SANJAY KUMAR KEDIA @ SANJAY KEDIA
v.
INTELLIGENCE OFFICER, NARCOTIC CONTROL BUREAU AND ANR.
(Criminal Appeal Nos. 2008-2009 of 2008)

AUGUST 20, 2009*

[HARJIT SINGH BEDI AND DR. B.S. CHAUHAN, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

s. 36-A (4), proviso – Extension of custody to complete investigation – Conditions to be satisfied – Held: In the instant case, there was no application of mind by the public prosecutor – Progress of investigation was not indicated — Compelling reasons which required extension of custody beyond 180 days were not shown — Both the extensions being contrary to law, struck down.

s. 36-A (4), proviso read with s. 167 (2) Cr. P.C. – Application for bail on the ground that investigation was not completed within the extended time – Extensions having been held contrary to law, appellant released on bail.

The appellant was arrested on 12.2.2007 on the allegations that he committed offences punishable u/ss 24, 29, 30 and 38 of the Narcotic Drugs and Psychotropic Substances Act, 1985. On 2.8.2007 respondent no.1 applied for and was granted extension of time u/s 36-A (4) of the Act and custody of accused to complete the investigation and file the complaint. Again on 30.1.2008 respondent no. 1 applied for and was allowed time till 13.2.2008. On 4.2.2008 the appellant filed an application for bail on the ground that the investigation was not completed within the extended period. The application was rejected. The appellant filed revision petitions before

* Judgment Received on 6.2.2010.

the High Court challenging the orders granting the second extension and rejecting his bail application. The High Court dismissed both the petitions. Aggrieved, the accused filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. The proviso to s. 36-A (4) of the Narcotic Drugs and Psychotropic Substances Act, 1985 authorizes the period of detention which may in total go upto one year, provided the stringent conditions laid down therein are satisfied and complied with. The conditions provided are: (1) a report is given by the public prosecutor; (2) which indicates the progress of the investigation; (3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days; and (4) after notice to the accused. [Para 9] [562-D-G]

1.2. The application dated 2.8.2007 shows that it has been filed by the investigating officer of respondent no.1 and does not indicate even remotely any application of mind on the part of the public prosecutor. It further does not indicate the progress of the investigation, nor the compelling reasons which required an extension of custody beyond 180 days. This application was allowed by the Special Judge on the day on which it was filed which also reveals that no notice had been issued to the accused and he was not even present in court on that day. The second application dated 30.1.2008 is even more incomprehensible. A bare perusal of this application would reveal that it does not even remotely satisfy the tests laid down in *Hitendra Vishnu Thakur's* **case. Thus the extensions granted to the investigating department under the proviso to s. 36-A (4) did not satisfy the conditions laid down therein and both the extensions, therefore, being contrary to law, must be struck down accordingly. [Para 14 and 16] [566-F-H; 567-A-B-G; 568-B-C]**

Hitendra Vishnu Thakur and others v. State of Maharashtra and Others **1994 (4) SCC 602 and** *Uday Mohanlal Acharya vs. State of Maharashtra* **(2001) 5 SCC 453, relied on.**

1.3. As regards the rejection of the application for bail filed by the accused under the default clause, the Special Judge observed that the period of investigation was extended on two occasions and the complaint had been filed before that expiry of the last extended date and as the allegations were serious, the appellant was not entitled to bail. The High Court while noticing the decision in *Hitendra Vishnu Thakur's* **case has deviated from its observations and side stepped the very categorical directions given by this Court, on wholly irrelevant considerations. In this view of the matter, the orders dated 13.2.2008 and 5.9.2008 passed by the Special Judge and the High Court, respectively, are set aside and the appellant is directed to be released on bail. [Para 17 and 20] [568-C-F; 571-C]**

Case Law Reference:

1994 (4) SCC 602	**relied on**	**Para 4**
(2001) 5 SCC 453	**relied on**	**Para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2008-2009 of 2008.

From the Judgment & Order dated 05.09.2008 of the High Court of Calcutta in C.R.R. Nos. 411 and 765 of 2008.

U.U. Lalit, Manoj Prasad, for the Appellant.

Avijit Bhattacharjee, Bikas Kargupta, for the Respondents.

The following Order of the Court was delivered

ORDER

These appeals arise out of the following facts:

1. The appellant was arrested on 12th February, 2007 for offences punishable under Sections 24, 29, 30 and 38 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the 'Act') and was produced before the Special Judge who remanded him to judicial custody for fifteen days, the period being extended from time to time. The appellant also moved an application for bail before the Special Judge. This application was rejected on 28th May, 2007 whereafter the appellant moved the Calcutta High Court. This application was rejected on 7th June, 2007. The appellant, aggrieved by the order of 7th June 2007, preferred a special leave petition in this Court on 10th July, 2007 which too was dismissed on 3rd December, 2007. It appears that as the period of 180 days fixed under Section 36A (4) of the Act read with Section 167 (2) of Code of Criminal Procedure, 1973 (hereinafter called the Code) was to expire on 10th August, 2007, Respondent No.1, the Narcotics Control Bureau, filed an application under Section 36A (4) on 2nd August, 2007 seeking a further period of six months for the completion of the investigation and the filing of the complaint. The Special Judge allowed this application by Order dated 2nd August, 2007. As the extended period would have expired on 2nd February, 2008, the Bureau, moved yet another application under Section 36A (4) of the Act which too was allowed on 30th January 2008 and the time for the completion of the investigation was extended to 13th February 2008, which would have (statedly) brought the total custody to 1 year and 2 days.

2. The appellant moved another application for bail under Section 36A (4) of the Act read with Section 167 (2) of the 'Code' on 4th February, 2008 on the plea that the investigation had not been completed within the stipulated period of time fixed by the Special Judge. This application was rejected on

13th February, 2008. The appellant also moved CRR No.411 of 2008 in the Calcutta High Court on 7th February, 2008 against the Order dated 30th January, 2008 whereby an extension of six months had been granted. The complaint was also filed by respondent No.1 on the 7th February 2008. The appellant filed CRR No.765 of 2008 before the Calcutta High Court challenging the order dated 13th February, 2008 rejecting the application for bail. On 6th August, 2008, a learned Single Judge of the Calcutta High Court released both the CRR's aforementioned for want of jurisdiction as they were required to be heard by a Division Bench. Both the matters came before the Division Bench and were dismissed by order dated 5th September, 2008. The present appeal has been filed impugning this order.

3. Leave was granted in this matter on 5th December, 2008 and though, both the respondents i.e. the Narcotic Control Bureau and the State of West Bengal have been served, the former has not put in appearance despite the passage of almost a year. The State of West Bengal Respondent No.2 however, which is not really the contesting party, has filed a counter and is also represented by its counsel, Mr. Avijit Bhattacharjee. He, at the very outset, pointed out that he felt gravely handicapped on account of the non-appearance of respondent No.1, the primary party respondent, but he has chosen to go ahead as it appears that the first respondent was not interested in contesting the case.

4. The broad facts given above have not been controverted by the respondents. Mr. Lalit, the learned counsel for the appellant has made two submissions before us:

(i) the two applications for extension dated 10th July, 2007 and 30th January, , 2008 did not satisfy the conditions laid down in Section 36A (4) of Act and were without notice to the accused and as such the orders were a nullity and any extension of time beyond 180 days was, therefore, contrary to law. For this submission he has placed reliance on the case of *Hitendra Vishnu Thakur and others Versus State of Maharashtra and others* [1994 (4) SCC 602].

(ii) that as the second extension would have ended on 2nd February, 2008 and the appellant had filed an application for bail under Section 36A (4) of the Act on 4th February, 2008, the said application was pending for consideration before the Special Judge when the complaint had been filed on the 7th February, 2008, the subsequent act of the filing the complaint did take away the right which had accrued to the appellant on 2nd February, 2008 as had been held by this Court in *Uday Mohanlal Acharya Versus State of Maharashtra* [2001 (5) SCC 453].

5. Mr. Bhattacharjee, has, however, supported the judgment of the Special Judge and the High Court by submitting that two applications for extension of time had been made by respondent no.1 in accordance with the provisions of Section 36A (4) of the Act and that the Special Judge, had, after applying his mind, granted the extensions. He has, further, pointed out that both the Special Judge and the High Court had taken all relevant factors into consideration and keeping in view the larger purpose behind the Act and the great social and legal ramifications, which it raised, required that it should be strictly enforced.

6. He has also pointed out that the submission that the period of 180 days had ended on 2nd February, 2008 was incorrect as the calculations would show that this period was to expire on 8th February, 2008 and the complaint having been filed a day earlier made the ratio of the judgment in *Uday Mohan Lal Acharya's* case (supra), inapplicable.

7. We have considered the arguments of learned counsel for the parties. Section 167 of the Code deals with the

procedure wherein investigation cannot be completed in 24 hours and the various sub-sections provide for the maximum period beyond which a person cannot be detained and this period varies between 60 and 90 days keeping in view the gravity of the offence - the maximum period of 90 days being provided with respect to offences punishable with death etc. and 60 days for other offences, and if the investigation is not completed within this period, the accused is entitled to bail under Section 167 sub-section (2) if he makes an application for that purpose and is prepared to furnish bail. It will be seen that Section 167 does not envisage an extension of the period of detention of an accused in custody beyond the specified periods. The legislature, however, thought in its wisdom, that certain special categories or situations required that the investigating agencies should be given more time to investigate a matter and to file their complaint or charge-sheets and such provisions have been made under special statutes.

8. The Terrorist and Disruptive Prevention Act, 1987 (hereinafter called the 'TADA') and the Act are two such special legislations. Section 36A (4) of the Act in so far as is relevant, reads as under:

"Section 36 A.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) xxxx

(b) xxxx

(c) xxxx

(d) xxxx

(2) xxxx

(3) xxxx

(4) In respect of persons accused of an offence punishable under Section 19 or Section 24 or section 27 A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) xxxx

9. The maximum period of 90 days fixed under Section 167 (2) of the Code has been increased to 180 days for several categories of offences under the Act but the proviso authorizes a yet further period of detention which may in total go upto one year, provided the stringent conditions provided therein are satisfied and are complied with. The conditions provided are:

(1) a report of the public prosecutor,

(2) which indicates the progress of the investigation, and

(3) specifies the compelling reasons for seeking the detention of the accused beyond the period of 180 days, and

(4) after notice to the accused.

10. The question to be noticed at this stage is as to whether the two applications for extension that had been filed by the public prosecutor seeking an extension beyond 180

days met the necessary conditions. We find that the matter need not detain us as it is no longer res integra and is completely covered by the judgment of this Court in *Hitendra Vishnu's case* (supra). In this case, the Bench was dealing with the proviso inserted as clause (bb) in Sub-section (4) of Section 20 of TADA, which is parimateria with the proviso to Sub-Section (4) of Section 36-A of the Act. This Court accepted the argument of the accused that an extension beyond 180 days could be granted but laid a rider that it could be so after certain conditions were satisfied. It was observed :

> "It is true that neither clause (b) nor clause (bb) of sub-section (4) of Section 20 TADA specifically provide for the issuance of such a notice but in our opinion the issuance of such a notice must be read into these provisions both in the interest of the accused and the prosecution as well as for doing complete justice between the parties. This is a requirement of the principles of natural justice and the issuance of notice to the accused or the public prosecutor, as the case may be, would accord with fair play in action, which the courts have always encouraged and even insisted upon. It would also strike a just balance between the interest of the liberty of an accused on the one hand and the society at large through the prosecuting agency on the other hand. There is no prohibition to the issuance of such a notice to the accused or the public prosecutor in the scheme of the Act and no prejudice whatsoever can be caused by the issuance of such a notice to any party.

11. Mr. Lalit, has further contended that the two applications for extension of time could not, by any stretch of imagination, be said to be reports of the public prosecutor as envisaged under Section 36A (4) and has again referred us to the case ibidem:

> A public prosecutor is an important officer of the State Government and is appointed by the State under the Code of Criminal Procedure. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A public prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation. In that event, he may not submit any report to the court under clause (bb) to seek extension of time. Thus, for seeking extension of time under clause (bb), the public prosecutor after an independent application of his mind to the request of the investigating agency is required to make a report to the Designated Court indicating therein the progress of the investigation and disclosing justification for keeping the accused in further custody to enable the investigating agency to complete the investigation. The public prosecutor may attach the request of the investigating officer along with this request or application and report, but his report, as envisaged under clause (bb), must disclose on the face of it that he has applied his mind and was satisfied with the progress of the investigation and considered grant of further time to complete the investigation necessary. The use of the expression "on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period" as occurring in clause (bb) in sub-section (2) of Section 167 as amended by Section 20(4) are important and indicative of the legislative intent not to keep an accused in custody unreasonably and to grant extension only on the report of the public prosecutor. The report of the public prosecutor,

therefore, is not merely a formality but a very vital report, because the consequence of its acceptance affects the liberty of an accused and it must, therefore, strictly comply with the requirements as contained in clause (bb). The request of an investigating officer for extension of time is no substitute for the report of the public prosecutor.

12. The court further went on to say that even if the application for extension of time was either rooted through the public prosecutor or supported by him would not make the said application a report of the public prosecutor.

13. Mr. Bhattacharjee has, however, pointed out that the applications for extension filed by the public prosecutor Section 36A (4) of the Act did satisfy the aforesaid conditions and merely because an independent report had not been tendered would not change the nature of the application. We reproduce herein the application dated 2nd August, 2007 for extension of time in extenso:

1. That, the aforesaid person was arrested on 12.02.2007 in connection with illegal distribution of psychotropic substances externally through the internet.

2. That he was produced before your honour on 12.02.2007 and thereafter he was remanded to judicial custody in Dum Dum Correctional Home.

3. That the investigation of the case is still on.

4. That a connected/related case against the associates of the present accused person is being investigated by the Drug Enforcement Administration (DEA), USA and the investigation report/collected documents are highly relevant/essential in proving the case. In this regard necessary steps, sending letters to that competent authority, has already been taken.

5. That, the Servers, Laptop, CDs etc. as seized in connection with this case, which has already been reported before Your Honour earlier, were also been sent to the Central Forensic Science Laboratory (CFSL) for deciphering the data on 20.2.07 and several reminders have been sent for obtaining the reports, but till date same could not be received. It is pertinent to mention that a letter from the end of CFSL has been received by NCB, wherein they informed that in a short time it is not possible to send the report.

6. That, considering the exigencies of the report of CFSL in proving the case against the accused person the prosecution has to pray for further extension of time.

7. That, as per the provision of Section 36A Clause (4) proviso the prosecution is submitting this petition for extension of time for filing. Complaint after completing the investigation accepting the report of the prosecution kept in the case file submitted herewith showing that the detention of the aforesaid accused is further necessary.

In the abovementioned circumstances, it is hereby prayed before your Honour that,

A further period of 6 months may kindly be given for the completion of investigation and filing of complaint. And the accused person may be remanded in judicial custody for further period.

And for this act of kindness, the petitioner as is duty bound shall ever pray.

14. A bare perusal of this application shows that it has been filed by the investigating officer of respondent No.1 and does not indicate even remotely any application of mind on the part of the public prosecutor. It further does not indicate the progress of the investigation, nor the *compelling* reasons which required an extension of custody beyond 180 days. This application was allowed by the Special Judge on 2nd August,

2007 i.e. on the day on which it was filed which also reveals that no notice had been issued to the accused and he was not even present in Court on that day.

15. The second application dated 30th January, 2008 is even more incomprehensible. We reproduce the same hereinbelow:

IN THE COURT OF LD.JUDGE-SPECIAL COURT NDPS ACT KOLKATA AT BARASAT NORTH 24 PGS
CASE NO.N-23/2007

Union of India

Versus

Sanjay Kedia ....Accused Person

The humble petition on behalf of the prosecution.

MOST RESPECTFULLY STATES;

1. That today is the date fixed for submission of the complaint.

2. That as the prosecution is not in a position to submit the complaint today hence prays for further time for the same.

Under the above circumstances it is prayed that a short date may kindly allowed for the same for ends of justice

AND

For this act of kindness shall ever pray your petitioner as is duty shall ever pray."

A bare perusal of this unsigned application would reveal that it does not even remotely satisfy the tests laid down in Vishnu Thakur's case. The Special Judge allowed this

application as well on the day it was filed by a cryptic order and without notice to the accused in the following terms:

"Accd. Sanjay Kedia is produced from J/C. Accd. Filed a vakalatnama. Prosecutor files Hazira. Prosecution also files a petition praying for time. Considered prayer for time is allowed to 13.2.2008 for production of the accd & report from I.O."

16. We are, therefore, of the opinion that the extensions granted to the investigating department under the proviso to Section 36A (4) did not satisfy the conditions laid down therein and both the extensions, therefore, being contrary to law, must be struck down accordingly.

17. As would appear from what has been held above we must now deal with the order of the Special Judge dated 13th February, 2008 whereby the application for bail filed by the appellant under the default clause had been dismissed. The special Judge observed that as the Supreme Court had rejected the prayer for bail on 4th February, 2008 and that the period of investigation had been extended on two occasions and that the complaint had been filed before the last extended date had expired and having regard to the facts of the case in as much that the allegations were serious, the appellant was not entitled to bail. The High Court while noticing the decision in *Hitendra Vishnu Thakur's case* (supra) has deviated from its observation and side stepped the very categorical directions given by this Court, on wholly irrelevant considerations. We reproduce certain observations of the High Court judgment to support our opinion :

The petition dated 02/08/2007 seeking to extend the period of investigation for a further period of six months was presented by the Intelligence Officer of the opposite party No.1. However, the same was not presented by the learned Public Prosecutor himself but the order passed by the learned Trial Court would show the same was

proceeded in the presence of the learned Public Prosecutor.

However, "Specific reasons" and the "progress of investigation" has been set out in the petition dated, 02/08/2007 wherein it was shown that the offence against the petitioned and his associates are being investigated even in the United States of America and several electronic equipment, which have been seized, were sent to the Central Forensic Science Laboratory for deciphering and the Report is yet to be received. Further time was sought for and the learned Trial Court applied its judicial mind on the basis of a subjective satisfaction quoting the substance of the prayer and allowed the time. As such, other portion of the provisio of Subsection (4) of Section 36A of the said Act with regard to the progress of investigation and the specific reasons for detention of the petitioner beyond the period of one hundred eighty days, in our humble view, have been complied with.

Now, if we see the phrase "on the report of the Public Prosecutor" *vis-à-vis* the petition dated 02/08/2007 sent by the Intelligence Officer and submitted through the Public Prosecutor and was moved in his presence- we must make a purposive construction of the word "report of the Public Prosecutor" and give it a wider and meaningful implication without doing violence to the Statue.

Proviso to sub-section (4) of Section 36A has to be construed in relation to the subject matter covered by the said Section. The general Rule in construing an enactment which contains a provisio is to construe them together without making either of them redundant or otiose.

In other words, the language of a proviso, even if general, should be normally construed in relation to the subject-matter covered by the Section to which the provisio is so appended.

Once we have seen the efficacy of the order passed on 02/08/2007 which cannot be sullied on the reasons seen by us earlier-we find the undisputed position remains that the period of further detention of the present petitioner stands extended till 02/02/2008.

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Now, comes the legality of the order passed on 30/01/2008 passed by the learned Trial Court. Of course, the said order was preceded by a petition filed by the Public Prosecutor himself outlining the fact since the Prosecution is not in a position to file the complaint some short time may be allowed. Acting on the basis of the same the learned Trial Court extended the period till 13/02/2008.

A put up petition was preferred on behalf of the petitioner for being released on bail on 04/02/2008 but in the meanwhile on 07/02/2008 the petition of complaint was filed on behalf of the Opposite Party No.1.

From a plan reading of the sequence of events it can be easily deciphered that the first phase of extension was up to 02/02/2008 which was subsequently, extended by the order dated 30/01/2008 till 13/02/2008. It is within the said period of extension i.e. on 07/02/2008 Petition of Complaint has been filed.

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In the light of our wholesome assessment of the entire situation, we would be of the view that the position as projected by Shri Basu turns out to be more academic than realistic. It has to be 'Just Justice'. Justice in the sense of Law and the Constitution and not to the individual mindset of the Court. The said Act and its ramification has to be understood in a wider context.

18. With great respect, these findings do no justice to the

observations of this court in Vishnu Thakur's case as the very specific observations therein have been noticed and ignored by the Division Bench.

19. In the light of what has been held above, Mr. Lalit's second submission as to the expiry of the maximum period of detention of one year based on *Uday Mohan Lal Acharya's case* (supra), need not detain us more particularly, as the facts are disputed by Mr. Bhattcharjee. We are, therefore, not required to go into this aspect of the matter.

20. We accordingly allow this appeal, set aside the order of Special Judge dated 13th February 2008 and High Court dated 5th September, 2008 and direct that the appellant be released on bail.

R.P. Appeals allowed.

A B C D

A

AMARJIT SINGH
v.
STATE OF HARYANA
(Criminal Appeal No.739 of 2007)

NOVEMBER 18, 2009*

B

[HARJIT SINGH BEDI AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860:

C

s.302 – Murder – Conviction – Serious injuries to one of the accused – Not explained by prosecution – ***Held:*** *Though every injury is not liable to be explained when the accused pleads a defence, but an obligation does lie on the prosecution to explain the presence of a serious injury – In the instant case, as the prosecution has not been able to present an explanation as to how injuries were suffered by the accused and on the contrary his very presence has been denied, the courts below were in error in brushing aside this serious infirmity in the prosecution case – Conviction and sentence of accused set aside – Accused acquitted – Evidence – Injuries on accused – Not explained by prosecution – Effect.*

D E

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 739 of 2007.

F

From the Judgment & Order dated 20.7.2006 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 46-DB of 2004.

WITH

G

Criminal Appeal No. 740 of 2007.

R.S. Cheema, K.B. Sinha, Kanwaljit Kochhar, Kusum

* Judgment Received on 6.2.2010.

H

Chaudhary, D.P. Singh, Tanu, Roopansh Purohit, Rajeev Gaur, 'Naseem', Kamal Mohan Gupta for the Appearing parties.

The following Order of the Court was delivered

ORDER

1. These appeals by way of special leave arise out of the following facts:-

1.1. Avatar Singh, accused, since acquitted, had taken an unauthorised connection from the electricity main line for the purpose of energising his tube well situated in village Bassi about 12 kms. away from Police Station Assandh. On 2nd July 1998, the officials of the Electricity Department accompanied by some police officers came to the tube well and removed the unauthorised line and took the wire away. Avatar Singh suspected that Joginder Singh P.W.1, who had a Dera at a very short distance away, had made the complaint to the Department which had brought the officers of the Department to his Dera. Due to this grudge, Amarjit Singh armed with a shot gun, Amrik Singh and Kashmir Singh all sons of Jarnail Singh attempted to stop the tractor trolley belonging to Joginder Singh P.W.1, while it was being driven to the fields with fertilizer. Nishan Singh – P.W. 3 son of Mohinder Singh was driving the tractor trolley of Joginder Singh was also accompanied by Palaram - P.W. 2 son of Fakiria one of Joginder Singh's Siris (crop-sharers). It appears that as a fall out of this incident two applications were filed in Police Station, Assandh by both the groups accusing each other of having misbehaved in the morning. The same evening at about 4:00p.m. Joginder Singh – P.W. and his brother Gurnam Singh deceased who were present at their Dera in their fields. In the meanwhile Avatar Singh armed with a sota, Sher Singh and Amarjit Singh armed with a DBBL gun each and Avatar Singh with gandasa came to the place in a tractor. On reaching the Dera, Sher Singh fired a shot with a DBBL gun on Joginder Singh hitting him on the finger of his right hand and a second shot hit him on his right thigh. Amarjit

Singh also fired a shot at Gurnam Singh which hit him on his chest instantly resulting in his immediate death. Although Joginder Singh thereafter attempted to snatch the gun from the hands of Sher Singh as a result of which, it broke into two pieces. This incident was witnessed by P.W. 2 Pala Ram and Nishan Singh – P.W. 3. Joginder Singh was removed in a tractor-trolley to the Sant Hospital at Assandh and on account of his serious condition was referred to the General Hospital, Karnal and was admitted therein. The dead body of Gurnam Singh was, however, left at the place of incident. Joginder Singh's statement, Exhibit PA was recorded in the General Hospital, Karnal at about 9:15a.m. on the 4th July, 1998 and on its basis, the formal FIR was registered at Police Station, Assandh, at 10:30a.m. by Sube Singh – P.W. 5, Inspector of Police. The police after investigation did not file a charge sheet against the accused on the plea that the case that had been foisted on them was false. Joginder Singh thereupon filed a complaint Exhibit PC in the court of the Judicial Magistrate, Karnal, against Avtar Singh, Sher Singh, Amarjit Singh, Amrik Singh and Kashmir Singh for offences punishable under Sections 302/307/148/149 IPC on 16th July, 1998. At the trial, the prosecution in support of its case, relied on the evidence of Joginder Singh – P.W. 1, an injured witness, Pala Ram – P.W. 2, Nishan Singh – P.W. 3 who was an associate of the complainants, Dr. Raj Kumar - P.W. 4, Ram Kumar – P.W. 5, Dr. Shyam Wadhwa _ P.W. 6 who had carried out the medical examination of Joginder Singh and the post mortem on the dead body, Naveen Kumar – P.W. 7 and S.K. Makkar – P.W. 8. The defendants also produced 7 witnesses in defence including Dr. Raj Kumar (earlier P.W. 4 now as D.W. 1) to depose that he had examined one Gurlal Singh on 4th July, 1998 at 6:45p.m. in Primary Health Centre, Assandh and had found him seriously injured with a dislocation of the teeth and a fracture of the mandible, Sahab Singh – D.W. 2 to prove the alibi on Sher Singh, ASI Surjeet Singh – D.W. 3 who deposed with regard to the two applications which were said to have been filed by the warring parties on the 3rd of July, 1998 after

the incident early that morning Inspector Prem Singh – D.W. 5 who had investigated the murder and deposed that on investigation it had been found that the case was false and as a consequence thereof a challan had not been filed against the accused who are now facing prosecution on account of the complaint and D.W. 6 – Gurlal Singh the injured witness who stated that he along with some of the accused had been present in the police station till about 3:00p.m. on the 3rd July, 1995 but on the directions of his father, he had decided to return home to look after the cattle taking his father's gun along with him and as he was on his way to the Dera, he saw Joginder Singh and Gurnam Singh standing outside armed with lathis and that as he had got down from the tractor he had been assaulted by them which resulted in the breaking of his teeth and mandible and that at this stage he had picked up the gun from the tractor and shot at Gurnam Singh and Joginder Singh in his self-defence. He further stated that notwithstanding the injuries caused to him Joginder Singh went on wielding lathi blows breaking the gun into two pieces. He further stated that after this incident he had reached the police station Assandh on his tractor and reported the matter to the police and had ultimately been sent to the Primary Health Centre for his medico-legal examination. He further stated that he had been referred to the General Hospital, Karnal and further to the Post Graduate Institute of Medical Education and Research, Rohtak on account of his serious injuries. The defence also produced D.W. 8 – Dr. Munish Madan, a Lecturer in the Dental College of the Post Graduate Institute of Medical Education and Research, Rohtak, who confirmed the existence of very serious injuries to the teeth and mandible of Gurlal Singh and that he had been treated in the Institute for about 2 months.

1.2. The trial court, however, relying on the evidence of P.Ws.1, 2 and 3 convicted all the accused under Section 302/149 etc. and sentenced them to undergo a sentence of life imprisonment for murder etc. In reaching its conclusions, the trial court observed that not only was the prosecution story as

given by the complainants fully proved on facts but the defence version given by Gurlal Singh was not worthy of belief for the primary reason that it was impossible to come to a firm conclusion with regard to the fact that the injuries had been suffered by Joginder Singh, Gurnam Singh and Gurlal Singh in the same incident and the defence story that Gurlal Singh had fired two shots in self-defence causing a fatal injury to Gurnam Singh and serious injuries to Joginder Singh could not be believed as Gurlal Singh was physically handicapped and was, therefore, not in a position to use his weapon in an effective manner. The trial court also concluded the story given by him that the gun that he had used had been broken on a persistent attack by the opposite party could not be believed as the injuries caused to him were so severe which precluded the possibility that he could not have caused the injuries to Joginder Singh and Gurnam Singh thereafter. The trial court also rejected the alibi set forth on behalf of Sher Singh as the evidence was not conclusive and it was possible that Sher Singh could have committed the crime and then rushed to Ghannori, his place of posting which was only about 17 kms. away. The trial court, accordingly, accepted the prosecution version in toto.

1.3. The matter was thereafter taken in appeal by all the accused before the High Court. The High Court made very significant observations completely upsetting the conclusions drawn by the trial court and whereas the trial court had expressed its doubt as to the presence of Gurlal Singh at the place of the murder and as to the manner under which the injuries had been suffered by him, the High Court gave a conclusive finding that Gurlal Singh had been present at the place of occurrence and had received injuries in the incident in which Gurnam Singh had been killed. The High Court, however, accepted the evidence of P.Ws. 1,2 and 3 and rejected the circumstantial evidence with regard to the breaking of the weapon as propounded by the defence and observed that in such matters the possibility of false implication could not be ruled. The Court then dissected the evidence yet further and

held that the presence of Avtar Singh, Amrik Singh and Kashmir Singh had to be ruled out whereas Amarjeet Singh and Sher Singh had undoubtedly been present as they were the ones who had caused the injuries to Gurnam Singh and Joginder Singh. The appeal qua the first three was allowed and dismissed qua the last two It is in this situation that the matter is before us after the grant of special leave.

2. Several arguments have been raised by Mr. R.S. Cheema and Mr. K.B. Sinha, the learned senior counsel for the appellants. It has been argued that the fact that some incident had happened on the morning of 2nd July was clear from the statements - Exhibits DE and DD, the two applications that had been filed by the two warring parties in the police station. It has also been submitted that the fact that Amarjeet Singh was indeed in the police station in the evening had been found correct to be in the investigation made by Inspector Prem Singh DW 5 and it was on that basis that the prosecuting agency had declined to file a challan against the accused. It has further been pleaded that there was absolutely no reason whatsoever as to why the alibi given by Sher Singh appellant duly supported by some of the staff in the PSEB office where he stood posted and was residing with his family had been disbelieved as he had been present in the morning at 7:30a.m. on the day of the incident and again at about 3:30p.m. the same afternoon and that it would have been impossible for him to have visited village Bassi, committed the murder and returned to his place of posting at village Ghannori 17 kms. away. It has finally been submitted that in any case there was absolutely no explanation for the injuries that had been suffered by Gurlal Singh and as this onus had not been discharged by the prosecution an inference could rightly be drawn that the defence version was the correct one. For the last submission, Mr. Cheema has placed reliance on *Lakshmi Singh v. State of Bihar* (1976) 4 SCC 394.

3. Mr. Roopansh Purohit, the learned State counsel has,

however, pointed out that there was absolutely no reason to disbelieve the statement of the three prosecution witnesses, more particularly, for the reason that Joginder Singh had been injured and P.W. 2 Pala Ram was an independent witness. He has further submitted that there was no evidence to suggest that Gurlal Singh had suffered the injuries in the same incident in which Gurmnam Singh had been killed and Joginder Singh had been injured as there was no contemporaneous record to show this fact and further that Gurlal Singh had made absolutely no effort to make a statement to the police giving his version of the events or after he had reached Assandh on 3rd July, 1998 at 6:20p.m. It has further been pleaded that Gurlal Singh was a handicapped person and it would not have been impossible for him to have fired two shots as suggested by him in his defence.

4. We have heard the learned counsel for the parties in extenso and gone through the record as well.

5. To our mind, the basic issue which would arise in this case is the inference that is to be drawn from the non-explanation of the injuries of Gurlal Singh. He had first been examined by Dr. Rajinder Kumar, D.W. 1 of the C.H.C., Assandh on 3rd July, 1998 at 6:45p.m. And had found the following injuries:-

> "2 upper incisors were missing and fresh bleeding was present from the sockets mucosa was congested and the lower jaw teeth were malaligned and were bleeding."

6. He further deposed that the injuries were subject to x-ray at the General Hospital, Karnal at 9:00a.m. on 4th October, 1998 and the mandible was found fractured and the injuries were all grievous in nature. This evidence is further reinforced by the statement of D.W. - 8 – Dr. Munish Madan of the Post Graduate Institute of Medical Education and Research, Rohtak, who yet again deposed to the very serious nature of injuries of Gurlal Singh. The learned counsel for the State has, however,

referred to the fact that the trial court was somewhat uncertain about Gurlal Singh's presence at the place of incident but on the contrary we find that the High Court has given a positive finding (contradicting the trial court) that Gurlal Singh was indeed present at the site of murder. We are, therefore, of the opinion that an obligation lay on the prosecution to explain as to how Gurlal Singh received such serious injuries. It will be seen that P.Ws. 1, 2 and 3 have been categoric in denying any injury to Gurlal and P.W. - Joginder Singh went so far as to deny Gurlal Singh's place of residence although he was living with his father in a Dera only half a kilometre away from his own Dera. P.W. 3 – Nishan Singh, on the other hand, admitted that Gurlal Singh was a resident of the Dera but he denied that any injury had been suffered by him. It is true, as contended by the learned State counsel, that every injury is not liable to be explained when the accused pleads a defence but but contrarily an obligation does lie on the prosecution to explain the presence of a serious injury. In assessing a similar situation, this Court has said in *Lakshmi Singh and Others* (supra):-

> "It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about ;the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:
>
> 1. that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
> 2. that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
> 3. that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.
>
> The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in *State of Gujarat v. Bai Fatima* (surpa) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweights the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

7. We are, therefore, of the opinion that as the prosecution has not been able to present an explanation as to how injuries had been suffered by Gurlal Singh and on the contrary his very presence has been denied the ratio of the observations in the above quoted judgment would apply to the facts of the present

case. Equally, the prosecution story that Gurlal Singh being an amputee would have been unable to handle a shotgun, cannot be accepted. Gurlal Singh in his testimony as D.W. - 6 stated that he had lost his left hand in an accident but had been fitted with an artificial one which he could use with dexterity. He emphatically denied that he could not use a gun effectively on account of his handicap. Moreover, experience tells us that even the absence of an arm does not completely make an amputee incapable of using a shot gun.

8. There is yet another circumstance which would, to some extent, go to the aid of the appellants. Gurlal Singh was prosecuted as a consequence of his own statement for the injuries that he had caused to Gurnam Singh and Joginder Singh. In that case, the present P.Ws. Joginder Singh, Pala Ram and Nishan Singh also appeared as prosecution witnesses but they stuck to the version given in these present proceedings and disowned any criminal act qua Gurlal Singh as a consequence of the position taken by them, Gurlal Singh too was acquitted by the trial court for the injuries he claimed to have caused to Gurnam Singh and to Joginder Singh. No appeal has been filed by the State challenging the acquittal of Gurlal Singh.

9. In view of what we have held above, we deem it unnecessary to go into the question of alibi or any other issues raised by Mr. Cheema and Mr. Sinha.

