SREE SWAYAM PRAKASH ASHRAMAM AND ANR.

v.

G. ANANDAVALLY AMMA AND ORS.

(Civil Appeal No. 7 of 2010)

JANUARY 05, 2010

[TARUN CHATTERJEE AND V.S. SIRPURKAR, JJ.]

Indian Easements Act, 1882 – s.13(b) – Easement rights – Easement by grant – Suit for declaration of easement rights over 'B' schedule property of the plaint as a pathway to 'A' schedule property of the plaint – 'A' Schedule property had been allotted to plaintiff in terms of a settlement deed – 'B' Schedule pathway was situated within property under control and use of defendants – Held: Grant can be by implication as well – There was implied grant of 'B' schedule property as pathway, which can be inferred for the reason that no other pathway was provided to plaintiff for access to 'A' schedule property and there was also no objection from defendants to use of 'B' schedule property by plaintiff as pathway for number of years, at least up to the time, when alone cause of action for the suit arose – Plaintiff acquired right of easement in respect of 'B' schedule pathway by way of implied grant.

Constitution of India, 1950 – Art. 136 – Interference with findings of facts arrived at by Courts below – Scope – Suit for grant of easement rights – No specific issue on question of implied grant – But parties adduced evidence for purpose of proving and contesting implied grant – Courts below found that plaintiff had acquired right of easement by way of implied grant – Held: In such circumstances, Supreme Court cannot upset the findings of fact arrived at by Courts below in exercise of its powers under Art.136.

Respondent-plaintiff filed suit for declaration of easement rights by way of necessity or of grant over 'B'

schedule property of the plaint as a pathway to 'A' schedule property of the plaint.

Both 'A' schedule and 'B' schedule properties of the plaint originally belonged to one 'Y', who was in enjoyment and management of a vast extent of properties including plaint 'A' and 'B' schedule properties for benefit of the first defendant-Ashramam. After the death of 'Y', her disciples executed a settlement deed as per her directions whereby `A' Schedule property of the plaint was allotted to the plaintiff. The 'B' Schedule pathway of the plaint was situated within the property under the control and the use of defendants.

The trial court accepted the version of the plaintiff that apart from 'B' Schedule pathway, there was no alternate pathway leading to the 'A' schedule property and, that the plaintiff was entitled to easement right in respect of the 'B' schedule pathway by implied grant as also by necessity, and decreed the suit. The First Appellate Court held that even assuming that the plaintiff had an alternative pathway as contended by the defendants, it did not extinguish the right of easement of grant in favour of the plaintiff, though the declaration granted on the ground of easement of necessity was not justified. Both courts concurrently found on appreciation of evidence that 'B' Schedule property was being used by the plaintiff-respondents for access to 'A' Schedule property even after construction of a building on 'A' Schedule property. Second appeal filed by defendants was dismissed by the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. The case of the defendants-appellants that since there was no mention in the deed of settlement enabling the use of 'B' schedule pathway for access to 'A' schedule property and the building therein, cannot be

the reason to hold that there was no grant as the grant could be by implication as well. The facts and circumstances of the case amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to 'B' schedule property of the plaint for its use as pathway to 'A' schedule property of the plaint in residential occupation of the original plaintiff (since deceased). In absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative pathway for access to the 'A' schedule property, it is difficult to negative the contention of the respondent that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the 'B' Schedule property of the plaint. The High Court was perfectly justified in holding that when it was the desire of 'Y' to grant easement right to the original plaintiff (since deceased) by way of an implied grant, the right of the original plaintiff (since deceased) to have 'B' schedule property of the plaint as a pathway could not have been taken away. The High Court was fully justified in holding that there was implied grant of 'B' schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to 'A' schedule property of the plaint and there was no objection also to the use of 'B' schedule property of the plaint as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose. [Paras 25 and 26] [285-G-H; 286-A-E; 287-B-C]

Annapurna Dutta v. Santosh Kumar Sett & Ors. **AIR 1937 Cal.661, referred to.**

Katiyar's Law of Easement and Licences **(12th edition), referred to.**

2. The Trial Court on consideration of the plaintiff's evidence and when the defendant had failed to produce any evidence, had come to the conclusion that the plaintiff was given right of easement by 'Y' as an easement of grant. Considering this aspect of the matter, although there is no specific issue on the question of implied grant, but as the parties have understood their case and for the purpose of proving and contesting implied grant had adduced evidence, the Trial Court and the High Court had come to the conclusion that the plaintiff had acquired a right of easement in respect of 'B' schedule pathway by way of implied grant. Such being the position, this Court cannot upset the findings of fact arrived at by the Courts below, in exercise of its powers under Article 136 of the Constitution. It is true that the defendant-appellants alleged that no implied grant was pleaded in the plaint. However, the Trial Court was justified in holding that such pleadings were not necessary when it did not make a difference to the finding arrived at with respect to the easement by way of grant. Accordingly, there is no substance in the argument raised by the appellants. Since the findings of the High Court as well as of the trial court on the question of implied grant have been accepted, it would not be necessary to deal with the decisions on the easement of necessity which necessarily involves an absolute necessity. Such being the state of affairs and such being the findings accepted by the High Court in second appeal, it is not possible for this Court to interfere with such findings of fact arrived at by the High Court which affirmed the findings of the Courts below. [Paras 27, 28 and 29] [287-F-H; 288-A; 288-B-D; 288-F-G]

Justiniano Antao & Ors. vs. Smt. Bernadette B.Pereira **2005 (1) SCC 471, held inapplicable.**

Case Law Reference:

AIR 1937 Cal. 661	**referred to**	**Para 25**
2005 (1) SCC 471	**held inapplicable**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7 of 2010.

From the Judgment & Order dated 9.5.2006 of the High Court of Kerala at Ernakulam in S.A. No. 198 of 2000 (F).

T.L. Viswanatha Iyer, Subramonium Prasad for the Appellants.

P. Krishnamoorthy, M.T. George for the Respondents.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order dated 9th of May, 2006, passed in Second Appeal No.198 of 2000 of the High Court of Kerala at Ernakulam, by which the High Court had affirmed the concurrent findings of fact arrived at by the courts below in a suit for declaration of easement rights in respect of 'B' Schedule property of the plaint as a pathway to the 'A' Schedule property of the plaint.

4. It may be mentioned that during the pendency of the second appeal before the High Court of Kerala, the original plaintiff expired and his legal representatives were brought on record as substituted respondents before the High Court, who are respondents in this appeal. For the sake of convenience, the appellants herein would be referred to as 'the defendants' as they were in the original suit for declaration of easement and permanent injunction filed by the original plaintiff, who is now represented by the respondents herein.

5. The case that was made out by the plaintiff (since deceased), in his plaint was as follows: Plaint A and B schedule properties originally formed part of a vast extent of properties which belonged to one Yogini Amma. During the life time of Yogini Amma, she was in enjoyment and management of the entire property for the benefit of the first defendant Ashramam. On her death, her brother and sole legal heir Krishna Pillai and other disciples executed a settlement deed dated 20th of June, 1948 as per the directions of the deceased Yogini Amma. As per the settlement, the Schedule 'A' property of the plaint was allotted to the original plaintiff (since deceased). Even thereafter, the original plaintiff (since deceased) continued to be in possession and enjoyment of the said properties effecting mutation and paying taxes. Even before the settlement deed was executed, during the life time of the said Yogini Amma, there is a building being 'A' schedule property of the plaint that was in occupation of the original plaintiff (since deceased). There is a gate provided on the South Western portion of the 'A' schedule property for ingress and egress to the same and 'B' schedule property of the plaint which is a pathway extends up to the road on the West from the said gate. The said gate and 'B' schedule pathway are as old as the building in 'A' schedule property of the plaint. Other than 'B' schedule pathway, there is no other means of direct or indirect access to 'A' schedule property of the plaint from any road or pathway. The 'B' schedule pathway of the plaint was granted to the original plaintiff (since deceased) as easement right by the said Yogini Amma and the original plaintiff (since deceased) continued to use it as such from time immemorial. This pathway is situated within the property which is now under the control and use of the defendants. Defendant Nos. 2 to 4 tried to close down the gate on the South Western extremity of the B schedule pathway and were also attempting to change the nature and existence of the 'B' schedule property of the plaint. An attempt in that direction was made on 21st of July, 1982. Original plaintiff (since deceased) apprehended that defendant nos. 2 to 4 might forcibly close down the pathway. Hence, he filed a suit for

declaration of easement of necessity or of grant and permanent injunction restraining the defendants from obstructing the 'B' schedule pathway and for other incidental reliefs.

6. The defendant No.1 was the Matathipadhi of the Ashramam; defendant Nos. 2 and 3 were its office bearers and defendant No.4 was only an inmate of the Ashramam. Defendant Nos. 1 to 4 entered appearance and filed a joint written statement praying for dismissal of the suit by making the following defence:

The suit was not maintainable. The description of 'A' schedule and 'B' schedule properties was incorrect. The original plaintiff (since deceased) was attached to the institution from his childhood. In consideration of the love and affection Yogini Amma had towards the original plaintiff (since deceased), she wished to gift some portion of the property to him and in pursuance thereof, Ashramam represented by the then office bearers executed a settlement deed in respect of the properties. Original plaintiff (since deceased) was the 13th signatory in the said settlement deed. There is a pathway provided in the settlement deed on the Eastern extremity of the Ashramam properties. There is yet another lane which comes along the Western side of the Ashramam property through which also the plaintiff has access to his property. It is incorrect to say that Plaint 'B' schedule is meant as a pathway for ingress and egress to 'A' schedule property and that other than 'B' schedule property there is no other means of direct or indirect access to 'A' schedule property of the plaint. The further allegation that the pathway was granted by the said Yogini Amma to the original plaintiff (since deceased) and that he was using it from time immemorial was also not correct. Originally, there was a narrow pathway which was widened to accommodate traffic to the Ashramam. The present pathway came into existence only within the last 10 years. It can never be considered as an easement of necessity. Original plaintiff (since deceased) has no easmentary right to use the gate and the pathway and he was not entitled to the declaration or

injunction prayed for. Therefore, the suit in the circumstances must be dismissed with costs to the defendants.

7. The IInd Additional Munsif, Trivandrum, accordingly, framed the following issues which are as follows :

"(1) Is not the suit maintainable?

(2) Whether the plaint schedule description is correct?

(3) Is there any pathway as Plaint B schedule?

(4) Is the plaintiff entitled to easement right over plaint B schedule as pathway to Plaint A schedule?

(5) Is the plaintiff entitled to the declaration as prayed for?

(6) Whether the injunction prayed for is allowed?

(7) Relief and costs."

8. After the parties adduced evidence in support of their respective cases and after hearing the parties, the IInd Additional Munsif, Trivandrum decreed the suit for declaration of easement right and for injunction filed by the original plaintiff (since deceased), holding *inter alia* that :-

The court noted that the plaintiff had claimed easement of necessity as well as easement of grant. According to the plaintiff, during the lifetime of Yogini Amma itself, 'B' schedule pathway had been given to him as an easement of grant, which had been in use from those days and even prior to the execution of the settlement deed. The deed does not refer to the existence of 'B' schedule pathway for the plaintiff to access 'A' schedule property. The defendants had alleged the existence of two alternative pathways leading to the 'A' schedule property. However, the same was denied by the sole witness produced by the original plaintiff (since deceased). The defendants could not lead any evidence to substantiate their claim that these

pathways provide access to 'A' schedule property. In a case where the original plaintiff was claiming easement right either as grant or as of necessity the plaintiff has only a primary burden to prove the absence of any alternate pathway. As the defendants have not proved the existence of any pathway for access to Plaint 'A' schedule property the version of the plaintiff that there is no alternate pathway shall be accepted. According to the plaintiff, he had been residing in the building on 'A' schedule property and had been using 'B' schedule pathway from the year 1940. A trace of this pathway could be presumed to be in existence from the time when the Ashramam acquired the properties. As per the deed of settlement, there is a separation of tenements. At the time of its execution itself, the plaintiff could have had access to 'A' schedule property only through 'B' schedule pathway. As 'B' schedule pathway was required for the reasonable and convenient use of the plaintiff's property and that on severance of the tenements, plaintiff can be presumed to have got a right over 'B' schedule pathway by an *implied grant* and also an easement of necessity. It is not on record that either Yogini Amma, or the defendants themselves until 1982 had obstructed this use of pathway. There is no reason to disbelieve the plaintiff's version that Yogini Amma had given 'B' schedule pathway as grant for his use as he was a close relative of the former. There is an apparent and continuous use which is necessary for the enjoyment of the 'A' schedule property within the meaning of Section 13(b) of the Indian Easements Act, 1882, and, therefore, the plaintiff is entitled to easement right in respect of the pathway. The defendants have not entered the witness box to disprove the evidence led by the plaintiff.

10. In these circumstances, *it was clear that 'B' schedule pathway was given to plaintiff as an easement of grant. Defendants argued that no implied grant was pleaded in the plaint. However, it does not make a difference to the findings arrived at, as the plaintiff had pleaded easement of grant.* The plaintiff's right to 'B' schedule pathway does not affect the

interest in the Ashramam property in any manner. Since this issue was found in favour of the plaintiff, the relief of declaration and injunction was granted as prayed for.

11. Feeling aggrieved by the order of the IInd Additional Munsif, the defendants preferred an appeal before the IIIrd Additional District Judge, Thiruvananthapuram. The Appellate Court, by an order dated 6th of April, 1999, allowed the appeal partly. The issues framed by the Appellate Court were as follows:

(1) Whether the Trial Court was justified in granting a decree for declaration in favour of the plaintiff?

(2) Whether the finding of the Trial Court that plaintiff is entitled to the decree of permanent injunction is correct?

12. The Appellate Court found that on evidence, it was proved that there is an alternate way on the western side of the 'A' schedule property. The plaintiff, however, asserted that there is a difference in level of 14 feet between the 'A' schedule property of the plaint and the property adjacent to it which is situated on the western side. However, the existence of an alternate pathway, howsoever inconvenient, will defeat the claim of easement of necessity. The necessity must be absolute and must be subsisting at the time when the plaintiff claims right of way by easement. In the light of these findings, the Appellate Court held that the claim of the plaintiff regarding the right of easement of necessity over the plaint 'B' schedule pathway was not sustainable.

13. On the question of easement by grant, the Appellate Court was of the opinion that the plaintiff's claim in that respect stood proved. The plaintiff had acquaintance and association with the Ashramam and Yogini Amma from his childhood days as revealed from the oral and documentary evidence. Considering the location and nature of 'B' schedule pathway, the location of two pillars at its inception and the gate from

which it started, it could be seen that it had been in use by the plaintiff as a pathway. The plaintiff had been residing in the house on 'A' schedule property even prior to the deed of settlement. Therefore, the Appellate Authority arrived at the conclusion that the plaintiff had obtained right of easement of grant from Yogini Amma over the 'B' schedule pathway. An easement of grant is a matter of contract between the parties and it may have its own consideration. (B.B. Katiyar's Commentaries on Easements and Licenses, p. 762). It may be either express or even by necessary implication. Though easement of necessity will come to an end with the termination of necessity, easement acquired by grant cannot be extinguished on that ground as per section 13(b) of the Indian Easements Act, 1882. Therefore, even assuming that the plaintiff had an alternative pathway as contended by the defendants, it does not extinguish the right of easement of grant in favour of the plaintiff. Therefore, the Trial Court was justified in granting a relief of declaration of right of easement of grant over the 'B' schedule pathway. However, the declaration granted on the ground of easement of necessity was not justified.

14. It was further held that the apprehension of the plaintiff on attempted obstruction of the 'B' schedule pathway was well-founded and, therefore, the Trial Court was justified in granting the relief of permanent injunction against the defendants.

15. Aggrieved by the order of the first Appellate Court, the defendants took a second appeal before the High Court of Kerala. The High Court, by its impugned judgment and order dated 9th of May, 2006, dismissed the appeal and affirmed the orders of the Trial Court and of the Appellate Court.

16. The issues that were raised for consideration of the High Court were as follows:

1. While Yogini Amma owned and held the entire land in both the schedules at that time of alleged grant, whether

the finding of easement of grant is contrary to law of easement which enjoins the existence of two tenements?

2. Whether the appellate court was right in granting an easement of grant without specifying the nature and extent of easementary right and without restricting it to the right of footway, when the terms of the grant are not known?

3. Whether the appellate court was justified in granting a decree for declaration in favour of the plaintiff as regards the easementary right by way of grant?

17. The High Court limited itself to the issue whether the decree of the first appellate court granting the original plaintiff (since deceased) right of easement over 'B' schedule property by way of grant concurring with the findings of the trial court was sustainable.

18. Before the High Court, the defendants pleaded that there had been no appeal or cross objection filed by the original plaintiff (since deceased) against the order of the Appellate Court which disallowed the claim of easement of necessity and, therefore, the finding that there existed no easement of necessity in favour of the original plaintiff (since deceased) over the 'B' schedule property stood confirmed. Further they contended that the alternative pathway on the western side of the 'A' schedule property was rendered inconvenient by the very act of the original plaintiff (since deceased) who sold that portion of the property to a third party who began digging that pathway resulting in the difference in level. The High Court, on consideration of these contentions, held that though the claim of right of easement by way of necessity over 'B' Schedule property may be affected by the subsequent sale of the said plot by the plaintiff in 1983, the claim of right of easement by way of grant over 'B' schedule property stood unaffected by the said conduct.

19. The very fact that the plaintiff was continuing to use the

said pathway for access to 'A' schedule property was an indication that there was implied grant of 'B' schedule pathway of the plaint for access to the 'A' schedule property even while 'A' schedule property was separately allotted to him under settlement deed. Such implied grant is inferable also on account of the acquiescence of the defendants in the original plaintiff (since deceased) using 'B' schedule as pathway till it was for the first time objected on 21st of July, 1982 as alleged by the original plaintiff (since deceased).

20. The High Court observed that the Courts below had concurrently found on a proper appreciation of the evidence adduced in the case that 'B' schedule property of the plaint was being used as a pathway by the plaintiff ever after construction of the building in 1940 in 'A' schedule property. The defendants did not dispute the case of the plaintiff that the plaintiff was in occupation of the building ever after its construction in 1940. The defendants were also not able to establish that the plaintiff was using any other pathway for access to 'A' schedule property and the building therein which was in his occupation. The mere fact that there is no mention in settlement deed enabling the use of the 'B' schedule pathway for access to 'A' Schedule property and the building therein is no reason to hold that there is no grant as the grant could be by implication as well. The fact of the use of 'B' schedule property as pathway ever after execution of settlement deed till 1982 by the plaintiff shows that there was an implied grant in favour of the plaintiff in relation to 'B' schedule property for its use as pathway to 'A' schedule property of the plaint in residential occupation of the plaintiff.

21. The High Court relied on a number of observations in Katiyars Law of Easement and Licences (12th Edition) on law with respect to "implication of grant of an easement." It may arise upon severance of a tenement by its owner into parts. The acquisition of easement by prescription may be classified under the head of implied grant for all prescription presupposes a grant. All that is necessary to create the easement is a

manifestation or an unequivocal intention on the part of the servient owner to that effect.

22. The High Court quoted with approval Katiyar's note to Section 8 of the Easement Act, which reads as follows:

> "There are numerous cases in which an agreement to grant easement or some other rights has been inferred or more correctly has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part. These cases rest on the equitable doctrine of acquiescence, but they may be referred to, for the purpose of classification, as imputed or constructive grants. The party acquiescing is subsequently estopped from denying the existence of easement. It is as if such person had made an actual grant of the easement…
>
> …It is the intention of the grantor whether he can be presumed to have been intended to convey to the grantee a right of easement for the reasonable and convenient enjoyment of the property which has to be ascertained in all the circumstances of the case to find out whether a grant can be implied. A description in a conveyance may connote an intention to create a right of easement. An easement may arise by implication, if the intention to grant can properly be inferred either from the terms of the grant or the circumstances".

23. Applying these observations to the facts of the case, the High Court held that though the original grant was by Yogini Amma that grant could not perfect as an easement for the reason that Yogini Amma herself was the owner of both 'A' schedule and 'B' schedule properties and consequently there was no question of 'B' schedule property becoming the servient tenement and 'A' schedule property becoming the dominant tenement. However, it was the desire of Yogini Amma that was implemented by her disciples by virtue of the settlement deed. Therefore, the right of the plaintiff to have 'B' schedule property

as a pathway could not have been taken away by the very same deed. In fact, there was implied grant of 'B' schedule property as pathway as can be inferred from the circumstances, namely, i) no other pathway was provided for access to 'A' schedule property in the settlement deed and ii) there was no objection to the use of 'B' schedule as pathway.

24. Feeling aggrieved by the concurrent orders of the Courts below, the defendants/Appellants have filed the present special leave petition, which, on grant of leave, was heard in the presence of the learned counsel of the parties.

25. We have heard Mr. T.L. Viswanatha Iyer, learned senior counsel for the appellants and Mr. Subramanium Prasad, learned senior counsel for the respondents. We have carefully examined the impugned judgment of the courts below and also the pleadings, evidence and the materials already on record. It is not in dispute that the trial court as well as the First Appellate Court concurrently found on a proper appreciation of the evidence adduced in the case that the 'B' Schedule Property of the plaint was being used by the original plaintiff (since deceased) and thereafter, by the respondents even after construction of the building in 1940 in 'A' Schedule property of the plaint. The appellants also did not dispute the case of the original plaintiff (since deceased) that he was in continuous occupation of the building even after its construction in the year 1940. It is also not in dispute that the appellants were not able to establish that the original plaintiff (since deceased) was using any other pathway for access to 'A' Schedule Property of the plaint and the building therein, which was in the occupation of the original plaintiff (since deceased). The case of the appellants that since there was no mention in the deed of settlement enabling the use of 'B' schedule pathway for access to 'A' schedule property and the building therein, cannot be the reason to hold that there was no grant as the grant could be by implication as well. It is not in dispute that the fact of the use of the 'B' schedule property as pathway even after execution of Exhibit A1, the settlement deed in the year 1982 by the

original plaintiff (since deceased) would amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to 'B' schedule property of the plaint for its use as pathway to 'A' schedule property of the plaint in residential occupation of the original plaintiff (since deceased). In the absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative pathway for access to the 'A' schedule property, it is difficult to negative the contention of the respondent that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the 'B' Schedule property of the plaint. It is an admitted position that both 'A' schedule and 'B' schedule properties of the plaint belonged to Yogini Amma and her disciples and it was the desire of Yogini Amma that was really implemented by the disciples under the settlement deed executed in favour of the original plaintiff (since deceased). Therefore, the High Court was perfectly justified in holding that when it was the desire of Yogini Amma to grant easement right to the original plaintiff (since deceased) by way of an implied grant, the right of the original plaintiff (since deceased) to have 'B' schedule property of the plaint as a pathway could not have been taken away. In *Annapurna Dutta vs. Santosh Kumar Sett & Ors.* [AIR 1937 Cal.661], B.K.Mukherjee, as His Lordship then was observed :

> "There could be no implied grant where the easements are not continuous and non-apparent. Now a right of way is neither continuous nor always an apparent easement, and hence would not ordinarily come under the rule. Exception is no doubt made in certain cases, where there is a 'formed road' existing over one part of the tenement for the apparent use of another portion or there is 'some permanence in the adaptation of the tenement' from which continuity may be inferred, but barring these exceptions,

an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement."

26. In our view, therefore, the High Court was also fully justified in holding that there was implied grant of 'B' schedule property as pathway, which can be inferred from the circumstances for the reason that no other pathway was provided for access to 'A' schedule property of the plaint and there was no objection also to the use of 'B' schedule property of the plaint as pathway by the original plaintiff (since deceased) at least up to 1982, when alone the cause of action for the suit arose.

27. The learned counsel for the appellant raised an argument that since no case was made out by the plaintiffs/ respondents in their plaint about the easementary right over the 'B' Schedule Pathway by implied grant, no decree can be passed by the courts below basing their conclusion on implied grant. We have already noted the findings arrived at by the Trial Court, on consideration of pleadings and evidence on record on the right of easement over 'B' Schedule pathway by implied grant. The Trial Court on consideration of the evidence of both the parties recorded the finding that there was no evidence on record to show that either Yogini Amma or the defendants themselves until 1982 had objected to the plaintiff's use of 'B' schedule pathway to access 'A' schedule property. The Trial Court on consideration of the plaintiff's evidence and when the defendant had failed to produce any evidence, had come to the conclusion that the plaintiff was given right of easement by Yogini Amma as an easement of grant. Considering this aspect of the matter, although there is no specific issue on the question of implied grant, but as the parties have understood their case and for the purpose of proving and contesting implied grant had adduced evidence, the Trial Court and the High Court had come to the conclusion that the plaintiff had acquired a right of easement in respect of 'B' schedule pathway by way of implied grant. Such being the position, we are not in a position to upset

the findings of fact arrived at by the Courts below, in exercise of our powers under Article 136 of the Constitution of India. We also agree with the finding of the Trial Court that from the evidence and pleadings of the parties 'B' schedule pathway was given to the plaintiff/respondent as an easement of grant. It is true that the defendant/appellant alleged that no implied grant was pleaded in the plaint. The Trial Court, in our view, was justified in holding that such pleadings were not necessary when it did not make a difference to the finding arrived at with respect to the easement by way of grant. Accordingly, there is no substance in the argument raised by the learned senior counsel for the appellants.

28. Since we have accepted the findings of the High Court as well as of the trial court on the question of implied grant, it would not be necessary for us to deal with the decisions on the easement of necessity which necessarily involves an absolute necessity. If there exists any other way, there can be no easement of necessity. Therefore, the decision of this Court in *Justiniano Antao & Ors. vs. Smt. Bernadette B.Pereira* [2005 (1) SCC 471] is clearly not applicable in view of our discussions made herein above. Similarly two other decisions referred to by the High Court in the impugned judgment need not be discussed because these decisions were rendered on the question of easement of necessity.

29. Such being the state of affairs and such being the findings accepted by the High Court in second appeal, it is not possible for this Court to interfere with such findings of fact arrived at by the High Court which affirmed the findings of the Courts below. No other point was raised by the learned senior counsel for the appellants.

30. In view of our discussions made hereinabove, we do not find any merit in this appeal. The appeal is thus dismissed. There will be no order as to costs.

B.B.B. Appeal dismissed.

SUNIL KUMAR AND ANR.
v.
STATE OF U.P.
(Criminal Appeal No.1241 of 2003)

JANUARY 6, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 – s.304, Part II r/w ss.147 and 149 – Unlawful assembly with common object – Assault with sticks – Death due to coma as a result of head injuries – Conviction of accused-appellants – Challenged – Held: Absence of motive was irrelevant in view of availability of evidence of 3 eye-witnesses, one of whom was father of the deceased – Their presence at the incident was most natural – All eye-witnesses specifically deposed about presence of accused persons and their individual acts in assaulting the deceased on his head – Evidence given by them could not be shaken even in cross-examination – Punishment imposed by Courts below was lenient – Conviction as well as sentence accordingly upheld.

According to the prosecution, the three appellants alongwith two others formed an unlawful assembly and in pursuance of their common object, committed the murder of PW-1's son, when he was working in his shop, by inflicting injuries upon him with *lathis/dandas*.

In the post-mortem examination, three injuries were found on the head of the deceased. According to the doctors, death was due to coma as a result of the head injuries caused by blunt weapons. The appellants alongwith the other two accused were charged and convicted by the courts below under s.304 Part II r/w ss.149 and 147 IPC and sentenced to rigorous

imprisonment for four years.

Appellants challenged their conviction before this Court. The other two accused had died in the meanwhile.

The appellants contended that there was absolutely no reason for the accused persons to assault the deceased and no motive was attributed to them and in absence of any motive, the prosecution case became extremely doubtful. It was further contended on behalf of the appellants that the evidence of PW-1, being a father, would be that of an interested witness and there was no possibility of the other two witnesses PW-2 and PW-3 being eye witnesses, as they were busy in their own shops. It was also contended that in any event the offences alleged would not come under s.304 Part II IPC and at the most would come under s.325 or s.326 IPC.

Dismissing the appeals, the Court

HELD: 1.1. Motive in a criminal case is irrelevant where evidence of the eye-witnesses is available. In the present case, there were as many as three eye-witnesses, one of whom i.e. PW-1 was the father of the deceased. Therefore, the question of absence of motive would have no importance whatsoever. [Para 6] [294-F-G]

1.2. It has clearly come in the evidence that PW-1 was very much present at the shop of the deceased while the shop of PW-2 is just by the side of the shop of the deceased. It has also come in the evidence that the shop of PW-3 is about 20 yards from the shop of the deceased. Considering this position and also considering that it was 5 O'clock in the evening, there is no possibility of the shop remaining closed and under these circumstances, the presence of the eye-witnesses would be most natural. Therefore, on that count, the evidence cannot be discarded. Though it was also suggested that the day on

which the occurrence took place was Tuesday and as such the market remained closed, but the shops of the deceased as also the eye-witnesses were in the nature of small workshops where welding and electric work etc. was going on and under such circumstances, it is not possible to hold that such small shops also remained closed on Tuesday. Again, in the wake of the direct evidence of the witnesses, it cannot be accepted that the shops were not there. All the three witnesses have very specifically deposed about the presence of the accused persons. They have also deposed about the individual acts in assaulting the deceased on his head. The evidence given by these witnesses could not be shaken even in the cross-examination. [Para 7] [295-A-F]

1.3. As regards the suggestion that PW-1 had in his evidence admitted that he did not pay any tax to the municipality and there was no permit which would mean that there was no shop as such, merely because the permit was not there, it does not mean that the deceased was not doing the gas welding work in his shop. In fact, all the witnesses unanimously stated about the shop being there and the deceased being assaulted. There appears to be some cross-examination as regards the identification particularly of PW2. However, this witness had actually identified all the accused persons since he knew the deceased as also the accused persons. The Trial Court as well as the High Court considered the evidence closely and there is no error in their appreciation. [Paras 8 and 9] [295-F-H; 296-A-C]

1.4. In view of the seriousness of the wounds, injuries on the head of the deceased including the fracture, one wonders as to how the accused were charged of the offence under s.304, IPC. It was absolutely incorrect. They should have been charged under s.302, IPC. However, in absence of the appeal by the State, this Court is not in a

position to do anything in that regard. The sentence imposed upon the appellants is also not harsh as alleged. In fact, the punishment is on the lenient side. After all, one young life was lost at the young age of 22 years. While considering the sentence, merely because the appeal pended and merely because the incident had taken place long back would not by itself justify any interference with the punishment, particularly, when the punishment itself is a lenient one. [Para 10] [296-C-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1241 of 2003.

From the Judgment & Order dated 12.3.2003 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1708 of 1982.

WITH

Criminal Appeal No. 1242 of 2003.

A. Sharan, Deepak Singh, Rashid Saeed, (for K.S. Rana), Rachana Srivastava, Noorullah, T.N. Singh, Manoj Kumar Mishra (for Kamlendra Mishra) for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This judgment will dispose of two appeals being Criminal Appeal No.1241 of 2003 and Criminal Appeal No. 1242 of 2003. The High Court's judgment dismissing the appeal and confirming the conviction and sentence is in challenge in these appeals at the instance of the three accused persons, namely, accused Sunil Kumar, accused Tilak Singh and accused Ram Singh. Originally, five accused persons came to be tried for committing offences under Section 304 Part II read with Sections 147, 504 and 302 read with Sections 149, 147 and 504, IPC. They were accused Sunil Kumar, accused Jageshwar, accused Tilak Singh, accused Ram Singh and accused Munna. All the accused persons were

charged and convicted for the offence under Section 304 Part II read with Section 149 and Section 147, IPC and were sentenced to suffer rigorous imprisonment for four years. All of them filed appeal before the High Court. However, the High Court convicted all the accused persons.

2. Before us only three accused persons have come up in appeal, they being accused Sunil Kumar and accused Tilak Singh (in Criminal Appeal No. 1241 of 2003) and accused Ram Singh (in Criminal Appeal No. 1242 of 2003). It is reported that accused Jageshwar and accused Munna are no more. That is how we have to consider the case only of three appellants. They shall be referred to as appellant Nos. 1, 2 and 3 respectively.

3. The prosecution case was that all the accused persons had on 23.02.1982 at about 5 p.m. in Mohalla Shivapuri within the limits of Police Station Orai, District Jalaun formed an unlawful assembly with the common object to commit the murder of Salim and inflict injuries on the person of Salim causing his death. The matter was reported by Hamid Khan, father of the deceased immediately at 5.30 p.m. It was contended therein that when Salim was working in his shop at about 5 p.m., the accused persons came to his shop and started asking Salim whether he considered himself to be a great *gunda* since he was showing off in the exhibition ground and thereafter started abusing him in filthy language. On being objected by Salim, all the accused started beating him with *lathis/dandas* whereupon Salim fell down. The complainant raised an alarm hearing which witnesses Naeem, Mohd. Ilyas @ Naushe and several other persons reached the spot. Seeing them, accused persons fled away from the scene.

4. Usual investigations followed and the accused came to be arrested barely within 2 or 3 days. The injured Salim was sent for Medical examination of the injuries where as many as six contused wounds were found on his body. Salim had become unconscious and, therefore, all the injuries could not be noted. Salim was thereafter transferred to the Medical

College, Kanpur for treatment where next day i.e. on 24.02.1982 at 7.55 a.m. he breathed his last. The information of death was sent to the Police Station, Swarup Nagar, Kanpur and an inquest was prepared of his body. Photographs were taken and the body was sent for post mortem examination. Salim was hardly 22 years old. In the post mortem examination, three injuries were found on his head and it was found that he had suffered a linear fracture of parietal bone on both sides extending from left ear to right ear. Haemetoma was found in the brain and according to the doctors, death was due to coma as a result of the head injuries caused by blunt weapons. The accused were charged for the offences under Sections 147, 304, 323 and 504 IPC. They abjured the guilt. Hamid Khan (PW-1), Mohd. Ilyas @ Naushe (PW-2) and Naeem (PW-3) were examined by the prosecution as eye-witnesses along with others. Their evidence was accepted and the accused persons came to be convicted as stated above. Their appeal also failed and that is how the accused persons are before us.

5. Mr. Amarendra Sharan, learned Senior Counsel who appeared in both the appeals attacked the judgment of the High Court and the Trial Court firstly, contending that there was absolutely no reason for the accused persons to assault the deceased and no motive has been attributed to all these accused persons. Learned Counsel suggested that basically the story of the prosecution in the absence of any apparent motive became extremely doubtful.

6. We are not impressed by this submission since motive in a criminal case is irrelevant where evidence of the eye-witnesses is available. In this case, there were as many as three eye-witnesses one of whom was the father of the deceased. Therefore, the question of absence of motive would have no importance whatsoever.

7. Learned Senior Counsel then took us extensively through the evidence of three eye-witnesses and pointed out that the evidence of the father would be that of an interested

witness and there was no possibility of the two other witnesses, namely, Mohd. Ilyas @ Naushe (PW-2) and Naeem (PW-3) being the eye-witnesses as according to the Counsel, they were busy in their own shops. But it has clearly come in the evidence that the father was very much present at the shop while the shop of Mohd. Ilyas @ Naushe (PW-2) is just by the side of the shop of the deceased. It has also come in the evidence that the shop of Naeem (PW-3) is about 20 yards from the shop of the deceased which is a tractor repairing workshop. Considering this position and also considering that it was 5 O'clock in the evening, there is no possibility of the shop remaining closed and under these circumstances, the presence of the eye-witnesses would be most natural. Therefore, on that count, the evidence cannot be discarded. It was also suggested that the day on which the occurrence took place was Tuesday and as such the market remained closed. The shops of the deceased as also the eye-witnesses were not big shops and they were in the nature of small workshops where welding and electric work etc. was going on. Under such circumstances, it is not possible to hold that such small shops also remained closed on Tuesday. Again, in the wake of the direct evidence of the witnesses, we cannot accept the contention that the shops were not there. All the three witnesses have very specifically deposed about the presence of the accused persons. They have also deposed about the individual acts in assaulting the deceased Salim on his head. There is very little cross-examination on the actual occurrence. We have seen the evidence and found that the evidence given by these witnesses could not be shaken even in the cross-examination.

8. It was suggested further that PW-1, Hamid Khan had in his evidence admitted that he did not pay any tax to the municipality and there was no permit which would mean that there was no shop as such. Now, merely because the permit was not there, it does not mean that the deceased was not doing the gas welding work in his shop. In fact, all the witnesses have unanimously stated about the shop being there and the

deceased being assaulted. Much of the cross-examination was redundant of this witness as also the other witnesses. Same is the story of evidence regarding Mohd. Ilyas @ Naushe (PW-2). There appears to be some cross-examination as regards the identification particularly of Mohd. Ilyas @ Naushe. However, this witness had actually identified all these accused persons since they all knew the deceased as also the accused persons.

9. The Trial Court as well as the High Court have considered the evidence closely and we do not think that there is any error in the appreciation.

10. Lastly, it was stated by the learned senior Counsel that the offence would not be under Section 304 Part II, IPC. At the most it could be under Section 325 or 326, IPC. We do not think that we can accept this argument. In fact, seeing the seriousness of the wounds, injuries on the head including the fracture on the head, we wonder as to how the accused were charged of the offence under Section 304, IPC. It was absolutely incorrect. They should have been charged under Section 302, IPC. However, in the absence of the appeal by the State, we would not be in a position to do anything in that behalf. Learned Counsel also suggested that considering that this incident had taken place in the year 1982 and sentence of four years would be harsh punishment. We do not think so. In fact, the punishment is on the lenient side. After all, one young life was lost at the young age of 22 years. While considering the sentence, merely because the appeal pended and merely because the incident had taken place long back would not by itself justify any interference with the punishment, particularly, when the punishment itself is a lenient one.

11. In that view, both the appeals are dismissed as being without any merit. The accused persons, who are on bail, shall immediately surrender within 15 days failing which immediate steps including issuance of non-bailable warrant shall be taken.

B.B.B. Appeals dismissed.

PINNINTI KISTAMMA AND ORS.
V.
DUVVADA PARSURAM CHOWDARY & ORS.
(Civil Appeal Nos. 6900-6906 of 2001)

JANUARY 8, 2010

[TARUN CHATTERJEE AND HARJIT SINGH BEDI, JJ.]

Andhra Pradesh Record of Rights in Land Act, 1971:

Revenue authorities' order declaring cultivatory possession of tenants – HELD: High Court has rightly held that the order of Tehsildar having achieved status of finality cannot be upset by civil court and that the landlords had failed to prove their possession and cultivation in respect of suit land to the extent of 19.80 acres.

Code of Civil Procedure, 1908:

s.114 and Or. 47, r.1 – Review – Clarification by High Court of its judgment passed in second appeals – HELD: High Court in the original judgment in second appeals had considered both the batches of appeals arising out of the suits of tenants and also cross suits of landlords – That apart, tenants had filed suits limiting their claim to the extent of 19.80 acres of land – Therefore, High Court was justified in reviewing the judgment, allowing the second appeals of tenants only to the extent of 19.80 acres of land – There is no ground for interference in exercise of jurisdiction under Article 136 of the Constitution of India – Constitution of India, 1950 – Article 136.

The appellants in CA Nos. 6900-6906 of 2001 filed suits claiming tenancy rights in respect of 19.80 acres of land and praying for permanent injunction restraining the respondents(landlords) from interfering with their

possession over the said land. The landlords filed cross-suits praying for injunction over 181 acres of land which also included the aforementioned 19.80 acres of land. The tenants also made complaint to Revenue authorities alleging manipulation of revenue records by the landlords, whereupon the Tehsildar conducted inquiry and by order dated 10.9.1984 declared the appellant-tenants and others as cultivatory tenants. The said order was affirmed by the Collector and the Commissioner of Land Revenue. The suits filed by the tenants were decreed. By a separate judgment the cross-suits filed by the landlords were dismissed. The landlords preferred two sets of appeals – one led by A.S. No. 12 of 1996 from the suits of landlords and the other led by A.S. No. 11 of 1996 from the suits of tenants. The first appellate court, by two separate judgments allowed both the sets of appeals. The tenants challenged both the judgments in two sets of second appeals before the High Court, which assumed that all the appeals were filed against a common judgment in A.S. No. 12 of 1996 and the batch. The High Court granted a decree for permanent injunction in favour of the tenants. Thereupon, the landlords filed a review petition, which was allowed by the High Court clarifying its judgment that the appeals of tenants as regards the 19.80 acres stood allowed, and landlords' appeals to that extent stood dismissed and their other batch appeals partly allowed. Aggrieved, the tenants as also the landlords filed the appeals.

Dismissing both the sets of appeals, the Court

HELD: 1. The High Court granted a decree for permanent injunction in favour of the tenants mainly on the basis that the tenants were in possession and cultivation of the lands in dispute and after considering the fact the landlords had failed to prove their possession and cultivation in respect of the lands in question by

producing reliable and material evidence before the court. In this regard the High Court rightly accepted the findings of the Tehsildar which had achieved the status of finality. Such being the position, there is no merit in these appeals so far as the Landlords/appellants are concerned. [Para 16 and 19] [310-A-B-C-D]

Abdulla Bin Ali v. Galappa, **AIR 1985 SC 577,** *State of Tamil Nadu v. Ramalinga Samigal Nadam,* **AIR 1986 SC 794;** *Sangubhotla Venkataramaiah v. Kallu Venkataswamy* **AIR 1976 AP 402, referred to.**

2. So far as the order of the High Court in the review petition and batch is concerned, the High Court in the original judgment in the second appeals had considered not only the second appeal being A.S.No.12 of 1996 and batch but also the second appeal filed against A.S.No.11 of 1996 and batch. That apart, the tenants/respondents filed their suits for permanent injunction limiting their claim to the extent of 19.80 acres of land and, therefore, the High Court was fully justified in reviewing the said judgment allowing the second appeals of the tenants only to the extent of 19.80 Acres of land. Accordingly, there is no ground to interfere with the order of the High Court reviewing its judgment in the second appeals and batch, in the exercise of discretionary power under Article 136 of the Constitution. [Para 21] [311-B-E]

Case Law Reference :

AIR 1985 SC 577	**referred to**	**Para 17**
AIR 1986 SC 794	**referred to**	**Para 17**
AIR 1976 AP 402	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6900-6906 of 2001.

From the Judgment & Order dated 27.03.1997 of the High

Court of Judicature Andhra Pradesh at Hyderabad in S.A. Nos. 374, 383, 398, 402, 403, 404 & 397 of 1996.

WITH

C.A. No. 6907-6946 of 2001.

Jitendra Sharma, P.N. Jha, Minakshi Vij, V.G. Pragasam, P.S. Narasimha, L. Roshmani, Sekhar G. Devasa, Sanjay Bansal, G.K. Bansal, P.N. Jha, for the appearing parties.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. These two batches of appeals are directed against the judgment and decree dated 27th of March, 1997 passed by the High Court of Andhra Pradesh at Hyderabad in Second Appeal Nos. 361 of 1996 & batch and Second Appeal Nos. 374 of 1996 & batch and also against the judgment and order dated 10th of September, 1997 of the same High Court in Review Petition Nos. 6980 of 1997 and batch whereby the High Court modified its earlier order dated 27th of March, 1997.

2. The Appellants in CA Nos. 6900-6906 of 2001(hereinafter called the 'Tenants'), filed O.S. Nos. 43 of 1980 and batch (7 suits) claiming tenancy rights in respect of 19.80 Acres of land in Kambirigam Village and also prayed for permanent injunction restraining the Respondents in C.A.Nos.6900-6906 of 2001, who are also the appellants in C.A.Nos.6907-6946 of 2001 (hereinafter called as the 'Landlords') from interfering with their possession over the said land. The Landlords also filed Cross Suits being OS Nos. 75/1980 and batch (13 suits) praying for injunction restraining the Tenants from interfering with the peaceful possession of an extent of land measuring 181 Acres which also included the aforementioned 19.80 Acres.

3. The case of the Tenants in their suits was that the plaint schedule lands formed a part of the pre-settlement un-

enfranchised Inams in Kambirigam Mokhasa in the erstwhile Tarla Estate, Tekkali Taluk. They had been cultivating the plaint schedule land as tenants from time immemorial under inamdars, predecessors-in-interest of Landlords by paying Rajbhagam paddy to them. In 1804, the British Government granted "Sannad" to the Tarla Estate wherein Kambirigam was described as a Jagir which was an Estate within the meaning of Section 3 of the Estate Land Act, 1908. However, no patta was granted to the Landlords or their predecessors-in-interest. Therefore, according to the tenants, the rights of the Landlords in respect of the lands in question vested in the Government by virtue of Madras Estates Abolition and Conversion into Raiyotwari Act of 1948. (for short 'Estates Abolition Act'). The tenants had complained to the Revenue Authorities alleging that the Revenue records were manipulated by the Landlords. Pursuant to this, Tehsildar, Palasa conducted an enquiry wherein it was found that the Tenants and other raiyots were occupants and cultivators in the Revenue Records for Fasli 1389. Being aggrieved by these orders, Landlords filed a Writ petition, which came to be registered as W.P.No. 3189 of 1980 before the High Court of Andhra Pradesh claiming that they were not given an opportunity to be heard in the enquiry conducted by the Tehsildar. Allowing the Writ Petition, the High Court vide its order dated 24th of August, 1982 quashed the order of the Tehsildar. However, the High Court had given liberty to the Tehsildar to conduct a fresh enquiry after giving due hearing to the parties. Accordingly, the Tehsildar Palasa, conducted an enquiry again and passed an order dated 10th of September, 1984, declaring the Tenants and others as cultivators in Kambirigam village and further observed that since the time of their ancestors, the Tenants and others had been cultivating the lands in dispute separately and also making payment to the Mokhasadars. This order was confirmed by the Collector and Commissioner of Land Revenue.

4. In the cross suits filed before the District Munsif, the Landlords claimed to be the Mokhasadars of Kambirigam

Mokhasa. According to them, the Plaint Schedule Lands are their absolute property which fell to their respective shares in the family arrangement among their respective family members inter se in or about the year 1945. Ever since such arrangement, they had been in exclusive possession and enjoyment of their respective land as described in the schedule of the plaint. According to the Landlords, Kambirigam village did not fall within the ambit of Section 2(d) of the Estates Abolition Act. No patta was granted to the Landlords because the village was not surveyed.

5. By its judgment and order dated 21st of July, 1987, the District Munsif, Palasa, decreed the suits filed by the Tenants praying for an order of permanent injunction, restraining the Landlords from interfering with their plaint schedule lands. By a separate order, District Munsif dismissed the cross suits filed by the Landlords praying for an order of injunction against the Tenants.

6. Being aggrieved by the said judgment of the District Munsif, Palasa dated 21st of July, 1987, the Landlords preferred two sets of Appeals before the Principal Subordinate Judge, Srikakulam. From the suits filed by the Tenants, i.e. O.S. Nos. 75 of 1980 and batch the appeals were numbered as A.S.No.12 of 1996 and batch (i.e. 13 appeals) and from the suits filed by the Landlords, i.e. O.S Nos. 43 of 1980 and batch the appeals were numbered as A.S. No. 11 of 1996 and batch (i.e. 7 appeals). The Principal Subordinate Judge, Srikakulam, by two judgments dated 15th of April, 1996 delivered separate judgments in 13 appeals (A.S No. 12 of 1996 and batch) and 7 appeals (A.S. No. 11 of 1996 and batch).

