

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 506 OF 2015

1. Shankarrao Ramrao Shinde,
Age: 50 years, Occu: Agriculture,
2. Saraswatibai Shankarrao Shinde,
Age: 40 years, Occ: Household,

Both R/o Dhasadi,
Tq. & Dist. Parbhani.

... **Appellants**
(Original accused
nos. 1 & 2)

Versus

The State of Maharashtra

... **Respondent**

Mr. Joydeep Chatterji, Advocate for the Appellants.
Mr. D.R. Kale, A.P.P. for the Respondent/State.

CORAM : MANGESH S. PATIL, J.

DATE OF RESERVING THE JUDGMENT : 06.04.2018
DATE OF PRONOUNCING THE JUDGMENT : 12.06.2018

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JUDGMENT:

This is an appeal against conviction preferred under Section 374
(2) of the Code of Criminal Procedure.

2. The facts leading to the appeal may be summarized as under:

The deceased was the first wife of the appellant no.1 (hereinafter referred to as the accused no.1). The couple has two sons Pralhad (PW-1), Vishnu and a daughter Suman. The appellant no.2. (hereinafter referred to as the accused no.2) is the second wife of the accused no.1 and the couple has school going children Chhaya, Yogita and Ramrao. The prosecution case and the topography of the house of these persons is to the effect that the accused persons with their children were residing separately in the same house, whereas, the deceased along with her sons was staying in the same house but in a separate portion. There was a common courtyard at the centre of the house referred to as Varandah. The incident is alleged to have taken place in this varandah. It is the prosecution case that there was a partition between the accused persons and their children on the one hand and the deceased and her children on the other. Accused no.1 was having a mare which he had sold just before the incident. The deceased was insisting for a share in the sale proceeds.

It is alleged that on 23.11.2013 in the morning a quarrel ensued between the accused persons and the deceased on account of sharing the sale proceeds. Having seen the quarrel Pralhad (PW-1) went to call some persons

to intervene. By the time he came back he saw that his mother was on fire in the courtyard/varandah. He along with the persons who had accompanied him doused the fire and took her in a jeep to the Civil Hospital, Parbhani which was at a distance of about 30 kms from the place of incident. It is alleged that on the way on being asked by Prahlad (PW-1) the deceased had declared that the accused no.2 had poured kerosene on her person, whereas, the accused no.1 had set her ablaze with a match stick when she started demanding half the price of the mare.

It is the prosecution case that she was brought to the Civil Hospital, Parbhani at about 11.05 hours on 23.11.2013. The Medical Officer Dr. Kazi (PW-2) informed the police about arrival of the patient. Police Constable Giri (PW-3) arrived at the Civil Hospital for recording a dying declaration. However, since the deceased was not conscious he went back and an endorsement to that effect was made in the case papers (Exhibit-14/3). After some time he again came back. Dr. Kazi (PW-2) examined the deceased and after she endorsed that the deceased was conscious and fit to give statement the first dying declaration (Exhibit-16) was recorded between 2.15 to 2.30 pm.

It is further the case of the prosecution that Police Constable Giri (PW-3) then sent a requisition to Tahsildar and Naib Tahsildar for recording another dying declaration. Naib Tahsildar Jadhav (PW-6) arrived at the Civil Hospital. By that time Dr. Doli (PW-5) was on duty. Jadhav (PW-6) then recorded the second dying declaration (Exhibit-36) in presence of Dr. Doli (PW-5). Even during the second dying declaration (Exhibit-36) she repeated the version in the first one (Exhibit-16). It was sent to Daithana Police Station and Crime No. 127 of 2013 was registered on the same day at about 9.20 pm for the offence punishable under Section 307 read with Section 34 of the I.P.C.

Unfortunately, the deceased breathed her last at about 10.45 pm of the same day while undergoing treatment. The crime was converted to Section 302 read with Section 34 of the I.P.C. An Inquest panchanama was drawn. The post mortem examination was conducted by Dr. Nahod (PW-4). He opined that deceased had died of respiratory arrest due to hypothalamic shock due to 100% burns. ASI Faziuddin (PW-10) reached the spot in the same evening and recorded the spot panchanama (Exhibit-45) between 22.00 to 23.00 hours in presence of Panch Dnyanoba (PW-9). The clothes on the person of the deceased were seized under a seizure memo (Exhibit-34) in

presence of panch. Even the clothes of the accused no.1 were seized under a separate panchanama in presence of panch Shinde (PW-7). A can and a match stick as well as the pieces of clothes seized under different panchanamas were sent for chemical analysis. The accused were arrested and in due course of time a charge-sheet was filed.

