



**HIGH COURT OF JUDICATURE AT ALLAHABAD
CAPITAL CASES No. - 12 of 2022**

Raiyyan

Appellant

Vs.

State of U.P.

Respondent

Counsel for Appellant

Somya Chaturvedi, Sr. Advocate

Counsel for Respondent

G.A., Sayyed Kashif Abbas Rizvi

Court No. - 48

HON'BLE RAJIV GUPTA, J.

HON'BLE HARVIR SINGH, J.

(Per : Hon'ble Rajiv Gupta, J.)

1. Heard Sri G.S. Chaturvedi, learned Senior Counsel assisted by Ms. Somya Chaturvedi, learned counsel for the appellant, Sri A.N. Mulla, learned A.G.A. for the State, Sri Sayyed Kashif Abbas Rizvi, learned counsel for the informant and perused the record.

2. The instant capital case was heard by us, however, on account of respectful difference of opinion vide judgment and order dated 11.12.2025, the matter was referred to the Hon'ble The Chief Justice for formation of an appropriate Bench to resolve the difference of opinion under Section 392 Cr.P.C. Thereafter, Hon'ble

The Chief Justice nominated and assigned the matter to the Hon'ble Third Judge. The Hon'ble Third Judge, after going into the records and other materials, has delivered his opinion allowing the appeal vide judgment and order dated 31.03.2026.

3. In view of the opinion of Hon'ble Third Judge, the instant capital case stands **allowed** and the conviction and sentence awarded to the appellant is accordingly set-aside and the appellant is acquitted of all the charges framed against him. The appellant has already been set at liberty pursuant to an order dated 31.03.2026 passed by Hon'ble Third Judge and as such, in view thereof, no further orders are required to be passed for the release of the appellant.

4. Let a copy of this judgment and order alongwith trial court record be transmitted to the trial court positively within two weeks for necessary compliance.

(Rajiv Gupta, J.)

(Per : Hon'ble Harvir Singh, J.)

1. Heard Sri G.S. Chaturvedi, learned Senior Counsel assisted by Ms. Somya Chaturvedi, learned counsel for the appellant, Sri Sayyed Kashif Abbas Rizvi, learned counsel for the informant, Sri A.N. Mulla, learned A.G.A. for the State and perused the record.

2. Pursuant to the judgement dated 11.12.2025, there was disagreement between the learned brother Judges of the Division Bench hearing the appeal initially, and the matter was referred for third opinion before Hon'ble The Chief Justice. The Hon'ble Chief Justice thereafter, nominated and assigned the matter to Hon'ble Single Judge and the Hon'ble Single Judge after going into the records and other materials has passed the judgment, whereby allowing the appeal of the sole appellant at present. Subsequently,

the matter was posted for further deliberations whatsoever, before Division Bench (original) to decide the matter accordingly, in terms of Section 392 Cr.P.C., which reads as under:-

Section 392 – Procedure where Judges of Court of appeal are equally divided;

"When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion;

Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

3. Since the opinion of the third Hon'ble Single Bench, is that the appeal has been allowed; After going through the order/ judgement dated 31.3.2026, but without expressing any opinion on merit, however having a careful reading, I express my respectful disagreement with the judgment passed by the Hon'ble Single Judge on 31.03.2026, under the circumstances, this matter is liable to be referred to a larger Bench, as per the law, laid down by Hon'ble Supreme Court in the following cases :-

(i). In the case of **State Of U.P vs Dan Singh And Ors** (1997); 1997 (3) SCC 747, the Hon'ble Apex Court held as under -

Para-24 "When the appeal as a whole is heard by the third judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be re-heard and decided by a larger bench of judges. This was an option which, under the proviso, was also open for any one of the two judges,

namely, B.N. Katju and Rajeshwar Singh, JJ. to exercise, but they choose not to do so."

(ii). In the case of **Sajjan Singh vs State of Madhya Pradesh (1998)**, 1999 (1) SCC 315, the Hon'ble Apex court reiterated the same as under:

Para-8 "When the appeal as a whole is heard by the third judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be re-heard and decided by a larger bench of judges. This was an option which, under the proviso, was also open for any one of the two judges, namely, B.N. Katju and Rajeshwar Singh, JJ. To exercise, but hey choose not to do so."