10. We, accordingly, allow these appeals, set aside the conviction of the appellants and order their acquittal. The appellants are stated to be in jail. They shall be released forth with if not required in any other case.

R.P. Appeals allowed.

VIJAY KUMAR SHARMA @ MANJU
v.
RAGHUNANDAN SHARMA @ BABURAM & ORS.
(Civil Appeal No. 89 of 2010)

JANUARY 5, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Arbitration and Conciliation Act, 1996:

ss. 8(1), (3), 11 and 15(2) – Appointment of arbitrator pending appeal filed against dismissal of suit under Or. 7, r.11 CPC read with s. 8(1) of the Act – ***HELD****: An application u/s 11 or s.15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application u/s 8 in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application u/s 11 or s.15(2) – Thus, if an arbitrator is appointed by the Designate of the Chief Justice u/s 11, nothing prevents the arbitrator from proceeding with the arbitration – Therefore, the mere fact that an appeal from order dismissing the suit under Or.7 r.11 CPC (on the ground that the disputes require to be settled by Arbitration) is pending before the High Court, will not come in the way of appointment of an arbitrator u/s 11 read with s.15(2), if the authority u/s 11 finds it necessary to appoint an arbitrator – Practice and Procedure.*

s. 7 – Arbitration agreement – Declaration by father that any future disputes among his sons should be settled by an arbitrator – HELD: Cannot be considered as an arbitration agreement among the children or such of the children who became parties to a dispute – Even if the Will provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and cannot be considered as an arbitration agreement among the legatees – Such a wish,

even if proved, cannot be construed as an agreement in writing between the parties to the dispute, agreeing to refer their disputes to arbitration – Will.

Raj Kumar vs. Shiva Prasad Gupta **AIR 1939 Cal. 500, held inapplicable.**

Case Law Reference :

AIR 1939 Cal. 500 held inapplicable Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 89 of 2010.

From the Judgment & Order dated 16.05.2008 of the High Court of Judicature for Rajasthan at Jaipur Bench is SB Civil Arbitration Application No. 72 of 2007.

P.N. Mishra, K.N. Tripathy, R.M. Patnaik, H.P. Sahu and V.K. Sidharthan for the Appellant.

K.V. Vijwanthan, Neha, Sanjeeb Panigrahi, Vikas Mehta, Jayanat K. Mehta and Amit Bhandari for the Respondents.

The Order of the Court was delivered by

ORDER

R.V. RAVEENDRAN, J. 1. Leave granted. Heard the learned counsel.

2. The first respondent and appellant are brothers. The first respondent filed a suit (Civil Suit No.100 of 2006) against the appellant alleging that their father Durganarayan Sharma died on 20.10.2005 leaving a will dated 21.10.2003 bequeathing portions of property bearing No.B-133, Bapu Nagar, Jaipur (for short the suit premises) to him, and that the appellant who was in possession of the said portions, was liable to deliver possession thereof to the first respondent on the basis of the

said will. The Executors of the said will were impleaded as defendants 2 and 3 (respondents 2 and 3 herein).

3. The appellant herein, in turn filed a Civil Suit No.53 of 2007 for partition and separate possession of his one-sixth share in the ancestral properties. He also sought a declaration that the will dated 21.10.2003 propounded by the first respondent was fabricated, null and void. In the said partition suit, first respondent and his son were impleaded as defendants 1 and 6; appellant's another brother and three sisters were impleaded as defendants 2 to 5; the son of another brother who had been given away in adoption was impleaded as defendant no.7; and the executors under the will were impleaded as defendants 8 and 9.

4. The two suits were consolidated for trial. Respondents 2 and 3 claiming to be the executors of the will of Durganarayan Sharma filed an application under section 8 of the Arbitration & Conciliation Act, 1996 ('Act' for short) in the said suits alleging that the deceased Durganarayan Sharma had made a declaration on 15.10.2005, shortly before his death, that if there was any dispute in connection with the will, the same should be decided by Shri U.N. Bhandari, Advocate; that the parties to the two suits being children and grandchildren of Durganarayan Sharma were bound by the said declaration and the disputes which were the subject matter of the two suits should therefore be decided by arbitration. The trial court heard the said application and by order dated 19.9.12007, held that in view of the said provision for resolution of disputes by arbitration, its jurisdiction was barred by the provisions of the Act. Consequently, the trial court dismissed both the suits, under Order 7 rule 11 of the Code of Civil Procedure ('Code' for short).

5. Feeling aggrieved by the order dated 19.9.2007, the appellant herein filed an appeal (SB Civil Appeal No.664 of 2007) contending that there was no agreement for arbitration and that there was no ground for dismissal of his suit and a

Division Bench of the High Court, while issuing notice to show cause why the appeal should not be admitted, stayed the order dated 19.9.2007 passed by the trial court, by order dated 14.11.2007.

6. The first respondent accepted the decision of the trial court and filed a claim statement on 20.10.2007 before Shri U.N. Bhandari, the sole Arbitrator named in the declarations of his father, the reliefs earlier sought by him in Civil Suit No. 100/2006. The said U.N. Bhandari issued notices to the appellant and other non-petitioners in the claim. The appellant appeared before Shri U.N. Bhandari, and objected to his jurisdiction to act as an arbitrator, contending that there was no arbitration agreement between the parties. He also pointed out that neither he nor first respondent had signed the declaration of his father giving consent to Shri U.N. Bhandari being the Arbitrator. He also brought to the notice of Shri Bhandari, that the order dated 19.9.2007 passed by the trial court had been stayed by the High Court. He also challenged the continuation of Shri Bhandari as an arbitrator by alleging bias against him. In these circumstances on 17.11.2007, Shri Bhandari withdrew himself from the arbitrator. On such withdrawal, the first respondent filed an application under section 11(6) read with section 14(1)(b) and 15(2) of the Act for appointment of an independent arbitrator. The designate of the Chief Justice who heard the matter, allowed the said application by the impugned order dated 16.5.2008, and appointed an Arbitrator to resolve the disputes. The said order is challenged in this appeal by special leave.

7. The first contention raised by the appellant is that when the question (whether there is a valid arbitration agreement between the appellant and first respondent) is pending consideration by the High Court in S.B. Civil First Appeal No.664 of 2007, the designate of the Chief Justice could not have entertained or decided an application under Sections 11, 14 and 15 of the Act involving the same question. It is

submitted that the order of the trial court dated 19.9.2007 holding that the parties should resolve their disputes by arbitration had been stayed by the High Court in the pending appeal. In view of the pendency of S.B. Civil first Appal No.664 of 2007 and the interim stay of the order dated 19.9.2007, granted by the High Court on 14.11.2007, the appellant submitted that the learned designate of the Chief Justice ought not to have proceeded to decide the application for appointment of a fresh arbitrator, but ought to have awaited the decision in the first appeal. It was submitted that in the pending first appeal (against the decision dismissing his suit under Order 7 Rule 11 of the Code), if it is held that there is no arbitration agreement between the parties or if the court refuses to refer the parties to arbitration, the suits will have to proceed and that will lead to conflicting decisions.

8. Section 8 of the Act which is relevant is extracted below:

> "8. Power to refer parties to arbitration where there is an arbitration agreement. – (1) A juridical authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

9. It is evident from sub-section (3) of section 8 that the pendency of an application under section 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious

intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party under section 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal. Having regard to the specific provision in section 8(3) providing that the pendency of an application under section 8(1) will not come in the way of an arbitration being commenced or continued, we are of the view that an application under section 11 or section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application under Section 8 of the Act in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application under Section 11 or 15(2) of the Act. It follows that if an arbitrator is appointed by the Designate of the Chief Justice under section 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 CPC (on the ground that the disputes require to be settled by Arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator under section 11 read with section 15(2) of the Act, if the Authority under section 11 finds it necessary to appoint an Arbitrator. Therefore the first contention of the appellant is liable to be rejected.

10. The appellant next contended that the parties to the dispute have not entered into an arbitration agreement, there is no arbitration agreement in existence as contemplated under section 7 of the Act, and the Authority under section 11 of the Act was not justified in appointing an arbitrator.

11. The learned Designate held that an arbitration agreement need not be signed by the parties and if a provision for arbitration is incorporated by a Testator in his Will, such a provision will be binding on his children/legatees, after his death. He held that a provision in a Will providing for arbitration, in the event of a dispute among the legatees, is an arbitration

agreement under section 7 of the Act, for the purposes deciding any disputes among the legatees. He relied upon a decision of the Calcutta High Court in *Raj Kumar v. Shiva Prasad Gupta* - [AIR 1939 Cal. 500] where it was observed that a father has the power to refer to arbitration the disputes relating to a joint family property, provided such reference was for the benefit of the family, and that an award made by an arbitrator upon such reference, will be binding upon all members of the family, including any minors.

12. We are of the view that the said decision has no relevance to the question on hand and at all events, is not of any assistance to determine whether there was any arbitration agreement, as contemplated under section 7 of the Act. Section 7 defines 'arbitration agreement' as meaning an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-sections (2) and (3) of section 7 require that an arbitration agreement shall be in writing (whether it is in the form of an arbitration clause in a contract or in the form of a separate agreement). Sub-section (4) of section 7 enumerating the circumstances in which an arbitration agreement will be considered as being in writing, is extracted below:

> "7(4). An arbitration agreement is in writing if it is contained in -
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
>
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

13. In this case, admittedly, there is no document signed

by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration agreement as defined in section 7 between the parties. In *Jagdish Chander vs. Ramesh Chander* – 2007 (5) SCC 519, this Court held:

> "The existence of an arbitration agreement as defined under section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under section 11 of the Act by the chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement of mutual consent."

14. While the respondents rely upon the Will, the appellant denies the existence of any such Will. The validity of the Will is pending consideration in the two civil suits filed by the appellant and the first respondent, referred to above. The alleged Will, admittedly, does not contain any provision for arbitration, though the learned Designate has proceeded on an erroneous assumption that the Will provides for arbitration. Even if the Will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and cannot be considered as an Arbitrator agreement among the legatees. In this case, according to the respondents, the provision for arbitration is not in the Will but in a subsequent declaration allegedly made by Durganarayan Sharma, stating that if there is any dispute in regard to his Will dated 28.12.2003, it shall be referred to his friend, U.M. Bhandari, Advocate, as the sole arbitrator whose decision shall be final and binding on the parties. A unilateral declaration by a father that any future disputes among the sons should be settled by an arbitrator

named by him, can by no stretch of imagination, be considered as an arbitration agreement among his children, or such of his children who become parties to a dispute. At best, such a declaration can be expression of a fond hope by a father that his children, in the event of a dispute, should get the same settled by arbitration. It is for the children, if and when they become parties to a dispute, to decide whether they would heed to the advice of their father or not. Such a wish expressed in a declaration by a father, even if proved, cannot be construed as an agreement in writing between the parties to the dispute agreeing to refer their disputes to arbitration.

15. We are therefore of the view that there is no arbitration agreement between the parties and the learned Designate committed a serious error in allowing the application under sections 11 and 15(2) of the Act and holding that there is an arbitration agreement between the parties to the dispute and appointing an arbitrator.

16. What has been considered and decided above is only the question whether there is an arbitration agreement or not. We have not examined or recorded any finding as to the existence or validity of the Will dated 21.10.2003 or the declaration dated 15.10.2005 said to have been made by Mr. Durganarayan Sharma, propounded by the respondents and denied by the appellant.

17. In view of the foregoing, this appeal is allowed and the impugned order of the Designate of the Chief Justice appointing an Arbitrator is set aside.

R.P. Appeal allowed.

HARJINDER SINGH
v.
PUNJAB STATE WAREHOUSING CORPORATION
(Civil Appeal No. 587 of 2010)

JANUARY 05, 2010

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Constitution of India, 1950:

Article 226 and Articles 38, 39(a) to (e), 43 and 43-A read with the Preamble – Writ jurisdiction – High Court substituting the award of reinstatement passed by Labour Court, by directing compensation to workman – HELD: High Court committed serious jurisdictional error by unjustifiably interfering with the well reasoned award passed by Labour Court, on the premise that initial appointment of workman was illegal and unconstitutional, particularly, when no such plea was raised before Labour Court – While exercising jurisdiction under Article 226 and/or 227 in such matters, High Courts are duty bound to keep in mind that Industrial Disputes Act and other similar legislative enactments are social welfare legislations which are to be interpreted keeping in view the goals set out in the Preamble and Part-IV of the Constitution, particularly, Articles 38, 39(a) to (e), 43 and 43-A – Industrial Disputes Act, 1947 – ss. 25-F and 25-G – Social Justice.

Industrial Disputes Act, 1947:

ss. 25-F and 25-G – Retrenchment of workman, while persons junior to him retained – HELD: Labour Court rightly passed the award of reinstatement with 50% back wages – For attracting applicability of s.25-G, workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding termination of his services – It is sufficient for him to plead and prove that while effecting

retrenchment, employer violated the rule of 'last come first go' without any tangible reason – Constitution of India, 1950 – Preamble, Articles 38, 39(a) to (e), 43, 43-A and 226.

In the reference arising out of the retrenchment of the appellant-workman, the Labour Court passed the award for his reinstatement with 50% back wages holding that the principle of equality enshrined in s.25-G of the Industrial Disputes Act, 1947 was violated and the persons junior to the appellant were allowed to continue in service. The High Court in the writ petition filed by the respondent-Corporation, though agreed with the Labour Court that the action taken by the Corporation was contrary to s.25-G of the Act, but did not approve the award of reinstatement, on the premise that initial appointment of the appellant was not in consonance with the statutory regulations and Articles 14 and 16 of the Constitution of India, and substituted the award by directing payment of compensation to the appellant.

Allowing the appeal of the workman, the Court

HELD:

By the Court:

1.1. Before the Labour Court, the appellant's claim for reinstatement with back wages was not resisted on the ground that his initial appointment was illegal or unconstitutional and neither any evidence was produced nor any argument was advanced in that regard. Therefore, the Labour Court did not get any opportunity to consider the issue whether reinstatement should be denied to the appellant by applying the new jurisprudence developed by the superior courts in recent years that the court should not pass an award which may result in perpetuation of illegality. This being the position, the Single Judge was not at all justified in entertaining the

wholly unfounded and new plea raised on behalf of the corporation for the first time during the course of arguments. The Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by High Court under Article 226 and/or 227 of the Constitution of India, and committed serious jurisdictional error by unjustifiably interfering with an otherwise well reasoned award passed by the Labour Court and depriving the appellant of what may be the only source of his own sustenance and that of his family. [Para 10,11 and 16] [603-A; 608-F-H; 609-A-B; 614-C-D]

Syed Yakoob v. K.S. Radhakrishnan and others, **1964 SCR 64 = AIR 1964 SC 477 and** *Surya Dev Rai v. Ram Chander Rai and others* **2003 (2) Suppl. SCR 290 = 2003 (6) SCC 675, relied on.**

1.2. Another serious error committed by the Single Judge is that he decided the writ petition by erroneously assuming that the appellant was a daily wage employee. This is ex facie contrary to the averments contained in the statement of claim filed by the workman that he was appointed in the scale of Rs.350-525 and the orders dated 3.10.1986 and 25.2.1987 issued by the Executive Engineer appointing the appellant as Work Munshi in the pay scale of Rs.355-525 and then in the scale of Rs.400-600. It was not even the case of the corporation that the appellant was employed on daily wages. [Para 12] [609-B-D]

1.3. Admittedly, the appellant had worked with the Corporation from 5.3.1986 to 5.7.1988. Therefore, it was not open for the Corporation to contend that the appellant had not completed 240 days service. Moreover, it is settled law that for attracting the applicability of s.25-G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is

sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. [Para 13] [609-G-H; 610-A-B]

Central Bank of India v. S. Satyam **1996 (4) Suppl. SCR 214 = (1996) 5 SCC 419;** and *Samishta Dube v. City Board Etawah* **1999 (1) SCR 930 = (1999) 3 SCC 14, relied on.**

Bhogpur Coop. Sugar Mills Ltd. v. Harmesh Kumar **2006 (8) Suppl. SCR 1021 =(2006) 13 SCC 28, referred to.**

1.4. While exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues. [Para 17] [614-D-G]

State of Mysore v. Workers of Gold Mines 1959 SCR 895 = **AIR 1958 SC 923;** *Y.A. Mamarde v. Authority under the Minimum Wages Act* **1973 (1) SCR 161 = (1972) 2 SCC 108;** *Ramon Services (P) Ltd. v. Subhash Kapoor* **2000 (4) Suppl. SCR 550 =(2001) 1 SCC 118;** *L.I.C. of India v. Consumer Education and Research Centre and Others* **1995 (1) Suppl. SCR 349 = (1995) 5 SCC 482;** *Government Branch Press v. D.B. Belliappa* **1979 (2) SCR 458 = (1979) 1 SCC 477;** *Glaxo Labotratories (India) Ltd. v. Presiding Officer* **1984 (1) SCR 230 = (1984) 1 SCC 1, relied on.**

1.5. The stock plea raised by the public employer in the cases of illegal retrenchment, with the attractive mantras of globalisation and liberalization, that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment, cannot be accepted by courts being unmindful of the accountability of the wrong doer and indirectly punishing the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It needs no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer – public or private. [Para 23] [621-C-F]

Per Ganguly, J. (Supplementing)

1.1. Judges of the last Court in the largest democracy of the world have a duty and the basic duty is to articulate the Constitutional goal which has found such an eloquent utterance in the Preamble. Judges and specially the judges of the highest Court have a vital role to ensure that the promise is fulfilled. If the judges fail to discharge their duty in making an effort to make the Preambular promise a reality, they fail to uphold and abide by the Constitution which is their oath of office. This has to be put as high

as that and should be equated with the conscience of this Court. [Para 2 and 3] [622-B-C; 623-A-B]

His Holiness Kesavananda Bharati Sripadagalvaru and others vs. State of Kerela and another **1973 (0) Suppl. SCR 1 = 1973 SC 1461; and** *Bidi Supply Co. vs. Union of India and others* **1956 SCR 267 = AIR 1956 SC 479, referred to.**

1.2. Under Article 38 of the Constitution, a duty is cast on the State, which includes the judiciary, to secure a social order for promotion of welfare of the people. [Para 11] [625-B-C]

Naresh Shridhar Mirajkar and others vs. State of Maharastra and Anr. **1966 SCR 744 = *AIR 1967 SC 1;*** *State of Kerela and another vs. N. M. Thomas and others* **1976 (1) SCR 906 = AIR 1976 SC 490, relied on.**

1.3. This Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it. In doing so this Court should make an effort to protect the rights of weaker sections of the society in view of the clear constitutional mandate. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity. [Para 13 and 14] [625-G-H; 626-A-B]

Sri Srinivasa Theatre and Others vs. Government of Tamil Nadu and Others **1992 (2) SCR 164 = (1992) 2 SCC 643;** *Indra Sawhney and Others vs. Union of India and Others* **1992 (2) Suppl. SCR 454 = 1992 Supp. (3) SCC 217*; and*** *Authorised Officer, Thanjavur and another vs. S. Naganatha Ayyar and others* **1979 (3) SCR 1121 = (1979) 3 SCC 466, relied on.**

1.4. Any attempt to dilute the constitutional imperatives in order to promote the so called trends of "Globalisation", may result in precarious consequences. At this critical juncture the judges' duty is to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization. [Para 19 and 21] [627-D-E; 628-B-C]

Case Law Reference :

Order by the Court

1964 SCR 64	**relied on**	**Para 10**
2003 (2) Suppl. SCR 290	**relied on**	**Para 10**
1996 (4) Suppl. SCR 214	**relied on**	**Para 13**
1999 (1) SCR 930	**relied on**	**Para 14**
2006 (8) Suppl. SCR 1021	**referred to**	**Para 15**
1959 SCR 895	**relied on**	**Para 17**
1973 (1) SCR 161	**relied on**	**Para 18**
2000 (4) Suppl. SCR 550	**relied on**	**Para 20**
1995 (1) Suppl. SCR 349	**relied on**	**Para 20**
1979 (2) SCR 458	**relied on**	**Para 22**
1984 (1) SCR 230	**relied on**	**Para 22**

Order by Ganguly, J.

1973 (0) Suppl. SCR 1	**referred to**	**Para 2**
1956 SCR 267	**referred to**	**Para 4**
1966 SCR 744	**relied on**	**Para 8**
1976 (1) SCR 906	**relied on**	**Para 9**
1992 (2) SCR 164	**relied on**	**Para 15**
1992 (2) Suppl. SCR 454	**relied on**	**Para 16**
1979 (3) SCR 1121	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 587 of 2010.

From the Judgment & Order dated 06.02.2009 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 372 of 2001.

Dhruv Mehta, T.S. Sbarish, Mohit Abraham (for K.L. Mehta & Co.) for the Appellant.

Vineet Dhanda, Sarad Kumar Singhania for the Respondent.

The following Order of the Court was delivered

ORDER

1. Leave granted.

2. This appeal is directed against order dated 6.2.2009 passed by the learned Single Judge of the Punjab and Haryana High Court in Writ Petition No.372 of 2001 whereby he modified the award passed by the Labour Court, Gurdaspur (for short, 'the Labour Court') in Reference No.43 of 1996 and directed that in lieu of reinstatement with 50% back wages, the appellant herein shall be paid Rs.87,582/- by way of compensation.

3. The appellant was employed in the services of the Punjab State Warehousing Corporation (hereinafter described as 'the corporation') as work charge Motor Mate with effect from 5.3.1986. After seven months, the Executive Engineer of the corporation issued order dated 3.10.1986 whereby he appointed the appellant as Work Munshi in the pay scale of Rs.350-525 for a period of three months. The same officer

issued another order dated 5.2.1987 and appointed the appellant as Work Munshi in the pay scale of Rs.400-600 for a period of three months. Though, the tenure specified in the second order ended on 4.5.1987, the appellant was continued in service till 5.7.1988 i.e., the date on which the Managing Director of the corporation issued one month's notice seeking to terminate his service by way of retrenchment. However, the implementation of that notice was stayed by the Punjab and Haryana High Court in Writ Petition No.8723 of 1988 filed by the appellant. The writ petition was finally dismissed as withdrawn with liberty to the appellant to avail remedy under the Industrial Disputes Act, 1947 (for short, 'the Act'). After two months, the Managing Director of the corporation issued notice dated 26.11.1992 for retrenchment of the appellant and 21 other workmen by giving them one month's pay and allowances in lieu of notice as per the requirement of Section 25F(a) of the Act.

4. As a sequel to withdrawal of the writ petition, the appellant raised an industrial dispute which was referred by the Government of Punjab to the Labour Court. In the statement of claim filed by him, the appellant pleaded that the action taken for termination of his service by way of retrenchment is contrary to the mandate of Sections 25F and 25M of the Act and that there has been violation of the rule of last-come-first go inasmuch as persons junior to him were retained in service. In the reply filed on behalf of the corporation, it was pleaded that the appellant's service was terminated by way of retrenchment because the projects on which he was employed had been completed. It was also pleaded that the impugned action was taken after complying with Section 25F of the Act. However, it was not denied that persons junior to the appellant were retained in service.

5. The learned Presiding Officer of the Labour Court considered the pleadings of the parties and evidence produced by them and passed award dated 15.12.1999 for reinstatement

of the appellant with 50% back wages. The Labour Court held that even though the appellant was retrenched after complying with Section 25-F of the Act, the principle of equality enshrined in Section 25G of the Act was violated and persons junior to the appellant were allowed to continue in service. This is evident from paragraph 12 of the award, which reads as under:

> "However, the contention of the AR of the workman about gross violation of the principles of equality as enshrined in Section 25G of the Act is full of substance. Ved Prakash, MW1, when cross-examined, admits that as per the salary record, the workman had drawn his monthly wages from 10.3.86 to 26.11.92 regularly in every month. He admits that the workman namely Nirmal Singh, Anju Gupta, Harbans Singh mentioned in the seniority list are juniors to the workman concerned and they are still working with the respondent. He further admitted that the work is existing with the respondent against which the workman was employed. He also admits that persons who were retrenchment have been reinstated in job through the different Courts and they are working with the respondent. Therefore, the grievance of the WW workman get support from the statement of MW1 that juniors to him namely Anju Gupta, Shubh Dhayan and Joginder Singh are still working with the respondent and that his statement has not been put to cross-examination and as such his version must be assumed to be correct in the light of seniority list, Ex.X1. No reason whatsoever was assigned by the respondent to dispute with the services of the workman while retaining juniors. Even it is so mentioned in the appointment orders Ex. WI to W3 that seniors of the workman can be terminated on ten days notice, does not mean principle of "last come, first go" as envisaged in sec. 25G of the Act are not required to be complied with. Reliance is placed upon a Supreme Court case reported as 1999 (2). SCT. Page 284: Samishta Dube vs. City Board: Etaway: that wherein it was held that "rule of`first come, last go' could

be deviated by the employer in cases of lack of efficiency or loss of confidence-But burden is on the employer to justify deviation. No such attempt made by the respondent Employer High Court was not correct in stating that rule of seniority is not applicable to daily wagers. There is clear violation of sec. 25 G of the Act. Appellant is entitled for reappointment. There is also no evidence that the workman was appointed for specific period and for specific job and the further that the nature of job was casual one and as such the workman is entitled to reinstatement. Therefore, I hold that the termination of services of the workman is in contravention of sec.25G of the I.D. Act."

6. The corporation challenged the award of the Labour Court in Writ Petition No.372/2001 mainly on the grounds that the dispute raised by the appellant could not be treated as industrial dispute because the termination of his service was covered by Section 2(oo)(bb) of the Act; that the appellant was not a regular employee and he was not working against any sanctioned post; that the appellant had not worked for a period of 240 days and that there was no post against which he could be reinstated.

7. The learned Single Judge rejected the plea that the termination of the appellant's service is covered by Section 2(oo) (bb) by observing that from the evidence produced before the Labour Court, it was clearly established that the work against which the appellant was engaged was still continuing. The learned Single Judge also agreed with the Labour Court that the action taken by the corporation was contrary to Section 25-G of the Act. He however, did not approve the award of reinstatement on the premise that initial appointment of the appellant was not in consonance with the statutory regulations and Articles 14 and 16 of the Constitution and, accordingly, substituted the award of reinstatement with 50% back wages by directing that the appellant shall be paid a sum of Rs.87,582/- by way of compensation.

8. Shri Dhruv Mehta, learned counsel for the appellant referred to the averments contained in the reply filed on behalf of the corporation before the Labour Court and the writ petition filed before the High Court to show that in the pleadings of the corporation there was not even a whisper that the appellant's initial engagement/appointment was illegal and argued that the learned Single Judge had no jurisdiction to interfere with the award of reinstatement by assuming that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the regulations framed under Section 42 read with Section 23 of the Warehousing Corporations Act, 1962 (for short, 'the 1962 Act'). Shri Mehta further argued that the question whether the appellant's appointment was made in contravention of the regulations framed under the 1962 Act or the doctrine of equality enshrined in the Constitution, is a pure question of fact which could be decided only on the basis of pleadings and evidence produced before the Labour Court and as no such evidence was produced before the Labour Court, the High Court was not at all justified in entertaining the new plea raised for the first time during the course of hearing of the writ petition.

9. Learned counsel for the corporation supported the impugned order and vehemently argued that the learned Single Judge did not commit any error by setting aside the award of reinstatement because the appellant's appointment was for a fixed period and his service was terminated after complying with Section 25-F of the Act. Learned counsel repeatedly emphasised that the initial appointment of the appellant was contrary to the Punjab State Warehousing Corporation Staff Groups C and D Service Regulations, 2002 (for short 'the Regulations') and argued that the learned Single Judge rightly set aside the award of reinstatement because the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the relevant regulations.

10. We have considered the respective submissions. In our opinion, the impugned order is liable to be set aside only

on the ground that while interfering with the award of the Labour Court, the learned Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the Constitution – *Syed Yakoob v. K.S. Radhakrishnan and others,* AIR 1964 SC 477 and *Surya Dev Rai v. Ram Chander Rai and others* 2003 (6) SCC 675. In *Syed Yakoob's case,* this Court delineated the scope of the writ of certiorari in the following words:

> "The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or properly, as for instance, it decides a question without giving an opportunity, be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (*vide Hari Vishnu Kamath v. Syed Ahmad Ishaque* 1955 (1) SCR 1104, *Nagandra Nath Bora v. Commissioner of Hills Division and Appeals Assam* 1958 SCR 1240 and *Kaushalya Devi v. Bachittar Singh* AIR 1960 SC 1168).
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> It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; hut it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious mis-interpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced

by the High Court in holding that the said error of law is apparent on the face of the record. It may also be that in some cases, the impugned error of law may not be obvious or patent on the face of the record as such and the Court may need an argument to discover the said error; but there can be no doubt that what can be corrected by a writ of certiorari is an error of law and the said error must, on the whole, be of such a character as would satisfy the test that it is an error of law apparent on the face of the record. If a statutory provision is reasonably capable of two constructions and one construction has been adopted by the inferior Court or Tribunal, its conclusion may not necessarily or always be open to correction by a writ of certiorari. In our opinion, it is neither possible nor desirable to attempt either to define or to describe adequately all cases of errors which can be appropriately described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law and an error of law which is apparent on the face of the record, must always depend upon the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened."

11. In *Surya Dev Rai's case,* a two-Judge Bench, after threadbare analysis of Articles 226 and 227 of the Constitution and considering large number of judicial precedents, recorded the following conclusions:

"(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be

subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction — by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction — by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen

to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

A reading of the impugned order shows that the learned Single Judge did not find any jurisdictional error in the award of the Labour Court. He also did not find that the award was vitiated by any error of law apparent on the face of the record or that there was violation of rules of natural justice. As a matter of fact, the learned Single Judge rejected the argument of the corporation that termination of the appellant's service falls within the ambit of Section 2(oo)(bb) of the Act, and expressed unequivocal agreement with the Labour Court that the action taken by the Managing Director of corporation was contrary to Section 25G of the Act which embodies the rule of last come first go. Notwithstanding this, the learned Single Judge substituted the award of reinstatement of the appellant with compensation of Rs.87,582/- by assuming that appellant was initially appointed without complying with the equality clause enshrined in Articles 14 and 16 of the Constitution of India and the relevant regulations. While doing so, the learned Single Judge failed to notice that in the reply filed on behalf of the corporation before the Labour Court, the appellant's claim for reinstatement with back wages was not resisted on the ground that his initial appointment was illegal or unconstitutional and that neither any evidence was produced nor any argument was advanced in that regard. Therefore, the Labour Court did not get any opportunity to consider the issue whether reinstatement should be denied to the appellant by applying the new jurisprudence developed by the superior courts in recent years that the court should not pass an award which may result in

perpetuation of illegality. This being the position, the learned Single Judge was not at all justified in entertaining the new plea raised on behalf of the corporation for the first time during the course of arguments and over turn an otherwise well reasoned award passed by the Labour Court and deprive the appellant of what may be the only source of his own sustenance and that of his family.

12. Another serious error committed by the learned Single Judge is that he decided the writ petition by erroneously assuming that the appellant was a daily wage employee. This is ex facie contrary to the averments contained in the statement of claim filed by the workman that he was appointed in the scale of Rs.350-525 and the orders dated 3.10.1986 and 25.2.1987 issued by the concerned Executive Engineer appointing the appellant as Work Munshi in the pay scale of Rs.355-525 and then in the scale of Rs.400-600. This was not even the case of the corporation that the appellant was employed on daily wages. It seems that attention of the learned Single Judge was not drawn to the relevant records, else he would not have passed the impugned order on a wholly unfounded assumption that the appellant was a daily wager.

13. It is true that in the writ petition filed by it, the corporation did plead that the dispute raised by the appellant was not an industrial dispute because he had not worked continuously for a period of 240 days, the learned Single Judge rightly refused to entertain the same because no such argument was advanced before him and also because that plea is falsified by the averments contained in para 2 of the reply filed on behalf of the corporation to the statement of claim wherein it was admitted that the appellant was engaged as work charge Motor Mate for construction work on 5.3.1986 and he worked in that capacity and also as Work Munshi from 3.10.1986 and, as mentioned above, even after expiry of the period of three months' specified in order dated 5.2.1987, the appellant continued to work till 5.7.1988 when first notice of retrenchment

was issued by the Managing Director of the corporation. Therefore, it was not open for the corporation to contend that the appellant had not completed 240 days service. Moreover, it is settled law that for attracting the applicability of Section 25-G of the Act, the workman is not required to prove that he had worked for a period of 240 days during twelve calendar months preceding the termination of his service and it is sufficient for him to plead and prove that while effecting retrenchment, the employer violated the rule of 'last come first go' without any tangible reason. In *Central Bank of India v. S. Satyam* (1996) 5 SCC 419, this Court considered an analogous issue in the context of Section 25-H of the Act, which casts a duty upon the employer to give an opportunity to the retrenched workmen to offer themselves for re-employment on a preferential basis. It was argued on behalf of the bank that an offer of re-employment envisaged in Section 25-H should be confined only to that category of retrenched workmen who are covered by Section 25-F and a restricted meaning should be given to the term 'retrenchment' as defined in Section 2(oo). While rejecting the argument, this Court analysed Section 25-F, 25-H, Rules 77 and 78 of the Industrial Disputes (Central) Rules, 1957, referred to Section 25-G and held:

> "Section 25-H then provides for re-employment of retrenched workmen. It says that when the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen who offer themselves for re-employment shall have preference over other persons. Rules 77 and 78 of the Industrial Disputes (Central) Rules, 1957 prescribe the mode of re-employment. Rule 77 requires maintenance of seniority list of all workmen in a particular category from which retrenchment is contemplated arranged according to seniority of their service in that category and publication of that list. Rule 78 prescribes the mode of re-employment

of retrenched workmen. The requirement in Rule 78 is of notice in the manner prescribed to every one of all the retrenched workmen eligible to be considered for re-employment. *Shri Pai contends that Rules 77 and 78 are unworkable unless the application of Section 25-H is confined to the category of retrenched workmen to whom Section 25-F applies. We are unable to accept* this contention.

Rule 77 requires the employer to maintain a seniority list of workmen in that particular category from which retrenchment is contemplated arranged according to the seniority of their service. The category of workmen to whom Section 25-F applies is distinct from those to whom it is inapplicable. There is no practical difficulty in maintenance of seniority list of workmen with reference to the particular category to which they belong. Rule 77, therefore, does not present any difficulty. Rule 78 speaks of retrenched workmen eligible to be considered for filling the vacancies and here also the distinction based on the category of workmen can be maintained because those falling in the category of Section 25-F are entitled to be placed higher than those who do not fall in that category. It is no doubt true that persons who have been retrenched after a longer period of service which places them higher in the seniority list are entitled to be considered for re-employment earlier than those placed lower because of a lesser period of service. In this manner a workman falling in the lower category because of not being covered by Section 25-F can claim consideration for re-employment only if an eligible workman above him in the seniority list is not available. Application of Section 25-H to the other retrenched workmen not covered by Section 25-F does not, in any manner, prejudice those covered by Section 25-F because the question of consideration of any retrenched workman not covered by Section 25-F would arise only, if and when, no retrenched workman covered by Section 25-

F is available for re-employment. There is, thus, no reason to curtail the ordinary meaning of "retrenched workmen" in Section 25-H because of Rules 77 and 78, even assuming the rules framed under the Act could have that effect.