The trial Court framed the charge for the offences punishable under Sections 302 and 201 both read with Section 34 of the I.P.C. and recorded the plea. The accused claimed to be tried and the prosecution led its evidence. Both the accused were examined under Section 313 of the Cr.P.C. Their defence was one of denial. They also examined one Nivrutti (DW-1) as a defence witness. At the end of the trial, the learned Additional Sessions Judge, Parbhani by the impugned judgment and order convicted both the accused for the offence punishable under Section 302 of the I.P.C. and sentenced them to suffer imprisonment for life and to pay a fine of Rs. 5,000/- each and in default of payment of the fine, to further rigorous imprisonment for six months. However, he acquitted them of the offence punishable under Section 201 of the I.P.C. This is how the accused have come in appeal.

A Division Bench of this Court heard the appeal. However, the Judges returned a divided opinion. Therefore, the learned Chief Justice in exercise of the powers under Section 392 of Cr.P.C. read with Rule 7 of Chapter I of the Bombay High Court Appellate Side Rules, 1980, has laid the appeal before me.

3. I have heard the learned advocate for the accused Mr. Chatterji as also the learned A.P.P. Mr. Kale. It has been argued by the learned advocate Mr. Chatterji that there are no eye witnesses to the incident. The prosecution has been heavily relying upon multiple dying declarations, couple of which are written and the third one allegedly orally made to Pralhad (PW-1). There are improbabilities and inconsistencies in these dying declarations which go to the root of the veracity of the prosecution case. He would point out that the deceased was certified to be burnt 100% by Dr. Kazi (PW-2). Not only that but even there is an endorsement on the M.L.C. letter (Exhibit-9) by her to the effect that the patient was unconscious at 1.35 pm which is duly proved by her. If such was the state of affairs, it was unlikely that the deceased could have narrated the incident by making any declaration to Pralhad (PW-1) on the way to the hospital. He would then point out that there is a contradiction in the statement of Pralhad (PW-1) recorded under Section 161 and his testimony. Unlike what he has deposed, his statement does not refer to such

declaration having been made by the deceased to him on the way to the hospital after travelling for about 3 kms, which is duly proved in the testimony of the Investigation Officer Faziuddin (PW-10). The learned advocate would then point out that even while recording the history in the case papers (Exhibit-14/3) the history was given only as 'Burn Injury morning 9.00 am'. He would point out that Dr. Kazi (PW-2) who had recorded this history, in her examination in chief has stated about the deceased herself having given the history, whereas, during her cross-examination she has stated about one Nivrati Jadhav having given history who was the relative of the patient and during further questioning as to why she did not record the history given by the patient when the patient was conscious she was unable to give any rational answer. He would then point out that the patient was unconscious at 1.35 pm. Dr. Kazi (PW-2) admitted that by passage of time there would be deterioration in the condition of the patient when it is a case of 100% burns. If such was the state of affairs when the deceased had sustained 100% burns as noticed by Dr. Kazi (PW-2), when she had found the deceased unconscious at 1.35 pm, further version of the witness and the endorsement on the dying declaration (Exhibit-16) as well as the second dying declaration (Exhibit-36) that the patient was conscious becomes doubtful.