(iii). The Hon'ble Apex Court in the case of **Tanviben Pankajkumar Divetia vs State Of Gujarat (1997)**; 1997 (7) SCC 156, held as under:

Para-4 "The Law Commission in the 41st Report had observed that if either of the Judges first hearing the appeal so requires or if after reference, the third Judge so requires, the case should be reheard and decided by a Bench of three or more Judges. This was incorporated in Clause 402 of the Bill. The Joint Select committee however substituted the words 'larger Bench of Judges' for the words 'Bench of three or more Judges' occurring in clause 402. Section 392 reproduces the proviso as amended by the Committee."

392. "Procedure where Judges or Court of Appeal are equally divided;

- When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and

that Judge after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:

Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this Section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

(iv). The Hon'ble Apex Court in the case of **Kunal Majumdar vs State Of Rajasthan (2012)**; 2012 (9) SCC 320, held as under -

Para-16 "when such Reference is heard by Bench of Judges and if they are divided in their opinion, the case should be decided in the manner provided under Section 392 as per which the case should be laid before another Judge of that Court who should deliver his opinion and the judgment or order should follow that opinion. Here again, under the proviso to Section 392, it is stipulated that if one of the Judges constituting the Bench or where the appeal is laid before another Judge, either of them, if so required, direct for rehearing of the appeal for a decision to be rendered by a larger Bench of Judges."

(v). In recent case of **Pankajakshi (Dead) Through L.Rs. & Ors v. Chandrika & Ors (2016)**; 2016 (6) SCC 157, the Hon'ble Supreme Court held as under -

Para-6 Under The Code of Criminal Procedure, 1973 (for short, *the Cr.PC'), the position is slightly different. Section 392 reads as follows:

392. Procedure when Judges of Court of Appeal are equally divided.-When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks

fit, shall deliver his opinion, and the judgment or order shall follow that opinion:

Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

Para-7 "The emerging position is that there is no uniformity or clarity with regard to the Judge strength in the event of difference of opinion, and according to me, it has affected the purpose for which the matters are required to be heard by a strength of more than one Judge, be it a Division Bench or Full Bench (Larger Bench)."

Para-9 "Under Section 392 of the Cr.PC, the situation again is different. In case, the Division Bench is divided in their opinion, the appeal with the opinions should be laid before another Judge of that Court and the appeal will be decided clearly on the basis of the opinion rendered by that Judge hearing the matter sitting alone. However, the proviso under Section 392 of the Cr.P.C. enables any one of the Judges of the Division Bench or the third Judge to order the appeal to be heard by a larger Bench of Judges."either of them, if so required, direct for rehearing of the appeal for a decision to be rendered by a larger Bench of Judges."

"Para-10 "when two judicial minds sitting together could not concur, that difficulty is to be resolved, ideally, if not on common sense, not by a third one, but by a Bench of larger coram."

Para-11 "In my humble view, if the purpose behind the requirement of a matter to be heard by a Bench of not less than two Judges is to be achieved, in the event of the two Judges being unable to agree either on facts or on law, the matters should be heard by a Bench of larger strength. Then only the members of

the Bench of such larger strength would be able to exchange the views, discuss the law and together appreciate the various factual and legal positions. The conspectus of the various provisions, in my view, calls for a comprehensive legislation for handling such situations of a Bench being equally divided in its opinion, either on law or on facts, while hearing a case which is otherwise required to be heard by a Bench of not less than two Judges, both civil and criminal. It is for the High Court and the Legislature of the State concerned to take further steps in that regard."

4. In view of the above law position, this matter is referred to a larger Bench for deliberations and further discussion in accordance with the provisions enumerated under Section 392 of the Cr.P.C. Consequently, the matter is now referred to the Hon'ble Chief Justice for constituting a larger Bench for hearing and deciding this appeal in accordance with the law.
5. Since the appeal of the accused-appellant was allowed by Hon'ble Single Judge and the accused-appellant has been released from jail thereafter.
6. Under the circumstances, the matter has been referred to Hon'ble The Chief Justice for constituting a larger Bench, hence, the accused-appellant, shall surrender before the learned Trial Court within three weeks from today and he shall be taken into custody and be sent to jail forthwith.