7. Disposing of the seven appeals in A.S.No.11/1996 and batch, the Principal Subordinate Judge noted that before the Trial Court, the plaintiffs and defendants in all seven suits, had taken similar pleas. After narrating the contentions of both the parties and examining the materials on record, the first appellate court came to a finding of facts, inter alia, as follows:

8. The tenants did not dispute the contentions of the landlords that their ancestors became the landlords in respect of the plaint schedule land. According to the tenants, their ancestors were inducted into possession of separate bits of plaint schedule lands by the ancestors of the landlords. The said tenancy was alleged to have been continuing till the date of filing of the suit. In an enquiry conducted by the Settlement Officer on an application filed by one of the landlords to determine whether Kamibirgam village was an Inam Estate or not, none of the tenants appeared before the Settlement Officer. The said landlord had contended that he and his ancestors owned almost all the land in the village, though they let out a few bits of lands to some raiyots for seasonal cultivation temporarily. Thus, by his order dated 29th of June, 1950, the Settlement Officer held that Kambirigam village was not an Inam Estate. It was not the case of the tenants that they had been inducted in possession of the plaint schedule land after the order of the Settlement Officer. Admittedly, they had no documents proving their possession. That the names of the landlords were recorded in the revenue registers as personal cultivators was also not denied. The contention that since the tenants were not residents of Kambirigam village on the date of the enquiry by the settlement officer, they could not appear before him, could not be accepted. If numerous tenants were put in possession of tiny bits of land measuring 300 Acres in respect of which the enquiry was conducted, at least one of them would have come across the notices put up announcing the enquiry. In a suit filed by the landlords before the Subordinate Judge, Srikakulam for a declaration that Kambirigam village was not an estate, a finding was recorded that there were no tenants in the village. The Government which was a party to the suit, did not dispute this. An appeal preferred against the Order of the Subordinate Judge was dismissed. Until 1976, when the tenants submitted applications to the Sub Collector, Tekkali stating that they had been cultivating the lands in Kambirigam Village, paying 'Ambaram' to the Mokhasadars, no case was ever made out by the tenants that they had been

tenants in Kambirigam village. In 1977, one of the landlords filed a suit claiming similar relief as in the present case against some of the tenants and the tenants did not even contest the said suit. Admittedly, they knew of the suit. The specious justification for not contesting the suit was that they were under the impression that the suit was compromised. This plea could not be accepted. In the absence of any indication that there were tenants in the lands of Kambirigam village till 1977, the mere allegation that the names of the landlords were wrongly recorded in No.2 Adangal, could not be accepted. The Tehsildar, Palasa by his order dated 18th of June, 1980 held that there were about 30 tenants in Kambirigam village but such an order was passed without giving any notice to the landlords. In the fresh enquiry conducted in accordance with the directions of the High Court issued on a writ petition filed by the landlords, applications filed by 60 other tenants were considered. The concerned Tehsildar by his order dated 10th of September, 1984 held that sizable land of Kambirigam village was under the cultivation of the tenants. This order was confirmed by the Collector. On this basis, the tenants disputed the veracity of the findings recorded by the Settlement officer and by the Subordinate Judge. The Tehsildar was of the opinion that as there was enough material to give rise to a doubt that the landlords had not been cultivating the entire cultivable land in the Kambirigam village, the benefit of doubt should be given to the hard pressed poor raiyots, as against the landlords who were rich and influential. Thus, the order of the Tehsildar was not based on any reliable and acceptable documentary evidence. The particulars of land, or rent or tenants were not mentioned in the findings. The particulars of land mentioned in the applications filed before Sub-Collector by the tenants, do not tally with those in the plaint schedule, based on the order of the Tehsildar. Hence, it is evident that the Tehsildar did not conduct the enquiry properly. Padi Narayana, the first defendant in all except one suit, had denied that he had been a tenant in the suit lands and had averred that he had been falsely impleaded in the said proceedings. Yet, he appeared as a

tenant in the findings given by the Tehsildar. Thus, the order of Tehsildar was found not to be based on proper and legal evidence. On the other hand, the names of the Landlords have been recorded in the revenue registers as the personal cultivators of the plaint schedule lands in the No.2 Adangal till 1979, i.e. for which these batch suits were filed. As against this, neither the tenants entered the witness box to support their specific cases, nor did they produce any reliable documentary evidence to rebut the entries in the record. The testimonies of witnesses they produced were not reliable.

9. Disposing of A.S.No.12 and batch i.e. the 13 appeals filed by the landlords from the Original Suits filed by the Tenants, the Principal Subordinate Judge, inter alia, held that none of the Tenants disputed the title of the Landlords over the land in Kambirigam village. While the Tenants, who were the plaintiffs in this batch suits should have established that they had the possession over the plaint schedule lands by virtue of the tenancy granted in their favour by the predecessors of the Landlords, none of them entered the witness box in support of their case. The particulars of origin of the alleged tenancy were not given in any of the plaints. The testimony of the only witness produced by the Tenants was self serving and was not corroborated by any other evidence, as he was too young to know the particulars of the alleged tenancy, which had allegedly been in existence since time immemorial. Again, reference was made to the discrepancies in the description of land in plaint schedules and in the applications filed before the Sub-Collector, Tekkali. It was pointed out that the Tehsildar's report on which the Tenants had placed reliance was not based on legal and relevant evidence. As the burden of proof was on the Tenants, the mere failure of the Landlords in establishing that they had been personally cultivating the plaint schedule lands alone would not enable the Tenants to get a permanent injunction against them in respect of particular bits of plaint schedule lands.

10. Accordingly, the first appellate court allowed the appeals of the landlords and dismissed the suit of the tenants against which second appeals were preferred by the tenants before a learned Single Judge of the Andhra Pradesh High Court which came to be registered as S.A.Nos.361 of 1996 and batch and S.A.Nos.374 of 1996 and batch. The second appeals were directed against both the judgments and decrees dated 15th of April, 1996 passed by the Principal Subordinate Judge, Srikakulam in two batches of First Appeals, i.e. A.S.Nos.11 and batch and A.S.Nos.12 and batch. The High Court by the impugned judgment allowed all the Second Appeals, numbered as above.

11. It may be noted that the Learned Judge in the impugned judgment, however, stated that "these second appeals arise out of a common judgment dated 15th of April, 1996 in *A.S.No12 of 1996 and batch* on the file of the Principal Subordinate Judge, Srikakulam, reversing the judgment and decree in O.S.No.87 of 1980 on the file of the District Munsif, Palasa."

12. Before the High Court in the second appeals and batch, the following questions were taken into consideration:

1. Whether the Sannad granted in 1804 to Tarla Estate describing Kambirigam village as Jagir assumed the character of an "Estate" within the meaning of Estate Abolition Act to the effect that the Landlords could dispossess the Tenants on that count?

2. Is the Civil Court empowered to set aside the orders of the three statutory authorities viz. Tehsildar, District Collector and the Commissioner of Land Revenue, when no challenge was made to their orders holding the Tenants as cultivators of the land in question?

13. After perusing the judgments of the courts below,

however, the High Court was of the opinion that the question whether the Sannad granted in 1804 assumed the character of an Estate within the meaning of Estate Abolition Act was of no consequence at all, because factum of the grant of sannad in 1804 itself was doubtful. The Tenants had not adduced any evidence to prove that the rights of the Landlords, if any, had vested in the Government. In the impugned judgment, the High Court came to a conclusion that the issue No.1 should not be examined in view of the aforesaid conclusion arrived at by it. For appreciation of the finding arrived at by the High Court, we may reproduce the same.

> "However, on going through the plaint O.S No. 75/80 it appears that no plea was made in that regard. The only averment made in the plaint is to the effect that the plaint schedule land was a portion of the pre-settlement unenfranchised inam in Kambirigam Mokhasa in the erstwhile Tarla Estate, and the Tarla Estate was abolished by the Government under the Act XXVI of 1948 but Kambirigam Mokhasa village was not taken over as it was not an "Estate" or an Inam Village within the meaning of the Abolition Act and that no patta was granted either to the defendants or their predecessors in interest either under the Abolition Act, 1948 or Act XXXVII of 1956. The defendants therefore lost their right, if any, in the plaint Schedule land as it vested in the Government as stated in the concluding part of Para 3 of the Plaint. The Plaintiffs, who are the appellants before us do not seem to have produced any document in respect of these averments made in paragraph 3 of the plaint. I am, therefore, of the opinion that no useful purpose would be served in examining this question whether the respondents acquired nay right to dispossess the appellants."

14. We have carefully examined these findings of the High Court and after carefully examining the same, we do not find any reason to differ from the conclusions arrived at by the High

Court on such question. Accordingly, we agree with the views expressed by the High Court on the question No.1 as noted herein above.

15. Let us now consider the question No.2 as noted herein earlier. The said question is whether the Civil Court was justified in setting aside the orders of three statutory authorities, namely the Tehsildar, the District Collector and the Commissioner of Land Revenue without there being any challenge to these orders.

16. On this question, the High Court, after considering the relevant statutes on the subject and after considering the material evidence on record came to a conclusion that the decision of the Tehsildar which came subsequent to the filing of the suit i.e. on 10th of September, 1984, which was affirmed by the District Collector and the Commissioner of Land Revenue, had achieved the status of finality. The High Court even came to the conclusion that even independent of that proposition the evidence, however, thin it may be, has weighted in favour of the persons who claimed to be the cultivators of the disputed lands. In the impugned judgment, the High Court had accepted the finding of the Tehsildar which stood in favour of the tenants that they had been cultivating the lands in question since time immemorial. In view of the findings arrived at, the Appeals of the Tenant were allowed by the High Court in S.A.Nos.361, 365, 366, 374, 383, 384, 391, 393, 394, 395, 396, 397, 398, 399, 400, 401,402, 403, 404 of 1996, and the judgment of the First Appellate Court in A.S.No.12 was set aside.

17. While accepting the order of the Tehsildar dated 10th of September, 1984, the High Court referred to the provisions of Andhra Pradesh Record of Rights in Land Act, 1971 and after considering the decisions of *Abdulla Bin Ali v. Galappa,* [AIR 1985 SC 577], *State of Tamil Nadu v. Ramalinga Samigal Nadam,* [AIR 1986 SC 794], *Sangubhotla Venkataramaiah v. Kallu Venkataswamy,* [AIR 1976 AP 402],

which discussed the principles relating to exclusion of jurisdiction of the Civil Courts by Statutory Tribunals, came to the conclusion that the order of the Tehsildar dated 10th of September, 1984 having achieved the status of finality cannot be upset by the Civil Court. The High Court further found that the Tenants were cultivating the land in question and, therefore, they were entitled to a decree for permanent injunction against the landlords and accordingly the High Court allowed S.A.Nos.361, 365, 366, 374, 383, 384, 391, 393, 394, 395, 396, 397, 398, 399, 400, 401,402, 403, 404 of 1996, and the judgment of the First Appellate Court in A.S.No.12 was set aside.

18. That apart, from the impugned judgment, it is found that the High Court concluded in the following manner :

> "…. the fact remains that the decision of the Revenue Authorities which came subsequent to the filing of the Civil Suits stood unchallenged and not contradicted. The Tehsildar order dated 10th of September 1984, therefore, achieved the status of finality. On that account, therefore, the Landlords lost complete ground for denying the tenancy rights of the Tenants-Appellants over the disputed lands. However, even independent of that proposition the evidence howsoever thin it may be, has weighed in favor of the persons who claim to be cultivators of the disputed land. The Tehsildar's second report speaks volumes about the tenant's case that they have been cultivating the disputed lands since the times of their ancestors and I am loath to disregard the same.
>
> The Tenants-Appellants' appeals therefore deserve to be allowed. Hence the appeals bearing no. 361, 365, 366, 367, 374,383,384,392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 401,403 and 404 of 1996 are allowed and the impugned judgement and the order dated 15.04.96 in A.S. No. 12 of 1996 and batch of lower appellate court is quashed and set aside. No costs."

19. In view of our discussions made herein above and in view of the fact that the High Court had granted a decree for permanent injunction in favour of the tenants mainly on the basis that the tenants were in possession and cultivation of the disputed lands and after considering the fact the landlords had failed to prove their possession and cultivation in respect of the lands in question by producing reliable and material evidence before the court. Accordingly, as noted herein above, by the impugned judgment, the High Court had allowed the second appeal and granted a decree for permanent injunction in favour of the tenants/appellants who are respondents before us. Such being the position, we do not find any merit in these appeals so far as the Landlords/appellants are concerned. However, the Landlords filed a review petition being Review Petition No.6980 of 1997 and batch against the group of second appeals, namely, S.A.No.361 of 1996 and batch under Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure. Among the many grounds that were taken, the High Court found merit only in one ground which is as follows-

> (1) When there was no defence and no proof emerging from the documentary or oral evidence, the suits filed by the Landlords could not be dismissed as the extent claimed by the Tenants/appellants was only 19.80 Acres.

20. Accordingly, the Court found it proper to insert a clarification in the operative part of the judgment under review:

> "The Tenants appeal covering a total extent of Ac 19.80 cents therefore deserved to be allowed. Hence the Appeals bearing Nos. 361/96, 365/96, 366/96, 367/96, 384/96, 392/96, 393/96, 394/96, 395/96, 396/96, 399/96, 400/96 and 401/96 are allowed, covering a total extent of Ac. 19.80 cents as mentioned in the schedules in the respective plaints filed by the tenants out of the total extent of Ac. 181.90 cents of lands claimed in the respective plaints filed by the landlords in their respective plaints and the impugned judgment and order dated 15th of April 1996

in A.S. No. 12 of 1996 and batch of the Lower Appellate Court is quashed and set aside. The Landlords' claim to the aforesaid extent of A.C No. 19.80 cents, thus, stands dismissed and to that extent only the Second Appeals Nos. 374/96, 383/96, 397/96, 398/96, 402/96, 403/96 and 404/96 stand partly allowed. No costs."

21. So far as the order of the High Court in the review petition and batch is concerned, we do not find any ground to upset the order passed in review petition as we find that the High Court in the original judgment in the second appeals had considered not only the second appeal being A.S.No.12 of 1996 and batch but also the second appeal filed against A.S.No.11 of 1996 and batch. That apart, the tenants/respondents filed their suit for permanent injunction limiting their claim to the extent of 19.80 Acres of land and, therefore, the High Court was fully justified in reviewing the said judgment allowing the second appeal of the tenants only to the extent of 19.80 Acres of land. Accordingly, we do not find any ground to interfere with the order of the High Court reviewing the second appeals and batch in the manner indicated above in the exercise of our discretionary power under Article 136 of the Constitution.

22. For the reasons aforesaid, we do not find any merit in these appeals filed before this Court and, accordingly, the appeals are dismissed. There will be no order as to costs.

R.P. Appeals dismissed.

STATE OF RAJASTHAN
v.
M/S. NAV BHARAT CONSTRUCTION COMPANY
(Civil Appeal No. 2500 of 2001)

JANUARY 8, 2010

[TARUN CHATTERJEE AND R.M. LODHA, JJ.]

Arbitration Act, 1940: s.30 – Jurisdiction of Court to set aside the award – Held: The jurisdiction of the Court under s.30 is not appellate in nature – Court is not empowered to re-appreciate the evidence and examine the correctness of conclusions arrived at by the Umpire in considering an application for setting aside the award – It is also not open to the court to interfere with the award merely if in its opinion, another view was possible – On facts, no reason to differ from award of Umpire as he rightly considered the entire evidence.

Jurisdiction: Supreme Court appointing new arbitrator and directed him to file award before it – New arbitrator filing award in Supreme Court – Jurisdiction of Supreme Court to entertain the application for making the award a rule of the court as well as the objections, challenged – Held: Supreme Court has the jurisdiction.

Dispute arose between the parties and the matter was referred to arbitration. There was difference of opinion between the arbitrators and matter was referred to an Umpire. The Umpire entered into reference and passed an award. The appellant filed objections under Sections 30 and 33 of the Arbitration Act, 1940 which were dismissed. In appeal, respondent also filed cross appeals claiming compound interest. High Court dismissed both the appeals.

Both the parties came up before this Court. This

Court by judgment dated 4.10.2005 set aside the award of the Umpire and the judgment of High Court, and appointed new Umpire and also clarified that it was not a new reference but continuation of the earlier proceeding and the Arbitration Act, 1940 would continue to apply. The new arbitrator passed an award. Before this Court, appellant filed an application for making the award a rule of Court and at the same time the respondent filed an objection under Sections 30 and 33 of the Act. An Interlocutory Application was also filed by the respondent challenging the jurisdiction of this Court to make the award absolute and also to consider the objections raised by the respondent.

Dismissing the IA and objections filed under Sections 30 and 33 and allowing the application for making the award a rule of the Court, the Court

HELD: 1. The judgment of this Court dated 4.10. 2005 made it clear in its operative part, that the award that would be passed by the Umpire must be filed in this Court. It was also clarified in the judgment itself that it was not a case of a new reference but a continuation of the earlier proceeding and thus the Act would continue to apply. Therefore, this Court had the jurisdiction to entertain the application of the appellant and also the objections filed by the respondent. [Para 4] [319-F-H]

Garwal Mandal Vikas Nigam Ltd. vs. Krishna Travel Agency **2008 (6) SCC 741;** *Bharat Coking Coal Ltd. vs. Annapurna Construction* **2008 (6) SCC 732;** *Mcdermott International Inc. vs. Burn Standard Co. Ltd and Others* **2005 (10) SCC 353, referred to.**

2. Under Section 30 of the Arbitration Act, 1940, the Court is not empowered to re-appreciate the evidence and examine the correctness of the conclusions arrived at by the Umpire in considering an application for setting

aside the award. The jurisdiction of the court under Section 30 of the Act is not appellate in nature and the award passed by the Umpire cannot be set aside on the ground that it was erroneous. It is also not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. [Paras 6 and 7] [322-E-F; 323-D-E]

3.1. Perusal of judgment dated 4.10. 2005 shows that the claim Nos. 2 and 26 were elaborately considered and this Court in the said judgment came to a clear finding with regard to Claim No.2 and 26 that the respondent would not be entitled to such claims. In this view of the matter, the Umpire was fully justified in not reconsidering the same while passing an award. [Para 5] [322-B-C]

Bhagwati Oxygen Ltd. vs. Hindustan Cooper Ltd. **2005 (6) SCC 462;** *Food Corporation of India vs. Chandu Construction* **2007 (4) SCC 697, relied on.**

3.2. Since Claim Nos.4, 6, 9, 13, 23, 32, 33, 36 and 38 of the respondent were accepted by the Umpire and the Award has been passed in respect of the said claims in favour of the respondent, it is held not necessary to deal with this part of the award any further. So far as Claim Nos. 1, 3, 5, 7, 8, 10, 11, 12, 14-22, 24, 25, 27, 28, 29,30, 31, 34, 35, 37 and 39 are concerned, the Umpire after going through the objections of the respondent and after hearing the parties in respect of these claims rightly rejected the same and there is no reason to set aside the said award on the ground that the jurisdiction of the court is not appellate in nature nor such an award could be found to be erroneous. Accordingly, the objections are overruled. [Para 8] [323-F-H; 324-A-B]

4. The respondent had claimed compound rate of interest which was not granted by the Umpire. The claimant had claimed compound interest with quarterly

rest while the respondent had opposed the said rate of interest. While rejecting the said claim of the claimant, the Umpire had rightly observed that there was no necessity for him to fix any other rate of interest because on the basis of the award passed by the Umpire, the claimant had to return the substantial amount received by him. In view of that, the Umpire in his award directed that difference of amount which has now become refundable by virtue of the award would be returned back to the State of Rajasthan with interest from the date of recovery by the claimant and the same was allowed by the previous Umpire till the date of repayment/recovery. There is no reason to differ from the award of the Umpire on this score, because the Umpire rightly considered the entire aspect of interest and passed an award. [Paras 9 and 10] [324-B-F]

Case Law Reference :

2008 (6) SCC 741	**referred to**	**Para 4**
2008 (6) SCC 732	**referred to**	**Para 4**
2005 (10) SCC 353	**referred to**	**Para 4**
2005 (6) SCC 462	**relied on**	**Para 6**
2007 (4) SCC 697	**relied on**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2500 of 2001.

From the Judgment & Order dated 10.12.1999 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S.B. Civil Misc. Petition No. 1091 of 1996.

WITH

C.A. No. 2501 of 2001.

Pallav Shishodia, Milind Kumar, Mool Chand Luhadia-in-

person, for the appearing parties.

The Judgment of the Court was delivered by

TARUN CHATTERJEE, J. 1. The appellant, State of Rajasthan, invited tenders for construction of Bhimsagar Dam in which one of the tenderer was the respondent. The tender of the respondent was accepted. Accordingly, a contract was awarded to the respondent and under the contract the work was to be started on 16th of November, 1978 and the date of completion was fixed on 15th of May, 1981. One of the terms of the contract was that if any difference or dispute arises between the parties, such dispute or difference shall be referred to arbitration. However, the work was not completed within the time allotted and time was thereafter extended. Inspite of extension of time, the work was not completed. For that reason, the State of Rajasthan terminated the contract and got the remaining work done from some other contractor.

2. The respondent raised various claims which were rejected by the State of Rajasthan. The respondent, therefore, moved an application under Section 20 of the Arbitration Act, 1940 (in short the 'Act') for referring the claims mentioned therein to arbitration. The District Judge, Jhalawar by an order dated 11th of November, 1982 held that only one claim was referable to arbitration and refused to refer the other three claims to arbitration. The respondent filed an appeal before the High Court of Rajasthan at Jaipur and the High Court by its order dated 7th of June, 1984 held that it was for the Arbitrator to decide whether the claims were to be awarded or not and accordingly directed that all the four claims be referred to arbitration. The disputes were referred to two Arbitrators. The respondent, however, filed 39 claims amounting to Rs.42,59,155.56 before the Arbitrators. The parties led oral and documentary evidence. There was a difference of opinion between the two Arbitrators. Therefore, the Arbitrators referred the dispute to an Umpire. The State of Rajasthan, the appellant herein, thereafter filed an application under Section 11 of the

Act for removal of the Umpire on the ground of bias. This application was dismissed on 16th of November, 1993. The appellants filed a revision case which also came to be dismissed by the High Court in January, 1995. The Umpire entered into the reference and passed an award on 29th of May, 1995.

3. The State of Rajasthan, the appellant herein, filed objections under Sections 30 and 33 of the Act which were dismissed by the trial court and in appeal the respondent filed a cross appeal claiming compound interest. The High Court by a judgment dismissed both the appeals. Feeling aggrieved, both the parties approached this Court and two Civil Appeals were registered. C.A.No.2500 of 2001 was by the State of Rajasthan which was aggrieved by the dismissal of their objection filed under Sections 30 and 33 of the Act and C.A.No.2501 of 2001 was by the respondent against the dismissal of their claim for compound interest. By a judgment and order dated 4th of October, 2005 passed in the aforesaid two appeals, this Court had set aside the award of the Umpire and the judgment of the High Court by the following directions:

> "Under the circumstances and for reasons set out hereinabove, we set aside the award and appoint Justice N.Santosh Hegde, a retired Judge of this Court as the Umpire. The Umpire, Mr.V.K.Gupta shall forthwith forward all papers and documents to Justice N.Santosh Hegde at his residence i.e. 9, Krishna Menon Marg, New Delhi. The parties shall appear before Justice N.Santosh Hegde on 6.10.2005 at 5.p.m. at 9, Krishna Menon Marg, New Delhi. Justice N.Santosh Hegde shall fix his fees which shall be borne by both the parties equally. Justice N.Santosh Hegde is requested to fix the schedule and give his award with a period of 4 months from the date of receipt of all the papers and documents from the outgoing Umpire Mr.V.K.Gupta. *The award to be filed in this Court.* We leave the question of grant of interest open to be decided by the Umpire in accordance with law.

Lastly, it is clarified that *this is not a new reference but a continuation of the earlier proceeding* and thus the Arbitration Act, 1940 shall continue to apply.

4. Accordingly, in compliance with the judgment of this Court as aforesaid, Mr.Justice N.Santosh Hegde, (as His Lordship then was), entered into reference and passed his award on 9th of September, 2006. Now the State of Rajasthan has filed an application for making the award a rule of the Court and at the same time the respondent filed an objection under Sections 30 and 33 of the Act. An Interlocutory Application was also filed by the respondent challenging the jurisdiction of this Court to make the award absolute and also to consider the objections raised by the respondent against the award passed by the Umpire in pursuance of the order passed on 4th of October, 2005. According to the respondent, who appeared in person, the application and objections filed by the parties must be sent back to the court of competent jurisdiction for deciding the same in accordance with law, because after the judgment was passed and the earlier award was set aside by the impugned judgment, this Court had become functus officio to entertain such applications. Therefore, before we go into the question regarding the objections raised by the respondent under Sections 30 and 33 of the Act and the application for making the award a rule of the Court, we must first deal with the Interlocutory application, that is to say, whether this Court still retains the jurisdiction to entertain the award passed by the Umpire or to consider the objections to the same or the matter should go back to the court of competent jurisdiction for considering the said application and objections in accordance with law. According to Mr. Mool Chand Luhadia, appearing in person, this Court is ceased to have jurisdiction after the appeal was disposed of and a new Umpire was appointed who passed an award on 9th of September, 2006. In support of this contention that this Court cannot have the jurisdiction to entertain the application filed by the appellant to make the award a rule of the court and also the objection filed under Sections 30 and

33 of the Act, he had relied on certain decisions of this Court out of which strong reliance was placed on the decision in *Garwal Mandal Vikas Nigam Ltd. vs. Krishna Travel Agency* [2008 (6) SCC 741] and also the decision in *Bharat Coking Coal Ltd. vs Annapurna Construction* [2008 (6) SCC 732]. This submission of Mr.Luhadia, who appeared in person was contested by Mr.Pallav Shishodia, learned senior counsel appearing on behalf of the State of Rajasthan. According to Mr.Shishodia, in view of the decision of a three-Judge Bench of this Court in *Mcdermott International Inc. vs. Burn Standard Co. Ltd and Others* [2005 (10) SCC 353], this question is no longer res integra. In our view, the submission of Mr.Shishodia must be accepted. From the judgment of this Court dated 4th of October, 2005, it has been made clear by this Court in the operative part of the same, as noted herein earlier, that the award that would be passed by the Umpire must be filed in this Court and secondly it was clarified in the judgment itself that this was not a case of a new reference but a continuation of the earlier proceeding and thus the Act shall continue to apply. In *Mcdermott International Inc.* (supra), a three-Judge Bench decision of this Court clearly observed that since the Arbitrator was directed to file his award in this Court, the objections as well as the entertainability of the application of the appellant for making the award a rule of the Court must be filed in this Court alone and, therefore, this Court has the jurisdiction to entertain the application of the appellant and also the objections filed by the respondent. In view of the discussions made herein above and in view of the three-Judge Bench decision of this Court, namely, *Mcdermott International* (supra), it would not be necessary for us to deal with the other two decisions as referred to herein earlier. That apart, in the judgment dated 4th of October, 2005, it has been made clear that the award was to be filed in this Court and that this was not to be taken as a new reference but a continuation of the earlier proceeding, thus the Act shall continue to apply. Accordingly, the question regarding entertainability of the aforesaid two applications namely, the application for making the award a rule of the court and the

objections under Sections 30 and 33 of the Act filed in this Court could not arise at all.

5. Let us now consider the objections filed by the respondent against the award passed by the Umpire under Sections 30 and 33 of the Act. Since we have already overruled the objections raised by the respondent about the entertainability of the two applications by this Court, we now deal with the objections filed by the respondent in respect of the various claims made by them for passing an award in their favour. According to Mr.Luhadia, since the first award of the Umpire Mr.V.K.Gupta was set aside, and a new Umpire was appointed after setting aside the said award it would be evident from the judgment of this Court that the intention of this Court was to permit the respondent to raise all their objections to the claims put forward by it including the claim No.2 and 26. We are unable to accept this contention of Mr.Luhadia. So far as Claim No.2 and 26 are concerned, on a perusal of the judgment of this court, it is difficult to accept the argument of Mr.Luhadia as we find from the said judgment that the claim Nos. 2 and 26 were elaborately considered in the judgment and this Court in the said judgment came to a clear finding with regard to Claim No.2 and 26 that the respondent would not be entitled to such claims. While rejecting Claim Nos. 2 and 26, this Court categorically made the following observations which we reproduce herein below :

> "As regards claim No. 2 Mr. Luhadia fairly admitted that Clause 5.11(iii) of the Contract requires chiseling of stones on all sides. He however submitted that the rates given in Schedule G were only for chiseling of stones on one side. He submitted that this was clear from Note 1 under Schedule G which stated that Schedule G was based on B.S.R. 1975. He submitted that B.S.R. 1975 showed that such rates were only for chiseling stones on one side. He submitted that when the stone has to be chiseled on all sides the rates given in B.S.R. 1975 were

to be applied. He submitted that claim No. 2 was based on those rates. We are unable to accept this submission of Mr. Luhadia. The Contract is very specific. The work specified in the Contract has to be done at the rates specified in Schedule `G`. Even though Schedule G may be based on B.S.R. 1975 it is not exactly as B.S.R. 1975. Where in respect of a work specified in the contract the rate has been given in Schedule G that work could only be done at that rate. Works specified in the Contract does not become extra work. It is only in respect of extra work that rates specified in B.S.R. 1975 can be applied. *To us it is clear that the claim No. 2 is contrary to the terms of the Contract. It is barred by Clauses 57, 60 and 61 of the Contract.* As regards claim No. 26, Mr. Luhadia relied upon the case of *Tarapore & Co. v. State of M.P.* [1994 [3] SCC 521]. In this case, the question was whether the contractor was entitled to claim extra amounts because he had to pay increased wages to his workers. This Court has held that the contractor would have tendered on the basis of the then prevailing wages and as the contract required the contractor to pay the minimum wages if the minimum wages increased it was an implied term of the contract that he would not be entitled to claim the additional amount. However, it must be noted that, in this case, there was no term in the contract which prohibited any extra claims being made because of the increase in wages. Clause 31 of the Special Conditions of the Contract, which has been reproduced hereinabove, specifically bars the contractor from claiming any compensation or an increase in rate under such circumstances. Not only that but the Respondent had with their initial tender put in a term which provided that if there was any increase in the minimum wages by the Government the rates quoted by him would be increased by the same percentage. At the time of negotiation this clause was dropped. *Thus, the Respondent had themselves specifically agreed not to claim any compensation or increase by reason of*

increase in wages. This claim could therefore not have been granted."

From a reading of this paragraph 30 of the judgment of this Court, it is clear that this Court in the judgment has, in detail, considered Claim Nos.2 and 26 and on consideration of the materials on record and the terms of the contract between the parties rejected the aforesaid two claims. In this view of the matter, we must accept the finding of the Umpire that since these two claims were clearly and elaborately considered and thereafter rejected by this Court in the said judgment, it was not open for him to reconsider the same while passing the award. In view of this conclusion arrived at by this Court in the aforesaid judgment, the Umpire was fully justified in not reconsidering the same while passing an award.

6. The jurisdiction of the court to set aside an award under Section 30 of the Act has now been settled by catena of decisions of this Court as well as by the different High Courts in India. Taking those principles into consideration, it would thus be clear that under Section 30 of the Act it must be said that the court is not empowered to re-appreciate the evidence and examine the correctness of the conclusions arrived at by the Umpire in considering an application for setting aside the award. In this connection, we may refer to a decision of this Court in the case of *Bhagwati Oxygen Ltd. vs. Hindustan Cooper Ltd.* [2005 (6) SCC 462]. In that decision, this Court observed in paragraph 25 as follows :-

"This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power under Section 30, cannot re-appreciate the evidence or examine correctness of the conclusions arrived at by the Arbitrator. The jurisdiction is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the

award merely because in the opinion of the court, another view is equally possible. It is only when the court is satisfied that the Arbitrator had mis-conducted himself or the proceedings or the award had been improperly procured or is "otherwise" invalid that the court may set aside such award."

7. Similarly in the case of *Food Corporation of India vs. Chandu Construction* [2007 (4) SCC 697] in which one of us (Chatterjee,J.) was also a party, it was held that when the Arbitrator or the Umpire as the case may be, had ignored the specific terms or had acted beyond the four corners of the contract, it was open for the court in the exercise of its power under Section 30 of the Act to set aside the award on the ground that the Arbitrator could not ignore the law or misapply the terms of the contract in order to do what he thought was just and reasonable. That apart, the law is also settled as referred to herein earlier that the jurisdiction of the court under Section 30 of the Act is not appellate in nature and the award passed by the Umpire cannot be set aside on the ground that it was erroneous. It is also not open to the court to interfere with the award merely because in the opinion of the court, another view is equally possible. Keeping these principles as laid down by this Court in the aforesaid two decisions, let us now consider the award passed by the Umpire in respect of the claims of the respondent excluding Claim Nos. 2 and 26.

8. Since Claim Nos.4, 6, 9, 13, 23, 32, 33, 36 and 38 of the respondent were accepted by the Umpire and the Award has been passed in respect of the said claims in favour of the respondent, it would not be necessary for us to deal with this part of the award any further. So far as Claim Nos. 1, 3, 5, 7, 8, 10, 11, 12, 14-22, 24, 25, 27, 28, 29,30, 31, 34, 35, 37 and 39 are concerned, we find that the Umpire after going through the objections of the respondent and after hearing the parties in respect of these claims rejected the same and we do not find any reason to set aside the said award on the ground that

the jurisdiction of the court is not appellate in nature nor such an award could be found to be erroneous. Accordingly, we do not find any reason to accept the objections of the respondent in this regard. The objections are overruled.

9. Before parting with this judgment, there is another aspect to be considered at this stage. As noted herein earlier, the respondent has claimed compound rate of interest which was not granted by the Umpire. The claimant had claimed compound interest with quarterly rest while the respondent had opposed the said rate of interest. While rejecting the said claim of the claimant, the Umpire had rightly observed that there was no necessity for him to fix any other rate of interest because on the basis of the award passed by the Umpire, the claimant had to return the substantial amount received by him. In view of that, the Umpire in his award directed that difference of amount which has now become refundable by virtue of the award would be returned back to the State of Rajasthan with interest from the date of recovery by the claimant and the same was allowed by the previous Umpire till the date of repayment/ recovery.

10. We do not find any reason to differ from the award of the Umpire on this score, because the Umpire has rightly considered the entire aspect of interest and passed an award which can never be said to be erroneously rejected by him.

11. For the reasons aforesaid, we allow the application for making the award a rule of the court and reject the objections filed under Sections 30 and 33 of the Act by the respondent. There will be no order as to costs.

D.G. Matters disposed of.

JITENDER KUMAR SINGH & ANR.
v.
STATE OF U.P. & ORS.
(Civil Appeal No. 74 of 2010)

JANUARY 08, 2010

[TARUN CHATTERJEE AND SURINDER SINGH NIJJAR, JJ.]

Constitution of India, 1950 – Articles 14, 16(1) and (4):

Direct recruitment on the post of Sub Inspectors and Platoon Commanders – Reservation for Backward Classes, Scheduled Castes, Scheduled Tribes – Relaxation of fee and age – Selection of a reserve category candidate against unreserved seats – Selection process, challenged by general category candidate – Held: Concession in fee and age relaxation would not fall within the definition of 'reservation' – Such relaxation only enables candidates belonging to reserved category to fall within the zone of consideration, so that they can participate in open competition on merit – It does not tilt the balance in favour of reserved category candidates, in the preparation of final select list – It is only, thereafter, merit of candidates is determined without any further concessions in his favour – There is no infringement of Article 16(1) – U.P. Public Services (Reservation for Scheduled Casts and Scheduled Tribes) Act, 1994 – ss. 3(6) and 8 – Government instructions dated 25.03.1994.

Direct recruitment on the post of Sub Inspectors and Platoon Commanders – Reservation for outstanding Sportspersons and women – Legality of – Carry forward of posts – Permissibility of – Held: Vacancies reserved for women and outstanding sportsperson is to be filled by applying 'horizontal reservation' – Any posts reserved for women which remain unfilled have to be filled up from

amongst suitable male candidates with a specific prohibition that posts shall not be carried forward for future – On facts, State did not carry forward any of general category posts reserved for women and outstanding sportspersons – All posts remaining unfilled, in category reserved for women were filled up by suitable male candidates – Thus, Division Bench erred in directing the State to fill in unfilled vacancies reserved for women from suitable male candidates – Single Judge erred in directing the State to recalculate vacancies reserved for sportspersons – Conclusions with regard to 34 posts reserved for sportsmen category set aside – Government instructions dated 26.02.1999 – Paragraph 2, 4.

Reservation under Article 16(1) and (4) – Benefit of – Explained.

Precedent: Mere quoting of isolated observations in a judgment – Held: Cannot be treated as a precedent de hors the facts and circumstances in which the observation was made.

An advertisement was issued for direct recruitment on the post of Sub Inspectors and Platoon Commanders. 2% posts were reserved for outstanding Sportspersons and the recruitments to these posts were to be made by a separate advertisement. 10% of the posts were reserved for women. The procedure for selection was carried out. The select list was prepared and the selected candidates were sent for training. Appellants-unsuccessful candidates challenged the selection. Single Judge of High Court dismissed the writ petitions seeking quashing of the entire select list; and direction to the respondents to send them for training to the post of Sub Inspectors. It directed the respondents to recalculate the number of posts of general category candidates by applying 2% reservation for sports men horizontally and adding 2% posts of sports men also while calculating the total number of vacancies of general category candidates

and if any post in general category candidates quota remains vacant the same shall be filled up by the general category candidates next in merit. The Division Bench of High Court held that if a reserved category candidate secured marks more than last General Category candidate, he is entitled to be selected against unreserved seat without being adjusted against reserved seat; that 52 vacancies of general category kept reserved for women candidates remained vacant, the same had to be filled from the general category male candidates and could not be carried forward; and that the reservation in favour of sportspersons quota has to operate horizontally, therefore, 29 vacancies which remained unfilled could not have been carried forward. Hence the present appeals by the unsuccessful candidates as well as State of U.P.

Allowing the appeals filed by the State and the Director General of Police and dismissing that of the General Category Candidates, the Court

HELD: 1. Reservation under Article 16(4) of the Constitution of India aims at group backwardness. It provides for group right. Article 16 (1) guarantees equality of opportunity to all citizens in matters relating to employment. However, in implementing the reservation policy, the State has to strike a balance between the competing claims of the individual under Article 16(1) and the reserved categories falling within Article 16(4). Reservations should not be so excessive as to render the Fundamental Right under Article 16(1) of the Constitution meaningless. Therefore, utmost care has to be taken that the 50% maximum limit placed on reservation in any particular year must be maintained. It must further be ensured that in making reservations for the members of the Scheduled Castes and Scheduled Tribes, the maintenance of the efficiency of administration is not

impaired. [Paras 33, 35 and 36] [354-D-E; 356-D-F-G]

Indra Sawhney and Ors. vs. Union of India and Ors. **1992 Supp (3) SCC 217, followed.**

Post Graduate Institute of Medical Education & Research, Chandigarh vs. Faculty Association & Ors. **1998 (4) SCC 1, relied on.**

2.1. A perusal of section 3(1) of the U.P. Public Services (Reservation for Scheduled Casts and Scheduled Tribes) Act, 1994 would show that it provides for reservation in favour of the categories mentioned therein at the stage of direct recruitment. The concessions falling within s. 8 of the Act of 1994 cannot be said to be relaxations in the standard prescribed for qualifying in the written examination. Section 8 clearly provides that the State Government may provide for concessions in respect of fees in the competitive examination or interview and relaxation in upper age limit. [Para 51] [369-A-B, E]

2.2. The Government issued instructions dated 25.03.1994 on the subject of reservation for Scheduled Caste, Scheduled Tribe and other backward groups in the Uttar Pradesh Public Services. It provided that, *if* any person belonging to reserved categories is selected on the basis of merits in open competition along with general candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category." It is apparent that the relaxation in age limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for

selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked. [Paras 51 and 52] [369-F-G; 370-B-D]

2.3. Relaxation in age is not only given to members of the Scheduled Castes, Scheduled Tribes and OBCs, but also the dependents of Freedom Fighters. Such age relaxation is also given to Ex-servicemen to the extent of service rendered in the Army, plus three years. In fact, the educational qualifications in the case of Ex-servicemen is only intermediate or equivalent whereas for the General category candidates it is graduation. Ex-servicemen compete not only in their own category, but also with the General category candidates. No grievance has been made by any of the appellants/petitioners with regard to the age relaxation granted to the Ex-servicemen. Similarly, the dependents of Freedom Fighters are also free to compete in the General category if they secure more marks than the last candidate in the General category. Therefore, there is no substance in the submission that relaxation in age "queers the pitch" in favour of the reserved category at the expense of the General category. The relaxation in age does not in any manner upset the "level playing field". It is not possible to accept that relaxation in age or the concession in fee would in any manner be infringement of Article 16(1). These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive

examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition. [Para 52] [370-F-H; 371-A-F]

2.4. The reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list. It is permissible for the State in view of Articles 14, 15, 16 and 38 to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16 (1). Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates at par with General Category candidates.

It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates. [Para 39] [358-G-H; 359-A-D]

Indra Sawhney and Ors. vs. Union of India and Ors. **1992 Supp (3) SCC 217, followed.**

2.5. The submission that section 3 (6) ensures that there is a level playing field in open competition, however, s. 8 lowers the level playing field, by providing concessions in respect of fees for any competitive examination or interview and relaxation in upper age limit, cannot be accepted. Section 3 (6) is clear and unambiguous. It clearly provides that a reserved category candidate who gets selected on the basis of merit in open competition with general category candidates shall not be adjusted against the reserved vacancies. Section 3(1), 3(6) and s. 8 are inter-connected. Expression "open competition" in s. 3 (6) clearly provides that all eligible candidates have to be assessed on the same criteria. All the candidates irrespective of the category they belong to have been subjected to the uniform selection criteria. All of them have participated in the Preliminary Written Test and the Physical Test followed by the Main Written Test and the Interview. Such being the position, it cannot be said that the reserved category candidates having availed relaxation of age are disqualified to be adjusted against the Open Category seats. It was perhaps to avoid any further confusion that the State of UP issued directions on 25.3.1994 to ensure compliance of the various provisions of the Act. Non-compliance by any Officer was in fact made punishable with imprisonment which may extend to period of three months. Thus, the appeals filed by the General Category candidates are without any substance. [Paras 53 and 54] [371-G-H; 372-A-E]

2.6. The conclusion reached by the Division Bench on the issue of concessions and relaxations cannot be said to be erroneous. The Division Bench concluded that concession in respect of age, fee etc. are provisions pertaining to eligibility of a candidate to find out as to whether he can appear in the competitive test or not and by itself do not provide any indicia of open competition. The competition would start only at the stage when all the persons who fulfill the requisite eligibility conditions, namely, qualification, age etc. are short-listed. [Para 37] [357-A-C]

2.7. The observations in *K.L. Narsimhan* **case make it clear that if a reserved category candidate gets selected on the basis of merit, he cannot be treated as a reserved candidate. In the instant case, the concessions availed of by the reserved category candidates in age relaxation and fee concession had no relevance to the determination of the** *inter se* **merit on the basis of the final written test and interview. The ratio of** *K.L. Narsimhan* **case in fact permits reserved category candidates to be included in the General Category Candidates on the basis of merit. Even otherwise, merely quoting the isolated observations in a judgment cannot be treated as a precedent** ***de hors*** **the facts and circumstances in which the observation was made. The judgment in** ***K.L. Narsimhan*** **case having been set aside, it cannot be accepted that the reasoning would still be binding as precedent. Reliance placed upon the observation in** ***K.L. Narsimhan*** **case is wholly misplaced. [Paras 42, 43, 47 and 48] [361-C-E; 365-F-G; 366-A]**

Post Graduate Institute of Medical Education & Research, Chandigarh and Ors. vs. K.L.Narsimhan and Ors. **1997 (6) SCC 283, held inapplicable.**

Union of India & Ors. vs. Dhanwanti Devi and Ors. **1996(6) SCC 44;** *State of Orissa and Ors. vs. Md.Illiyas*

2006(1) SCC 275; *Chakradhar Paswan (Dr.) vs.* State *of Bihar* **(1998) 2 SCC 214;** *Union of India vs. Madhav* **(1997) 2 SCC 332;** *Arati Ray Chaudhary vs. Union of India* **1974 (1) SCC 87;** *Dr.Preeti Srivastava and Anr.*v. *State of M.P. and Ors.* **1999 (7) SCC 120;** *Bharati Vidyapeeth and Ors v. State of Maharashtra and Anr.* **2004 (11) SCC 755;** *State of Madhya Pradesh and Ors.v.Gopal D. Tripathi and Ors.* **2003 (7) SCC 83, referred to.**

3.1. The vacancies reserved for women and for the outstanding sportsperson had to be filled by applying 'horizontal reservation'. Para 2 and 4 of the instructions dated 26.02.1999 state that the reservation will be horizontal in nature i.e. to say that category for which a women has been selected under the aforesaid reservation policy for posts for women in Public Services and on the posts meant for direct recruitment under State Government, shall be adjusted in the same category only; that if a suitable women candidate is not available for the post reserved for women in Public Services and on the posts meant for direct recruitment under State Government, then such a post shall be filled up from amongst a suitable male candidate and such a post shall not be carried forward for future." The Single Judge whilst interpreting the same observed that it does not specifically provide for posts which are not filled up by women candidates to be filled up from the male candidates. This view is contrary to the specific provision contained in Paragraph 4. The said provision leaves no matter of doubt that any posts reserved for women which remain unfilled have to be filled up from amongst suitable male candidates. There is a specific prohibition that posts shall not be carried forward for future. Therefore, the view expressed by Single Judge cannot be sustained. [Paras 59, 60 and 61] [377-C-H; 378-A-B]

3.2. In view of the Para 2 and 4 of the instructions dated 26.02.1999, the State has not carried forward any

of the general category posts reserved for women and outstanding sportspersons. All the posts remaining unfilled, in the category reserved for women have been filled up by suitable male candidates, therefore, clearly no post has been carried forward. Therefore, the mandate in *Indra Sawhney* **and the G.O. dated 26.2.1999, have been fully coupled with. The conclusion recorded by the Division Bench is without any factual basis. The factual position was brought to the notice of Division Bench in the recall/modification application. However, the recall/ modification application was rejected. The Division Bench erred in issuing the directions to the appellants to fill in the unfilled vacancies reserved for women candidates from suitable male candidates. This exercise had already been completed by the appellant-State. [Para 62] [378-C-E]**

3.3. The Single Judge despite taking note of the averments made in the supplementary counter affidavit by the State, erroneously issued directions to recalculate the vacancies reserved for outstanding sportspersons. It was specifically pointed out that a separate advertisement had been published for recruitment on the post reserved for outstanding sportsperson; and pointed out that all the posts available in the category of sportsmen were filled up in the subsequent selection. No post remained unfilled. Therefore, the conclusion of the Single Judge that 34 posts-29 SICP+5 PC ought not to have been deducted from the available 1478 posts for the purposes of calculating the number of vacancies available to the general category, was factually erroneous. The principle of horizontal reservation would also apply for filling up the post reserved for outstanding sportsperson. There could have been no carry forward of any of the post remaining unfilled in the category of outstanding sportsperson. As a matter of fact, there was no carry forward of the vacancies. They were filled in accordance

with the various instructions issued by the Government from time to time. Division Bench erred in law in concluding that since the advertisement did not mention that a separate selection will be held, for the post reserved for sportsmen, the same would not be permissible in law. The deduction of 34 posts for separate selection would not in any manner affect the overall ratio of reservation as provided by law. The separate selection is clearly part and parcel of the main selection. Thus, the conclusions recorded by the Single Judge and the Division Bench with regard to the 34 posts reserved for the outstanding sportsmen category-29 SICP+5 PC also cannot be sustained. The direction issued by the Single Judge in the final paragraph as well as the directions issued by the Division Bench in modification of the order of Single Judge are set aside. [Paras 63 and 64] [378-E-H; 379-A-E-F]

Indra Sawhney and Ors. vs. Union of India and Ors. **1992 Supp (3) SCC 217, Followed.**

Union of India and Anr. v. Satya Prakash and Ors. **JT 2006 (4) SC 524, referred to.**

Case Law Reference :

JT 2006 (4) SC 524	**Referred to.**	**Para 27**
1992 Supp (3) SCC 217	**Followed.**	**Para 33, 35, 36, 39, 59, 62**
(1998) 4 SCC 1	**Relied on.**	**Para 34**
1997 (6) SCC 283	**Held inapplicable.**	**Para 41, 42**
1996(6) SCC 44	**Referred to.**	**Para 43**
2006(1) SCC 275	**Referred to.**	**Para 44**
(1998) 2 SCC 214	**Referred to.**	**Para 45**

(1997) 2 SCC 332	**Referred to.**	**Para 45**
1974 (1) SCC 87	**Referred to.**	**Para 45**
1999(7) SCC 120	**Referred to.**	**Para 48**
2004 (11) SCC 755	**Referred to.**	**Para 48**
2003 (7) SCC 83	**Referred to.**	**Para 48**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 74 of 2010.