4. The learned advocate would argue further that both the dying declarations (Exhibit-16 and 36) do not bear any endorsement by the witnesses recording it namely Giri (PW-3) and Naib Tahsildar Jadhav (PW-6) about the contents of the dying declaration having been read over to the deceased and she having admitted them to be true. Absence of such endorsement is sufficient to discard both these dying declarations in view of the principles laid down by the Supreme Court in the case of **Shaikh Bakshu V/s. State of Maharashtra; (2007) 11 Supreme Court Cases 269.**

5. The learned advocate for the accused would then submit that as far as oral dying declaration with which Pralhad (PW-1) is coming forth is concerned, apart from being a highly interested witness his version is not believable since it is highly improbable. Several persons like Nivrutti (DW-1) and one Prakash, who was then a Kotwal of the village were also present in the vehicle. Apparently the deceased had not made any such declaration to anybody else and it was unlikely that she could have made such declaration only to Pralhad (PW-1) during the course of the journey. On the contrary, Nivrutti (DW-1) has specifically denied about she having made any such oral dying declaration even when admittedly he was travelling in the same jeep in

which she was being taken to the hospital. Thus, according to the learned advocate, the prosecution has failed to prove any of these dying declarations and resultantly there remains no concrete and cogent material to bring home the charge against the accused.

6. The learned A.P.P. submitted that both the dying declarations (Exhibit-16 and 36) are consistent as far as material particulars attributing authorship of the crime is concerned. Few minor variation are not sufficient to discard the dying declarations. He would point out that the case paper (Exhibit-14/3 to 14/7) has been duly maintained by Dr. Kazi (PW-2) and Dr. Doli (PW-5) in the ordinary course and clearly bear their endorsements about consciousness of the patient i.e. the deceased at the time of recording of the dying declarations. The learned A.P.P. would then submit that both the dying declarations (Exhibit-16 and 36) are believable and have been duly proved by the persons recording it namely Giri (PW-3) and Naib Tahsildar Jadhav (PW-6). Both Dr. Kazi (PW-2) and Dr. Doli (PW-5) in whose presence they have been recorded have also duly proved the endorsements made by them on these dying declarations about consciousness of the deceased and being independent witnesses both the dying declarations stand duly proved and are sufficient to bring home the guilt.

7. The learned A.P.P. would then submit that even the oral dying declaration made to Prahlad (PW-1) is quite reliable. The contradiction is only in respect of the spot during the journey where the dying declaration was made. It is only the fact that it was made after travelling a distance of 3 kms has been missing. It is only a minor contradiction which does not go to the root of veracity of this witness. He would point out that Nivrutti (DW-1) is the real brother of the accused no.1 and is therefore highly interested witness who has apparently been won over by the accused persons to somehow falsify the prosecution evidence and particularly the testimony of Pralhad (PW-1).

8. The learned A.P.P. would point out that independent of dying declarations, even by resorting to the theory of last seen together, both the accused can easily be found guilty for the offence. He would point out that both the accused and even the deceased with their families were staying in the same house albeit in different portions having a common yard/varandah. The incident had taken place in the varandah in the morning after a quarrel had ensued between the accused persons on the one hand and the deceased on the other. Pralhad (PW-1) had left home for brining some intervenors. By the time he returned the deceased was found burning and both the accused were

present there. Since nobody else was present in the house, as it has come in the evidence, except a small child of Pralhad (PW-1), in the absence of any explanation as to how the deceased had caught fire, complicity of the accused in commission of the crime can easily be discerned by resorting to the theory of last seen together.

9. As has been mentioned cursorily at the beginning, there is no dispute about the fact that the deceased was the first wife of accused no.1, whereas, accused no.2 is his second wife. There is also no dispute that all of them were staying in the same house but in different portions having a common varandah at the centre. There is also not much of a dispute that there was a partition in which a portion of agricultural land was given to the sons of the deceased, even the livestock was distributed. For that matter there is also no dispute that the accused no.1 was having a mare which he had sold and the deceased was demanding a share in the sale proceeds. All these facts stand duly established and proved during the testimony of Pralhad (PW-1) and Nivrutti (DW-1). The latter happens to be the real brother of the accused no.1. In the backdrop of such factual matrix let us consider the evidence.

10. In consonance with the prosecution version Pralhad (PW-1) has stated that the incident took place on 23.11.2013 at 9.00 am. His father i.e. the accused no.1 had sold the mare for Rs. 81,000/- and his mother the deceased was demanding half of the money. She had raised such a demand with both the accused. He then stated that the accused no.1 flatly refused to pay and there was exchange of words between the deceased on one hand and the accused persons on the other. He has then stated that in order to settle the dispute he had gone to the village and called one Prakash C. Mhaske. When he along with Prakash returned home he found that his mother was on fire. He along with his brother Vishnu and Prakash extinguished the fire. Both the accused were present there. A jeep of one Santosh Shinde was called and the deceased was transported to the Civil Hospital, Parbhani. He has then stated that after reaching about 3 kms, on his inquiry the deceased stated him about accused no.2-Sarubai having poured kerosene on her person and accused no.1-Shankar having set her ablaze with a match stick. His testimony needs to be looked into in relation to two aspects. Firstly, the circumstance in which the incident had occurred. Secondly, to establish the oral dying declaration made to him.