(Harvir Singh, J.)

(By the Court)

1. I have gone through the opinion expressed by Hon'ble Harvir Singh, J., vide order dated 17.04.2026, however, in view of the

express provisions contained under Section 392 Cr.P.C, which is quoted herein-below:-

"Section 392. *Procedure where Judges of Court of Appeal are equally divided.—When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:*

Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

it culls out that when an opinion has already been delivered by the Third Judge allowing the appeal, then as per the provisions contained in Section 392 CrPC, the instant capital case is liable to be allowed and stands concluded and no further orders could be passed referring the appeal to be re-heard and decided by a larger Bench of Hon'ble Judges.

2. It is germane to point out here that controversy raised herein is primarily based on interpretation of proviso contained under Section 392 CrPC. It is germane to point out here that the said provision has lucidly been interpreted by the Full Bench of Gauhati High Court in the case of **Nagen Das @ Balai Das Vs. State of Assam reported in (1997) 2 Gauhati Law Reports 282**, wherein it has been held that :-

13. *A proviso is a provision or a portion of a clause in a statute, the function of which is either to exclude something from the enacting provision or to qualify or to limit its generality, or to leave out some "possible ground of misinterpretation". Difficulties can be avoided, according to Maxwell, by applying the general rule that*

the words of a proviso are not to be taken "absolutely in their strict literal sense." One of the purpose of inserting of a proviso is to allay fears and eliminate apprehension.

A proviso is to be considered in relation to the principal provision to which it stands as a proviso. It is to be harmoniously construed with the main Section. It should not destroy the main provision or another provision of the contemporaneous enactment. Lord Macmillan in Madras and Southern Maharashtra Railway Co. v. Bezwada Municipality, 71 Ind App 113 laid down the law as follows:

"The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms. The territory of a proviso therefore is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that is its necessary effect.

3. In the light of the aforesaid principles laid down for interpretation of a particular provision, it is culled out that when an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in their opinion, then in that case, one of the Judges of the Division Bench hearing the appeal, if so requires, may refer the appeal to be heard by a larger Bench of Judges, however, the aforesaid exercise is to be made before the appeal is laid before the Third Judge for his opinion under the main

enactment of Section 392 CrPC. Once the case is laid before the Third Judge, the Third Judge alone is empowered by the Statute to deal with the entire matter. Even at this stage, it will be open to the Third Judge to refer the case to a larger Bench of Judges, however, once the Third Judge after hearing the matter delivers his opinion, then it would not be open to further refer the matter to the larger Bench.

4. Thus, in the light of the aforesaid principles as discussed above, in view of the difference of opinion between the two Judges of the Division Bench, the matter has been referred to the Third Judge, who, after going into the records and other materials, has delivered his opinion vide order dated 31.03.2026, then, now at this stage, the Bench of Judges can not get out of the same and refuse to accept the opinion of the Third Judge and seek further reference to the larger Bench. Thus, the judicial propriety demands that the aforesaid aspects be referred for being answered by a larger Bench.

5. The Registry is directed to place this matter before the Hon'ble The Chief Justice for constituting a larger Bench to answer the following questions :-

"(i). Whether a further reference to a larger Bench as contemplated under Section 392 CrPC is well within the competence of a Bench of Judges, after the Third Judge has delivered his opinion that may or may not concur with either view of the original Division Bench ?

(ii) Whether after delivery of an opinion of the Third Judge, a Bench of Judges can get out of the same and refuse to accept the opinion of the Third Judge and seek further reference to the larger Bench ?"

6. Till the aforesaid questions are answered by the larger Bench, order of release granted to the appellant vide order dated 31.03.2026 shall remain in operation.

April 17, 2026

Nadim/Faridul

(Harvir Singh, J.) (Rajiv Gupta,J.)