From the Judgment & Order dated 22.12.2006 of the High Court of Judicature at Allahabad in Special Appeal No. 862 of 2002.

WITH

C.A. Nos. 75, 79, 80, 76-78 and 81 of 2010.

L.N. Rao, Dinesh Dwivedi, Dr. Rajeev Dhawan, S.R. Singh, Shail Kr. Dwivedi, AAG, Sanjeev Kr. Singh, Siddhartha Chowdhury, Manoj Kr. Dwivedi, Vandana Mishra, Abhishek Kr. Singh, Ashutosh Kr. Sharma, Manish Srivastava, Gunnam Venkateswara Rao, Jatendra Singh, Pallavi Mohan, Priyanka Singh, S.K. Sabharwal, Jetendra Singh, Sunita Pandit, K.L. Janjani, Amit Anand Tiwari, the appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J.

Civil Appeal Nos. 74, 79, 75, 80 of 2010
(arising out of SLP (C)Nos.1952, 1959, 1967 & 7739 of 2008

1. Leave granted.

2. These Appeals are directed against the common Division Bench judgment of the High Court of Judicature at Allahabad dated 22.12.2006. By the aforesaid judgment, the

High Court decided number of Appeals directed against the common judgment of the learned Single Judge in Writ Petition No.25328 of 2001 and a number of other connected writ petitions.

3. The appellants had assailed the judgment dated 22.5.2002 of the learned Single Judge to the extent that the Writ Petition Nos.25328, 26847, 36411, 28836, 26177, 34039, 4630, 32763, 27849, 27060, 29069 of 2001 and 47528 of 2002 had been dismissed whereby the petitioners-appellants were seeking a writ in the nature of mandamus directing the respondents to send them for training to the post of Sub Inspectors. In some of the writ petitions, a prayer had also been made for quashing the entire select list which was also declined by the learned Single Judge. In Special Appeal No.592 of 2006, the appellant who was respondent had assailed the aforesaid judgment of the learned Single Judge only to the extent the Single Judge had issued a writ in the nature of mandamus to the respondent-appellants to fill up vacancies against 2% Sports Quota from the aforesaid selection itself. In Special Appeal No.1285 of 2002, the original petitioner had challenged the judgment dated 01.10.2002 passed by the learned Single Judge (R.K.Agarwal, J.) dismissing the writ petition no.47528 of 2002 following the judgment dated 22.5.2002 of Ashok Bhusan, J. in writ petition no.25328 of 2001 and other connected matters (supra). In Special Appeal No.910 of 2005, the original petitioner had assailed the judgment dated 19.7.2005 of Sunil Ambwani, J. dismissing writ petition no.29383 of 2001 again following the judgment dated 22.5.2002 of *Ashok Bhusan,J.* (supra).

4. The dispute between the petitioners and the respondents revolves around the issue of reservation of posts for Backward Classes, Scheduled Castes, Scheduled Tribes, Women Candidates and Sportspersons.

5. We may notice here the relevant facts before we advert to controversy in detail.

6. An advertisement was issued on 4.5.1999 for direct recruitment on the post of Sub Inspectors in Civil Police (hereinafter referred to as "SICP") and Platoon Commanders in PAC (hereinafter referred to as "PC"). According to the respondents, the break down of the posts was 1379 Posts for SICP and 255 posts for PC. Out of these posts, 2% posts were reserved for outstanding Sportspersons. The recruitments to these posts were to be made by a separate advertisement. Apart from above, 10% of the posts were reserved for women.

7. The procedure for selection included a Preliminary Written Test consisting of 300 marks. Candidates were required to secure at least 50% marks for being declared successful and entitled to participate in further test. This was followed by a Physical Test consisting of 100 marks. Again the candidate had to secure at least 50% or more marks. The marks obtained in the Preliminary Written Test and the Physical Test were, however, not to be included for determination of final merit. Candidates who qualified in the Preliminary Written Test and the Physical Test were required to appear in the Main Written Test consisting of 600 marks, having two papers i.e. General Hindi, General Knowledge and Mental Aptitude Test. Here again a candidate who secured 40% or more marks could only be declared successful. The written test consisted of two papers- (i) Hindi language and Essay consisting of 200 marks and (ii) General Knowledge and Mental Aptitude Test consisting of 400 marks. Thereafter, the candidate was to appear for interview which consisted of 75 marks. There were, however, no qualifying marks for the interview.

8. It is common ground that in response to the advertisement, more than 50,000 candidates applied for the posts. The result for the Preliminary Written Test which was held on 6.2.2000, was declared on 22.9.2000. 7325 candidates were found successful. Physical Test was held from 29.10.2000 to 6.11.2000 and 1454 candidates were found successful. The Main Written Test was held on 29.4.2001 wherein 1178

candidates were declared successful. The final result of the interview was declared on 6.7.2001, wherein 1006 candidates were declared successful. The number of persons who were selected in different categories finally and have been sent for Training is as under:-

1.	General (Male) for the post of Sub Inspectors	608
2.	General (Female) for the post of Sub Inspectors (This included one dependent of freedom fighter) Note: 163 OBC, 19 Scheduled Castes and 1 Scheduled Tribes candidates having secured more than the last general candidate, were selected against general vacancies.	15
3.	OBC (male) for the post of Sub Inspectors	168
4.	OBC (female) for the post of Sub Inspectors	9
5.	SC (male) for the post of Sub Inspectors	25
6.	SC (female) for the post of Sub Inspectors	1
7.	ST (male) for the post of Sub Inspectors	3
8.	General (male) Platoon Commander in PAC	125

9. All the petitioners-appellants who applied pursuant to the aforesaid advertisement had participated in the entire selection process. However, the names did not figure in the merit list of the selected candidates.

10. The selection was challenged in a number of writ petitions by candidates who were not included in the select list. According to the High Court, the selection was challenged on the following grounds:-

1. The selection has been made by adopting pick and choose method.

2. More than 600 posts are still vacant yet the petitioners have not been declared successful.

3. There was no guideline or criteria for interview.

4. The number of candidates appeared for main examination and interview being less than the total number of vacancies, therefore, the petitioner-appellants could not have been unsuccessful.

5. Several candidates having inferior educational record have been declared successful.

6. Certain persons having Roll Nos.0492198, 520570, 0492263, 760146, 480612, 492353, 7706166, 790658, 790519 and 790035 did not find place in the result after main examination yet have been shown as selected finally in the final merit list which shows serious irregularities and bungling in the selection.

7. Keeping large number of vacancies unfilled although successful candidates are available is a motive for extracting illegal demand.

11. The writ petitions were opposed by the State Government by filing a detailed counter-affidavit in Writ Petition No.26177 of 2001. The aforesaid counter-affidavit was said to have been read on behalf of the State in all the cases. It was explained by the State Government that in response to the advertisement, total 53780 application forms were received. It was further explained that 1178 candidates had qualified in the main written test who appeared in the interview which was held between 18.6.2001 to 1.7.2001. It was further explained that vide Government order dated 3.2.1999, 2956 posts of SICP were sanctioned, out of which 50% posts were to be filled by direct recruit and 50% posts by promotion. Therefore, 1478 posts came to be filled in by direct recruit. Since 99 posts were filled under the Category of "Dying in Harness" Rules, only 1379 posts remained to be filled. Separate selection was to be held

on the 2% vacancies reserved for Sportspersons through a separate advertisement. Therefore, as a matter of fact, actual recruitment was made i.e. only for 1350 posts of SICP and 255 posts of PC. The break-up of the posts was as indicated above.

12. Upon consideration of the entire matter, Ashok Bhusan, J. delivered common judgment dated 22.5.2002 in CMWP No.25328 of 2001 (Narendra Partap Singh vs. Director General of Police, UP and others). All the writ petitions were disposed of with the following observations:-

> "In view of the foregoing discussions none of the contentions of the petitioner can be accepted except the contention regarding 2% reservation for sports men. Relief claimed by the petitioner cannot be granted except the direction to the respondents to recalculate the number of posts of general category candidates by applying 2% reservation for sports men horizontally and adding 2% posts of sports men also while calculating the total number of vacancies of general category candidates. If after applying 2% reservation horizontally any post in general category candidates quota remains vacant the same shall be filled up by the general category candidates next in merit. It is, however, made clear that by the said exercise the selection already made will not be affected in any manner.
>
> All the writ petitions are disposed of with the aforesaid directions"

13. This judgment was subsequently followed in the separate judgments delivered by R.K.Agarwal, J. and Sunil Ambwani, J. All the three judgments were challenged in appeals before the Division Bench, which have been decided by the common judgment dated 22.12.2006.

14. The Division Bench noticed the submissions made by the learned counsel for the parties in detail and formulated

seven issues which arose in the appeals. The issues were as under:-

> "1. What is the extent of selection of a reserve category candidate against unreserved seats and in what circumstances he can be considered against unreserved vacancies besides reserve seats. The relevant factors, shades and nuisances for such adjustment also need to be identified, if any.
>
> 2. Whether Section 3 (6) of Act of 1994 would apply where a candidate of reserve category though has availed relaxation meant for reserve category candidates namely fee and age but in all other respect, in the selection test, has competed with general category candidates and has secured more marks than the last selected general category candidate. In other words whether relaxation in age and fee would deprive and outsource him from competing against an unreserved seat in an open competition with general candidates.
>
> 3. Whether selection of reserve category candidates against reserved and unreserved constituting more than 50% is unconstitutional or otherwise contrary to law.
>
> 4. Whether reservation of seats for women is violative of Article 16(2) of the Constitution of India.
>
> 5. Whether seats reserved for women can be carried forward in case suitable candidates are not available or the reservation being horizontal and applicable to all categories, the unfilled vacancies are to be filled by suitable male candidates.
>
> 6. Whether keeping 2% sports quota separate from the selection in question is illegal.
>
> 7. Whether selection in question is otherwise vitiated on account of any alleged irregularity or bungling.

15. The Division Bench noticed the historical background in which the provisions with regard to reservation came to be incorporated in the Constitution of India. The Division Bench also noticed the entire history with regard to the various government orders making reservation for different categories. The Division Bench notices that the matter of reservation has been dealt in detail by this Court in numerous cases. Therefore, the Division Bench has confined itself to the problem as, faced and countered, in the State of U.P; particularly with reference to the category of the candidates belonging to 'O.B.Cs.' The Division Bench also noticed the statutory provisions contained in the U.P. Public Services (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1994 (hereinafter referred to as "the Act of 1994"). The High Court considered issues no.1, 2 and 3 together.

16. The Division Bench has concluded that the various Government orders and the Act of 1994 provide reservation in State services with the intent to achieve the goal of adequate representation of Backward Classes of Citizens in service. It notices that reservation under Article 16(4) has to be made keeping in view the provisions contained in Article 14, 16(1) and 335 of the Constitution of India. It is also held that there are various modes and methods of providing reservation. The extent and nature of reservation is a matter for the State to decide considering the facts and requirements of each case. In this case the Legislature has empowered the State to extend concessions limited to fee and age to OBCs, besides keeping reservation of seats to the extent of 27%. The prime objective, obviously, is to provide adequate representation to these classes, which in the opinion of the Legislature are not adequately represented in the services under the State. The Division Bench also concluded that the State Government has not conducted any indepth study to find out as to whether adequate representation has been given to any particular Backward Classes as a result of successive provisions for reservation. Therefore, a direction has been given to the State

Government of U.P. to undertake an indepth study to find out the representation of various Backward Citizens in Public service and to find out whether any Backward Class citizens have achieved the constitutional goal of adequate representation in service or not. Thereafter, the Government is to review the policy in the light of facts, figures and information received pursuant to such study. The exercise is to be undertaken by the State Government within six months and a compliance report is to be submitted to the Court.

17. With regard to the manner, mechanism and inter-relationship of various concessions and reservations, the Division Bench observed that it is permissible for the State to provide concessions to achieve the goal under Article 16(4) without keeping the seats reserved for any backward class of citizens. When certain seats are reserved, it would not result in making unreserved seats compartmentalized for General Category candidates i.e. unreserved candidates. There is no reservation for General Category Candidates. It is also held that a reserved category candidate, in addition to the reserved seats, can always compete for unreserved seat. The Division Bench has further held that the reserved category candidate can also compete against the unreserved seats under a criteria which is uniformly applicable to all the candidates. In case the selection criteria is lowered for the reserved category candidate, then such difference in standard or criteria would disentitle the reserved category candidate to compete in the general category. After analyzing the law laid down by this Court in numerous judgments, the Division Bench has concluded that the conflicting claims of individuals under Article 16(1) and the preferential treatment given to a backward class under Article 16(4) of the Constitution has to be balanced, objectively. The Division Bench then considered as to whether the concession or relaxation in the matter of fee and age would deprive a reserved candidate of his right to be considered against an unreserved seat. Can it be said that such a candidate is not a person who has competed with the general category in an open

competition. It is noticed that under GOs (Government Orders) dated 11.04.1991, 19.12.1991 and 16.04.1992 and the clarification dated 19th October, 1992, it was provided that a reserved category candidate cannot compete with the open category candidate(s) after availing preferences which result in lowering of the prescribed standards. Such a candidate would only be considered against seat/post for the reserved category. However, after the promulgation of the 1994 Act and issuance of the Instructions dated 25th of March, 1994, the State Government has not treated relaxation in age and fee as relaxation in the standard of selection. Therefore, even if a candidate has availed concession in fee and or age limit, it cannot be treated to be a relaxation in standard of selection. Therefore, it would not deny a reserved category candidate selection in Open Competition with General Category candidates. Such concessions can be granted by the State under Section 8(1) of the Act. The Division Bench has also held that a relaxation in age and concession in fee are provisions pertaining to eligibility of a candidate to find out as to whether he can appear in a competitive test or not and by itself do not provide any indicia of open competition. The competition would start only at a stage when all the persons who fulfill all the requisite eligibility qualification, age etc. are short listed. The candidates in the zone of consideration entering the list on the basis of aforesaid qualifications would thereafter participate in competition and open competition would commence therefrom. Therefore, concession granted under Section 8 would not disentitle a reserved category candidate of the benefit under Section 3 sub-Section (6).

18. In view of the above legal position, it has been held that if a reserved category candidate has secured marks more than the last General Category candidate, he is entitled to be selected against the unreserved seat without being adjusted against the reserved seat. According to the Division Bench, merely because 183 candidates, belonging to the reserved category, have been successful against unreserved seats would

not result in reverse discrimination, as apprehended by the petitioners. This is particularly so as selection of such reserved category candidate against the unreserved seats would not be material for the purpose of applying the principle of reservation being limited to a total of 50%.

19. The Division Bench has also held that the reservation in favour of women is constitutionally permissible and is valid. On issue No.5 it has been held that in view of the GO dated 26.02.1999 (para 4), the 52 vacancies of general category kept reserved for women candidates have been illegally carried forward for the next selection instead of filling in from the general category male candidates. However, since the posts remained vacant, the same had to be filled from the general category male candidates and could not be carried forward.

20. Reservation in favour of sportspersons quota (2%) has also been upheld. It was held that the aforesaid reservation has to operate horizontally, therefore, the 29 vacancies which remained unfilled could not have been carried forward. The observations made by the Single Judge on this issue have been approved. A direction has been issued as follows:-

> "We direct the respondent-authorities to fill in the unfilled vacancies reserved for women candidates and sportsmen from suitable candidates of respective category on the basis of merit list and send them for training and provide all other benefits, if any as per rules. However, we may add here, since the respondents did not hold recruitment for sports persons in the present selection and we are informed that a separate selection was held, therefore, we provide that the vacancies remain unfilled from the separate selection held for sportsmen against 29 vacancies separated from the impugned selection, only those remaining vacancies shall be made available to the respective candidates of this selection."

21. The aforesaid findings of the Division Bench have been

challenged in these appeals by the unsuccessful candidates as well as the State of U.P.

22. We have heard learned counsel for the parties.

23. Mr. L.N. Rao, learned Sr. Counsel appearing on behalf of the appellants submitted that the cardinal issue raised in these appeals is whether the reserved category candidates who had taken the benefit of age or fee relaxation, are entitled to be counted as general category candidates. According to the learned Sr.Counsel, the Division Bench has erred in law in concluding that relaxation in age and fee cannot be treated to be relaxation in standard of selection and shall not deny a reserved category candidate's selection in Open Competition with General Category candidate. According to learned Sr. Counsel, the benefit of reservation under Article 16(4) of the Constitution of India is a group right whereas under Article 16 (1) of the Constitution of India, it is an individual right. It is emphasized that reservation under Article 16(4) of the Constitution of India will take into its fold concessions. Once a candidate falls within the reserved category, he/she can only exit the Group i.e. from the benefit of Article 16(4) of the Constitution of India to Article 16(1) of the Constitution of India on fulfillment of two circumstances, namely, (a) imposition of a creamy layer and (b) merit selection. That is where there is a level playing field in respect of the selection process, without any benefit under Article 16(4) of the Constitution of India. According to the learned Sr. Counsel, a level playing field would be of candidates who have not availed of any concessions or relaxation. All things have to be equal for all the candidates.

24. According to learned Sr. Counsel, there is a distinction between relaxation and concession which pertain to a particular selection process and mere support mechanism (such as General Coaching) independent of a criteria for a particular selection.

25. According to the learned Sr. Counsel, selection

process would include all stages. There can be no distinction that relaxation in age and fee can be treated as provisions pertaining to eligibility i.e. to bring a candidate within the zone of consideration. According to the learned Sr. Counsel, it is hair splitting to divide the selection process into further parts. Each undermines the concept of "level playing field". Learned Sr. Counsel further submitted that the Division Bench has misinterpreted Section 3 of the Act of 1994. It has to be read as a whole. Section 8 is in nature of exception to Section 3 (6), because it creates a non-level playing field.

26. In order to emphasize that reservation under Article 16 (4) of the Constitution of India is a group right, and includes preferences, concessions and exemptions, Mr. L.N. Rao relied on certain observations of this Court made in the case of *Indra Sawhney and others vs. Union of India and others,* 1992 Supp (3) Supreme Court Cases 217. According to him, the fact that only age and fee relaxations were given does not take the reserved category candidates out of the group category. He has also relied on the judgment rendered in the case of *Post Graduate Institute of Medical Education & Research, Chandigarh and others vs. K.L.Narsimhan and another,* 1997 (6) SCC 283 in support of the submission that once a candidate takes advantage of relaxation in the eligibility criteria, he/she has to be treated as a reserved category candidate.

27. With regard to the interpretation to be placed on the Act of 1994, Mr. L.N.Rao submitted that Section 3 preserves the definition of the group throughout. According to him, Sections 3 (6) and Section 8 are to be read together in the following way i.e. in Section 3(6), the term "gets selected on the basis of merit in an open competition" denotes a level playing field in Open Competition permitting exit from the group into the merit category. Section 8 lowers the level playing field "for any competitive examination" and clubs three categories together- (a) fees, (b) interview and (c) age limit. According to the learned Sr. Counsel, the invocation of Section 8 wholly

excludes the operation of Section 3 (6) to which Section 8 is an exception. He further submitted that relaxation and concessions may be of various kinds. Each is a part of Article 16 (4) of the Constitution of India and could have egalitarian consequences. In support of the submissions, reliance is placed on observations of this Court made in paragraph 743 in the case of *Indra Sawhney* (supra). According to the learned Sr. Counsel, there is a distinction between social support mechanisms prior to an examination, (which are also a part of Article 16 (4) of the Constitution of India) and the relaxations/ concessions which relate to the selection process itself. According to the learned Sr. Counsel, supplemental and ancillary provisions to ensure full availment of provisions for reservation would be a part of reservation under Article 16 (4) of the Constitution of India. He submitted that the selection process has to be seen as a whole. It cannot be split up into different parts. Section 8 is an exception to Section 3(6). In view of the above, according to the learned Sr. Counsel, the Division Bench has erroneously held that in view of Section 8 of the Act of 1994, reserved category candidates can be permitted to compete with the General Category candidates. Learned Sr. Counsel has also submitted that the learned Single Judge has wrongly distinguished the judgment in the case of *K.L.Narsimhan* (supra) on the basis that it was over-ruled by a larger five Judges Bench in the case of *Post Graduate Institute of Medical Education & Research, Chandigarh vs. Faculty Association and others,* (1998) 4 SCC 1. The aforesaid judgment was over-ruled only on one particular point raised in the review application. The aforesaid judgment had decided three appeals in a common judgment. Review was filed only in one. Therefore, the judgment in other cases is not over-ruled. It has in fact been subsequently referred to in *Dr.Preeti Srivastava and Anr. v. State of M.P. and Ors.,* 1999(7) SCC 120, *Bharati Vidyapeeth and Ors v. State of Maharashtra and Anr.,* 2004 (11) SCC 755 and *State of Madhya Pradesh and Ors. v. Gopal D.Tirpathi and Ors.,* 2003 (7) SCC 83. Therefore, according to Mr. L.N.Rao, the reasoning given therein is still

relevant. Learned Sr. Counsel then relied on the judgment in the case of *Union of India and another v. Satya Prakash and others,* JT 2006 (4) SC 524, in support of the submission that only a candidate who has been selected without taking advantage of any relaxation/concession can be adjusted against a seat meant for General Category Candidate. Learned Sr. Counsel then submitted that the vacancies which are reserved for Women candidates remained unfilled, and therefore, ought to have been filled from the men candidates belonging to the General Category. Even these vacancies have been illegally carried forward. The reservation in favour of women is referable to Article 15 (3) of the Constitution of India and not Article 16 (4) of the Constitution of India. Therefore, it is horizontal reservation in which carry forward rule would not be applicable. Even with the carry forward rule which is applicable only to vertical reservations, 50% cap as approved in *Indra Sawhney case* (supra) cannot be permitted to be breached.

28. In fact in the present case, the reserved category candidates have occupied one third of the posts meant for the General Category. If the argument of the State is accepted in addition to the quota of 50% (with carry forward), another 183 out of 1014 (18%) would be added. Learned Sr. Counsel reiterated that the purpose of reservation is not to distribute largesse, but to create empowerment among the disadvantaged. The test is, therefore, "adequacy", not mechanical over-empowerment, which must be constantly maintained. Learned Sr. Counsel also emphasized that the provisions contained in Article 16 (4) (a) and (b) of the Constitution of India are all enabling provisions and subject to (a) creamy layer, (b) 50% cap (c) compelling reasons and (d) proportionality. In the present case, the State has failed to give any details with regard to adequacy of representation. Finally, learned Sr. Counsel submitted that reservation in favour of women is even otherwise violative of Article 16 (2) of the Constitution of India.

29. On the other hand, Mr. Dwivedi, learned Senior counsel appearing on behalf of the respondents submitted that in fact no cause of action has arisen in favour of the appellants. All of them are qualified candidates who did not make it to the final select list on the basis of comparative merit. He then submitted that in fact the selected candidates who are likely to be affected, have not been made parties. It has also been submitted that in any case, no relief can be granted to the appellants, at this stage as all the posts had already been filled. Therefore, the submissions made by the appellants are merely an academic exercise. According to him, the Division Bench has correctly interpreted Section 3 of the Act of 1994. He further submits, by the suggested interpretation, the appellants seek to add the words from Section 8 to sub-section (6) of Section 3. There is no relaxation in the qualifications. The concession is only in the matter of fee and the age which pertains only to eligibility of a candidate to apply for the post. The criteria for selection for all the candidates is identical, which has not been lowered, by the concessions/relaxations in fee and age. Under Section 3(6), the candidate even though belonging to a reserved category is entitled to be treated as a General Category Candidate. According to Mr. Dwivedi, the Division Bench has correctly observed that taking advantage of fee concession or age relaxation would not be a bar for the reserved category candidates to be treated as general category candidates. They can be taken out of General Category only as an exception i.e. if their standard is lowered. On the other hand, if by relaxation, the reserved category candidate gets no advantage, he cannot be compartmentalized. The judgment relied upon by the appellants in *K.L.Narsimhan* (supra) has been over-ruled in the subsequent judgment of this Court in the case of *Faculty Association* (supra). Once the judgment is over-ruled, it cannot be argued that it is only partly over-ruled. Learned Senior counsel also submitted that the particular sentence relied upon by learned Sr. Counsel appearing on behalf of the appellants in the case of *K.L.Narsimhan* (supra) is a stray observation and cannot be treated as an authoritative

pronouncement or a precedent. In any event, according to him, in the case of *K.L.Narsimhan* (supra), the issue of relaxation in age or fee was not considered. In the case of *Satya Prakash* (supra), it has been clearly held that candidates who have been recommended without resorting to the relaxed standard shall not be adjusted against the vacancies reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes. According to the learned Senior counsel, even *Indra Sawhney case* (supra) only lays down the meaning of "Reservation" in terms of Article 16 (4) of the Constitution of India.

30. SLP (C) Nos.14078-80 of 2008 have been filed by the State of U.P. challenging the common final judgment of the Division Bench dated 22.12.2006 and the final order dated 18.12.2007 declining to modify or recall the earlier judgment dated 22.12.2006. In support of the appeals, Mr. Dinesh Dwivedi, learned Sr. Counsel submitted that the learned Single Judge of the High Court had taken notice of the fact that total posts of SICP were 1231 (male) + 148 (female). 2% posts were reserved for sports persons. Therefore, 29 posts of SICP and 5 posts of PC were earmarked for Sports Quota. Since 608 male candidates belonging to the General Category were selected, 67 posts of General category were available for women. However, only 15 candidates had been selected. Therefore, 52 posts were filled up on merit from male candidates in accordance with the Government Order dated 26.2.1999. Therefore, it was noticed by the learned Single Judge that no post in General Category was vacant. Having come to the aforesaid conclusion, the learned Single Judge had wrongly issued the directions in the final paragraph of the judgment to recalculate the number of posts of General Category candidates by applying 2% reservation for Sportsmen horizontally and adding 2% posts of sportsmen also while calculating the total number of vacancies of General Category candidates. This direction had been challenged by the State and the Director General of Police in Special Appeal Nos.910 of 2005 and 592 of 2006. In spite of the aforesaid categoric

finding of the learned Single Judge, that there were no vacant posts, the Division Bench concluded that the vacancies which were left unfilled were carried forward for next selection, instead of filling in from the General Category of male candidates. In fact Government Order dated 26.2.1999 was fully complied with. According to the learned Sr. Counsel, the direction issued by the Division Bench to fill up the unfilled vacancies reserved for women candidates and sportsmen from suitable candidates of respective categories has been issued without taking into account that all the vacant posts have been filled, in accordance with the Government Order. The Division Bench has failed to appreciate that no unfilled posts reserved for women and the Sportsmen quota have been carried forward.

31. Dr. Rajeev Dhawan, learned Sr. Counsel reiterated the submissions made by Mr.L.N. Rao. According to Dr.Dhawan the judgment in the case of *K.L.Narsimhan* (supra) has only been partly over-ruled in one case. The aforesaid judgement had decided three appeals by a common judgement, therefore, the reasoning of the judgment is still intact and would be applicable to the facts and circumstances of the present case. Since the reserved category candidates have been given relaxation in the age and the fee, the same would fall within the group right of reservation under Article 16 (4) of the Constitution of India. Learned Sr. Counsel reiterated that once a candidate takes advantage of reservation/concessions under Article 16 (4) of the Constitution of India, he/she cannot be permitted to be appointed against the seat meant for the General Category. According to the learned Sr. counsel, all parts of Section 3 of the Act of 1994 talk of group rights. There cannot be an exit from reservation, once a benefit is taken. In other words, a candidate covered under Article 16 (4) of the Constitution of India cannot also be a candidate under Article 16 (1) of the Constitution of India.

32. We have considered the submissions made by the learned counsel for the parties.

33. The core issue in the writ petitions was with regard to filling up the General Category posts by candidates belonging to the reserved category candidates on their obtaining more marks than the last candidate in the General Category. The submissions made by the learned counsel for the appellants are all over-lapping. Reference to case law is also common. In our opinion, it is not necessary to consider the larger issues raised by the learned counsel for the parties with regard to the nature and extent of reservation. These issues have been dilated upon by this Court in numerous judgments. The Division Bench in the impugned judgment has traced the history of reservation at considerable length. It has also distinguished between vertical and horizontal reservations. It has also correctly concluded that in case of horizontal reservation, the carry forward rule would not be applicable. All these issues are no longer *res integra*, in view of the authoritative judgment rendered in the case of *Indra Sawhney* (supra). It can also be no longer disputed that reservation under Article 16 (4) of the Constitution of India aims at group backwardness. It provides for group right. Article 16 (1) of the Constitution of India guarantees equality of opportunity to all citizens in matters relating to employment. However, in implementing the reservation policy, the State has to strike a balance between the competing claims of the individual under Article 16(1) and the reserved categories falling within Article 16(4). A Constitution Bench of this Court in the case of *Indra Sawhney case* (supra), this Court reiterated the need to balance the Fundamental Right of the individual under Article 16(1) against the interest and claim of the reserve category candidates under Article 16(4) of the Constitution.

> "It needs no emphasis to say that the principal aim of Article 14 and 16 is equality and equality of opportunity and that Clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision – though not an exception to Clause (1). Both the provision have to be harmonized keeping in mind the fact

that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) – conceived in the interest of certain sections of society – should be balanced against the guarantee of equality enshrined in Clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. If is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (see his speech in Constituent Assembly, set out in para 28). No. other member of the Constituent Assembly suggested otherwise. It is thus, clear that reservation of a majority of seats were never envisaged by the found Fathers. Nor are we satisfied that the present context requires us to depart from that concept."

34. In *PGI MER vs. Faculty Association* (supra in para 32 the same principle was reiterated as under:-

"32. Article 14, 15 and 16 including Articles 16(4), 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decisions of this Court in Balaji case, Devendasan case and Sabharwal case. Even in Indra Sawhney case the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15(4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15(4 [sic 16(4)] must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in

State of AP vs. USV Balram and A Rajendran v. Union of India, it has been indicated in Indra Sawhney case that Clause (4) of Article 16 is not in the nature of an exception to Clauses (1) and (2) of Article 16 but an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire field covered by Clauses (1) and (2) of Article 16. In Indra Sawhney case this Court has also indicated that in the interests of the Backward clauses of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in Clause (1) of Article 16 is to be reconciled in favour of backward clauses under Clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality."

35. These observations make it abundantly clear that the reservations should not be so excessive as to render the Fundamental Right under Article 16(1) of the Constitution meaningless. In *Indra Sawhney* (supra), this Court has observed as under:-

"In our opinion, however, the result of application of carry-forward rule, in whatever manner it is operated, shall not result in breach of 50% rule."

36. Therefore, utmost care has to be taken that the 50% maximum limit placed on reservation in any particular year by this Court in *Indra Sawhney case* (supra) must be maintained. It must further be ensured that in making reservations for the members of the Scheduled Castes and Scheduled Tribes, the maintenance of the efficiency of administration is not impaired.

37. It is in this context, we have to examine the issue as to whether the relaxation in fee and upper age limit of five years in the category of OBC candidates would fall within the definition of "reservation" to exclude the candidates from open

competition on the seats meant for the General Category Candidates. Taking note of the submissions, the Division Bench has concluded by considering questions 1, 2 and 3 that concession in respect of age, fee etc. are provisions pertaining to eligibility of a candidate to find out as to whether he can appear in the competitive test or not and by itself do not provide any indicia of open competition. According to the Division Bench, the competition would start only at the stage when all the persons who fulfill the requisite eligibility conditions, namely, qualification, age etc. are short-listed. We are of the opinion that the conclusion reached by the Division Bench on the issue of concessions and relaxations cannot be said to be erroneous.

38. The selection procedure provided the minimum age for recruitment as 21 years and the maximum age of 25 years on the cut off date. Relaxation of age for various categories of candidates in accordance with the Government Orders issued from time to time was also admissible. This included five years' relaxation in age to Scheduled Caste, Scheduled Tribes, Other Backward Classes and dependents of Freedom Fighters. Relaxation of age was also provided in case of Ex-servicemen. The period of service rendered in Army would be reduced for computing the age of the Ex-Army personnel. After deducting the period of service they had rendered in the Army, they would be deemed eligible. These were mere eligibility conditions for being permitted to participate in the selection process. Thereafter, the candidates had to appear in a Preliminary Written Test. This consisted of 300 maximum marks and the candidates were required to secure 50% or more marks to participate in the further selection process. Thereafter, the candidates had to undergo physical test consisting of 100 marks. Again a candidate was required to secure at least 50% or more marks. It is not disputed before us that the standard of selection in the Preliminary Written Test and the Physical Test was common to all the candidates. In other words, the standard was not lowered in case of the candidates belonging to the reserved category. The Preliminary Written Test and the

Physical Test were in the nature of qualifying examinations to appear in the Main Written Test. The marks obtained in the Preliminary Written Examination and the Physical Test were not to be included for determination of final merits. It was only candidates who qualified in the preliminary written test and the physical test that became eligible to appear in the main written test which consisted of 600 marks. As noticed earlier, this had two papers- General Hindi, General Knowledge and Mental Aptitude Test. A candidate who secured 40% or above would be declared successful in the written test. Thereafter, the candidates were to appear for interview of 75 marks. The final merit list would be prepared on the basis of merit secured in the main written test and the interview. Candidates appearing in the merit list, so prepared, would be declared selected. It is common ground that more than 50000 candidates appeared in the preliminary written test. Upon declaration of the result on 22.9.2000, only 3,325 candidates were found successful. Thereafter, the physical test which was conducted from 29.10.2000 to 6.11.2000 reduced the successful candidates to 1454. It was these 1454 candidates who sat in the main written test held on 29.4.2001. Upon declaration of result, 1178 candidates were declared successful.

The candidates who were successful in the written test were subjected to an interview between 18.6.2001 to 1.7.2001. The final result published on 6.7.2001 declared only 1006 candidates successful.

39. In view of the aforesaid facts, we are of the considered opinion that the submissions of the appellants that relaxation in fee or age would deprive the candidates belonging to the reserved category of an opportunity to compete against the General Category Candidates is without any foundation. It is to be noticed that the reserved category candidates have not been given any advantage in the selection process. All the candidates had to appear in the same written test and face the same interview. It is therefore quite apparent that the

concession in fee and age relaxation only enabled certain candidates belonging to the reserved category to fall within the zone of consideration. The concession in age did not in any manner tilt the balance in favour of the reserved category candidates, in the preparation of final merit/select list. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16 (1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates at par with General Category candidates. It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates. It has been recognized by this Court in the case of *Indra Sawhney* (supra) that larger concept of reservation would include incidental and ancillary provisions with a view to make the main provision of reservation effective. In the case of *Indra Sawhney* (supra), it has been observed as under:-

> "743. The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question, it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts". The question is whether the said words contemplate only one form of provision namely reservation simplicitor, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are

> lesser forms. The constitutional scheme and context of Article 16 (4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration—the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in Karamchari Sangh are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour....."

40. In our opinion, these observations are a complete answer to the submissions made by Mr. L.N. Rao and Dr. Rajiv Dhawan on behalf of the petitioners.

41. We are further of the considered opinion that the reliance placed by Mr.Rao and Dr.Dhawan on the case of *K.L.Narsimhan* (supra) is misplaced. Learned Sr. Counsel had relied on the following observations:-

> "5.....Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

41. The aforesaid lines cannot be read divorced from the entire paragraph which is as under:-

> "5.It was decided that no relaxation in respect of qualifications or experience would be recommended by Scrutiny Committee for any of the applicants including candidates belonging to Dalits and Tribes. In furtherance thereof, the faculty posts would be reserved without mentioning the specialty; if the Dalit and Tribe candidates were available and found suitable, they would be treated

as reserved candidates. If no Dalit and Tribe candidate was found available, the post would be filled from general candidates; otherwise the reserved post would be carried forward to the next year/advertisement. It is settled law that if a Dalit or Tribe candidate gets selected for admission to a course or appointment to a post on the basis of merit as general candidate, he should not be treated as reserved candidate. Only one who does get admission or appointment by virtue of relaxation of eligibility criteria should be treated as reserved candidate."

42. These observations make it clear that if a reserved category candidate gets selected on the basis of merit, he cannot be treated as a reserved candidate. In the present case, the concessions availed of by the reserved category candidates in age relaxation and fee concession had no relevance to the determination of the *inter se* merit on the basis of the final written test and interview. The ratio of the aforesaid judgment in fact permits reserved category candidates to be included in the General Category Candidates on the basis of merit.

43. Even otherwise, merely quoting the isolated observations in a judgment cannot be treated as a precedent *de hors* the facts and circumstances in which the aforesaid observation was made. Considering a similar proposition in the case of *Union of India & Ors. vs. Dhanwanti Devi and others,* 1996(6) SCC 44, this Court observed as follows:-

"9..... It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. It would, therefore, be not profitable to extract a

sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution."

44. In the case of *State of Orissa & Ors. vs. Md. Illiyas* reported in 2006(1) SCC 275, the Supreme Court reiterates the law, as follows:-

"12..... Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent.

A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament."

45. We may now examine the ratio in *Narasimhan case* (supra) keeping in view the aforesaid principles. On 16.11.1990 an advertisement was issued by Post Graduate Institute of Medical Education and Research (hereinafter referred to as 'PGI') relating to recruitment to the post of Assistant Professor; out of 12 posts, 8 was reserved for Scheduled Caste and 4 posts were reserved for Scheduled Tribes. Since all the available posts were sought to be filled on the basis of reservation, the same were challenged in two writ petitions in the Punjab and Haryana High Court, Chandigarh.

Both the writ petitions were allowed by the learned Single Judge. It was held that the post of Assistant Professor in various disciplines is a single post cadre; reservation for Scheduled Caste and Scheduled Tribes would amount to 100% reservation; accordingly, it is unconstitutional. The said writ petition pertained to admission to Doctoral courses and Ph.D. programme. This was also allowed by the learned Single Judge on the ground that admission to the aforesaid courses on the basis of reservation, undermines efficiency and is detrimental to excellence, rendering it unconstitutional. Appeals against the judgements of the learned Single Judge were dismissed by the High Court. Therefore, three appeals had been filed in this Court. Two issues involved therein were (a) whether reservation in appointment to the post of Assistant Professors in various disciplines in the PGI is violative of Article 14 and 16(1) of the Constitution of India; and (b) whether there could be reservation in admission to the Doctoral courses and Ph.D. programmes. A number of posts of Assistant Professor in diverse disciplines had been advertised. It was not in dispute that the post of Assistant Professor in each Department was a single post cadre, but carried the same scale of pay and grade in all disciplines. It was also not disputed that the posts in different specialties/super-specialties prescribed distinct and different qualifications. The posts were also not transferable from one specialty to another, however, the PGI had clubbed all the posts of Assistant Professor for the purpose of reservation in view of the fact that they are in the same pay scale and have same designation. The High Court had allowed the writ petition by relying on judgement of this Court in *Chakradhar Paswan (Dr.) vs. State of Bihar* (1998) 2 SCC 214. The ratio in the aforesaid judgement was distinguished on the basis of the judgement in *Union of India vs. Madhav,* (1997)2 SCC 332. The aforesaid judgement was reviewed by a larger Bench of five Judges of this Court in the case of *Post Graduate Institute of Medical Education and Research, Chandigarh vs. Faculty Association and others* (1998) 4 SCC 1. On behalf of the review petitioners it was contended that judgement in Narasimhan case (supra)

cannot be supported as in *Madhav case* (supra) the ratio in the decision of *Arati Ray Chaudhary vs. Union of India* 1974 (1) SCC 87 was wrongly appreciated and the ratio was wrongly stated. On the other hand, it was submitted by the learned Solicitor General that the judgement in *Madav case* (supra) indicated the correct principle by giving very cogent reasons. Therefore, no interference is called for against the decision in *Madhav* case (supra) and the other decisions rendered by following the decision. Upon consideration of the rival submissions, it was observed as follows:-

> "29. In Madhav case in support of the view that even in respect of single post cadre reservation can be made for the backward classes by rotation of roster, the Constitution Bench decision in Arati Ray Choudhury case has been relied on. We have already indicated that in Arati case the Constitution Bench did not lay down that in single post cadre, reservation is possible with the aid of roster point. The Court in Arati case considered the applicability of roster point in the context of plurality of posts and in that context the rotation of roster was upheld by the Constitution Bench. The Constitution Bench in Arati case had made it quite clear by relying on the earlier decisions of the Constitution Bench in Balaji case and Devadasan case that 100% reservation was not permissible and in no case reservation beyond 50% could be made. Even the circular on the basis of which appointment was made in Arati Ray Choudhury case was amended in accordance with the decision in Devadasan case. Therefore, the very premise that the Constitution Bench in Arati case has upheld reservation in a single post cadre is erroneous and such erroneous assumption in Madhav case has been on account of misreading of the ratio in Arati Ray Choudhury case. It may be indicated that the latter decision of the Constitution Bench in R.K. Sabharwal case has also proceeded on the footing that reservation in roster can operate provided in the cadre there is plurality of post. It

has also been indicated in Sabharwal decision that the post in a cadre is different from vacancies.

46. From the above it becomes evident that the very premise on the basis of which Madhav case was decided has been held to be erroneous. Thereafter it is further observed in paragraph 30 that "*it also appears that the decision in Indra Sawhney case has also not been properly appreciated in Madhav decision."* The conclusion of the judgement is given in paragraph 37 which is as under:-

"37. We, therefore, approve the view taken in Chakradhar Case that there cannot be any reservation in a single post cadre and we do not approve the reasonings in *Madhav Case, Brij Lal Thakur case* and *Bageshwari Prasad case* upholding reservation in a single post cadre either directly or by device of rotation of roster point. Accordingly, the impugned decision in the case of *Post Graduate Institute of Medical Education & Research, Chandigarh* is, therefore, allowed and the judgment dated 2.5.1997 passed in Civil Appeal No.3175 of 1997 is set aside."

47. Since the judgment and reasoning in *Narasimhan* case (supra) were based on the reasoning in *Madhav* case (supra), we are unable to accept the submissions of the learned counsel for the appellants that the reasoning in the aforesaid judgement is still intact, merely because review was filed only in one appeal out of three. The judgment in *Narasimhan* case (supra) having been set aside, we are unable to accept the submissions of the learned Senior counsel that the reasoning would still be binding as a precedent.

48. Mere reference to the judgement in the cases of *Dr. Preeti Srivastava; Bharati Vidyapeet;* and *Gopal D. Tirthani and others* (supra) would not re-validate the reasoning and ratio in *Narasimhan* case (supra) which has been specifically set aside by the larger Bench in *Faculty Association* case (supra).

We are, therefore, of the opinion that the reliance placed upon the observations in *Narasimhan case* (supra) is wholly misconceived.

49. In any event the entire issue in the present appeals need not be decided on the general principles of law laid down in various judgments as noticed above. In these matters, we are concerned with the interpretation of the 1994 Act, the instructions dated 25.03.1994 and the GO dated 26.2.1999. The controversy herein centres around the limited issue as to whether an OBC who has applied exercising his option as a reserved category candidate, thus, becoming eligible to be considered against a reserved vacancy, can also be considered against an unreserved vacancy if he/she secures more marks than the last candidate in the general category.

50. The State Legislature enacted the UP Public Service (Reservation for Scheduled Castes and Scheduled Tribes) Act, 1993 (hereinafter referred to as the 'Act of 1993'). It was soon replaced by the UP Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Ordinance, 1994. This was to provide a comprehensive enactment for Scheduled Castes, Scheduled Tribes and OBCs. The Ordinance was replaced by the Act of 1994 which came into force w.e.f. 11.12.1993. Section 2 (c) of this Act defines public service and posts as the service and post in connection with the affairs of the State and includes services and posts in local authority, cooperative societies, statutory bodies, government companies, educational institutions owned and controlled by the State Government. It also includes all posts in respect of which reservation was applicable by Government Orders on the commencement of the Act. Section 3 of the Act of 1994 makes provisions with regard to the reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes. Section 3 of the Act of 1994 provides as under:-

"3.Reservation in favour of Scheduled Castes, Scheduled

Tribes and Other Backward Classes- (1) In Public Services and Posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in Sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens.

(a) in the case of Scheduled Castes Twenty-one percent;

(b) in the case of Scheduled Tribes Two per cent;

(c) in the case of other backward Twenty Seven percent; Classes of citizens

Provided that the reservation under Clause (c) shall not apply to the category of other backward classes of citizens specified in Schedule II.

(2)If, even in respect of any year of recruitment, any vacancy reserved for any category of persons under Sub-section (1) remains unfilled, special recruitment shall be made for such number of times, not exceeding three, as may be considered necessary to fill such vacancy from amongst the persons belonging to that category.

(3) If, in the third such recruitment, referred to in Sub-section (2), suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them, such vacancy shall be filled by persons belonging to the Scheduled Castes.

(4) Where, due to non-availability of suitable candidates any of the vacancies reserved under Sub-section (1) remains unfilled even after special recruitment referred to in Sub-section (2), it may be carried over to the next year commencing from first of July, in which recruitment is to be made, subject to the condition that in that year total

reservation of vacancies for all categories of persons mentioned in Sub-section (1) shall not exceed fifty one per cent of the total vacancies.

(5) The State Government shall, for applying the reservation under Sub-section (1), by a notified order, issue a roster which shall be continuously applied till it is exhausted.

(6) If a person belonging to any of the categories mentioned in Sub-section (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under Sub-section (1).

(7) If on the date of commencement of this Act, reservation was in force under Government Orders for appointment to posts to be filled by promotion, such Government Orders shall continue to be applicable till they are modified or revoked."

Section 8 of the Act of 1994 reads as under:-

"8. Concession and relaxation- (1) The State Government may, in favour of the categories of persons mentioned in sub-section (1) of Section 3, by order, grant such concessions in respect of fees for any competitive examination or interview and relaxation in upper age limit, as it may consider necessary.

(2) The Government orders in force on the date of commencement of this Act, in respect of concessions and relaxations, including concession in fees for any competitive examination or interview and relaxation in upper age limit and those relative to reservation in direct recruitment and promotion, in favour of categories of persons referred to in Sub-section (1), which are not inconsistent with the provisions of this Act, shall continue to be applicable till they are modified or revoked, as the case may be."

51. Schedule II gives a list of category of persons to whom reservation under Section 3 (1) would not be available, as they fall within the category of persons commonly known as "creamy layer". A perusal of Section 3 (1) would show that it provides for reservation in favour of the categories mentioned therein at the stage of direct recruitment. The controversy between the parties in these appeals is limited to sub-section (6) of Section 3 and Section 8 of the 1994 Act. It was strenuously argued by Mr.Rao and Dr. Rajeev Dhawan that Section 3 (6) of the Act of 1994 does not permit the reserved category candidates to be adjusted against general category vacancies who had applied as reserved category candidate. In the alternative, learned counsel had submitted that at least such reserved category candidate who had appeared availing relaxation of age available to reserved category candidates cannot be said to have competed at par in Open Competition with General category candidates, and therefore, cannot be adjusted against the vacancies meant for General Category Candidates. We are of the considered opinion that the concessions falling within Section 8 of the Act of 1994 cannot be said to be relaxations in the standard prescribed for qualifying in the written examination. Section 8 clearly provides that the State Government may provide for concessions in respect of fees in the competitive examination or interview and relaxation in upper age limit. Soon after the enforcement of the 1994 Act the Government issued instructions dated 25.03.1994 on the subject of reservation for Scheduled Caste, Scheduled Tribe and other backward groups in the Uttar Pradesh Public Services. These instructions, *inter alia,* provide as under:-

> "4. If any person belonging to reserved categories is selected on the basis of merits in open competition along with general candidates, then he will not be adjusted towards reserved category, that is, he shall be deemed to have been adjusted against the unreserved vacancies. It shall be immaterial that he has availed any facility or relaxation (like relaxation in age limit) available to reserved category."