11. Taking up the first aspect, there cannot be much of a dispute as far as the facts narrated by him are concerned. For that matter his version regarding these factual aspects stands duly corroborated by defence witness Nivrutti (DW-1), albeit there is some minor variance between the two. As far as the relations, the dispute regarding sharing of sale proceeds of the mare, partition, situation or topography of the house and even the place of incident, these two witnesses have come out with similar version. Therefore one can safely proceed on the premise that the incident had occurred on 23.11.2013 at about 9.30 am in the residential house of the accused and the deceased. The version of Pralhad (PW-1) when he returned home along with Prakash and saw his mother on fire also has been corroborated by Nivrutti (DW-1) to a major extent. The only variance is, Pralhad (PW-1) has not stated anything about presence of Nivrutti (DW-1), whereas, the latter has stated that Pralhad (PW-1) had first called him and thereafter went to call Prakash. However, simultaneously Nivrutti (DW-1) has also stated that when he reached the house of the accused persons even Pralhad (PW-1) and Prakash had reached there. He has also stated that even accused no.1 was present at the entrance, whereas, the accused no.2 was removing dung and the deceased was present in the varandah. Therefore, at least to the extent of the presence of the both

the accused inside the house along with the deceased at the material time stands duly corroborated and proved during the testimony of Pralhad (PW-1) and Nivrutti (DW-1).

12. It is further pertinent to note that Nivrutti (DW-1) has not come out with any version as to how the deceased had caught fire. He has only stated that after Pralhad (PW-1) went inside the house the deceased shouted and thereafter he went inside and extinguished the fire. It has been elicited during the cross-examination of Pralhad (PW-1) that his wife had gone for answering the nature's call and it is only his two year old son who was present inside the house. It has also been elicited that apart from the deceased and the accused persons no one else was present inside the house. As is mentioned herein-above, Pralhad (PW-1) and Nivrutti (DW-1) both have stated about the deceased having caught fire inside the house. All these circumstances are very vital in as much as, as has been rightly submitted by the learned A.P.P., in the circumstances, it was for the accused persons to have come out with some sort of explanation to explain as to under what circumstances the deceased had caught fire. Conspicuously, neither in their examination under Section 313 of the Cr.P.C. nor during the testimony of Nivrutti (DW-1) they have come out with any version as to the circumstances

which led to the deceased catching fire. Therefore, apart from all other circumstances, this is a very crucial circumstance which leads us to a reasonable hypothesis ruling out any other possibility of deceased catching fire except that she was set ablaze by the accused persons.

13. As a corollary to the above circumstance, it is equally important to note that if at all the deceased had caught fire accidentally or may be in an attempt to set herself ablaze, going by the natural human conduct at least the accused no.1 who is her husband would have certainly come forward to douse the fire. Pertinently, in spite of having stated that both the accused were present in the house when the deceased had caught fire, Nivrutti (DW-1) has not stated about both the accused having made even a lame attempt to douse it. In my considered view, even this behaviour of the accused persons is not compatible with the one expected of a normal human being. Therefore, such behaviour of the accused further tends to corroborate the hypothesis drawn herein-above. Its a fact relevant under Section 8 of the Indian Evidence Act. In the case of **Pratap Nathuji Dhikhe V/s. State of Maharashtra; 2011 ALL MR (Cri.) 3172**, it has been observed that such a conduct militates against their innocence. In case of **Jaspal Singh V/s. State of Punjab; (1980) 1 SCC 487**, the Supreme Court had an occasion to consider similar set of facts

and circumstances. In that case the accused and the deceased were seen travelling in a cart in the night. The accused then had handed over the deceased to the relatives with serious injuries. The doctor had found that the injuries found on the deceased could have been as a result of being run over by the cart. It was observed that there was no dispute that on the night of the occurrence the accused and the deceased were last seen together travelling in a cart and after they returned the accused handed over the deceased to his relatives in an injured condition. It was observed that this circumstance indicated in the absence of an explanation to a different effect that the deceased having received injuries after he left the village along with the accused and after he was returned to his relatives the injuries must have been caused by the accused and nobody else. A parallel can certainly be drawn in the matter in hand. No explanation much less provable having been sought to be given for the deceased catching fire, it is only the accused persons who alone were present in the house with the deceased can certainly be attributed with the authorship of the crime.