The plain language of Section 25-H speaks only of re-employment of "retrenched workmen". The ordinary meaning of the expression "retrenched workmen" must relate to the wide meaning of 'retrenchment' given in Section 2(*oo*). Section 25-F also uses the word 'retrenchment' but qualifies it by use of the further words "workman ... who has been in continuous service for not less than one year". Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words "workman ... who has been in continuous service for not less than one year". It is clear that Section 25-F applies to the retrenchment of a workman who has been in continuous service for not less than one year and not to any workman who has been in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less than one year. Chapter V-A deals with all retrenchments while Section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. *Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of "last come first go" which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F."* (emphasis supplied)

14. The ratio of the above noted judgment was reiterated in *Samishta Dube v. City Board Etawah* (1999) 3 SCC 14. In that case, the Court interpreted Section 6-P of the U.P.

Industrial Disputes Act, 1947, which is *pari materia* to Section 25-G of the Act, and held:

> Now this provision is not controlled by conditions as to length of service contained in Section 6-N (which corresponds to Section 25-F of the Industrial Disputes Act, 1947). Section 6-P does not require any particular period of continuous service as required by Section 6-N. In *Kamlesh Singh v. Presiding Officer* in a matter which arose under this very Section 6-P of the U.P. Act, it was so held. Hence the High Court was wrong in relying on the fact that the appellant had put in only three and a half months of service and in denying relief. See also in this connection *Central Bank of India v. S. Satyam.*
>
> Nor was the High Court correct in stating that no rule of seniority was applicable to daily-wagers. There is no such restriction in Section 6-P of the U.P. Act read with Section 2(z) of the U.P. Act which defines "workman".
>
> It is true that the rule of "first come, last go" in Section 6-P could be deviated from by an employer because the section uses the word "ordinarily". It is, therefore, permissible for the employer to deviate from the rule in cases of lack of efficiency or loss of confidence, etc., as held in *Swadesamitran Ltd. v. Workmen.* But the burden will then be on the employer to justify the deviation. No such attempt has been made in the present case. Hence, it is clear that there is clear violation of Section 6-P of the U.P. Act.

15. The distinction between Sections 25-F and 25-G of the Act was recently reiterated in *Bhogpur Coop. Sugar Mills Ltd. v. Harmesh Kumar* (2006) 13 SCC 28, in the following words:

> "We are not oblivious of the distinction in regard to the legality of the order of termination in a case where Section 25-F of the Act applies on the one hand, and a situation where Section 25-G thereof applies on the other. Whereas in a case where Section 25-F of the Act applies the workman is bound to prove that he had been in continuous service of 240 days during twelve months preceding the order of termination; in a case where he invokes the provisions of Sections 25-G and 25-H thereof he may not have to establish the said fact. See: *Central Bank of India v. S. Satyam, Samishta Dube v. City Board, Etawah, SBI v. Rakesh Kumar Tewari and Jaipur Development Authority v. Ram Sahai."*

16. In view of the above discussion, we hold that the learned Single Judge of the High Court committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,582/- by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the regulations.

17. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J, opined that "the concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and

significance to the ideal of welfare State" – *State of Mysore v. Workers of Gold Mines* AIR 1958 SC 923.

18. In *Y.A. Mamarde v. Authority under the Minimum Wages Act* (1972) 2 SCC 108, this Court, while interpreting the provisions of Minimum Wages Act, 1948, observed:

> "The anxiety on the part of the society for improving the general economic condition of some of its less favoured members appears to be in supersession of the old principle of absolute freedom of contract and the doctrine of *laissez faire* and in recognition of the new principles of social welfare and common good. Prior to our Constitution this principle was advocated by the movement for liberal employment in civilised countries and the Act which is a pre-constitution measure was the offspring of that movement. Under our present Constitution the State is now expressly directed to endeavour to secure to all workers (whether agricultural, industrial or otherwise) not only bare physical subsistence but a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure. This Directive Principle of State Policy being conducive to the general interest of the nation as a whole, merely lays down the foundation for appropriate social structure in which the labour will find its place of dignity, legitimately due to it in lieu of its contribution to the progress of national economic prosperity."

19. The preamble and various Articles contained in Part IV of the Constitution promote social justice so that life of every individual becomes meaningful and he is able to live with human dignity. The concept of social justice engrafted in the Constitution consists of diverse principles essentially for the orderly growth and development of personality of every citizen. Social justice is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived

sections of the society and to elevate them to the level of equality to live a life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society. In a developing society like ours which is full of unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst to reach the ladder of justice. The philosophy of welfare State and social justice is amply reflected in large number of judgments of this Court, various High Courts, National and State Industrial Tribunals involving interpretation of the provisions of the Industrial Disputes Act, Indian Factories Act, Payment of Wages Act, Minimum Wages Act, Payment of Bonus Act, Workmen's Compensation Act, the Employees Insurance Act, the Employees Provident Fund and Miscellaneous Provisions Act and the Shops and Commercial Establishments Act enacted by different States.

20. In *Ramon Services (P) Ltd. v. Subhash Kapoor* (2001) 1 SCC 118, R.P. Sethi, J. observed: "that after independence the concept of social justice has become a part of our legal system. This concept gives meaning and significance to the democratic ways of life and of making the life dynamic. The concept of welfare State would remain in oblivion unless social justice is dispensed. Dispensation of social justice and achieving the goals set forth in the Constitution are not possible without the active, concerted and dynamic efforts made by the persons concerned with the justice dispensation system. In *L.I.C. of India v. Consumer Education and Research Centre and Others* (1995) 5 SCC 482, K. Ramaswamy, J. observed that social Justice is a device to ensure life to be meaningful and liveable with human dignity. The State is obliged to provide to workmen facilities to reach minimum standard of health, economic security and civilized living. *The principle laid down by this law requires courts to ensure that a workman who has not been found guilty can not be deprived of what he is entitled to get. Obviously when a workman has been illegally deprived*

of his device then that is misconduct on the part of the employer and employer can not possibly be permitted to deprive a person of what is due to him.

21. In 70s, 80s and early 90s, the courts repeatedly negated the doctrine of *laissez faire* and the theory of hire and fire. In his treaties: Democracy, Equality and Freedom, Justice Mathew wrote:

> "The original concept of employment was that of master and servant. It was therefore held that a court will not specifically enforce a contract of employment. The law has adhered to the age-old rule that an employer may dismiss the employee at will. Certainly, an employee can never expect to be completely free to do what he likes to do. He must face the prospect of discharge for failing or refusing to do his work in accordance with his employer's directions. Such control by the employer over the employee is fundamental to the employment relationship. But there are innumerable facets of the employee's life that have little or no relevance to the employment relationship and over which the employer should not be allowed to exercise control. It is no doubt difficult to draw a line between reasonable demands of an employer and those which are unreasonable as having no relation to the employment itself. The rule that an employer can arbitrarily discharge an employee with or without regard to the actuating motive is a rule settled beyond doubt. But the rule became settled at a time when the words `master' and `servant' were taken more literally than they are now and when, as in early Roman Law, the rights of the servant, like the rights of any other member of the household, were not his own, but those of his *pater familias.* The overtones of this ancient doctrine are discernible in the judicial opinion which rationalised the employer's absolute right to discharge the employee. Such a philosophy of the employer's dominion over his employee may have been in tune with the rustic

> simplicity of bygone days. But that philosophy is incompatible with these days of large, impersonal, corporate employers. The conditions have now vastly changed and it is difficult to regard the contract of employment with large scale industries and government enterprises conducted by bodies which are created under special statutes as mere contract of personal service. *Where large number of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service might have to remain without means of subsistence for a considerably long time and damages in the shape of wages for a certain period may not be an adequate compensation to the employee for non-employment. In other words, damages would be a poor substitute for reinstatement.* The traditional rule has survived because of the sustenance it received from the law of contracts. From the contractual principle of mutuality of obligation, it was reasoned that if the employee can quit his job at will, then so too must the employer have the right to terminate the relationship for any or no reason. And there are a number of cases in which even contracts for permanent employment, i.e. for indefinite terms, have been held unenforceable on the ground that they lack mutuality of obligation. But these case demonstrate that mutuality is a high-sounding phrase of little use as an analytical tool and it would seem clear that mutuality of obligation is not an inexorable requirement and that lack of mutuality is simply, as many courts have come to recognize, an imperfect way of referring to the real obstacle to enforcing any kind of contractual limitation on the employer's right of discharge, i.e. lack of consideration. If there is anything in contract law which seems likely to advance the present inquiry, it is the growing tendency to protect individuals from contracts of adhesion from over-reaching terms often found in standard forms of contract used by large commercial establishments. *Judicial disfavour of contracts of adhesion*

has been said to reflect the assumed need to protect the weaker contracting part against the harshness of the common law and the abuses of freedom of contract. The same philosophy seems to provide an appropriate answer to the argument, which still seems to have some vitality, that "the servant cannot complain, as he takes the employment on the terms which are offered to him."

(emphasis added)

22. In *Government Branch Press v. D.B. Belliappa* (1979) 1 SCC 477, the employer invoked the theory of hire and fire by contending that the respondent's appointment was purely temporary and his service could be terminated at any time in accordance with the terms and conditions of appointment which he had voluntarily accepted. While rejecting this plea as wholly misconceived, the Court observed:

> "It is borrowed from the archaic common law concept that employment was a matter between the master and servant only. In the first place, this rule in its original absolute form is not applicable to government servants. Secondly, even with regard to private employment, much of it has passed into the fossils of time. "This rule held the field at the time when the master and servant were taken more literally than they are now and when, as in early Roman Law, the rights of the servant, like the rights of any other member of the household, were not his own, but those of his pater familias". The overtones of this ancient doctrine are discernible in the Anglo-American jurisprudence of the 18th century and the first half of the 20th century, which rationalised the employer's absolute right to discharge the employee. "Such a philosophy", as pointed out by K.K. Mathew, J. (vide his treatise: "Democracy, Equality and Freedom", p. 326), "of the employer's dominion over his employee may have been in tune with the rustic simplicity of bygone days. But that philosophy is incompatible with these days of large, impersonal, corporate employers". To bring it in tune with vastly changed and changing socio-economic conditions and mores of the day, much of this old, antiquated and unjust doctrine has been eroded by judicial decisions and legislation, particularly in its application to persons in public employment, to whom the Constitutional protection of Articles 14, 15, 16 and 311 is available. The argument is therefore overruled.

The doctrine of *laissez faire* was again rejected in *Glaxo Labotratories (India) Ltd. v. Presiding Officer* (1984) 1 SCC 1, in the following words:

> "In the days of laissez-faire when industrial relation was governed by the harsh weighted law of hire and fire the management was the supreme master, the relationship being referable to contract between unequals and the action of the management treated almost sacrosanct. The developing notions of social justice and the expanding horizon of socio-economic justice necessitated statutory protection to the unequal partner in the industry namely, those who invest blood and flesh against those who bring in capital. Moving from the days when whim of the employer was *suprema lex*, the Act took a modest step to compel by statute the employer to prescribe minimum conditions of service subject to which employment is given. The Act was enacted as its long title shows to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. The movement was from status to contract, the contract being not left to be negotiated by two unequal persons but statutorily imposed. If this socially beneficial Act was enacted for ameliorating the conditions of the weaker partner, conditions of service prescribed thereunder must receive such interpretation as to advance the intendment underlying the Act and defeat the mischief."

23. Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the *raison d'etre* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer – public or private.

24. In the result, the appeal is allowed. The impugned order of the High Court is set aside and the award passed by the Labour Court is restored. The appellant shall get cost of Rs.25,000/- from the corporation.

O R D E R

BY ASOK KUMAR GANGULI, J.

1. I entirely agree with the views expressed by my learned Brother Justice G.S. Singhvi. Having regard to the changing judicial approach noticed by His Lordship and if I, may say so, rightly, I may add a few words. I consider it a very important aspect in decision making by this Court.

2. Judges of the last Court in the largest democracy of the world have a duty and the basic duty is to articulate the Constitutional goal which has found such an eloquent utterance in the Preamble. If we look at our Preamble, which has been recognised, a part of the Constitution in *His Holiness Kesavananda Bharati Sripadagalvaru and others vs. State of Kerela and another* - [1973 SC 1461], we can discern that as divided in three parts. The first part is a declaration whereby people of India adopted and gave to themselves the Constitution. The second part is a resolution whereby people of India solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic. However, the most vital part is the promise and the promise is to secure to all its citizens:

"JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

And to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;"

[See Justice R.C. Lahoti, *Preamble- The Spirit and backbone of the Constitution of India,* Anundoram Barooah law Lectures, Seventh Series, Eastern Book Company, 2004, at p. 3]

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3. Judges and specially the judges of the highest Court have a vital role to ensure that the promise is fulfilled. If the judges fail to discharge their duty in making an effort to make the Preambular promise a reality, they fail to uphold and abide by the Constitution which is their oath of office. In my humble opinion, this has to be put as high as that and should be equated with the conscience of this Court.

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4. As early as in 1956, in a Constitution Bench judgment dealing with an Article 32 petition, Justice Vivian Bose, while interpreting the Article 14 of the Constitution, posed the following question:

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"After all, for whose benefit was the Constitution enacted?"

[*Bidi Supply Co. vs. Union of India and others* - AIR 1956 SC 479 at Para 23, pg. 487]

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5. Having posed the question, the Learned Judge answered the same in his inimitable words and which I may quote:

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"I am clear that the Constitution is not for the exclusive benefit of Governments and States; it is not only for lawyers and politicians and officials and those highly placed. *It also exists for the common man, for the poor and the humble, for those who have businesses at stake, for the "butcher, the baker and the candlestick maker".* It lays down for this land a "rule lof law" as understood in the free democracies of the world. It constitutes India into a Sovereign Democratic Republic and guarantees in every page rights and freedom to the individual side by side and consistent with the overriding power of the State to act for the common good of all."

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[*Ibid,* Emphasis supplied)

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6. The essence of our Constitution was also explained by the eminent jurist Palkhivala in the following words:

"Our Constitution is primarily shaped and moulded for the common man. It takes no account of "the portly presence of the potentates, goodly in girth". It is a Constitution not meant for the ruler

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"but the ranker, the tramp of the road,

The slave with the sack on his shoulders pricked on with the goad,

C

The man with too weighty a burden, too weary a load.""

[N. A. Palkhivala*, Our Constitution Defaced and Defiled,* MacMillan, 1974, p. 29]

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7. I am in entire agreement with the aforesaid interpretation of the Constitution given by this Court and also by the eminent jurist.

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8. In this context another aspect is of some relevance and it was pointed out by Justice Hidayatullah, as His Lordship was then, in *Naresh Shridhar Mirajkar and others vs. State of Maharastra and Anr.* - [AIR 1967 SC 1]. In a minority judgment, His Lordship held that the judiciary is a State within the meaning of Art. 12. [See paras 100, 101 at page 28, 29 of the report]. This minority view of His Lordship was endorsed by Justice Mathew in *Kesavananda Bharati* (supra) [at page 1949, para 1717 of the report] and it was held that the State under Article 12 would include the judiciary.

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9. This was again reiterated by Justice Mathew in the Constitution bench judgement in the case of *State of Kerela and another vs. N. M. Thomas and others* [AIR 1976 SC 490] where Justice Mathew's view was the majority view, though

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given separately. At para 89, page 515 of the report, his Lordship held that under Article 12, 'State' would include 'Court'.

10. In view of such an authoritative pronouncement the definition of State under Article 12 encompass the judiciary and in *Kesavananda* (supra) it was held that "judicial process" is also "state action" [Para 1717, pg. 1949]

11. That being the legal position, under Article 38 of the Constitution, a duty is cast on the State, which includes the judiciary, to secure a social order for the promotion of the welfare of the people. Article 38(1) runs as follows:

> "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

This is echoing the preambular promise

12. Therefore, it is clearly the duty of the judiciary to promote a social order in which justice, economic and political informs all the institution of the national life. This was also made clear in *Kesavananda Bharati* (supra) by Justice Mathew at para 1728, p. 1952 and His Lordship held that the Directive Principles nevertheless are:

> "…fundamental in the governance of the country and all the organs of the State, including the judiciary are bound to enforce those directives. The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience."

13. In view of such clear enunciation of the legal principles, I am in clear agreement with Brother J. Singhvi that this Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate

it. In doing so this Court should make an effort to protect the rights of the weaker sections of the society in view of the clear constitutional mandate discussed above.

14. Thus, social justice, the very signature tune of our Constitution and being deeply embedded in our Constitutional ethos in a way is the arch of the Constitution which ensures rights of the common man to be interpreted in a meaningful way so that life can be lived with human dignity.

15. Commenting on the importance of Article 38 in the Constitutional scheme, this court in *Sri Srinivasa Theatre and Others vs. Government of Tamil Nadu and others* [(1992) 2 SCC 643], held that equality before law is a dynamic concept having many facets. One facet- the most commonly acknowledged- is that there shall be not be any privileged person or class and that none shall be above the law. This Court held that Art 38 contemplates an equal society [Para 10, pg. 651].

16. In *Indra Sawhney and Others vs. Union of India and Others* [1992 Supp. (3) SCC 217], the Constitution Bench of the Supreme Court held that:

> "The content of the expression "equality before law" is illustrated not only by Articles 15 to 18 but also by the several articles in Part IV, in particular, Articles 38, 39, 39-A, 41 and 46."
>
> [at Paras 643, pg. 633]

17. Therefore, the Judges of this Court are not mere phonographic recorders but are empirical social scientists and the interpreters of the social context in which they work. That is why it was said in *Authorised Officer, Thanjavur and another vs. S. Naganatha Ayyar and others* - [(1979) 3 SCC 466], while interpreting the land reforms Act, that beneficial construction has to be given to welfare legislation. Justice Krishna Iyer, speaking

for the Court, made it very clear that even though the judges are "constitutional invigilators and statutory interpreters" they should "also be responsive to part IV of the Constitution being "one of the trinity of the nation's appointed instrumentalities in the transformation of the socio-economic order". The Learned Judge made it very clear that when the Judges "decode social legislation, they must be animated by a goal oriented approach" and the Learned Judge opined, and if I may say so, unerringly, that in this country "the judiciary is not a mere umpire, as some assume, but an activist catalyst in the constitutional scheme." [Para 1, p. 468]

18. I am in entire agreement with the aforesaid view and I share the anxiety of my Lord Brother Justice Singhvi about a disturbing contrary trend which is discernible in recent times and which is sought to be justified in the name of globalisation and liberalisation of economy.

19. I am of the view that any attempt to dilute the constitutional imperatives in order to promote the so called trends of "Globalisation", may result in precarious consequences. Reports of suicidal deaths of farmers in thousands from all over the country along with escalation of terrorism throw dangerous signal. Here if we may remember Tagore who several decades ago, in a slightly different context, spoke of eventualities which may visit us in our mad rush to ape western ways of life. Here if I may quote the immortal words of Tagore:

> "We have for over a century been dragged by the prosperous West behind its chariot, choked by the dust, deafened by the noise, humbled by our own helplessness and overwhelmed by the speed. We agreed to acknowledge that this chariot-drive was progress, and the progress was civilization. If we ever ventured to ask "progress toward what, and progress for whom", it was considered to be peculiarly and ridiculously oriental to entertain such ideas about the absoluteness of progress.

> Of late, a voice has come to us to take count not only of the scientific perfection of the chariot but of the depth of the ditches lying in its path."

20. How stunningly relevant are these words and how deep are the ditches created in our society by the so called advance of globalization.

21. At this critical juncture the judges' duty, to my mind, is to uphold the constitutional focus on social justice without being in any way misled by the glitz and glare of globalization.

R.P. Appeal allowed.

JOSEPH KANTHARAJ & ANR.
v.
ATTHARUNNISA BEGUM S.
(Civil Appeal No. 282 of 2010)

JANUARY 11, 2010

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Karnataka Rent Act, 1999:

ss. 27(2)(r) and 43 – Eviction proceedings – Deferment of – HELD: A mere assertion by a tenant that he is in possession in part performance of an agreement of sale or mere filing of a suit for specific performance, by itself will not lead to deferment of eviction proceedings u/s 43 – But where tenant produces and relies upon an agreement of sale which confirms delivery of possession in part performance and a specific performance suit is pending, and there is no lease deed or payment of rent from the date of such agreement of sale, or no acknowledgement of attornment of tenancy, s.43 may apply – Unless the court is satisfied prima facie that the agreement is genuine and defence is bona fide, it should not defer the eviction proceedings – In the instant case, trial court was justified in holding that eviction petition should be deferred till the decision in the suit for specific performance – Order of High Court set aside and that of trial court restored – However, in case the suit for specific performance fails, landlord would be entitled to seek restoration of eviction petition – Suit for specific performance of contract.

Haji Iqbal Shariff vs. C. Manjula **ILR 2006 Kar 2766, held inapplicable.**

Case Law Reference:

ILR 2006 Kar 2766, held inapplicable

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 282 of 2010.

From the Judgment & Order dated 28.5.2008 of the High Court of Karnataka at Bangalore in H.R.R.P. No. 463 of 2006.

S.N. Bhat for the Appellants.

Shakil Ahmed Syed, Saud A. Syed, Mohd. Moonis Abbasi for the Respondent.

The order of the Court was delivered by

ORDER

R.V. RAVEENDRAN, J. 1. Leave granted. Heard the parties.

2. The respondent claiming to be the owner of the suit premises filed an eviction petition (HRC 1247/1998) against the first appellant under section 21(1) proviso (a) and (h) of the Karnataka Rent Control Act, 1961 ('Old Act', for short). She alleged that the previous owner Anthony Swamy, sold the suit premises to her under a registered sale deed dated 25.9.1997.

3. The first appellant resisted the eviction petition contending that he was not the tenant of the premises under the respondent. He alleged that he was earlier the tenant of the suit premises from the year 1988, under Anthony Swamy; that the said Anthony Swamy had entered into an agreement of sale dated 11.6.1997 in his favour agreeing to sell the suit property for a consideration of Rs.1,05,000/-; and that under the said agreement, Anthony Swamy confirmed having received Rs.75,000/- as advance and permitted him (the first appellant) to continue in possession free of rent in part performance of the agreement of sale. He contended that from that date, he has been in possession not as a tenant but as a purchaser in part performance of the agreement of sale and has not therefore paid any rent in regard to the premises. The first appellant also

filed a suit for specific performance in OS No.2089/1999 on the file of the City Civil Court, Bangalore, against the said Anthony Swamy and the purchaser (respondent). The said suit is still pending.

4. The trial court allowed the eviction petition by order dated 30.6.2001 holding that the first appellant was the tenant under the respondent and that the respondent had established that she bonafide and reasonably required the suit premises. The said order was challenged by the first appellant by filing a revision before the High Court. The High Court, by its order dated 18.10.2001, allowed the revision petition. The High Court affirmed the trial court's finding that the relationship of landlord and tenant was established between the respondent and first appellant, but held that the ground of eviction alleged, was not established.

5. Feeling aggrieved by the finding that there was a relationship of landlord and tenant between the respondent and himself, the first appellant approached this Court in SLP (C) No. 8245/2002. This Court by order dated 29.4.2002 dismissed the special leave petition but, however, clarified that the finding arrived at by the High Court (about the relationship of landlord and tenant) shall be confined to the said proceedings for eviction and that the suit for specific performance filed by the appellant shall be decided on merits on the basis of the pleadings therein and the evidence adduced.

6. Thereafter, the respondent filed a second petition for eviction in HRC No.157/2002, against the first appellant and his wife (second appellant) under Section 27(2)(r) of the Karnataka Rent Act, 1999 ('new Act', for short). The first appellant resisted the said petition also, on the ground that there was no relationship of landlord and tenant between respondent and appellants. The trial court disposed of the said petition by order dated 13.7.2006. It held that having regard to the denial of relationship of landlord and tenant by the appellants, in the absence or any lease deed or

acknowledgement of tenancy or receipt in regard to payment of rent, the dispute relating to relationship required to be settled by the Civil Court. It therefore deferred the eviction proceedings till the disposal of OS No.2089 of 1999 filed by the first respondent for specific performance. The said order was challenged by the respondent in HRRP No. 463 of 2006. The High Court, by the impugned order dated 28.5.2008, allowed the petition, set aside the order of the trial court and granted eviction subject to the decision in the suit for specific performance. The said order is challenged in this appeal by special leave.

7. It is not disputed that the first appellant had filed a suit for specific performance in OS No. 2089/1999 and the same is pending. The first appellant has contended that he has not paid any rent from the date of agreement (11.6.1997) as he was permitted to continue in possession of the suit premises in part performance of the agreement of sale. No acknowledgment in writing by the appellant that he is the tenant after 11.6.1997, nor any receipt or document to establish that any rent was paid by the first appellant to the respondent, was produced. In these circumstances, having regard to the provisions of section 43 of the new Act, the trial court was justified in holding that the eviction petition should be deferred till the decision in the suit for specific performance.

8. We are of the view that interference with that decision of the trial court by the High Court relying upon the earlier decision of the High Court in *Haji Iqbal Shariff vs. C. Manjula* - ILR 2006 Kar 2766 is erroneous. In *Haji Iqbal Shariff*, the High Court had held that once the person in occupation of a premises, admits that he was the tenant under the previous owner, that can be taken as evidence of relationship of landlord and tenant between the transferee from previous owner and such tenant. The High Court purporting to follow the said decision, held that the first appellant having admitted that he was earlier the tenant under Anthony Swamy, became the tenant under the respondent, ignoring the defence.

9. There can be no dispute about the general proposition laid down by the High Court in *Haji Iqbal Shariff*. But the High Court ignored the fact that though the first appellant had admitted that he was earlier the tenant under the previous owner, he had also specifically pleaded that the previous owner had executed an agreement of sale and permitted him to continue in possession in part performance of the said agreement of sale and that therefore he ceased to be a tenant from the date of agreement, namely 11.6.1997, that the relationship of landlord and tenant between him and the previous owner had come to an end, and that as on the date of sale by Anthony Swamy in favour of the respondent, he was in possession in part performance of the agreement of sale and not as a tenant. In fact the first appellant also filed a suit for specific performance in the year 1999 which is pending. If there was an agreement of sale dated 11.6.1967 and delivery of possession in part performance, as alleged by the first appellant, then he did not become a tenant under the Respondent and the decision in *Haji Iqbal Shariff* relied on by the High Court would be inapplicable.

10. We may however clarify that a mere assertion by a tenant that he is in possession in part performance of an agreement of sale, or the mere filing of a suit for a specific performance, by itself will not lead to deferment of the eviction proceedings under section 43 of the New Act. But where the respondent in an eviction proceeding under the Rent Act denies the relationship of landlord and tenant contending that he is not in possession as a tenant and produces and relies upon an agreement of sale in his favour which confirms delivery of possession in past performance, and a specific performance suit is pending and there is no lease deed, or payment of rent from the date of such agreement of sale, or no acknowledgment of attornment of tenancy, section 43 of the new Act may apply. But a word of caution. Courts dealing with summary proceedings against tenants under Rent Acts for eviction, should be wary of defendants coming forward with defences of agreement of sale, lest that becomes a stock defence in such

petitions. Unless the court is satisfied prima facie that the agreement is genuine and defence is bonafide, it should not defer the proceedings for eviction under the Rent Acts.

11. On the facts and material in this case, we are of the view that trial court was justified in its decision to defer the eviction proceedings till decision by the civil court. We therefore allow this appeal, set aside the order of the High Court and restore the order of the trial court subject to the following clarifications :

(i) Nothing stated herein shall be construed as acceptance of the claim of the appellants that the previous owner (Anthony Swamy) had executed an agreement of sale in his favour or that he is in possession in part performance of the agreement of sale. The specific performance suit shall be decided on its merits with reference to the pleadings and evidence produced therein. Whatever observations we have made herein is only with reference to the issue of deferring the eviction proceedings.

(ii) In the event of first appellant failing in the suit for specific performance, the respondent will be entitled to seek restoration of her eviction petition (HRC No.157/2002) and pursue it in accordance with law.

(iii) Having regard to the facts and circumstances, we request the City Civil Court where the suit for specific performance (OS No.2089/1999) is pending for more than ten years, to dispose of the same expeditiously.

R.P. Appeal allowed.

PARASNATH TIWARI AND ANR.
v.
CENTRAL RESERVE POLICE FORCE AND ANR.
(Civil Appeal No. 140 of 2010)

JANUARY 11, 2010

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

Compensation – Death of CRPF constable while in service – Deceased was only earning member of the family – Mental agony and financial difficulties to parents of deceased, who were purportedly denied proper information as regards cause of the death for long period – They filed writ petition claiming compensation of Rs.5 lakhs – High Court granted compensation of Rs.1 lakh – On appeal, held: Considering the facts, and in view of the escalating cost of living, it is appropriate that the compensation amount be enhanced to Rs.2 lakhs.

A CRPF constable died while in service, when a fellow constable on sentry duty, allegedly mistook him for an intruder in the house of the Development Commissioner and as a measure of safety, fired upon him resulting in his death. Appellants, the parents of the deceased, filed writ petition in High Court seeking for direction to the respondents to pay them compensation of Rs.5 lakhs on account of mental agony and loss suffered by them due to death of their son while in service.

The High Court came to a finding that for more than 20 years, the appellants had been denied proper information as regards the cause of the death of their son, consequent to which they suffered mental agony and financial difficulties for a long period, and allowed the writ petition directing the respondents to pay a sum of Rs. 1

lakhs to the appellants as compensation.

In appeal to this Court, it was contended by the appellants that the amount of Rs.1 lakh was too meagre an amount to be paid for loss and mental agony caused to the appellants.

Disposing of the appeal, the Court

HELD: 1. The son of the appellants was working in a sensitive area. A fellow constable, who was in the sentry duty at the residence of the Development Commissioner, Aizwal, mistook the appellant's son as an intruder to the house and as a measure of safety, he fired upon the appellant's son. On facts, it turns out to be a case of accident and wrong identity. However, the death of son of the appellants, is definitely not only a personal loss to the family but also financial. The deceased was a victim of an unfortunate incident and this caused a heavy loss and mental agony to the family members of the deceased. That being the position, the amount of Rs.1 lakh directed to be paid to the appellants towards compensation and damages is meagre. [Paras 11 and 12] [640-D-H]

2. The victim was a Constable and, therefore, there would have to be some surmises and conjectures in arriving at the amount of compensation payable by the respondents to the appellants. Appellant no.1 is an old man and the deceased was the only earning member of the family. The earnings of the deceased were a source of sustenance for the family. Besides, loss of a son at such a young age creates a void in the family, which cannot be filled up by making payment of any compensation. Considering these facts and being alive to the escalating cost of living, it is appropriate to enhance the amount of compensation fixed by the High Court. The respondents are directed to pay to the

appellant an amount of Rs. 2 lakhs as compensation instead of Rs.1 lakh fixed by the High Court. [Para 13] [641-B-E]

Charanjit Kaur (Smt.) v. Union of India and Others, **(1994) 2 SCC 1 distinguished.**

Case Law Reference:

(1994) 2 SCC 1 distinguished Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 140 of 2010.

From the Judgement & Order dated 11.7.2006 of the High Court of Chhattisgarh at Bilaspur in Writ Petition Nos. 554 of 2001 & 2407 of 1996.

Sarabjeet Dutta, I.J. Yadav, P.P. Singh for the Appellants.

Indira Jaising, ASG, Binu Tamta, S.N. Tedol, Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. In this appeal the scope for consideration is restricted only to actual quantum of compensation payable to the appellants. The appellants herein filed a Writ Petition in the High Court of Chhattisgarh at Bilaspur seeking for a direction to the respondents to pay to them compensation of Rs. 5 lakhs on account of mental agony and loss suffered by the appellants due to death of their son while in service. The High Court after hearing both the parties issued an order directing for payment of compensation of Rs. 1 lakh to the appellants but in respect of their prayer for payment of liberalised pension, the Writ Petition was dismissed.

3. The present Special Leave Petition was filed by the appellants, who are the parents of the deceased, Sunil Kumar Tiwari, a Constable with the Central Reserve Police Force [for short `CRPF'] who died while in service at Mizoram.

4. In order to fully appreciate the contentions it would be

necessary to set out certain facts leading to the filing of the Writ Petition in the High Court of Chhattisgarh. The deceased was employed as a Constable in 66 Battalion of CRPF at Bhubaneshwar. However, at the relevant point of time he was working in the CRPF at Mizoram. On 01.02.1982, the appellant received information from the office of Respondent No. 2 that his son died on 01.02.1982 at Mizoram and that his last rites were performed at the place where the deceased was working at the relevant point of time, but no such intimation or information was given to the parents.

5. The respondents intimated the appellants that a fellow Constable - Desh Raj while being on sentry duty in the residence of the Development Commissioner at Aizwal saw a man climbing a guava tree in the moonlight and consequently shot four rounds of bullets within a distance of 15 yards as a result of which the deceased died on the spot. In the Writ Petition, the appellant stated that they made several representations to the Respondent No. 2 for sending the last photograph of the deceased, which, however, were not received by them despite such representations. It was, however, stated that the appellant received a letter dated, 18.12.1982 from a friend of the deceased, viz., Ravindra Kumar Sharma, wherein itwas stated that the death of the deceased was not an accident but it was a brutal murder by his fellow constables. Being aggrieved, the appellant filed a Writ Petition in the High Court praying for the following reliefs: - 1) to direct the respondents to inquire into the matter and report to the Court and the appellant, 2) to direct the respondents to take action to book the culprit, 3) that an independent inquiry be ordered by the CBI or some other responsible authority to look into the case of the death of the appellant's son and 4) if the Hon'ble High Court comes to the conclusion that the death of the appellant's son was not by an accident, then, the appellant be suitably compensated by the respondents. The respondents be directed to pay Rs. 5 lakhs as compensation to the appellants.

6. In the said Writ Petition, the respondents replied stating

inter alia that the death of the deceased was an accident on the intervening night of 30th November/1st December, 1982. The Constable-Desh Raj, who had fired on the deceased was arrested by the Civil Police, Aizwal and a criminal case was registered against him. It was also stated that a departmental inquiry was conducted against Constable-Desh Raj who was responsible for the death of the deceased, and LNK Ranjit Singh Yadav, who was the Guard Commander. It was also mentioned that pursuant to the aforesaid departmental inquiry, Constable-Desh Raj was dismissed from service and Guard Commander-LNK Ranjit Singh Yadav was punished with reversion to the post of Constable for 16 months. However, while disposing of the Writ Petition the High Court observed that the appellant had suffered mental agony for more than 20 years, particularly, when the fact of the cause of death was not informed to the appellant, his wife and relatives and further by sending a photograph of a person not being the deceased. The High Court was of the view that the appellant, his wife and other family members had been denied proper information consequent to which they have suffered mental agony and financial difficulties for a long period.

7. Accordingly, the High Court allowed the Writ Petition and directed the respondents to pay a sum of Rs. 1 lakh with costs of Rs. 5,000/- to the appellant and his wife for the mental agony and loss suffered by them.