52. From the above it becomes quite apparent that the relaxation in age limit is merely to enable the reserved category candidate to compete with the general category candidate, all other things being equal. The State has not treated the relaxation in age and fee as relaxation in the standard for selection, based on the merit of the candidate in the selection test i.e. Main Written Test followed by Interview. Therefore, such relaxations cannot deprive a reserved category candidate of the right to be considered as a general category candidate on the basis of merit in the competitive examination. Sub-section (2) of Section 8 further provides that Government Orders in force on the commencement of the Act in respect of the concessions and relaxations including relaxation in upper age limit which are not inconsistent with the Act continue to be applicable till they are modified or revoked. Learned counsel for the appellants had submitted that in the present appeals, the issue is only with regard to age relaxation and not to any other concessions. The vires of Section 3 (6) or Section 8 have not been challenged before us. It was only submitted by the learned Sr. Counsel for the petitioners/appellants that age relaxation gives an undue advantage to the candidate belonging to the reserved category. They are more experienced and, therefore, steal a march over General Category candidates whose ages range from 21 to 25 years. It is not disputed before us that relaxation in age is not only given to members of the Scheduled Castes, Scheduled Tribes and OBCs, but also the dependents of Freedom Fighters. Such age relaxation is also given to Ex-servicemen to the extent of service rendered in the Army, plus three years. In fact, the educational qualifications in the case of Ex-servicemen is only intermediate or equivalent whereas for the General category candidates it is graduation. It is also accepted before us that Ex-servicemen compete not only in their own category, but also with the General category candidates. No grievance has been made by any of the appellants/petitioners

with regard to the age relaxation granted to the Ex-servicemen. Similarly, the dependents of Freedom Fighters are also free to compete in the General category if they secure more marks than the last candidate in the General category. Therefore, we do not find much substance in the submission of the learned counsel for the appellants that relaxation in age "queers the pitch" in favour of the reserved category at the expense of the General category. In our opinion, the relaxation in age does not in any manner upset the "level playing field". It is not possible to accept the submission of the learned counsel for the appellants that relaxation in age or the concession in fee would in any manner be infringement of Article 16 (1) of the Constitution of India. These concessions are provisions pertaining to the eligibility of a candidate to appear in the competitive examination. At the time when the concessions are availed, the open competition has not commenced. It commences when all the candidates who fulfill the eligibility conditions, namely, qualifications, age, preliminary written test and physical test are permitted to sit in the main written examination. With age relaxation and the fee concession, the reserved candidates are merely brought within the zone of consideration, so that they can participate in the open competition on merit. Once the candidate participates in the written examination, it is immaterial as to which category, the candidate belongs. All the candidates to be declared eligible had participated in the Preliminary Test as also in the Physical Test. It is only thereafter that successful candidates have been permitted to participate in the open competition.

53. Mr. Rao had suggested that Section 3 (6) ensures that there is a level playing field in open competition. However, Section 8 lowers the level playing field, by providing concessions in respect of fees for any competitive examination or interview and relaxation in upper age limit. We are unable to accept the aforesaid submission. Section 3 (6) is clear and unambiguous. It clearly provides that a reserved category candidate who gets selected on the basis of merit in open

competition with general category candidates shall not be adjusted against the reserved vacancies. Section 3(1), 3(6) and Section 8 are inter-connected. Expression "open competition" in Section 3 (6) clearly provides that all eligible candidates have to be assessed on the same criteria. We have already noticed earlier that all the candidates irrespective of the category they belong to have been subjected to the uniform selection criteria. All of them have participated in the Preliminary Written Test and the Physical Test followed by the Main Written Test and the Interview. Such being the position, we are unable to accept the submissions of the learned counsel for the petitioners/ appellants that the reserved category candidates having availed relaxation of age are disqualified to be adjusted against the Open Category seats. It was perhaps to avoid any further confusion that the State of UP issued directions on 25.3.1994 to ensure compliance of the various provisions of the Act. Non-compliance by any Officer was in fact made punishable with imprisonment which may extend to period of three months.

54. In view of the above, the appeals filed by the General Category candidates are without any substance, and are, therefore, dismissed.

Civil Appeal Nos……of 2010

(Arising out of SLP (C) NOS. 14078-80 of 2008 and 19100 of 2009)

Leave granted.

55. In the appeal filed by the State of UP it was submitted that against the 67 posts of general category reserved for women only 15 qualified candidates were available. They were duly selected. 52 posts, which remained unfilled, were filled up from the male candidates in accordance with GO dated 26.02.1999. Therefore, there remained no unfilled vacancy in the general category. Therefore, the Division Bench erred in

coming to the conclusion that 52 vacancies have been carried forward contrary to the aforesaid GO. It was further submitted that the learned Single Judge erred by directing the appellants to fill up the vacancy which were excluded from 2% sports quota from the aforesaid selection. According to the appellants, the advertisement clearly mentioned that the vacancies under the sports quota shall be filled separately. Therefore, the learned Single Judge was not justified in directing for filling up of these vacancies from this very selection. According to Mr. Dwivedi, the entire factual position was placed before the learned Single Judge in the counter affidavit which was duly noticed by the learned Single Judge as follows:-

> "In the counter affidavit the respondents have given details pertaining to the candidates belonging to different categories who were finally selected and the percentage of reservation fixed according to number of posts. According to the respondents total posts for Sub Inspector Civil Police were 1231 (male) + 148 female (ten per cent posts were referred to be reserved for women). According to the respondents the advertisement for 1634 posts was published containing 1231 male + 148 (female) Sub Inspector Civil Police and 255 Platoon Commander. It was stated that according to the police of the State 2% posts were reserved for sports men hence against 1478 posts of Sub Inspector 2% i.e. 29 posts of Sub Inspector were earmarked for sports men and five posts of Platoon Commander in sports quota. It was thus stated that 1350 posts were for Sub Inspector civil police and 250 posts were to be filled up by Platoon Commanders. The percentage of reservation against the aforesaid posts have been mentioned in paragraph 4 of the supplementary counter-affidavit which is extracted below.

1-Posts 1350 for Sub Inspector, Civil Police

Sl. No.	Caste/Class	Percentage of reservation	Male	Female 10%	Total
1.	General Caste (Unreserved)	50%	608	67	675
2.	8 Backward Class (reserved)	27%	328	37	365
3.	8 Scheduled Caste (reserved)	21%	255	28	283
4.	84 Scheduled Tribe	2%	24	03	027
		1005	1215	135	1350
5.	Dependent of Freedom Fighters	2%	24	03	27
6.	Ex-servicemen	1%	12	01	13

(2) 250 Posts for Platoon Commander, PAC

Sl. No.	Caste/Class	Percentage of reservation	Male
1.	General Caste Unreserved)	50%	125
2.	Backward Class (reserved)	27%	67
3	8 Scheduled Caste	21%	53
4	84 Scheduled Tribe	2%	05
		100%	250

It has been stated in the supplementary counter affidavit that 608 male belonging to general category were selected, against 67 posts of general category for women only 15 women were available who were selected rest of 52 posts were filled up on merit from male candidates in accordance with the Government order dated 26.02.1999. It was stated that the total 675 posts in general category were filled up and no post of general category is vacant. "

56. Mr. Dwivedi further submits that the learned Single Judge took note of the averments made in paragraph 4 of the supplementary counter affidavit, and yet issued a direction to recalculate the number of posts of general category candidates by applying 2% reservation for sportsmen horizontally and adding 2% posts of sportsmen also while calculating the number of vacancy of general category candidates. Mr. Dwivedi further submits that the learned Single Judge erred in holding that the Government order dated 26.02.1999 does not specifically provide that the post which are not filled up by women candidates are to be filled up from the male candidates. The Division Bench was, therefore, justified that the aforesaid view of the learned Single Judge was apparently erroneous and inconsistent to the specific provisions contained in paragraph 4 of GO dated 26.02.1999. The Division Bench, however, committed a factual error in recording the following conclusion "*we are constrained to hold that the authorities erred in law by leaving the vacancies kept for reserved women candidates unfilled instead of selecting and recommending suitable male candidates of respective category of the same selection"*.

57. Aggrieved against the aforesaid observations, the appellants sought review of the aforesaid judgement which has been erroneously dismissed by simply recording:-

"We have head Sri G.S. Upadhyay, learned Standing counsel appearing for the applicant. It is submitted that this Court's observation at page 65 and 66 in respect of

vacancies reserved for woman and sports quota which remain unfilled needs clarification.

We are of the view that our judgement is clear and it does not suffer from any ambiguity and thus does not require to be clarified or recalled."

58. As noticed earlier, Mr. L.N. Rao and Dr.Dhawan had submitted that the vacancies reserved for women and for the outstanding sportsperson had to be filled by applying "horizontal reservation". No carrying forward of the vacancies was permissible.

59. We have considered the submissions made by the learned counsel. It is accepted by all the learned counsel for the parties that these vacancies had to be filled by applying the principle of horizontal reservation. This was also accepted by the learned Single Judge as well as by the Division Bench. This in consonance with the law laid down by this Court in the case of *Indra Sawhney* case (supra):-

"812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture; all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations – what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The

persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains – and should remain – the same. This is how these reservations are worked out in several States and there is no reason no to continue that procedure."

60. The aforesaid principle of law has been incorporated in the instructions dated 26.02.1999. Paragraphs 2 and 4 of the aforesaid instructions which are relevant are hereunder:-

"2. The reservation will be horizontal in nature i.e. to say that category for which a women has been selected under the aforesaid reservation policy for posts for women in Public Services and on the posts meant for direct recruitment under State Government, shall be adjusted in the same category only;

xxxx xxxx xxxx xxx

4. If a suitable women candidate is not available for the post reserved for women in Public Services and on the posts meant for direct recruitment under State Government, then such a post shall be filled up from amongst a suitable male candidate and such a post shall not be carried forward for future;"

61. The Learned Single Judge whilst interpreting the aforesaid, has observed that it does not specifically provide for posts which are not filled up by women candidates to be filled up from the male candidates. This view is contrary to the specific provision contained in Paragraph 4. The aforesaid provision leaves no matter of doubt that any posts reserved for

women which remain unfilled have to be filled up from amongst suitable male candidates. There is a specific prohibition that posts shall not be carried forward for future. Therefore, the view expressed by the Learned Single Judge cannot be sustained.

62. We may also notice here that in view of the aforesaid provisions, the State has not carried forward any of the general category posts reserved for women and outstanding sportspersons. Furthermore, all the posts remaining unfilled, in the category reserved for women have been filled up by suitable male candidates, therefore, clearly no post has been carried forward. Therefore the mandate in Indra Sawhney (supra) and the G.O. dated 26.2.1999, have been fully coupled with. We are also of the opinion that the conclusion recorded by the Division Bench is without any factual basis. The factual position was brought to the notice of Division Bench in the recall/modification application No.251407 of 2007. However, the recall/ modification application was rejected. We are, therefore, of the opinion that the Division Bench erred in issuing the directions to the appellants to fill in the unfilled vacancies reserved for women candidates from suitable male candidates. This exercise had already been completed by the appellant-State.

63. As noticed earlier, the learned Single Judge despite taking note of the averments made in the supplementary counter affidavit by the State, erroneously issued directions to recalculate the vacancies reserved for outstanding sportspersons. It was specifically pointed out that a separate advertisement had been published for recruitment on the post reserved for outstanding sportsperson. It was also pointed out that all the posts available in the category of sportsmen were filled up in the subsequent selection. No post remained unfilled. Therefore, the conclusion of the learned Single Judge that the (29 SICP) + (5 PC) i.e. 34 posts ought not to have been deducted from the available 1478 posts for the purposes of calculating the number of vacancies available to the general category, was factually erroneous. It is not disputed before us

that the principle of horizontal reservation would also apply for filling up the post reserved for outstanding sportsperson. It is also not disputed before us that there could have been no carry forward of any of the post remaining unfilled in the category of outstanding sportsperson. As a matter of fact, there was no carry forward of the vacancies. They were filled in accordance with the various instructions issued by the Government from time to time. In our opinion the Division Bench erred in law in concluding that since the advertisement did not mention that a separate selection will be held, for the post reserved for sportsmen, the same would not be permissible in law. The deduction of 34 posts for separate selection would not in any manner affect the overall ratio of reservation as provided by law. Furthermore, there is no carry forward of any post. The separate selection is clearly part and parcel of the main selection. In view of the factual situation, we are of the opinion, that the conclusions recorded by the learned Single Judge and the Division Bench with regard to the 34 posts reserved for the outstanding sportsmen category i.e. (29 SICP) + (5 PC) also cannot be sustained.

64. Therefore, the aforesaid appeals filed by the State and the Director General of Police are allowed. The direction issued by the learned Single Judge in the final paragraph as well as the directions issued by the Division Bench in modification of the order of learned Single Judge are set aside.

N.J. Appeals disposed of.

M/S. SOUTHERN TECHNOLOGIES LTD.

v.

JOINT COMMISSIONER OF INCOME TAX, COIMBATORE

(Civil Appeal No. 1337 of 2003)

JANUARY 11, 2010

[S.H. KAPADIA AND AFTAB ALAM, JJ.]

Income Tax Act, 1961:

s.2(24) – Provision for NPA – Debited by NBFC to the P&L Account – In terms of Para 9(4) of the RBI Directions 1998 – Whether the provision for NPA to be treated as income under s.2(24) of the Act – Held: RBI directions deal with the presentation of the provision for NPA in the Balance Sheet of NBFC – The Directions are only disclosure norms and are not related with the computation of total taxable income under IT Act or with the accounting treatment – Not to be treated as "income" under s. 2(24) of the Act – RBI Directions 1998 – Para 9(4).

s.36(1)(vii) – Provision for NPA debited to the P&L Account by NBFC in terms of RBI Directions 1998 – Claim for deduction under s.36(1)(vii) – Entitlement for – Held: Not entitled as the provision does not constitute expense.

s.36(1)(viia) and s.43D – Different treatment for NBFC and banks for deduction under s.36(1)(viia) and s.43D – Constitutional validity of – Held: s.36(1)(viia) provides for deduction not only in respect of "written off" bad debt but in case of banks it extends the allowance also to any Provision for bad and doubtful debts made by banks which incentive is not given to NBFCs – Banks face a huge demand from the industry and at times face liquidity crunch – Thus, the line of business operations of NBFCs and banks are quite different – It is for this reason, apart from social commitments which

banks undertake, that allowances of the nature mentioned in s.36(1)(viia) and 43D are often restricted to banks and not to NBFCs – Neither s.36(1)(viia) nor s.43D violates Article 14 – The test of "intelligible differentia" stands complied with – Constitution of India, 1950 – Article 14, 19(1)(g).

RBI Directions 1998:

Scope and applicability of – Discussed.

Para 9(4) – Analysis of – Held: RBI directions deal with the presentation of provision for NPA in the Balance Sheet of NBFC – The Directions do not recognize the "income" under the mercantile system – IT Act and the 1998 Directions operate in different fields – The primary object of 1998 Directions is prudence, transparency and disclosure – The basis of 1998 Directions is that anticipated losses must be taken into account but expected income need not be taken note of – Therefore, these Directions ensure cash liquidity for NBFCs which are now required to state true and correct profits, without projecting inflated profits – The nature of expenditure under the IT Act cannot be conclusively determined by the manner in which accounts are presented in terms of 1998 Directions – RBI Directions 1998, though deviate from accounting practice as provided in the Companies Act, do not override the provisions of the IT Act – Income Tax Act, 1961 – Companies Act, 1956.

The question which arose for consideration in these appeals filed by Non-Banking Financial Companies (NBFC) is whether the "Provision for NPA", which in terms of RBI Directions 1998 is debited to the P&L Account is to be treated as "income" under Section 2(24) of the Income Tax Act, 1961 while computing the profits and gains of the business under Sections 28 to 43D of the Act.

Dismissing the appeals, the Court

HELD: 1.1. The RBI Directions 1998 deal with Presentation of NPA provision in the Balance Sheet of an NBFC. By Para 9 of 1998 Directions, RBI mandated that every NBFC should disclose in its Balance Sheet, the Provision without netting them from the Income or from the value of the assets and that the provision should be distinctly indicated under the separate heads of accounts as: - (i) provisions for bad and doubtful debts, and (ii) provisions for depreciation in investments in the Balance Sheet under "Current Liabilities and Provisions" and that such provision for each year should be debited to P&L Account so that a true and correct figure of "Net Profit" gets reflected in the financial accounts of the company. The effect of such Disclosure is to increase the current liabilities by showing the provision against the possible Loss on assets classified as NPA. An NPA continues to be an Asset – "Debtors/ Loans and Advances" in the books of NBFC. The entire exercise mentioned in the RBI Directions 1998 is only in the context of Presentation of NPA provisions in the balance sheet of an NBFC and it has nothing to do with computation of taxable income or accounting concepts. [Paras 6 and 7] [420-E; 421-B-F]

1.2. The net profit shown in the P&L Account is the basis for NBFC to accept deposits and declare dividends. Higher the profits higher is the NOF and higher is the increase in the public making deposits in NBFCs. Hence the object of the NBFC is disclosure and provisioning. By insertion (w.e.f. 1.4.1989) of a new Explanation in Section 36(1)(vii), it has been clarified that any bad debt written off as irrecoverable in the account of the assessee will not include any provision for bad and doubtful debt made in the accounts of the assessee. The said amendment indicates that before 1.4.1989, even a provision could be treated as a write off. However, after 1.4.1989, a distinct dichotomy is brought in by way of the said Explanation to Section 36(1)(vii). Consequently, after 1.4.1989, a mere

provision for bad debt would not be entitled to deduction under Section 36(1)(vii). If an assessee debits an amount of doubtful debt to the P&L Account and credits the asset account like sundry debtor's Account, it would constitute a write off of an actual debt. However, if an assessee debits "provision for doubtful debt" to the P&L Account and makes a corresponding credit to the "current liabilities and provisions" on the Liabilities side of the balance sheet, then it would constitute a provision for doubtful debt. In the latter case, assessee would not be entitled to deduction after 1.4.1989. [Paras 7 and 8] [421-G-H; 422-D-H; 423-A]

Commissioner of Income Tax v. Jwala Prasad Tewari **24 ITR 537, relied on.**

Vithaldas H. Dhanjibhai Bardanwala v. Commissioner of Income-Tax, Gujarat-V **130 ITR 95;** *Commissioner of Income-Tax v. Woodward Governor India P. Ltd.,* **312 ITR 254;** *Commissioner of Income-tax, A.P. v. T. Veerabhadra Rao K. Koteswara Rao & Co.* **155 ITR 152, referred to.**

2.1. The three deviations between RBI directions 1998 and Companies Act, are: in the matter of presentation of financial statements under Schedule VI of the Companies Act; in not recognising the "income" under the mercantile system of accounting and its insistence to follow cash system with respect to assets classified as NPA as per its Norms; and in creating a provision for all NPAs summarily as against creating a provision only when the debt is doubtful of recovery under the norms of the Accounting Standards issued by the Institute of Chartered Accountants of India. These deviations prevail over certain provisions of the Companies Act, 1956 to protect the Depositors in the context of Income Recognition and Presentation of the Assets and Provisions created against them. Thus, the P&L Account prepared by NBFC in terms of RBI Directions 1998 does

not recognize "income from NPA" and, therefore, directs a Provision to be made in that regard and hence an "add back. The "add back" is there only in the case of provisions. The Companies Act allows an NBFC to adjust a Provision for possible diminution in the value of asset or provision for doubtful debts against the assets and only the Net Figure is allowed to be shown in the Balance Sheet, as a matter of disclosure. However, the said RBI Directions 1998 mandates all NBFCs to show the said provisions separately on the Liability Side of Balance Sheet, i.e., under the Head "current liabilities and provisions". The purpose of the said deviation is to inform the user of the Balance Sheet, the particulars concerning quantum and quality of the diminution in the value of investment and particulars of doubtful and sub-standard assets. Similarly, the 1998 Directions does not recognize the "income" under the mercantile system and it insists that NBFCs should follow cash system in regard to such incomes. The 1998 Directions has nothing to do with the accounting treatment or taxability of "income" under the IT Act. The two, viz., IT Act and the 1998 Directions operate in different fields. Under the mercantile system of accounting, interest / hire charges income accrues with time. In such cases, interest is charged and debited to the account of the borrower as "income" is recognized under accrual system. However, it is not so recognized under the 1998 Directions and, therefore, in the matter of its Presentation under the said Directions, there would be an add back but not under the IT Act necessarily. [Para 9] [424-C-H; 425-B-F]

2.2. RBI Directions 1998 were issued under Section 45JA of RBI Act. The primary object of the said 1998 Directions is prudence, transparency and disclosure. The basis of the 1998 Directions is that anticipated losses must be taken into account but expected income need not be taken note of. Therefore, these Directions ensure

cash liquidity for NBFCs which are now required to state true and correct profits, without projecting inflated profits. The nature of expenditure under the IT Act cannot be conclusively determined by the manner in which accounts are presented in terms of 1998 Directions. RBI Directions 1998, though deviate from accounting practice as provided in the Companies Act, do not override the provisions of the IT Act. [Para 10] [426-A-E]

2.3. Provision for NPA in terms of RBI Directions 1998 does not constitute expense on the basis of which deduction could be claimed by NBFC under Section 36(1)(vii). Provision for NPAs is an expense for Presentation under 1998 Directions and in that sense it is notional. For claiming deduction under the IT Act, one has to go by the facts of the case (including the nature of transaction). One must keep in mind another aspect. Reduction in NPA takes place in two ways, namely, by recoveries and by write off. However, by making a provision for NPA, there will be no reduction in NPA. Similarly, a write off is also of two types, namely, a regular write off and a prudential write off. If one keeps these concepts in mind, it becomes very clear that RBI Directions 1998 are merely prudential norms. They can also be called as disclosure norms or norms regarding presentation of NPA Provisions in the Balance Sheet. They do not touch upon the nature of expense to be decided by the AO in the assessment proceedings. [Para 10] [428-B-F]

*Advance Accounts by Shukla, Gravel, Gupta***, referred to.**

2.4. "Income Tax is a tax on the "real income", i.e., the profits arrived at on commercial principles subject to the provisions of the Income Tax Act. The real profit can be ascertained only by making the permissible deductions under the provisions of the Income Tax Act.

There is a clear distinction between the real profits and statutory profits. The latter are statutorily fixed for a specified purpose. Therefore, if by Explanation to Section 36(1)(vii) a provision for doubtful debt is kept out of the ambit of the bad debt which is written off then, one has to take into account the said Explanation in computation of total income under the IT Act failing which one cannot ascertain the real profits. This is where the concept of "add back" comes in. A provision for NPA debited to P&L Account under the 1998 Directions is only a notional expense and, therefore, there would be add back to that extent in the computation of total income under the IT Act. Under Section 36(1)(vii) read with the Explanation, a "write off" is a condition for allowance. [Para 11] [429-A-B-E-G; 430-D]

Poona Electric Supply Co. Ltd. v. Commissioner of Income-Tax, Bombay City I, **57 ITR 521;** *Commissioner of Wealth-Tax, Bombay v. Bombay Suburban Electric Supply Ltd.* **103 ITR 384, relied on.**

2.5. Section 36(1)(vii) after 1.4.1989 draws a distinction between write off and provision for doubtful debt. The IT Act deals only with doubtful debt. It is for the assessee to establish that the provision is made as the loan is irrecoverable. However, in view of Explanation which keeps such a provision outside the scope of "written off" bad debt, Section 37 cannot come in. If an item falls under Sections 30 to 36, but is excluded by an Explanation to Section 36(1)(vii) then Section 37 cannot come in. Section 37 applies only to items which do not fall in Sections 30 to 36. If a provision for doubtful debt is expressly excluded from Section 36(1)(vii) then such a provision cannot claim deduction under Section 37 of the IT Act even on the basis of "real income theory. [Para 14] [432-C-F]

3. Section 43D is similar to Section 43B. The reason

for enacting this Section is that interest from bad and doubtful debts in the case of bank and financial institutions is difficult to recover; taxing such income on accrual basis reduces the liquidity of the bank without generation of income. With a view to improve their viability, the IT Act has been amended by inserting Section 43D to provide that such interest shall be charged to tax only in the year of receipt or the year in which it is credited to the P&L Account, whichever is earlier. In the context of Article 14 of the Constitution, the test to be applied is that of "rational/ intelligible differentia" having nexus with the object sought to be achieved. Risk is one of the main concerns which RBI has to address when it comes to NBFCs. NBFCs accept deposits from the Public for which transparency is the key, hence, the RBI Directions/ Norms. On the other hand, as far as banking goes, the weightage, one must place on, is on "liquidity". These two concepts, namely, "risk" and "liquidity" bring out the basic difference between NBFCs and Banks. An asset is rated as NPA when over a period of time it ceases to get converted to cash or generate income and becomes difficult to recover. Therefore, Parliament realized that taxing such "income" on accrual basis without actual recovery would create liquidity crunch, hence, Section 43D came to be enacted. Section 36(1)(viia) provides for a deduction not only in respect of "written off" bad debt but in case of banks it extends the allowance also to any Provision for bad and doubtful debts made by banks which incentive is not given to NBFCs. Banks face a huge demand from the industry particularly in an emerging market economy and at times the credit offtake is so huge that banks face liquidity crunch. Thus, the line of business operations of NBFCs and banks are quite different. It is for this reason, apart from social commitments which banks undertake, that allowances of the nature mentioned in Sections 36(1)(viia) and 43D are often restricted to banks and not

to NBFCs. Even in the case of banks, the Provision for NPA has to be added back and only after such add back that deduction under Section 36(1)(viia) can be claimed by the banks. Neither Section 36(1)(viia) nor Section 43D violates Article 14. The test of "intelligible differentia" stands complied with. [Paras 15 and 16] [432-G-H; 433-A-B; 434-B-H; 435-A-C]

R.K. Garg v. Union of India **(1981) 4 SCC 675;** *Bhavesh D. Parish v. Union of India,* **(2000) 5 SCC 471;** *State of Madras v. V.G. Row* **1952 SCR 597, relied on.**

Barclays Mercantile Business Finance Ltd. v. Mawson (Inspector of Taxes), **2005 (1) All ER 97, referred to.**

Case Law Reference:

130 ITR 95	**referred to**	**Para 3**
312 ITR 254	**referred to**	**Para 4**
155 ITR 152	**referred to**	**Para 8**
24 ITR 537	**relied on**	**Para 8**
57 ITR 521	**relied on**	**Para 11**
103 ITR 384	**relied on**	**Para 11**
(1981) 4 SCC 675	**relied on**	**Para 11**
(2000) 5 SCC 471	**relied on**	**Para 16**
1952 SCR 597	**relied on**	**Para 16**
2005 (1) All ER 97	**referred to**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1337 of 2003.

From the Judgment & Order dated 23.1.2002 of the High Court of Judicature at Madras in Tax Case (Appeal No. 1 of 2002).

WITH

Crl. Appeal No. 154 of 2010 T.C. 5 & 6 of 2005.

Vivek Tankha, ASG, Arvind Datar, Dr. Debi Prosad Pal, Radha Rangaswamy, Pritesh Kapur, J. Balachander, K.V. Mohan, Ananda Sen, Dayan Krishnan, N.L. Rajah, Gautam Narayan, Nikhil Nayyar, Lakshmi Iyengar, Ashok K. Srivastava, Arijit Prasad, C.V. S. Rao, B.V. Balaram Das for the appearing parties.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Leave granted in the Special Leave Petition.

2. **Introduction**

An interesting question of law which arises for determination in these Civil Appeals filed by Non-banking Financial Companies ("NBFCs" for short) is:

> "Whether the Department is entitled to treat the "Provision for NPA", which in terms of RBI Directions 1998 is debited to the P&L Account, as "income" under Section 2(24) of the Income Tax Act, 1961 ("IT Act" for short), while computing the profits and gains of the business under Sections 28 to 43D of the IT Act?"

3. **Facts**

For the sake of convenience, we may refer to the facts in the case of M/s. Southern Technologies Ltd. [Civil Appeal No. 1337 of 2003].

At the outset, it may be stated that categorization of assets into doubtful, sub-standard and loss is not in dispute.

The financial year of the Appellant is July to June and the P&L Account and the Balance Sheet are drawn as on 30th

June. The P&L Account and Balance Sheet is for shareholders, Reserve Bank of India (RBI) and Registrar of Companies (ROC) under the Companies Act, 1956. However, for IT Act, a separate P&L Account is made out for the year ending 31st March and the Balance Sheet as on that date is prepared and submitted to the Assessing Officer(AO) for computing the Total Income under the IT Act, which is not for use of RBI or ROC.

For the accounting year ending 31.03.1998, Assessee debited Rs. 81,68,516/- as Provision against NPA in the P&L Account on three counts, viz., Hire-Purchase of Rs. 57,38,980/-, Bill Discounting of Rs. 12,79,500/- and Loans and Advances of Rs. 31,84,701/-, in all, totalling Rs. 1,02,03,121/- from which AO allowed deduction of Rs. 20,34,605/- on account of Hire Purchase Finance Charges leaving a balance provision for NPA of Rs. 81,68,516/-.

Before the AO, Assessee claimed deduction in respect of Rs. 81,68,516/- under Section 36(1)(vii) being Provision for NPA in terms of RBI Directions 1998 on the ground that Assessee had to debit the said amount to P&L Account [in terms of Para 9(4) of the RBI Directions] reducing its Profits, contending it to be write off. In the alternative, Assessee submitted that consequent upon RBI Directions 1998 there has been diminution in the value of its assets for which Assessee was entitled to deduction under Section 37 as a trading loss. This led to matters going in appeal (s). To conclude, it may be stated that following the judgment of the Gujarat High Court in the case of *Vithaldas H. Dhanjibhai Bardanwala v. Commissioner of Income-Tax, Gujarat-V* 130 ITR 95, the ITAT held that since Assessee had debited the said sum of Rs. 81,68,516/- to the P&L Account it was entitled to claim deduction as a write off under Section 36(1)(vii) which view was not accepted by the High Court, hence, this batch of Civil Appeal (s) are filed by NBFCs.

4. **Submissions**

Appellant made "Provision for NPA" amounting to Rs. 81,68,516/- for the financial year ending 31st March, 1998. This was calculated as per Para 8 of the Prudential Norms 1998. Accordingly, the P & L Account was debited and corresponding amount was shown in the Balance Sheet. The Department sought to add back Rs. 81,68,516/- to the taxable income on the ground that the provision for bad and doubtful debt was not allowable under Section 36(1)(vii) of the IT Act. The appellant claimed that the "Provision for NPA", however, represented "loss" in the value of assets and was, therefore, allowable under Section 37(1) of the IT Act. This claim of the appellant was dismissed on the ground that the provisions of Section 36(1)(vii) of the IT Act could not be by-passed.

The basic submission of the appellant in the lead case before us was that an amount written off was allowable on the basis of "real income theory" as well as on the basis of Section 145 of the IT Act. In this connection, the appellant submitted that it was bound to follow the method of accounting prescribed by RBI in terms of Paras 8 and 9 of the Prudential Norms 1998. As per the said method of accounting, the "Provision for NPA" actually represented depreciation in the value of the assets and, consequently, it is deductible under Section 37(1) of the IT Act. In this connection, appellant placed reliance on the judgment of this Court in *Commissioner of Income-Tax v. Woodward Governor India P. Ltd.,* 312 ITR 254. According to the appellant, applying "real income theory", the "Provision for NPA" which is debited to P&L Account in terms of the RBI Directions 1998 and shown accordingly in the Balance Sheet can never be treated as income under Section 2(24) of the IT Act and added back while computing profits and gains of business under Sections 28 to 43D of the IT Act.

In reply, the Department contended before us that the IT Act is a separate code by itself; that the taxable total income

has to be computed strictly in terms of the provisions of the IT Act; that the Reserve Bank of India Act, 1934 ("RBI Act" for short) operates in the field of monetary and credit system and that the said RBI Act never intended to compute taxable income of NBFC for income tax purposes; and, hence, there was no inconsistency between the two Acts.

According to the Department, RBI has classified all assets on which there is either a default in payment of interest or in repayment of the principal sum for more than the specified period as NPA. According to the Department, NPA does not mean that the asset has gone bad. It still continues to be an asset in the books of the lender, i.e., NBFC under the head "Debtors/Loans and Advances". According to the Department, RBI as a regulator wants NBFCs who accept deposits from the public to provide for a possible loss. The RBI Directions 1998 insists that non-payment on Due Date alone is sufficient for creation of a "Provision for NPA" (hereinafter referred to as "provision"). In this connection, it was submitted that even if a borrower repays his entire loan liability subsequent to the closing of the Books on 31st March, say on 10th April, even then as per the RBI Directions 1998, a provision has to be created to cover a possible loss. According to the Department, even applying "real income theory" as propounded on behalf of the assessee(s), the said theory presupposes that not only income but even expenditure or loss incurred should be real. According to the Department, "Provision for NPA" is definitely not an expenditure nor a loss, it is only a provision against possible loss and, therefore, it is not open to the appellant(s) to claim deduction for such provision under Section 36(1)(vii) of the IT Act, as it stood at the material time. The only object behind RBI insisting on an NBFC to make "Provision for NPA" compulsorily is to enable NBFC to state its profits only after compulsorily creating a "Provision for NPA" because it is the net profit of NBFC which is the base to determine its capacity to accept deposits from the public. More the profit more they can accept deposits. According to the Department, vide RBI

Directions 1998, RBI tries to bring out the Profit in the P&L Account after providing for NPA which profit will be the minimum profit that the company would make so that the real or true and correct profit earned by an NBFC shall not be anything lesser than what is disclosed. According to the Department, the said "Provision for NPA" is in substance a "Reserve", which has been named as a "Provision" in the RBI Directions 1998 to protect the depositors of NBFC. According to the Department, even under accounting concepts, a provision for possible diminution in value of an asset is a reserve. In this connection, the Department has given three illustrations – Depreciation Reserve, Reserve against Long Term Investments, and Reserve against bad and doubtful debts. According to the Department, as per accounting principles, reserves are normally adjusted against the assets and only a net figure is shown in the balance sheet. However, RBI, in the case of NBFC, has deviated from the above accounting concept by insisting that the provision for NPA shall not be netted against the assets and should be shown separately on the liability side of the balance sheet so as to inform its user about the quantum and quality of NPA, in a more transparent manner. To this extent, there is a deviation from Part I of Schedule VI to the Companies Act, 1956.

Coming to the scope of Section 145 of the IT Act, it was submitted by the Department that Section 145 occurs in Chapter IV of the IT Act which deals with computation of total income. It indicates how the taxable income should be arrived at vide Sections 14 to 59. It is not an assessment Section. Section 145 helps to arrive at taxable total income. It nowhere indicates that the net profit arrived at shall be by adopting the accounting standards of Institute of Chartered Accountants of India (ICAI). It is the 1998 Directions which *inter alia* states that NBFC shall not recognize any income from an asset classified as NPA on mercantile system of accounting and that such Income shall be recognized only on cash basis. In the case under appeal, the Assessing Officer, in his wisdom, has not

considered Rs.20,34,605/- as "income" (being income accrued on mercantile system of accounting) and did not include the same in computing the total income.

According to the Department, under the accounting concepts, a provision is a charge against a profit, whereas, a reserve is an appropriation of profit. According to the Department, the RBI Directions 1998 are not in conflict with the provisions of the IT Act, however, they constitute deviations to the presentation of the financial statements indicated in Part I of Schedule VI to the Companies Act, 1956. For example, under the 1998 Directions, Income from NPA under mercantile system of accounting is not recognized and to that extent it insists on NBFCs following the cash system of accounting. Thus, the P&L Account prepared by NBFC shall not recognise income from NPA but it shall create a provision by debit to the P&L Account on all NPAs. Similarly, under the said 1998 Directions, there is insistence on creation of a provision in respect of all NPAs summarily as against creation of a provision only when the debt is doubtful of recovery. These deviations are made mandatory with the paramount object of protecting the interest of the depositors, even though they are against accounting concepts. To the extent of these above mentioned specific deviations, the RBI Directions 1998 shall prevail over the provisions of the Companies Act (See Section 45Q of the RBI Act). Therefore, according to the Department, inconsistency in terms of Section 45Q of the RBI Act is only with respect to the Companies Act, 1956 so far as it relates to Income recognition and Presentation of assets and Presentation of Provision/ Reserve created against NPAs and not with the IT Act. According to the Department, if the argument that Section 45Q prevails over the IT Act is accepted, then various incomes like dividend income, agricultural income, profit on sale of depreciable assets, capital gains, etc. which items are all credited to P&L Account, but, which are exempted under the IT Act would become taxable income which is not the intention of Section 45Q of the IT Act. That, the said 1998

Directions cannot be taken as an excuse by the NBFC to compute lower taxable income under the IT Act.

In rejoinder, it has been submitted on behalf of the appellant(s) /assessee(s) that even if "Provision for NPA" is treated to be in the nature of a reserve still it will not convert a statutory debit in the P&L Account or a statutory charge in the said Account as "real income". It is contended that under Section 145 of the IT Act, NBFCs are bound to follow the method of accounting prescribed by RBI. Hence, a statutory debit or a statutory charge under RBI Directions 1998 issued under Section 45JA of the RBI Act cannot form part of the "real income" and, consequently, it cannot be subjected to tax under the IT Act. According to the appellant(s), the "real income theory" is concerned with determining whether a particular amount can be treated as taxable income based on commercial principles. According to the appellant(s), the statutory provision for NPA represents an amount forming part of the value of the asset that the assessee is entitled to, but not likely to receive. According to the appellant(s), they are in the business of lending of money, financing by way of hire purchase, leasing or bill discounting. According to the appellant(s), on default, interest as well as the principal remains unrealized and, thus, the "provision for NPA" provides for a diminution in the amounts realizable (assets) and, consequently, "provision for NPA" cannot be treated as "real income" and added back to the taxable income of NBFCs, as is sought to be done by the Department. According to the appellant(s), they have never asked for deduction under Section 36(1)(vii) of the IT Act. It is the case of the appellant(s) that if one applies "real income theory", "Provision for NPA" cannot be added back to the income of NBFCs, as is sought to be done by the Department. It is this "add back" which is impugned in the present case. According to the appellant(s), when RBI Act has specifically used the words "provision", "reserves", "assets", etc., it is not permissible to treat a "provision for NPA" mentioned in the 1998 Directions as a "reserve" for income tax proceedings.

According to the appellant(s), the RBI Directions 1998 provides for a mandatory method of accounting. It inter alia mandates Income recognition of NPA on cash basis and not on mercantile basis as required by Section 209(3) of the Companies Act. It lays down, vide para 8, the "provisioning requirements" which have got to be followed and the aggregate amount whereof has got to be debited to the P&L Account. According to appellant(s), para 8 of the 1998 Directions shows that the "Provision for NPA" takes into account diminution in value of the security charge, hence, it was, under Section 37 of the IT Act, entitled to deduction. According to the appellant(s), Section 45IA of the RBI Act defines "NOF". The Explanation (I) to the said Section defines "NOF" as the aggregate of paid-up equity capital and free reserves. According to the appellant(s), if "Provision for NPA" is treated as reserve, it would increase the NOF of the company and, consequently, the higher the provision for NPAs, higher will be the net worth of the company which could never have been the intention or objective of the RBI Directions 1998. Further, according to the appellant(s), in view of a statutory reserve fund which has to be created by all NBFCs under Section 45IC, the "Provision for NPA" can never be treated as one more another type of reserve.

Coming to the accounting treatment, the appellant has given us the following chart to bring out the difference between "provision" and "reserve":

S.No.	Provision	Reserve
1.	Provision is a charge or debit to the P& L Account.	Reserve is an appropriation of profits.
2.	Provision is made against gross receipts in the P & L A/c irrespective of whether there is profit or loss.	No reserve can be created in accounting year when there is a loss.

	Provisions are a pretax charge to P & L account irrespective of whether the NBFC makes a net profit or not.	Reserves are created out of post-tax profits, by way of appropriation, subject to there being adequate net profit.
3.	If NPA is Rs. 10 lakhs, then the accounting entry is: P&L A/c Dr. 10,00,000 To Prov. for NPA 10,00,000 If there is a loss, the debit of Rs. 10,00,000/- will increase the quantum of loss. This aggregate loss will be shown on the assets side as debit balance of P&L A/c.	If NPA is Rs. 10 lakhs, and there is a loss, no "Reserve can be created.
4.	Provision is based on a one-stage entry: P&L A/c Dr. To Prov. for Excise/ PF/ Gratuity/ etc.	Reserves are based on a two stage accounting process under the horizontal system. If the profits are Rs. 10 crores, the Board of Directors may transfer Rs. 8 crores to P&L Appropriation A/c for taxation, dividend and reserve. The balance will be transferred to credit balance of P&L A/c. The entries will be as follows:- **Stage 1:** P&L A/c Dr. 10.00 To P&L Appropriation A/c 8.00 To P& L A/c 2.00 **Stage 2:** P&L Appropriation A/c 8.00 To Prov. Taxation 4.00 To Prov. for Dividends 2.00 To Transfer to Reserve 2.00 Thus, if there are no profits, there can be no debit to the reserve. Under the vertical system, "profits available for appropriation" are post-tax profits. Appropriation to reserves can be made only when there is a surplus.
5.	Under Clause 7(1)(a) of Part – III of Schedule VI of Companies Act, 1956 – provision, inter alia, is to provide for depreciation, renewals or diminution in value of assets or to provide for any taxation.	Under Clause 7(1)(b) of Part – III of Schedule – VI of Companies Act, 1956 – reserve does not include any amount written off or retained by providing for depreciation, renewals, etc. or providing for any known liability. Under Part – I of Schedule – VI, 'reserve' can be made in respect of capital reserves, capital redemption, share premium, etc.
6.	Provision cannot be used to declare dividend, etc.	Reserves can be utilized to pay dividends/ bonus, unless there is a statutory bar.

Lastly, on the question of adding back to the taxable income, it has been submitted on behalf of the appellant(s) that the profits arrived as per the P&L Account under the Companies Act are after debiting several provisions under various accounting heads. There are several statutory liabilities like provision for excise duty, gratuity, provident fund, ESI, etc. The IT Act disallows several such provisions under Sections 40A(7), 43B, 40 and 40A. Such disallowances alone could be added back to the taxable income. The IT Act does not disallow a provision for NPA; that, unless the "provision for NPA" is specifically disallowed under the IT Act, the same cannot be added back and, hence, such a provision for NPA cannot be added back in computing the taxable income. According to the appellant, the purpose behind prescribing RBI Directions 1998 is to ensure that members of the public and shareholders of the company obtain a true picture of the financial health of the company. Its purpose is not to create a notional income. According to the appellant, in the present case, only a method of accounting has been prescribed by RBI. This accounting method cannot be used by the Department to assume existence of an income when such income does not really exist and, consequently, add back to the taxable income is not contemplated by the IT Act, nor is it contemplated under the "real income theory", however, if at all it has to be taken into account, it should be made allowable as a loss under Section 37(1) of the IT Act.

5. **Relevant Provisions**

(a) Of RBI Act, 1934

Chapter IIIB - PROVISIONS RELATING TO NON-BANKING INSTITUTIONS RECEIVING DEPOSITS AND FINANCIAL INSTITUTIONS

Section 45I - Definitions

In this Chapter, unless the context otherwise requires,-

(a) *"business of a non-banking financial institution"* means carrying on the business of a financial institution referred to in clause (c) and includes business of a non-banking financial company referred to in clause (f);

(aa) *"company"* means a company as defined in section 3 of the Companies Act, 1956 (1 of 1956), and includes a foreign company within the meaning of section 591 of that Act;

(c) *"financial institution"* means any non-banking institution which carries on as its business or part of its business any of the following activities, namely:-

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own;

(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature;

(iii) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in clause (c) of section 2 of the Hire-Purchase Act, 1972 (26 of 1972);

(iv) the carrying on of any class of insurance business;

(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being in force in any State, or any business, which is similar thereto;

(vi) collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lump sum or otherwise, by way of subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or king, or disbursing monies in any other way, to persons from whom monies are collected or to any other person,

but does not include any institution, which carries on as its principal business,-

(a) agricultural operations; or

(aa) industrial activity; or

Explanation.-For the purposes of this clause, "industrial activity" means any activity specified in sub-clauses (i) to (xviii) of clause (c) of section 2 of the Industrial Development Bank of India Act, 1964 (18 of 1964);

(b) the purchase, or sale of any goods (other than securities) or the providing of any services; or

(c) the purchase, construction or sale of immovable property, so, however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales of immovable property by other persons;

45-IA. Requirement of registration and net owned fund

*** *** ***

Explanations.-For the purposes of this section,-

(I) *"net owned fund"* means-

(a) the aggregate of the paid-up equity capital and free reserves as disclosed in the latest balance-sheet of the company after deducting there from-

(i) accumulated balance of loss; (ii) deferred revenue expenditure; and (iii) other intangible assets; and

(b) further reduced by the amounts representing-

(1) investments of such company in shares of- (i) its subsidiaries; (ii) companies in the same group; (iii) all other

non-banking financial companies; and

(2) the book value of debentures, bonds, outstanding loans and advances (including hire-purchase and lease finance) made to, and deposits with,-

(i) subsidiaries of such company; and

(ii) companies in the same group,

to the extent such book value exceeds ten per cent, of (a) above.

45-IC. Reserve fund

(1) Every non-banking financial company shall create a reserve fund the transfer therein a sum not less than twenty per cent of its net profit every year as disclosed in the profit and loss account and before any dividend is declared.

(2) No appropriation of any sum from the reserve fund shall be made by the non-banking financial company except for the purpose as may be specified by the Bank from time to time and every such appropriation shall be reported to the Bank within twenty-one days from the date of such withdrawal:

Provided that the Bank may, in any particular case and for sufficient cause being shown, extend the period of twenty-one days by such further period as it thinks fit or condone any delay in making such report.

(3) Notwithstanding anything contained in sub-section (1), the Central Government may, on the recommendation of the Bank and having regard to the adequacy of the paid-up capital and reserves of a non-banking financial company in relation to its deposit liabilities, declare by order in writing that the provisions of sub-section (1) shall not be applicable to the non-banking financial company for

such period as may be specified in the order:

Provided that no such order shall be made unless the amount in the reserve fund under sub-section (1) together with the amount in the share premium account is not less than the paid-up capital of the non-banking financial company.

45JA. Power of Bank to determine policy and issue directions

(1) If the Bank is satisfied that, in the public interest or to regulate the financial system of the country to its advantage or to prevent the affairs of any non-banking financial company being conducted in manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any of the non-banking financial companies relating to income recognition, accounting standards, making of proper provision for bad and doubtful debts, capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a non-banking financial company or a class of non-banking financial companies or non-banking financial companies generally, as the case may be, and such non-banking financial companies shall be bound to follow the policy so determined and the direction so issued.

(2) Without prejudice to the generality of the powers vested under subsection (1), the Bank may give directions to non-banking financial companies generally or to a class of non banking financial companies or to any non-banking financial company in particular as to-

(a) the purpose for which advances or other fund based or non-fund based accommodation may not be made; and

(b) the maximum amount of advances of other financial accommodation or investment in shares and other securities which, having regard to the paid-up capital, reserves and deposits of the non-banking financial company and other relevant considerations, may be made by that non-banking financial company to any person or a company or to a group of companies.

45K - Power of Bank to collect information from non-banking institutions as to deposits and to give directions

(1) The Bank may at any time direct that every non-banking institution shall furnish to the Bank, in such form, at such intervals and within such time, such statements information or particulars relating to or connected with deposits received by the non-banking institution, as may be specified by the Bank by general or special order.

(2) Without prejudice to the generality of the power vested in the Bank under sub-section (1), the statements, information or particulars to be furnished under sub-section (1), may relate to all or any of the following matters, namely, the amount of the deposits, the purposes and periods for which, and the rates of interest and other terms and conditions on which, they are received.