14. Indeed, the second aspect in respect of oral dying declaration sought to be established by Pralhad (PW-1), though it appears to be natural for a son to have inquired with his mother who had caught fire the reason for

the incident, it is equally important to note that few other persons also had accompanied him in the same vehicle, but none of them has come out with any such disclosure about the oral dying declaration. Further, if at all the deceased had made such an oral dying declaration attributing authorship of the crime to both the accused, certainly, no person in the position of Pralhad (PW-1) would have waited for lodging a complain with the police promptly, may be after reaching the deceased tot the Civil Hospital, Parbhani. Even according to the prosecution, the first of the dying declaration (Exhibit-16) was recorded between 2.15 pm and 2.30 pm, whereas, the case papers (Exhibit -14/3) show that the patient had reached the hospital at 11.30 am. Therefore, his version about the deceased having disclosed to him about the accused persons having set her ablaze en route to the Civil Hospital while he was travelling in a vehicle does not appeal to a reasonable mind. Therefore, in my considered view, the version of Pralhad (PW-1) about the deceased having made an oral dying declaration to him is not reliable and trustworthy. Therefore to this extent, his testimony is of no avail to the prosecution to establish authorship of crime to the accused persons on the basis of oral dying declaration.

15. This takes me to the two dying declarations (Exhibit-16 and Exhibit-36) being heavily relied upon by the prosecution. Even the learned Additional Sessions Judge has based the conviction primarily by believing these two dying declarations. To repeat, Dr. Kazi (PW-2) has stated that on 23.11.2013 she was on casualty duty in the Civil Hospital, Parbhani and the deceased was brought with 100% burns, her relative had given the history, the patient was conscious she immediately started treatment and recorded medico legal case and sent a letter to the police (Exhibit-9). She has then stated that after arrival of police she examined the patient (the deceased) who was conscious, oriented, she asked her as to what had happened and the deceased had given the history. Since she was responding to the questions she put an endorsement about the patient being conscious at 2.15 pm (Exhibit-10). Thereafter, a statement of the patient was recorded by police in her presence and she again examined the patient who was conscious throughout the statement and put an endorsement to that effect (Exhibit-11) at 2.30 pm. Her version is sought to be assailed on behalf of the defence for variety of reasons. It is pointed out that this witness has stated that the burns were 100%. It was further pointed out that this witness also admitted that a person who has sustained 100% burns and becomes unconscious, condition of the patient

worsens by passage of time. It was further pointed out that if at all the patient had given her the history, it was not made clear by her as to why she did not record that history in the case papers (Exhibit-14/3). It was also pointed out that there is a scratching in the endorsements put by her on the dying declaration (Exhibit-16).

16. A careful consideration of the testimony of Dr. Kazi (PW-2) reveals that indeed she has committed a few mistakes. Even though in the case papers (Exhibit-14/3) she herself had made entries which read that the patient had sustained 80% burns, it was a sheer recklessness on her part to depose that the burns were 100%. A bare look at the case papers before deposing in the Court would have avoided such a mistake. Therefore, in my considered view, it is a sheer mistake and no weight can be attached to it except attributing the witness with carelessness. Not much can be read beyond that. Neither the witness was to gain anything nor was the prosecution trying to salvage something by making her depose about the deceased having sustained 100% burns which was apparently inconsistent with the endorsement in the case papers (Exhibit-14/3) by the self same witness during the ordinary course of her duties.