8. Being aggrieved by the aforesaid order passed by the High Court, the present Special Leave Petition was filed on which we have heard the learned counsel appearing for the parties. Counsel appearing for the appellants restricted his argument only to the issue of enhancement of quantum of compensation awarded. No submission was made against the order denying liberalised pension. As such, the order passed by the High Court denying liberalised pension is not considered and interfered with.

9. Counsel appearing for the appellants submitted that the

amount of Rs. 1 lakh, which is directed to be paid is too meager an amount to be paid for loss and mental agony caused to the appellant and his wife. He has drawn our attention to paragraph 24 of the judgment passed by the High Court wherein it is observed by the High Court that the appellant has suffered mental agony for more than 20 years. Relying on the said observation, the counsel submitted that the amount of compensation should have been at least Rs. 5 lakhs and in support of the said submission he relied upon the decision of the Supreme Court in *Charanjit Kaur (Smt.) v. Union of India and Others* [(1994) 2 SCC 1].

10. Mrs. Indira Jaisingh, learned Additional Solicitor General appearing on behalf of the respondent, however, submitted that in the facts and circumstances of the case payment of Rs. 1 lakh compensation should be held to be justified as there was no negligence on the part of the CRPF in the entire incident and that the incident had happened because of a mistaken identity only for which the family is being suitably compensated.

11. The son of the appellant was working in a sensitive area. Constable Desh Raj who was in the sentry duty at the residence of Development Commissioner, Aizwal mistook the deceased as an intruder to the house and as a measure of safety he fired upon the deceased. On facts, it turns out to be a case of accident and wrong identity. However, the death of son of the appellant, is definitely not only a personal loss to the family but also financial. The deceased was a victim of an unfortunate incident and this has caused a heavy loss and mental agony to the family members of the deceased. The aforesaid findings recorded by the High Court have not been challenged by the respondents before us by filing any independent appeal.

12. That being the position, we are of the considered opinion that the amount of Rs. 1 lakh directed to be paid to the appellants towards compensation and damages is meager.

Therefore, we are to consider what would be an appropriate amount of compensation which is payable to the appellants.

13. The case of *Charanjit Kaur* (Supra) relied upon by the learned counsel appearing for the appellants is clearly distinguishable on facts and, therefore, the ratio of the aforesaid decision cannot be made applicable to the facts and circumstances of the present case. The son of the appellant was a Constable and, therefore, in our considered opinion there would have to be some surmises and conjectures in arriving at the amount of compensation payable by the respondents to the appellants. We have been informed that the appellant no. 1 is an old man and that the deceased was the only earning member of the family. The earnings of the deceased were a source of sustenance for the family. Besides, loss of a son at such a young age creates a void in the family, which cannot be filed up by making payment of any compensation. Considering these facts and being alive to the escalating cost of living, we deem it appropriate to enhance the amount of compensation fixed by the High Court. We, therefore, direct that respondents shall pay to the appellant an amount of Rs. 2 lakhs as compensation instead of Rs. 1 lakh fixed by the High Court. The said amount of Rs. 2 lakhs shall be paid within a period of six weeks from today. The amount already paid towards compensation fixed by the High Court shall in natural course be deducted while complying with this order. If the amount is not paid within six weeks from today, the balance amount payable shall earn interest at the rate of 12 per cent per annum from expiry of date of six weeks till the date of payment.

14. The appeal stands disposed of in terms of the aforesaid order.

B.B.B. Appeal disposed of.

DARSHAN SINGH
v.
STATE OF PUNJAB & ANR.
(Criminal Appeal No. 1057 of 2002)

JANUARY 15, 2010

[DALVEER BHANDARI AND ASOK KUMAR GANGULY, JJ.]

Penal Code, 1860:

ss. 96, 97 and 100 – Right to private defence – Exercise of – Land dispute between parties – Gun shot injury by accused resulting in death of deceased – Plea of private defence by accused – Acquittal by trial court – Set aside by High Court and conviction of accused – On appeal, held: Law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression – When there is real apprehension that aggressor might cause death or grievous hurt, right of private defence of defender extends to killing the aggressor – On facts, accused had serious apprehension of death or at least grievous hurt when he exercised his right of private defence to save himself – Role attributed to accused is fully covered by his right of private defence – Trial court's view is the possible view and is based on the entire evidence on record – Thus, order of acquittal restored.

Right to private defence – Guiding principles for exercise of right to private defence – Explained.

Appeal: *Appeal against acquittal – Scope of interference – Held: If trial court's view is a possible or plausible view, then appellate court or High Court is not justified in interfering with it – There is presumption of innocence which is further fortified with the acquittal of accused by trial court.*

According to the prosecution case, there was a dispute between two brothers GS and BS with regard to partition of land. On the fateful day, the complainant party were irrigating their fields and cutting the ridges. GD and AS were also present. BS gave gandasa blow causing injuries on the chest of GS. GS then attacked BS with a gandasa on his head and BS fell down. Thereafter, the appellant-son of BS fired two shots from his licensed gun which hit GS in the chest and some of the pellets hit GR and GD. GS died on the spot. Appellant claimed right of private defence. Trial court acquitted the appellant and BS. High Court set aside the order of acquittal and convicted them. Hence the present appeal. During the pendency of the appeal BS died.

Allowing the appeal, the Court

HELD: 1. In the facts and circumstances of the instant case, the appellant had the serious apprehension of death or at least the grievous hurt when he exercised his right of private defence to save himself. The role attributed to the appellant is fully covered by his right of private defence. The impugned judgment of the High Court is set aside and the judgment of acquittal of the trial court is restored. [Paras 37 and 65] [668-E; 677-A-B]

SCOPE AND FOUNDATION OF PRIVATE DEFENCE:

2.1. In order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon used, the manner and nature of assault and other surrounding circumstances should be taken into account while

evaluating whether the apprehension was justified or not? [Para 23] [664-A-C]

2.2. When enacting ss. 96 to 106 IPC excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger. *The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression.* **There is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits. [Paras 24 and 38] [664-F-H; 668-F-G]**

Mahandi v. Emperor **(1930) 31 Criminal Law Journal 654 (Lahore);** *Alingal Kunhinayan and Anr. v. Emperor Indian* **Law Reports 28 Madras 454;** *Ranganadham Perayya* **(1957) 1 Andhra Weekly Reports 181, referred to.**

Russel on Crime **11th Edn., Vol.1, p.491;** *Penal Law of India by Hari Singh Gour* **11th Edition 1998-99;** *Principles of Penal Laws'* ***by Bentham,*** **referred to.**

2.3. The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit or lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggression on property. [Para 29] [665-F-H; 666-A-B]

2.4. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also settled position of law that a right of self-defence is only right to defend oneself and not to retaliate. It is not a right to take revenge. [Para 30] [666-C]

2.5. Right of private defence of person and property is recognized in all free, civilsed, democratic societies within certain reasonable limits. Those limits are dictated by two considerations: (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrong done to them or to punish the wrong doer of commission of offences. [Para 31] [666-D-F]

Article on 'Private Defense' by Michael Gorr published in Journal "Law and Philosophy" **Volume 9, Number 3 / August 1990 p. 241, referred to.**

2.6. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must

not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. [Para 33] [667-B-C]

2.7. According to s. 99 IPC the injury which is inflicted by the person exercising the right should commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right every reasonable allowance should be made for the bona fide defender. It would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to attack. [Paras 35] [667-F-G]

Robert B. Brown v. United States of America **(1921) 256 US 335, referred to.**

2.8. The right of private defence extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100 IPC. According to the combined effect of two clauses of s. 100 IPC taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. It is necessary that the extent of right of private defence is that the force used must bear a reasonable proportion of the injury to be averted, that is the injury inflicted on the assailant must not be greater than is necessary for the protection of the person assaulted. A person in fear of his life is not expected to modulate his defence step by step, but at the

same time it should not be totally disproportionate. [Paras 36 and 39] [667-H; 668-A-C; 669-A-B]

3. The following principles of right to private defence emerge on scrutiny of the relevant judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) Even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The IPC confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened. [Para 58] [674-B-H; 675-A-D]

State of Orissa v. Rabindranath Dalai and Anr. **1973 Crl LJ 1686 (Orissa) (FB), approved.**

Laxman Sahu v. State of Orissa **1986 (1) Supp SCC 555;** *Raghavan Achari v. State of Kerala* **1993 Supp. (1) SCC 719;** *Jagtar Singh v. State of Punjab* **AIR 1993 SC 970;** *Puran Singh and Ors. v. The State of Punjab* **(1975) 4 SCC 518;** *Bhagwan Swaroop v. State of Madhya Pradesh* **(1992) 2 SCC 406;** *Kashmiri Lal and Ors. v. State of Punjab* **(1996) 10 SCC 471;** *James Martin v. State of Kerala* **(2004) 2 SCC 203;** *Gotipulla Venkatasiva Subbrayanam and Ors. v. The State of Andhra Pradesh and Anr.* **(1970) 1 SCC 235;** *Mahabir Choudhary v. State of Bihar* **(1996) 5 SCC 107;** *Munshi Ram and Ors. v. Delhi Administration* **(1968) 2 SCR 455;** *State of Madhya Pradesh v. Ramesh* **(2005) 9 SCC 705;** *Triloki Nath and Ors. v. State of U.P.* **(2005) 13 SCC 323;** *Vidhya Singh v. State of Madhya Pradesh* **(1971) 3 SCC 244;** *Jai Dev v. State of Punjab* **AIR 1963 SC 612;** *Buta Singh v. The State of Punjab* **(1991) 2 SCC 612, relied on.**

4.1. The High Court in the impugned judgment reversed the trial court's judgment of acquittal and convicted the accused. Admittedly, appellant fired from

his 12-bore double barrel gun which had a number of pellets. High Court disbelieved the trial court's version that GS and GD did not receive fire arm injuries because no pellet or pellets were recovered from their bodies. In the impugned order, the High Court without giving any cogent reasons set aside the well considered judgment of the trial court. When a shot was fired from a 12-bore gun and if no pellet was recovered, then the trial court is not wrong in arriving at the conclusion that the injuries were not caused by a fire arm. The High Court on this point discarded the reasoning of the trial court without any sound basis. [Paras 59 and 60] [675-D-F]

4.2. The High Court gave the finding that "since it is a case of dual version, one given by the complainant, who appears to be a truthful witness when he has not concealed the role of his father and explained the injury of BS. On the contrary, the accused persons came with untenable defence." While arriving at this conclusion, the High Court did not follow the consistent legal position. The High Court or the appellate court would not be justified in setting aside a judgment of acquittal only on the ground that the version given by the complainant is more truthful. [Para 61] [675-G-H; 676-A-B]

4.3. High Court unnecessarily laid stress on the point of recovery of the gun at the instance of appellant. The accused has not denied the incident. The case of the defence is that their case is covered by the right of private defence. Appellant admitted in his statement u/s. 313 Cr.P.C., 1973 that he had fired from his licensed gun in his right of private defence. High Court without properly comprehending the entire evidence on record reversed the well reasoned judgment of the trial court. [Para 63] [676-E-F]

4.4. In a case of acquittal, if the trial court's view is a possible or plausible view, then the appellate court or the

High Court would not be justified in interfering with it. There is presumption of innocence and that presumption is further fortified with the acquittal of the accused by the trial court. Appellate court or High Court would not be justified in reversing the judgment of acquittal unless it comes to a clear conclusion that the judgment of the trial court is utterly perverse and, on the basis of the evidence on record, no other view is plausible or possible than the one taken by the appellate court or the High Court. In the instant case, after marshalling and scrutinizing the entire prosecution evidence, the trial court's view is not only the possible or plausible view but it is based on the correct analysis and evaluation of the entire evidence on record. No other view is legally possible. [Paras 62 and 64] [676-C-D; G]

Cases Law Reference :

(1921) 256 US 335	**Referred to.**	**Para 34**
(1930) 31 Criminal Law Journal 654 (Lahore)	**Referred to.**	**Para 38**
Indian Law Reports 28 Madras 454	**Referred to.**	**Para 38**
(1957) 1 Andhra Weekly Reports 181	**Referred to.**	**Para 38**
1973 Crl. LJ 1686 (Orissa) (FB)	**Approved.**	**Para 40**
1986 (1) Supp SCC 555	**Relied on.**	**Para 41**
1993 Supp. (1) SCC 719	**Relied on.**	**Para 42**
AIR 1993 SC 970	**Relied on.**	**Para 43**

(1975) 4 SCC 518	**Relied on.**	**Para 44**
(1992) 2 SCC 406	**Relied on.**	**Para 45**
(1996) 10 SCC 471	**Relied on.**	**Para 47**
(2004) 2 SCC 203	**Relied on.**	**Para 48**
(1970) 1 SCC 235	**Relied on.**	**Para 49**
(1996) 5 SCC 107	**Relied on.**	**Para 50**
(1968) 2 SCR 455	**Relied on.**	**Para 51**
(2005) 9 SCC 705	**Relied on.**	**Para 52**
(2005) 13 SCC 323	**Relied on.**	**Para 53**
(1971) 3 SCC 244	**Relied on.**	**Para 54**
AIR 1963 SC 612	**Relied on.**	**Para 55**
(1991) 2 SCC 612	**Relied on.**	**Para 57**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1057 of 2002.

From the Judgment & Order dated 06.08.2002 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 446-DBA of 1994.

R.K. Kapoor, Sanjana J. Bali, Shweta Kapoor, Harish Chandra Pant, Mansi Dhiman, Gunjan Sinha, Anis Ahmed Khan, D.P. Singh, Premjit Singh Dhaliwal, Shuchta Srivastava, Kuldip Singh, Ajay Pal Satyapal Khushal Chand Pasi for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This appeal is directed against the judgment and order of the Punjab & Haryana High Court in Criminal Appeal No.446-(Division Bench) of 1994 dated 6.8.2002.

2. Both Darshan Singh and Bakhtawar Singh were acquitted by the Sessions Court, Ludhiana. The said judgment of acquittal was set aside by the High Court of Punjab & Haryana at Chandigarh.

3. Darshan Singh and Bakhtawar Singh filed appeal against the said judgment before this court. During the pendency of this appeal, Bakhtawar Singh died and consequently the appeal filed by him abated.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:-

The dispute is between very close and intimate family members. Deceased Gurcharan Singh was the brother of Bakhtawar Singh and uncle of Darshan Singh. He was the father of Gurdish Singh, PW7, the informant. The agriculture fields of both brothers, Gurcharan Singh and Bakhtawar Singh were situated adjoining to each other. According to the prosecution, on 15.7.1991 at about 8 a.m. Gurdish Singh, PW7 and his father, Gurcharan Singh were irrigating their aforesaid fields and were also mending its ridges and at that time Gurdev Singh, PW8 and Ajit Singh were also present there. In the meantime, Darshan Singh and Bakhtawar Singh came there from the side of their fields raising lalkaras and abused the complainant party. Darshan Singh, accused was armed with D.B.B.L. gun and his father Bakhtawar Singh was carrying a Gandasa and they were saying that they would teach a lesson to the complainant party for cutting the ridges.

5. According to the further story of the prosecution, Bakhtawar Singh gave a Gandasa blow causing injuries on the chest of Gurcharan Singh. Gurcharan Singh was also having a Gandasa with him and in order to save himself he also caused injury on the head of Bakhtawar Singh. Thereafter, Darshan Singh fired two shots from his licensed gun which hit Gurcharan Singh in the chest and some of the pellets hit Gurdish Singh PW7 on his left upper arm and Gurdev Singh, PW8 on his left

thigh. Gurcharan Singh fell down and died at the spot. Gurdish Singh and others retraced their steps in order to save themselves. Both the accused in order to save themselves ran towards their respective houses. Gurdish Singh, PW7 left the dead body of Gurcharan Singh and proceeded to the police station to lodge a report. Gurdev Singh PW8 also accompanied him. They met Om Prakash, ASI at about 9 a.m. at Barnala crossing where Gurdish Singh PW7 gave his statement. It was then read over and explained to him who signed the same admitting the contents thereof to be correct. Om Prakash, ASI made his endorsement (Ex. N/1) and forwarded the statement to the police station, Rajkot and on the basis of which the case was registered against both the accused.

6. Om Prakash, ASI accompanied Gurdish Singh and Gurdev Singh to the place of occurrence. He prepared inquest report in respect of the dead body of Gurcharan Singh and then sent the dead body for post-mortem examination through Constable Milkha Singh and Head Constable Pargat Singh. Om Prakash, ASI lifted blood stained earth from the place where dead body of Gurcharan Singh was lying and took the same into possession after preparing the recovery memo. One gandasa and an empty cartridge of 12 bore were found lying near the dead body. The gandasa and the empty cartridge were also taken into possession. The Investigating Officer prepared visual site plan of the place of occurrence with marginal notes. Gurdish Singh and Gurdev Singh's injury statements were also prepared and sent for medico legal examination.

7. Dr. Mukesh Gupta PW4 conducted post-mortem examination on the dead body of Gurcharan Singh on 15.7.1991 at 4.30 p.m. On the same day at 5.50 p.m. Dr. Gupta also conducted medico legal examination of Gurdev Singh and found one abrasion on his left thigh. Dr. Gupta found a superficial abrasion on Gurdish Singh on his elbow. Darshan Singh and Bakhtawar Singh were arrested on 28.7.1991. The factum of the incident has not been denied by the accused and

they claimed right of private defence.

8. According to the prosecution, the motive of the crime was dispute regarding partition of land between both brothers Bakhtawar Singh and Gurcharan Singh. One year prior to the present incident, the village Panchayat had got the dispute compromised by a written agreement. There was a common well situated in the adjoining land. As a result of the compromise, the well along with a small piece of land attached to it was given to Gurcharan Singh and the land of common pathway leading to the well was given to the accused party. The compromise was not accepted by the accused party and they wanted repartition of the land attached to the well. This grievance led to this unfortunate incident.

9. The prosecution examined 11 witnesses. Dr. Mukesh Gupta, PW4 who conducted the post-mortem examination found the following injuries on the dead body of Gurcharan Singh:-

> "1. There were 14 wounds in an area of 20 cm x 18 cm on left side of the chest above the nipple. One of the wounds which was above the nipple was having inverted margins. A wad was recovered from this wound. This wound was 1 cm x 1 cm. The 9 wounds which measured 0.75 cm x 0.75 cm which were on the chest and shoulder also had inverted margins. Out of these wounds 6 were found to entering chest cavity and 6 pellets were recovered from the chest cavity. The remaining 3 wounds were having everted margins. These were near the axilla and each wound measured 1 cm x 1 cm. One of the 14 wounds which measured 0.75 cm x 1.5 cm was having inverted margins. It was skin deep and was on the shoulder, upper part of humerous and clavicle bones were found to be fractured. 4th and 5th rib of the left side of the chest were also found to be fractured.

2. There were 7 wounds in an area of 20 cm x 8 cm on the upper part of the chest on its right side above the nipple. Out of these wounds 3 wounds measuring 0.75 cm x 1 cm each was having inverted margins, these were skin deep. 2 wounds were having everted margins having a dimension of 1 x 1 cm each near the axilla. A pellet was recovered from near the axilla. The remaining 2 wounds were near the top of right shoulder measuring 0.75 x 1.5 cm each with inverted margins. These were skin deep.

3. An incised wound 8 cm x 0.5 cm skin deep on the left side of chest 3 cm above the nipple. It was horizontally placed."

10. Dr. Mukesh Gupta found following injury on the person of Gurdev Singh:-

"An abrasion measuring 1 cm x 0.5 cm on the front and inner side of left thigh. It was a superficial abrasion reddish in colour, over the junction of upper 1/3rd and lower 2/3rd of the thigh. There was damage to the pajama corresponding to the injury."

11. According to the doctor, the injury was simple in nature and was caused within 24 hours. Doctor also found injury on Gurdish Singh to be superficial. The same reads as under:-

"A very superficial abrasion 1 cm x 0.5 cm on the upper side of left upper arm 12 cm above the elbow. It was reddish in colour."

12. It may be relevant to mention that Dr. M.S. Gill, PW5, who conducted the medical examination of Bakhtawar Singh found the following injuries on his person:-

"1. An incised wound 7 cm x 0.5 cm on the parietal region of the right side of head. It was placed anterior posteriorly. The wound was bone deep and 4 cm above the right pinna. Clotted blood was present."

13. According to doctor, this injury was caused by sharp-edged weapons.

14. Both Gurdish Singh, PW7 and Gurdev Singh, PW8 are the eye-witnesses who gave detailed description of the occurrence. After examining the prosecution evidence, the following statements of Darshan Singh and Bakhtawar Singh were recorded under section 313 Cr. P.C.. The relevant portion of the statement of Darshan Singh reads as under:-

"I am innocent. In fact the complainant party had gone back from the agreement got effected by the Panchayat one year prior to the occurrence. In accordance with the said compromise we had ploughed the land which was earlier under common pathway. One day prior to the occurrence we had irrigated that portion of the land. On the day of occurrence when we went to the fields, Gurcharan Singh (deceased) along with 3-4 outsiders came to our field and remarked that we would be taught a lesson for irrigating the land. Immediately thereafter Gurcharan Singh gave a gandasa blow hitting my father Bakhtawar Singh on the head as a result of which he fell down. I felt that my father had been killed. Gurcharan Singh then advanced towards me holding the gandasa. I apprehended that I too would be killed and I then pulled the trigger of my gun. Gurcharan Singh fell to the ground and his companions took to their heels. I then took Bakhtawar Singh in injured condition to Govt. hospital, Sudhar. Police came to the hospital at about 5 p.m. We were kept under guard and brought to the police station on the next day after getting my father discharged. We have been falsely implicated in this case.

Bakhtawar Singh (accused) pleaded as under:-

"I am innocent. It was the complainant party who had

resiled from the compromise got effected by Panchayat about a year before the occurrence. We had ploughed the land which had fallen to our share and one day prior to the occurrence we had irrigated the same. On the day of occurrence when we went to the fields Gurcharan Singh (deceased) along with 3-4 outsiders came to our field and remarked that we would be taught a lesson for irrigating the land. Immediately thereafter Gurcharan Singh gave a gandasa blow on my head as a result of which I fell down. Gurcharan Singh then advanced towards Darshan Singh holding his gandasa whereupon Darshan Singh fired a shot from his gun. I was taken to Government hospital, Sudhar by Darshan Singh. Police came there on the same day at about 5 p.m. and took us to the police station after getting me discharged. I have been falsely involved in this case."

15. According to the versions of the accused Darshan Singh and Bakhtawar Singh, Gurcharan first gave Gandasa blow hitting Bakhtawar Singh on the head and the injury caused on Bakhtawar Singh was an incised wound of 7 cm x 0.5 cm. on the parietal region of the right side of head. The wound was bone deep and 4 cm above the right pinna and clotted blood was present and after receiving these injuries in order to save himself, Darshan Singh fired at Gurcharan Singh and as a result of which he died. According to the accused, the entire act is covered by the right of private defence. According to the prosecution, Bakhtawar Singh gave first injury on the chest of Gurcharan Singh whereas according to the defence the first injury was given by Gurcharan Singh to Bakhtawar Singh. The appellant Darshan Singh fired only after the serious incised wound by a Gandasa was inflicted on his father Bakhtawar Singh and at that time in order to save his life he fired 2 shots which hit the deceased Gurcharan Singh leading to his death.

16. The point for determination is the place where the unfortunate incident had taken place. According to Bhupinder

Singh Patwari, PW3, point 'A' in site plan Ex.PC denotes the place where the dead body of Gurcharan Singh was said to be lying and this point is in Khasra No.10. He further testified that accused Bakhtawar Singh was recorded in cultivating possession of Khasra No.10. According to the finding of the trial court, it clearly shows that Bakhtawar Singh was in possession of Khasra No.10. According to Bhupinder Singh Patwari, Point 'E' is in Khasra No.10 from where Darshan Singh had allegedly fired at Gurcharan Singh. According to the site plan prepared by Bhupinder Singh Patwari, Point 'F' is the place where the dispute took place with Bakhtawar Singh. According to the Patwari, this point 'F' is in Khasra No.10 at a distance of 5 karms which is equivalent to 27.5 feet from the aforesaid pathway and point 'A' is at a distance of 7 karms from point 'F'. Thus, from this evidence it is evident that the occurrence took place inside Khasra No.10 which was in possession of Bakhtawar Singh accused. Gurcharan Singh covered a distance of about 7 karms which is equivalent to 37.5 feet.

17. The trial court came to the conclusion that the presence of Gurdev Singh and Gurdish Singh at the time of alleged occurrence is highly doubtful. Dr. Mukesh Gupta also stated that injuries on the person of Gurdev Singh and Gurdish Singh could be caused by friendly hands and can be self suffered. He further stated in the cross examination that duration of the injuries was less than 6 hours. As per the prosecution case, the injuries were allegedly received by them at about 8 a.m. No pellet was recovered from the injuries of these witnesses namely, Gurdev Singh and Gurdish Singh. According to the trial court, the possibility of these injuries on their person having been fabricated at a later stage cannot be ruled out. The trial court also held that there was no mention of the injuries received by Gurdish Singh and Gurdev Singh in the inquest report whereas this fact finds mention in the first information report. According to the prosecution, Gurdish Singh suffered pellet injury on the left upper arm whereas, Gurdev Singh was hit on his left thigh.

If it was so, there would have been mention of this fact in the inquest report or the investigating officer must have prepared their injury statement, but neither any such injury statement was prepared at the spot nor their medical-examination was carried out. Om Prakash, ASI, in his cross-examination has admitted that he came to know about the injuries of Gurdish Singh and Gurdev Singh only when they gave their supplementary statements at the bus stand. According to the findings of the trial court, their injury statement was prepared at the spot and they were medically examined by Dr. Mukesh Gupta. Thus, according to the trial court the injuries were fabricated with connivance with the investigating officer just in order to make Gurdish Singh and Gurdev Singh stamp witnesses.

18. The trial court after discussing the entire evidence came to the conclusion that two counter versions of the case have been presented and, in the view of the trial court, the defence version is more probable and nearer to the truth for the following reasons:

(i) The delay in lodging the FIR impells the court to scrutinize the evidence of witnesses regarding the actual occurrence with greater care and caution.

(ii) The crucial point to be decided in this case was that who was the aggressor or which of the parties can have the motive to open the attack?

The trial court held that "if the accused were already cultivating the land as per compromise, then it does not appeal to reason as to why they would feel aggrieved. On the other hand there was strong motive for Gurcharan Singh to assault the accused person as he has resiled from the compromise."

(iii) The next crucial point according to the trial court was as to where the incident took place? According to the trial court the incident had taken place in the field of the accused.

(iv) According to the trial court, the presence of the prosecution witnesses Gurdev Singh and Gurdish Singh at the time of alleged occurrence is highly doubtful. Dr. Mukesh Gupta stated that the injuries on Gurdev Singh and Gurdish Singh could be caused by friendly hands and can be self suffered.

(v) No pellet was recovered from the injuries of the prosecution witnesses namely, Gurdev Singh and Gurdish Singh. The possibility of the injuries on their persons having been fabricated at a later stage cannot be ruled out.

The trial court found that, in the instant case, it appeared that the inquest report was prepared first and the FIR was prepared at some later stage because there was no mention about the injuries of Gurdev Singh and Gurdish Singh in the inquest report, whereas this fact is mentioned in the FIR. According to the prosecution case, Gurdish Singh suffered a pellet injury on his left upper arm whereas, Gurdev Singh was hit on his left thigh. This was so mentioned in the FIR. If it was so, this fact would have been mentioned in the inquest report or the Investigating Officer must have prepared their injury statement, but no such injury statement was prepared at the spot nor their medical examination was got done.

In the cross-examination, Om Prakash ASI had admitted that he came to know about the injuries of Gurdish Singh and Gurdev Singh only when they gave their supplementary statements at the bus stand. The finding of the trial court is that the injuries were fabricated with the connivance of the

Investigating Officer just in order to make Gurdish Singh and Gurdev Singh stamp witnesses.

(vi) Gurdish Singh P.W.7 had admitted that his father Gurcharan Singh was face to face when Bakhtawar Singh gave Gandasa blow from above to downward vertically on the chest of Gurcharan Singh. However, Dr. Mukesh Gupta contradicted him and stated that injury no.3 on the person of Gurcharan Singh was skin deep and was horizontally placed and was possible by a fall on a sharp edged weapon. From this it can safely be concluded that it was not Bakhtawar Singh who gave Gandasa blow to Gurcharan Singh in the manner as suggested by the prosecution. It is most likely that Gurcharan Singh suffered injury no. 3 by a fall on his own Gandasa and this was the reason that the wound was only skin deep. The story put forth by the prosecution that Gurcharan Singh was cutting weeds of ridges with Gandasa is not believable. Gurdish Singh stated that he was collecting the cut weeds. They were not having any Kassi or Khurpa and it was not possible to cut weeds of ridges with Gandasa.

(vii) The trial court came to a clear conclusion that Bakhtawar Singh was injured at point 'F' as shown in the site plan at the hands of Gurcharan Singh (deceased). Gurcharan Singh after causing that injury forwarded towards Darshan Singh armed with Gandasa and at that point Darshan Singh had no option but to open fire and Gurcharan Singh died of that firearm injury. The trial court came to the definite conclusion that Darshan Singh fired a shot in his right of private defence.

(viii) The trial court after marshalling the entire evidence came to the conclusion that seeing from all angles, the probabilities of the case are much more in favour of the defence than in favour of the prosecution. The possibility of the injuries having been caused to Gurcharan Singh by Darshan Singh in exercise of private defence cannot be ruled out. Thus, the prosecution has failed to prove its case against the accused person beyond any reasonable doubt and the benefit has to be given to them.

19. We deem it appropriate to briefly discuss the principle of right of private defence and how the courts have crystallized this principle in some important judgments.

20. Relevant provisions dealing with the right of private defence are sections 96 and 97 of the Indian Penal Code.

"*96. Things done in private defence.* – Nothing is an offence which is done in the exercise of the right of private defence.

97. Right of private defence of the body and of property. – Every person has a right subject to the restrictions contained in Section 99, to defend—

First.– His own body, and the body of any other person, against any offence affecting the human body;

Secondly.– The property, whether moveable or immoveable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."

21. Section 100 of the Indian Penal Code is extracted as under:

"*100. When the right of private defence of the body*

extends to causing death. -- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely: --

First. -- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly. -- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly. -- An assault with the intention of committing rape;

Fourthly. -- An assault with the intention of gratifying unnatural lust;

Fifthly. -- An assault with the intention of kidnapping or abducting;

Sixthly. -- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release."

22. Section 100 of the Indian Penal Code justifies the killing of an assailant when apprehension of atrocious crime enumerated in several clauses of the section is shown to exist. First clause of Section 100 applies to cases where there is reasonable apprehension of death while second clause is attracted where a person has a genuine apprehension that his adversary is going to attack him and he reasonably believes that the attack will result in a grievous hurt. In that event he can go to the extent of causing the latter's death in the exercise of the right of private defence even though the latter may not have inflicted any blow or injury on him.

23. It is settled position of law that in order to justify the act of causing death of the assailant, the accused has simply to satisfy the court that he was faced with an assault which caused a reasonable apprehension of death or grievous hurt. The question whether the apprehension was reasonable or not is a question of fact depending upon the facts and circumstances of each case and no strait-jacket formula can be prescribed in this regard. The weapon used, the manner and nature of assault and other surrounding circumstances should be taken into account while evaluating whether the apprehension was justified or not?

SCOPE AND FOUNDATION OF THE PRIVATE DEFENCE

24. The rule as to the right of private defence has been stated by Russel on *Crime* (11th Edn., Vol.1, p.491) thus:

> "….. a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

When enacting sections 96 to 106 of the Indian Penal Code, excepting from its penal provisions, certain classes of acts, done in good faith for the purpose of repelling unlawful aggressions, the Legislature clearly intended to arouse and encourage the manly spirit of self-defence amongst the citizens, when faced with grave danger. The law does not require a law-abiding citizen to behave like a coward when confronted with an imminent unlawful aggression. As repeatedly observed by this court there is nothing more degrading to the human spirit than to run away in face of danger. The right of private defence is thus designed to serve a social purpose and deserves to be fostered within the prescribed limits.

25. Hari Singh Gour in his celebrated book on Penal Law of India (11th Edition 1998-99) aptly observed that self-help is the first rule of criminal law. It still remains a rule, though in process of time much attenuated by considerations of necessity, humanity, and social order. According to Bentham, in his book 'Principles of Penal Laws' has observed "the right of defence is absolutely necessary". It is based on the cardinal principle that it is the duty of man to help himself.

26. Killing in defence of a person, according to the English law, will amount to either justifiable or excusable homicide or chance medley, as the latter is termed, according to the circumstances of the case.

27. But there is another form of homicide which is excusable in self-defence. There are cases where the necessity for self-defence arises in a sudden quarrel in which both parties engage, or on account of the initial provocation given by the person who has to defend himself in the end against an assault endangering life.

28. The Indian Penal Code defines homicide in self-defence as a form of substantive right, and therefore, save and except the restrictions imposed on the right of the Code itself, it seems that the special rule of English Law as to the duty of retreating will have no application to this country where there is a real need for defending oneself against deadly assaults.

29. The right to protect one's own person and property against the unlawful aggressions of others is a right inherent in man. The duty of protecting the person and property of others is a duty which man owes to society of which he is a member and the preservation of which is both his interest and duty. It is, indeed, a duty which flows from human sympathy. As Bentham said: "It is a noble movement of the heart, that indignation which kindles at the sight of the feeble injured by the strong. It is noble movement which makes us forget our danger at the first cry of distress….. It concerns the public safety

that every honest man should consider himself as the natural protector of every other." But such protection must not be extended beyond the necessities of the case, otherwise it will encourage a spirit or lawlessness and disorder. The right has, therefore, been restricted to offences against the human body and those relating to aggression on property.

30. When there is real apprehension that the aggressor might cause death or grievous hurt, in that event the right of private defence of the defender could even extend to causing of death. A mere reasonable apprehension is enough to put the right of self-defence into operation, but it is also settled position of law that a right of self-defence is only right to defend oneself and not to retaliate. It is not a right to take revenge.

31. Right of private defence of person and property is recognized in all free, civilsed, democratic societies within certain reasonable limits. Those limits are dictated by two considerations : (1) that the same right is claimed by all other members of the society and (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order. The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrong done to them or to punish the wrong doer of commission of offences.

32. A legal philosopher Michael Gorr in his article "Private Defense" (published in the Journal "Law and Philosophy" Volume 9, Number 3 / August 1990 at Page 241) observed as under:

> "Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in what Glanville Willams has termed "private defence", i.e., to inflict serious (even lethal) harm upon another person in

order to protect oneself or some innocent third party from suffering the same".

33. The basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self creation. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose.

34. This court in number of cases have laid down that when a person is exercising his right of private defence, it is not possible to weigh the force with which the right is exercised. The principle is common to all civilized jurisprudence. In *Robert B. Brown v. United States of America* (1921) 256 US 335, it is observed that a person in fear of his life in not expected to modulate his defence step by step or tier by tier. Justice Holmes in the aforementioned case aptly observed "detached reflection cannot be demanded in the presence of an uplifted knife".

