 of IPC and rigorous imprisonment of three years along with a fine of Rs. 5,000/-, in default whereof rigorous imprisonment of six months for the offences punishable under Section 201 of IPC.

2.10 For confirmation of the execution of the death sentence, a reference was made by the trial court to the High Court which was numbered as Confirmation Case No. 2 of 2016.

2.11 Vide impugned judgment and order, the High Court upheld the order of the trial court convicting the appellant and also confirmed the death sentence imposed on him. However, in view of Section 415(1) of Code of Criminal Procedure, 1973[3] the operation and effect of the impugned judgment was stayed till the expiry of period allowed for preferring an appeal before this Court.

2.12 Aggrieved thereby, the present appeal.

3. We have heard Ms. Payoshi Roy, learned counsel appearing on behalf of the appellant and Mr. Siddharth Dharmadhikari, learned counsel appearing on behalf of the respondent-State of Maharashtra.

4. Ms. Payoshi Roy, learned counsel appearing on behalf of the appellant submits that the High Court and the trial court have grossly erred in holding the present appellant guilty for the offence punishable under Section 302 of IPC. She submits that the prosecution case mainly rests on the evidence of Madhusudhan Kulkarni (PW-12). It is submitted that, from the testimony of Madhusudhan Kulkarni (PW-12) itself, it would be clear that his testimony is not sufficient to

[3] **Hereinafter referred to as "Cr.P.C.".**

base the order of conviction. She submits that, firstly, the statement of Madhusudhan Kulkarni (PW-12) recorded under Section 161 of Cr.P.C. is recorded belatedly i.e. after 6 days. She further submits that there is no explanation at all as to why his statement was not recorded for 6 days. She submits that even the testimony of the IO would show that the IO did not find it necessary to go to the hospital for 6 days to record the statement of Madhusudhan Kulkarni (PW-12). She further submits that, from the evidence of Madhusudhan Kulkarni (PW-12), it would also be clear that he has not witnessed the incident. She submits that the statement of Madhusudhan Kulkarni (PW-12) has been recorded by the police after he was informed that an FIR has been registered against the present appellant for committing the murder of his wife, daughter and mother. As such, no credence could be given to the testimony of Madhusudhan Kulkarni (PW-12).

5. Ms. Roy submitted that if the testimony of Madhusudhan Kulkarni (PW-12) is discarded, then the only circumstances upon which the prosecution relies are recovery of hammer and clothes at the instance of the present appellant on a memorandum under Section 27 of the

Evidence Act, 1872. It is however submitted that the said recoveries are all farcical and cannot be relied on. She therefore submitted that the present appeal deserves to be allowed.

6. Ms. Roy submits that, in the event this Court finds that the prosecution has proved that the present appellant has committed the offence, then the death penalty would not be warranted in the facts and circumstances of the case. She submits that there are various mitigating circumstances as to be found from the various reports placed on record that the appellant was not a hardened criminal. She submits that there is nothing on record to establish that there is no possibility of the present appellant being reformed. She therefore submits that the present case would fall under the middle path as laid down by this Court in a catena of judgments including ***Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka***[4].

7. Per contra, Shri Siddharth Dharmadhikari, learned counsel appearing on behalf of the respondent-State submits that the learned trial court and the High Court have

[4] **(2008) 13 SCC 767 : 2008 INSC 853**

concurrently on the basis of the evidence placed before them come to a considered conclusion that the prosecution has proved the case beyond reasonable doubt. He submits that the ocular testimony of Madhusudhan Kulkarni (PW-12) is corroborated by the other circumstantial evidence. He submits that the hammer used in the crime has been recovered on the statement of the present appellant recorded under Section 27 of the Evidence Act. He further submits that one *chhanni* is also recovered on the basis of the memorandum of the appellant under Section 27 of the Evidence Act. The recovery of blood-stained clothes, according to the learned counsel, is another circumstance which establishes the complicity of the present appellant with the crime in question. He further submits that Madhusudhan Kulkarni (PW-12) is an injured witness and therefore a greater credence would be attached to his testimony.