17. Equally, the endorsement on the case papers (Exhibit-14/3) put by her at 1.35 pm also appears to have been scratched by scoring 'un' appearing before 'conscious'. This witness has specifically admitted that she had put such an endorsement having found that the patient was unconscious at 1.35 pm. Again, when it is her version that the patient was indeed unconscious at 1.35 pm and was not responding to verbal commands leading to which her statement could not be recorded when Police Constable Giri (PW-3) had first visited the patient, such scoring is inconsequential. If at all the dying declaration was to be recorded objectively with oblique reasons, a person in the position of Dr. Kazi (PW-2) and Police Constable Giri (PW-3) would have certainly avoided such inconsequential improvisation of scoring. Under these circumstances, I find no sufficient and cogent reason to discard the testimony of Dr. Kazi (PW-2) outrightly on the basis of above two circumstances.

18. Police Constable Giri (PW-3) has stated about having received the MLC letter (Exhibit-9) and to have made an attempt to record the statement of the deceased. However the patient was unconscious at 1.35 pm and he had to return. He then stated about having come back to the hospital at 2.15 pm to record the statement of the patient. Dr. Kazi (PW-2) examined the patient

and placed an endorsement that the patient was conscious and then he inquired with the patient her name. He also put some questions to ascertain if she was in a proper state of mind to give a statement and then recorded her statement. He stated that the deceased had told him that she was demanding her share from the sale proceeds of mare to her husband and his second wife. A quarrel had ensued. The second wife poured kerosene on her person and her husband ignited her with match stick. He then read over the statement to the deceased and obtained her thumb impression. He then put an endorsement under the statement and asked the Medical officer to ascertain if the patient was conscious. The Medical Officer examined the patient and put an endorsement to that effect at 2.30 pm and accordingly the dying declaration (Exhibit-16) was concluded. As is mentioned herein-above his such version stands duly corroborated in material particulars by the testimony of Dr. Kazi (PW-2) and her endorsement made on the case papers (Exhibit-14/3) and the dying declaration (Exhibit-16). In my considered view, nothing could be elicited during the cross-examination of both these witnesses so as to discredit them.

19. Similar is the case with the second dying declaration recorded by Naib Tahsildar Jadhav (PW-6) after the deceased was examined and endorsed to be conscious and oriented by Dr. Doli (PW-5).

20. Police Constable Giri (PW-3) has stated about having sent a letter (Exhibit-17) requisitioning the services of a Special Executive Magistrate for recording the dying declaration. Accordingly, Naib Tahsildar Jadhav (PW-6) has stated to have received the letter (Exhibit-17) at 3.00 pm. He then went to the hospital and met Dr. Doli (PW-5). Dr. Doli (PW-5) examined the patient and told him that the patient was conscious and made an endorsement to that effect on the dying declaration (Exhibit-36). He then stated about having started recording the dying declaration. He inquired the patient her name and as to how the incident had occurred. He stated that the patient told her name and further disclosed that the incident had taken place at 9.00 am. There was a quarrel with her husband and the second wife-Sarubai (accused no.2) poured kerosene on her person and her husband set her afire with a match stick. He further stated that on inquiry as to if she has any grievance against anybody, she told that she had grievance against her husband and his second wife. He then stated that after recording the dying declaration he read over it to her. Dr. Doli (PW-5) was present there. She examined the patient again and

put an endorsement to that effect. He then obtained the thumb impression of the deceased on the dying declaration (Exhibit-36). He further identified both the endorsements (Exhibit-31 and 32) to be that of Dr. Doli (PW-5).

21. In turn, Dr. Doli (PW-5) has stated that she was working as a Casualty Medical Officer in the Civil Hospital at Parbhani between 3 pm to 9 pm on 23.11.2013. She stated that after about 3 pm Naib Tahsildar Jadhav (PW-6) arrived there for recording a statement of patient Kantabai Shinde i.e. the deceased. She examined her at 3.10 am (*sic.*). Patient was conscious and was in a state to give statement. She made an endorsement to that effect under her signature. Thereafter, Naib Tahsildar Jadhav (PW-6) recored the statement and Dr. Doli (PW-5) again examined the patient and certified that the patient was conscious throughout the statement between 3.10 pm to 3.25 pm and the endorsements (Exhibit-30 and Exhibit-31) on the dying declaration (Exhibit-36) are her.