35. According to Section 99 of the Indian Penal Code the injury which is inflicted by the person exercising the right should commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right every reasonable allowance should be made for the bona fide defender. The courts in one voice have said that it would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to attack.

36. The courts have always consistently held that the right of private defence extends to the killing of the actual or potential

assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of section 100 of the IPC. According to the combined effect of two clauses of section 100 IPC taking the life of the assailant would be justified on the plea of private defence; if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. When we see the principles of law in the light of facts of this case where Darshan Singh in his statement under section 313 has categorically stated that "Gurcharan Singh gave a gandasa blow hitting my father Bakhtawar Singh on the head as a result of which he fell down. I felt that my father had been killed. Gurcharan Singh then advanced towards me holding the gandasa. I apprehended that I too would be killed and I then pulled the trigger of my gun in self defence." Gurcharan Singh died of gun shot injury.

37. In the facts and circumstances of this case the appellant, Darshan Singh had the serious apprehension of death or at least the grievous hurt when he exercised his right of private defence to save himself.

BRIEF ENUMERATION OF IMPORTANT CASES:

38. The legal position which has been crystallized from a large number of cases is that law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. This principle has been enunciated in *Mahandi v. Emperor* [(1930) 31 Criminal Law Journal 654 (Lahore); *Alingal Kunhinayan & Another v. Emperor* Indian Law Reports 28 Madras 454; *Ranganadham Perayya*, In re (1957) 1 Andhra Weekly Reports 181.

39. The law clearly spells out that right of private defence is available only when there is reasonable apprehension of

receiving the injury. The law makes it clear that it is necessary that the extent of right of private defence is that the force used must bear a reasonable proportion of the injury to be averted, that is the injury inflicted on the assailant must not be greater than is necessary for the protection of the person assaulted. A person in fear of his life is not expected to modulate his defence step by step, but at the same time it should not be totally disproportionate.

40. A Full Bench of the Orissa High Court in *State of Orissa v. Rabindranath Dalai & Another* 1973 Crl LJ 1686 (Orissa) (FB) summarized the legal position with respect to defence of person and property thus: "In a civilized society the defence of person and property of every member thereof is the responsibility of the State. Consequently, there is a duty cast on every person faced with apprehension of imminent danger of his person or property to seek the aid of the machinery provided by the State but if immediately such aid is not available, he has the right of private defence.

41. In *Laxman Sahu v. State of Orissa* 1986 (1) Supp SCC 555 this court observed that it is needless to point out in this connection that the right of private defence is available only to one who is suddenly confronted with immediate necessity of averting an impending danger not of his creation.

42. In *Raghavan Achari v. State of Kerala* 1993 Supp. (1) SCC 719 this court observed that "No court expects the citizens not to defend themselves especially when they have already suffered grievous injuries".

43. In *Jagtar Singh* v. *State of Punjab* AIR 1993 SC 970 this court held that "the accused has taken a specific plea of right of self-defence and it is not necessary that he should prove it beyond all reasonable doubt. But if the circumstances warrant that he had a reasonable apprehension that death or grievous hurt was likely to be caused to him by the deceased or their companions, then if he had acted in the right of self-defence,

he would be doing so lawfully."

44. In *Puran Singh & Others v. The State of Punjab* (1975) 4 SCC 518 this court observed that in the following circumstances right of private defence can be exercised :-

i. There is no sufficient time for recourse to the public authorities

ii. There must be a reasonable apprehension of death or grievous hurt to the person or danger to the property concerned.

iii. More harm than necessary should not have been caused.

45. In *Bhagwan Swaroop* v. *State of Madhya Pradesh* (1992) 2 SCC 406 this court had held as under:-

> "It is established on the record that Ramswaroop was being given lathi blows by the complainant party and it was at that time that gun-shot was fired by Bhagwan Swaroop to save his father from further blows. A lathi is capable of causing a simple as well as a fatal injury. Whether in fact the injuries actually caused were simple or grievous is of no consequence. It is the scenario of a father being given lathi blows which has to be kept in mind and we are of the view that in such a situation a son could reasonably apprehend danger to the life of his father and his firing a gun-shot at that point of time in defence of his father is justified."

46. The facts of this case are akin to the facts of the instant case.

47. In *Kashmiri Lal & Others v. State of Punjab* (1996) 10 SCC 471, this court held that "a person who is unlawfully attacked has every right to counteract and attack upon his assailant and cause such injury as may be necessary to ward

off the apprehended danger or threat."

48. In *James Martin v. State of Kerala* (2004) 2 SCC 203, this court again reiterated the principle that the accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

49. In *Gotipulla Venkatasiva Subbrayanam & Others v. The State of Andhra Pradesh & Another* (1970) 1 SCC 235, this court held that "the right to private defence is a very valuable right and it has been recognized in all civilized and democratic societies within certain reasonable limits."

50. In *Mahabir Choudhary v. State of Bihar* (1996) 5 SCC 107 this court held that "the High Court erred in holding that the appellants had no right to private defence at any stage. However, this court upheld the judgment of the sessions court holding that since the appellants had right to private defence to protect their property, but in the circumstances of the case, the appellants had exceeded right to private defence. The court observed that right to private defence cannot be used to kill the wrongdoer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence including killing".

51. In *Munshi Ram & Others v. Delhi Administration* (1968) 2 SCR 455, this court observed that "it is well settled that even if the accused does not plead self defence, it is open to consider such a plea if the same arises from the material on record. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of materials available on record.

52. In *State of Madhya Pradesh v. Ramesh* (2005) 9 SCC 705, this court observed "every person has a right to defend

his own body and the body of another person against any offence, affecting the human body. The right of self defence commences as soon as reasonable apprehension arises and it is co-terminus with the duration of such apprehension. Again, it is defensive and not retributive right and can be exercised only in those cases where there is no time to have recourse to the protection of the public authorities."

53. In *Triloki Nath & Others v. State of U.P*. (2005) 13 SCC 323 the court observed as under:-

> "No decision relied upon by the Appellants lays down a law in absolute terms that in all situations injuries on the persons of the accused have to be explained. Each case depends upon the fact situation obtaining therein."

54. In *Vidhya Singh v. State of Madhya Pradesh* (1971) 3 SCC 244, the court observed that "the right of self-defence is a very valuable right, serving a social purpose and should not be construed narrowly. Situations have to be judged from the subjective point of view of the accused concerned in the surrounding excitement and confusion of the moment, confronted with a situation of peril and not by any microscopic and pedantic scrutiny. In adjudging the question as to whether more force than was necessary was used in the prevailing circumstances on the spot it would be inappropriate, as held by this court, to adopt tests by detached objectivity which would be so natural in a court room, or that which would seem absolutely necessary to a perfectly cool bystander. The person facing a reasonable apprehension of threat to himself cannot be expected to modulate his defence step by step with any arithmetical exactitude of only that much which is required in the thinking of a man in ordinary times or under normal circumstances."

55. In *Jai Dev* v. *State of Punjab* AIR 1963 SC 612 the court held as under:-

"as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence."

56. In order to find out whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered.

57. In *Buta Singh v. The State of Punjab* (1991) 2 SCC 612, the court noted that a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private-defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hyper technical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negatived. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially, as noted above, a finding of fact."

58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

59. The High Court in the impugned judgment has reversed the trial court's judgment of acquittal and convicted the accused. Admittedly, Darshan Singh fired from his 12-bore double barrel gun which had a number of pellets. The High Court disbelieved the trial court's version that Gurdish Singh and Gurdev Singh did not receive fire arm injuries because no pellet or pellets were recovered from their bodies. In the impugned order, the High Court without giving any cogent reasons has set aside the well considered judgment of the trial court.

60. In our view, when a shot was fired from a 12-bore gun and if no pellet was recovered, then the trial court is not wrong in arriving at the conclusion that the injuries were not caused by a fire arm. The High Court on this point discarded the reasoning of the trial court without any sound basis.

61. The High Court gave the finding that "since it is a case of dual version, one given by the complainant, who appears to be a truthful witness when he has not concealed the role of his father and explained the injury of Bakhtawar Singh. On the contrary, the accused persons have come with untenable

defence." While arriving at this conclusion, the High Court in the impugned judgment has not followed the consistent legal position as crystallized by various judgments of this Court. The High Court or the Appellate Court would not be justified in setting aside a judgment of acquittal only on the ground that the version given by the complainant is more truthful.

62. In a case of acquittal, if the trial court's view is a possible or plausible view, then the Appellate Court or the High Court would not be justified in interfering with it. It is the settled legal position that there is presumption of innocence and that presumption is further fortified with the acquittal of the accused by the trial court. The Appellate Court or the High Court would not be justified in reversing the judgment of acquittal unless it comes to a clear conclusion that the judgment of the trial court is utterly perverse and, on the basis of the evidence on record, no other view is plausible or possible than the one taken by the Appellate Court or the High Court.

63. The High Court has unnecessarily laid stress on the point of recovery of the gun at the instance of Darshan Singh. The accused has not denied the incident. The case of the defence is that their case is covered by the right of private defence. Darshan Singh in his statement under Section 313 of the Code of Criminal Procedure, 1973 has admitted that he had fired from his licensed gun in his right of private defence. The High Court without properly comprehending the entire evidence on record reversed the well reasoned judgment of the trial court.

64. In the instant case after marshalling and scrutinizing the entire prosecution evidence, we are clearly of the view that the trial court's view is not only the possible or plausible view but it is based on the correct analysis and evaluation of the entire evidence on record. Rationally speaking, no other view is legally possible.

65. Consequently, this appeal is allowed and the impugned judgment of the High Court is set aside and the judgment of

acquittal of the trial court is restored. The role attributed to the appellant is fully covered by his right of private defence. Consequently, the appellant is acquitted. The appellant was released on bail by this Court. He need not surrender. The appeal is accordingly allowed and disposed of.

N.J. Appeal allowed.

STATE OF UTTARANCHAL
v.
BALWANT SINGH CHAUFAL & OTHERS
(Civil Appeal Nos.1134-1135 of 2002)

JANUARY 18, 2010

[DALVEER BHANDARI AND DR. MUKUNDAKAM SHARMA, JJ.]

Constitution of India, 1950:

Article 165, 217 and 226 – Advocate General for the State – Eligibility – Age – HELD: It is fully settled that the Advocate General for the State can be appointed after he/she attains the age of 62 years – Similarly, the Attorney General for India can be appointed after he/she attains the age of 65 years – Public Interest Litigation.

Public Interest Litigation:

Appointment of Advocate General for the State – Challenged by way of writ petition before High Court on the ground that incumbent before his appointment to the post had crossed 62 years of age – HELD: The issue having been settled half a century ago by a judgment of the constitution Bench of the Supreme Court and the position having been reiterated in several decisions of High Courts and Supreme Court thereafter, filing of writ petition by practicing advocate on an issue which is no longer res integra, is a clear abuse of process of the Court for extraneous considerations – This tendency has to be curbed effectively – Exemplary cost imposed on writ petitioners – Significance and evolution of public interest litigation – Explained – In order to preserve purity and sanctity of PIL, guidelines laid down – Constitution of India, 1950 –Article 165, 217 and 226 – Practice and Procedure.

Precedent:

When an issue is no longer res integra, filing of indiscriminate petitions raising the controversy repeatedly creates unnecessary strain on judicial system and leads to inordinate delay in disposal of genuine and bona fide cases – It is the bounden duty of Courts to ensure that controversy once settled by an authoritative pronouncement should not be reopened unless there are extra-ordinary reasons for doing so – Though a petitioner can ask the Court to review its own judgment, but that should be in a bona fide presentation with listing of all relevant cases in a chronological order and a brief description of what the judicial opinion has been, and why there should be re-consideration of the existing law.

'Words and Phrases:

Expression 'public interest litigation' – Defined.

A writ petition was filed as public interest litigation by the respondents in the High Court challenging the appointment of the Advocate General for the State on the ground that the incumbent had crossed the age of 62 years before his appointment to the post and, therefore, he was not eligible to hold the post. The High Court directed the State Government to take decision on the issue within the time stipulated in the order. Aggrieved, the State Government filed the appeals.

Giving directions to High Courts and adjourning the appeals for compliance thereof, the Court

HELD: 1.1. In view of the clear enunciation of law in various judgments, the controversy has been fully settled that the Advocate General for the State can be appointed after he/she attains the age of 62 years. Similarly, the Attorney General for India can be appointed after he/she attains the age of 65 years. In a number of other cases regarding the appointment of other authorities, courts have consistently taken the similar view. [Para 15] [706-H; 707-A-B]

Atlas Cycle Industries Ltd. Sonepat v. Their Workmen **1962 Supp. (3) SCR 89;** *Binay Kant Mani Tripathi v. Union of India & Others* **(1993) 4 SCC 49, relied on.**

G.D. Karkare v. T.L. Shevde & Others **AIR 1952 Nagpur 330,** *Ghanshyam Chandra Mathur v. The State of Rajasthan & Others* **1979 Weekly Law Notes 773;** *Dr. Chandra Bhan Singh v. State of Rajasthan & Others* **AIR 1983 Raj. 149;** *Manendra Nath Rai & Another v. Virendra Bhatia & Others* **AIR 2004 All. 133;** *Prem Chandra Sharma & Others v. Milan Banerji & Others* **2005 (3) ESC 2001 and** *Baishnab Patnaik & Others v. The State* **AIR 1952 Orissa 60 and** *Gurpal Singh v. State of Punjab & Others* **(2005) 5 SCC 136, referred to.**

1.2. When the controversy is no longer *res integra,* the filing of indiscriminate petitions raising the controversy repeatedly, creates unnecessary strain on the judicial system and consequently leads to inordinate delay in disposal of genuine and bona fide cases. [Para 9 and 24] [709-G-H; 704-E]

1.3. In the instant case, one of the petitioners before the High Court was a local practicing lawyer. The State of Uttrakhand was a part of the State of U.P. a few years ago. In the State of U.P., a large number of Advocate Generals appointed were beyond 62 years of age at the time of their appointment. The petitioner, ought to have bestowed some care before filing the writ petition in public interest under Article 226 of the Constitution. Similarly, it is the bounden duty of the court to ensure that the controversy once settled by an authoritative judgment should not be reopened unless there are extraordinary reasons for doing so. [Para 20, 21 and 23] [708-C-E; 709-E-F]

2.1. Public interest litigation has been defined by this Court* as a cooperative or collaborative effort by the petitioner, the State or public authority and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society. [Para 30] [711-D-E]

People's Union for Democratic Rights & Others v. Union of India & Others* **(1982) 3 SCC 235, relied on.

Black's Law Dictionary (6th Edition); *Advanced Law Lexicon*; *The Council for Public Interest Law, report of Public Interest Law*, **USA, 1976, referred to.**

2.2. Public interest litigation is an extremely important jurisdiction exercised by the Supreme Court and the High Courts. It is the product of realization of the constitutional obligation of the court. The Courts in a number of cases have given important directions and passed orders which have brought positive changes in the country. Public interest litigation is upshot and product of this court's deep and intense urge to fulfill its bounden duty and constitutional obligation. The Courts' directions have immensely benefited marginalized sections of the society in a number of cases. It has also helped in protection and preservation of ecology, environment, forests, marine life, wildlife etc. etc. The court's directions to some extent have helped in maintaining probity and transparency in the public life. [Para 31 and 33] [711-E-F; 712-C-E]

2.3. This court while exercising its jurisdiction of judicial review realized that a very large section of the society because of extreme poverty, ignorance, discrimination and illiteracy had been denied justice for time immemorial and in fact they have no access to justice. Pre-dominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalized sections of the society, this court has initiated, encouraged and propelled the public interest litigation. [Para 34] [712-C-E]

Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India & Others **AIR 1981 SC 298;** *Bandhua Mukti Morcha v. Union of India & Others* **AIR 1984 SC 802, referred to.**

2.4. Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements. [Para 39] [713-H; 714-C-E]

Fertilizer Corporation Kamagar Union (Regd., Sindri & Others v. Union of India & Others **AIR 1981 SC 844;** *Ramsharan Autyanuprasi & Another v. Union of India & Others* **AIR 1989 SC 549, referred to.**

EVOLUTION OF PUBLIC INTEREST LITIGATION

3.1. The development of public interest litigation has been extremely significant development in the history of the Indian jurisprudence and it can be broadly divided in three phases. The decisions of the Supreme Court in the first phase **in the 1970's loosened the strict** *locus standi* **requirements to permit filing of petitions on behalf of marginalized and deprived sections of the society by public spirited individuals, institutions and/or bodies. Most of the public interest litigation cases which were entertained by the courts are pertaining to enforcement of fundamental rights under Article 21 of the Constitution, of marginalized and deprived sections of the society. The Supreme Court broadened the traditional rule of standing and the definition of "person aggrieved". [Para 43 and 45] [715-D-H; 716-A]**

M. C. Mehta & Another v. Union of India & Others **AIR 1987 SC 1086;** *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Others* **(1976) 1 SCC 671 ;** *Bar Council of Maharashtra* v. *M.V. Dabholkar & Others* **1976 SCR 306;** *The Mumbai Kamgar Sabha, Bombay* v. *Abdulbhai Faizullabhai & Others* **AIR 1976 SC 1455;** *Sunil Batra* v. *Delhi Administration & Others* **AIR 1978 SC 1675;** *Hussainara Khatoon & Others* v. *Home Secretary, State of Bihar, Patna* **AIR 1979 SC 1369;** *Prem Shankar Shukla* v. *Delhi Administration* **AIR 1980 SC 1535;** *Municipal Council, Ratlam* v. *Vardhichand & Others* **AIR 1980 SC 1622;** *S.P. Gupta v. President of India & Others* **AIR 1982 SC 149 ;** *Anil Yadav & Others* v. *State of Bihar and Bachcho Lal Das, Superintendent, Central Jail, Bhagalpur, Bihar* **(1982) 2 SCC 195;** *Munna & Others* v. *State of Uttar Pradesh & Others*, **(1982) 1 SCC 545;** *Sheela Barse v. State of Maharashtra* **AIR 1983 SC 378;** *Dr. Upendra Baxi (I)* v. *State of Uttar Pradesh & Another* **1983 (2) SCC 308 ;** *Veena Sethi (Mrs.)* v. *State of Bihar & Others* **AIR 1983 SC 339;** *Labourers Working on Salal Hydro Project* v. *State of Jammu & Kashmir & Others* **AIR 1984 SC 177;** *Shri Sachidanand Pandey & Another* v. *The State of West Bengal & Others* **(1987) 2 SCC 295;** *B. R. Kapoor & Another* v. *Union of India & Others* **AIR 1990 SC 752 ;** *Smt. Nilabati Behera alias Lalita Behera* v. *State of Orissa & Others* **AIR 1993 SC 1960;** *Punjab and Haryana High Court Bar Association, Chandigarh through its Secretary* v. *State of Punjab & Others* **(1994) 1 SCC 616;** *Navkiran Singh & Others* v. *State of Punjab through Chief Secretary & Another* **(1995) 4 SCC 591;** *Delhi Domestic Working Women's Forum* v. *Union of India & Others* **(1995) 1 SCC 14;** *Citizens for Democracy* v. *State of Assam & Others* **(1995) 3 SCC 743;** *Paramjit Kaur (Mrs.) v. State of Punjab & Others* **(1996) 7 SCC 20;** *M. C. Mehta* v. *State of Tamil Nadu & Others* **(1996) 6 SCC 756;** *D. K. Basu* v. *State of West Bengal* **(1997) 1 SCC 416;** *Vishaka & Others* v. *State of Rajasthan & Others* **(1997) 6 SCC 241;** *Prajwala* v. *Union of India & Others* **(2009) 4 SCC 798;** *Avinash Mehrotra* v. *Union of India & Others* **(2009) 6 SCC 398, referred to.**

3.2. The second phase of public interest litigation started sometime in the 1980's and it related to the courts' innovation and creativity, where directions were given to protect ecology and environment, forests, marine life, wild life, mountains, rivers and historical monuments etc. with special attention to the problem of air pollution, water pollution, environmental degradation. [Para 45 and 81] [729-F-G; 716-D]

M.C. Mehta & Another v. Union of India & Others **AIR 1987 SC 1086;** *Rural Litigation and Entitlement Kendra, Dehradun & Others v. State of U.P. & Others* **AIR 1985 SC 652;** *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P. & Others* **AIR 1990 SC 2060;** *Subhash Kumar v. State of Bihar & Others* **AIR 1991 SC 420;** *M.C. Mehta v. Union of India & Others* **(1988) 1 SCC 471;** *Vellore Citizens Welfare Forum v. Union of India & Others* **AIR 1996 SC 2715;** *M.C. Mehta* v. *Union of India & Others* **AIR 1988 SC 1037;** *M.C. Mehta* v. *Union of India & Others* **AIR 1997 SC 734;** *A. P.*

Pollution Control Board v. *Prof. M. V. Nayadu (Retd.) & Others* **(1999) 2 SCC 718;** *Essar Oil Ltd.* v. *Halar Utkarsh Samiti & Others* **AIR 2004 SC 1834,** *Karnataka Industrial Areas Development Board* v. *Sri C. Kenchappa & Others* **AIR 2006 SC 2038;** *M.C. Mehta* v. *Kamal Nath & Others* **(2000) 6 SCC 213;** *Managing Director, A.P.S.R.T.C.* v. *S. P. Satyanarayana* **AIR 1998 SC 2962;** ***Re. Noise Pollution*** **AIR 2005 SC 3136;** *Indian Council for Enviro-Legal Action v. Union of India & Others* **(1996) 5 SCC 281; and** *S. Jagannath v. Union of India & Others* **(1997) 2 SCC 87, referred to.**

3.3. In the third phase in the 1990' s, the Supreme Court expanded the ambit and scope of public interest litigation further, and passed a number of judgments, orders or directions to unearth corruption and maintain probity, transparency, integrity and morality in the governance of the State. The probity in governance is a *sine qua non* for an efficient system of administration and for the development of the country and an important requirement for ensuring probity in governance is the absence of corruption. The High Courts also under Article 226 followed the Supreme Court. [Para 106] [739-E-G]

Vineet Narain & Others v. *Union of India & Another* **AIR 1998 SC 889;** *Rajiv Ranjan Singh 'Lalan' & Another* v. *Union of India & Others* **(2006) 6 SCC 613.;** *M.C. Mehta* v. *Union of India & Others* **(2007) 1 SCC 110;** *M.C. Mehta* v. *Union of India & Others* **(2007) 12 SCALE 91;** *Centre for Public Interest Litigation* v. *Union of India & Another* **AIR 2003 SC 3277;** *Pareena Swarup* v. *Union of India* **(2008) 13 SCALE 84;** *L. Chandrakumar* v. *Union of India & Others* **(1997) 3 SCC 261, referred to.**

3.4. The Indian courts may have taken some inspiration from the group or class interest litigation of the United States of America and other countries but the shape of the public interest litigation as we see now is predominantly indigenously developed jurisprudence. The public interest litigation as developed in various facets and various branches is unparalleled. The Indian Courts by its judicial craftsmanship, creativity and urge to provide access to justice to the deprived, discriminated and otherwise vulnerable sections of society have touched almost every aspect of human life while dealing with cases filed in the label of the public interest litigation. The credibility of the superior courts of India has been tremendously enhanced because of some vital and important directions given by the courts. The courts' contribution in helping the poorer sections of the society by giving new definition to life and liberty and to protect ecology, environment and forests are extremely significant. [Para 159 and 160] [754-B-E]

Oshlack v Richmond River Council **(1998) 193 CLR 72 : (1998) 152 ALR 83;** *Oliver Brown v. Board of Education of Topeka* **347 U.S. 483, 489-493 (1954);** *Association of Data Processing Service Organizations* v. *William B. Camp* **397 U.S. 150 (1970);** *Olive B. Barrows* v. *Leola Jackson* **346 U.S. 249 (1953), 73 S.Ct. 1031;** *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)* **412 US 669 (1973);** *Paul J. Trafficante* v. *Metropolitan Life Insurance Company* **409 U.S. 205 (1972) ;** *Thomas E. Singleton v. George J. L. Wulff* **428 U.S. 106 (1976);** *Caplin v. Drysdale* **491 U.S. 617, 623-24 n. 3 (1989);** *Robert Warth v. Ira Seldin* **422 U.S. 490, 511 (1975);** *James B. Hunt v. Washington State Apple Advertising Commission,* **432 U.S. 333, 343 (1977);** *Re. Reed, Bowen & Co.* **(1887) 19 QBD 174;** *Attorney-General of the Gambia v. Pierre Sarr N'Jie* **(1961) AC 617;** *Regina v. Commissioner of Police of the Metropolis, Ex parte Blackburn* **[1968] 2 W.L.R. 893 ("Blackburn I");** *Blackburn v. Attorney-General* **[1971] 1 W.L.R. 1037);** *Regina v. Commissioner of Police of the Metropolis, Ex parte Blackburn* **[1973] Q.B. 241;** *Regina v. Greater London Council ex parte. Blackburn* **[1976] 1 W.L.R. 550;** *Attorney*

General Ex rel McWhirter v. Independent Broadcasting Authority, **(1973) Q.B. 629;** *Gouriet v. Union of Post Office Workers* [1978] A.C. 435; *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* **[1982] A.C. 617;** *Regina v. Secretary of State for the Environment, Ex parte Rose Theatre Trust Co.* **(1990) 1 Q.B. 504;** *Soobramoney v. Minister of Health, KwaZulu-Natal*, **1998 (1) SA 765 (CC);** *Ferreira v. Levin NO & Others* **1996 (1) SA 984 (CC);** ***S v.*** *Twala (South African Human Rights Commission Intervening)*, **2000 (1) SA 879;** *Xinwa & Others v. Volkswagen of South Africa (PTY) Ltd.* **2003 (4) SA 390, referred to.**

3.5. The development of public interest litigation in India has had an impact on the judicial systems of neighbouring countries like Bangladesh, Sri Lanka, Nepal and Pakistan and other countries. [Para 146] [750-B-C]

General Secretary, West Pakistan Salt Miners Labour Union (CBA) Khewra, Jhelum v. *The Director, Industries and Mneral Development, Punjab, Lahore* **1994 SCMR 2061 (Supreme Court of Pakistan) ;** *Ms. Shehla Zia* v. *WAPDA* **PLD 1994 Supreme Court 693, referred to.**

ABUSE OF THE PUBLIC INTEREST LITIGATION:

4.1. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. Time has come when genuine and *bona fide* public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In considered opinion of the Court this important jurisdiction has to be protected and preserved in the larger interest of the people of this country but for this purpose, effective

steps have to be taken to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts. [Para 161 and 162] [754-F-H]

BALCO Employees' Union (Regd.) v. Union of India & Others **AIR 2002 SC 350;** *Neetu v. State of Pubjab & Others* **AIR 2007 SC 758;** *S.P. Anand v. H.D. Deve Gowda & Others* **AIR 1997 SC 272;** *Sanjeev Bhatnagar v. Union of India & Others* **AIR 2005 SC 2841;** *Charan Lal Sahu & Others v. Giani Zail Singh & Another* **AIR 1984 SC 309;** *J. Jayalalitha v. Government of Tamil Nadu & Others* **(1999) 1 SCC 53;** *Holicow Pictures Pvt. Ltd.* v. *Prem Chandra Mishra & Others* **AIR 2008 SC 913, referred to.**

Everywoman's Health Centre Society v. Bridges **54 B.C.L.R. (2nd Edn.) 294; *Harris v. Marsh* 679 F.Supp. 1204 (E.D.N.C. 1987);** *Frye v. Pena* **199 F.3d 1332 (Table), 1999 WL 974170, referred to.**

4.2. The court should be careful that its jurisdiction is not abused by a person or a body of persons to further his or their personal causes or to satisfy his or their personal grudge or grudges. The stream of justice should not be allowed to be polluted by unscrupulous litigants. [Para 186] [763-A-B]

Dattaraj Nathuji Thaware v. State of Maharashtra & Others **(2005) 1 SCC 590, referred to.**

4.3. In the instant case, a practicing lawyer has made a serious attempt to demean an important constitutional office. The petitioner ought to have known that the controversy which he has been raising in the petition stands concluded half a century ago by a Constitution Bench of this Court and the controversy involved in this case is no longer *res integra*. A degree of precision and purity in presentation is a *sine qua non* for a petition filed by a member of the Bar under the label of public interest

litigation. It is expected from a member of the Bar to at least carry out the basic research whether the point raised by him is *res integra* or not. The lawyer who files such a petition cannot plead ignorance. The petitioner ought to have refrained from filing such a frivolous petition. This case is a clear case of the abuse of the process of the court in the name of public interest litigation. This tendency has to be curbed effectively. [Para 189 and 190] [763-C-E-H; 764-A-B]

4.4. It is made it clear that the petitioner can ask the court to review its own judgment because of flaws and lacunae, but that should have been a bona fide presentation with listing of all relevant cases in a chronological order and a brief description of what judicial opinion has been and cogent and clear request why there should be re-consideration of the existing law. Unfortunately, the petitioner has not done this exercise. [Para 191] [764-C-E]

4.5. It may be pertinent to mention that, despite the service of notice, the respondents, who had initially filed the writ petition before the High Court challenging the appointment of the Advocate General, did not appear before this Court. This clearly demonstrates the non-seriousness and non-commitment of the respondents in filing the petition. [Para 4] [697-C]

4.6. On consideration of the totality of the facts and circumstances of the case, the proceedings of the writ petition filed in the High Court are quashed. The respondents-writ petitioners are directed to pay costs of Rs.1,00,000/- (Rupees One Lakh) in the name of Registrar General of the High Court. Chief Justice of the High Court would create a fund in the name of Uttarakhand High Court Lawyers Welfare Fund, if not already in existence. It is abundantly made clear that the Court is not discouraging the public interest litigation in any manner, what the Court is trying to curb is its misuse and abuse. [Para 192 to 194] [764-F-H; 765-A-C]

5. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity

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and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

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(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations. [Para 198] [765-G-H; 766-A-H; 767-A-B]

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Case Law Reference:

1962 Supp. (3) SCR 89	**relied on**	**para 8**
AIR 1952 Nagpur 330	**referred to**	**para 8**
1979 Weekly Law Notes 773	**referred to**	**para 11**
AIR 1983 Raj. 149	**referred to**	**para 12**
AIR 2004 All. 133	**referred to**	**para 13**
2005 (3) ESC 2001	**referred to**	**para 14**
(1993) 4 SCC 49	**relied on**	**para 16**
AIR 1952 Orissa 60	**referred to**	**para 17**
(2005) 5 SCC 136	**referred to**	**para 18**
(1982) 3 SCC 235	**relied on**	**para 30**

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AIR 1981 SC 298	**referred to**	**para 36**
AIR 1984 SC 802	**referred to**	**para 37**
AIR 1981 SC 844	**referred to**	**para 40**
AIR 1989 SC 549	**referred to**	**para 41**
AIR 1987 SC 1086	**referred to**	**para 42**
(1976) 1 SCC 671	**referred to**	**para 47**
1976 SCR 306	**referred to**	**para 48**
AIR 1976 SC 1455	**referred to**	**para 50**
AIR 1978 SC 1675	**referred to**	**para 51**
AIR 1979 SC 1369	**referred to**	**para 52**
AIR 1980 SC 1535	**referred to**	**para 53**
AIR 1980 SC 1622	**referred to**	**para 54**
AIR 1982 SC 149	**referred to**	**para 57**
(1982) 2 SCC 195	**referred to**	**para 59**
(1982) 1 SCC 545	**referred to**	**para 60**
AIR 1983 SC 378	**referred to**	**para 62**
1983 (2) SCC 308	**referred to**	**para 63**
AIR 1983 SC 339	**referred to**	**para 64**
AIR 1984 SC 177	**referred to**	**para 65**
(1987) 2 SCC 295	**referred to**	**para 66**
AIR 1990 SC 752	**referred to**	**para 67**
AIR 1993 SC 1960	**referred to**	**para 68**
(1994) 1 SCC 616	**referred to**	**para 69**
(1995) 4 SCC 591	**referred to**	**para 70**

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(1995) 1 SCC 14	**referred to**	**para 71**	A
(1995) 3 SCC 743	**referred to**	**para 72**	
(1996) 7 SCC 20	**referred to**	**para 73**	
(1996) 6 SCC 756	**referred to**	**para 74**	B
(1997) 1 SCC 416	**referred to**	**para 75**	
(1997) 6 SCC 241	**referred to**	**para 76**	
(2009) 4 SCC 798	**referred to**	**para 77**	C
(2009) 6 SCC 398	**referred to**	**para 78**	
AIR 1987 SC 1086	**referred to**	**para 86**	
AIR 1985 SC 652	**referred to**	**para 87**	
AIR 1990 SC 2060	**referred to**	**para 88**	D
AIR 1991 SC 420	**referred to**	**para 89**	
(1988) 1 SCC 471	**referred to**	**para 90**	
AIR 1996 SC 2715	**referred to**	**para 91**	E
AIR 1988 SC 1037	**referred to**	**para 92**	
AIR 1997 SC 734	**referred to**	**para 93**	
(1999) 2 SCC 718	**referred to**	**para 94**	F
AIR 2004 SC 1834	**referred to**	**para 96**	
AIR 2006 SC 2038	**referred to**	**para 97**	
(2000) 6 SCC 213	**referred to**	**para 98**	
AIR 1998 SC 2962	**referred to**	**para 100**	G
AIR 2005 SC 3136	**referred to**	**para 101**	
(1996) 5 SCC 281	**referred to**	**para 102**	
(1997) 2 SCC 87	**referred to**	**para 103**	H

A	**AIR 1998 SC 889**	**referred to**	**para 107**
	(2006) 6 SCC 613	**referred to**	**para 108**
	(2007) 1 SCC 110	**referred to**	**para 109**
B	**(2007) 12 SCALE 91**	**referred to**	**para 111**
	AIR 2003 SC 3277	**referred to**	**para 112**
	(2008) 13 SCALE 84	**referred to**	**para 115**
	(1997) 3 SCC 261	**referred to**	**para 115**
C	**(1998) 193 CLR 72 : (1998) 152 ALR 83**	**referred to**	**para 119**
	347 U.S. 483, 489-493 (1954)	**referred to**	**para 121**
D	**397 U.S. 150 (1970)**	**referred to**	**para 122**
	346 U.S. 249 (1953), 73 S.Ct. 1031	**referred to**	**para 123**
E	**412 US 669 (1973)**	**referred to**	**para 125**
	409 U.S. 205 (1972)	**referred to**	**para 126**
	428 U.S. 106 (1976)	**referred to**	**para 128**
F	**491 U.S. 617, 623-24 n. 3 (1989)**	**referred to**	**para 128**
	422 U.S. 490, 511 (1975)	**referred to**	**para 129**
	432 U.S. 333, 343 (1977)	**referred to**	**para 129**
G	**(1887) 19 QBD 174**	**referred to**	**para 131**
	(1961) AC 617	**referred to**	**para 132**
	[1968] 2 W.L.R. 893 (“Blackburn I	**referred to**	**para 133**
H	**[1971] 1 W.L.R. 1037**	**referred to**	**para 135**

[1973] Q.B. 241	**referred to**	**para 136**
[1976] 1 W.L.R. 550	**referred to**	**para 137**
(1973) Q.B. 629	**referred to**	**para 138**
[1978] A.C. 435	**referred to**	**para 138**
[1982] A.C. 617	**referred to**	**para 139**
(1990) 1 Q.B. 504	**referred to**	**para 140**
1998 (1) SA 765 (CC)	**referred to**	**para 141**
1996 (1) SA 984 (CC)	**referred to**	**para 143**
2000 (1) SA 879	**referred to**	**para 144**
2003 (4) SA 390	**referred to**	**para 145**
1994 SCMR 2061 (Supreme Court of Pakistan)	**referred to**	**para 150**
PLD 1994 Supreme Court 693	**referred to**	**para 154**
AIR 2002 SC 350	**referred to**	**para 163**
AIR 2007 SC 758	**referred to**	**para 166**
AIR 1997 SC 272	**referred to**	**para 167**
AIR 2005 SC 2841	**referred to**	**para 168**
(2005) 1 SCC 590	**referred to**	**para 169**
AIR 1984 SC 309	**referred to**	**para 170**
(1999) 1 SCC 53	**referred to**	**para 171**
AIR 2008 SC 913	**referred to**	**para 176**
54 B.C.L.R. (2nd Edn.) 294	**referred to**	**para 177**

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A B C D E F G H

679 F.Supp. 1204 (E.D.N.C. 1987)	**referred to**	**para 178**
199 F.3d 1332 (Table), 1999 WL 974170	**referred to**	**para 180**
(1992) 4 SCC 305	**relied on**	**para 184**
(2003) 7 SCC 546	**relied on**	**para 185**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1134-1135 of 2002.