(3) The Bank may, if it considers necessary in the public interest so to do, give directions to non-banking institutions either generally or to any non-banking institution or group of non-banking institutions in particular, in respect of any matters relating to or connected with the receipt of deposits, including the rates of interest payable on such deposits, and the periods for which deposits may be received.

(4) If any non-banking institution fails to comply with any direction given by the Bank under sub-section (3), the Bank may prohibit the acceptance of deposits by that non-

banking institution.

[***]

(6) Every non-banking institution receiving deposits shall, if so required by the Bank and within such time as the Bank may specify, cause to be sent at the cost of the non-banking institution a copy of its annual balance-sheet arid profit and loss account or other annual accounts to every person from whom the non-banking institution holds, as on the last day of the year to which the accounts relate, deposits higher than such sum as may be specified by the Bank.

45Q - Chapter IIIB to override other laws

The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

(b) Of Notification No. DFC.119/DG(SPT)-98 dated 31st January, 1998 issued by RBI under Section 45JA

RBI, having considered it necessary in public interest and being satisfied that for the purpose of enabling the Bank to regulate the credit system, it was necessary to issue directions relating to Prudential Norms, gives to every Non-Banking Financial Company the following directions. The said directions are called as "NBFCs Prudential Norms (Reserve Bank) Directions, 1998":

Definitions

2. (1) For the purpose of these directions, unless the context otherwise requires :-

*** *** ***

(iv) *"doubtful asset"* means -

(a) a term loan, or

(b) a lease asset, or

(c) a hire purchase asset, or

(d) any other asset,

which remains a substandard asset for a period exceeding two years;

(xii) with effect from March 31, 2003, *'non-performing asset'* (referred to in these directions as "NPA") means:

(a) an asset, in respect of which, interest has remained overdue for a period of six months or more;

(b) a term loan inclusive of unpaid interest, when the instalment is overdue for a period of six months or more or on which interest amount remained overdue for a period of six months or more;

(c) a demand or call loan, which remained overdue for a period of six months or more from the date of demand or call or on which interest amount remained overdue for a period of six months or more;

(d) a bill which remains overdue for a period of six months or more;

(e) the interest in respect of a debt or the income on receivables under the head 'other current assets' in the nature of short term loans/advances, which facility remained overdue for a period of six months or more;

(f) any dues on account of sale of assets or services rendered or reimbursement of expenses incurred, which remained overdue for a period of six months or more;

(g) the lease rental and hire purchase instalment, which has

become overdue for a period of twelve months or more;

(h) in respect of loans, advances and other credit facilities (including bills purchased and discounted), the balance outstanding under the credit facilities (including accrued interest) made available to the same borrower/beneficiary when any of the above credit facilities becomes non-performing asset:

Provided that in the case of lease and hire purchase transactions, an NBFC may classify each such account on the basis of its record of recovery;

"non-performing asset" (referred to in these directions as "NPA") means :-

(a) an asset, in respect of which, interest has remained past due for six months;

(b) a term loan inclusive of unpaid interest, when the instalment is overdue for more than six months or on which interest amount remained past due for six months;

(ba) a demand or call loan, which remained overdue for six months from the date of demand or call or on which interest amount remained past due for a period of six months;

(c) a bill which remains overdue for six months;

(d) the interest in respect of a debt or the income on receivables under the head 'other current assets' in the nature of short term loans/advances, which facility remained over due for a period of six months;

(e) any dues on account of sale of assets or services rendered or reimbursement of expenses incurred, which remained overdue for a period of six months;

(f) the lease rental and hire purchase instalment, which has

become overdue for a period of more than twelve months;

(g) In respect of loans, advances and other credit facilities (including bills purchased and discounted), the balance outstanding under the credit facilities (including accrued interest) made available to the same borrower/beneficiary when any of the above credit facilities becomes non-performing asset :

Provided that in the case of lease and hire purchase transactions, an NBFC may classify each such account on the basis of its record of recovery;"

(xiii) *"owned fund"* means paid up equity capital, preference shares which are compulsorily convertible into equity, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of asset, excluding reserves created by revaluation of asset, as reduced by accumulated loss balance, book value of intangible assets and deferred revenue expenditure, if any;

(xv) *"standard asset"* means the asset in respect of which, no default in repayment of principal or payment of interest is perceived and which does not disclose any problem nor carry more than normal risk attached to the business;

(xvi) *"sub-standard assets"* means -

(a) an asset which has been classified as non-performing asset for a period of not exceeding two years;

(b) an asset where the terms of the agreement regarding interest and/or principal have been renegotiated or rescheduled after commencement of operations, until the expiry of one year of satisfactory performance under the renegotiated or rescheduled terms;

Income recognition

3. (1) The income recognition shall be based on recognised accounting principles.

(2) Income including interest/discount or any other charges on NPA shall be recognised only when it is actually realised. Any such income recognised before the asset became non-performing and remaining unrealised shall be reversed. (Effective from May 12, 1998)

(3) In respect of hire purchase assets, where instalments are overdue for more than 12 months, income shall be recognised only when hire charges are actually received. Any such income taken to the credit of profit and loss account before the asset became non-performing and remaining unrealised, shall be reversed.

(4) In respect of lease assets, where lease rentals are overdue for more than 12 months, the income shall be recognised only when lease rentals are actually received. The net lease rentals taken to the credit of profit and loss account before the asset became non-performing and remaining unrealised shall be reversed.

Explanation For the purpose of this paragraph, 'net lease rentals' mean gross lease rentals as adjusted by the lease adjustment account debited/credited to the profit and loss account and as reduced by depreciation at the rate applicable under Schedule XIV of the Companies Act, 1956 (1 of 1956).

Accounting standards

5. Accounting Standards and Guidance Notes issued by the Institute of Chartered Accountants of India (referred to in these directions as "ICAI") shall be followed insofar as they are not inconsistent with any of these directions.

Provisioning requirements

8. Every NBFC shall, after taking into account the time lag between an account becoming non-performing, its recognition as such, the realisation of the security and the erosion over time in the value of security charged, make provision against sub-standard assets, doubtful assets and loss assets as provided hereunder :-

Loans, advances and other credit facilities including bills purchased and discounted

(1) The provisioning requirement in respect of loans, advances and other credit facilities including bills purchased and discounted shall be as under :

(i) Loss Assets	*The entire asset shall be written off.* If the assets are permitted to remain in the books for any reason, 100% of the outstandings should be provided for;
(ii) Doubtful Assets	(a) *100% provision to the extent to which the advance is not covered by the realisable value of the security* to which the NBFC has a valid recourse shall be made. The realisable value is to be estimated on a realistic basis;
	(b) In addition to item (a) 11 above, depending upon the period for which the asset has remained doubtful, provision to the extent of 20% to 50% of the secured portion (i.e. estimated realisable

value of the outstandings) shall be made on the following basis : -

Period for which the asset has been considered as doubtful	*% of provision*
Upto one year	20
One to three years	30
More than three years	50
iii) Sub-standard assets	A general provision of 10% of total outstandings shall be made.

Lease and hire purchase assets

(2) The provisioning requirements in respect of hire purchase and leased assets shall be as under:-

Hire purchase assets

(i) In respect of hire purchase assets, the total dues (overdue and future instalments taken together) as reduced by

(a) the finance charges not credited to the profit and loss account and carried forward as unmatured finance charges; and

(b) the depreciated value of the underlying asset,

shall be provided for.

Explanation

For the purpose of this paragraph,

(1) the depreciated value of the asset shall be notionally computed as the original cost of the asset to be reduced by depreciation at the rate of twenty per cent per annum on a straight line method; and

(2) in the case of second hand asset, the original cost shall be the actual cost incurred for acquisition of such second hand asset…"

Additional provision for hire purchase and leased assets

(ii) In respect of hire purchase and leased assets, additional provision shall be made as under :

(a) Where any amounts of hire charges or lease rentals are overdue upto 12 months

Nil

Sub-standard assets:

(b) where any amounts of hire charges or lease rentals are overdue for more than 12 months but upto 24 months
10 percent of the net book value

Doubtful assets:

(c) where any amounts of hire charges or lease rentals are overdue for more than 24 months but upto 36 months
40 percent of the net book value

(d) where any amounts of hire charges or lease rentals are overdue for more than 36 months but upto 48 months
70 percent of the net book value

Loss assets

(e) where any amounts of hire charges or lease rentals are overdue for more than 48 months

100 percent of the net book value

(iii) On expiry of a period of 12 months after the due date of the last instalment of hire purchase/leased asset, the entire net book value shall be fully provided for.

NOTES :

1. The amount of caution money/margin money or security deposits kept by the borrower with the NBFC in pursuance of the hire purchase agreement may be deducted against the provisions stipulated under clause (i) above, if not already taken into account while arriving at the equated monthly instalments under the agreement. The value of any other security available in pursuance to the hire purchase agreement may be deducted only against the provisions stipulated under clause (ii) above.

2. The amount of security deposits kept by the borrower with the NBFC in pursuance to the lease agreement together with the value of any other security available in pursuance to the lease agreement may be deducted only against the provisions stipulated under clause (ii) above.

3. *It is clarified that income recognition on and provisioning against NPAs are two different aspects of* prudential norms and provisions as per the norms are required to be made on NPAs on total outstanding balances including the depreciated book value of the leased asset under reference after adjusting the balance, if any, in the lease adjustment account. *The fact that income on an NPA has not been recognised cannot be taken as reason for not making provision.*

4. An asset which has been renegotiated or rescheduled as referred to in paragraph (2) (xvi) (b) of these directions shall be a sub-standard asset or continue to remain in the

same category in which it was prior to its renegotiation or reschedulement as a doubtful asset or a loss asset as the case may be. Necessary provision is required to be made as applicable to such asset till it is upgraded.

5. The balance sheet for the year 1999-2000 to be prepared by the NBFC may be in accordance with the provisions contained in sub-paragraph (2) of paragraph 8.

6. All financial leases written on or after April 1, 2001 attract the provisioning requirements as applicable to hire purchase assets.

Disclosure in the balance sheet

9. (1) Every NBFC shall separately *disclose in its balance sheet the provisions made* as per paragraph 8 above *without netting them from the income or against the value of assets.*

(2) The provisions shall be distinctly indicated under separate heads of accounts as under :-

(i) *provisions for bad and doubtful debts;* and

(ii) *provisions for depreciation in investments.*

(3) Such provisions *shall not be appropriated from the general provisions and loss reserves held,* if any, by the NBFC.

(4) *Such provisions for each year shall be debited to the profit and loss account*. The excess of provisions, if any, held under the heads general provisions and loss reserves may be written back without making adjustment against them.

Schedule to the balance sheet

9BB. Every NBFC shall append to its balance sheet prescribed under the Companies Act, 1956, the particulars in the format as set out in the schedule annexed hereto.

(c) Of Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances dated July 1, 2009

2. *DEFINITIONS*

2.1 *Non performing Assets*

2.1.1 An asset, including a leased asset, becomes non performing when it ceases to generate income for the bank.

2.1.2 A non performing asset (NPA) is a loan or an advance where;

i. interest and/ or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,

ii. the account remains 'out of order' as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),

iii. the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,

iv. the instalment of principal or interest thereon remains overdue for two crop seasons for short duration crops,

v. the instalment of principal or interest thereon remains overdue for one crop season for long duration crops,

vi. the amount of liquidity facility remains outstanding for more than 90 days, in respect of a securitisation

transaction undertaken in terms of guidelines on securitisation dated February 1, 2006.

vii. in respect of derivative transactions, the overdue receivables representing positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

3. INCOME RECOGNITION

3.1 *Income Recognition Policy*

3.1.1 The policy of income recognition has to be objective and based on the record of recovery. Internationally *income from nonperforming assets (NPA) is not recognised on accrual basis but is booked as income only when it is actually received.* Therefore, the banks should not charge and take to income account interest on any NPA.

4. *ASSET CLASSIFICATION*

4.1 *Categories of NPAs*

Banks are required to classify nonperforming assets further into the following three categories based on the period for which the asset has remained nonperforming and the realisability of the dues:

i. Substandard Assets

ii. Doubtful Assets

iii. *Loss Assets*

4.1.1 *Substandard Assets*

With effect from 31 March 2005, a substandard asset would be one, which has remained NPA for a period less than or equal to 12 months. In such cases, the current net

worth of the borrower/ guarantor or the current market value of the security charged is not enough to ensure recovery of the dues to the banks in full. In other words, such an asset will have well defined credit weaknesses that jeopardise the liquidation of the debt and are characterised by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

4.1.2. *Doubtful Assets*

With effect from March 31, 2005, an asset would be classified as doubtful if it has remained in the substandard category for a period of 12 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as substandard, with the added characteristic that the weaknesses make collection or liquidation in full, – on the basis of currently known facts, conditions and values – highly questionable and improbable.

4.1.3 *Loss Assets*

A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.

5 *PROVISIONING NORMS*

5.1 *General*

5.1.1 The primary responsibility for making adequate provisions for any diminution in the value of loan assets, investment or other assets is that of the bank managements and the statutory auditors. The

assessment made by the inspecting officer of the RBI is furnished to the bank to assist the bank management and the statutory auditors in taking a decision in regard to making adequate and necessary provisions in terms of prudential guidelines.

(d) Of Income Tax Act, 1961

Section 36 - Other deductions [as it stood at the material time]

(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 –

(vii) subject to the provisions of sub-section (2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year:

Provided that in the case of an assessee to which clause (viia) applies, the amount of the deduction relating to any such debt or part thereof shall be limited to the amount by which such debt or part thereof exceeds the credit balance in the provision for bad and doubtful debts account made under that clause.

Explanation.- For the purposes of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the assessee shall not include any provision for bad and doubtful debts made in the accounts of the assessee.

(viia) in respect of any provision for bad and doubtful debts made by –

(a) a scheduled bank not being a bank incorporated by or under the laws of a country outside India or a non-scheduled bank, an amount not exceeding five per cent of the total income (computed before making any deduction under this clause and Chapter VIA) and an amount not exceeding ten per cent of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner.

43D - Special provision in case of income of public financial institutions, public companies, etc.

Notwithstanding anything to the contrary contained in any other provision of this Act, -

(a) in the case of a public financial institution or a scheduled bank or a State financial corporation or a State industrial investment corporation, the income by way of interest in relation to such categories of bad or doubtful debts as may be prescribed2 having regard to the guidelines issued by the Reserve Bank of India in relation to such debts;

(b) in the case of a public company, the income by way of interest in relation to such categories of bad or doubtful debts as may be prescribed having regard to the guidelines issued by the National Housing Bank in relation to such debts,

shall be chargeable to tax in the previous year in which it is credited by the public financial institution or the scheduled bank or the State financial corporation or the State industrial investment corporation or the public company to its profit and loss account for that year or, as the case may be, in which it is actually received by that

institution or bank or corporation or company, whichever is earlier.

6. **Reasons for RBI Directions 1998**

On 31.01.1998, RBI Directions 1998 introduced a new regulatory framework involving prescription of Disclosure norms for NBFCs which are deposit taking to ensure that these NBFCs function on sound and healthy lines. Regulatory and supervisory attention was focussed on the deposit taking NBFCs so as to enable the RBI to discharge its responsibilities to protect the interest of the depositors. These NBFCs are subjected to prudential regulations on various aspects such as income recognition; asset classification and provisioning, etc.

The basis of every business is that anticipated losses must be taken into account but expected income need not be taken note of. This is the basis of the RBI Directive of 1998 as it is closer to reality of cash liquidity that prevents NBFC from collapse.

The RBI Directions 1998 deal with Presentation of NPA provision in the Balance Sheet of an NBFC. Before 1998, the Balance Sheet and P&L Account of an NBFC were required to be prepared in accordance with Parts I and II of Schedule VI as provided under Section 211 of the Companies Act, 1956 like any other company. Schedule VI Part I of the Companies Act, 1956 specifically provides that Provision for doubtful debts should be reduced from the gross amount of debtors and advances. NBFCs were following the same practice of disclosure in their audited financial statements as done by the Company. Therefore, vide Para 9(1) of 1998 Directions, NBFCs are now obliged to disclose in the Balance Sheet the Provision for NPAs without netting them from the income or value of the assets. As per sub-para 2 of Para 9, “the provisions shall be distinctly indicated under separate heads of accounts” on the Liability side of the balance sheet under the caption

"current liabilities and provisions".

It needs to be emphasized that the said 1998 Directions are only Disclosure Norms. They have nothing to do with computation of Total Taxable Income under the IT Act or with the accounting treatment. The said 1998 Directions only lay down the manner of presentation of NPA provision in the balance sheet of an NBFC.

7. **Analysis of Para 9 of RBI Directions 1998**

Vide Para 9, RBI has mandated that every NBFC shall disclose in its Balance Sheet the Provision without netting them from the Income or from the value of the assets and that the provision shall be distinctly indicated under the separate heads of accounts as: - (i) provisions for bad and doubtful debts, and (ii) provisions for depreciation in investments in the Balance Sheet under "Current Liabilities and Provisions" and that such provision for each year shall be debited to P&L Account so that a true and correct figure of "Net Profit" gets reflected in the financial accounts of the company. The effect of such Disclosure is to increase the current liabilities by showing the provision against the possible Loss on assets classified as NPA. An NPA continues to be an Asset – "Debtors/ Loans and Advances" in the books of NBFC. For creating a provision the only yardstick is default in terms of the loan under RBI norms, a provision is mathematical calculation on time lines. The entire exercise mentioned in the RBI Directions 1998 is only in the context of Presentation of NPA provisions in the balance sheet of an NBFC and it has nothing to do with computation of taxable income or accounting concepts.

It is important to note that the net profit shown in the P&L Account is the basis for NBFC to accept deposits and declare dividends. Higher the profits higher is the NOF and higher is the increase in the public making deposits in NBFCs. Hence the object of the NBFC is disclosure and provisioning.

NBFCs have to accept the concept of "income" as evolved by RBI after deducting the Provision against NPA, however, as stated above, such treatment is confined to Presentation / Disclosure and has nothing to do with computation of taxable income under the IT Act.

8. **Scope of the Finance Act No. 2 of 2001 w.e.f. 1.4.1989 insofar as Section 36(1)(vii) is concerned**

Prior to 1.4.1989, the law, as it then stood, took the view that even in cases in which the assessee (s) makes only a provision in its accounts for bad debts and interest thereon and even though the amount is not actually written off by debiting the P&L Account of the assessee and crediting the amount to the account of the debtor, assessee was still entitled to deduction under Section 36(1)(vii). [See *Commissioner of Income Tax v. Jwala Prasad Tewari* 24 ITR 537 and *Vithaldas H. Dhanjibhai Bardanwala* (supra)] Such state of law prevailed upto and including assessment year 1988-89. However, by insertion (w.e.f. 1.4.1989) of a new Explanation in Section 36(1)(vii), it has been clarified that any bad debt written off as irrecoverable in the account of the assessee will not include any provision for bad and doubtful debt made in the accounts of the assessee. The said amendment indicates that before 1.4.1989, even a provision could be treated as a write off. However, after 1.4.1989, a distinct dichotomy is brought in by way of the said Explanation to Section 36(1)(vii). Consequently, after 1.4.1989, a mere provision for bad debt would not be entitled to deduction under Section 36(1)(vii). To understand the above dichotomy, one must understand "how to write off". If an assessee debits an amount of doubtful debt to the P&L Account and credits the asset account like sundry debtor's Account, it would constitute a write off of an actual debt. However, if an assessee debits "provision for doubtful debt" to the P&L Account and makes a corresponding credit to the "current liabilities and provisions" on the Liabilities side of the balance

sheet, then it would constitute a provision for doubtful debt. In the latter case, assessee would not be entitled to deduction after 1.4.1989.

We have examined the P&L Account of First Leasing Company of India Limited for the year ending 31st March, 2003. On examination of Schedule J to the P&L Account which refers to operating expenses, we find two distinct heads of expenditure, namely, "Provision for Non-performing Assets" and "Bad Debts/ Advances Written Off". It is for the appellant (s) to explain the difference between the two to the assessing officer. Which of the two items will constitute expenditure under the IT Act has to be decided according to the IT Act. In the present case, we are not concerned with taxability under the IT Act or the accounting treatment. We are essentially concerned with presentation of financial statements by NBFCs under the 1998 Directions. The point to be noted is that even according to the assessee "Bad debts/ Advances Written Off" is a distinct head of expenditure vis-à-vis "Provision for Bad Debt". One more aspect needs to be highlighted. It is true that under Part I of Schedule VI to the Companies Act, 1956 an amount could be first included in the list of sundry debtors/ loans and then deducted from the list as "provision for doubtful debts". However, these are matters of Presentation of Provisions for doubtful debts even under the Companies Act and have nothing to do with taxability under the IT Act. One more aspect needs to be mentioned. Section 36(1)(vii) is subject to sub-section (2) of Section 36. The condition incorporated in Section 36 of the IT Act, which was not there in Section 10(2)(xi) of the 1922 Act, is that the amount of debt should have been taken into account in computing the income of the assessee in the previous year. Under the IT Act, the emphasis is not on the assessee being the creditor but taking into account of the debt in computing the business income. [See Section 36(2)] In *Commissioner of Income-tax, A.P. v. T. Veerabhadra Rao K. Koteswara Rao & Co.* reported in 155 ITR 152 at 157, it was found that the debt

was taken into account in the income of the assessee for the assessment year 1963-64 when the interest accruing thereon was taxed in the hands of the assessee. The said interest was taxed as income as it represented accretion accruing during the earlier year on the moneys owed to the assessee by the debtor. It was held that transaction constituted the debt which was taken into account in computing the income of the assesee of the previous years.

9. **Deviations between RBI Directions 1998 and Companies Act**

Broadly, there are three deviations:

(i) in the matter of presentation of financial statements under Schedule VI of the Companies Act;

(ii) in not recognising the "income" under the mercantile system of accounting and its insistence to follow cash system with respect to assets classified as NPA as per its Norms;

(iii) in creating a provision for all NPAs summarily as against creating a provision only when the debt is doubtful of recovery under the norms of the Accounting Standards issued by the Institute of Chartered Accountants of India.

These deviations prevail over certain provisions of the Companies Act, 1956 to protect the Depositors in the context of Income Recognition and Presentation of the Assets and Provisions created against them.

Thus, the P&L Account prepared by NBFC in terms of RBI Directions 1998 does not recognize "income from NPA" and, therefore, directs a Provision to be made in that regard and hence an "add back". It is important to note that "add back" is there only in the case of provisions.

As stated above, the Companies Act allows an NBFC to adjust a Provision for possible diminution in the value of asset or provision for doubtful debts against the assets and only the Net Figure is allowed to be shown in the Balance Sheet, as a matter of disclosure. However, the said RBI Directions 1998 mandates all NBFCs to show the said provisions separately on the Liability Side of Balance Sheet, i.e., under the Head "current liabilities and provisions". The purpose of the said deviation is to inform the user of the Balance Sheet the particulars concerning quantum and quality of the diminution in the value of investment and particulars of doubtful and sub-standard assets. Similarly, the 1998 Directions does not recognize the "income" under the mercantile system and it insists that NBFCs should follow cash system in regard to such incomes.

Before concluding on this point, we need to emphasise that the 1998 Directions has nothing to do with the accounting treatment or taxability of "income" under the IT Act. The two, viz., IT Act and the 1998 Directions operate in different fields. As stated above, under the mercantile system of accounting, interest / hire charges income accrues with time. In such cases, interest is charged and debited to the account of the borrower as "income" is recognized under accrual system. However, it is not so recognized under the 1998 Directions and, therefore, in the matter of its Presentation under the said Directions, there would be an add back but not under the IT Act necessarily. It is important to note that collectibility is different from accrual. Hence, in each case, the assessee has to prove, as has happened in this case with regard to the sum of Rs. 20,34,605/-, that interest is not recognized or taken into account due to uncertainty in collection of the income. It is for the assessing officer to accept the claim of the assessee under the IT Act or not to accept it in which case there will be add back even under real income theory as explained hereinbelow.

10. **Scope and applicability of RBI Directions 1998**

RBI Directions 1998 have been issued under Section 45JA of RBI Act. Under that Section, power is given to RBI to enact a regulatory framework involving prescription of prudential norms for NBFCs which are deposit taking to ensure that NBFCs function on sound and healthy lines. The primary object of the said 1998 Directions is prudence, transparency and disclosure. Section 45JA comes under Chapter IIIB which deals with provisions relating to Financial Institutions, and to non-banking Institutions receiving deposits from the public. The said 1998 Directions touch various aspects such as income recognition; asset classification; provisioning, etc. As stated above, basis of the 1998 Directions is that anticipated losses must be taken into account but expected income need not be taken note of. Therefore, these Directions ensure cash liquidity for NBFCs which are now required to state true and correct profits, without projecting inflated profits. Therefore, in our view, RBI Directions 1998 deal only with presentation of NPA provisions in the Balance Sheet of an NBFC. It has nothing to do with the computation or taxability of the provisions for NPA under the IT Act.

Prior to RBI Directions 1998, Advances were stated net of provisions for NPAs / bad and doubtful debts. They were shown at net figure (Advances less Provisions for NPAs) and the amount of provision for NPA was shown in the notes to the accounts only. Such presentation of NPA Provision warranted disclosure. Therefore, Para 9(1) of RBI Directions 1998 stipulates that every NBFC shall separately disclose in its Balance Sheet the provision for NPAs without netting them from the income or against the value of assets. That, the provision for NPA should be shown separately on the "Liabilities side" of the Balance Sheet under the head "Current Liabilities and Provisions" and not as a deduction from "Sundry Debtors/ Advances". Therefore, RBI has taken a position as a

matter of disclosure, with which we agree, that if an NBFC deducts a provision for NPA from "sundry debtors/ loans and advances", it would amount to netting from the value of assets which would constitute breach of Para 9 of RBI Directions 1998. Consequently, NPA provisions should be presented on the "Liabilities side" of the Balance Sheet under the head "Current Liabilities and Provisions" as a Disclosure Norm and not as accounting or computation of income norm under the IT Act. At this stage, we may clarify that the entire thrust of RBI Directions 1998 is on presentation of NPA provision in the Balance Sheet of an NBFC. Presentation/ disclosure is different from computation/ taxability of the provision for NPA. The nature of expenditure under the IT Act cannot be conclusively determined by the manner in which accounts are presented in terms of 1998 Directions. There are cases where on facts courts have taken the view that the so-called provision is in effect a write off. Therefore, in our view, RBI Directions 1998, though deviate from accounting practice as provided in the Companies Act, do not override the provisions of the IT Act. Some companies, for example, treat write offs or expenses or liabilities as contingent liabilities. For example, there are companies which do not recognize mark-to-market loss on its derivative contracts either by creating reserve as suggested by ICAI or by charging the same to the P&L Account in terms of Accounting Standards. Consequently, their profits and reserves and surplus of the year are projected on the higher side. Consequently, such losses are not accounted in the books, at the highest, they are merely disclosed as contingent liability in the Notes to Accounts. The point which we would like to make is whether such losses are contingent or actual cannot be decided only on the basis of presentation. Such presentation will not bind the authority under the IT Act. Ultimately, the nature of transaction has to be examined. In each case, the authority has to examine the nature of expense/ loss. Such examination and finding thereon will not depend upon presentation of

expense/ loss in the financial statements of the NBFC in terms of the 1998 Directions. Therefore, in our view, the RBI Directions 1998 and the IT Act operate in different fields.

The question still remains as to what is the nature of "Provision for NPA" in terms of RBI Directions 1998. In our view, provision for NPA in terms of RBI Directions 1998 does not constitute expense on the basis of which deduction could be claimed by NBFC under Section 36(1)(vii). Provision for NPAs is an expense for Presentation under 1998 Directions and in that sense it is notional. For claiming deduction under the IT Act, one has to go by the facts of the case (including the nature of transaction), as stated above. One must keep in mind another aspect. Reduction in NPA takes place in two ways, namely, by recoveries and by write off. However, by making a provision for NPA, there will be no reduction in NPA. Similarly, a write off is also of two types, namely, a regular write off and a prudential write off. [See Advances Accounts by Shukla, Grewal, Gupta, Chapter 26, Page 26.50] If one keeps these concepts in mind, it is very clear that RBI Directions 1998 are merely prudential norms. They can also be called as disclosure norms or norms regarding presentation of NPA Provisions in the Balance Sheet. They do not touch upon the nature of expense to be decided by the AO in the assessment proceedings.

11. **Theory of "Real Income"**

An interesting argument was advanced before us to say that a provision for NPA, under commercial accounting, is not an "income" hence the same cannot be added back as is sought to be done by the Department. In this connection, reliance was placed on "Real Income Theory".

We find no merit in the above contention. In the case of *Poona Electric Supply Co. Ltd. v. Commissioner of Income-Tax, Bombay City I,* 57 ITR 521 at page 530, this is what the

Supreme Court had to say:

> "Income Tax is a tax on the "real income", i.e., the profits arrived at on commercial principles *subject to the provisions of the Income Tax Act.* The real profit can be ascertained only by making the permissible deductions *under the provisions of the Income Tax Act.* There is a clear distinction between the real profits and statutory profits. The latter are statutorily fixed *for a specified purpose".*

To the same effect is the judgment of the Bombay High Court in the case of *Commissioner of Wealth-Tax, Bombay v. Bombay Suburban Electric Supply Ltd.* 103 ITR 384 at page 391, where it was observed as under:

> "Income Tax is a tax on the real income, i.e., profits arrived at on commercial principles *subject to the provisions of the Income Tax Act, 1961.* The real profits can be ascertained only by making the permissible deductions".

The point to be noted is that the IT Act is a tax on "real income", i.e., the profits arrived at on commercial principles subject to the provisions of the IT Act. Therefore, if by Explanation to Section 36(1)(vii) a provision for doubtful debt is kept out of the ambit of the bad debt which is written off then, one has to take into account the said Explanation in computation of total income under the IT Act failing which one cannot ascertain the real profits. This is where the concept of "add back" comes in. In our view, a provision for NPA debited to P&L Account under the 1998 Directions is only a notional expense and, therefore, there would be add back to that extent in the computation of total income under the IT Act.

One of the contentions raised on behalf of NBFC before us was that in this case there is no scope for "add back" of the Provision against NPA to the taxable income of the assessee.

We find no merit in this contention. Under the IT Act, the charge is on Profits and Gains, not on gross receipts (which, however, has Profits embedded in it). Therefore, subject to the requirements of the IT Act, profits to be assessed under the IT Act have got to be Real Profits which have to be computed on ordinary principles of commercial accounting. In other words, profits have got to be computed after deducting Losses/ Expenses incurred for business, even though such losses/ expenses may not be admissible under Sections 30 to 43D of the IT Act, unless such Losses/ Expenses are expressly or by necessary implication disallowed by the Act. Therefore, even applying the theory of Real Income, a debit which is expressly disallowed by Explanation to Section 36(1)(vii), if claimed, has got to be added back to the total income of the assessee because the said Act seeks to tax the "real income" which is income computed according to ordinary commercial principles but subject to the provisions of the IT Act. Under Section 36(1)(vii) read with the Explanation, a "write off" is a condition for allowance. If "real profit" is to be computed one needs to take into account the concept of "write off" in contradistinction to the "provision for doubtful debt".

12. **Applicability of Section 145**

At the outset, we may state that in essence RBI Directions 1998 are Prudential/ Provisioning Norms issued by RBI under Chapter IIIB of the RBI Act, 1934. These Norms deal essentially with Income Recognition. They force the NBFCs to disclose the amount of NPA in their financial accounts. They force the NBFCs to reflect "true and correct" profits. By virtue of Section 45Q, an overriding effect is given to the Directions 1998 vis-à-vis "income recognition" principles in the Companies Act, 1956. These Directions constitute a code by itself. However, these Directions 1998 and the IT Act operate in different areas. These Directions 1998 have nothing to do with computation of taxable income. These Directions cannot overrule the "permissible

deductions" or "their exclusion" under the IT Act. The inconsistency between these Directions and Companies Act is only in the matter of Income Recognition and presentation of Financial Statements. The Accounting Policies adopted by an NBFC cannot determine the taxable income. It is well settled that the Accounting Policies followed by a company can be changed unless the AO comes to the conclusion that such change would result in understatement of profits. However, here is the case where the AO has to follow the RBI Directions 1998 in view of Section 45Q of the RBI Act. Hence, as far as Income Recognition is concerned, Section 145 of the IT Act has no role to play in the present dispute.

13. **Analysis of Section 36(1)(viia)**

Section 36(1)(vii) provides for a deduction in the computation of taxable profits for the debt established to be a bad debt.

Section 36(1)(viia) provides for a deduction in respect of any provision for bad and doubtful debt made by a Scheduled Bank or Non-Scheduled Bank in relation to advances made by its rural branches, of a sum not exceeding a specified percentage of the aggregate average advances by such branches. Having regard to the increasing social commitment, Section 36(1)(viia) has been amended to provide that in respect of provision for bad and doubtful debt made by a scheduled bank or a non-scheduled bank, an amount not exceeding a specified per cent of the total income or a specified per cent of the aggregate average advances made by rural branches, whichever is higher, shall be allowed as deduction in computing the taxable profits.

Even Section 36(1)(vii) has been amended to provide that in the case of a bank to which Section 36(1)(viia) applies, the amount of bad and doubtful debt shall be debited to the provision for bad and doubtful debt account and that the

deduction shall be limited to the amount by which such debt exceeds the credit balance in the provision for bad and doubtful debt account.

The point to be highlighted is that in case of banks, by way of incentive, a provision for bad and doubtful debt is given the benefit of deduction, however, subject to the ceiling prescribed as stated above. Lastly, the provision for NPA created by a scheduled bank is added back and only thereafter deduction is made permissible under Section 36(1)(viia) as claimed.

14. **Whether provision on NPA is allowable under Section 37(1)?**

As stated above, Section 36(1)(vii) after 1.4.1989 draws a distinction between write off and provision for doubtful debt. The IT Act deals only with doubtful debt. It is for the assessee to establish that the provision is made as the loan is irrecoverable. However, in view of Explanation which keeps such a provision outside the scope of "written off" bad debt, Section 37 cannot come in. If an item falls under Sections 30 to 36, but is excluded by an Explanation to Section 36(1)(vii) then Section 37 cannot come in. Section 37 applies only to items which do not fall in Sections 30 to 36. If a provision for doubtful debt is expressly excluded from Section 36(1)(vii) then such a provision cannot claim deduction under Section 37 of the IT Act even on the basis of "real income theory" as explained above.

15. **Analysis of Section 43D**

It is similar to Section 43B.

The reason for enacting this Section is that interest from bad and doubtful debts in the case of bank and financial institutions is difficult to recover; taxing such income on accrual

basis reduces the liquidity of the bank without generation of income.

With a view to improve their viability, the IT Act has been amended by inserting Section 43D to provide that such interest shall be charged to tax only in the year of receipt or the year in which it is credited to the P&L Account, whichever is earlier.

Before concluding, we may state that none of the judgments cited on behalf of the appellant(s) are relevant as they do not touch upon the concept of NPA. In our view, the issues which arise for determination in this case did not arise in the cases cited by the appellant(s).

16. **Challenge to the constitutional validity of Sections 36(1)(viia) and 43D of the IT Act**

According to NBFCs, there is no reason why a Provision for NPA of an NBFC be treated differently from a provision for NPAs of banks, SFCs, HFCs, etc. According to NBFCs, the Disclosure Norms for NBFCs are designed to bring NBFCs in line with banks, SFCs, HFCs, etc. That, if NPAs are similar to Doubtful Debts, then permitting deductions only in the case of Provisions for doubtful debts of banks, cooperative financial corporations, etc. will violate Article 14 of the Constitution. In this connection, it was submitted that when banks, financial institutions and NBFCs are all subject to RBI norms in the matter of Income Recognition, denial of deduction only to NBFCs in respect of Provisions which they make against their NPAs and not including NBFCs in Sections 43D and 36(1)(viia) would be wholly discriminatory and violative of Article 14.

According to NBFCs, levying a tax on the Provision for NPA would amount to an unreasonable restriction on the right of the NBFCs to carry on business under Article 19(1)(g) of the Constitution. For example, in the case of First Leasing Company, who made the Provision for NPA of Rs. 15.77

crores, the taxable income stands increased by the said sum even when it does not represent real or notional income. Accordingly, the taxable income of the Company stands raised by a fictitious amount. This, according to the Company, would constitute an unreasonable restriction on the fundamental rights of the Company to carry on business under Article 19(1)(g).

We find no merit in the above contentions. In the context of Article 14, the test to be applied is that of "rational/ intelligible differentia" having nexus with the object sought to be achieved. Risk is one of the main concerns which RBI has to address when it comes to NBFCs. NBFCs accept deposits from the Public for which transparency is the key, hence, we have the RBI Directions/ Norms. On the other hand, as far as banking goes, the weightage, one must place on, is on "liquidity". These two concepts, namely, "risk" and "liquidity" bring out the basic difference between NBFCs and Banks. Take the case of the scope of impugned Section 43D. As stated above, an asset is rated as NPA when over a period of time it ceases to get converted to cash or generate income and becomes difficult to recover. Therefore, Parliament realized that taxing such "income" on accrual basis without actual recovery would create liquidity crunch, hence, Section 43D came to be enacted. So also, as stated above, Section 36(1)(viia) provides for a deduction not only in respect of "written off" bad debt but in case of banks it extends the allowance also to any Provision for bad and doubtful debts made by banks which incentive is not given to NBFCs. Banks face a huge demand from the industry particularly in an emerging market economy and at times the credit offtake is so huge that banks face liquidity crunch. Thus, the line of business operations of NBFCs and banks are quite different. It is for this reason, apart from social commitments which banks undertake, that allowances of the nature mentioned in Sections 36(1)(viia) and 43D are often restricted to banks and not to NBFCs. Lastly, as stated above, even in the case of banks the Provision for NPA has to be added back

and only after such add back that deduction under Section 36(1)(viia) can be claimed by the banks. Therefore, even in the case of banks, there is an element of add back, however, by way of special provision banks are allowed to claim deduction under Section 36(1)(viia). One more aspect needs to be mentioned, apart from the fact that NBFCs and Banks are two different entities, under Section 36(1)(viia) the banks are allowed deductions subject to a ceiling or a limit and if the contentions of NBFCs are to be accepted that NBFCs should also be included in Section 36(1)(viia), then, we will be undertaking judicial legislation which is not allowed, hence, in our view, we hold that neither Section 36(1)(viia) nor Section 43D violates Article 14. We further hold that the test of "intelligible differentia" stands complied with and hence we reject the challenge.

As regards challenge to the validity of Sections 43D and 36(1)(viia) as violative of Article 19, we find that RBI Directions 1998 govern the business of NBFCs. To protect the investors, RBI has prescribed norms for provisioning and disclosure. These norms have nothing to do with computation of taxable income under the IT Act. These Directions 1998 do not apply to banks. Ultimately, the challenge is to the validity of a taxing enactment. In such cases, we must give some latitude to the law makers in enacting laws which impose reasonable restrictions under Article 19(6). This we say so for two reasons. Firstly, the impugned allowance under Section 36(1)(viia) cannot be extended to NBFCs which are vulnerable to economic and financial uncertainties. Secondly, the RBI Directions 1998 are only Disclosure Norms. They require NBFCs to make a Provision for possible loss to be made and disclosed to the public. Such debits are only notional for purposes of disclosure, hence, they cannot be made an excuse for claiming deduction under the IT Act, hence, "add back". Since RBI Direction 1998 is not applicable to Banks, there is no question of extending the benefit of deduction to NBFCs

under Section 36(1)(viia) or under Section 43D. Keeping in mind an important role assigned to banks in our market economy, we are of the view that the restriction, if any placed on NBFC by not giving them the benefit of deduction, satisfies the principle of "reasonable justification".

Before concluding, we may cite the following judgments of this Court in the context of the constitutional validity of Sections 36(1)(viia) and 43D of the IT Act.

In the case of *R.K. Garg v. Union of India* (1981) 4 SCC 675 this Court held that every legislation, particularly in economic matters, is essentially empiric and it is based on experimentation. There may be possibilities of abuse but on that account alone it cannot be struck down as invalid. These can be set right by the legislature by passing amendments. The Court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions. Laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. Moreover, there is a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. The legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination is based on adequate grounds. There may be cases where the legislation can be condemned as arbitrary or irrational, hence, violative of Article 14. But the test in every case would be whether the provisions of the Act are arbitrary and irrational having regard to all the facts and circumstances of the case. Immorality, by itself, cannot be a constitutional challenge as morality is essentially a subjective value. The terms "reasonable, just and fair" derive their significance from the existing social conditions.

In the case of *Bhavesh D. Parish v. Union of India,* (2000) 5 SCC 471, this Court laid down that while considering the scope of economic legislation as well as tax legislation, the courts must bear in mind that unless the provision is manifestly unjust or glaringly unconstitutional, the courts must show judicial restraint in interfering with its applicability. Merely because a statute comes up for examination and some arguable point is raised, the legislative will should not be put under a cloud. It is now well settled that there is always a presumption in favour of the constitutional validity of any legislation unless the same is set aside for breach of the provisions of the Constitution. The system of checks and balances has to be utilised in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself.

18. In the case of *State of Madras v. V.G. Row* 1952 SCR 597**,** this Court observed as follows:

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

19. In the case of *Barclays Mercantile Business Finance Ltd. v. Mawson (Inspector of Taxes),* 2005 (1) All ER 97, the House of Lords observed that "a tax is generally imposed by reference to economic activities or transactions which exist in the real world". When an economic activity is to be valued, it is open to the law makers to take into account various factors like

public investments, disclosure and transparency in the matter of maintenance of accounts, reflection of true and correct profits, etc. This is precisely what is done by RBI Directions 1998.

20. **Conclusion**

For the afore-stated reasons, we find no merit in the Civil Appeals filed by the NBFCs, so also in the Transferred Cases, and, accordingly, the same are dismissed with no order as to costs.

D.G. Appeals dismissed.

BENGAI MANDAL @ BEGAI MANDAL
v.
STATE OF BIHAR
(Criminal Appeal No. 1418 of 2004)

JANUARY 11, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860:

ss.304 Part II and 326 r/w s.34 and s.302 r/w s.34 – Appellant and co-accused allegedly entered into house of deceased and poured acid over her, which caused blisters and rashes on her entire body, and ultimately she died – Dying declaration given by deceased – Conviction of appellant under s.302 r/w s.34 – Challenge to – Held: In her dying declaration, deceased imputed acts of entry into her house and physical presence at the time of incident to appellant without anything more – In absence of any active role played by appellant or overt act being done by him, it cannot be said with certainty that he accompanied co-accused to house of deceased with common intention to murder her – Hence, conviction of appellant under s.302 r/w s.34 cannot be sustained – However, appellant did not prevent the co-accused from throwing acid on deceased, which clearly establishes that he intended to cause injury to and also disfigurement of deceased and as such is liable to be punished under s.326 – Also since appellant could be said to be possessing knowledge that throwing of acid is likely to cause death of deceased, case under s.304 part II is also made out – However, since death ensued twenty six days after the incident as a result of septicemia and not as a consequence of burn injuries, and as appellant had already served RI for seven years, quantum of sentence reduced to period already undergone.

s.34 – Nature, purpose and scope of – Discussed.

According to the prosecution, since PW-7's sister-in-law had turned down the sexual advances of the appellant-accused and a co-accused, they, with the intent to kill her, entered into her house at night and poured acid over her, which caused blisters and rashes on her entire body, and ultimately she died. The courts below convicted appellant under s.302 r/w s.34 and sentenced him to life imprisonment.

In appeal to this Court, it was contended that Courts below erred in convicting the appellant under s.302 IPC and if at all a case existed against the appellant, it was under s.304 Part II IPC, for it was the other accused, who had carried the vessel containing the acid and actually poured the acid on the deceased causing her death and that there was no overt act on the part of the appellant in the commission of the said offence.

Partly allowing the appeal, the Court

HELD: 1. The position with regard to s.34 IPC is crystal clear. The existence of common intention is a question of fact. Since intention is a state of mind, it is therefore very difficult, if not impossible, to get or procure direct proof of common intention. Therefore, courts, in most cases, have to infer the intention from the act(s) or conduct of the accused or other relevant circumstances of the case. However, an inference as to the common intention shall not be readily drawn; the criminal liability can arise only when such inference can be drawn with a certain degree of assurance. [Para 14] [447-E-G]

Girija Shankar v. State of U.P. (2004) 3 SCC 793 and *Vaijayanti v. State of Maharashtra* (2005) 13 SCC 134, relied on.

2. On a perusal of the evidence on record, it is found

that all the prosecution witnesses except the official witnesses namely, PW-8, PW-10 and PW-11 disowned the prosecution case (some completely and some to the extent of the identification of the accused persons). However, what is clearly established from the evidence of prosecution witnesses is that acid was thrown over the deceased on the night intervening 13.07.1996 and 14.07.1996 which caused blisters and rashes on her body and later led to her death. This fact finds corroboration in the dying declaration given by the deceased to PW-11 wherein the deceased has categorically stated that on the night intervening 13.07.1996 and 14.07.1996, the appellant and the co-accused had entered into her house and the co-accused poured a watery substance over her from the pot which the co-accused was carrying in his hand. [Para 15] [448-A-C]

3.1. From the dying declaration given by the deceased, it is clear that it was the other accused who had carried (in his hand) the vessel containing the acid and who had actually thrown its contents i.e. the acid on the deceased. The deceased, in her dying declaration, had attributed the acts of carrying the vessel containing the acid and throwing the contents thereof on her only to the other accused whereas she accused both the accused of demanding illicit body relations with her as also entering into her house. From the dying declaration, it is clearly established that the appellant was present at the time and scene of the offence. [Para 15] [448-C-F]

3.2. In her dying declaration, the deceased has imputed the acts of entry into her house and physical presence at the time of the incident to the appellant without anything more. No other overt act save as mentioned above has been imputed to the appellant by the deceased. It has also not come in evidence that the appellant tried to gag her mouth or overpower the

deceased in any other manner so as to facilitate the pouring of acid on her by the co-accused. Had the appellant shared an intention common with the co-accused to kill the deceased by throwing acid on her, it would have been manifest in his conduct which would certainly have been something more than him being just a mute spectator to the whole incident. [Para 16] [448-G-H; 449-A-C]

4.1. In absence of any active role played by the appellant or overt act being done by him, it cannot be said with certainty that the appellant had accompanied the co-accused to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under s.302 r/w s.34 IPC cannot be sustained. [Para 17] [449-C-D]

4.2. However, keeping in mind the facts that the deceased had turned down the sexual advances made by the appellant and that he had accompanied the co-accused who was carrying a vessel containing acid in his hand at the dead of the night and in an unearthly hour, it can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the co-accused to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the co-accused throwing acid on the deceased without preventing the co-accused from doing so, it clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under s.326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under s.304 part II is also made out. The appellant has already served rigorous imprisonment for a period of seven years. Considering

the facts that the death ensued after twenty six days of the incident as a result of *septicemia* and not as a consequence of burn injuries, the period already undergone by the appellant would be sufficient to meet the ends of justice. [Para 18] [449-E-H; 450-A-B]

Case Law Reference :

(2004) 3 SCC 793	**relied on**	**Para 12**
(2005) 13 SCC 134	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1418 of 2004.

From the Judgment & Order dated 20.05.2004 of the High Court of Judicature at Patna in Criminal Appeal No. 505 of 2000.

Anil K. Chopra (N.P.) and Anagha S. Desai (A.C.), for the Appellant.

Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By this appeal, the present appellant seeks to challenge the judgment and order dated 20.05.2004 passed by the Patna High Court, whereby the High Court upheld the conviction and sentence passed against the appellant by the trial Court. The trial Court had by its judgment dated 24.07.2000 and order dated 25.07.2000 convicted the appellant and sentenced him to undergo imprisonment for life under Section 302 read with Section 34, RI for a period of seven years under Section 326 read with Section 34, RI for a period of three years under Section 452 and RI for a period of three years under Section 324 IPC.