22. Again, in spite of probing cross-examination of Dr. Doli (PW-5) and Naib Tahsildar Jadhav (PW-6) nothing startling could be elicited so as to discredit their version.

23. True it is that there are certain discrepancies in the two dying declarations (Exhibit-16 and Exhibit-36). In the first dying declaration (Exhibit-16) the deceased had stated that the quarrel had ensued on account of sale of the mare, however in the second dying declaration (Exhibit-36) such reason is absent. In the first dying declaration (Exhibit-16) she had stated that her husband had refused to give her money but omitted to state so in the second dying declaration (Exhibit-36). In the first dying declaration (Exhibit-16) she stated that both her sons had extinguished the fire, whereas, in the second dying declaration (Exhibit-36) she has stated that no one extinguished the fire. In the first dying declaration (Exhibit-16) she has stated about the incident having occurred in her house but omitted to state so in the second dying declaration (Exhibit-36). However, in my considered view, these are only minor discrepancies which are likely to occur when a person who is burnt up to 100% makes a statement to different persons particularly when she is under a critical condition. The fact remains that as far as the authorship of crime is concerned she has consistently stated about the accused no.2 having poured kerosene on her person and accused no.1 having set her ablaze with a match stick. That should be sufficient to attribute authorship of crime to both

the accused. It cannot be said that the aforementioned discrepancies make both these dying declarations incompatible in material particulars.

24. Again, some emphasis was laid upon the fact of absence of attestation on the thumb impression of the deceased on these two dying declarations. Some ground was also sought to be salvaged on the basis of the fact that upper extremities of the deceased were fully burnt and no clear ridges and curves of thumb impression could have been seen on the dying declarations but these show that the thumb impressions have clear ridges and curves. However, in my considered view both these aspects do not hold any water. Once we believe the testimonies of the persons who have recorded the dying declaration as well as the testimonies of the concerned Medical Officers who had examined the deceased and had certified her condition to be fit for recording the statements, when they have specifically stated about the deceased herself having impressed the thumb impression, the argument based on the hypothesis of percentage of burns sustained on the upper extremities and possibility of impressions of ridges and curves being not clear deserves to be discarded. Similarly, though the thumb impressions, as these dying declarations are not attested, when the law in the form of Section 32 of the

Indian Evidence Act does not require such thumb impressions to be attested, no much weight can be attached even to this part of the argument.

25. Perhaps as a last resort, it was strenuously argued that both the dying declarations (Exhibit-16 and Exhibit-36) deserve to be discarded since there is no specific endorsement on either of them certifying that the contents thereof were read over and explained to the deceased and she having admitted those to be correct. Indeed there were divergent views in respect of the requirement of such endorsements on the dying declarations. The point apparently seems to have been put at rest, at least for the time being in the form of a decisive pronouncement of the Full Bench of this High Court in Criminal Appeal No. 186 of 2013 (Nagpur Bench) dated 09.03.2018. The Full Bench had an occasion to consider several pronouncements of different Division Benches of this High Court vis. **Shivaji s/o Tukaram Patdukhe V/s. State of Maharashtra; 2004 ALL MR (Cri.) 3220, Abdul Riyaz Abdul Bashir V/s. State of Maharashtra; 2012(3) BCR (Cri.) 329, Ganpat Bakaramji Lad Vs. State of Maharashtra; 2015(4) BCR (Cri.) 534, unreported judgment of a Division Bench of this Court in Criminal Appeal No. 13 of 2008 (Nagpur Bench) Raju s/o Rambau Patile and Anr. V/s. State of Maharashtra decided on 18.09.2012 and Vilas @ Bandu Punjabrao Misal**

V/s. State of Maharashtra; 2016 ALL MLR (Cri.) 3838. It also had opportunity to go through several decisions of the Supreme Court on the point, namely **Shaikh Bakshu and Ors. V/s. State of Maharashtra; (2007) 11 SCC 269, Kanti Lal V/s. State of Rajasthan; (2009) 12 SCC 498, Khushal Rao V/s. State of Bombay; AIR 1958 SC 22, State of Rajasthan V/s. Kishore; (1996) 8 SCC 217, Laxman Vs. State of Maharashtra; (2002) 6 SCC 710 and Narendar Kumar V/s. State (NCT of Delhi); (2015) 17 SCC 451.** The question which was posed for reference was as under:

“Whether a Dying Declaration can be rejected merely because the same is not read over to the declarant and the declarant admitting the same to have been correctly recorded?”