From the Judgment & Order dated 12.7.2001 & 1.8.2001 of the High Court of Uttaranchal at Nainital in Civil Misc. Writ Petition No. 689 M/B of 2001.

Dinesh Dwivedi, S.S. Shamshery, Rachna Srivastava for the Appellant.

P.N. Gupta for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. These appeals have been filed by the State of Uttaranchal (now Uttarakhand) against the orders dated 12.7.2001 and 1.8.2001 passed by the Division Bench of the High Court of Uttaranchal at Nainital in Civil Miscellaneous Writ Petition No. 689 (M/B) of 2001.

2. The appointment of L. P. Nathani was challenged before the High Court in a Public Interest Litigation on the ground that he could not hold the august Office of the Advocate General of Uttarakhand in view of Article 165 read with Article 217 of the Constitution. According to the respondent, Mr. Nathani was ineligible to be appointed as the Advocate General because he had attained the age of 62 years much before he was appointed as the Advocate General. The High Court entertained the petition and directed the State Government to take decision

on the issue raised within 15 days and apprise the same to the High Court.

3. The State of Uttaranchal preferred special leave petitions before this Court on 6.8.2001. This Court vide order dated 9.8.2001 stayed the operation of the impugned judgment of the High Court. Thereafter on 11.2.2002, this Court granted leave and directed that the stay already granted shall continue.

4. It may be pertinent to mention that, despite the service of notice, the respondents who had initially filed the writ petition before the High Court challenging the appointment of Nathani as the Advocate General did not appear before this Court. This clearly demonstrates the non-seriousness and non-commitment of the respondents in filing the petition.

5. Before we proceed to examine the controversy involved in this case, we deem it appropriate to set out Articles 165 and 217 of the Constitution dealing with the post of the Advocate General and the qualifications for appointment to this post in the Constitution. Article 165 which deals with the appointment of the Advocate General for the States is reproduced as under:

> *"165. The Advocate-General for the State.*-(1) The Governor of each State shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State.
>
> (2) It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.
>
> (3) The Advocate-General shall hold office during the pleasure of the Governor, and shall receive such remuneration as the Governor may determine.

6. Article 217 which deals with the appointment and the conditions of the office of a Judge of a High Court is set out as under:

> *217 - Appointment and conditions of the office of a Judge of a High Court .*- (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years:
>
> Provided that—
>
> (a) a Judge may, by writing under his hand addressed to the President, resign his office;
>
> (b) a Judge may be removed from his office by the President in the manner provided in clause (4) of article 124 for the removal of a Judge of the Supreme Court;
>
> (c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.
>
> (2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—
>
> (a) has for at least ten years held a judicial office in the territory of India; or
>
> (b) has for at least ten years been an advocate of a High Court or of two or more such courts in succession;
>
> Explanation: For the purposes of this clause—

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

(b) in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act,1935, or has been an advocate of any High Court in any such area, as the case may be.

(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."

7. The Division Bench of the High Court in the impugned judgment observed that the first clause of Article 165 insists that the Governor shall appoint a person as the Advocate General who is qualified to be appointed as a Judge of a High Court. The qualifications for the appointment of a Judge of a High Court are prescribed in the second clause of Article 217. It is true that the first clause of Article 217 says that a Judge of a High Court "shall hold office until he attains the age of 60

years" (at the relevant time the age of retirement of a Judge of the High Court was 60 years and now it is 62 years). The Division Bench further held that the real question then was whether this provision is to be construed as one prescribing a qualification or as one prescribing the duration of the appointment of a Judge of a High Court. It was further held that as the provision does not occur in the second clause, it can only be construed as one prescribing the duration of the appointment of a Judge of a High Court. The Court further observed that the provisions about duration in the first clause of Article 217 cannot be made applicable to the Advocate General because the Constitution contains a specific provision about the duration of the appointment of the Advocate General in the third clause of Article 165 which says that the Advocate General shall hold office during the pleasure of the Governor. This provision does not limit the duration of the appointment by reference to any particular age, as in the case of a Judge, it is not permissible to import into it the words "until he attains the age of sixty years". The specific provision in the Constitution must, therefore, be given effect to without any limitation. If a person is appointed as an Advocate General, say at the age of fifty-five years, there is no warrant for holding that he must cease to hold his office on his attaining sixty two years because it is so stated about a Judge of a High court in the first clause of Article 217. If that be a true position, as we hold it is, then the appointment is not bad because the person is past sixty two years, so long as he has the qualifications prescribed in the second clause of Article 217.

8. Shri Dinesh Dwivedi, the learned senior counsel appearing for the State of Uttarakhand submitted that, over half a century ago, in *G.D. Karkare v. T.L. Shevde & Others* AIR 1952 Nagpur 330, this controversy has been settled by the Division Bench of the Nagpur High Court and the said judgment was approved by a Constitution Bench of this Court in the case of *Atlas Cycle Industries Ltd. Sonepat v. Their Workmen* 1962 Supp. (3) SCR 89. In *Karkare's* case (supra), it was observed

as follows:

"25. It is obvious that all the provisions relating to a Judge of a High Court cannot be made applicable to the Advocate-General. The provisions about remuneration are different for the two offices. A Judge of the High Court is governed by Art. 221. The Advocate-General is governed by clause (3) of Art. 165 and receives such remuneration as the Governor may determine.

26. What the first clause of Art. 165 insists is that the Governor shall appoint a person who is qualified to be appointed a Judge of a High Court to be Advocate-General for the State. The qualifications for the appointment of a Judge of a High Court are prescribed in the second clause of Art. 217. It is true that the first clause of Art 217 says that a Judge of a High Court "shall hold office until he attains the age of 60 years". The real question then is whether this provision is to be construed as one prescribing a qualification or as one prescribing the duration of the appointment of a Judge of a High Court. As the provision does not occur in the second clause, it can only be construed as one prescribing the duration of the appointment of a Judge of a High Court.

27. The provision about duration in the first clause of Art. 217 cannot be made applicable to the Advocate-General because the Constitution contains a specific provision about the duration of the appointment of the Advocate-General in the third clause of Art. 165 which says that the Advocate-General shall hold office during the pleasure of the Governor. As this provision does not limit the duration of the appointment by reference to any particular age, as in the case of a Judge, it is not permissible to import into it the words "until he attains the age of sixty years". The specific provision in the Constitution must therefore be given effect to without any limitation. If a person is appointed Advocate-General, say at the age of fifty-five,

there is no warrant for holding that he must cease to hold his office on this attaining sixty years because it is so stated about a Judge of a High Court in the first clause of Art. 217. If that be the true position, as we hold it is, then the appointment is not bad because the person is past sixty years, so long as he has the qualifications prescribed in the second clause of Art. 217. It was not suggested that the non-applicant does not possess the qualifications prescribed in that clause.

28. The provision that every Judge of a High Court "shall hold office until he attains the age of sixty years" has two aspects to it. While in one aspect it can be viewed as a guarantee of tenure during good behaviour to a person appointed as a Judge of a High Court until he attains the age of sixty, in another aspect it can be viewed as a disability in that a Judge cannot hold his office as of right after he attains the age of sixty years.

29. We say as of right because under Art. 224 a person who has retired as a Judge of a High Court may be requested to sit and act as a Judge of a High court. The attainment of the age of sixty by a person cannot therefore be regarded as a disqualification for performing the functions of a Judge. But the learned counsel for the applicant tried to distinguish between the case of a person qualified to be appointed a Judge of a High Court under Article 217 and the case of a person requested to sit and act as a Judge under Article 224.

The distinction between the case of a person qualified to be appointed a Judge of a High Court under Article 217 and the case of a person requested to sit and act under Article 224 is not with respect to the qualifications for performing the functions of a Judge, but with respect to the matters provided by Article 221, 222, 223, etc. In the language of the Constitution a Judge does not lose the qualifications prescribed in the second clause of Article

217 on the attainment of the age of sixty years. A person who attains that age cannot be appointed as a Judge not because he is not qualified to be so appointed within the meaning of the second clause of Article 217, but because the first clause of that Article expressly provides that a Judge shall hold office until he attains the age of sixty years.

(30) If the provision in the first clause of Article 217 viewed as a guarantee of tenure of office until the age of sixty is not available to the Advocate-General because he holds office during the pleasure of the Governor, we see no compelling reason why the same provision construed as a disability should be made applicable to him. We are, therefore, of the view that the first clause of Article 217 cannot be read with the first clause of Article 165 so as to disqualify a person from being appointed Advocate-General after the age of sixty years. We have no doubt on the point. Even if the question be considered as not free from doubt, as the applicant desires to construe the first clause of Article 217 as a disabling provision against the non-applicant, we cannot forget that provisions entailing disabilities have to be construed strictly: 'Parameshwaram Pillai Bhaskara Pillai v. State', 1950-5 Dom L R (Trav) 382. The canon of construction approved by their Lordships of the Privy Council is that if there be any ambiguity as to the meaning of a disabling provision, the construction which is in favour of the freedom of the individual should be given effect to : *'David v. De'silva',* (1934) A C 106 at p. 114.

(31) There is no force in the contention that the non-applicant could not have been appointed Advocate-General because he had retired as a Judge of the High Court. The learned counsel referred us to Clause (4)(a) of Article 22 of the Constitution and submitted that the Constitution makes a distinction between a person who has been a Judge and one who is qualified to be appointed

as a Judge of a High Court. The provision in our view only makes an exhaustive enumeration of the classes of persons who can constitute an Advisory Board. Such persons must either be or must have been or must be qualified to be appointed as Judges of a High Court. The provision has therefore no bearing on the question whether the first clause of Article 165 has to be read with the first clause of Article 217, which question we have already answered in the negative. The case of the non-applicant is unique. Article 220 is not applicable to him because he did not hold office as a Judge of the High Court after the commencement of the Constitution. So the bar contained in that Article also does not come in his way."

9. Despite the fact that the controversy has been fully settled by a judgment of this Court, it has been raised from time to time in a number of writ petitions before the various High Courts. We would reproduce some of the judgments to demonstrate that after the controversy has been finally settled by this Court, the filing of indiscriminate petitions with the same relief creates unnecessary strain on the judicial system and consequently leads to inordinate delay in disposal of genuine and bona fide cases.

10. The following cases would demonstrate that, in how many High Courts, the similar controversy has been raised after the matter was finally settled by this Court:

11. In *Ghanshyam Chandra Mathur v. The State of Rajasthan & Others* 1979 Weekly Law Notes 773, the appointment of the Advocate General was once again challenged. The court held that "…no age of superannuation has been mentioned in Article 165 of the Constitution of India. This clearly means that the age of superannuation which applies to a High Court Judge, does not apply to the office of the Advocate General".

12. In *Dr. Chandra Bhan Singh v. State of Rajasthan &*

Others AIR 1983 Raj. 149, the question regarding the validity of the appointment of the Advocate General was challenged. The Court in this case had held that the age of superannuation of a High Court Judge did not apply to the post of the Advocate General. The court noted that all provisions in the Constitution for High Court Judges, such as remuneration and tenure of office do not apply to the post of the Advocate General.

13. In *Manendra Nath Rai & Another v. Virendra Bhatia & Others* AIR 2004 All. 133, the appointment of the Advocate General was yet again challenged. The Court held as under:

> "The argument that the provision of Sub-clause (1) of Article 217 of the Constitution should be followed in the matter of appointment of Advocate General is wholly misconceived. Article 217 of the Constitution deals with the appointment and conditions of the office of a Judge of a High Court. The consultation with the Chief Justice of the State in the matter of appointment of a Judge of the High Court cannot be made a requirement in the matter of the appointment of Advocate General. The appointment of Advocate General is not governed by the aforesaid Article which falls in Chapter-V Part-6 of the Constitution whereas Article 165, which deals with the appointment of Advocate General for the State falls in Chapter II of Part 6. The scheme of the Constitution for the appointment of Advocate General as well as for appointment of a Judge of the High Court is totally different."

14. In a Division Bench judgment dated 4.2.2005 of the Allahabad High Court in *Prem Chandra Sharma & Others v. Milan Banerji & Others* in writ petition No. 716 (M/B) of 2005 reported in 2005 (3) ESC 2001, the appointment of the Attorney General for India was challenged and a prayer was made to issue a writ in the nature of *quo warranto*, because according to the petitioner, the respondent Milan Banerji had already attained the age of 65 years and he could not be appointed as the Attorney General for India. In that case, the Division

Bench relied upon the judgment of the Division Bench of the Nagpur High Court in *G.D. Karkare's* case (supra). The Court held as under:

> "Having examined various provisions of the Constitution, it is quite clear that the Constitution of India does not provide the retirement age of various constitutional appointees. No outer age limit has been provided for the appointment of the Attorney General, Solicitor General and Advocate General in the State. In the democratic system, prevailing in our country the Attorney General is appointed on the recommendation of the Prime Minister by the President of India and traditionally, he resigns along with the Prime Minister. Learned Counsel for the petitioner could not show any law relating to the age of retirement of Attorney General or embargo provided in Constitution on appointment of a person as Attorney General, who has already attained the age of 65 years. We are of the considered opinion that the letter and spirit of the Constitution as far as appointment of the Attorney General is concerned, looking to significance, responsibility and high status of the post, it lays down certain requirements for a Member of Bar to be appointed as Attorney General of India. It is in this backdrop that the framers of the Constitution thought it necessary to prescribe minimum requisite qualification by laying that a person who is qualified to be appointed as Judge of the Hon'ble Court can be appointed as Attorney-General of India. This situation, however, cannot lead us to the conclusion by any stretch of imagination that the Attorney General cannot hold his office after the age of 65 years. As already indicated herein-above there are various constitutional functionaries where no outer age limit is provided to hold the office."

15. In view of the clear enunciation of law in the aforesaid judgments, the controversy has been fully settled that the Advocate General for the State can be appointed after he/she

attains the age of 62 years. Similarly, the Attorney General for India can be appointed after he/she attains the age of 65 years. In a number of other cases regarding the appointment of other authorities, the Courts have consistently taken the similar view.

16. This Court in *Binay Kant Mani Tripathi v. Union of India & Others* (1993) 4 SCC 49 has re-affirmed this position. The Court pointed out that the decision of appointing D.K. Aggarwal to the position of the Vice-chairman of the Central Administrative Tribunal could not be held to be illegal or wrong on the ground that he was more than sixty two years old.

17. In *Baishnab Patnaik & Others v. The State* AIR 1952 Orissa 60, the appointment of a person to the Advisory Board under the Preventive Detention Act was challenged on the grounds that he was older than 60 years (the age of superannuation for High Court judges at that time). The court pointed out:

> "If the makers of the Constitution thought that the age limit was one of the qualifications for appointment as a Judge of a High Court they would not have specified it in Clause (1) of Article 217 but would have included it in Clause (2) of the said Article."

18. In *Gurpal Singh v. State of Punjab & Others* (2005) 5 SCC 136, the appointment of the appellant as Auction Recorder was challenged. The Court held that the scope of entertaining a petition styled as a public interest litigation and *locus standi* of the petitioner particularly in matters involving service of an employee has been examined by this Court in various cases. The Court observed that before entertaining the petition, the Court must be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. The court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge

in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions.

19. The aforementioned cases clearly give us the picture how the judicial process has been abused from time to time and after the controversy was finally settled by a Constitution Bench of this Court, repeatedly the petitions were filed in the various courts.

20. In the instant case, one of the petitioners before the High Court is a practicing lawyer of the court. He has invoked the extraordinary jurisdiction of the High Court in this matter. It was expected from a Hon'ble member of the noble profession not to invoke the jurisdiction of the court in a matter where the controversy itself is no longer *res integra*.

21. Similarly, it is the bounden duty of the court to ensure that the controversy once settled by an authoritative judgment should not be reopened unless there are extraordinary reasons for doing so.

22. In the instant case, the High Court entertained the petition despite the fact that the controversy involved in the case was no longer *res integra*. In reply to that writ petition, the Chief Standing Counsel of Uttrakhand also filed a Miscellaneous Application before the High Court. The relevant portion of the application reads as under:

> "3. That the following Attorney Generals appointed under Article 76 of the Constitution were appointed when they were appointed as Attorney General were beyond prescribed age for appointment as Supreme Court of India.
>
> (I) Sri M. C. Setalvad
>
> (II) Sri C. K. Dapatary

(III) Shri Niren De

(IV) Sri Lal Narain Singh

(V) Sri K. Parasaran

(VI) Sri Soli Sorabjee

4. That the appointment of present Attorney General (Mr. Milon Banerjee) was challenged before the Delhi High Court and the petition was dismissed in limine. The appointment of Mr. R.P. Goel, Advocate General of U.P. who has passed the age of 62 at the time of appointment was also dismissed.

5. That in the Hon'ble High Court of Judicature at Allahabad Sri JV. K.S. Chaudhary, Sir Rishi Ram, Pt. Kanhaiya Lal Mishra, Sri Shanti Swaroop Bhatnagar and several others were appointed as Advocate General after crossing the age of 62 years. There were several Advocate Generals in India who were appointed after 62 years."

23. The State of Uttrakhand was a part of the State of U.P. a few years ago. In the State of U.P., a large number of Advocate Generals appointed were beyond 62 years of age at the time of their appointment. The petitioner, a local practicing lawyer, ought to have bestowed some care before filing this writ petition in public interest under Article 226 of the Constitution.

24. The controversy raised by the petitioner in this case was decided 58 years ago in the judgment of *Karkare* (supra) which was approved by the Constitution Bench of the Supreme Court way back in 1962. Unfortunately, the same controversy has been repeatedly raised from time to time in various High Courts. When the controversy is no longer *res-integra* and the same controversy is raised repeatedly, then it not only wastes the precious time of the Court and prevent the Court from deciding other deserving cases, but also has the immense

potentiality of demeaning a very important constitutional office and person who has been appointed to that office.

25. In our considered view, it is a clear case of the abuse of process of court in the name of the Public Interest Litigation. In order to curb this tendency effectively, it has now become imperative to examine all connected issues of public interest litigation by an authoritative judgment in the hope that in future no such petition would be filed and/or entertained by the Court.

26. To settle the controversy, we deem it appropriate to deal with different definitions of the Public Interest Litigation in various countries. We would also examine the evolution of the public interest litigation.

DEFINITIONS OF PUBLIC INTEREST LITIGATION

27. Public Interest Litigation has been defined in the Black's Law Dictionary (6th Edition) as under:-

> "Public Interest - Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, state or national government...."

28. Advanced Law Lexicon has defined 'Public Interest Litigation' as under:-

> "The expression 'PIL' means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of the community has pecuniary interest or some interest by which their legal rights or liabilities are affected."

29. The Council for Public Interest Law set up by the Ford

Foundation in USA defined "public interest litigation" in its report of Public Interest Law, USA, 1976 as follows:

> "Public Interest Law is the name that has recently been given to efforts provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, *consumers, racial and ethnic minorities and others."* (M/s Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra & Ors. – AIR 2008 SC 913, para 19).

30. This court in *People's Union for Democratic Rights & Others v. Union of India & Others* (1982) 3 SCC 235 defined 'Public Interest Litigation' and observed that the "Public interest litigation is a cooperative or collaborative effort by the petitioner, the State of public authority and the judiciary to secure observance of constitutional or basic human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society".

ORIGIN OF PUBLIC INTEREST LITIGATION:

31. The public interest litigation is the product of realization of the constitutional obligation of the court.

32. All these petitions are filed under the big banner of the public interest litigation. In this view of the matter, it has become imperative to examine what are the contours of the public interest litigation? What is the utility and importance of the public interest litigation? Whether similar jurisdiction exists in other countries or this is an indigenously developed jurisprudence? Looking to the special conditions prevalent in our country, whether the public interest litigation should be encouraged or discouraged by the courts? These are some of the questions which we would endeavour to answer in this judgment.

33. According to our opinion, the public interest litigation is an extremely important jurisdiction exercised by the Supreme Court and the High Courts. The Courts in a number of cases have given important directions and passed orders which have brought positive changes in the country. The Courts' directions have immensely benefited marginalized sections of the society in a number of cases. It has also helped in protection and preservation of ecology, environment, forests, marine life, wildlife etc. etc. The court's directions to some extent have helped in maintaining probity and transparency in the public life.

34. This court while exercising its jurisdiction of judicial review realized that a very large section of the society because of extreme poverty, ignorance, discrimination and illiteracy had been denied justice for time immemorial and in fact they have no access to justice. Pre-dominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalized sections of the society, this court has initiated, encouraged and propelled the public interest litigation. The litigation is upshot and product of this court's deep and intense urge to fulfill its bounded duty and constitutional obligation.

35. The High Courts followed this Court and exercised similar jurisdiction under article 226 of the Constitution. The courts expanded the meaning of right to life and liberty guaranteed under article 21 of the Constitution. The rule of *locus standi* was diluted and the traditional meaning of '*aggrieved person'* was broadened to provide access to justice to a very large section of the society which was otherwise not getting any benefit from the judicial system. We would like to term this as the first phase or the golden era of the public interest litigation. We would briefly deal with important cases decided by this Court in the first phase after broadening the definition of 'aggrieved person'. We would also deal with cases how this Court prevented any abuse of the public interest litigation?

36. This Court in *Akhil Bharatiya Soshit Karamchari*

Sangh (Railway) v. Union of India & Others AIR 1981 SC 298 at page 317, held that our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through 'class actions', 'public interest litigation', and 'representative proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concepts of 'cause of action', 'person aggrieved' and individual litigation are becoming obsolescent in some jurisdictions.

37. In *Bandhua Mukti Morcha v. Union of India & Others* AIR 1984 SC 802, this court entertained a petition even of unregistered Association espousing the cause of over down-trodden or its members observing that the cause of "little Indians" can be espoused by any person having no interest in the matter.

38. In the said case, this court further held that where a public interest litigation alleging that certain workmen are living in bondage and under inhuman conditions is initiated it is not expected of the Government that it should raise preliminary objection that no fundamental rights of the petitioners or the workmen on whose behalf the petition has been filed, have been infringed. On the contrary, the Government should welcome an inquiry by the Court, so that if it is found that there are in fact bonded labourers or even if the workers are not bonded in the strict sense of the term as defined in the Bonded Labour System (Abolition) Act, 1976 but they are made to provide forced labour or any consigned to a life of utter deprivation and degradation, such a situation can be set right by the Government.

39. Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights

meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation root out exploitation and injustice and ensure to the weaker sections their rights and entitlements.

40. In *Fertilizer Corporation Kamagar Union (Regd., Sindri & Others v. Union of India & Others* AIR 1981 SC 844, this court observed that "public interest litigation is part of the process of participative justice and 'standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps".

41. In *Ramsharan Autyanuprasi & Another v. Union of India & Others* AIR 1989 SC 549, this court observed that the public interest litigation is for making basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social, economic and political justice.

EVOLUTION OF THE PUBLIC INTEREST LITIGATION IN INDIA

42. The origin and evolution of Public Interest Litigation in India emanated from realization of constitutional obligation by the Judiciary towards the vast sections of the society - the poor and the marginalized sections of the society. This jurisdiction has been created and carved out by the judicial creativity and

craftsmanship. In *M. C. Mehta & Another v. Union of India & Others* AIR 1987 SC 1086, this Court observed that Article 32 does not merely confer power on this Court to issue direction, order or writ for the enforcement of fundamental rights. Instead, it also lays a constitutional obligation on this Court to protect the fundamental rights of the people. The court asserted that, in realization of this constitutional obligation, "it has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the fundamental rights". The Court realized that because of extreme poverty, a large number of sections of society cannot approach the court. The fundamental rights have no meaning for them and in order to preserve and protect the fundamental rights of the marginalized section of society by judicial innovation, the courts by judicial innovation and creativity started giving necessary directions and passing orders in the public interest.

43. The development of public interest litigation has been extremely significant development in the history of the Indian jurisprudence. The decisions of the Supreme Court in the 1970's loosened the strict *locus standi* requirements to permit filing of petitions on behalf of marginalized and deprived sections of the society by public spirited individuals, institutions and/or bodies. The higher Courts exercised wide powers given to them under Articles 32 and 226 of the Constitution. The sort of remedies sought from the courts in the public interest litigation goes beyond award of remedies to the affected individuals and groups. In suitable cases, the courts have also given guidelines and directions. The courts have monitored implementation of legislation and even formulated guidelines in absence of legislation. If the cases of the decades of 70s and 80s are analyzed, most of the public interest litigation cases which were entertained by the courts are pertaining to enforcement of fundamental rights of marginalized and deprived sections of the society. This can be termed as the first phase of the public interest litigation in India.

44. The Indian Supreme Court broadened the traditional rule of standing and the definition of "person aggrieved".

45. In this judgment, we would like to deal with the origin and development of public interest litigation. We deem it appropriate to broadly divide the public interest litigation in three phases.

- **Phase-I**:It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this court or the High Courts.

- **Phase-II**:It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments etc. etc.

- **Phase-III**:It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance.

46. Thereafter, we also propose to deal with the aspects of abuse of the Public Interest Litigation and remedial measures by which its misuse can be prevented or curbed.

DISCUSSION OF SOME IMPORTANT CASES OF PHASE-I

47. The court while interpreting the words "person aggrieved" in *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed & Others* (1976) 1 SCC 671 observed that "the traditional rule is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or even a fiduciary interest in the subject-matter. That apart, in

exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule".

48. The rule of *locus standi* was relaxed in *Bar Council of Maharashtra v. M. V. Dabholkar & Others* 1976 SCR 306. The court observed as under:

> "Traditionally used to the adversary system, we search for individual persons aggrieved. But a new class of litigation public interest litigation-where a section or whole of the community is involved (such as consumers' organisations or NAACP-National Association for Advancement of Coloured People-in America), emerges in a developing country like ours, this pattern of public oriented litigation better fulfils the rule of law if it is to run close to the rule of life.
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> "The possible apprehension that widening legal standing with a public connotation may unloose a flood of litigation which may overwhelm the judges is misplaced because public resort to court to suppress public mischief is a tribute to the justice system."

49. The court in this case observed that "procedural prescriptions are handmaids, not mistresses of justice and failure of fair play is the spirit in which Courts must view procession deviances."

50. In *The Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullabhai & Others* AIR 1976 SC 1455, this Court made conscious efforts to improve the judicial access for the masses by relaxing the traditional rule of *locus standi.*

51. In *Sunil Batra v. Delhi Administration & Others* AIR 1978 SC 1675, the Court departed from the traditional rule of

standing by authorizing community litigation. The Court entertained a writ petition from a prisoner, a disinterested party, objecting to the torture of a fellow prisoner. The Court entertained the writ after reasoning that "these 'martyr' litigations possess a beneficent potency beyond the individual litigant and their consideration on the wider representative basis strengthens the rule of law." Significantly, citing "people's vicarious involvement in our justice system with a broad-based concept of locus standi so necessary in a democracy where the masses are in many senses weak," the Court permitted a human rights organization to intervene in the case on behalf of the victim.

52. In *Hussainara Khatoon & Others v. Home Secretary, State of Bihar, Patna* AIR 1979 SC 1369, P. N. Bhagwati, J. has observed that "today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to (sic) about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across *'law for the poor" rather than law of the poor'.* The law is regarded by them as something mysterious and forbidding—always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker section of the community.

53. In *Prem Shankar Shukla v. Delhi Administration* AIR 1980 SC 1535, a prisoner sent a telegram to a judge complaining of forced handcuff on him and demanded implicit protection against humiliation and torture. The court gave necessary directions by relaxing the strict rule of *locus standi.*

54. In *Municipal Council, Ratlam v. Vardhichand & Others* AIR 1980 SC 1622, Krishna Iyer, J. relaxed the rule of locus standi:

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"The truth is that a few profound issues of processual jurisprudence of great strategic significance to our legal system face us and we must zero-in on them as they involve problems of access to justice for the people beyond the blinkered rules of 'standing' of British Indian vintage. If the center of gravity of justice is to shift, as the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, these issues must be considered.....

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Why drive common people to public interest action? Where Directive Principles have found statutory expression in Do's and Don'ts the court will not sit idly by and allow municipal government to become a statutory mockery. The law will relentlessly be enforced and the plea of poor finance will be poor alibi when people in misery cry for justice......"

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55. In *Fertilizer Corporation Kamgar Union* (supra) Krishna Iyer, J. and Bhagwati, J. had to answer in affirmative as to whether the workers in a factory owned by government had *locus standi* to question the legality of sale of the factory. They concluded with a quote: 'Henry Peter Brougham: Nieman Reports, April 1956 as under:

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"It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence."

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56. In *People's Union for Democratic Rights & Others* (supra), this Court observed as under:

"that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and un-redressed. That would be destructive of the Rule of Law which forms one of the essential elements of public interest in any democratic form of government. The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law is meant for them also, though today it exists only on paper and not in reality. If the sugar barons and the alcohol kings have the Fundamental Right to carry on their business and to fatten their purses by exploiting the consuming public, have the 'chamars' belonging to the lowest strata of society no Fundamental Right to earn an honest living through their sweat and toil? The former can approach the courts with a formidable army of distinguished lawyers paid in four or five figures per day and if their right of exploit is upheld

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against the government under the label of Fundamental Right, the courts are praised for their boldness and courage and their independence and fearlessness are applauded and acclaimed. But, if the Fundamental Right of the poor and helpless victims of injustice is sought to be enforced by public interest litigation, the so called champions of human rights frown upon it as waste of time of the highest court in the land, which, according to them, should not engage itself in such small and trifling matters. Moreover, these self-styled human rights activists forget that civil and political rights, priceless and invaluable as they are for freedom and democracy, simply do not exist for the vast masses of our people. Large numbers of men, women and children who constitute the bulk of our population are today living a sub-human existence in conditions of abject poverty: utter grinding poverty has broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. What civil and political rights are these poor and deprived sections of humanity going to enforce?

57. Justice Bhagwati of this court in his judgment in *S.P. Gupta v. President of India & Others* AIR 1982 SC 149 altogether dismissed the traditional rule of standing, and replaced it with a liberalized modern rule. In this case, the Court awarded standing to advocates challenging the transfer of judges during Emergency. Describing the traditional rule as an "ancient vintage" of "an era when private law dominated the legal scene and public law had not been born," the Court concluded that the traditional rule of standing was obsolete. In its place, the Court prescribed the modern rule on standing:

"where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal

injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, *any member of the public can maintain an application for an appropriate direction, order or writ, in the High Court under Article 226, and in case of breach of any fundamental right, in this Court under Article 32*."

58. Finding that the practicing advocates "are vitally interested in the maintenance of a fearless and an independent Judiciary," the Court granted standing to the advocates under the modern rule to bring cases challenging the transfer of judges during Emergency. In this case, this Court further observed as under:

"……it must now be regarded as well settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the Court on account of some disability or it is not practicable for him to move the Court for some other sufficient reasons, such as his socially or economically disadvantaged position, some other person can invoke assistance of the Court for the purpose of providing judicial redress to the person wronged or injured, so that the legal wrong or injury caused to such person does not go un-redressed and justice is done to him.

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……Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights

and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief. It is in this spirit that the Court has been entertaining letters for Judicial redress and treating them as writ petitions and we hope and trust that the High Courts of the country will also adopt this pro-active, goal-oriented approach."

59. In *Anil Yadav & Others v. State of Bihar and Bachcho Lal Das, Superintendent, Central Jail, Bhagalpur, Bihar* (1982) 2 SCC 195, a petition was filed regarding blinding of under-trial prisoners at Bhagalpur in the State of Bihar. According to the allegation, their eyes were pierced with needles and acid poured into them. The Court had sent a team of the Registrar and Assistant Registrar to visit the Central Jail, Bhagalpur and submit a report to the Court. The Court passed comprehensive orders to ensure that such barbarous and inhuman acts are not repeated.

60. In *Munna & Others v. State of Uttar Pradesh & Others,* (1982) 1 SCC 545, the allegation was that the juvenile under-trial prisoners have been sent in the Kanpur Central Jail instead of Children's Home in Kanpur and those children were sexually exploited by the adult prisoners. This Court ruled that in no case except the exceptional ones mentioned in the Act, a child can be sent to jail. The Court further observed that the children below the age of 16 years must be detained only in the Children's Homes or other place of safety. The Court also observed that "a Nation which is not concerned with the welfare of the children cannot look forward to a bright future."

61. Thereafter, in a series of cases, the Court treated Post

Cards and letters as writ petitions and gave directions and orders.

62. In *Sheela Barse v. State of Maharashtra* AIR 1983 SC 378, Sheela Barse, a journalist, complained of custodial violence to women prisoners in Bombay. Her letter was treated as a writ petition and the directions were given by the court.

63. In *Dr. Upendra Baxi (I) v. State of Uttar Pradesh & Another* 1983 (2) SCC 308 two distinguished law Professors of the Delhi University addressed a letter to this court regarding inhuman conditions which were prevalent in Agra Protective Home for Women. The court heard the petition on a number of days and gave important directions by which the living conditions of the inmates were significantly improved in the Agra Protective Home for Women.

64. In *Veena Sethi (Mrs.) v. State of Bihar & Others* AIR 1983 SC 339, some prisoners were detained in jail for a period ranging from 37 years to 19 years. They were arrested in connection with certain offences and were declared insane at the time of their trial and were put in Central Jail with directions to submit half-yearly medical reports. Some were convicted, some acquitted and trials were pending against some of them. After they were declared sane no action for their release was taken by the authorities. This Court ruled that the prisoners remained in jail for no fault of theirs and because of the callous and lethargic attitude of the authorities. Even if they are proved guilty the period they had undergone would exceed the maximum imprisonment that they might be awarded.