8. With the assistance of the learned counsel for the parties, we have perused the evidence on record.

9. The prosecution case mainly rests on the ocular testimony of Madhusudhan Kulkarni (PW-12). Madhusudhan

Kulkarni (PW-12) is the neighbour of the appellant and the deceased. In his testimony, Madhusudhan Kulkarni (PW-12) stated that he knew all the three deceased persons as well as the appellant. He states that the deceased persons as well as the appellant used to reside in his neighbourhood. He stated that deceased Shobha Masalkar i.e. the mother of the appellant used to do the work of cleaning utensils and she was also working in his house. He further stated that deceased Shobha had one daughter namely Aboli and that he had helped Shobha in the marriage of her daughter Aboli. He further stated that there used to be quarrels between the appellant on one hand and his mother and wife on the other. He stated that the appellant was intending to marry another lady and that he was intending to give divorce to his wife Archana. He stated that, he as well as deceased Shobha were against this as the appellant was already married.

10. Madhusudhan Kulkarni (PW-12) further stated in his examination-in-chief that on the date of the incident, he was in his house and at around 12:00 Noon, he heard the noises of shouts and cries. When he came out, he saw deceased Archana along with her daughter Kimaya crying outside their

house. He further stated that he asked them as to why they were crying outside their house. Thereafter, he came into his house. At that time, someone hit on his backside with some weapon. Due to which, he fell down and saw that the appellant was holding a hammer and was going away. Thereafter, he became unconscious. He further stated that he was admitted in the hospital for 6 days. He stated that he could not identify the hammer as to whether it was the same hammer used by the appellant for the commission of the crime.

11. The testimony of Madhusudhan Kulkarni (PW-12) is full of contradictions. Though, he stated in his examination-in-chief that the appellant was holding hammer in his hand and he was going away, the same did not find place in the statement recorded under Section 164 Cr.P.C. by Judicial Magistrate, First Class. He stated that he did not remember as to whether he was conscious or not when he was admitted in the hospital. In the next breath, he admitted that after the incident, some people came to his flat and he asked them to call the doctor there only.

12. It will be relevant to refer to the testimony of Dr. Abhijit Sudhakr Bele (PW-13) who was attached as Junior Resident Doctor in Sassoon Hospital. He stated that on 4th October 2012, when he was on duty, Madhusudhan Kulkarni (PW-12) was admitted in the hospital. He stated that he gave the history of assault. He stated that on 10th October 2012, the statement of Madhusudhan Kulkarni (PW-12) was recorded in his presence and at that time, he was conscious and oriented.

13. PW-16 is Dr. Tushar Madhavrao Kalekar. He stated that, on 4th October 2012, when he was on duty, Madhusudhan Kulkarni (PW-12) was referred to his department from the surgery department for the purpose of CT Scan of the brain. He admitted that, initially the patient was treated in casualty section and then referred to the surgery department. He further admitted that, as per the first noting dated 4th October 2012 at 09:55 PM, the case paper Exhibit 93-A indicated that the appellant was conscious and oriented. He further admitted that the doctor who at the first instance examined the patient is an important person who can opine about the nature of injuries.

14. Therefore, a million-dollar question that would arise is if Madhusudhan Kulkarni (PW-12) was conscious and oriented at the time of admission in the hospital, then why was his statement not immediately recorded. Another question that would arise is if Madhusudhan Kulkarni (PW-12) had asked the neighbourers, who had come to his flat, to call for the doctor, then he naturally would have informed about the incident to the neighbourers. However, not a single neighbourer is examined to corroborate the version of Madhusudhan Kulkarni (PW-12). On the contrary, his evidence would show that he had admitted that he came to know from the police on 4th October 2012 that in the afternoon of 4th October 2012, the appellant, on account of his desire to marry Gouri Londhe (PW-2), he had fought with his wife Archana and mother Shobha and killed them with a hammer and had smothered by a pillow to death his daughter Kimaya. He also stated that the appellant came and assaulted him with the hammer so as to prevent him from telling it to the neighbourers. If that be so, if the neighbourers arrived immediately on the scene of occurrence, then the question would be, what prevented Madhusudhan

Kulkarni (PW-12) from informing about the incident to the neighbourers. Even if his testimony is taken at its face value, it only suggests that he heard the noises of shouts and cries, then he immediately came out and saw Shobha and Kimaya crying. He only stated that he asked them as to why they were crying outside the house. He did not state that the wife of the appellant told him that there was a fight between the appellant and his wife. From the evidence, it is also not clear as to whether the appellant was present in the house or not.