2. The facts necessary for the disposal of the present appeal and as presented by the prosecution may be set out at this stage. On 14.07.1996 at 6 a.m., Shrikant Mahto, brother-

in-law of the deceased (PW-7) gave a fard-e-bayan to the Assistant Sub-Inspector of Police wherein he stated that on 13.07.1996 after having his supper, he had gone to sleep at his darwaza (open space in front of the house). Pramila Devi, the deceased was sleeping inside the house with her son Sonu Mahto. At about 2.30 in the night, PW-7 woke up on hearing the cries of the deceased and rushed inside to find out what was happening. PW-7 saw that the deceased was lying on the ground and was tossing about on the ground. PW-7 picked up the deceased and found that the entire body and clothes of the deceased had burnt. PW-7 further noticed that blisters and rashes were erupting all over the body of the deceased and that she was writhing in pain.

3. The deceased told PW-7 that the appellant herein and one Mahendra Mahto (accused no. 1) had entered into the house carrying a vessel in his hand and had thrown its contents over her as a result of which her entire body and clothes were burnt. The deceased further informed PW-7 that the appellant and the accused no.1 would try to stop the deceased on her visit to market or work and ask for sexual favour. The deceased further told that she had turned down their advances and for that reason they had thrown acid over her to burn her body with the intent to kill her.

4. On hearing the commotion, some villagers assembled there and went out to look for the appellant and the accused no.1, who were seen fleeing towards the east. The deceased was taken to the hospital. At the hospital also, the deceased stated that acid was thrown over her by the appellant and the accused no. 1. After treatment at the District hospital at Purnea for a few days, the deceased was sent back to her home where she finally died on 10.08.1996.

5. On the basis of the aforesaid fard-e-bayan, an F.I.R. under Sections 302, 326, 448, 323 read with Section 34 IPC was registered on the same day at 1 p.m.

6. After completion of the investigation, the police submitted a charge-sheet against the appellant and accused no.1. On the basis of the aforesaid charge sheet, the trial Court framed charges under the Section 302 read with Section 34, Section 326 read with Section 34, Section 452 and Section 324 IPC against the appellant and the accused no. 1 to which they pleaded not guilty and claimed to be tried.

7. At the trial, the prosecution examined 11 witnesses and exhibited several documents in support of its case. On conclusion of the trial, the trial Court by its judgment dated 24.07.2000 and order dated 25.07.2000 convicted the appellant and accused no. 1 to undergo imprisonment for life under Section 302 read with Section 34, RI for a period of seven years under Section 326 read with Section 34, RI for a period of three years under Section 452 and RI for a period of three years under Section 324 IPC. All the sentences were directed to run concurrently.

8. Aggrieved by the decision of the trial Court, the appellant herein and the accused no. 1 filed two separate appeals before the Patna High Court. By a common judgment and order dated 20.05.2004, the Patna High Court upheld the decision of the trial Court and dismissed the said appeals.

9. The counsel appearing on behalf of the appellant strongly contended before us that the High Court as well as the trial Court had erred in convicting the appellant under Section 302 IPC and if at all a case existed against the appellant, it was under Section 304 part II IPC, for it was accused no. 1 who had carried the vessel containing the acid and actually poured the acid on the deceased causing her death. The counsel further submitted that there was no overt act on the part of the appellant in the commission of the said offence.

10. The counsel appearing on behalf of the respondent–State, on the other hand, supported the decisions of the courts below.

11. Before dwelling into the evidence on record and addressing the rival contentions made by the parties, we wish to reiterate the precise nature, purpose and scope of Section 34 IPC.

12. *In Girija Shankar v. State of U.P.* (2004) 3 SCC 793, this Court, while bringing out the purpose and nature of Section 34 IPC observed in para 9, as follows:

> **"9.** Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar* v. *State of Punjab* the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or

identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

13. In *Vaijayanti v. State of Maharashtra* (2005) 13 SCC 134**,** this Court, observed in para 9, as follows:

> **"9.** Section 34 of the Indian Penal Code envisages that "when a criminal act is done by several persons in furtherance of the common intention of, each of such persons is liable for that act, in the same manner as if it were done by him alone". The underlying principle behind the said provision is joint liability of persons in doing of a criminal act which must have found in the existence of common intention of enmity in the acts in committing the criminal act in furtherance thereof. The law in this behalf is no longer *res integra*. There need not be a positive overt act on the part of the person concerned. Even an omission on his part to do something may attract the said provision. *But it is beyond any cavil of doubt that the question must be answered having regard to the fact situation obtaining in each case.*"
>
> (emphasis supplied)

14. Thus, the position with regard to Section 34 IPC is crystal clear. The existence of common intention is a question of fact. Since intention is a state of mind, it is therefore very difficult, if not impossible, to get or procure direct proof of common intention. Therefore, courts, in most cases, have to infer the intention from the act(s) or conduct of the accused or other relevant circumstances of the case. However, an inference as to the common intention shall not be readily drawn; the criminal liability can arise only when such inference can be drawn with a certain degree of assurance.

15. With the aforesaid legal position in mind, we have considered the submissions made by the counsel for the parties

and also scrutinized the evidence available on record before us. On a perusal of the evidence before us, we find that all the prosecution witnesses except the official witnesses namely, PW-8, PW-10 and PW-11 disowned the prosecution case (some completely and some to the extent of the identification of the accused persons). However, what is clearly established from the evidence of prosecution witnesses is that acid was thrown over the deceased on the night intervening 13.07.1996 and 14.07.1996 which caused blisters and rashes on her body and later led to her death. This fact finds corroboration in the dying declaration given by the deceased to PW-11 wherein the deceased has categorically stated that on the night intervening 13.07.1996 and 14.07.1996, accused no.1 and the appellant had entered into her house and accused no.1 poured a watery substance over her from the pot which the accused no.1 was carrying in his hand. The dying declaration given by the deceased comes as an important piece of evidence as it throws light on the role played by each of the accused persons at the time of the incident. After a careful reading of the dying declaration, what comes out to the fore is that it was accused no. 1 who had carried (in his hand) the vessel containing the acid and who had actually thrown its contents i.e. the acid on the deceased. The deceased, in her dying declaration, had attributed the acts of carrying the vessel containing the acid and throwing the contents thereof on her only to accused no. 1 whereas she accused both the accused no.1 and the appellant of demanding illicit body relations with her as also entering into her house. From the dying declaration as on record before us, it is clearly established that the appellant was present at the time and scene of the offence. However, what needs to be ascertained is whether the appellant herein shared an intention common with the accused no.1 so that he may be convicted under Section 302 IPC by invoking the aid of Section 34 IPC.

16. To find answer to this question, we need to revert back to the dying declaration of the deceased. In her dying declaration, the deceased has imputed the acts of entry into

her house and physical presence at the time of the incident to the appellant without anything more. No other overt act save as mentioned above has been imputed to the appellant by the deceased. It has also not come in evidence before us that the appellant tried to gag her mouth or overpower the deceased in any other manner so as to facilitate the pouring of acid on her by the accused no.1. Had the appellant shared an intention common with the accused no.1 to kill the deceased by throwing acid on her, it would have been manifest in his conduct which would certainly have been something more than him being just a mute spectator to the whole incident.

17. Thus, in absence of any active role played by the appellant or overt act being done by the appellant, it cannot be said with certainty that the appellant had accompanied the accused no.1 to the house of the deceased with a common intention to murder the deceased. In view thereof, the conviction of the appellant under Section 302 read with Section 34 IPC cannot be sustained.

18. However, keeping in mind the facts that the deceased had turned down the sexual advances made by the appellant and that he had accompanied the accused no.1 who was carrying a vessel containing acid in his hand at the dead of the night and in an unearthly hour, it can be said with certainty that the appellant had the intention to inflict bodily harm on the deceased otherwise the appellant would not have accompanied the accused no.1 to the house of the deceased. Since the appellant was present at the scene of occurrence and simply watched the accused no.1 throwing acid on the deceased without preventing the accused no.1 from doing so clearly establishes that the appellant had intended to cause injury to and also disfigurement of the deceased and as such is liable to be punished under Section 326 IPC. Also since the appellant could be said to be possessing knowledge that the throwing of acid is likely to cause death of the deceased, a case under Section 304 part II is also made out. The appellant has

already served rigorous imprisonment for a period of seven years. Considering the facts that the death ensued after twenty six days of the incident as a result of septicemia and not as a consequence of burn injuries, we are of the considered view that the period already undergone by the appellant would be sufficient to meet the ends of justice. We, therefore, partly allow the appeal to the aforesaid extent and direct that the appellant be released forthwith if not wanted in connection with any other case.

B.B.B. Appeal partly allowed.

SHARDA KAILASH MITTAL
v.
STATE OF M.P. & ORS.
(Civil Appeal No. 222 of 2010)

JANUARY 12, 2010

[K.G. BALAKRISHNAN, CJI. AND P. SATHASIVAM, J.]

Madhya Pradesh Municipalities Act, 1961 – s. 41-A – Power of State Government to remove the President, Vice-President or a Chairman of any Committee – Application of s. 41-A – Scope of – Held: Such person can be removed, if his continuance in the office is not found desirable in public interest or in the interest of Council or if he is incapable of performing his duties; or is working against the provisions of the Act/Rules – Resort to s. 41-A can be had only after such person is duly elected – Removal of such officer must be resorted to only in grave and exceptional circumstances and not for minor irregularities in discharge of duties – On facts, order of removal of the President of Nagar Palika by State Government as upheld by High Court not justified and is set aside – Actions of the President, even if proved, only amount to irregularities, and not grave forms of illegalities, which may allow State Government to invoke its extreme power u/s. 41-A – Municipalities.

Appellant was elected as the President of the Nagar Palika. She was issued show cause notice and certain charges were leveled against her. It was alleged that the appellant had caused monetary loss to the Panchayat by publishing advertisements; that she had struck off her signature from the minutes; and that she had shown undue haste in appointing HS as the Chief Municipal Officer. Appellant denied the charges. The Chief Secretary also found that she had violated the provisions of s. 51 of the Madhya Pradesh Municipalities Act, 1961.

Thereafter, the State Government invoked Section 41-A of the Act and removed the appellant from the post of the President of the Nagar Palika. High Court upheld the removal of the appellant. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1. The actions of the President-appellant, even if proved, only amount to irregularities, and not grave forms of illegalities, which may allow the State Government to invoke its extreme power u/s. 41-A of the Madhya Pradesh Municipalities Act, 1961. Thus, the order of the State Government removing the appellant as President of the Nagar Palika, u/s. 41-A of the Act and consequential orders passed by the Single Judge and Division Bench of High Court is set aside. In view of the fact that her tenure has come to an end and fresh election was also conducted, the subsequent events are not disturbed. However, it is made clear that in view of the present order, the disqualification of the appellant is expunged and the appellant would be free to contest the elections in future. [Paras 19 and 21] [464-G-H; 466-B-D]

2.1. Section 41-A of the Act vests the State Government with power to remove the President, Vice-President or a Chairman of any Committee, if his continuance in the office is not found desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties; or is working against the provisions of the Act or rules made thereunder. A conjoint reading of ss. 20, 22 and 41-A as also the Article 243-ZG of the Constitution of India would make it amply clear that resort to s. 41-A can be had to remove a person from the office only after he/she is duly elected and his/her conduct in office is otherwise found prejudicial to public interest or in the interest of the Council. In addition, u/s. 41-A (2), the State Government

at the time of removal from office may also pass an order disqualifying the person from holding the office of President, Vice-President or Chairman for the next term. [Paras 9 and 16] [459-D-E; 463-C]

2.2. The President under the Act is a democratically elected officer, and the removal of such an officer is an extreme step which must be resorted to only in grave and exceptional circumstances. For taking action u/s. 41-A for removal of President, Vice-President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office bearer and may result in his/her disqualification to hold such office for the next term. Therefore, the exercise of power has serious civil consequences on the status of an office bearer. There are no sufficient guidelines in the provisions of s. 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise, such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation. [Paras 17 and 18] [464-B-G]

Tarlochan Dev Sharma v. State of Punjab and Ors. **(2001) 6 SCC 260, referred to.**

3.1. The analysis of the materials, particularly, the background shows that the State Government failed to

appreciate that the decisions for publication of advertisements, calling for tenders and payment of salaries were made by the entire council and the President-appellant could not be singled out for those decisions taken by the Council. High Court failed to appreciate that removal u/s. 41-A of the Act could be resorted to only under grave and exceptional circumstances which were not present in the appellant's case. No charge of causing financial loss to the Nagar Palika could be established by the State Government. [Para 15] [462-G-H; 463-A]

3.2. It is clear that the advertisements, tenders calling for attending day-to-day work of the Municipality such as provision for drinking water, sanitation etc. were duly put out only after due deliberation by the Council of Nagar Palika and no decision was taken by the appellant herself. All works had been completed after satisfying the conditions prescribed therein. The appellant has also established that due to transfer of Chief Municipal Officer, the salaries of workers of the Nagar Palika remained upaid for the month of January, 2006 leading to possibility of unrest in the area, therefore, it was requested to the appellant by the Councilors that necessary arrangements be made for immediate payment of salaries in view of the ensuing festivals of Muharram and Basant Panchami. The appellant pointed out that out of the amount of Rs.8,12,783/-, an amount of Rs.5,08,890/- was disbursed towards salaries of the workers and other officers of the Nagar Palika and the remaining Rs. 3,03,890/- was paid to various contractors for payment of salaries to their daily wage workers. The vouchers of all the said payments were prepared and approved by the then Chief Municipal Officer and the appellant, and those accounts were duly audited and as such there is no valid reason to reject the stand taken by the appellant. Though

the State Government erroneously mentioned the expenses on advertisement as Rs.2.46 lacs subsequently they themselves filed an application for amendment to correct the amount of Rs.2.46 lacs to be read as Rs.24,600/-. The Single Judge as well as the Division Bench of High Court not only failed to consider all the above circumstances and the exigencies under which the appellant was compelled to make the appointment of HS as Chief Municipal Officer and also ignored the fact that the appointment was actually made for payment of salaries and to make the payments to the contractors who pressed for disbursement of the same to their workers. In the light of the above conclusion and in the absence of a finding that any loss was caused, the decision of the State Government can not be sustained. [Para 20] [465-A-H; 466-A]

Case Law Reference:

(2001) 6 SCC 260 Referred to. Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 222 of 2010.

From the Judgment & Order dated 20.6.2008 of the High Court of Madhya Pradesh Bench at Gwalior in W.A. No. 253 of 2008.

Ravindra Kr. Srivastava, S.K. Dubey, Suryanarayana Singh, Pragati Neekhra, Anup Jain and Chhavi Batra for the Appellant.

T.S. Doabia, Sushil Kumar Jain, Puneet Jain, Eshita Barua, B.S. Banthia, Naveen Sharma and Samar Vijay Singh (for Jagjit Singh Chhabra) for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment rendered by a Division Bench of the High Court of Madhya Pradesh at Jabalpur dismissing W.A. No. 253 of 2008 filed by the appellant herein against the order of the learned single Judge dated 25.04.2008 in W.P. No. 4894 of 2007 whereby the learned Judge dismissed the writ petition filed by the appellant challenging the order dated 04.10.2007 passed by the Principal Secretary, Department of Local Administration and Development, Government of Madhya Pradesh.

3. The facts giving rise to the filing of this appeal may be briefly stated as follows:

The appellant was elected as President of Nagar Palika, Jora, District Muraina in the year 2004. On 15.09.2006, a show cause notice was issued to the appellant under Section 41-A of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as the "Act"). Charge No. 1 leveled by the respondent against the appellant was that she has caused monetary loss to the Panchayat by publishing advertisements for more than Rs.1500/-. In Charge No.2, it was alleged that the appellant had struck off her signature from the minutes dated 27.12.2005 and the then Chief Municipal Officer signed the minutes, which has been accepted by the respondent. Charge No.3 against the appellant was that she had shown undue haste in appointing Shri Harishankar Sharma as the Chief Municipal Officer and compelled him to make various payments to the tune of Rs. 8,12,783/-.

4. On 27.04.2007, Smt. Sharda Kailash Mittal, the appellant filed a detailed reply to the show cause notice refuting the charges leveled against her. In relation to charge No.1 while denying the same she asserted that she had not issued any direction for publishing the advertisements or messages in the newspapers. The then Chief Municipal Officer, Shri A.K. Bansal, has given the advertisement. The matter was placed before the Council and by resolution No. 48 dated 23.07.2005, the

permission was granted by the President-In-Council and upon the recommendation payments were made by the Chief Municipal Officer. She denied Charge No.2 stating that no alteration had been done in the proceedings register. According to her, on 21.12.2005, at the instance of the Chief Municipal Officer, Sh. A.K. Bansal, upon the disturbance being caused by the Vice-Chairman Shri Surya Narain Jain and some of the Councilors and upon their mis-behaviour she postponed the meeting till 26.12.2005. In the postponed meeting, after discussing proposal Nos. 103 to 112, the resolution was passed. The same was entered in the proceedings register and duly signed by the appellant and the Chief Municipal Officer. Again on 27.12.2005, after discussing proposal Nos. 113 to 150 the resolutions were passed. All those subjects were thoroughly discussed and resolutions were passed and recorded as resolution Nos. 100 to 135 in the proceedings register. In this way all the actions were approved by the Council. Regarding Charge No. 3, she asserted that she came to know that after the transfer of the In-charge CMO Shri A.K. Bansal to Muraina Shri A.K. Vashisht, Revenue Inspector was posted in the Municipality of Zora on interim basis. She heard that it would take 5 to 7 days to get the new C.M.O. In order to settle down the salary for the month of January to the employees of the Corporation and ensuing Moharam and Basant Panchami festival as well as the contractors were pressing for settlement since they had completed their work, the Council authorized Shri Hari Shankar Sharma, Revenue Inspector as the C.M.O.

5. By order dated 4.10.2007, the Chief Secretary, City Administration and Development Department, found that Smt. Mittal has violated the provisions of Section 51 of the Act. It is also stated that being the Chairman, it was her duty that she should supervise the financial and executive administration of the council and does not deserve to remain on the post of the Chairman. Basing such conclusion, the said authority under Section 41-A of the Act removed the appellant from the post

of the Chairman of the Nagar Palika, Zora.

6. The said order of removal was challenged by the appellant before the High Court of M.P. Gwalior in W.P. No. 4894 of 2007. By order dated 25.4.2008, the learned single Judge, after finding no ground for interference with the order passed by the State Government dismissed her writ petition.

7. Aggrieved by the dismissal of the writ petition, the appellant filed W.A. No. 253 of 2008 before the Division Bench of the High Court of M.P. at Jabalpur. By the impugned order dated 20.6.2008, the Division Bench confirmed the order of the learned single Judge and dismissed the writ petition. Hence the present appeal before this Court by way of special leave petiton.

8. We have heard Mr. Ravindra Kr. Srivastava, learned senior counsel, appearing for the appellant and Mr. Sushil Kr. Jain, learned counsel, for respondent No.3 and Mr. B.S. Banthia, learned counsel for respondents 1 & 2.

9. It is not in dispute that election for Nagar Palika, Zora was held and the appellant was elected as President of the Nagar Palika which is a reserved seat for woman under Section 29-B of the Act. Before considering the specific charges leveled against the appellant, it is useful to refer Section 41-A of the Act which refers the removal of President or Vice-President or Chairman of a Committee:-

> *"41-A. Removal of President or Vice-President or Chairman of a Committee* – (1) The State Government may, at any time, remove a President or Vice-President or a Chairman of any Committee, if his continuance as such is not in the opinion of the State Government desirable in public interest or in the interest of the Council or if it is found that he is incapable of performing his duties or is working against the provisions of the Act or any rules made thereunder or if it is found that he does not belong to the reserved category for which the seat was reserved.

(2) As a result of the order of removal of Vice-President or Chairman of any Committee, as the case may be, under sub-section (1) it shall be deemed that such Vice-President or a Chairman of any Committee, as the case may be, has been removed from the office of the Councilor also. At the time of passing order under sub-section (1), the State Government may also pass such order that the President or Vice-President or Chairman of any Committee, as the case may be, shall be disqualified to hold the office of President or Vice-President or Chairman, as the case may be, for the next term:

Provided that no such order under this section shall be passed unless a reasonable opportunity of being heard is given."

The above Section 41-A vests the State Government with power to remove the President, Vice-President or a Chairman of any Committee, if his continuance in the office is not found desirable in public interest or in the interest of the Council. A conjoint reading of other provisions such as Sections 20, 22 and 41-A as also the Article 243-ZG of the Constitution of India would make it amply clear that resort to Section 41-A can be had to remove a person from the office only after he/she is duly elected and his/her conduct in office is otherwise found prejudicial to public interest or in the interest of the Council.

10. Let us consider the charges leveled against the appellant, procedure followed in her case and the ultimate decision by the State Government under Section 41-A of the Act. Though four charges have been pressed into service in the show cause notice dated 15.09.2006, admittedly Charge No.4 has not been established, hence we are concerned with Charge Nos. 1-3 only. They are as follows:

"Charge No.1

That by getting published advertisements/best wishes

messages in various newspapers of more than Rs.1500/- each she has caused financial loss to the Municipality of Zora.

Charge No.2

On 27.12.2005, after the meeting of the council in the end of the details of the proceedings Smt. Sharda Kailash Mittal had put her signatures which have been cut and after the signatures so cut, Smt. Mittal has herself signed it again alongwith this on the sea of the Chief of the Chief Municipal Officer are the signatures of Sh. Hari Shankar Sharma who is not authorized to carry on any duty by the administration or senior officer of the Chief Municipal Officer.

Charge No.3

In sequence to the order dated 06.02.2006 for the transfer of Sh. A.K. Bansal, the then Chief Municipal Officer, on the same day he was discharged and automatically on the same day irregularly Sh. Hari shankar Sharma was given the charge of the Chief Municipal Officer and an irregular payment of Rs.3,12,783/- was made by him."

11. The substance of the Charge No.1 was that the appellant has caused monetary loss to the Municipality by publishing advertisements for more than Rs.1500/-. We have already pointed out and it was also not in dispute that the appellant-the President had submitted her detailed explanation with reference to the same. According to her, the payment for such publications had been approved by the President-in-Council, and the request for making the payment was expressed by the Chief Municipal Officer. However, the State pointed out that the appellant being the President of the Nagar Palika, ought to have proceeded on the basis of the prevalent Rules. It was further pointed out that by spending more than Rs.1500/- the appellant has not followed the Rules laid down

in that regard and as such she is guilty of the said charge. In the explanation to the said charge, the appellant has pointed out that though the charge leveled against her relates to causing financial loss to the Nagar Palika, on the contrary, according to her, the order states that the appellant was guilty of not following the Rules while making the payment, which was never framed against her. It is also relevant to mention that the Rules filed by the respondent and heavily relied on by the State Government provides that the expenditure on "welcome" shall not be more than Rs.1500/-. In the present case, it was pointed out more than one place that the expenditure was with regard to the advertisement and not with regard to the "welcome" expenses alone. Though this was highlighted in the explanation to the charge, it was not properly considered by the Government. The materials placed, particularly, Annexures 1 & 2, show that the office of Nagar Palika, Zora, invited tenders for purchase of goods relating to water supply for various wards and asserted that those tenders were to be out only after due deliberation by the Nagar Palika Committee. In the light of the above factual details, the actual contents of charge and the relevant rules, we are satisfied that the conclusion arrived at by the State Government cannot be accepted.

12. Charge No.2 relates to the allegation that the appellant had struck off her signature from the minutes dated 27.12.2005 and the then Chief Municipal Officer had signed the minutes, which has been accepted by the respondent. It was pointed out by the appellant that absolutely there was nothing on record to show that either the appellant herself struck off her signature or that the appellant had permitted or compelled the then Chief Municipal Officer to affix his signatures on the said minutes. It was pointed out by her that even if assuming to be so, it was not so grave in nature so as to attract Section 41-A of the Act. On going through her specific explanation and assertion and the relevant records, there is no reason to reject her claim and the State Government took it seriously without any acceptable material in order to take action under Section 41-A of the Act

more particularly, she being the President of the opposite party.

13. Charge No.3 relates to the allegation that the appellant had shown undue haste in appointing one Harishankar Sharma as the Chief Municipal Officer and compelled him to make various payments to the tune of Rs.8,12,783/-. In the explanation, it was pointed out that out of the total amount of Rs.8,12,783/-, Rs.5,08,890/- was spent towards the disbursement of the salary of the workers and other officers of the Corporation and the remaining of Rs.3,03,890/- was disbursed to various contractors for payment and wages to their daily wage workers. It was highlighted that the said payment to the contractor was made in part keeping in view the ensuing two festivals of Muharram and Basant Panchami. It was further highlighted that the vouchers of all the said payment were prepared and approved by the then Chief Municipal Officer – Shri A.K. Bansal and the appellant and were duly and properly audited, as such, there was no illegality in such disbursement. Copy of the report of the Chief Municipal Officer, Zora dated 09.03.2006 has been placed as Annexure P-8. The appellant has also pointed out that her political opponents sent a complaint to the Chief Minister making bald allegations of corruption against her. A copy of the letter dated 12.05.2006 has been included as Annexure P-9.

14. Apart from the above complaint, the appellant has also highlighted certain communications between the local leaders and the State Government seeking the Government's intervention in taking action against her for one reason or the other.

15. The analysis of these materials, particularly, the background shows that the State Government failed to appreciate that the decisions for publication of advertisements, calling for tenders and payment of salaries were made by the entire council and the President-appellant could not be singled out for those decisions taken by the Council. The High Court failed to appreciate that removal under Section 41-A of the Act

could be resorted to only under grave and exceptional circumstances which were not present in the appellant's case. No charge of causing financial loss to the Nagar Palika could be established by the State Government.

16. As directed earlier, Section 41–A of the Act gives power to the State Government to remove the President, Vice – President or Chairman of a Committee on four broad grounds, namely, (a) Public interest; (b) Interest of the Council; (c) Incapability of performing his duties; and (d) Working against the provisions of the Act or rules made thereunder. In addition, under Section 41 – A (2), the State Government at the time of removal from office may also pass an order disqualifying the person from holding the office of President, Vice – President or Chairman for the next term. The question to be determined is what is the scope of the application of Section 41–A and what is the nature of power of the Government?

17. In *Tarlochan Dev Sharma v. State of Punjab and Ors.* (2001) 6 SCC 260, this Court while dealing with the removal of a President of the Council under Punjab Municipal Act of 1911, held in Paragraph 6 as under:

> "In a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his elections set aside by a prescribed procedure known to law… Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office a stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held."

In Paragraph 11 this Court observed as under:

> "A singular or causal aberration or failure in exercise of power is not enough ; a course of conduct or plurality of aberration or failure in exercise of power and that too

> involving, dishonesty of intention is… The legislature could not have intended the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision."

The same consideration must be taken into account while interpreting Section 41- A of the Act. The President under the M.P. Municipalities Act, 1961 is a democratically elected officer, and the removal of such an officer is an extreme step which must be resorted to only in grave and exceptional circumstances.

18. For taking action under Section 41-A for removal of President, Vice-President or Chairman of any Committee, power is conferred on the State Government with no provision of any appeal. The action of removal casts a serious stigma on the personal and public life of the concerned office bearer and may result in his/her disqualification to hold such office for the next term. The exercise of power, therefore, has serious civil consequences on the status of an office bearer. There are no sufficient guidelines in the provisions of Section 41-A as to the manner in which the power has to be exercised, except that it requires that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Keeping in view the nature of the power and the consequences that flows on its exercise it has to be held that such power can be invoked by the State Government only for very strong and weighty reason. Such a power is not to be exercised for minor irregularities in discharge of duties by the holder of the elected post. The provision has to be construed in strict manner because the holder of office occupies it by election and he/she is deprived of the office by an executive order in which the electorate has no chance of participation.

19. In the present case, the actions of the appellant, even if proved, only amount to irregularities, and not grave forms of illegalities, which may allow the State Government to invoke its extreme power under Section 41 – A.

20. From the materials placed before us, we are satisfied that the advertisements, tenders calling for attending day-to-day work of the Municipality such as provision for drinking water, sanitation etc. were duly put out only after due deliberation by the Council of Nagar Palika and no decision was taken by the appellant herself. The appellant has also established that due to transfer of Chief Municipal Officer, the salaries of workers of the Nagar Palika remained upaid for the month of January, 2006 leading to possibility of unrest in the area, therefore, it was requested to the appellant by the Councilors that necessary arrangements be made for immediate payment of salaries in view of the ensuing festivals of Muharram and Basant Panchami. The materials placed by the appellant before the State Government as well as before the High Court show that the tender had been put out after due deliberation by the Council and all works had been completed after satisfying the conditions prescribed therein. The appellant had pointed out that out of the amount of Rs.8,12,783/-, an amount of Rs.5,08,890/- was disbursed towards salaries of the workers and other officers of the Nagar Palika and the remaining Rs. 3,03,890/- was paid to various contractors for payment of salaries to their daily wage workers. The vouchers of all the said payments were prepared and approved by the then Chief Municipal Officer-Shri A.K. Bansal and the appellant and those accounts were duly audited and as such there is no valid reason to reject the stand taken by the appellant. It is also relevant to point out that though the State Government erroneously mentioned the expenses on advertisement as Rs.2.46 lacs subsequently they themselves filed an application for amendment to correct the amount of Rs.2.46 lacs to be read as Rs.24,600/-. The learned single Judge as well as the Division Bench not only failed to consider all the above circumstances and the exigencies under which the appellant was compelled to make the appointment of one Shri Harishankar Sharma as Chief Municipal Officer and also ignored the fact that the appointment was actually made for payment of salaries and to make the payments to the

contractors who pressed for disbursement of the same to their workers. In the light of the above conclusion and in the absence of a finding that any loss was caused, the decision of the State Government can not be sustained.

21. In the light of the above discussion, we set aside the order of the State Government removing the appellant as President of the Nagar Palika, Zora, District Muraina under Section 41-A of the Act and consequential orders dated 25.04.2008 passed by the learned single Judge in W.P. No. 4894 of 2007 and of the Division Bench dated 20.06.2008 in W.A. No. 253 of 2008. In view of the fact that her tenure has come to an end and fresh election was also conducted, we are not disturbing the subsequent events. However, we make it clear that in view of the present order, the disqualification of the appellant is expunged and the appellant would be free to contest the elections in future.

22. With the above conclusion and observation, the appeal is allowed. There shall be no order as to costs.

N.J. Appeal allowed.

CHAITANYA PRAKASH & ANR.
v.
H. OMKARAPPA
(Civil Appeal No. 2786 of 2007)

JANUARY 12, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Service law – Termination – Employee on probation – Performance not found satisfactory – Extension of probation period –Thereafter, termination of employee – High Court holding the termination order as stigmatic – Directions to employer to allow the employee to continue in service – On appeal, held: Employer had time and again specifically brought to the notice of employee of his short comings, gave ample opportunities to improve them and no misconduct as such was alleged against employee – Thus, was termination simpliciter due to unsuitability of employee and not punishment for misconduct – It cannot be said to be stigmatic – Order of termination restored – Hindustan Photo Films Service Rules for Officers – Clause 3.

The question which arose for consideration in this appeal is whether the impugned order passed by the appellants-employer against the respondent-employee terminating his service during the period of probation was an order of termination simpliciter due to unsatisfactory service or "stigmatic" due to misconduct.

Allowing the appeal, the Court

HELD: 1. Even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. The impugned order passed by the appellants against the respondent terminating his service during the period of probation is not stigmatic and as such the decision of the High Court

is erroneous and vitiated and is set aside. The order passed by the appellant is restored. [Paras 16 and 22] [478-G-H; 482-C-D]

2.1. The respondent was appointed as Executive Director [Marketing] on specific terms and conditions, one of which was that he would be on probation in the said post for a period of one year from the date of joining the post. The respondent accepted the said offer of appointment along with terms and conditions appended thereto and also specifically accepted the position that he would be guided by the rules and regulations applicable to the appellant no. 2-Company. [Para 11] [475-E-G]

2.2. The respondent was ordered to be on probation for a period of one year and as per clause 3.2 of Hindustan Photo Films Service Rules for Officers his performance during the period of probation was to be reviewed by the company and that the company could extend the period of probation or terminate the service of the respondent at any time during or at the time of probation period. Clause 3.3 of Service Rules stated there has to be an order communicating the order of confirmation to the officers concerned after the end of the period of probation. In the instant case, no such order of confirmation was passed by the appellant no. 2 confirming the service of the respondent. Respondent continued to be on probation, which was extended for a period of three months. [Para 12] [475-H; 476-A-C]

2.3 The respondent was not confirmed in the post of Executive Director (Marketing) and he continued to be on probation during which period his service could be terminated for unsatisfactory work and for doing so it was not necessary for the appellants to institute departmental proceedings or to give an opportunity of hearing to the respondent. But the respondent was time and again informed during the probation period about his

deficiencies and was given ample opportunities to improve them. Therefore, enough precautions were taken by the appellants to see that the respondent improved his performance and such an opportunity was provided to him. But such advices and opportunity were totally misplaced as the respondent considered the same as unnecessary encroachment and interference in his work and wrote back rudely in an intemperate language. Whether or not a person is suitable to be retained and confirmed in service could be considered and assessed by the Managing Director, namely, appellant no. 1, but he after making an appraisal submitted his report along with all other records of the respondent before the Board of Directors, who finally took the decision. The Board of Directors constituted of responsible persons and they while deciding the suitability of the respondent not only considered the Performance Assessment Report but also considered all other records, and thereafter they took a considered and conscious decision that the respondent was not suitable for confirmation and terminated his service. The reasons mentioned in the letter terminating the services of the respondent cannot be said to be stigmatic. The appellant had time and again specifically brought to the notice of the respondent his short comings and no misconduct as such is alleged against the respondent by the appellant and therefore the instant case is a case of termination simpliciter due to unsuitability of the respondent and not a case of punishment for misconduct. [Paras 14 and 20] [477-B-D; 480-G-H; 481-A-E]

2.4. Respondent submitted that the order of dismissal of the respondent was stigmatic is also proved from the fact that subsequent to his termination, the respondent was called for interview for the post of Managing Director of M/s. Spice Trading Corporation Ltd. Company and that when he reached the venue of interview, he was informed by the Selection Board that he was not required to attend

the interview because the appellants informed the said company that the service of the respondent was terminated due to his unsatisfactory service performance; and the same indicated and fortified the vindictive attitude of the appellant no. 1 from issuance of the said letter. Appellants informed M/s. Spice Trading Corporation Ltd. Company on being specifically asked by the said company about the performance of the respondent and consequently it was informed that his service was terminated due to unsuitability, which is a fact. If, they would have not intimated the same to the company despite their specific query then they would have been suppressing the material fact. The said aspect does not in any manner support the case of the respondent. [Para 21] [481-F-H; 482-A-C]

Abhijit Gupta v. S.N.B. National Centre, Basic Sciences **2006 (4) SCC 469;** *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.* **2003 (3) SCC 263;** *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* **(2002) 1 SCC 520;** *Allahabad Bank Officers Assn. v. Allahabad Bank* **(1996) 4 SCC 504, relied on.**

Case Law Reference:

2006 (4) SCC 469	**Relied on.**	**Para 16**
2003 (3) SCC 263	**Relied on.**	**Para 17**
(2002) 1 SCC 520	**Relied on.**	**Para 18**
(1996) 4 SCC 504	**Relied on.**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2786 of 2007.

From the Judgment & Order dated 11.4.2007 of the High Court of Judicature at Madras in Writ Appeal No. 3290 of 2004 in W.P. No. 19169 of 1999.

E.R. Kumar, Ranjeeta Rohtagi, Somandri Gour, Parekh & Co. for the Appellant.

P. Vishwanatha Shetty, Vijay Bhaskar, Vijay Kumar, L. Paradesi, Rameshwar Prasad Goyal for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The issue that falls for consideration in this appeal is whether the impugned order passed by the appellants against the respondent terminating his service during the period of probation was an order of termination simpliciter due to unsatisfactory service or "stigmatic" due to misconduct.

2. The respondent herein was offered an appointment to the post of Executive Director [Marketing] by the Appellant No. 2, namely, M/s. Hindustan Photo Films Manufacturing Company Ltd. by issuing an offer of appointment dated 03.06.1998. The said offer of appointment was accompanied with terms and conditions of appointment, one of which was that the respondent was to undergo probation for a period of one year, which is extendable. Those terms and conditions mentioned in the said offer of appointment are relevant for the purpose of deciding the present case. Few important passages from the aforesaid terms and conditions are extracted hereunder:

> "i. You will be on probation in the above post for a period of one year from the date of joining the post.
>
> ii. During the period of your employment in the Company, you will be governed by the Service Rules of Hindustan Photo Films Service Rules for Officers, which would be applicable to the officers of the company as may be in force from time to time."

Clause-3 of the Hindustan Photo Films Service Rules for Officers which came into effect on 1st March, 1974 deals with matter of probation. The relevant sub-clauses within clause-3, read as follows:

> "3.1. An Officer appointed by direct recruitment or promotion shall be on probation for a period of one year from the date of joining the post.
>
> 3.2. The performance during the period of probation shall be reviewed by the Company and the Company may extend the period of probation or terminate the services of the probationer recruited from outside at any time during or at the time of the probation period.
>
> 3.3. The Management would try to communicate the orders of confirmation to the Officer concerned as early as possible after the end of the period of probation. However, any delay in such communication does not mean the automatic confirmation of the Officer.
>
> ……..
>
> 3.5. During the period of probation, an Officer directly recruited shall be liable to be discharged from the services of the company after being suitably advised about his unsatisfactory performance or other reasons, if any…."

3. Pursuant to the aforesaid offer of appointment, the respondent expressed his willingness to join on the said post and consequently joined as Executive Director [Marketing] on 03.09.1998. At the time of joining, the respondent gave a declaration that he would abide by all the rules and regulations of the appellant No. 2 - Company. It is the specific case of the appellants that as the performance of the respondent was not found to be satisfactory during the period of probation his service was not confirmed and his probation was extended by another three months, in terms of Clauses 3.2 and 3.3 of the Service Rules. The aforesaid letter intimating the respondent that his probation had been extended by three months also mentioned that during the extended period of probation of three months he was expected to show concrete results in his performance which had been intimated to him from time to time and that his performance would be reviewed again on 05.10.1999.

4. The respondent addressed a letter dated 05.10.1999 in reply to the letter issued by the company dated 20.09.1999, wherein he had stated that his performance during the period of probation was excellent as his service records did not carry any adverse remarks.

5. That there are several letters on record wherein the appellant no. 1 advised the respondent to improve his performance. The appellants prepared a detailed report dated 25.11.1999 regarding his performance which was in the nature of an assessment of the respondent during the period of probation and the same was placed before the Board of Directors of the appellant company in its 225th meeting, which was held on 27.11.1999. The Board of Directors considered the performance and suitability of the respondent on the basis of his entire service records including the Performance and Assessment Report prepared by the office and passed a resolution to the following effect:

> "……RESOLVED THAT the services of Shri H. Omkarappa, Executive Director (Marketing) be terminated on or before 2nd December, 1999.
>
> RESOLVED FURTHER THAT the Chairman-cum-Managing Director be and is hereby authorized to take all necessary steps in the matter".

6. Consequent upon the said decision of the Board of Directors, the appellant no. 1 issued a letter dated 29.11.1999 to the respondent terminating his services as Executive Director [Marketing] with effect from 29.11.1999.

7. Immediately thereafter, the respondent herein preferred a writ petition in the Madras High Court praying for setting aside and quashing the order dated 29.11.1999 issued by the appellant. Notice having been issued in the said writ petition, the appellants filed a detailed counter affidavit. The Division Bench of the High Court heard the writ petition after completion

of pleadings. In the said writ petition it was also brought to the notice of the court that subsequent to the order of termination, the respondent applied for the post of Managing Director of M/s. Spices Trading Corporation Ltd. but he was not called for interview held during the selection process in view of the letter dated 29.02.2000 sent by the appellants bringing to their notice the misconduct of the respondent. The said writ petition was heard by the Division Bench of the High Court of Madras and by the impugned Judgment and Order dated 11.04.2007, the High Court allowed the writ petition holding that the order of termination passed by the appellants against respondent was stigmatic, and therefore, the said order could not have been given effect to without giving an opportunity to the respondent. It was, therefore, directed that the respondent herein would be allowed to continue in his service.

8. Being aggrieved by the Judgment and Order dated 11.04.2007 passed by the Division Bench of the High Court, the present appeal was preferred by the appellants herein on which we have heard the learned counsel appearing for the respective parties.

9. Mr. E.R. Kumar, Advocate for the appellants has drawn our attention to the terms and conditions of the appointment, the Rules position with regard to the service conditions of the respondent and also to the communications between the appellant no. 1 and the respondent. The counsel appearing for the appellants submitted before us that the High Court was wrong and incorrect in holding that the order terminating the services of the respondent was stigmatic. It was also submitted that it cannot be said that the appellant no. 1 was biased against the respondent in taking the decision to terminate his services as the Board of Directors was responsible for passing a resolution to the effect of termination of the services of the respondent after considering the entire records and Performance and Assessment Report of the respondent. The Counsel also relied upon the decision of the Supreme Court

in Abhijit Gupta v. S.N.B. National Centre, Basic Sciences reported in (2006) 4 SCC 469 and also the decision of the Supreme Court in *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.,* reported in (2003) 3 SCC 263.

10. Mr. P. Vishwanatha Shetty, learned Senior Advocate appearing for the respondent, on the other hand, submitted that a bare perusal of the order of termination dated 29.11.1999 would indicate that the same was stigmatic, and therefore, the High Court was justified in setting aside the same as the same was issued without giving any opportunity to the respondent and without conducting any enquiry in that regard. It was also submitted that the decision of the Board of Directors to terminate the services of the respondent was the result of bias of appellant No. 1 and also influenced by him as he was very much present in the meeting of the Board of Directors in which the decision to terminate the services of the respondent was taken.

11. In light of the submissions made by the counsel appearing for the parties, we have perused the entire records. The respondent was appointed as Executive Director [Marketing] vide letter dated 03.06.1998 on specific terms and conditions, one of which was that he would be on probation in the aforesaid post for a period of one year from the date of joining the post. It was also stated in para 3 of the letter of appointment that if the aforesaid terms and conditions are acceptable to the respondent he may indicate the date of joining within 10 days. The respondent accepted the aforesaid offer of appointment along with terms and conditions appended thereto and also specifically accepted the position that he would be guided by the rules and regulations applicable to the appellant no. 2 - Company.

12. We have already extracted the rule position governing the service conditions of the respondent. The respondent was ordered to be on probation for a period of one year and as per clause 3.2 of Service Rules his performance during the period

of probation was to be reviewed by the company and that the company could extend the period of probation or terminate the service of the respondent at any time during or at the time of probation period. On the other hand, clause 3.3 of Service Rules stated there has to be an order communicating the order of confirmation to the officers concerned after the end of the period of probation. In the present case, no such order of confirmation was passed by the appellant no. 2 confirming the service of the respondent. There is no dispute with regard to the fact that the respondent continued to be on probation, which was extended for a period of three months.

13. A letter dated 20.09.1999 was issued to the respondent communicating to him that his probation period has been extended by another three months and that during the aforesaid period of probation he is expected to show concrete results in his performance which was being communicated to him from time to time and that his performance would be viewed during the period of probation and the said fact was communicated to him. There are communications on the record communicating to the respondent that the appellants were not satisfied with the performance of the respondent. It was communicated to him in one of such communications that it was very disheartening to note that the respondent did not improve his deficiencies and show any improvement in his conduct and behaviour. The appellant no. 1 in his communications dated 20.09.1999, 04.11.1999 and 08.11.1999 apprised the respondent about his deficiencies. He was advised that if a significant improvement was not shown, the appellants would be constrained to initiate further action, as per Company Rules in that regard.

14. After making a total appraisal of his performance, a report was submitted to the Board of Directors by appellant No. 1. The record also discloses that the Board of Directors held a meeting and in that meeting they not only considered the Performance Assessment Report prepared by the appellant no.

1 but also perused the entire service record of the respondent, and thereafter took a conscious and considered decision of terminating his service due to unsatisfactory work. The aforesaid decision of the Board of Directors of appellant no. 2 was communicated to the respondent under the impugned order dated 29.11.1999. The respondent was not confirmed in the post of Executive Director (Marketing) and he continued to be on probation during which period his service could be terminated for unsatisfactory work and for doing so it was not necessary for the appellants to institute departmental proceedings or to give an opportunity of hearing to the respondent. But the fact remains that a number of communications were issued to the respondent by the appellant no. 1 bringing to his notice his dismal performance and unsatisfactory work with an advise to improve his performance.

15. Our attention was also drawn to a letter written by the respondent to the appellant no. 1, who was the Managing Director of the company. If a subordinate officer like the respondent is in the habit of using an intemperate language against his superior like the appellant No. 1 the decision taken by the appellant company cannot be said to be in any manner vitiated. Letter dated 13.11.1999 written by the respondent to the appellant no. 1 would support the said position and would speak volume about his behaviour and conduct. The relevant paragraphs of the said letter are extracted hereunder:

"……..

I acknowledge the receipt of the above letters. I have also gone through the contents of the letters carefully. I respectfully submit to the respected CMD, that you have spent enough of your intellectual faculty to bring out a picture of non-performance by me, for which I must appreciate your efforts. However, I feel sad that you have wasted your energy in manipulating the facts through figures. As my Senior Officer & elderly person, I must also thank you for numerous advices given to me in the letter,

which I must consider on their merits"

……..

"Sir, I must refer here that unlike my above explained case, yourself and Director Finance have joined this company only to enjoy better benefits which include status, good pay, perquisites and other facilities."

……..

"Alas, I am unable to comprehend from the fact that from the beginning of my career in HPF, I found that I have been restrained to perform with my full capacity by CMD and DF, by their non congenial attitude and acts, which gradually concentrated to the extent of suffocating me, affecting my efficiency to a great extent. Sir, it is not out of pen to mention here that under various acts of commissions and omissions of CMD and DF, I have been totally restricted from functioning as EDM, with even small part of my capacity. I give below some of them for your kind knowledge and perusal, even though you are quite aware of them."

……..

"Thus, it is not EDM's inefficiency/non performance that has affected the efficiency of Marketing Division, but the callous act of CMD/DF which prevented EDM from functioning normally and also affected his efficiency and credibility."

16. It is no longer res integra that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the decision of the Supreme Court in *Abhijit Gupta v. S.N.B. National Centre, Basic Sciences* (supra), wherein also a similar letter was issued to the concerned employee intimating him that his

performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negatived the said contention and upheld the order of termination.

17. In *Mathew P. Thomas v. Kerala State Civil Supply Corpn. Ltd.,* (supra) also the concerned employee was kept on probation for a period of two years. During the course of his employment he was also informed that despite being told to improve his performance time and again there is no such improvement. His shortfalls were brought to his notice and consequently by order dated 16.01.1997 his services were terminated, wherein also a reference was made to his unsatisfactory service. In the said decision, the Supreme Court has held that on the basis of long line of decisions it appears that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case.

18. In *Pavanendra Narayan verma v. Sanjay Gandhi PGI of Medical Sciences,* (2002) 1 SCC 520; this court had the occasion to determine as to whether the impugned order therein was a letter of termination of services simpliciter or stigmatic termination. After considering various earlier decisions of this court in paragraph 21 of the aforesaid decision it was stated by this Court thus :-

> "21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

19. In *Abhijit Gupta* (Supra.), this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in *Allahabad Bank Officers Assn. V. Allahabad Bank* (1996) 4 SCC 504; where it is stated thus :-

> "14…….As pointed out in this judgment, expressions like "want of application", "lack of potential" and "found not dependable" when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service."