65. In *Labourers Working on Salal Hydro Project v. State of Jammu & Kashmir & Others* AIR 1984 SC 177, on the basis of a news item in the Indian Express regarding condition of the construction workers, this Court took notice and observed that the construction work is a hazardous employment and no child below the age of 14 years can therefore be allowed to be employed in construction work by reason of the prohibition

enacted in Article 24 and this constitutional prohibition must be enforced by the Central Government.

66. In *Shri Sachidanand Pandey & Another v. The State of West Bengal & Others* (1987) 2 SCC 295, in the concurring judgment, Justice Khalid, J. observed that the public interest litigation should be encouraged when the Courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected.

67. The case of *B. R. Kapoor & Another v. Union of India & Others* AIR 1990 SC 752 relates to public interest litigation regarding mismanagement of the hospital for mental diseases located at Shahdara, Delhi. This Court appointed a Committee of Experts which highlighted the problems of availability of water, existing sanitary conditions, food, kitchen, medical and nursing care, ill-treatment of patients, attempts of inmates to commit suicide, death of patients in hospital, availability of doctors and nurses etc. The Court went on to recommend the Union of India to take over the hospital and model it on the lines of NIMHANS at Bangalore.

68. In *Smt. Nilabati Behera alias Lalita Behera v. State of Orissa & Others* AIR 1993 SC 1960, this Court gave directions that for contravention of human rights and fundamental freedoms by the State and its agencies, a claim for monetary compensation in petition under Article 32 or 226 is justified. In a concurring judgment, Anand, J. (as he then was) observed as under:

> "The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the courts too much as protector and guarantor of the indefeasible rights of the citizens. The courts have the obligation to satisfy the social aspirations of the citizens because the courts and the law are for the people and expected to respond to their aspirations."

69. In *Punjab and Haryana High Court Bar Association, Chandigarh through its Secretary v. State of Punjab & Others* (1994) 1 SCC 616, the allegation was that a practicing advocate, his wife and a child aged about two years were abducted and murdered. This Court directed the Director of the CBI to investigate and report to the Court.

70. In *Navkiran Singh & Others v. State of Punjab through Chief Secretary & Another* (1995) 4 SCC 591, in a letter petition the advocates from the Punjab & Haryana High Court expressed concerned about the kidnapping/elimination of advocates in the State of Punjab. This Court directed the CBI to investigate the matter and also directed the State of Punjab to provide security to those advocates who genuinely apprehend danger to their lives from militants/anti-social elements. The Court also observed that if the request for security is recommended by the District Judge or the Registrar of the High Court, it may be treated as genuine and the State Government may consider the same sympathetically.

71. In *Delhi Domestic Working Women's Forum v. Union of India & Others* (1995) 1 SCC 14, the Court expressed serious concern about the violence against women. The Court gave significant directions and observed that compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

72. In *Citizens for Democracy v. State of Assam & Others*

(1995) 3 SCC 743, this Court held that handcuffing and tying with ropes is inhuman and in utter violation of human rights guaranteed under the international law and the law of the land. The Court in para 15 observed as under:

> "15. ….. The handcuffing and in addition tying with ropes of the patient-prisoners who are lodged in the hospital is, the least we can say, inhuman and in utter violation of the human rights guaranteed to an individual under the international law and the law of the land. We are, therefore, of the view that the action of the respondents was wholly unjustified and against law. We direct that the detenus – in case they are still in hospital – be relieved from the fetters and the ropes with immediate effect."

73. In *Paramjit Kaur (Mrs.) v. State of Punjab & Others* (1996) 7 SCC 20, a telegram was sent to a Judge of this Court which was treated as a *habeas corpus* petition. The allegation was that the husband of the appellant was kidnapped by some persons in police uniform from a busy residential area of Amritsar. The Court took serious note of it and directed the investigation of the case by the Central Bureau of Investigation.

74. In *M. C. Mehta v. State of Tamil Nadu & Others* (1996) 6 SCC 756, the Court was dealing with the cases of child labour and the Court found that the child labour emanates from extreme poverty, lack of opportunity for gainful employment and intermittency of income and low standards of living. The Court observed that it is possible to identify child labour in the organized sector, which forms a minuscule of the total child labour, the problem relates mainly to the unorganized sector where utmost attention needs to be paid.

75. In *D. K. Basu v. State of West Bengal* (1997) 1 SCC 416, this Court observed that the custodial death is perhaps one of the worst crimes in a civilized society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected.

The expression "life or personal liberty" in Article 21 includes the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. The precious right guaranteed by Article 21 cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. The Court gave very significant directions which are mandatory for all concerned to follow.

76. In *Vishaka & Others v. State of Rajasthan & Others* (1997) 6 SCC 241, this Court gave directions regarding enforcement of the fundamental rights of the working women under Articles 14, 19 and 21 of the Constitution. The Court gave comprehensive guidelines and norms and directed for protection and enforcement of these rights of the women at their workplaces.

77. In a recently decided case *Prajwala v. Union of India & Others* (2009) 4 SCC 798, a petition was filed in this Court in which it was realized that despite commencement of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, disabled people are not given preferential treatment. The Court directed the State Governments/local authorities to allot land for various purposes indicated in section 43 of the Act and various items indicated in section 43, preferential treatment be given to the disabled people and the land shall be given at concessional rates. The percentage of reservation may be left to the discretion of the State Governments. However, total percentage of disabled persons shall be taken into account while deciding the percentage.

78. In *Avinash Mehrotra v. Union of India & Others* (2009) 6 SCC 398, a public interest litigation was filed, when 93 children were burnt alive in a fire at a private school in Tamil Nadu. This happened because the school did not have the minimum safety standard measures. The court, in order to

protect future tragedies in all such schools, gave directions that it is the fundamental right of each and every child to receive education free from fear of security and safety, hence the Government should implement National Building Code and comply with the said orders in constructions of schools for children.

79. All these abovementioned cases demonstrate that the courts, in order to protect and preserve the fundamental rights of citizens, while relaxing the rule of *locus standi*, passed a number of directions to the concerned authorities.

80. We would not like to overburden the judgment by multiplying these cases, but brief resume of these cases demonstrate that in order to preserve and protect the fundamental rights of marginalized, deprived and poor sections of the society, the courts relaxed the traditional rule of *locus standi* and broadened the definition of aggrieved persons and gave directions and orders. We would like to term cases of this period where the court relaxed the rule of *locus standi* as the first phase of the public interest litigation. The Supreme Court and the High Courts earned great respect and acquired great credibility in the eyes of public because of their innovative efforts to protect and preserve the fundamental rights of people belonging to the poor and marginalized sections of the society.

PHASE-II – DIRECTIONS TO PRESERVE AND PROTECT ECOLOGY AND ENVIRONMENT

81. The second phase of public interest litigation started sometime in the 1980's and it related to the courts' innovation and creativity, where directions were given to protect ecology and environment.

82. There are a number of cases where the court tried to protect forest cover, ecology and environment and orders have been passed in that respect. As a matter of fact, the Supreme Court has a regular Forest Bench (Green Bench) and regularly

passes orders and directions regarding various forest cover, illegal mining, destruction of marine life and wild life etc. Reference of some cases is given just for illustration.

83. In the second phase, the Supreme Court under Article 32 and the High Court under Article 226 of the Constitution passed a number of orders and directions in this respect.

84. The recent example is the conversion of all public transport in the Metropolitan City of Delhi from diesel engine to CNG engine on the basis of the order of the High Court of Delhi to ensure that the pollution level is curtailed and this is being completely observed for the last several years. Only CNG vehicles are permitted to ply on Delhi roads for public transport.

85. Louise Erdrich Bigogress, an environmentalist has aptly observed that "grass and sky are two canvasses into which the rich details of the earth are drawn." In 1980s, this court paid special attention to the problem of air pollution, water pollution, environmental degradation and passed a number of directions and orders to ensure that environment ecology, wildlife should be saved, preserved and protected. According to court, the scale of injustice occurring on the Indian soil is catastrophic. Each day hundreds of thousands of factories are functioning without pollution control devices. Thousands of Indians go to mines and undertake hazardous work without proper safety protection. Everyday millions of litres of untreated raw effluents are dumped into our rivers and millions of tons of hazardous waste are simply dumped on the earth. The environment has become so degraded that instead of nurturing us it is poisoning us. In this scenario, in a large number of cases, the Supreme Court intervened in the matter and issued innumerable directions.

86. We give brief resume of some of the important cases decided by this court. One of the earliest cases brought before the Supreme Court related to oleum gas leakage in Delhi. In order to prevent the damage being done to environment and

the life and the health of the people, the court passed number of orders. This is well-known as *M.C. Mehta & Another v. Union of India & Others* AIR 1987 SC 1086. The court in this case has clearly laid down that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area owes an absolute and non-delegable duty to the community to ensure that no such harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The court directed that the enterprise must adopt highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

87. In *Rural Litigation and Entitlement Kendra, Dehradun & Others v. State of U.P. & Others* AIR 1985 SC 652 the Supreme Court ordered closure of all lime-stone quarries in the Doon Valley taking notice of the fact that lime-stone quarries and excavation in the area had adversely affected water springs and environmental ecology. While commenting on the closure of the lime-stone quarries, the court stated that this would undoubtedly cause hardship to owners of the lime-stone quarries, but it is the price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment.

88. Environmental PIL has emerged because of the court's interpretation of Article 21 of the Constitution. The court in *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P. & Others* AIR 1990 SC 2060 observed that every citizen has fundamental right to have the enjoyment of quality of life and

living as contemplated by Article 21 of the Constitution of India. Anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to take recourse to Article 32 of the Constitution.

89. This court in *Subhash Kumar v. State of Bihar & Others* AIR 1991 SC 420 observed that under Article 21 of the Constitution people have the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

90. The case of *M.C. Mehta v. Union of India & Others* (1988) 1 SCC 471, relates to pollution caused by the trade effluents discharged by tanneries into Ganga river in Kanpur. The court called for the report of the Committee of experts and gave directions to save the environment and ecology. It was held that "in Common Law the Municipal Corporation can be restrained by an injunction in an action brought by a riparian owner who has suffered on account of the pollution of the water in a river caused by the Corporation by discharging into the river insufficiently treated sewage from discharging such sewage into the river. But in the present case the petitioner is not a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance, which is widerspread in range and indiscriminate in its effect and it would not be reasonable to expect any particular person to take proceedings to stop it as distinct from the community at large. The petition has been entertained as a Public Interest Litigation. On the facts and in the circumstances of the case, the petitioner is entitled to move the Supreme Court in order to enforce the statutory provisions

which impose duties on the municipal authorities and the Boards constituted under the Water (Prevention and Control of Pollution) Act, 1974".

91. In *Vellore Citizens Welfare Forum v. Union of India & Others* AIR 1996 SC 2715, this court ruled that precautionary principle and the polluter pays principle are part of the environmental law of the country. This court declared Articles 47, 48A and 51A(g) to be part of the constitutional mandate to protect and improve the environment.

92. In *M.C. Mehta v. Union of India & Others* AIR 1988 SC 1037, this court observed that the effluent discharged in river Ganga from a tannery is ten times noxious when compared with the domestic sewage water which flows into the river from any urban area on its banks. The court further observed that the financial capacity of the tanneries should be considered as irrelevant without requiring them to establish primary treatment plants. Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist, a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large.

93. In *M.C. Mehta v. Union of India & Others* AIR 1997 SC 734, this court observed that in order to preserve and protect the ancient monument Taj Mahal from sulphurdioxide emission by industries near Taj Mahal, the court ordered 299 industries to ban the use of coke/coal. The court further directed them to shift-over to Compressed Natural Gas (CNG) or re-locate them.

94. In *A. P. Pollution Control Board v. Prof. M. V. Nayadu (Retd.) & Others* (1999) 2 SCC 718, this Court quoted A. Fritsch, "Environmental Ethics: Choices for Concerned Citizens". The same is reproduced as under:

"The basic insight of ecology is that all living things exist

in interrelated systems; nothing exists in isolation. The world system in weblike; to pluck one strand is to cause all to vibrate; whatever happens to one part has ramifications for all the rest. Our actions are not individual but social; they reverberate throughout the whole ecosystem". [Science Action Coalition by A. Fritsch, Environmental Ethics: Choices for Concerned Citizens 3-4 (1980)] : (1988) Vol. 12 Harv. Env. L. Rev. at 313)."

95. The court in this case gave emphasis that the directions of the court should meet the requirements of public interest, environmental protection, elimination of pollution and sustainable development. While ensuring sustainable development, it must be kept in view that there is no danger to the environment or to the ecology.

96. In *Essar Oil Ltd. v. Halar Utkarsh Samiti & Others* AIR 2004 SC 1834, while maintaining the balance between economic development and environmental protection, the court observed as under:

"26. Certain principles were enunciated in the Stockholm Declaration giving broad parameters and guidelines for the purposes of sustaining humanity and its environment. Of these parameters, a few principles are extracted which are of relevance to the present debate. Principle 2 provides that the natural resources of the earth including the air, water, land, flora and fauna especially representative samples of natural eco-systems must be safeguarded for the benefit of present and future generations through careful planning and management as appropriate. In the same vein, the 4th principle says "man has special responsibility to safeguard and wisely manage the heritage of wild life and its habitat which are now gravely imperiled by a combination of adverse factors. Nature conservation including wild life must, therefore, receive importance in planning for economic developments". These two principles highlight the need to factor in considerations of

the environment while providing for economic development. The need for economic development has been dealt with in Principle 8 where it is said that "economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for improvement of the quality of life"."

97. On sustainable development, one of us (Bhandari, J.) in *Karnataka Industrial Areas Development Board v. Sri C. Kenchappa & Others* AIR 2006 SC 2038, observed that there has to be balance between sustainable development and environment. This Court observed that before acquisition of lands for development, the consequence and adverse impact of development on environment must be properly comprehended and the lands be acquired for development that they do not gravely impair the ecology and environment; State Industrial Areas Development Board to incorporate the condition of allotment to obtain clearance from the Karnataka State Pollution Control Board before the land is allotted for development. The said directory condition of allotment of lands be converted into a mandatory condition for all the projects to be sanctioned in future.

98. In another important decision of this Court in the case of *M.C. Mehta v. Kamal Nath & Others* (2000) 6 SCC 213, this Court was of the opinion that Articles 48A and 51-A(g) have to be considered in the light of Article 21 of the Constitution. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21. In the matter of enforcement of rights under Article 21, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Articles 14 and 21 and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have

suffered due to that disturbance. In order to protect the "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21.

99. The court also laid emphasis on the principle of Polluter-pays. According to the court, pollution is a civil wrong. It is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages or compensation for restoration of the environment and ecology.

100. In *Managing Director, A.P.S.R.T.C. v. S. P. Satyanarayana* AIR 1998 SC 2962, this Court referred to the White Paper published by the Government of India that the vehicular pollution contributes 70% of the air pollution as compared to 20% in 1970. This Court gave comprehensive directions to reduce the air pollution on the recommendation of an Expert Committee of Bhure Lal appointed by this Court.

101. *In Re. Noise Pollution* AIR 2005 SC 3136, this Court was dealing with the issue of noise pollution. This Court was of the opinion that there is need for creating general awareness towards the hazardous effects of noise pollution. Particularly, in our country the people generally lack consciousness of the ill effects which noise pollution creates and how the society including they themselves stand to benefit by preventing generation and emission of noise pollution.

102. In *Indian Council for Enviro-Legal Action v. Union of India & Others* (1996) 5 SCC 281 the main grievance in the petition is that a notification dated 19.2.1991 declaring coastal stretches as Coastal Regulation Zones which regulates the activities in the said zones has not been implemented or enforced. This has led to continued degradation of ecology in the said coastal areas. The court observed that while economic

development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of environment.

103. In *S. Jagannath v. Union of India & Others* (1997) 2 SCC 87, this Court dealt with a public interest petition filed by the Gram Swaraj Movement, a voluntary organization working for the upliftment of the weaker section of society, wherein the petitioner sought the enforcement of Coastal Zone Regulation Notification dated 19.2.1991 and stoppage of intensive and semi-intensive type of prawn farming in the ecologically fragile coastal areas. This Court passed significant directions as under:

1. The Central Government shall constitute an authority conferring on the said authority all the powers necessary to protect the ecologically fragile coastal areas, seashore, waterfront and other coastal areas and specially to deal with the situation created by the shrimp culture industry in coastal States.

2. The authority so constituted by the Central Government shall implement "the Precautionary principle" and "the Polluter Pays" principles.

3. The shrimp culture industry/the shrimp ponds are covered by the prohibition contained in para 2(i) of the CRZ Notification. No shrimp culture pond can be constructed or set up within the coastal regulation zone as defined in the CRZ notification.

This shall be applicable to all seas, bays, estuaries, creeks rivers and backwaters. This direction shall not apply to traditional and improved traditional types of technologies (as defined in Alagarswami report) which are practised in the coastal low lying areas.

4. All acquaculture industries/shrimp culture industries/ shrimp culture ponds operating/set up in the coastal regulation zone as defined under the CRZ Notification shall be demolished and removed from the said area before March 31, 1997.

5. The agricultural lands, salt pan lands, mangroves, wet lands, forest lands, land for village common purpose and the land meant for public purposes shall not be used/converted for construction of the shrimp culture ponds.

6. No acquaculture industry/shrimp culture industry/ shrimp culture ponds shall be constructed/set up within 1000 meter of Chilka lake and Pulicat lake (including Bird Sanctuaries namely Yadurapattu and Nelapattu).

7. Acquaculture industry/shrimp culture industry/shrimp culture ponds already operating and functioning in the said area of 1000 meter shall be closed and demolished before March 31, 1997.

8. The Court also directed that the shrimp industries functioning within 1000 meter from the Coastal Regulation Zone shall be liable to compensate the affected persons on the basis of the "polluter pays" principle.

9. The authority was directed to compute the compensation under two heads namely, for

reversing the ecology and for payment to individuals.

10. The compensation amount recovered from the polluters shall be deposited under a separate head called "Environment Protection Fund" and shall be utilised for compensating the affected persons as identified by the authority and also for restoring the damaged environment.

104. The Court also granted substantial costs to the petitioners.

105. The courts because of vast destruction of environment, ecology, forests, marine life, wildlife etc. etc. gave directions in a large number of cases in the larger public interest. The courts made a serious endeavour to protect and preserve ecology, environment, forests, hills, rivers, marine life, wildlife etc. etc. This can be called the second phase of the public interest litigation in India.

THE TRANSPARENCY AND PROBITY IN GOVERNANCE – PHASE-III OF THE PUBLIC INTEREST LITIGATION

106. In the 1990's, the Supreme Court expanded the ambit and scope of public interest litigation further. The High Courts also under Article 226 followed the Supreme Court and passed a number of judgments, orders or directions to unearth corruption and maintain probity and morality in the governance of the State. The probity in governance is a *sine qua non* for an efficient system of administration and for the development of the country and an important requirement for ensuring probity in governance is the absence of corruption. This may broadly be called as the third phase of the Public Interest Litigation. The Supreme Court and High Courts have passed significant orders.

107. The case of *Vineet Narain & Others v. Union of India & Another* AIR 1998 SC 889 is an example of its kind. In that

case, the petitioner, who was a journalist, filed a public interest litigation. According to him, the prime investigating agencies like the Central Bureau of Investigation and the Revenue authorities failed to perform their legal obligation and take appropriate action when they found, during investigation with a terrorist, detailed accounts of vast payments, called 'Jain diaries', made to influential politicians and bureaucrats and direction was also sought in case of a similar nature that may occur hereafter. A number of directions were issued by the Supreme Court. The Court in that case observed that "it is trite that the holders of public offices are entrusted with certain power to be exercised in public interest alone and, therefore, the office is held by them in trust for the people."

108. Another significant case is *Rajiv Ranjan Singh 'Lalan' & Another v. Union of India & Others* (2006) 6 SCC 613. This public interest litigation relates to the large scale defalcation of public funds and falsification of accounts involving hundreds of crores of rupees in the Department of Animal Husbandry in the State of Bihar. It was said that the respondents had interfered with the appointment of the public prosecutor. This court gave significant directions in this case.

109. In yet another case of *M. C. Mehta v. Union of India & Others* (2007) 1 SCC 110, a project known as "Taj Heritage Corridor Project" was initiated by the Government of Uttar Pradesh. One of the main purpose for which the same was undertaken was to divert the River Yamuna and to reclaim 75 acres of land between Agra Fort and the Taj Mahal and use the reclaimed land for constructing food plazas, shops and amusement activities. The Court directed for a detailed enquiry which was carried out by the Central Bureau of Investigation (CBI). On the basis of the CBI report, the Court directed registration of FIR and made further investigation in the matter. The court questioned the role played by the concerned Minister for Environment, Government of Uttar Pradesh and the Chief Minister, Government of Uttar Pradesh. By the intervention of this Court, the said project was stalled.

110. These are some of the matters where the efficacy, ethics and morality of the governmental authorities to perform their statutory duties was directed under the scanner of the Supreme Court and the High Courts.

111. In *M. C. Mehta v. Union of India & Others* (2007) 12 SCALE 91, in another public interest litigation, a question was raised before the court whether the Apex Court should consider the correctness of the order passed by the Governor of Uttar Pradesh refusing to grant sanction for prosecution of the Chief Minister and Environment Minister after they were found responsible in 'Taj Heritage Corridor Project". It was held that the judiciary can step in where it finds the actions on the part of the legislature or the executive to be illegal or unconstitutional.

112. In *Centre for Public Interest Litigation v. Union of India & Another* AIR 2003 SC 3277, two writ petitions were filed in public interest by the petitioner calling in the question of decision of the government to sell majority of shares in Hindustan Petroleum Corporation Limited and Bharat Petroleum Corporation Limited to private parties without Parliamentary approval or sanction as being contrary to and violative of the provisions of the ESSO (Acquisition of Undertaking in India) Act, 1974, the Burma Shell (Acquisition of Undertaking in India) Act, 1976 and Caltex (Acquisition of Shares of Caltex Oil Refining India Limited and all the undertakings in India for Caltex India Limited) Act, 1977. The court upheld the petitions until the statutes are amended appropriately.

113. These are some of the cases where the Supreme Court and the High Courts broadened the scope of public interest litigation and also entertained petitions to ensure that in governance of the State, there is transparency and no extraneous considerations are taken into consideration except the public interest. These cases regarding probity in governance or corruption in public life dealt with by the courts can be placed in the third phase of public interest litigation.

114. We would also like to deal with some cases where the court gave direction to the executives and the legislature to ensure that the existing laws are fully implemented.

115. In *Pareena Swarup v. Union of India* (2008) 13 SCALE 84, a member of the Bar of this court filed a public interest litigation seeking to declare various sections of the Prevention of Money Laundering Act, 2002 as ultra vires to the Constitution as they do not provide for independent judiciary to decide the cases but the members and chairperson to be selected by the Selection Committee headed by the Revenue Secretary. According to the petitioner, following the case of *L. Chandrakumar v. Union of India & Others* (1997) 3 SCC 261 undermines separation of powers as envisaged by the Constitution.

116. We have endeavoured to give broad picture of the public interest litigation of Ist, IInd and IIIrd phases decided by our courts.

117. We would briefly like to discuss evolution of the public interest litigation in other judicial systems.

EVOLUTION OF PUBLIC INTERST LITIGATION IN OTHER JUDICIAL SYSTEMS NAMELY, USA, U.K., AUSTRALIA AND SOUTH AFRICA.

AUSTRALIA

118. In Australia also for protecting environment, the Australian court has diluted the principle of 'aggrieved person'.

119. In Australia, Public Interest Litigation has been a method of protecting the environment. The courts have not given a definition of 'Public Interest Litigation', but in *Oshlack v Richmond River Council* (1998) 193 CLR 72 : (1998) 152 ALR 83, the High Court of Australia (apex court) upheld the concept and pointed out the essential requirements. McHugh J., quoted Stein J., from the lower court:

"In summary I find the litigation to be properly characterised as public interest litigation. The basis of the challenge was arguable, raising serious and significant issues resulting in important interpretation of new provisions relating to the protection of endangered fauna. The application concerned a publicly notorious site amidst continuing controversy. Mr. Oshlack had nothing to gain from the litigation other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna."

120. To the court it was important that the petitioner did not have any other motive than the stated one of protecting the environment. The test therefore in Australia seems to be that the petitioner when filing a public interest litigation, should not stand to gain in some way.

U.S.A.

121. The US Supreme Court realized the constitutional obligation of reaching to all segments of society particularly the black Americans of African origin. The courts' craftsmanship and innovation is reflected in one of the most celebrated path-breaking judgment of the US Supreme Court in *Oliver Brown v. Board of Education of Topeka* 347 U.S. 483, 489-493 (1954). Perhaps, it would accomplish the constitutional obligation and goal. In this case, the courts have carried out their own investigation and in the judgment it is observed that "Armed with our own investigation" the courts held that all Americans including Americans of African origin can study in all public educational institutions. This was the most significant development in the history of American judiciary.

122. The US Supreme Court dismissed the traditional rule of Standing in *Association of Data Processing Service Organizations v. William B. Camp* 397 U.S. 150 (1970). The court observed that a plaintiff may be granted standing

whenever he/she suffers an "injury in fact" – "economic or otherwise".

123. In another celebrated case *Olive B. Barrows v. Leola Jackson* 346 U.S. 249 (1953), 73 S.Ct. 1031 the court observed as under:-

"But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."

124. In environment cases, the US Supreme Court has diluted the stance and allowed organizations dedicated to protection of environment to fight cases even though such societies are not directly armed by the action.

125. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* 412 US 669 (1973), the court allowed a group of students to challenge the action of the railroad which would have led to environmental loss.

126. In *Paul J. Trafficante v. Metropolitan Life Insurance Company* 409 U.S. 205 (1972) the Court held that a landlord's racially discriminatory practices towards non-whites inflicted an injury in fact upon the plaintiffs, two tenants of an apartment complex, by depriving them of the "social benefits of living in an integrated community."

127. Similarly, the Supreme Court of the United States has granted standing in certain situations to a plaintiff to challenge

injuries sustained by a third party with whom he/she shares a "close" relationship.

128. In *Thomas E. Singleton v. George J. L. Wulff* 428 U.S. 106 (1976), the Court granted standing to two physicians challenging the constitutionality of a state statute limiting abortions. Similarly, in *Caplin v. Drysdale* 491 U.S. 617, 623-24 n. 3 (1989), the Court granted standing to an attorney to challenge a drug forfeiture law that would deprive his client of the means to retain counsel.

129. The Supreme Court has also granted organizational standing. In *Robert Warth v. Ira Seldin* 422 U.S. 490, 511 (1975), the Court declared that "even in the absence of injury to itself, an association may have standing solely as the representative of its members." This judgment had far reaching consequence. In *James B. Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977), the Court elaborated the parameters for organizational standing where an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit".

ENGLAND

130. The use of PIL in England has been comparably limited. The limited development in PIL has occurred through broadening the rules of standing.

Broad Rules of Standing

131. *In Re. Reed, Bowen & Co.* (1887) 19 QBD 174 to facilitate vindication of public interest, the English judiciary prescribed broad rules of standing. Under the traditional rule of standing, judicial redress was only available to a 'person

aggrieved' – one "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something." However, the traditional rule no longer governs standing in the English Courts.

132. One of the most distinguished and respected English Judge Lord Denning initiated the broadening of standing in the English Courts with his suggestion that the "words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation." – *Attorney-General of the Gambia v. Pierre Sarr N'Jie* (1961) AC 617.

133. The *Blackburn Cases* broadened the rule of standing in actions seeking remedy through prerogative writs brought by individuals against public officials for breach of a private right. (e.g., mandamus, prohibition, and certiorari). Under the *Blackburn* standard, "any person who was adversely affected" by the action of a government official in making a mistaken policy decision was eligible to be granted standing before the Court for seeking remedy through prerogative writs - *Regina v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 W.L.R. 893 ("Blackburn I").

134. In *Blackburn I,* the Court of Appeal granted standing to Blackburn to seek a writ of mandamus to compel the Police Commissioner to enforce a betting and gambling statute against gambling clubs.

135. In *Blackburn II,* the Court of Appeal found no defects in Blackburn's standing to challenge the Government's decision to join a common market. *Blackburn v. Attorney-General* [1971] 1 W.L.R. 1037).

136. In *Blackburn III,* the Court of Appeal granted standing to Blackburn to seek a writ of mandamus to compel the Metropolitan Police to enforce laws against obscene

publications. *Regina v. Commissioner of Police of the Metropolis, Ex parte Blackburn* [1973] Q.B. 241.

137. In *Blackburn IV,* the Court of Appeal granted standing to Blackburn to seek a writ of prohibition directed at the Greater London Council for failing to properly use their censorship powers with regard to pornographic films. *Regina v. Greater London Council ex parte. Blackburn* [1976] 1 W.L.R. 550.

138. The English judiciary was hesitant in applying this broadened rule of standing to actions seeking remedy through relator claims - Relator claims are remedies brought by the Attorney General to remedy a breach of a public right. (e.g., declaration and injunction). Initially, Lord Denning extended the broadened rule of standing in actions seeking remedy through prerogative writs to actions seeking remedy through relator claims. In *Attorney General Ex rel McWhirter v. Independent Broadcasting Authority,* (1973) Q.B. 629 the Court stipulated that, "in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has a sufficient interest can himself apply to the court." This rule was promptly overturned by the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. In this case, the House of Lords held that in relator claims, the Attorney General holds absolute discretion in deciding whether to grant leave to a case. Thus, the English judiciary did not grant standing to an individual seeking remedy through relator claims.

139. Finally, an amendment to the Rules of the Supreme Court in 1978 through Order 53 overcame the English judiciary's hesitation in applying a broadened rule of standing to relator claims. Order 53 applied the broadened rule of standing to both actions seeking remedy through prerogative writs and actions seeking remedy through relator claims. Rule

3(5) of Order 53 stipulates that the Court shall not grant leave for judicial review "unless it considers that the applicant has a sufficient interest in the matter to which the applicant relates." - ORDER 53, RULES OF THE SUPT. CT. (1981). In *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, the Court explained that "fairness and justice are tests to be applied" when determining if a party has a sufficient interest.

140. In *Regina v. Secretary of State for the Environment, Ex parte Rose Theatre Trust Co.* (1990) 1 Q.B. 504, the Court elaborated that "direct financial or legal interest is not required" to find sufficient interest. Thus, under the new rule of standing embodied in Order 53, individuals can challenge actions of public officials if they are found to have "sufficient interest" – a flexible standard.

SOUTH AFRICA

141. The South African Constitution has adopted with a commitment to "transform the society into one in which there will be human dignity, freedom and equality." – *See: Soobramoney v. Minister of Health, KwaZulu-Natal,* 1998 (1) SA 765 (CC), p. 5. Thus, improving access to justice falls squarely within the mandate of this Constitution. In furtherance of this objective, the South African legal framework takes a favorable stance towards PIL by prescribing broad rules of standing and relaxing pleading requirements.

(A) Broad Rules of Standing

142. Section 38 of the Constitution broadly grants standing to approach a competent court for allegations of infringement of a right in the bill of rights to:

"(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest;

(e) an association acting in the interest of its members."

143. In expressly permitting class actions and third-party actions, Section 38 prescribes broad rules of standing for constitutional claims. Interpreting the language of Section 38, the Constitutional Court elaborated in *Ferreira v. Levin NO & Others* 1996 (1) SA 984 (CC), p. 241 that a broad approach to standing should be applied to constitutional claims to ensure that constitutional rights are given the full measure of protection to which they are entitled. In the said judgment by a separate concurring judgment, Justice O'Regan suggested that a "wider net for standing" should be extended to all "litigation of a public character."

(B) Relaxing Formal Requirements of Pleadings

144. The Constitutional Court has been prompt to relax formal pleading requirements in appropriate cases. In *S v. Twala (South African Human Rights Commission Intervening),* 2000 (1) SA 879, the President of the Court directed that a hand written letter received from a prisoner complaining about his frustration in exercising his right to appeal be treated as an application for leave to appeal.

145. In *Xinwa & Others v. Volkswagen of South Africa (PTY) Ltd.* 2003 (4) SA 390 (CC), p. 8 the Court cemented the *Twala* principle that "form must give way to substance" in public interest litigation. The Court explained that "pleadings prepared by lay persons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing

such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared."

IMPACT OF PUBLIC INTEREST LITIGATION ON NEIGHBOURING COUNTRIES

146. The development of public interest litigation in India has had an impact on the judicial systems of neighbouring countries like Bangladesh, Sri Lanka, Nepal and Pakistan and other countries.

PAKISTAN:

147. By a recent path-breaking historical judgment of the Pakistan Supreme Court at Islamabad dated 31st July, 2009 delivered in public interest litigation bearing Constitution Petition No.9 of 2009 filed by *Sindh High Court Bar Association* through its Secretary and Constitution Petition No.8 of 2009 filed by *Nadeem Ahmed Advocate,* both petitions filed against *Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad & Others,* the entire superior judiciary which was sacked by the previous political regime has now been restored.

148. Another path breaking judgment delivered very recently on 16th December, 2009 by all the 17 judges of the Pakistan Supreme Court in Constitution Petition Nos.76 to 80 of 2007 and 59 of 2009 and another Civil Appeal No.1094 of 2009 also has far-reaching implications.

149. In this judgment, the National Reconciliation Ordinance (No.XV) 2007 came under challenge by which amendments were made in the Criminal Procedure Code, 1898 and the Representation of the People Act, 1976 and the National Accountability Ordinance of 1999. The National Accountability Ordinance, 1999 (for short, NAO) was designed to give immunity of the consequences of the offences committed by the constitutional authorities and other authorities

in power and (NRO) was declared void *ab initio* being *ultra vires* and violative of constitutional provisions including 4, 8, 25, 62(f), 63(i)(p), 89, 175 and 227 of the Constitution. This judgment was also delivered largely in public interest.

150. In an important judgment delivered by the Supreme Court of Pakistan in *General Secrerary, West Pakistan Salt Mineral Labour Union (CBA) Khewra, Jhelum v. The Director, Industries and Mineral Development, Punjab, Lahore* reported in 1994 SCMR 2061 (Supreme Court of Pakistan) in Human Right Case No.120 of 1993 on 12th July, 1994 gave significant directions largely based on the judgments of this court.

151. The petitioners in the said petition sought enforcement of the rights of the residents to have clean and unpolluted water. Their apprehension was that in case the miners are allowed to continue their activities, which are extended in the water catchment area, the watercourse, reservoir and the pipelines would get contaminated. According to the court, water has been considered source of life in this world. Without water there can be no life. History bears testimony that due to famine and scarcity of water, civilization have vanished, green lands have turned into deserts and arid goes completely destroying the life not any of human being, but animal life as well. Therefore, water, which is necessary for existence of life, if polluted, or contaminated, will cause serious threat to human existence.