15. In this respect, it will be relevant to refer to the testimony of Bajirao Dadoba Mohite (PW-14), Investigating Officer (IO). His testimony would reveal that, on the basis of suspicion, the appellant was arrested on 5th October 2012 at 09:05 PM. It will also be relevant to refer to his cross-examination which reads thus:

> "It is true to say that on 4th itself I realized that the alive injured is the important witness in this case. I went on 10th in the hospital to meet that injured. Before that I did not go to the hospital. That injured was not in a position to speak and therefore, I have not visited the hospital before 10th. Prior thereto I have not written letter to the doctor It is true to say that till 10th. I have not received information from the hospital about the state of that injured."

16. It can be seen that PW-14 has admitted that on 4th October 2012 itself, he realised that Madhusudhan Kulkarni (PW-12) was an important witness in this case, but he did not go to the hospital before 10th October 2012 and for the first time, he went to the hospital on 10th October 2012. He further admitted that prior to 10th October 2012, he did not write a letter to the doctor as well.

17. Thus, the delay of 6 days in recording the statement of Madhusudhan Kulkarni (PW-12) particularly when the evidence of Dr. Abhijit Sudhakar Bele (PW-13) shows that Madhusudhan Kulkarni (PW-12) had given the history of the incident and Dr. Tushar Madhavrao Kalekar (PW-16) admitted that Exhibit 93-A showed that Madhusudhan Kulkarni (PW-12) was conscious and oriented casts a serious doubt on the testimony of Madhusudhan Kulkarni (PW-12). No doubt that a conviction could be based solely on the basis of the evidence of a solitary witness, however, the testimony of such a witness is required to be found to be credible and trustworthy. It is also necessary to examine the testimony of such a witness critically. A reliance in this respect could be placed on the three-Judges Bench judgment of this Court in

the case of ***Chuhar Singh v. State of Haryana***[5] which has been followed in a catena of cases.

18. As discussed hereinabove, on a deeper scrutiny of the testimony of Madhusudhan Kulkarni (PW-12), we do not find that the testimony of Madhusudhan Kulkarni (PW-12) is one which would inspire confidence in the mind of the Court to base the conviction for the offence punishable under Section 302 of IPC. Firstly, the statement of Madhusudhan Kulkarni (PW-12) is recorded after 6 days. Secondly, when the evidence shows that he was conscious and oriented on the date of the incident, no neighbourer has been examined to corroborate the testimony of Madhusudhan Kulkarni (PW-12) though even according to Madhusudhan Kulkarni (PW-12), after the incident, the neighbourers had come and he himself had asked them to get the doctor there only. Thirdly, his testimony does not show that he has witnessed the incident and he himself admitted that he had given the statement after he was informed by the police that the present appellant had committed the crime.

[5] **(1976) 1 SCC 879**

19. If the testimony of Madhusudhan Kulkarni (PW-12) is discarded, then the case would become the one of circumstantial evidence.

20. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalised in the judgment of this Court in the case of ***Sharad Birdhichand Sharda v. State of Maharashtra***[6], wherein this Court held thus:

> "**152.** Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant* v. *State of Madhya Pradesh* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi* v. *State of Uttar Pradesh* [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and *Ramgopal* v. *State of Maharashtra* [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in *Hanumant case* [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :
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> > "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so

[6] **(1984) 4 SCC 116 : 1984 INSC 121**

> established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (*2*) the facts so established should be consistent only with the hypothesis of the

> guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
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> (*3*) the circumstances should be of a conclusive nature and tendency,
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> (*4*) they should exclude every possible hypothesis except the one to be proved, and
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> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **154.** These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

21. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of guilt is to be drawn should be fully established. The Court held that it is a primary principle that the accused 'must be' and not merely 'may be' proved guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved'. It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be

explainable on any other hypothesis except the one where the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities, the act must have been done by the accused.

22. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted solely on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

23. In the light of these guiding principles, we will have to examine the present case.

24. The circumstances which have been relied on by the learned trial court are – (i) recovery of hammer; (ii) recovery of blood-stained clothes; and (iii) CCTV Footage which shows that deceased Shobha had come in the building at 03:22 PM

and where the appellant was seen going out of his motor-cycle at 04:28 PM. However, the High Court itself has disbelieved the said circumstance in paras 58-59 of its judgment.

25. Insofar as the first circumstance i.e. recovery of the hammer alleged to have been used in the crime is concerned, according to the prosecution, the said hammer was recovered at the instance of the appellant on a statement recorded under Section 27 of the Evidence Act. Firstly, it is to be noted that the said recovery is from a canal. The recovery panchnama shows that the said hammer was having blood-stains. It is the prosecution case that the hammer was packed in a bag which was put in water. It is to be noted that the hammer was recovered from a place which is open and accessible to one and all. It is improbable that a hammer which was soaked in water for 3 days would still retain the blood-stains. It is to be noted that the investigating agency had to take the service of two swimmers to take the bag out from the canal. The evidence of Santosh Bhau Awaghade (PW-11) who is a panch witness would show that when the police along with the appellant reached the spot, two persons

were already there and they were searching as per the say of the police party. It is thus clear that the place where the accused had taken the police party to show where he had concealed the incriminating article was already within the knowledge of the police. It is also difficult to believe that, in flowing water where two swimmers were required to find out the incriminating material, the said article would remain at the same place after 3 days. We therefore find that it cannot be said that the prosecution has proved the said circumstance beyond reasonable doubt.

26. Insofar as the circumstance regarding the recovery of the appellant's clothes is concerned, even according to the prosecution, it is the appellant who had informed the police about the crime and he was present there. As such, the presence of blood-stains on his clothes cannot be said to be unnatural. Again, the recovery is from a place which is open and accessible to one and all. Same is the case with regard to the recovery of jewellery. In any case, the recovery panchnama does not show that the clothes were sealed. As such, the possibility of tampering cannot be ruled out. Insofar as the recovery of jewellery (mangalsutra) is

concerned, the said mangalsutra was not shown either to Vijaykumar Kisanrao Sonpetkar (PW-5), father of deceased Archana or to the appellant's sister so as to identify that the same belong to deceased Archana.

27. That leaves us with the circumstance of motive. We find that solely on the basis of circumstance of motive, a conviction cannot be based. As held by this Court in the case of ***Sharad Birdhichand Sharda*** (supra), a suspicion, however strong it may be, cannot take the place of a proof beyond reasonable doubt. As has been held by this Court in the case of ***Sharad Birdhichand Sharda*** (supra), there is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". It is a primary principle that the accused "must be" and not merely "may be" guilty before a court can convict and every possible hypothesis except the guilt of the accused has to be ruled out. In our considered opinion, in the present case, the prosecution has failed to do so. We are therefore of the considered view that the impugned judgment and order of the High Court as well as the trial court are not sustainable in law.

28. In the result, we pass the following order:

(i) The appeal is allowed;

(ii) The judgment and order of the High Court dated 23rd July 2019 in Confirmation Case No. 2 of 2016 and the judgment and order of conviction and sentence dated 26th August 2016 and 31st August 2016 passed by the trial court in Sessions Case No.64 of 2013 are quashed and set aside; and

(iii) The appellant is directed to be set at liberty if not required in any other case.

29. Pending application(s), if any, shall stand disposed of.

.....J.
(B.R. GAVAI)

.....J
(PRASHANT KUMAR MISHRA)

.....J.
(K.V. VISWANATHAN)

NEW DELHI;
OCTOBER 17, 2024.