After considering all these decisions of the Supreme Court and the different Division Benches, this is what has been observed in paragraph 33 of the judgment by the Full Bench:

“33. It is not possible to lay down the nature, kind quality and quantity of the evidence which would be required to record the subjective satisfaction based upon the objective assessment about – (a) an opportunity to the declarant to observe and identify the assailant, (b) the fitness of the mental condition, and (c) the truthfulness or the voluntary nature of the statement to

inspire the confidence of the Court. The rejection of the dying declaration cannot be on the solitary instance of absence of endorsement of reading over and explaining the declaration and the declarant confirming it to be true. It will always depend upon the facts and circumstances of each case. We are clearly of the view that it will be a cumulative effect of the facts and circumstances of the case, which will determine such issues. The presence or absence of a particular fact or circumstance or a situation in a given case may become significant, whereas it may become insignificant in another case. The mode and manner of appreciation of evidence differs from case to case, though the principles of appreciation of evidence may be the same. The perception of the matter in each case and the manner of the appreciation of evidence differs from person to person. Hence, there cannot be a strait-jacket formula or hard and fast rule which can be laid down.”

These observations are further followed by following observations in paragraph no. 38:

“38. Neither the provision of Section 32(1) of the Evidence Act nor any decision of the Apex Court prescribe any particular format in which a dying declaration is to be recorded. It can be oral as well as written. In case of oral dying declaration, the question of existence or insistence upon reading over and explaining the declaration to the deceased does not arise. If that be so, how can such insistence be in respect of written dying

declaration. It is not the requirement of any statute or of the decision of the Apex Court that a written dying declaration must contain a column to be duly filled in that the statements of the declarant are read over and explained to him and that he found it to be true and correct. We are, therefore, unable to hold such requirement as mandatory and that in the absence of it, the dying declaration would become unreliable or unsustainable. We, therefore, subscribe to such a view taken in the referring judgment in the case of Ganpat Lad.”

Lastly the question referred to has been answered in following words:

“A dying declaration cannot be rejected merely because the same is not read over to the declarant and the declarant admitting the same to have been correctly recorded. We hold and clarify that this can be one of the factors, if it assumes significance in the facts and circumstances of any case.”

26. This being the law as it stands today, in my considered view, the case in hand in the facts and circumstances and the evidence on the record discussed herein-above is such that absence of the endorsement about the dying declarations having been read over to the deceased and she having admitted those to be correct is not sufficient to discard them. To repeat, Police Constable Giri (PW-5) who recorded the first dying declaration (Exhibit-16)

and Naib Tahsildar Jadhav (PW-6) who recorded the second dying declaration (Exhibit-36) have both stated about the statement having been read over to the deceased. Therefore the accused are not entitled to derive any benefit from the absence of endorsement on these dying declarations.

27. To sum up, though there are no eye witnesses, the evidence clearly establishes that both the accused were present inside the house when the deceased had caught fire and there was no one else, which rules out the hypothesis of anybody else having authored the crime. Both the dying declarations (Exhibit 16 and Exhibit-36) have been recorded by two different persons in presence of two different Medical Officers and none of them could be attributed with any ulterior motive to falsely implicate the accused persons. Barring few discrepancies, both the dying declarations are compatible as far as material particulars are concerned. The deceased specifically attributed authorship of crime to both the accused by saying that the accused no.2 had poured kerosene on her person and accused no.1 having set her on fire. There was a strong motive for the accused persons to see the deceased dead since she was demanding half the sale proceeds of mare. Cumulative effect of these circumstance and evidence leads to the only conclusion that the accused persons with sufficient knowledge and intention set the deceased on fire and

as a result she had sustained 80% burns, of which she died. The learned Additional Sessions Judge has meticulously considered all these facts and evidence as well as the law and has rightly convicted both the accused for the offence punishable under Section 302 read with Section 34 of the I.P.C. The appeal does not have any merit and is liable to be dismissed.

28. The appeal is dismissed.

(MANGESH S. PATIL, J.)