20. In our considered opinion, the ratio of the above-referred decisions are squarely applicable to the facts of the present case. The respondent was time and again informed during the probation period about his deficiencies and was given ample opportunities to improve them. Therefore, enough precautions were taken by the appellants to see that the respondent improved his performance and such an opportunity was provided to him. But such advices and opportunity were totally misplaced as the respondent considered the same as unnecessary encroachment and interference in his work and wrote back rudely in an intemperate language. Whether or not a person is suitable to be retained and confirmed in service

could be considered and assessed by the Managing Director, namely, appellant no. 1, but he after making an appraisal submitted his report along with all other records of the respondent before the Board of Directors, who finally took the decision. The Board of Directors constituted of responsible persons and they while deciding the suitability of the respondent not only considered the Performance Assessment Report but also considered all other records, and thereafter they took a considered and conscious decision that the respondent was not suitable for confirmation and terminate his service. The said decision of the Board of Directors appears to be in parity with the ratio of the aforesaid decisions of this Court (supra). The reasons mentioned in the letter dated 29.11.1999 – terminating the services of the respondent cannot be said to be stigmatic. The appellant had time and again specifically brought to the notice of the respondent his short comings and no misconduct as such is alleged against the respondent by the appellant and therefore the present case is a case of termination simpliciter due to unsuitability of the respondent and not a case of punishment for misconduct.

21. It was brought to our notice during the course of argument by the counsel appearing for the respondent that the order of dismissal of the respondent dated 29.11.1999 was stigmatic is also proved from the fact that subsequent to his termination, the respondent was called for interview for the post of Managing Director of M/s Spices Trading Corporation Ltd. and that when he reached the venue of interview, he was informed by the Selection Board that he was not required to attend the interview because the appellants informed the said company that the service of the respondent was terminated due to his unsatisfactory service performance. Referring to and relying on the same, it was submitted by the counsel appearing for the respondent that it indicated and fortified the vindictive attitude of the 1st appellant herein from issuance of the aforesaid letter. We have perused the relevant records and on the basis of the same we are of considered opinion that the

appellants informed M/s Spices Trading Corporation Ltd. company on being specifically asked by the said company about the performance of the respondent and consequently it was informed that his service was terminated due to unsuitability, which is a fact. If, they would have not intimated the same to the company despite their specific query then they would have been suppressing the material fact. In our considered opinion the aforesaid aspect does not in any manner support the case of the respondent.

22. In view of the above, we hold that the impugned order is not stigmatic and as such the decision of the High Court is erroneous and vitiated. We accordingly, hereby set aside the same and restore the order dated 29.11.1999 passed by the appellant.

23. As a result, the appeal is allowed. There will be no orders as to costs.

N.J. Appeal allowed.

UNION OF INDIA ETC.
v.
RAKESH KUMAR AND ORS., ETC.
(Civil Appeal Nos. 484-491 of 2006)

JANUARY 12, 2010

[K.G. BALAKRISHNAN, CJI, P. SATHASIVAM AND J.M. PANCHAL, JJ.]

Constitution of India, 1950:

Articles 14, 243-D and 243-M(4)(b) – Panchayats in Scheduled Areas – Section 4(g) of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and ss. 17(B)(2), 21(B), 36(B)(2), 40(B), 51(B)(2) and 55(B) of the Jharkhand Panchayat Raj Act,2001 providing for reservation of 50% of total seats in Panchayats and reservation of posts of Chairpersons at all level in Panchayats in Scheduled Areas for Scheduled Tribes – HELD: Constitutionally valid – Reservation of 50% seats in favour of Scheduled Tribes in Scheduled Areas at all the three tiers is clearly an example of 'compensatory discrimination' as these areas were completely under a separate administrative scheme as per Fifth Schedule to the Constitution – The provisions laying down that reservation not to exceed 80% of total seats in Panchayats in case of reservation provided to backward class proportionate to their population in Scheduled Areas if combined with seats reserved for Scheduled Tribes and Scheduled Castes, are also constitutionally valid – Total reservations exceeding 50% of seats in Panchayats in Scheduled Areas are permissible on account of exceptional treatment mandated under Article 243-M(4)(b) – This would not amount to unreasonable restriction on rights of political participation of persons belonging to general category – Besides, rights to exercise electoral franchise are legal rights, subject to control through legislative means – Provisions of

the Panchayats (Extension to the Scheduled Areas) Act, 1996 – s.4(g) – Jharkhand Panchayat Raj Act,2001 – ss. 17(B)(2), 21(B), 36(B)(2), 40(B), 51(B)(2) and 55(B) – Committees – Bhuria Committee Report – Social Justice – Election Law.

Writ petitions were filed before the High Court challenging the constitutional validity of s.4(g) of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the provisions of the Jharkhand Panchayat Raj Act, 2001. The High Court struck down the second proviso to s.4(g) of PESA and ss. 21(B), 40(B) and 55(B) of JPRA which provided for reservation for Scheduled Tribes, of posts of Chairpersons at all levels in Panchayats in Scheduled Areas. It also struck down ss.17(B)(2), 36(B)(2) and 51(B)(2) of JPRA, which provided for reservation upto the extent 80% of seats in Panchayats in Scheduled Areas for Scheduled Tribes, Scheduled Castes and backward class, combined together. Aggrieved, the Union of India and others filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. The second proviso to s.4(g) of the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996, and ss. 21(B), 40(B) and 55(B) of the Jharkhand Panchayat Raj Act, 2001 are constitutionally valid. In Panchayats located in Scheduled Areas, the exclusive representation of Scheduled Tribes in the Chairperson positions of the same bodies is constitutionally permissible. This is so because Article 243-M(4)(b) of the Constitution of India expressly empowers Parliament to provide for 'exceptions and modifications' in the application of Part IX of the Constitution to Scheduled Areas. The provisos to s. 4(g) of the PESA contemplate certain exceptions to the norm of 'proportionate representation' and the same exceptional treatment was incorporated in the impugned

provisions of the JPRA. [Para 23 and 44] [531-E; 510-B-D]

Janardhan Paswan v. State of Bihar, **AIR 1988 Pat 75, distinguished.**

1.2. The Panchayati Raj system in Scheduled Areas is a fit case that warrants exceptional treatment with regard to reservation. The principles of reservation which are applicable for public employment and for admission to educational institutions cannot be readily applied in respect of the reservation policy made by the legislature to protect the interests of the Scheduled Tribes by assuring them of majority reservation as well as the occupancy of Chairperson positions in Panchayats located in Scheduled Areas. This policy broadly corresponds with the past practice wherein the Scheduled Areas were administered as per the provisions of the Fifth Schedule to the Constitution and the same was expected to adhere to the advice of the Tribes Advisory Councils, which were predominantly controlled by Scheduled Tribes. By extending the Panchayati Raj system to these areas, Scheduled Tribes should not be put in a relatively disadvantageous position. In the Panchayati Raj system contemplated by Part IX of the Constitution, the Scheduled Tribes should have an effective say in the administration. That is why the Bhuria Committee recommended that all Chairperson positions should be reserved in favour of Scheduled Tribes. The Parliament has conferred such special reservation on account of the pivotal role of the Chairperson in a Panchayat. [Para 15, 18 and 34] [510-D-E; 511-G-H; 512-A-B; 523-F]

Vinayakrao Gangaramji Deshmukh v. *P.C. Agrawal & Ors.,* **AIR 1999 Bom 142; and** *Indra Sawhney* v. *Union of India*, **1992 (2) Suppl. SCR 454 = (1992) Suppl. (3) SCC 217, referred to.**

2.1. Sections 17(B)(2), 36(B)(2) and 55(B)(2) of the Jharkhand Panchayat Reservation Act, 2001 are also constitutionally valid provisions. The legislative intent behind the provisions of the JPRA is primarily that of safeguarding the interests of persons belonging to the Scheduled Tribes category. Therefore, total reservations exceeding 50% of the seats in Panchayats located in Scheduled Areas are permissible on account of the exceptional treatment mandated under Article 243-M(4)(b) of the Constitution. [Para 42 and 44] [530-H; 531-A-B-E]

M.R. Balaji v. *State of Mysore*, **1963 Suppl. SCR 439 = AIR 1963 SC 649 and** *Indra Sawhney* v. *Union of India* **(1992) Supp 3 SCC 217;** *Krishna Kumar Mishra* v. *State of Bihar*, **AIR 1996 Pat. 112, referred to.**

2.2. Under Article 243-D of the Constitution, there is a clear mandate for the State Legislature to reserve seats for SCs and STs in every panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the SCs or the STs in that Panchayat area bears to the total population of the area under consideration. In view of Article 243-D(6), a State Legislature can make provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens. Under the PESA, 50% of the seats in Gram Panchayats, Panchayat Samitis and Zilla Parishads should be reserved in favour of Schedule Tribes and the ceiling is fixed to the extent that this reservation put together shall not exceed 80% of the total seats. It may be noticed that this reservation policy is exclusively applicable to Scheduled Areas which had hitherto been the subject of a separate administrative scheme under the Fifth Schedule of the Constitution. [Para 27] [518-E-H; 519-A-B]

2.3. It is a well-accepted premise in our legal system that ideas such as 'substantive equality' and 'distributive justice' are at the heart of our understanding of the guarantee of 'equal protection before the law'. The State can treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres. The question is whether 'reasonable classification' has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with a legitimate governmental objective. While examining the validity of affirmative action measures, the enquiry should be governed by the standard of proportionality rather than the standard of 'strict scrutiny'. Of course, these affirmative action measures should be periodically reviewed and various measures are modified or adapted from time to time in keeping with the changing social and economic conditions. Reservation of seats in Panchayats is one such affirmative action measure enabled by Part IX of the Constitution. [Para 28] [519-C-E]

2.4. The principle of 'one-man, one-vote' cannot be applied in an absolute sense in the context of Panchayat elections in Scheduled Areas. However, it is the responsibility of the executive to identify territorial constituencies which have a certain degree of parity in their population levels. It is of course important to re-draw these constituencies from time to time, in keeping with the demographic shifts in the area concerned. [Para 20] [513-D-F]

2.5. Reservation of 50% seats in favour of the STs in Panchayats at all the three tiers is clearly an example of 'compensatory discrimination' especially in view of the fact that the scheduled areas under consideration were completely under a separate administrative scheme as per the Fifth Schedule to the Constitution. There is of course a rational basis for departing from the norms of

'adequate representation' as well as 'proportionate representation' in the case of Scheduled Tribes. This was necessary because it was found that even in the areas where Scheduled Tribes are in a relative majority, they are under-represented in the government machinery and hence vulnerable to exploitation. [Para 31and 37] [521-G-H; 525-E]

Ashok Kumar Tripathi v. *Union of India* **2000 (2) MPHT 193, approved.**

2.6. Article 243-D is a distinct and independent constitutional basis for reservation in Panchayat Raj Institutions. This reservation cannot be readily compared to the affirmative action measures enabled by Articles 15(4) and 16(4) of the Constitution; especially analogy between Article 16(4) and Article 243-D is unviable. [Para 32] [522-B-D]

Vinayakrao Gangaramji Deshmukh v. *P.C. Agrawal & Ors.,* **AIR 1999 Bom 142, approved.**

3.1. The reservation policy in question is applicable only to Scheduled Areas which were hitherto covered by the Fifth Schedule to the Constitution, and merit such exceptional treatment. The Scheduled Areas under consideration are restricted only to certain Districts in the State of Jharkhand. In some Districts where STs are not predominantly in occupation, only certain blocks have been notified as Scheduled Areas by themselves. On account of migration of non-tribal people in some areas, there may be a relatively lesser proportion of tribal population but historically these areas were occupied almost exclusively by Tribal people. It is quite clear that the exceptional treatment for Scheduled Tribes will be confined to the blocks that have been notified as Scheduled Areas. This means that in the Districts where only some of the blocks have been notified as Scheduled

Areas, the provisions of the JPRA will be applicable at the level of Panchayat Samitis within the notified area but not at the level of the Zilla Parishad for the whole district. [Para 19 and 21] [512-D-G; 513-G-H; 514-A]

Ashok Kumar Tripathi v. *Union of India* **2000 (2) MPHT 193; and** *R.C Poudyal v. Union of India* **1993 (1) SCR 891 = (1994) Supp. 1 SCC 324, referred to.**

3.2. The identification of Scheduled Areas is an executive function and courts do not possess the expertise needed to scrutinize the empirical basis of the same. The data submitted before the Court indicates that while the Scheduled Tribes are indeed in a majority in some Scheduled Areas, the same is not true for some other Scheduled Areas. This disparity is understandable keeping in mind that there has been a considerable influx of non-tribal population in some of the Scheduled Areas. In this regard, the Bhuria Committee's recommendation must be emphasized which says that persons belonging to the Scheduled Tribes should occupy at least half of the seats in Panchayats located in Scheduled Areas, irrespective of whether the ST population was in a relative minority in the concerned area. This recommendation is in line with the larger objective of safeguarding the interests of Scheduled Tribes. [Para 38] [528-D-G]

4.1. As regards the plea that reservation of 80% of the seats in Panchayats in Scheduled Areas amounts to an unreasonable limitation on the rights of political participation of persons belonging to the general category, it is significant to note that the rights of political participation broadly include the right of a citizen to vote for a candidate of his/her choice and right of citizens to contest elections for a public office. While the exercise of electoral franchise is an essential component of a liberal democracy, it is a well-settled principle in Indian law that such rights do not have the status of fundamental

rights and are instead legal rights which are controlled through legislative means It will suffice to say that there is no inherent right to contest elections since there are explicit legislative controls over the same. [Para 39] [529-B-F]

N.P. Ponnuswami vs. Returning Officer Namakkal Constituency Namakkal Salem Dist. **1952 SCR 218= 1952 AIR 64, referred to.**

4.2. In the context of reservations in Panchayats, the limitation placed on the choices available to voters is an incidental consequence of the reservation policy. In this case, the compelling State interest in safeguarding the interests of weaker sections by ensuring their representation in local self-government clearly outweighs the competing interest in not curtailing the choices available to voters. [Para 40] [529-G-H; 530-A]

Case Law Reference:

AIR 1988 Pat 75	**referred to**	**Para 13**
1992 (2) Suppl. SCR 454	**referred to**	**Para 17**
(1963)1 SCC 439	**referred to**	**Para 17**
1993 (1) SCR 891	**referred to**	**Para 20**
2000 (2) MPHT 193	**relied on**	**Para 22**
AIR 1996 Pat. 112	**referred to**	**Para 24**
AIR 1999 Bom 142	**referred to**	**Para 32**
2000 (2) MPHT 193	**approved**	**Para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 484-491 of 2006.

From the Judgment & Order dated 02.09.2005 of the High Court of Jharkhand in W.P. (PIL) No. 2728 of 2002, W.P. (PIL)

No. 3877/2002, W.P. (PIL) No. 747/2001, W.P. (PIL) No. 1585 of 2002, W.P. (PIL) No. 849 of 2002, CWJC No. 3591/1997 (R), CWJC No. 2148 of 2001, W.P. (C) No. 2097 of 2002.

WITH

C.A. Nos. 209, 210-211, 212, 213, 214, 215, 216, 217, of 2010

Gopal Subramanium, ASG, Dr. Rajeev Dhawan (N.P.), P.S. Mishra, (N.P.), S.B. Upadhyay (N.P.), M.N. Krishnamani (N.P.), Nagendra Rai, (N.P.), Tapesh Kr. Singh, Balaji (for B. Krishna Prasad), Amlan Kumar Ghosh, Prashant Bhushan, Bhupender Yadav, Vikramjit Banerjee, R.C. Kohli, Saket Singh, Niranjana Singh, Vikram, Braj Kishore Mishra, Ujjwal K.Jha, Arup Banerjee, Kshatrashal Raj, Braj K. Mishra, T.T.K. Deepak & Co., (NP), Nikhil Nayyar, T.V.S. Raghavendra Sreyas, Sumeet Gagodra, Amboj Agrawal, Dr. M.P. Raju, Mary Scaria, P. George Giri, Y. Kalivi Zhimomi, Ashwani Bhardwaj, Santosh Mishra, Rajesh Ranjan Dubey, Dhruv Kumar Jha, Jayesh Gaurav, Shiv Mangal Sharma, Upendra Mishra, Pawan Upadhyay, Sharmila Upadhyaya, Chinmoy Khaladkar, Shailendra Narayan Singh, Neelam Kalsi, Vimal Chandra S. Dave, Sanjay R. Hegde, Anil Kr. Mishra, A. Rohen Singh, Amit Kr. Chawla, Vikrant Yadav, R. Venkataraman, Manish Kumar Saran, Nirmal Kumar Ambastha, Delip Jerath, Ruchira Gupta, Bhawesh Kumar, (for Ashok Mathur), Kumud Lata Das, D.N. Goburdhan, (NP), Ajit Kumar Sinha, (NP), for the appearing parties.

The Judgment of the Court was delivered by

K.G. BALAKRISHNAN, CJI. 1. Leave granted.

2. For a considerable period during the British Rule, special laws were made applicable to certain 'backward areas' in India that were predominantly occupied by tribal people. These backward regions covered an area of more than 1,20,000 square miles. However, the characteristics of these

areas and their populations varied widely. By Act XIV of 1874, Santhal Parganas and Chutia Nagpur Division (now known as Chhotanagpur Division) were created and in these 'Scheduled districts', tribal communities were accorded a certain degree of autonomy to regulate their affairs on the basis of their own conventions and traditions. Many of these communities chose their leaders through an informal consensus among other customary methods for selection. When the Constitution was enacted, these areas were designated as 'Scheduled Areas'. Article 244 of the Constitution explicitly states that the provisions of the Fifth Schedule shall apply in respect of the administration and control of the Scheduled Areas in any State other than the States of Assam, Meghalaya, Tripura and Mizoram. The provisions of the Sixth Schedule guide the administration of tribal areas in those states.

3. Paragraph (4) of the Fifth Schedule states that there shall be in each State having a "Schedule Area", a 'Tribes Advisory Council' consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State. It was the duty of the 'Tribes Advisory Council' to advise on matters pertaining to the welfare and advancement of the Scheduled Tribes in the State. Paragraph (5) of the Fifth Schedule states that the Governor of the State may by public notification direct that any particular Act of Parliament or the Legislature of the State shall not apply to a Scheduled Area or would apply subject to such exceptions and modifications as he may specify. The Governor of the State may also make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. The Governor of the State has also been given the power to repeal or amend any existing Act of Parliament or of the Legislature of the State which is for the time being applicable to the area in question.

4. Hence, it is evident that the framers' intent behind

including the Fifth Schedule was that of a separate administrative scheme for Scheduled Areas in order to address the special needs of tribal communities. During the debates on the floor of the Constituent Assembly, some members had criticized such differential treatment for Scheduled Tribes. In response to such criticisms, Shri K.M. Munshi had said that 'Adivasis' or tribes were many in number belonging to different "ethnic, religious and social groups" and he explained the object of the Drafting Committee's proposals in the following words:

> "We want that the Scheduled Tribes in the whole country should be protected from the destructive impact of races possessing a higher and more aggressive culture and should be encouraged to develop their own autonomous life; at the same time we want them to take a larger part in the life of the country adopted. They should not be isolated communities or little republics to be perpetuated for ever….. object is to maintain them as little unconnected communities which might develop into different groups from the rest of the country….. and that these tribes should be absorbed in the national life of the country."

5. In exercise of the powers conferred by paragraph 6(i) of the Fifth Schedule to the Constitution of India, the President of India made an Order known as The Scheduled Area (Part A States) Order, 1950. With respect to the then combined State of Bihar, this Order was applied to Ranchi district, Singhbhum district (excluding Dalbhum sub-division) and Santhal Pargana district. The following table shows the chronology of the governmental measures which have identified Scheduled Areas in the territories that lie in the present-day State of Jharkhand:

1874	Scheduled Districts Act, 1874 (Act XIV of 1874) passed during the colonia period	Declared the Santhal Parganas and the Chutia NagpurDivision (now known as 'Chhotanagpur Division') as 'scheduled districts' in the erstwhile province of Bengal. These areas now come within the territory of the State of Jharkhand.
1950	After independence, The President of India had made an order known as The Scheduled Area (Part A States) Order, sub-division), 1950 in exercise of the powers conferred by Paragraph 6(ii) of the Fifth Schedule to the Constitution of India.	In pursuance of this Order, Ranchi district, Singhbhum district (excluding Dalbhum Santhal Pargana district (excluding Godda and Deoghar sub-divisions) and Latehar sub-division of Palamau district were declared to be Scheduled areas.
1977	The 1950 Order was rescinded and replaced by the Scheduled Areas (States of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977	By the said Order, Ranchi district, Singhbhum district, Latehar sub-division and Bhandaria block of Garhwa sub-division in Palamau district, Dumka; Pakur; Rajmahal and Jamatra sub-divisions and Sundarpahari and Boarijor blocks of Godda sub-divisions in Santhal Pargana district were shown as scheduled areas of the then combined

		State of Bihar, all of which now fall within the territory of Jharkhand.
2003	Subsequent to the formation of the States of Jharkhand and Chhattisgarh, The Scheduled Areas (States of Chhattisgarh, Jharkhand and Madhya Pradesh) Order, 2003 was passed to replace the 1977 order	Under the 2003 order, the following areas in the State of Jharkhand have been declared as Scheduled Areas: 1. Burhmu, Mandar, Chanho, Bero, Lapung, Namkom, Kanke, Ormanjhi, Angara, Silli, Sonahatu, Tamar, Bundu, Arki, Khunti, Murhu, Karra, Torpa and Raniya blocks in Ranchi District. 2. Kisko, Kuru, Lohardaga, Bhadra and Senha blocks in Lohardaga district 3. Bishanpur, Ghaghra, Chainpur, Dumri, Raidih, Gumla, Sisai, Kagdara, Basiya and Palkot blocks in Gumla District 4. Simdega, Kolebira, Bano, Jaldega, Thethetangar, Kurdeng and Bolba blocks within Simdega District. 5. Barwadih, Manika,

		Balumath, Chandwa, Latehar, Garu and Mahuadaran blocks within Latehar District 6. Bhandariya block within Garhwa District 7. Bandgaon, Chakradharpur, Sonuwa, Goyalkera, Mahoharpur, Noamundi, Jagannathpur, Manghgaon, Kumardungi, Manjhari, Tatnagar, Jhinkpani, Tonto, Khutpani and Chaibasa blocks within the West Singhbum District 8. Govindpur (Rajnagar), Adityapur (Ghamariya), Seraikela, Kharsaan, Kuchai, Chandil, Ichagarh and Nimdih blocks within Seraikella Kharsawan District 9. Golmuri-Jugslia, Patmada, Potka, Dumariya, Musabani, Ghatsila, Dhalbhumgarh, Chakuliya and Bahragora blocks within East Singhbhum District 10. Sariyahat, Jarmundi, Jama, Ramagarh,

		Gopikandar, Kathikund, Dumka, Sikripara, Raneshwar and Masaliya blocks within Dumka District. 11. Kundhit, Nala, Jamtara and Narayanpur blocks within Jamtara District 12. Sahebganj, Boriyo, Taljhari, Rajmahal, Barharwa, Pathna and Barhet blocks within Sahebganj District. 13. Littipara, Amrapara, Hiranpur, Pakur, Maheshpur and Pakuriya blocks within Pakur District 14. Borijore and Sundarpahari blocks within Godda District.
2007	Subsequent to the impugned judgment of the Jharkhand High Court, the Government of Jharkhand passed the Scheduled Areas (State of Jharkhand) Order, 2007 and the same is presently in force.	

Hence, Tribes Advisory Councils had been constituted for these Scheduled areas since the Panchayati Raj System had not been extended to them.

6. By way of the Constitution (Seventy-Third Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243B of Part IX of the Constitution mandated that there shall be Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part. Article 243-C provides that the Legislature of a State may, by law, make provisions with respect to the composition of Panchayats. Detailed provisions were made under Article 243-D enabling the reservation of seats for Scheduled Castes, Scheduled Tribes, women and other backward classes. Article 243-M stated that nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

7. Two years after the 73rd Amendment Act, the Union Government had appointed a Committee of Members of Parliament (MPs) and experts under the Chairmanship of Sh. Dilip Singh Bhuria to undertake a detailed study and make recommendations about whether the Panchayati raj system should be extended to the Schedules Areas, as contemplated by Article 243-M(4)(b) of the Constitution. The Committee submitted its report on 17.1.1995 and favoured democratic decentralization in scheduled areas. It will be instructive to refer to the following observations in the Bhuria Committee Report (at Para. 10):-

> "Tribal life and economy, in the not too distant past, bore a harmonious relationship with nature and its endowment. It was an example of sustainable development. But with the influx of outside population, it suffered grievous blows. The colonial system was established on the basis of expropriation of the natural and economic resources of tribal and other areas in the country. Although, theoretically,

there has been difference in the approach after the departure of the colonial masters from Tribal areas, in practice, the principles enunciated in Article 39 and other Directive Principles of State Policy have to be followed more rigorously. On account of their simplicity arid ignorance, over the decades the tribals have been dispossessed of their natural and economic resources like land, forest, water, air, etc.. The dispossession has not been confined to that through private parties. For the purpose of promotion of general economic development projects, the State also has been depriving them of the basis means of livelihood. These processes have been operative since a long time causing human misery and socio-economic damage. No reliable picture is yet available, for instance, we are not seized on the total quantum of land alienated from the tribals both on private and State account nor the number of families, clans or Tribes involved. This has compelled some to perceive development as an agent of destruction. But since planned development has been an article of faith with us, it has to be ensured that implementation of the policies and programmes drawn up in tribal interest are implemented in tribal interest. Since, by and large, the politico-bureaucratic apparatus has failed in its endeavor, powers should be developed on the people so that they can formulate programmed which suit them and implement them for their own benefits."

It was further observed, at Para. 30:

"The group was further of the view that notwithstanding the fact that the areas under consideration i.e. Scheduled Areas are expected to have majority of tribal population, *it is necessary to stipulate that the Panchayats therein will have a majority of Scheduled Tribes members. The reason is that the Scheduled Areas were notified as such on account of majority of Scheduled Tribe population, contiguity etc. In course of time, on account of influx of non-ST population, in a few Scheduled Areas, the status of the ST population might have been reduced to a minority. That should not be regarded as having altered the overall character of the Scheduled Areas. The chairmen and vice-chairmen should belong to the Scheduled Tribes. One-third of the seats should be reserved for women."*

(Emphasis supplied)

8. Evidently, the Committee made three specific recommendations, namely, (a) Panchayats in scheduled areas must have a majority of scheduled tribes members, (b) Chairmen and Vice-Chairmen should belong to scheduled tribes, and (c) one-third of the seats should be reserved for women. The Committee felt that certain provisions in Part IX which pertained to Panchayati Raj Institutions (PRIs) were wholesome and should be incorporated in the law to be passed by the Parliament under Article 243-M(4)(b) with due regard for the unique characteristics of tribal societies residing in the Scheduled Areas. It was considered especially important to protect the interests of many tribal societies which have their own customary laws, traditional practices and community ethos. The Committee was also of the view that since the Scheduled Areas and Tribal Areas are expected to have a majority of tribal population, the Panchayats at different tiers should have a majority of members who belong to the Scheduled Tribes (Hereinafter 'STs'). Furthermore, it was suggested that both the chairman and vice-chairman should belong to this category as well. The Committee also made recommendations in respect of the various functions to be discharged by the Gram Sabhas in Tribal areas. They pertained to safeguards for the rights of the tribal communities in matters relating to land, water, forest and minor forest produce; enforcement of customary rights such as grazing, fuel, fodder, minor forest produce, building materials; mobilization for community welfare programmes and

organising voluntary labour for community works; promotion of solidarity and harmony among all sections of people; consideration of the report on the audit of accounts of the Gram Panchayat; women and child development; identification of the beneficiaries for poverty alleviation and other programmes and host of other welfare measures such as drinking water supply, sanitation, conservancy and drainage; public health measures; village roads and streets; small tanks; maintenance of public properties and community assets. The Committee gave detailed suggestions with regard to the powers, functions and procedures of the Panchayati Raj Institutions.

9. Based on these recommendations, The Panchayats (Extension to the Scheduled Areas) Act, 1996 [hereinafter 'PESA'] was passed by the Parliament in 1996. The statement of Objects and Reasons of the PESA Act reads as follows:

> "There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayat Raj Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Schedule Areas with certain modifications providing that, among other things, the State Legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources; …. The offices of the Chairpersons in the Panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every Panchayat for the Scheduled Tribes shall not be less than one-third of the total number of seats."

10. The provision of the PESA Act which merits consideration in the present case is Section 4 which reads as follows:-

4. Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:—

(a) a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;

(b) a village shall ordinarily consist of a habitation or a group of habitations or a hamlet or a group of hamlets comprising a community and managing its affairs in accordance with traditions and customs;

(c) every village shall have a Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level;

Declared the Santhal Parganas and the Chutia Nagpur Division (now known as 'Chhotanagpur Division') as 'scheduled districts' in the erstwhile province of Bengal. These areas now come within the territory of the State of Jharkhand.

(d) every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution;

(e) every Gram Sabha shall –

(i) approve the plans, programmes and projects

for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level;

(ii) be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes;

(f) every Panchayat at the village level shall be required to obtain from the Gram Sabha a certification of utilization of funds by that Panchayat for the plans, programmes and projects referred to in clause (e);

(g) *the reservation of seats in the Scheduled Areas at every Panchayat shall be in proportion to the population of the communities in that Panchayat for whom reservation is sought to be given under Part IX of the Constitution;*

Provided that the reservation for the Scheduled Tribes shall not be less than one-half of the total number of seats:

Provided further that all seats of Chairpersons of Panchayats at all levels shall be reserved for the Scheduled Tribes;

(h) the State Government may nominate persons belonging to such Schedule Tribes as have no representation in the Panchayat at the intermediate level or the Panchayat at the district level:

Provided that such nomination shall not exceed one-tenth of the total members to be

elected in that Panchayat;

(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level;

(j) planning and management of minor water bodies in the Scheduled Areas shall be entrusted to Panchayats at the appropriate level;

(k) the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas:

(l) the prior recommendation of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory for grant of concession for the exploitation of minor minerals by auction;

(m) while endowing Panchayats in the Scheduled Areas with such powers and authority as may be necessary to enable them to function as institutions of self-government, a State Legislature shall ensure that the Panchayats at the appropriate level and the Gram Sabha are endowed specifically with –

(i) the power to enforce prohibition or to regulate or restrict the sale and consumption of any intoxicant;

(ii) the ownership of minor forest produce;

(iii) the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe;

(iv) the power to manage village markets by whatever name called;

(v) the power to exercise control over money lending to the Scheduled Tribes;

(vi) the power to exercise control over institutions and functionaries in all social sectors;

(vii) the power to control over local plans and resources for such plans including tribal sub-plans;

(n) the State legislations that may endow Panchayats with powers and authority as may be necessary to enable them to function as institutions or self-government shall contain safeguards to ensure that Panchayats at the higher level do not assume the powers and authority of any Panchayat at the lower level or of the Gram Sabha;

(o) the State Legislature shall endeavour to follow the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the

Panchayats at district levels in the Scheduled Areas.

[emphasis supplied]

11. To give effect to the provisions of PESA Act, the State Legislature of Jharkhand had passed the Jharkhand Panchayat Raj Act, 2001 [Hereinafter 'JPRA'] which included the following provisions:-

Section 17(B). Reservation of seats in Gram Panchayat.–

(B) For the members of the Gram Panchayat (in Scheduled Area). –

(1) In scheduled areas, in every Gram Panchayat, reservation of seats in favour of Scheduled Castes and Scheduled Tribes shall be made, proportionate to their respective population in that Gram Panchayat:

Provided that the seats reserved for Scheduled Tribes shall not be less than half of the total number.

(2) In the scheduled areas, in Gram Panchayat, seats shall be reserved in such number in favour of persons of backward class, proportionate to their population, which, if combined with the seats reserved for Scheduled Castes and Scheduled tribes, if any, shall not exceed more than Eighty per cent of total seats of that Gram Panchayat.

Section 21(B) – Reservation of Posts of Mukhia and Up-Mukhia in Gram Panchayat (In Scheduled area) –

Post of Mukhia and Up-Mukhia of the Gram Panchayats in the scheduled areas shall be reserved for the scheduled tribes;

Provided also that the Gram Panchayats, in the scheduled areas, wherein there is no population of scheduled tribes, shall be duly excluded from allotment of reserved posts of

Mukhia and Up-Mukhia of scheduled tribes.

Section 36(B)- Reservation of seats of Panchayat Samiti (in Schedule Area) –

(1) In scheduled areas, in every Panchayat Samiti, reservation of seats in favour of Scheduled Castes and Scheduled Tribes shall be made, proportionate to their respective population in that Panchayat Samiti:

Provided that the seats reserved for Scheduled Tribes shall not be less than half of the total number.

(2) In the scheduled areas, in Panchayat Samiti, seats shall be reserved in such number in favour of persons of backward class, proportionate to their population, which, if combined with the seats reserved for Scheduled Castes and Scheduled tribes, if any, shall not exceed more than Eighty per cent of total seats of that Panchayat Samiti.

…

Section 40(B) – Reservation of Posts of Pramukh and Up-Pramukh in Panchayat Samiti (In the scheduled area) –

Posts of Pramukh and Up-Pramukh in Panchayat Samitis in the scheduled areas shall be reserved for the members belonging to the scheduled tribes.

Section 51(B). Reservation of seats of Zila Parishad (in Scheduled Area) –

(1) In scheduled areas, in every Zila Parishad, reservation of seats in favour of Scheduled Castes and Scheduled Tribes shall be made, proportionate to their respective population in that Zila Parishad:

Provided that the seats reserved for Scheduled Tribes shall not be less than half of the total number.

(2) In the scheduled areas, in Zila Parishad, seats shall be reserved in such number in favour of persons of backward class, proportionate to their population, which, if combined with the seats reserved for Scheduled Castes and Scheduled tribes, if any, shall not exceed more than Eighty per cent of total seats of that Zila Parishad.

Section 55(B) – Reservation for Posts of Adhyaksha and Upadhakshya in Zila Parishad (In scheduled area) –

The post of Adhyaksha and Zila Parishads in scheduled areas shall be reserved for the members of the scheduled tribes.

12. In the High Court of Jharkhand, several writ petitions were filed to challenge the constitutional validity of the PESA Act, 1996 and certain other provisions of the Jharkhand Panchayati Raj Act, 2001. With regard to the PESA, the main challenge was directed against the second proviso to Section 4(g) whereby all the seats of Chairpersons of Panchayats at all three tiers in Scheduled Areas are to be reserved in favour of Scheduled Tribes. The petitioners before the High Court had contended that since every eligible individual has a right to vote and the right to contest elections for the seats and Chairperson positions in panchayats, the cent per cent reservation of Chairperson positions in favour of STs would curtail the rights of candidates other than those belonging to the ST category.

13. It was also argued that the cent per cent reservation of Chairperson positions was excessive and hence violative of Article 14 of the Constitution. Some of the petitioners had urged that the office of a Chairperson should be treated as a solitary post and hence reservation of such office was not permissible. In support of this contention, they had relied on an earlier Judgment of the Patna High Court in the case of *Janardhan Paswan v. State of Bihar,* AIR 1988 Pat 75. This case was distinguished by the High Court keeping in mind that it was decided before the commencement of the Seventy-Third

Amendment and that Article 243-D in Part IX of the Constitution had contemplated the said reservation policy. However, the High Court held that the second proviso to Section 4(g) of the PESA Act, 1996 reserving all the seats of Chairpersons of Panchayats in favour of Scheduled Tribes was unconstitutional. The relevant portion of the High Court Judgment reads as follows:-

> "..So far as 2nd proviso to clause (g) of Section 4 of PESA Act, 1996 is concerned, by such provision of the seats of Chairpersons of Panchayats at all levels in the scheduled areas have been reserved for the Scheduled Tribes. In view of the aforesaid proviso to clause (g) of Section 4 of PESA Act, 1996, the State Government while enacted Jharkhand Panchayat Raj Act, 2001 in regard to the scheduled areas, all seats of Chairpersons of Panchayats at all levels have been reserved for Scheduled Tribes vide Section 21 (B), Section 40(B) and Section 55 (B) of the Act, 2001. It has already been held that cent-percent reservation of the offices and seats of Chairpersons cannot be made, being excessive, unreasonable and against the principles of equality i.e. violative of Article 14 of the Constitution of India. By the aforesaid provisions cent-percent reservation of seats of Chairpersons of Panchayats at all levels in scheduled areas having been made, they cannot be upheld, being unconstitutional. Accordingly, the 2nd proviso to clause (g) of Section 4 of PESA Act, 1996, Section 21 (B), Section 40 (B) and Section 55 (B) of Jharkhand Panchayat Raj Act, 2001 so far cent percent reservation of seats of Chairpersons of Panchayats at all levels in favour of Scheduled Tribes is concerned, are hereby declared unconstitutional and ultra-vires."

The above-mentioned finding of the High Court has been challenged before this Court by the Union of India (appellant).

14. In the course of the proceedings before this Court, we

heard Mr. Gopal Subramanium, Additional Solicitor General [now Solicitor General of India] and Mr. M.P. Raju, on behalf of the appellant. Mr. P.S. Mishra, Mr. M.N. Krishnamani, Sr. Adv., Mr. R. Venkataraman, Mr. Nagender Rai and Mr. Delip Jerath, learned counsels made oral submissions on behalf of the respondents.

15. It should be kept in mind that apart from relying on the earlier decision, the High Court did not state any specific reason for striking down the second proviso to Section 4(g) of the PESA Act, 1996 as well as Sections 21 (B), 40 (B) and 55 (B) of the JPRA Act, 2001 by holding these provisions to be unconstitutional. The only reason given by the High Court was that cent per cent reservation of the offices of Chairpersons is excessive, unreasonable and against the principles of equality. It may also be noted that the Bhuria Committee Report had recommended that the Chairman and Vice-Chairman of Panchayats should belong to Scheduled Tribes. This recommendation was accepted by the Union Government and the PESA Act, 1996 was enacted to give effect to the same. The Parliament has conferred such special reservation on account of the pivotal role of the Chairperson in a Panchayat. It must have been felt that if the Chairperson positions are occupied by non-tribal persons in Scheduled Areas, there is no guarantee that such persons will account for the special interests of the Scheduled Tribes.

16. While enacting the Fifth Schedule, the Constituent Assembly was of the view that the subjection to normal laws would have exposed the tribal communities to two dangers in particular. Both arose out of the fact that they were primitive people, simple, unsophisticated and frequently improvident. Firstly, there was a risk of their agricultural land being usurped by the more civilized section of the population. This would threaten their livelihood and sustenance since the occupation of the tribals was for the most part agricultural. Secondly they were more likely to be victimized by the 'wiles of the

moneylender'. The primary aim of the government policy then was to protect the tribal communities from these two dangers and to preserve their customs. This objective was pursued by incorporating special provisions that were to be made applicable to these backward areas. The main contention made by the counsels for the respondents is that it is not justifiable to reserve all Chairperson positions in Panchayats located in Scheduled Areas in favour of persons belonging to the ST category. At this juncture, we must clarify that Sections 21(B), 40(B) and 55(B) of the JPRA have since been amended to confine reservation to the office of Mukhiya (at Gram Panchayat level), Pramukh (at Panchayat Samithi level) and Adhyaksh (at Zila Parishad level).

17. The counsel for the respondent had contended that the constitutional intention behind Article 243-D is not that of 100 per cent reservation but only proportionate reservation and it speaks of rotation of the reserved seats. However, we must emphasize that Article 243-M(4)(b) permits 'exceptions and modifications' in the application of Part IX to Scheduled Areas. The respondents have also argued that the maximum reservation which is legally permissible is only up to 50 per cent and reliance was placed on the decisions of this Court in *Indra Sawhney v. Union of India,* (1992) Suppl. (3) SCC 217 and *M.R. Balaji v. State of Mysore,* (1963) 1 SCC 439. However, it should be kept in mind that both of these decisions were given in respect of reservation measures enabled by Article 16 (4) of the Constitution.

18. At the outset, we are of the view that the principles of reservation which are applicable for public employment and for admission to educational institutions cannot be readily applied in respect of a reservation policy made by the legislature to protect the interests of the Scheduled Tribes by assuring them of majority reservation as well as the occupancy of Chairperson positions in Panchayats located in Scheduled Areas. This policy broadly corresponds with the past practice wherein the

Scheduled Areas were administered as per the provisions of the Fifth Schedule to the Constitution and the same was expected to adhere to the advice of the Tribes Advisory Councils, which were predominantly controlled by Scheduled Tribes. By extending the Panchayati Raj system to these areas, Scheduled Tribes should not be put in a relatively disadvantageous position. In the Panchayati Raj system contemplated by Part IX, the Scheduled Tribes should have an effective say in the administration. That is why the Bhuria Committee recommended that all Chairperson positions should be reserved in favour of Scheduled Tribes.

19. The Counsel for the respondents also contended that the exclusive reservation in favour of Scheduled Tribes unfairly limits the scope of political participation for others and since all the offices of Chairpersons are reserved, there is no scope for rotation of seats as contemplated by the third proviso to Article 243-D(4) of the Constitution. It was also pointed out that in some of the Districts notified as Scheduled Areas, the Scheduled Tribes are not in a majority. First of all, it is to be remembered that the impugned reservation policy is applicable only to Scheduled Areas which were hitherto covered by the Fifth Schedule to the Constitution. We must make it abundantly clear that this pattern of reservation has been designed only for Scheduled Areas which merit such exceptional treatment. In the present case, it should be noted that the Scheduled Areas under consideration are restricted only to certain Districts in the State of Jharkhand. In some Districts where STs are not predominantly in occupation, only certain blocks have been notified as Scheduled Areas by themselves. On account of migration of non-tribal people in some areas, there may be a relatively lesser proportion of tribal population but historically these areas were occupied almost exclusively by Tribal people.

20. In the course of the proceedings, our attention was also drawn to a Constitution Bench decision reported as *R.C. Poudyal v. Union of India* (1994) Supp. 1 SCC 324, wherein

the majority had upheld the reservation of some seats in the favour of the Bhutia and Lepcha communities in the Sikkim Legislative Assembly. In that case the majority had held that even though legislative seats could not be ordinarily reserved on the basis of ethnic and religious identity, an exception could be made in this case on account of the particular historical factors that led to the integration of Sikkim with the Union of India. The judgment in that case does not directly aid the case of either side in the present litigation. However, the opinions delivered in that case did touch on the importance of the 'one-man, one-vote' principle that should be followed in liberal democracies. While this principle entails that there should be parity between the weightage given to the votes cast by individuals, the same cannot be enforced to an absolute standard. This is because territorial constituencies are of varying sizes with regard to the number of voters residing in them. This means that there is bound to be some disparity in the weightage accorded to the votes cast by individuals across different constituencies. This problem exists in all electoral formats where representatives are chosen from territorial constituencies. Needless to say the principle of 'one-man, one-vote' cannot be applied in an absolute sense in the context of Panchayat elections in Scheduled Areas. However, it is the responsibility of the executive to identify territorial constituencies which have a certain degree of parity in their population levels. It is of course important to re-draw these constituencies from time to time, in keeping with the demographic shifts in the concerned area.

21. Concerns were also raised that in some instances the notified Scheduled Areas include certain blocks in particular districts but do not include the remaining blocks of the same districts. This is not a serious hurdle because it is quite clear that the exceptional treatment for Scheduled Tribes will be confined to the blocks that have been notified as Scheduled Areas. This means that in the Districts where only some of the blocks have been notified as Scheduled Areas, the impugned

provisions of the JPRA will be applicable at the level of Panchayat Samitis within the notified area but not at the level of the Zilla Parishad for the whole district.

22. A comparable reservation policy contained in the Madhya Pradesh Panchayati Raj Act was challenged in *Ashok Kumar Tripathi v. Union of India,* 2000 (2) MPHT 193 and the High Court upheld the provision. The High Court of Madhya Pradesh held that:

> "45. So far as the high percentage of reservation exceeding 50% for members and 100% reservation for Chairpersons in Scheduled Areas is concerned, it is supportable even on the touch stone of Article 14 of the Constitution. It is a protective discrimination permissible on a reasonable classification of different sections of the society into more oppressed-backwards and the forwards. The peculiar situation of the inhabitants of the Scheduled Areas whose conditions have to be improved to educate them in the local Government, a step towards an effort to achieve their assimilation in the normal stream of democratic life at par with the advanced and the forward sections of the society justifies such classification. In the Scheduled Areas in reality if an aboriginal has to contest an election against a member of the forward section of the society, the contest would be totally unequal as of a weak and ignorant against wealthy and powerful. In a contest of this nature the weak and ignorant hardly can get a chance to become a member and in any case it would be impossible for him to reach to the helm of the institution as Chairperson. If he by chance becomes a Chairperson in the Panchayat consisting of elected members from advanced sections of the society and the members are in majority, it would be well nigh impossible for the Chairperson of the reserved category to effectively function and to save his elected status. The necessity, therefore, is that the Chairperson should be from the reserved

category so that he is in a position to effectively function without inhibition and threat of no confidence motion against him to remove him from his office. …"

23. In light of these observations, it is our considered opinion that the High Court of Jharkhand had erred in striking down Sections 21(B), 40(B) and 55(B) of the Jharkhand Panchayat Raj Act which give effect to the second proviso of Section 4(g) of the Panchayats (Extension to Scheduled Areas) Act, 1996. We hold that in Panchayats located in Scheduled Areas, the exclusive representation of Scheduled Tribes in the Chairperson positions of the same bodies is constitutionally permissible. This is so because Article 243-M(4)(b) expressly empowers Parliament to provide for 'exceptions and modifications' in the application of Part IX to Scheduled Areas. The provisos to Section 4(g) of the PESA contemplate certain exceptions to the norm of 'proportionate representation' and the same exceptional treatment was incorporated in the impugned provisions of the JPRA.

24. The next point that arises for consideration is whether it is constitutionally permissible to provide reservations in favour of Scheduled Castes (SC), Scheduled Tribes (ST) and Other Backward Classes (OBC) that together amount to eighty percent of the seats in the Panchayati Raj Institutions located in Scheduled Areas of the State of Jharkhand? The High Court had struck down Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the JPRA as unconstitutional by virtue of reasoning that reservations to the extent of 80% of the seats in panchayats were excessive, arbitrary and disproportionate, thereby violating Article 14 of the Constitution. The Counsels for the respondent had referred to the observations of this Court in *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649 and *Indra Sawhney v. Union of India* (1992) Supp 3 SCC 217 which had prescribed an upper ceiling of 50% for reservation of posts in public employment. Reference was also made to a decision of the Patna High Court in the case of *Krishna Kumar Mishra*

v. State of Bihar, AIR 1996 Pat. 112, wherein a similar view had been adopted.

25. Sections 17(B)(1), 36(B)(1) and 51(B)(1) of the JPRA are in conformity with the first proviso to Section 4(g) of the PESA Act as 50% of the seats in Panchayats located in scheduled areas are reserved in favour of ST candidates. The High Court has not struck down these provisions. These provisions contemplate that in Gram Panchayats, Panchayat Samitis and Zila Parishads located in Scheduled Areas, the reservation of seats for the Scheduled Castes and Scheduled Tribes shall be made on the basis of the proportion of their respective population, provided that reservation for the scheduled tribes shall not be less than half of the total number of seats. In addition to this, Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the JPRA provide that in Gram Panchayats, Panchayat Samitis and Zila Parishads located in Scheduled Areas, seats are to be reserved in favour of persons belonging to backward classes in proportion to their population, so that the aggregate reservations shall not exceed 80% of the total number of seats available. By the impugned judgment, Section 17(B)(2), 36(B)(2) and 51(B)(2) have been held to be unconstitutional mainly on the ground that they permit 'excessive reservation' which violates Article 14 of the Constitution. This finding of the High Court has also been contested before us.

26. Before adverting to the contentions advanced by the appellants' counsel, it is useful to refer to the pattern of reservations set out in Part IX of the Constitution. Article 243-D is reproduced below:-

"Article 243-D. Reservation of Seats. - (1) Seats shall be reserved for –

(*a*) The Scheduled Castes; and

(*b*) The Scheduled Tribes,

in every Panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the Scheduled Castes in that Panchayat area or of the Scheduled Tribes in that Panchayat area bears to the total population of that area and such seats may be allotted by rotation to different constituencies in a Panchayat.

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide:

> Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State:
>
> Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women:
>
> Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at each level.

(5) The reservation of seats under clauses (1) and (2) and the reservation of office of Chairpersons (other than the reservation for women) under clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens."

27. It may be noted that under Article 243-D there is a clear mandate for the State Legislature to reserve seats for SCs and STs in every panchayat and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in that Panchayat as the population of the SCs or of the STs in that Panchayat area bears to the total population of the area under consideration. Article 243-D(6) further states that nothing in this Part shall prevent a State Legislature from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens. There was no contention on behalf of the petitioners before the High Court that the members of backward class were not entitled to get reservation in the scheduled area. With respect to scheduled castes, the State was bound to provide reservation to them even in the Scheduled Areas. As already noticed, under the PESA 50% of the seats in Gram Panchayats, Panchayat Samitis and Zila

Parishads should be reserved in favour of schedule tribes and the ceiling is fixed to the extent that this reservation put together shall not exceed 80% of the total seats. The contention of the respondents is that this policy will lead to reverse discrimination against persons who are not eligible for such reservation benefits. It may be noticed that this reservation policy is exclusively applicable to scheduled areas which had hitherto been the subject of a separate administrative scheme under the Fifth Schedule of the Constitution.

28. It is a well-accepted premise in our legal system that ideas such as 'substantive equality' and 'distributive justice' are at the heart of our understanding of the guarantee of 'equal protection before the law'. The State can treat unequals differently with the objective of creating a level-playing field in the social, economic and political spheres. The question is whether 'reasonable classification' has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with a legitimate governmental objective. When examining the validity of affirmative action measures, the enquiry should be governed by the standard of proportionality rather than the standard of 'strict scrutiny'. Of course, these affirmative action measures should be periodically reviewed and various measures are modified or adapted from time to time in keeping with the changing social and economic conditions. Reservation of seats in Panchayats is one such affirmative action measure enabled by Part IX of the Constitution.

29. The Statement of Objects and Reasons appended to the Constitution (Seventy Second Amendment) Bill, 1991 which was enacted as the Constitution (Seventy Third Amendment) Act, 1992 reads as follows :-

> "Though the Panchayat Raj Institutions have been in existence for a long time, it has been observed that these institutions have not been able to acquire the status and dignity of viable and responsive people's bodies due to a

> number of reasons including absence of regular elections, prolonged supercessions, insufficient representation of weaker sections like Schedule Castes, Scheduled Tribes and women, inadequate devolution of powers and lack of financial resources.
>
> (2) Article 40 of the Constitution which enshrines one of the Directive Principles of State Policy lays down that the State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. In the light of the experience in the last forty years and in view of the short-comings which have been observed, it is considered that there is an imperative need to enshrine in the Constitution certain basic and essential features of Panchayat Raj Institutions to impart certainty, continuity and strength to them.
>
> (3) Accordingly, it is proposed to add a new Part relating to Panchayats in the Constitution to provide for among other things, Gram Sabha in a village or group of villages; constitution of Panchayats at village and other level or levels; direct elections to all seats in Panchayats at the village and intermediate level, if any, and to the offices of Chairpersons of Panchayats at such levels; reservations of seats for the Scheduled Castes and Schedule Tribes in proportion to their population for membership of Panchayats and office of Chairpersons in Panchayats at each level; reservation of not less than one-third of the seats for women; fixing tenure of 5 years for Panchayats and holding elections within a period of 6 months in the event of supercession of any Panchayat; disqualifications for membership of Panchayats; devolution by the State Legislature of powers and responsibilities upon the Panchayats with respect to the preparation of plans for economic developments and social justice and for the implementation of development schemes; sound finance of the Panchayats by securing authorization from State

Legislature for grants-in-aid to the Panchayats from the Consolidated Fund of the State, as also assignments to, or appropriation by, the Panchayats of the revenues of designated taxes, duties, tolls and fees; setting up of a Finance Commission within one year of the proposed amendment and thereafter every 5 years to review the financial position of Panchayats; auditing of accounts of the Panchayats; powers of State Legislatures to make provisions with respect to elections to Panchayats under the superintendence, direction and control of the chief electoral officer of the State; application of the provisions of the said Part to Union territories; excluding certain State and areas from the application of the provisions of the said Part; continuance of existing laws and Panchayats until one year from the commencement of the proposed amendment and barring interference by courts in electoral matters relating to Panchayats;

(4) The Bill seeks to achieve the aforesaid objectives."

30. Article 243D of the Constitution, as stated earlier, clearly identifies the intended beneficiaries in the form of persons belonging to scheduled castes, scheduled tribes, women and other backward class of citizens. While introducing the 73rd Amendment Act, the Statement of Objects and Reasons clearly contemplated democratic decentralization to pursue the legitimate governmental objective of ensuring that the traditionally marginalized groups should progressively gain a foothold in local self government. It is in this background that 'reasonable classification' is to be viewed.

31. 50% of reservation in favour of the STs in Panchayats at all the three tiers is clearly an example of 'compensatory discrimination' especially in view of the fact that the scheduled areas under consideration were completely under a separate administrative scheme as per the Fifth Schedule to the Constitution. In fact, 50% of reservation in favour of the scheduled tribes by itself was not challenged before the High

Court. Therefore, the question that now remains is whether reservation should be made in favour of the scheduled castes and backward class for the purpose of scheduled areas. The Constitutional mandate is that the scheduled castes should be given reservation at all the three tiers of Panchayats, with regard to the principle of proportionate representation.

32. The Division Bench of the High Court has relied on the precedents relating to Article 15(4) and Article 16(4) by drawing an analogy with the limits placed on reservations in higher education and public employment. We must emphasize that Article 243-D is a distinct and independent constitutional basis for reservation in Panchayat Raj Institutions. This reservation cannot be readily compared to the affirmative action measures enabled by Articles 15(4) and 16(4) of the Constitution. Especially on the unviability of the analogy between Article 16(4) and Article 243-D, we are in agreement with a decision of the Bombay High Court, reported as *Vinayakrao Gangaramji Deshmukh v. P.C. Agrawal & Ors.,* AIR 1999 Bom 142. That case involved a fact-situation where the chairperson position in a Panchayat was reserved in favour of a Scheduled Caste Woman. In the course of upholding this reservation, it was held:

"... Now, after the seventy-third and seventy-fourth Constitutional amendments, the constitution of local has been granted a constitutional protection and Article 243D mandates that a seat be reserved for the Scheduled Caste and Scheduled Tribe in every Panchayat and Sub-article (4) of the said Article 243D also directs that the offices of the Chairpersons in the panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide. Therefore, the reservation in the local bodies like the Village Panchayat is not governed by Article 16(4), which speaks about the reservation in the public employment, but a separate constitutional power which directs the reservation in such

local bodies. …"

33. For the sake of argument, even if an analogy between Article 243-D and Article 16(4) was viable, a close reading of the *Indra Sawhney* decision will reveal that even though an upper limit of 50% was prescribed for reservations in public employment, the said decision did recognise the need for exceptional treatment in some circumstances. This is evident from the following words (at Paras. 809, 810):

> "809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in Clause (4) of Article 16 should not exceed 50%.
>
> 810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being put of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

34. We believe that the case of Panchayats in Scheduled Areas is a fit case that warrants exceptional treatment with regard to reservations. The rationale behind imposing an upper ceiling of 50% in reservations for higher education and public employment cannot be readily extended to the domain of political representation at the Panchayat-level in Scheduled Areas. With respect to education and employment, parity is maintained between the total number of reserved and unreserved seats in order to maintain a pragmatic balance between the affirmative action measures and considerations of merit. Under Article 15(4) and 16(4) the reservation of seats in favour of socially and educationally backward classes

(SEBC) is ordinarily done on the basis of proportionate representation and an upper ceiling of 50% allows for considerable flexibility in distributing the benefits of higher education and public employment among a wide range of intended beneficiaries such as the Scheduled Castes (SC), Scheduled Tribes (ST), Women and Other Backward Classes (OBC). However, the same approach of providing proportionate representation is likely to be less effective in the context of reservations for panchayats in scheduled areas. One reason for this is the inherent difference between the nature of benefits that accrue from access to education and employment on one hand and political participation on the other hand. While access to higher education and public employment increases the likelihood of gradual socio-economic empowerment of the individual beneficiaries, involvement in local-self government is intended as a more immediate measure of protection for the individual as well as the community that he/she belongs to. Especially in the context of Scheduled Areas, there is a compelling need to safeguard the interests of tribal communities with immediate effect by giving them an effective voice in local self-government. The Bhuria Committee Report had clearly outlined the problems faced by Scheduled Tribes and urged the importance of democratic decentralisation which would empower them to protect their own interests.

35. By reserving at least half of the seats in panchayats located in Scheduled Areas in favour of STs, the legislature has adopted a standard of compensatory discrimination which goes beyond the ordinary standards of 'adequate representation' and 'proportionate representation'. The standard of 'adequate representation' comes into play when it is found that a particular community is under-represented in a certain domain and a specific threshold is provided in order to ensure that the beneficiary group comes to be adequately represented with the passage of time. For instance in Part IX of the Constitution, the reservation in favour of women which amounts to one-third of all the seats in Panchayats is an embodiment of the 'adequate

representation' standard.

36. However, in instances where the Constitution does not specify the quantum of reservations, the idea of 'proportionate representation' is the rule of thumb. As mentioned earlier, proportionate representation has been the controlling idea behind reservations in the context of education and employment which have a basis in Article 15(4) and 16(4) respectively. Even in the context of Panchayati Raj Institutions, Article 243-M(1) and Article 243-M(6) explicitly refer to 'proportionate representation' as the controlling idea behind reservations in favour of SCs, STs and Backward Classes respectively. With respect to the panchayats located in Scheduled Areas, the flexibility provided by Article 243-M(4)(b) has led to the enactment of the PESA which specifies 'proportional representation' as the norm for reservations in favour of the intended beneficiaries, but makes a departure from this standard in order to protect the interests of Scheduled Tribes in particular.

37. There is of course a rational basis for departing from the norms of 'adequate representation' as well as 'proportionate representation' in the present case. This was necessary because it was found that even in the areas where Scheduled Tribes are in a relative majority, they are under-represented in the government machinery and hence vulnerable to exploitation. Even in areas where persons belonging to Scheduled Tribes held public positions, it is a distinct possibility that the non-tribal population will come to dominate the affairs. The relatively weaker position of the Scheduled Tribes is also manifested through problems such as land-grabbing by non-tribals, displacement on account of private as well as governmental developmental activities and the destruction of environmental resources. In order to tackle such social realities, the legislature thought it fit to depart from the norm of 'proportional representation'. In this sense, it is not our job to second-guess such policy-choices. A similar position was also

adopted by the Madhya Pradesh High Court in *Ashok Kumar Tripathi v. Union of India,* 2000 (2) MPHT 193, where Dharmadhikari, J. made the following observations (extracted from Para. 36, 37):

> "… To safeguard interests of Scheduled Tribes living in remote or hilly areas or forests with primitive culture of their own, the Constitution envisages formation of Scheduled Areas for them, and application of laws to them with 'exceptions and modifications', so that they are able to preserve their culture and occupation and are not exposed to exploitation by forward classes of Urban Population. The protective discrimination in favour of such deprived section of the Society can go to the extent of complete exclusion, if the circumstances so justify, of advanced classes in Local Self Governance of Scheduled areas. The main object and purpose behind such reservations based on population, even in excess of 50% is with a view that the exclusive participation of deprived and oppressed sections of the Society in Local Self-Government bodies in their areas is ensured because in open competition with the advanced sections of the Society they can never have any share to participate in Self-Governance. A close and careful examination of the provisions of the Central and State Act, in the light of Constitutional provisions, shows that principle of proportionate representation based on the population of the reserved categories has been adhered to but only departure has been made from it in giving them larger share of self-governance by reserving seats for them as member and in the Scheduled Areas a monopoly of seats of Chairpersons has been created for them so that they conserve their culture and way of living. … For taking a decision on the policy of reservation as to whether it is reasonable or unreasonable, the Court has to examine the overall Scheme of the Constitution as envisaged in Part IX and IX A and the corresponding Central and State Legislation brought to implement it. The aim and object of

the reservation policy contained in Part IX and IX A is that the Backward and oppressed sections of the Society have to be encouraged in the democratic process by giving them a share of governance which hither-to was denied to them since the times of British India and after independence. The other object at the same time is to protect them from urban influences so that they may be able to conserve their culture and way of life and are not exposed to exploitation by the advanced or socially and economically powerful sections of the society.

At the Bar it was argued that such excess policy of reservation is bound to create bad blood between the two classes and would be a serious deterrent to bring such oppressed classes into the mainstream of democratic life. There are arguments for and against this. In the matters of policy the best judges are the Legislators who are closer to the society and represent them. They have a study of the society and have advantage of reports based on sociological surveys made by experts. They better understand the needs of the society and the various sections forming it. It is not for this Court to enter into this forbidden arena and lay down a policy of reservation. The argument advanced on behalf of the petitioners only shows that the attitude of the members of the advanced sections of the society towards castes and tribes continues to be more of competition than compassion. The reservation in various walks of life made in their favour for the last 50 years of the independence has not been successful in improving their socio-economic condition and have not made them effective participant in the democratic process. The necessity is still felt by the legislators in making special provisions for them in the Constitution and the laws to ensure their effective participation at least in the local self Government institutions as a first step to give them due share of governance in the Assemblies of the States and the Parliament. The argument that the policy of reservation

would segregate them rather than assimilate them with the common stream is one for the legislator to consider on the basis of existing social situation. In the matters of policy, wisdom of legislature cannot be questioned or the policy laid down cannot be upset by the Court which is ill equipped to deal with the subject."

38. Even though there are cogent reasons for the exceptional treatment accorded to Scheduled Tribes, there are some other concerns that merit consideration. One such concern is with the very identification of Scheduled Areas in the first place. It is a common refrain that the efficacy as well as legitimacy of affirmative action measures can be questioned if they are not targeted properly. In the present case, it was pointed out that the identification of Scheduled Areas is done on the basis of census data and the same is collected after intervals of 10 years. It was urged that the identification of Scheduled Areas may not be accurate if it was based on outdated data. Even though we were shown data describing the distribution of the population belonging to the Scheduled Tribes category in the various districts of Jharkhand (As per the 2001 census), it will suffice to say that the identification of Scheduled Areas is an executive function and we do not possess the expertise needed to scrutinize the empirical basis of the same. The data submitted before us indicates that while the Scheduled Tribes are indeed in a majority in some Scheduled Areas, the same is not true for some other Scheduled Areas. This disparity is understandable keeping in mind that there has been a considerable influx of non-tribal population in some of the Scheduled Areas. In this regard, we must re-emphasize the Bhuria Committee's recommendation that persons belonging to the Scheduled Tribes should occupy at least half of the seats in Panchayats located in Scheduled Areas, irrespective of whether the ST population was in a relative minority in the concerned area. This recommendation is in line with the larger objective of safeguarding the interests of Scheduled Tribes.

39. The other significant criticism of aggregate reservation amounting to 80% of the seats in Panchayats located in Scheduled Areas is that it amounts to an unreasonable limitation on the rights of political participation of persons belonging to the general category. The rights of political participation broadly include the right of a citizen to vote for a candidate of his/her choice and right of citizens to contest elections for a public office. In the present case, it was urged that reservations amounting to 80% of the seats in Scheduled area panchayats will have the effect of limiting the choices available to voters and effectively discourage persons belonging to the general category from contesting these elections. While the exercise of electoral franchise is an essential component of a liberal democracy, it is a well-settled principle in Indian law that such rights do not have the status of fundamental rights and are instead legal rights which are controlled through legislative means (See *N.P. Ponnuswami's case,* AIR 1952 SC 64*).* For instance, the Constitution empowers the Election Commission of India to prepare electoral rolls for the purpose of identifying the eligible voters in elections for the Lok Sabha and the Vidhan Sabhas. Furthermore, the Representation of People Act, 1951 gives effect to the Constitutional guidance on the eligibility of persons to contest these elections. This includes grounds that render persons ineligible from contesting elections such as that of a person not being a citizen of India, a person being of unsound mind, insolvency and the holding of an 'office of profit' under the executive among others. It will suffice to say that there is no inherent right to contest elections since there are explicit legislative controls over the same.

40. In the context of reservations in Panchayats, it can be reasoned that the limitation placed on the choices available to voters is an incidental consequence of the reservation policy. In this case, the compelling state interest in safeguarding the interests of weaker sections by ensuring their representation in local self-government clearly outweighs the competing

interest in not curtailing the choices available to voters. It must also be reiterated here that the 50% reservations in favour of STs as contemplated by the first proviso to Section 4(g) of the PESA were not struck down in the impugned judgment. Even though it was argued before this Court that this provision makes a departure from the norm of 'proportionate representation' contemplated by Art. 243-D(1), we have already explained how Art. 243-M(4)(b) permits 'exceptions and modifications' in the application of Part IX to Scheduled Areas. Sections 17(B)(1), 36(B)(1) and 51(B)(1) of the JPRA merely give effect to the exceptional treatment that is mandated by the PESA.

41. However, in addition to the 50% reservations in favour of Scheduled Tribes, the State of Jharkhand is also under an obligation to account for the interests of Scheduled Castes and Other Backward Classes. The same has been contemplated in Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the JPRA which incorporate the standard of 'proportionate representation' for Scheduled Castes and Backward Classes in such a manner that the total reservations do not exceed 80%. This does not mean that reservations will reach the 80% ceiling in all the Scheduled Areas. Since the allocation of seats in favour of Scheduled Castes and Backward Classes has to follow the principle of proportionality, the extent of total reservations is likely to vary across the different territorial constituencies identified for the purpose of elections to the panchayats. Depending on the demographic profile of a particular constituency, it is possible that the total reservations could well fall short of the 80% upper ceiling. However, in Scheduled Areas where the extent of the population belonging to the Scheduled Castes and Backward Classes exceeds 30% of the total population, the upper ceiling of 80% will become operative.

42. Irrespective of such permutations, the legislative intent behind the impugned provisions of the JPRA is primarily that of safeguarding the interests of persons belonging to the

Scheduled Tribes category. In light of the preceding discussion, it is our considered view that total reservations exceeding 50% of the seats in Panchayats located in Scheduled Areas are permissible on account of the exceptional treatment mandated under Article 243-M(4)(b). Therefore, we agree with the appellants and overturn the ruling of the High Court of Jharkhand on this limited point.

43. Dr. M.P. Raju, learned counsel appearing for one of the Respondents, contended that Jharkhand Panchayat Reservation Act should not have been extended to the 'Scheduled Area' as the Scheduled Tribes were enjoying more powers under the Fifth Schedule to the Constitution. The learned Counsel contended that if those provisions are held to be unconstitutional as held by the High Court, it would be better to revert to the system of Tribes Advisory Councils under the Fifth Schedule. We do not find much force in the contention and it is only to be rejected.

44. In the result, the appeals filed by the Union of India are allowed and the proviso to Section 4(g) of PESA Act and Sections 21(B), 40(B) and 55(B) of Jharkhand Panchayat Reservation Act, 2001 are held to be constitutionally valid. We also hold that Sections 17(B)(2), 36(B)(2) and 51(B)(2) of the Jharkhand Panchayat Reservation Act, 2001 are constitutionally valid provisions.

45. The other appeals are also disposed of accordingly and the State Election Commission of the State of Jharkhand is directed to conduct elections for the Panchayati Raj Institutions (PRIs) as early as possible.

R.P. Appeals allowed.

RAMESH KUMAR

v.

STATE OF HARYANA

(Civil Appeal No. 229 of 2010)

JANUARY 13, 2010

[P. SATHASIVAM AND H.L. DATTU, J.]

Industrial Disputes Act, 1947 – s. 2(oo), 2(s) and 25F – Workman employed on casual basis – Termination of his service without notice or retrenchment compensation – Industrial dispute raised – Award by labour court reinstating him with continuity of service and with back wages – Award set aside by High Court – On appeal, held: The workman had continuous service of 240 days in a calender year – Similarly placed persons were regularized – Employee in question was a 'workman' u/s. 25(s) – Termination of his service was in contravention of s. 25F – The plea that initial appointment of the workman was contrary to recruitment rules not applicable in the facts of the case – The plea also cannot be allowed, since it was raised for the first time before High Court.

Appellant was appointed on casual basis in a State Government Department. His service was terminated without any notice or retrenchment compensation. On coming to know that persons similarly appointed were either allowed to continue or regularized, appellant raised industrial dispute. Labour court passed the award holding that the workman had worked with the Department for a period of more than 240 days within 12 calendar months preceding the date of termination; and that since s. 25F of Industrial Disputes Act, 1947 was not complied with, he was entitled to reinstatement. Reinstatement was directed with continuity of service with 50% back wages. High Court set aside the award. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1. The materials placed by the appellant before the labour court clearly show that he had worked for three years and there was no break during his service tenure. He was issued identity card to work in the residence of the Chief Minister and no reason was given for his termination. It is also his case that there was no show cause notice and no inquiry was conducted. The Labour Court rightly found that the workman has continuously worked from December 1991 to January, 1993. It also found that the workman worked for 240 days with the Department within 12 calendar months preceding his date of termination. [Para 10] [536-G-H; 537-B-C]

2. It is not in dispute that the appellant is a "workman" as defined under Section 2(s) of Industrial Disputes Act, 1947 and "retrenchment" if any, it should be in accordance with Section 25F of the Act. In the instant case, the workman was not given any notice or pay in lieu of notice or retrenchment compensation at the time of his retrenchment. In view of the same, the labour court has correctly concluded that his termination is in contravention of the provisions of Section 25F of the Act. [Para 10] [538-D-E; 538-E-F]

3. The appellant alone was singled out and discriminated. Identical awards passed in the case of three other workmen was upheld by the High Court and the award in favour of the appellant alone was quashed by the High Court in the second round of litigation. Though, it was contended that the initial appointment of the appellant was contrary to the recruitment rules and constitutional scheme of employment, admittedly, the said objection was not raised by the Department either before the labour court or before the High Court at the first instance. It was only for the first time that they raised the said issue before the High Court when the matter was remitted to it that too the same was raised only during the

arguments. In such circumstances, the High Court ought not to have interfered with the factual finding rendered by the labour court and in view of the different treatment to other similarly placed workmen, the Department ought not to have challenged the order of the labour court. [Para 12] [541-C; 541-E-G]

4. An appointment on public post cannot be made in contravention of recruitment rules and constitutional scheme of employment. However, in view of the materials placed before the labour court and in this Court, the said principle would not apply in the case on hand. The appellant has not prayed for regularization but only for reinstatement with continuity of service for which he is legally entitled to. In the case of termination of casual employee what is required to be seen is whether a workman has completed 240 days in the preceding 12 months or not. If sufficient materials are shown that workman has completed 240 days then his service cannot be terminated without giving notice or compensation in lieu of it in terms of Section 25F. The High Court failed to appreciate that in the present case appellant has completed 240 days in the preceding 12 months and no notice or compensation in lieu of it was given to him, in such circumstances his termination was illegal. [Para 13] [542-B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 229 of 2010.

From the Judgment & Order dated 23.12.2008 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 575 of 2004.

Y.P. Rangi, B.K. Satija for the Appellant.

Manjit Singh, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and final order dated 23.12.2008 passed by the High Court of Punjab and Haryana at Chandigarh in CWP No. 575 of 2004 whereby the High Court allowed the writ petition filed by the State of Haryana.

3. According to the appellant, in December, 1991, he was appointed as Mali on casual basis in Public Works Department (B & R) Haryana and worked at the Chief Minister's residence. On 31.01.1993, his service was terminated without any notice or retrenchment compensation as provided in the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). After knowing that persons similarly appointed were either allowed to continue or regularized by the Department, the appellant sent a notice to the respondent. Since the Department declined to accede to his request, appellant made a Reference No. 81 of 1999 before the Labour Court, Union Territory, Chandigarh. He pleaded before the Labour Court that he had completed more than 240 days of service and all along he was performing his duties at the residence of the Chief Minister, Haryana. The Government has made a policy that persons who have completed 240 days of service may be regularized, however, instead of regularization of his services, he was terminated w.e.f. 31.01.1993. He prayed before the Labour Court for setting the order of termination of his service and for an award for reinstatement with full back-wages.

4. It is the case of the Department that the workman has not completed 240 days of service except in the year 1992. He has not fulfilled the circular dated 27th May, 1993 entitling him for regularization of his service. Further, the Government has not framed any policy to regularize the service of persons who have completed 240 days as claimed.

5. Before the Labour Court, the workman himself was examined as AW-1. On the side of the Department, one Junior Engineer was examined as MW-1. On consideration of the materials placed, the Labour Court, by award dated

10.02.2003, has arrived at a conclusion that the workman has worked with the Department for a period of more than 240 days within 12 calendar months preceding the date of termination i.e. 31.01.1993, and in view of non-compliance of Section 25F of the Act, he is entitled to reinstatement. The Labour Court has also directed reinstatement with continuity of service with 50 per cent back-wages from the date of termination. With the above direction, reference was accepted and answered in the affirmative.

6. Aggrieved by the said award of the Labour Court, the State of Haryana challenged the same in CWP No. 575 of 2004 before the Punjab and Haryana High Court. By the impugned order dated 23.12.2008, the High Court set aside the award of the Labour Court granting reinstatement and back-wages, consequently allowed the writ petition.

7. Questioning the said decision of the High Court, the workman has filed the present appeal by way of special leave.

8. Heard learned counsel for the appellant-workman as well as learned counsel for the respondent-State of Haryana.

9. The only point for consideration in this appeal is whether the High Court was justified in setting aside the award of the Labour Court when the appellant had established that he was in continuous service for a period of 240 days in a calendar year, particularly, when similarly placed workmen were regularized by the Government.

10. It is not in dispute that the appellant was appointed as a Mali and posted at the residence of the Chief Minister in the year 1991. The materials placed by the appellant before the Labour Court clearly show that he had worked for three years and there was no break during his service tenure. He was issued identity card to work in the residence of the Chief Minister and no reason was given for his termination. It is also his case that there was no show cause notice and no inquiry was conducted. The perusal of the order of the Labour Court

clearly shows that one Shri Nasib Singh, Junior Engineer, who deposed as MW-1 on behalf of the Department has categorically stated that the workman was engaged by the Department on muster rolls as Mali in December, 1991 and he worked up to 31.01.1993. He also stated that there was no break from December, 1991 to January, 1993 during which the workman was engaged. The Labour Court as per the materials placed rightly found that the workman has continuously worked from December 1991 to 31.01.1993. It also found that the workman worked for 240 days with the Department within 12 calendar months preceding his date of termination i.e. 31.01.1993. It is useful to refer the definition of "retrenchment" and "workman" in the Act which reads thus:

> "2 (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include……."
>
> 2 (s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person……."
>
> 25F. Conditions precedent to retrenchment of workmen.
>
> No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-
>
> (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
>
> (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
>
> (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

It is not in dispute that the appellant is a "workman" as defined under Section 2 (s) and "retrenchment" if any it should be in accordance with Section 25F of the Act. Admittedly, in the case on hand, the workman was not given any notice or pay in lieu of notice or retrenchment compensation at the time of his retrenchment. In view of the same, the Labour Court has correctly concluded that his termination is in contravention of the provisions of Section 25 F of the Act. Though the Department has relied on a circular, the Labour Court on going through the same rightly concluded that the same is not applicable to the case of the retrenchment.

11. In addition to the factual conclusion by the Labour Court, namely, continuance for a period of 240 days in a calendar year preceding his termination, the appellant has also placed relevant materials to show that persons similarly situated have already been reinstated and their services have been regularized. It is his grievance that appellant alone has been meted out with the hostile discrimination by the Department. He also highlighted that in respect of some of the workmen who were appointed and terminated, after similar awards passed

S. No.	Name	Labour Court	High Court	Supreme Court	Present Status
1.	Gurbax Singh	Claim allowed	No writ petition filed	No SLP filed	Reinstated on 19.06.2004. Service regularized w.e.f. 01.07.2004
2.	Mast Ram	Claim allowed	Writ petition filed by respondents, dismissed	SLP filed by the respondents, also dismissed.	Reinstated on 19.06.2004. Service regularized
3.	Rajesh Kumar	Claim allowed	Writ petition filed by respondents, dismissed	SLP filed by the respondents, also dismissed.	Reinstated. Service regularized.
4.	Paramjit Kumar	Claim allowed	Writ petition filed by respondents, dismissed	SLP filed by the respondents, also dismissed.	Reinstated. Service regularized.

5.	Ramesh Kumar (Petitioner)	Claim allowed	In 1st round Writ petition filed by respondents, dismissed In 2nd round writ petition was allowed.	SLP filed by the respondents, matter remitted back. Now petitioner has filed the present writ petition.	Reinstated on 18.06.2004 but service not regularized.

by the Labour Court, the Management did not challenge the same before the High Court by filing writ petitions. He also pointed out that in some cases where a challenge was made before the High Court by filing writ petitions however, after dismissal of the writ petitions those persons were reinstated. In fact, according to the appellant some of them were even regularized. The details of other identically situated persons are as on page 540.

12. The perusal of all these details clearly shows that the appellant alone was singled out and discriminated. We have already noted the specific finding of the Labour Court that the appellant had fulfilled 240 days in a calendar year before the order of termination. The appellant has also highlighted that he is the sole bread earner of his family and his family consists of his old mother, wife and two minor sons and a minor daughter. The above-mentioned chart also shows that identical awards passed in the case of Mast Ram, Rajesh, Paramjit and Amarjit was upheld by the High Court and the award in favour of the appellant alone was quashed by the High Court in the second round of litigation. Though, it was contended that the initial appointment of the appellant was contrary to the recruitment rules and constitutional scheme of employment, admittedly, the said objection was not raised by the Department either before the Labour Court or before the High Court at the first instance. It was only for the first time that they raised the said issue before the High Court when the matter was remitted to it that too the same was raised only during the arguments. In such circumstances, the High Court ought not to have interfered with the factual finding rendered by the Labour Court and in view of the different treatment to other similarly placed workmen the Department ought not to have challenged the order of the Labour Court. In addition to the above infirmities, the appellant has also pointed out that one Gurbax Singh who was engaged subsequent to the appellant on casual basis has challenged his termination order, which was quashed by the Labour Court; interestingly the Department did not challenge the award of the

Labour Court by filing writ petition. It was also highlighted by the appellant that on the basis of the award, Gurbax singh was not only taken back in service but his services were regularized w.e.f. 01.07.2004.

13. We are conscious of the fact that an appointment on public post cannot be made in contravention of recruitment rules and constitutional scheme of employment. However, in view of the materials placed before the Labour Court and in this Court, we are satisfied that the said principle would not apply in the case on hand. As rightly pointed out, the appellant has not prayed for regularization but only for reinstatement with continuity of service for which he is legally entitled to. It is to be noted in the case of termination of casual employee what is required to be seen is whether a workman has completed 240 days in the preceding 12 months or not. If sufficient materials are shown that workman has completed 240 days then his service cannot be terminated without giving notice or compensation in lieu of it in terms of Section 25F. The High Court failed to appreciate that in the present case appellant has completed 240 days in the preceding 12 months and no notice or compensation in lieu of it was given to him, in such circumstances his termination was illegal. All the decisions relied on by the High Court are not applicable to the case on hand more particularly, in view of the specific factual finding by the Labour Court.

14. Under these circumstances, the impugned order of the High Court dated 23.12.2008 passed in CWP No. 575 of 2004 is set aside. It is not in dispute that the appellant-workman is continuing in service and learned counsel representing him fairly stated that he is willing to forego back-wages as awarded by the Labour court, the same is recorded. Consequently, the civil appeal filed by the workman is allowed to the extent mentioned above. No costs.

K.K.T. Appeal allowed.

COMMISSIONER OF INCOME TAX-V, NEW DELHI
v.
M/S. ORACLE SOFTWARE INDIA LTD.
(Civil Appeal No. 235 of 2010)

JANUARY 13, 2010

[S.H. KAPADIA, H.L. DATTU AND SURINDER SINGH NIJJAR, JJ.]

Income Tax Act, 1961: s.80IA(1) r.w. s.80IA(12)(b): Transformation of blank Compact Disc (CD) into software loaded disc – Held: Amounts to manufacture/processing of goods in terms of s.80IA(1) r.w. s.80IA(12)(b) – Blank CD is an input – By duplicating process, the recordable media which is unfit for any specific use gets converted into the programme which is embedded in the Master Media and, thus, blank CD gets converted into recorded CD by this intricate process – Duplicating process changes the basic character of a blank CD, dedicating it to a specific use – Therefore, processing of blank CDs constitutes manufacture in terms of s.80IA(12)(b) r.w. s.33B of the Act.

The question which arose for consideration in these appeals is whether the process by which a blank Compact Disc (CD) is transformed into software loaded disc constitutes "manufacture or processing of goods" in terms of Section 80IA(1) read with Section 80IA(12)(b), as it stood then, of the Income Tax Act, 1961.

Dismissing the appeals, the Court

HELD: 1. A blank CD is different and distinct from a pre-recorded CD. Marketed copies are goods and if they are goods then the process by which they become goods would certainly fall within the ambit of Section 80IA(12)(b) read with Section 33B because an industrial undertaking

has been defined in Section 33B to cover manufacture or processing of goods. [Para 12] [554-B-C]

Gramophone Co. of India Ltd. v. Collector of Customs, Calcutta **114 ELT 770, relied on.**

2.1. The details of Oracle Applications show that the software on the Master Media is an application software. It is not an operating software or a system software. It can be categorized into Product Line Applications, Application Solutions and Industry Applications. A commercial duplication process involves four steps. For the said process of commercial duplication, one requires Master Media, fully operational computer, CD Blaster Machine (a commercial device used for replication from Master Media), blank/ unrecorded Compact Disc also known as recordable media and printing software/labels. The Master Media is subjected to a validation and checking process by software engineers by installing and rechecking the integrity of the Master Media with the help of the software installed in the fully operational computer. After such validation and checking of the Master Media, the same is inserted in a machine which is called as the CD Blaster and a virtual image of the software in the Master Media is thereafter created in its internal storage device. This virtual image is utilized to replicate the software on the recordable media. [Para 8] [550-C-D]

2.2. Virtual image is an image that is stored in computer memory but it is too large to be shown on the screen. Therefore, scrolling and panning are used to bring the unseen portions of the image into view. The examination of the process shows that commercial duplication cannot be compared to home duplication. Complex technical nuances are required to be kept in mind while deciding such issues. The term "manufacture" implies a change, but, every change is not

a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. If an operation/ process renders a commodity or article fit for use for which it is otherwise not fit, the operation/ process falls within the meaning of the word "manufacture". Applying the said test to the facts of the present case, the assessee has undertaken an operation which renders a blank CD fit for use for which it was otherwise not fit. The blank CD is an input. By the duplicating process undertaken by the assessee, the recordable media which is unfit for any specific use gets converted into the programme which is embedded in the Master Media and, thus, blank CD gets converted into recorded CD by the afore-stated intricate process. The duplicating process changes the basic character of a blank CD, dedicating it to a specific use. Without such processing, blank CDs would be unfit for their intended purpose. Therefore, processing of blank CDs, dedicating them to a specific use, constitutes a manufacture in terms of Section 80IA(12)(b) read with Section 33B of the Income Tax Act. [Paras 9 and 10] [550-E; 551-D-G]

Tata Consultancy Services v. State of Andhra Pradesh **137 STC 620, relied on.**

Microsoft Computer Dictionary, **Fifth Edition, referred to.**

2.3. The intelligence/logic (contents) of a programme do not change. They remain the same, be it in the original or in the copy. The Department needs to take into account the ground realities of the business and sometimes over-simplified tests create confusion, particularly, in modern times when technology grows each day. To say, that contents of the original and the copy are the same and, therefore, there is manufacture would not be a correct proposition. What one needs to examine in each case is the process undertaken by the assessee. [Para 11] [552-G-H; 553-A-B]

United States v. International Paint Co. **35 C.C.P.A. 87, C.A.D. 76, referred to.**

Case Law Reference:

137 STC 620	**relied on**	**Para 11**
35 C.C.P.A. 87, C.A.D. 76	**referred to**	**Para 11**
114 ELT 770	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 235 of 2010.

From the Judgment & Order dated 09.05.2007 of the High Court of Delhi at New Delhi in ITA No. 811 of 2006.

WITH

C.A. Nos. 238 & 239 of 2010.

Bishwajit Bhattacharya, ASG, Arijit Prasad, Rahul Kaushik, B.V. Balaram Das for the Appellant.

M.S. Syali, Mahua Kalra, Jagjit Singh Chhabra, Shekhar Prit Jha, Pratyush Jain, Maryam Sharma, Mohan Pandey for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Leave granted.

2. A short question which arises for determination in this batch of civil appeals is whether the process by which a blank Compact Disc (CD) is transformed into software loaded disc constitutes "manufacture or processing of goods" in terms of Section 80IA(1) read with Section 80IA(12)(b), as it stood then, of the Income Tax Act, 1961?

3. For the sake of convenience, we may refer to bare facts mentioned in Civil Appeal @ SLP (C) No. 6847 of 2008. In

this appeal, we are concerned with the Assessment Years 1995-96 and 1996-97.

4. Assessee is 100% subsidiary of Oracle Corporation, USA. It is incorporated with the object of developing, designing, improving, producing, marketing, distributing, buying, selling and importing of computers softwares. Assessee is entitled to sub-licence the software developed by Oracle Corporation, USA. Assessee imports Master Media of the software from Oracle Corporation, USA which is duplicated on blank discs, packed and sold in the market along with relevant brouchers. Assessee pays a lump-sum amount to Oracle Corporation, USA for the import of Master Media. In addition thereto, assessee also pays royalty at the rate of 30% of the price of the licensed product. The only right which the assessee has is to replicate or duplicate the software. They do not have any right to vary, amend or make value addition to the software embedded in the Master Media. According to the assessee, it uses machinery to convert blank CDs into recorded CDs which along with other processes become a Software Kit. According to the assessee, it is the blank CD in the present case which constitutes raw-material. According to the assessee, Master Media cannot be conveyed as it is. In order to sub-licence, a copy thereof has to be made and it is the making of this copy which constitutes manufacture or processing of goods in terms of Section 80IA and consequently assessee is entitled to deduction under that Section. On the other hand, according to the Department, in the process of copying, there is no element of manufacture or processing of goods. According to the Department, since the software on the Master Media and the software on the recorded media remains unchanged, there is no manufacture or processing of goods involved in the activity of copying or duplicating, hence, the assessee was not entitled to deduction under Section 80IA. According to the Department, when the Master Media is made from what is lodged into the computer, it is a clone of the software in the computer and if one compares the contents of

the Master Media with what is there in the computer/ data bank, there is no difference, hence, according to the Department, there is no change in the use, character or name of the CDs even after the impugned process is undertaken by the assessee.

5. Before answering the controversy, we need to reproduce relevant provisions of Sections 80IA(1), 80IA(12)(b) as also Explanation to Section 33B of the Income Tax Act in the following terms:

"80IA - Deduction in respect of profits and gains from industrial undertakings, etc.in certain cases.

(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or a hotel or operation of a ship (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to the percentage specified in sub-section (5) and for such number of assessment years as is specified in sub-section (6).

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(12) For the purposes of this section, -

(a) *** ***

(b) "industrial undertaking" shall have the meaning assigned to it in the Explanation to Section 33B;"

Explanation to Section 33B

"Explanation: In this section, "industrial undertaking" means any undertaking which is mainly engaged in the business of generation or distribution of electricity or any other form

of power or in the construction of ships or in the manufacture or processing of goods or in mining."

6. Section 80IA occurs in Chapter VIA which deals with Deductions in respect of certain Incomes. Where the gross total income of an assessee includes any profits derived from any business of an industrial undertaking to which Section 80IA applies, there shall in accordance with and subject to the provisions of Section 80IA, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to a specified percentage for such number of assessment years as specified in Section 80IA. For deciding the present controversy, it would be sufficient to notice that the gross total income of an assessee must include profits derived from any business (eligible) of an industrial undertaking which in terms of Section 80IA(12)(b) is given the same meaning as is assigned to that expression vide Explanation to Section 33B. As can be seen from the Explanation to Section 33B, an industrial undertaking inter alia has been defined to mean any undertaking which is engaged inter alia in the manufacture or processing of goods.

7. At the outset, we may state that Section 80IA comes in Chapter VIA. That Chapter, in a way, is a code by itself. It provides for special deductions. Broadly, these special deductions are incentives provided for setting up industrial undertakings in backward areas, for earning profits in foreign exchange, for setting up hotels, etc. It is in this background that one has to interpret the meaning of the expression "manufacture or processing of goods". One more aspect needs to be highlighted. Technological advancement in computer science makes knowledge as of today obsolete tomorrow. We need to move with the times. At the same time, one needs to take note of the fact that unlimited deductions are not permissible under Chapter VIA. Therefore, in each case, where an issue of this nature arises for determination, the Department should study the actual process undertaken by the

assessee. Duplication can certainly take place at home, however, one needs to draw a line between duplication done at home and commercial duplication. Even a pirated copy of a CD is a duplication but that does not mean that commercial duplication as is undertaken in this case should be compared with home duplication which may result in pirated copy of a CD. The point to be noted by the Department in each of such cases is to study the actual process undertaken by the licensee who claims deduction under Section 80IA of the Income Tax Act, 1961. At this stage, we may clarify that in this case we are concerned with the Income Tax Act, 1961, as it stood during the relevant Assessment Years.

8. From the details of Oracle Applications, we find that the software on the Master Media is an application software. It is not an operating software. It is not a system software. It can be categorized into Product Line Applications, Application Solutions and Industry Applications. A commercial duplication process involves four steps. For the said process of commercial duplication, one requires Master Media, fully operational computer, CD Blaster Machine (a commercial device used for replication from Master Media), blank/ unrecorded Compact Disc also known as recordable media and printing software / labels. The Master Media is subjected to a validation and checking process by software engineers by installing and rechecking the integrity of the Master Media with the help of the software installed in the fully operational computer. After such validation and checking of the Master Media, the same is inserted in a machine which is called as the CD Blaster and a virtual image of the software in the Master Media is thereafter created in its internal storage device. This virtual image is utilized to replicate the software on the recordable media.

9. What is virtual image? It is an image that is stored in computer memory but it is too large to be shown on the screen. Therefore, scrolling and panning are used to bring the unseen

portions of the image into view. [See Microsoft Computer Dictionary, Fifth Edition, page 553] According to the same Dictionary, burning is a process involved in writing of a data electronically into a programmable read only memory (PROM) chip by using a special programming device known as a PROM programmer, PROM blower, or PROM blaster. [See Pages 64, 77 of Microsoft Computer Dictionary, Fifth Edition]

10. In our view, if one examines the above process in the light of the details given hereinabove, commercial duplication cannot be compared to home duplication. Complex technical nuances are required to be kept in mind while deciding issues of the present nature. The term "manufacture" implies a change, but, every change is not a manufacture, despite the fact that every change in an article is the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the above process. If an operation/ process renders a commodity or article fit for use for which it is otherwise not fit, the operation/ process falls within the meaning of the word "manufacture". Applying the above test to the facts of the present case, we are of the view that, in the present case, the assessee has undertaken an operation which renders a blank CD fit for use for which it was otherwise not fit. The blank CD is an input. By the duplicating process undertaken by the assessee, the recordable media which is unfit for any specific use gets converted into the programme which is embedded in the Master Media and, thus, blank CD gets converted into recorded CD by the afore-stated intricate process. The duplicating process changes the basic character of a blank CD, dedicating it to a specific use. Without such processing, blank CDs would be unfit for their intended purpose. Therefore, processing of blank CDs, dedicating them to a specific use, constitutes a manufacture in terms of Section 80IA(12)(b) read with Section 33B of the Income Tax Act.

11. One of the arguments advanced on behalf of the Department is that since the software on the Master Media and

the software on the pre-recorded media is the same, there is no manufacture because the end product is not different from the original product. We find no merit in this argument. Firstly, as stated above, the input in this case is blank disc. Secondly, the test applied by the Department may not be relevant in the context of computer technology. One of the questions which arose for determination before this Court in the case of *Tata Consultancy Services v. State of Andhra Pradesh,* 137 STC 620 was whether a software programme put in media for transferring or marketing is "goods" under Section 2(h) of the Andhra Pradesh General Sales Tax Act, 1957. It was held that a software programme may consist of commands which enable the computer to perform a designated task. The copyright in the programme may remain with the originator of the programme. But, the moment copies are made and marketed, they become goods. It was held that even an intellectual property, once put on to a media, whether it will be in the form of computer discs or cassettes and marketed, it becomes goods. It was further held that there is no difference between a sale of a software programme on a CD/ Floppy from a sale of music on a cassette/ CD. In all such cases the intellectual property is incorporated on a media for purposes of transfer and, therefore, the software and the media cannot be split up. It was further held, in that judgment, that even though the intellectual process is embodied in a media, the logic or the intelligence of the programme remains an intangible property. It was further held that when one buys a software programme, one buys not the original but a copy. It was further held that it is the duplicate copy which is read into the buyer's computer and copied on memory device. [See Pages 630 and 631 of the said judgment] If one reads the judgment in *Tata Consultancy Services* (supra), it becomes clear that the intelligence/ logic (contents) of a programme do not change. They remain the same, be it in the original or in the copy. The Department needs to take into account the ground realities of the business and sometimes over-simplified tests create

confusion, particularly, in modern times when technology grows each day. To say, that contents of the original and the copy are the same and, therefore, there is manufacture would not be a correct proposition. What one needs to examine in each case is the process undertaken by the assessee. Our judgment is confined strictly to the process impugned in the present case. It is for this reason that the American Courts in such cases have evolved a new test to determine as to what constitutes manufacture. They have laid down the test which states that if a process renders a commodity or article fit for use which otherwise is not fit, the operation falls within the letter and spirit of manufacture. [See *United States v. International Paint Co.* reported in 35 C.C.P.A. 87, C.A.D. 76]

12. Before concluding, we may once again refer to the judgment of this Court in *Tata Consultancy Services* (supra) in which as stated above, it has been held that there is no difference between a sale of software programme on a CD/ Floppy and a sale of music on a CD/ Cassette. Therefore, in our view, the judgment of this Court in the case of *Gramophone Co. of India Ltd. v. Collector of Customs, Calcutta,* 114 ELT 770 would apply. In that case, the question which arose for determination was whether recording of audio cassettes on duplicating music system amounts to manufacture. The answer was in the affirmative. It was held that a blank audio cassette is distinct and different from a pre-recorded audio cassette and the two have different use and name. Applying that test to the facts of the present case, we hold that a blank CD is different and distinct from a pre-recorded CD. In *Gramophone Co. of India Ltd.* (supra), it was held that an input/ raw-material in the above process is a blank audio cassette. It was further held that recording of an audio cassette on duplicating music system amounts to manufacture because blank audio cassette is distinct and different from pre-recorded audio cassette and the two have different uses and names. In our view, the High Court was right in coming to the conclusion that the judgment of this Court in *Gramophone Co. of India Ltd.* (supra) is squarely

applicable to the facts of the present case. We may add that in the case of *Tata Consultancy Services* (supra), as stated above, it has been held that a software programme may consist of commands which enable the computer to perform designated task, but, the moment copies are made and marketed, they become goods. Therefore, applying the above judgment to the facts of the present case, we are of the view that marketed copies are goods and if they are goods then the process by which they become goods would certainly fall within the ambit of Section 80IA(12)(b) read with Section 33B because an industrial undertaking has been defined in Section 33B to cover manufacture or processing of goods.

13. For the afore-stated reasons, we find no merit in the Civil Appeals filed by the Department, which are accordingly dismissed with no order as to costs.

D.G. Appeals disimissed.

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