152. The court gave significant directions including stopping the functioning of factory which created pollution and environmental degradation.

153. Another significant aspect which has been decided in this case was to widen the definition of the 'aggrieved person'. The court observed that in public interest litigation, procedural trappings and restrictions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the court. The Supreme Court also observed that

the Court has vast power under Article 183(3) to investigate into question of fact as well independently by recording evidence.

154. In another important case *Ms. Shehla Zia v. WAPDA* PLD 1994 Supreme Court 693, a three-Judge Bench headed by the Chief Justice gave significant directions. In the said petition four residents of Street No. 35,F-6/1, Islamabad protested to WAPDA against construction of a grid station in F-6/1, Islamabad. A letter to this effect was written to the Chairman on 15.1.1992 conveying the complaint and apprehensions of the residents of the area in respect of construction of a grid station allegedly located in the green-belt of a residential locality. They pointed out that the electromagnetic field by the presence of the high voltage transmission lines at the grid station would pose a serious health hazard to the residents of the area particularly the children, the infirm and the Dhobi-ghat families that live; the immediate vicinity. The presence of electrical installations and transmission lines would also be highly dangerous to the citizens particularly the children who play outside in the area. It would damage the greenbelt and affect the environment. It was also alleged that it violates the principles of planning in Islamabad where the green belts are considered an essential component of the city for environmental and aesthetic reasons.

155. The Supreme Court observed that where life of citizens is degraded, the quality of life is adversely affected and health hazards created are affecting a large number of people. The Supreme Court in exercise of its jurisdiction may grant relief to the extent of stopping the functioning of such units that create pollution and environmental degradation.

SRI LANKA:

156. There has been great impact of Public Interest Litigation on other countries. In *Bulankulama and six others v. Secretary, Ministry of Industrial Development and seven others (Eppawala case),* the Supreme Court of Sri Lanka gave

significant directions in public interest litigation. In the said case, Mineral Investment Agreement was entered between the Government and the private company for rapid exploitation of rock phosphate reserves at Eppawala in Sri Lanka's agriculture rich North Central Province – High intensity mining operation plus establishment of a processing plant on Trincomalee coast was set up which would produce phosphoric and sulphuric acid. Six residents of the area of whose agricultural lands stood to be affected filed a petition before the court in public interest. It was stated in the petition that the project was not for a public purpose but for the benefit of a private company and would not bring substantial economic benefit to Sri Lanka. The petitioners claimed imminent infringement of their fundamental rights under various provisions of the Constitution. The court invoked the public trust theory as applied in the United States and in our country in the case of *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388. The court upheld the petitioners' fundamental rights. The respondents were restrained from entering into any contract relating to the Eppawala phosphate deposit. The court allowed the petition and the respondents were directed to give costs to the petitioners. The Supreme Court of Sri Lanka protected environmental degradation by giving important directions in this case.

NEPAL:

157. A three-Judge Bench of the Supreme Court of Nepal in *Surya Prasad Sharma Dhungle v. Godawari Marble Industries* in writ petition No.35 of 1992 passed significant directions. It was alleged in the petition that Godawari Marble Industries have been causing serious environmental degradation to Godawari forest and its surrounding which is rich in natural grandeur and historical and religious enshrinement are being destroyed by the respondents. In the petition it was mentioned that the illegal activities of the respondent Godawari Marble Industries have caused a huge public losses.

158. The Supreme Court of Nepal gave significant directions to protect degradation of environment and ecology. The court adopted the concept of sustainable development.

159. The Indian courts may have taken some inspiration from the group or class interest litigation of the United States of America and other countries but the shape of the public interest litigation as we see now is predominantly indigenously developed jurisprudence.

160. The public interest litigation as developed in various facets and various branches is unparalleled. The Indian Courts by its judicial craftsmanship, creativity and urge to provide access to justice to the deprived, discriminated and otherwise vulnerable sections of society have touched almost every aspect of human life while dealing with cases filed in the label of the public interest litigation. The credibility of the superior courts of India has been tremendously enhanced because of some vital and important directions given by the courts. The courts' contribution in helping the poorer sections of the society by giving new definition to life and liberty and to protect ecology, environment and forests are extremely significant.

ABUSE OF THE PUBLIC INTEREST LITIGATION:

161. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and *bona fide* public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged.

162. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts.

163. In *BALCO Employees' Union (Regd.) v. Union of India & Others* AIR 2002 SC 350, this Court recognized that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the court has devised a number of strategies to ensure that the attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bonafide." Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations.

164. In *S. P. Gupta's* case (supra), this Court has found that this liberal standard makes it critical to limit standing to individuals "acting bona fide. To avoid entertaining frivolous and vexatious petitions under the guise of PIL, the Court has excluded two groups of persons from obtaining standing in PIL petitions. First, the Supreme Court has rejected awarding standing to "meddlesome interlopers". Second, the Court has denied standing to interveners bringing public interest litigation for personal gain.

165. In *Chhetriya Pardushan Mukti Sangharsh Samiti* (supra), the Court withheld standing from the applicant on grounds that the applicant brought the suit motivated by enmity between the parties. Thus, the Supreme Court has attempted to create a body of jurisprudence that accords broad enough standing to admit genuine PIL petitions, but nonetheless limits standing to thwart frivolous and vexations petitions.

166. The Supreme Court broadly tried to curtail the frivolous public interest litigation petitions by two methods – one monetary and second, non-monetary. The first category of cases is that where the court on filing frivolous public interest litigation petitions, dismissed the petitions with exemplary costs. In *Neetu v. State of Pubjab & Others* AIR 2007 SC 758,

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A the Court concluded that it is necessary to impose exemplary costs to ensure that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

B 167. In *S.P. Anand v. H.D. Deve Gowda & Others* AIR 1997 SC 272, the Court warned that it is of utmost importance that those who invoke the jurisdiction of this Court seeking a waiver of the locus standi rule must exercise restraint in moving the Court by not plunging in areas wherein they are not well-versed.

C 168. In *Sanjeev Bhatnagar v. Union of India & Others* AIR 2005 SC 2841, this Court went a step further by imposing a monetary penalty against an Advocate for filing a frivolous and vexatious PIL petition. The Court found that the petition was D devoid of public interest, and instead labelled it as "publicity interest litigation." Thus, the Court dismissed the petition with costs of Rs.10,000/-.

169. Similarly, in *Dattaraj Nathuji Thaware v. State of Maharashtra & Others* (2005) 1 SCC 590, the Supreme Court E affirmed the High Court's monetary penalty against a member of the Bar for filing a frivolous and vexatious PIL petition. This Court found that the petition was nothing but a camouflage to foster personal dispute. Observing that no one should be permitted to bring disgrace to the noble profession, the Court F concluded that the imposition of the penalty of Rs. 25,000 by the High Court was appropriate. Evidently, the Supreme Court has set clear precedent validating the imposition of monetary penalties against frivolous and vexatious PIL petitions, especially when filed by Advocates.

G 170. This Court, in the second category of cases, even passed harsher orders. In *Charan Lal Sahu & Others v. Giani Zail Singh & Another* AIR 1984 SC 309, the Supreme Court observed that, "we would have been justified in passing a heavy H order of costs against the two petitioners" for filing a "light-

hearted and indifferent" PIL petition. However, to prevent "nipping in the bud a well-founded claim on a future occasion," the Court opted against imposing monetary costs on the petitioners." In this case, this Court concluded that the petition was careless, meaningless, clumsy and against public interest. Therefore, the Court ordered the Registry to initiate prosecution proceedings against the petitioner under the Contempt of Courts Act. Additionally, the court forbade the Registry from entertaining any future PIL petitions filed by the petitioner, who was an advocate in this case.

171. In *J. Jayalalitha v. Government of Tamil Nadu & Others* (1999) 1 SCC 53, this court laid down that public interest litigation can be filed by any person challenging the misuse or improper use of any public property including the political party in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest.

172. This court has been quite conscious that the forum of this court should not be abused by any one for personal gain or for any oblique motive.

173. In *BALCO* (*supra)*, this court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the court must take care that the forum be not abused by any person for personal gain.

174. In *Dattaraj Nathuji Thaware* (supra), this court expressed its anguish on misuse of the forum of the court under the garb of public interest litigation and observed that the public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The court must not allow its process to be abused for oblique considerations.

175. In *Thaware's* case (supra), the Court encouraged the imposition of a non-monetary penalty against a PIL petition filed by a member of the bar. The Court directed the Bar Councils and Bar Associations to ensure that no member of the Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of Public Interest Litigation. This direction impels the Bar Councils and Bar Associations to disbar members found guilty of filing frivolous and vexatious PIL petitions.

176. In *Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra & Others* AIR 2008 SC 913, this Court observed as under:

> 'It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, the time which otherwise could have been spent for disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy, whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters -government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the

busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system."

The Court cautioned by observing that:

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta.

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The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of *Pro Bono Publico* though they have no interest of the public or even of their own to protect."

177. The malice of frivolous and vexatious petitions did not originate in India. The jurisprudence developed by the Indian judiciary regarding the imposition of exemplary costs upon frivolous and vexatious PIL petitions is consistent with jurisprudence developed in other countries. U.S. Federal Courts and Canadian Courts have also imposed monetary penalties upon public interest claims regarded as frivolous. The courts also imposed non-monetary penalties upon Advocates for filing frivolous claims. In *Everywoman's Health Centre Society v. Bridges* 54 B.C.L.R. (2nd Edn.) 294, the British Columbia Court of Appeal granted special costs against the Appellants for bringing a meritless appeal.

178. U.S. Federal Courts too have imposed monetary penalties against plaintiffs for bringing frivolous public interest claims. Rule 11 of the Federal Rules of Civil Procedure ("FRCP") permits Courts to apply an "appropriate sanction" on any party for filing frivolous claims. Federal Courts have relied on this rule to impose monetary penalties upon frivolous public interest claims. For example, in *Harris v. Marsh* 679 F.Supp. 1204 (E.D.N.C. 1987), the District Court for the Eastern District

of North Carolina imposed a monetary sanction upon two civil rights plaintiffs for bringing a frivolous, vexatious, and meritless employment discrimination claim. The Court explained that "the increasingly crowded dockets of the federal courts cannot accept or tolerate the heavy burden posed by factually baseless and claims that drain judicial resources." As a deterrent against such wasteful claims, the Court levied a cost of $83,913.62 upon two individual civil rights plaintiffs and their legal counsel for abusing the judicial process. Case law in Canadian Courts and U.S. Federal Courts exhibits that the imposition of monetary penalties upon frivolous public interest claims is not unique to Indian jurisprudence.

179. Additionally, U.S. Federal Courts have imposed non-monetary penalties upon Attorneys for bringing frivolous claims. Federal rules and case law leave the door open for such non-monetary penalties to be applied equally in private claims and public interest claims. Rule 11 of the FRCP additionally permits Courts to apply an "appropriate sanction" on Attorneys for filing frivolous claims on behalf of their clients. U.S. Federal Courts have imposed non-monetary sanctions upon Attorneys for bringing frivolous claims under Rule 11.

180. In *Frye v. Pena* 199 F.3d 1332 (Table), 1999 WL 974170, for example, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order to disbar an Attorney for having "brought and pressed frivolous claims, made personal attacks on various government officials in bad faith and for the purpose of harassment, and demonstrated a lack of candor to, and contempt for, the court." This judicial stance endorses the ethical obligation embodied in Rule 3.1 of the Model Rules of Professional Conduct ("MRPC"): "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Together, the FRCP, U.S. federal case law, and the MRPC endorse the imposition of non-monetary penalties upon attorneys for bringing frivolous private claims or public interest claims.

181. In *Bar Council of Maharashtra* (supra) this court was apprehensive that by widening the legal standing there may be flood of litigation but loosening the definition is also essential in the larger public interest. To arrest the mischief is the obligation and tribute to the judicial system.

182. In *SP Gupta* (supra) the court cautioned that important jurisdiction of public interest litigation may be confined to legal wrongs and legal injuries for a group of people or class of persons. It should not be used for individual wrongs because individuals can always seek redress from legal aid organizations. This is a matter of prudence and not as a rule of law.

183. *In Chhetriya Pardushan Mukti Sangharsh Samiti* (supra) this court again emphasized that Article 32 is a great and salutary safeguard for preservation of fundamental rights of the citizens. The superior courts have to ensure that this weapon under Article 32 should not be misused or abused by any individual or organization.

184. In *Janata Dal v. H.S. Chowdhary & Others* (1992) 4 SCC 305, the court rightly cautioned that expanded role of courts in modern 'social' state demand for greater judicial responsibility. The PIL has given new hope of justice-starved millions of people of this country. The court must encourage genuine PIL and discard PIL filed with oblique motives.

185. In *Guruvayur Devaswom Managing Committee & Another v. C.K. Rajan & Others* (2003) 7 SCC 546, it was reiterated that the court must ensure that its process is not abused and in order to prevent abuse of the process, the court would be justified in insisting on furnishing of security before granting injunction in appropriate cases. The courts may impose heavy costs to ensure that judicial process is not misused.

186. In *Dattaraj Nathuji Thaware* (supra) this court again

cautioned and observed that the court must look into the petition carefully and ensure that there is genuine public interest involved in the case before invoking its jurisdiction. The court should be careful that its jurisdiction is not abused by a person or a body of persons to further his or their personal causes or to satisfy his or their personal grudge or grudges. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

187. In *Neetu* (*supra*) this court observed that under the guise of redressing a public grievance the public interest litigation should not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature.

188. In *M/s. Holicow Pictures Pvt. Ltd.* (supra) this court observed that the judges who exercise the jurisdiction should be extremely careful to see that behind the beautiful veil of PIL, an ugly private malice, vested interest and/o publicity-seeking is not lurking. The court should ensure that there is no abuse of the process of the court.

189. When we revert to the facts of the present then the conclusion is obvious that this case is a classic case of the abuse of the process of the court. In the present case a practicing lawyer has deliberately abused the process of the court. In that process, he has made a serious attempt to demean an important constitutional office. The petitioner ought to have known that the controversy which he has been raising in the petition stands concluded half a century ago and by a Division Bench judgment of Nagpur High Court in the case of *Karkare* (supra) the said case was approved by a Constitution Bench of this court. The controversy involved in this case is no longer *res integra*. It is unfortunate that even after such a clear enunciation of the legal position, a large number of similar petitions have been filed from time to time in various High Courts. The petitioner ought to have refrained from filing such a frivolous petition.

190. A degree of precision and purity in presentation is a *sine qua non* for a petition filed by a member of the Bar under the label of public interest litigation. It is expected from a member of the Bar to at least carry out the basic research whether the point raised by him is *res integra* or not. The lawyer who files such a petition cannot plead ignorance.

191. We would like to make it clear that we are not saying that the petitioner cannot ask the court to review its own judgment because of flaws and lacunae, but that should have been a bona fide presentation with listing of all relevant cases in a chronological order and that a brief description of what judicial opinion has been and cogent and clear request why where should be re-consideration of the existing law. Unfortunately, the petitioner has not done this exercise. The petition which has been filed in the High Court is a clear abuse of the process of law and we have no doubt that the petition has been filed for extraneous considerations. The petition also has the potentiality of demeaning a very important constitutional office. Such petition deserves to be discarded and discouraged so that no one in future would attempt to file a similar petition.

192. On consideration of the totality of the facts and circumstances of the case, we allow the appeals filed by the State and quash the proceedings of the Civil Miscellaneous Writ Petition No. 689 (M/B) of 2001 filed in the Uttaranchal High Court. We further direct that the respondents (who were the petitioners before the High Court) to pay costs of Rs.1,00,000/- (Rupees One Lakh) in the name of Registrar General of the High court of Uttarakhand. The costs to be paid by the respondents within two months. If the costs is not deposited within two months, the same would be recovered as the arrears of the Land Revenue.

193. We request the Hon'ble Chief Justice of Uttrakhand High Court to create a fund in the name of Uttarakhand High

Court Lawyers Welfare Fund if not already in existence. The fund could be utilized for providing necessary help to deserving young lawyers by the Chief Justice of Uttarakhand in consultation with the President of the Bar.

194. We must abundantly make it clear that we are not discouraging the public interest litigation in any manner, what we are trying to curb is its misuse and abuse. According to us, this is a very important branch and, in a large number of PIL petitions, significant directions have been given by the courts for improving ecology and environment, and directions helped in preservation of forests, wildlife, marine life etc. etc. It is the bounden duty and obligation of the courts to encourage genuine bona fide PIL petitions and pass directions and orders in the public interest which are in consonance with the Constitution and the Laws.

195. The Public Interest Litigation, which has been in existence in our country for more than four decades, has a glorious record. This Court and the High Courts by their judicial creativity and craftsmanship have passed a number of directions in the larger public interest in consonance with the inherent spirits of the Constitution. The conditions of marginalized and vulnerable section of society have significantly improved on account of courts directions in the P.I.L.

196. In our considered view, now it has become imperative to streamline the P.I.L.

197. We have carefully considered the facts of the present case. We have also examined the law declared by this court and other courts in a number of judgments.

198. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs

or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

199. Copies of this judgment be sent to the Registrar Generals of all the High Courts within one week.

200. These appeals are listed on 03.05.2010 to ensure compliance of our order.

R.P. Appeals adjourned.

COMMISSIONER OF INCOME TAX, DELHI
v.
M/S. KELVINATOR OF INDIA LIMITED
(Civil Appeal Nos. 2009-2011 of 2003)

JANUARY 18, 2010

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

Income Tax Act, 1961: s.147 – Power to reassess – The word "opinion" inserted in s.147 after the enactment of Direct Tax Laws (Amendment) Act, 1987 i.e. prior to 1st April, 1989, vested arbitrary powers in the Assessing Officer to reopen past assessments on mere change of opinion – The concept of "change of opinion" stood obliterated with effect from 1st April, 1989, i.e. after substitution of s.147 of the Act by Direct Tax Laws (Amendment) Act, 1989 – Direct Tax Laws (Amendment) Act, 1987 – Circular No.549 dated 31st October, 1989.

The question which arose for consideration in the present appeal is whether the concept of "change of opinion" stands obliterated with effect from 1st April, 1989, i.e. after substitution of section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1989.

Dismissing the appeals, the Court

HELD: Post-1st April, 1989, power to re-open is much wider. The words "reason to believe" need to be given a schematic interpretation failing which, Section 147 of the Income Tax Act, 1961 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot *per se* **be reason to re-open. The Assessing Officer has no power to review but he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-**

condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. The Circular No.549 dated 31st October, 1989, stated that the omission of expression 'reason to believe' from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. The Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same. [Para 6] [772-C-H; 773-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2009-2011 of 2003.

From the Judgment & Order dated 19.04.2002 of the High Court of Delhi at New Delhi in I.T.C. No.4 of 2000 and dated 15.05.2002 in I.T.A. No. 81 of 2000.

WITH

C.A. No. 2520 of 2008.

Arijit Prasad, Kunal Bahri, B.V. Balaram Das for the Appellant.

Kavita Jha, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Heard learned counsel on both sides.

2. A short question which arises for determination in this batch of civil appeals is, whether the concept of "change of opinion" stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1989?

3. To answer the above question, we need to note the changes undergone by Section 147 of the Income Tax Act, 1961 [for short, "the Act"]. Prior to Direct Tax Laws (Amendment) Act, 1987, Section 147 reads as under:

"Income escaping assessment.

147. If--

[a] the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

[b] notwithstanding that there has been no omission or failure as mentioned in clause

(a) on the part of the assessee, the Income- tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped

assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year)."

4. *After enactment of Direct Tax Laws (Amendment) Act*, 1987, i.e., prior to 1st April, 1989, Section 147 of the Act, reads as under:

"147. Income escaping assessment.-- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year)."

5. *After the Amending Act,* 1989, Section 147 reads as under:

"Income escaping assessment.

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation

allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."

6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe"

but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 *would give arbitrary powers to the Assessing Officer* to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs.

D.G. Appeals dismissed.

UNION OF INDIA & ANR.
v.
RAJA MOHAMMED AMIR MOHAMMAD KHAN
I.A. No. 47 and 48
In
(Civil Appeal No. 2501 of 2002)

JANUARY 19, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Mesne Profit – Claim for – Supreme Court by final order declaring the claimant to be successor of the estate of predecessor-Raja – Direction issued to the Custodian of Enemy Property to release the rents and profit collected after 5.4.2002 to the claimant – Also held that mesne profit prior to that date to be claimed by resorting to the remedy of suit – Interlocutory applications filed before Supreme Court claiming the amount credited in the account of predecessor-Raja on 27.3.2002 – Held: Since the claim was for the period prior to 5.4.2002, claimant entitled to recover it by filing a suit – Enemy Property Act, 1968.

In the present appeal, Supreme Court held that the respondent was sole legal heir and successor to the properties of the Late Raja of Mahmudabad, which had been taken over by the Custodian of Enemy Property under the provisions of the Enemy Property Act, 1968. The court held that he could get *mesne profit* **for the period i.e. till the passing of interim order on 5.4.2002 by filing a suit. Money received as rent or lease after 5.4.2002 was directed to be handed over to the respondent. Appellant was also directed to handover possession of other properties to the respondent.**

From the records of the Custodian of Enemy Property, respondent came to know that an amount was

credited to the account of the Late Raja on 27.3.2002. Respondent claimed remission of the amount to his credit. The same was refused. Hence the present applications were filed by the respondent for a direction to the appellant and the Custodian of Enemy Property, to release the amount to his credit.

Dismissing the applications, the Court

HELD: 1. A conscious distinction with regard to the rents and profits collected from the estate prior to 5.4.2002 and thereafter, had been made by this Court while disposing of the appeal. It was clearly the intention of the Court that in respect of rents and profits collected after the order of *status-quo* passed on 5.4.2002, the same were to be made over by the Custodian to the applicant, but as far as the rents and profits collected prior to that date were concerned, the applicant would be required to file a suit to recover the same. [Para 14] [781-F-H; 782-A]

2. The directions given to the appellants to hand over the possession of other properties, mentioned in the second part of the order relates to the immovable properties of the estate and not to the rents and profits collected by the Custodian from the estate prior to 5.4.2002. The two sets of properties are dealt with separately and are on two different settings. [Para 15] [782-E-F]

3. Since the amount recorded in the Custodian's ledger as being credited to the Estate of Raja of Mahmudabad represents the collections made from the estate prior to the order of status-quo passed on 5.4.2002, the respondent has been given leave to recover the same by filing a suit. In view of the said order passed by this Court, it cannot be said that the directions to make over the possession of other properties to the applicant also included the rents and profits collected from the estate prior to 5.4.2002. [Para 15] [782-G-H; 783-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2501 of 2002.

I.A. Nos. 47 & 48

In

Civil Appeal No. (s) 2501 of 2002.

From the Judgment & Order dated 21.09.2001 of the High Court of Judicature at Bombay in Writ Petition No. 1524 of 1997.

Indira Singh, ASG, Naresh Kaushik, Subhash Kaushik, A.K. Sharma, Aditi Gupta, Lalitha Kaushik, Shreekant N. Terdal for the Appellants.

P.V. Kapur, S.K. Dwivedi, Anjali K. Varma, Meera Mathur, Niraj Gupta, Chetna Gulati, Shail Kumar Dwivedi, Subhash Chandra Jain, Shrish Kumar Misra, Gunnam Venkateswara Rao, R.K. Gupta, Manoj Kumar Dwivedi, G.V. Rao for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. These two I.A. Nos.47 and 48 of 2008 have been filed on behalf of the Respondent in connection with Contempt Petition No.87 of 2006 filed in Civil Appeal No.2501 of 2002, inter alia, for a direction upon the Union of India, and the Custodian of Enemy Property to release to the Respondent a sum of Rs.1,77,38,828.11, being held by the said Custodian on account of the Estate of the Raja of Mahmudabad.

2. It may be recalled that in Writ Petition No.1524 of 1977 filed by the applicant herein, Raja Mohammed Amir Mohammad Khan, (Raja MAM Khan for short), the Bombay High Court, while allowing the writ petition, had directed the return of the properties of the Raja of Mahmudabad to the applicant. The decision of the Bombay High Court was

challenged by the Union of India in this Court in Civil Appeal No.2501 of 2002, which was disposed of on 21.10.2005, *inter alia,* with the following directions :

> "The High Court had refused to grant the mesne profits to the respondents, against the aforesaid finding no appeal has been filed by the respondent. Since no appeal has been filed, the appellants are not entitled to the mesne profits till the passing of the interim orders of status quo by this Court on 5.4.2002. The respondent would be entitled to the actual mesne profits by filing a suit, if so advised for this period. However, whatever moneys have been collected by the appellants by way of rent or lease etc. after 5.4.2002, till the handing over of the possession of these properties to the respondent be deposited/ disbursed to the respondent within 8 weeks.
>
> The appellants are directed to get the buildings (residence or offices) vacated from such officers and handover the possession to the respondent within eight weeks. Similarly, appellants are directed to handover the possession of other properties as well. The officers who are in occupation of the buildings for their residence or for their offices are also directed to immediately vacate and handover the buildings or the properties to the Custodian to enable him to handover the possession to the respondent in terms of the directions given. Failure to comply with the directions to handover the possession within 8 weeks will constitute disobedience of this order and the appellants would be in contempt of this order. Respondent would be at liberty to move an application in this Court if the above directions are not complied with for taking appropriate action against the appellants or their agents. Since the appellants have retained the possession of the properties illegally and in a high handed manner for 32 years the appeal is dismissed with costs which are assessed at Rs. 5 lacs."

3. In I.A. No. 47 it has been stated that when the properties were taken over by the Custodian, the amounts due and payable by the various occupants were collected by the office of the Custodian and credited to the account of the Estate of Mahmudabad in the Ledger of the Custodian maintained in his office at Mumbai. In view of the judgments of the Bombay High Court and this Court, holding the applicant to be the sole legal heir and successor of the Late Raja of Mahmudabad, he had succeeded to the properties belonging to the late Raja which had been taken over by the Custodian of Enemy Property under the provisions of the Enemy Property Act, 1968. It has further been contended that it could not, therefore, be disputed that the applicant is entitled to the moneys standing to the credit of the Estate of Mahmudabad in the Ledger Account maintained by the Custodian of Enemy Property.

4. According to the applicant, after continuous efforts, a copy of the Ledger Account was supplied to him in the month of December, 2007, by the office of the Custodian of Enemy Property and on perusal of the same it was discovered that a sum of Rs.1,77,38,828.11 stood credited to the account of the applicant as on 27.3.2002. On coming to know of the above, the applicant requested the Custodian by his letter dated 27.12.2007, to remit the amount which stood to his credit in the Ledger maintained by the office of the Custodian.

5. As no response was received to the said letter, another letter was issued to the Custodian on 6.2.2008, and in his reply the said Custodian replied that there was no provision in the Enemy Property Act, 1968, to refund any amount received from Enemy Property. In response it was also indicated clearly that no amount was admissible to the applicant by way of refund.

6. It is on account of such response from the Custodian of Enemy Property that I.A.No.47 of 2008 was filed for the reliefs which are indicated in the prayer.

7. Appearing for the applicant, Mr. P.V. Kapur, learned Senior Advocate, submitted that after the clear and

unambiguous directions given by this Court in its judgment dated 21.10.2005 in Civil Appeal No.2501 of 2002, there could be no justification for the Custodian of Enemy Property to object to making over of the moneys collected by him on account of rents and profits to the applicant. Mr. Kapur submitted that the intent of the order of this Court was very clear that on being found to be the sole legal heir of the Raja of Mahmudabad, the applicant was entitled to his entire estate, which included all amounts which had been collected from the properties of the Estate and credited to the account of the Estate in the Ledger maintained by the office of the Custodian of Enemy Property.

8. As an alternate submission Mr. Kapur urged that in addition to the directions contained regarding disbursement to the applicant of the amount collected by the appellant by way of rent or lease after 5.4.2002 till the handing over of the possession of the properties to the applicant this Court had also directed the appellants to get the immovable properties of the Estate vacated and to hand over the possession of the same to the respondent/applicant within 8 weeks. *The appellants were also directed to handover the possession of the other properties as well.* (Emphasis supplied)

9. Mr. Kapur submitted that under the general directions given by this Court in respect of properties belonging to the Estate of Mahmudabad, which included the amount held by the Custodian on account of rents collected from the Estate of the Raja of Mahmudabad prior to 5.4.2002, the said Custodian and the Union of India were bound to make over the said amount collected by the Custodian to the applicant.

10. Resisting the application filed on behalf of the respondent Mr. MAM Khan, the learned Additional Solicitor General, Ms. Indira Jai Singh submitted that in view of the categorical direction given in the order of 21.10.2005 passed by this Court, the question of making payment of the amount in question to the respondent did not arise. Ms. Jai Singh submitted that this Court had recorded the fact that the High

Court had refused to grant mesne profits to the appellant and against that decision no appeal had been filed by him. Consequently, the applicant was not entitled to the mesne profits till the passing of the interim order of status quo by this Court on 5.4.2002. In the said order this Court went on to say that the applicant would be entitled to the actual mesne profits for the period prior to the passing of the interim order of status quo by filing a suit. However, whatever moneys that had been collected by the appellant by way of rents after 5.4.2002 till the handing over of the possession of the properties to the applicant, should be deposited/disbursed to the respondent within 8 weeks. Ms. Jai Singh submitted that the rents collected from the said properties after 5.4.2002 till the handing over of the possession of the properties to the applicant, had already been disbursed to him as directed. However, since other than the directions for recovery of mesne profits for the period prior to 5.4.2002 no other direction had been given by this Court for disbursement of the rents and profits from the said Estate prior to 5.4.2002, the claim of the applicant was misconcieved. Ms. Jai Singh contended that if it had been the intention of this Court that the applicant would be entitled even to the rents and profits prior to 5.4.2002, then it would have given a clear direction for payment of the entire amount to the applicant.

11. As to the alternate submission of Mr. Kapur, the learned ASG urged that in view of what has been stated hereinabove, it could not have been the intention of this Court to release the entire sum of Rs.1,77,38,828.11 being the amount of the rents and profits collected from the Estate of the Raja prior to 5.4.2002. Ms. Jai Singh submitted that the claim of the applicant was misconceived in view of the directions contained in the Judgment of this Court dated 21.10.2005.

12. In addition to her aforesaid submissions, Ms. Jai Singh also urged that neither of the two applications were maintainable since the appeal and the contempt petition in which they have been filed have already been disposed of

earlier. Ms. Jai Singh submitted that having disposed of the appeal and the contempt petition, this Court had become functus officio and was bereft of jurisdiction for passing orders on the said two applications which are not in the nature of consequential reliefs being claimed from the disposed of matters but substantive applications raising substantial claims, de hors the reliefs prayed for in the appeal and the contempt petition. Ms. Jai Singh referred to various decisions on the question of the maintainability of applications filed in concluded proceedings, which we may refer to if it becomes necessary to do so.

13. Replying to Ms. Jai Singh's submissions, Mr. Kapur submitted that the answer to the question as to what is to be done in regard to the rents and profits collected prior to 5.4.2002, is clearly provided in Section 18 of the Enemy Property Act, 1968, which provides that the Central Government may by general or special order, direct that any enemy property vested in the Custodian under this Act and remaining with him shall be divested from him and be returned, in such manner as may be prescribed, to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the Custodian and shall revest in such owner or other person. It was submitted that there was neither any legal nor moral justification for the Custodian to hold on the said amount lying to the credit of the Estate of the Raja of Mahmudabad which had devolved upon the applicant as held by the Bombay High Court and confirmed by this Court.

14. On a careful consideration of the submissions made on behalf of the respective parties, we are of the view that a conscious distinction with regard to the rents and profits collected from the Estate of Raja of Mahmudabad prior to 5.4.2002 and thereafter, had been made by this Court while disposing of Civil Appeal No.2501 of 2002 on 21st October, 2005. It was clearly the intention of the Court that in respect of rents and profits collected after the order of status-quo passed

on 5th April, 2002, the same were to be made over by the Custodian to the applicant, but as far as the rents and profits collected prior to that date were concerned, the applicant would be required to file a suit to recover the same. We have been informed that, in fact, such a suit has been filed by the applicant and the same is pending decision.

15. Notwithstanding the use of the expression "mesne profits" in the first pat of the directions given by this Court, what was intended was that all rents and profits collected in respect of the Estate of Raja of Mahmudabad prior to the order of status-quo passed on 5th April, 2002, would have to be treated separately and not with the other collections made from the estate. The use of the expression "mesne profits", in our view, would cover all the monies received by the Custodian for the period prior to 5th April, 2002, and would, thereafter, be covered by the aforesaid order of this Court directing the appellant to release to the respondent the sum of Rs.1,77,38,828.11 held by the Custodian to the credit of the Estate of Raja of Mahmudabad. The interpretation sought to be given to the second part of this Court's order extracted above, will not include handing over of possession of the rents and profits prior to 5.4.2002, which had been excluded in the previous paragraph of the judgment of this Court. In our view, the directions given to the appellants to hand over the possession of other properties, mentioned in the second part of the order extracted hereinabove, relates to the immovable properties of the estate and not to the rents and profits collected by the Custodian from the estate prior to 5.4.2002. The two sets of properties are dealt with separately and are on two different settings. Mr. Kapur's attempt to include both the movable and immovable properties of the Estate of Raja of Mahmudabad is misconceived and is not acceptable. Since the amount recorded in the Custodian's ledger as being credited to the Estate of Raja of Mahmudabad represents the collections made from the estate prior to the order of status-quo passed on 5th April, 2002, the Respondent has been given leave to recover

A

the same by filing a suit. In view of the said order passed by this Court, it can no longer be argued that the directions to make over the possession of other properties to the applicant also included the rents and profits collected from the estate prior to 5.4.2002.

B

16. We are not, therefore, inclined to allow I.A. Nos.47 and 48, which are, accordingly, dismissed. The applicant will be free to pursue his claim for the said amount of Rs.1,77,38,828.11 before the Civil Court.

C

17. There will, however, be no order as to costs.

K.K.T. Applications dismissed.

A

MAHESH RATILAL SHAH
v.
UNION OF INDIA AND ORS.
(Special Leave Petition (C) No. 21686 of 2006)

JANUARY 19, 2010

B

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Securities Contracts (Regulation) Act, 1956:

C

s.4 – Absence of publication of the Rules and Bye-laws of the Bombay Stock Exchange, framed prior to its recognition in 1956 under the Act would not render its activities illegal and without authority.

D

ss.7 and 9 – Non-compliance of – Listing of fake and bogus shares – Petitioner's allegation that Bombay Stock Exchange (BSE) acted contrary to the interest of the securities market and investors in listing the share scrips of a company involved in fraudulent dealing of its scrip – Held: There is nothing to establish any ulterior motive on the part of BSE in listing the said scrip – The said scrip was listed on BSE after it had been listed in the Stock Exchange at Ahmedabad – However, as soon as information was received that the said company was involved in fraudulent dealing of its scrip, the said scrip was delisted and debarred from trading by the BSE – Thus, no offence committed by BSE or its members.

E

F

G

The case of the petitioner was that BSE and its members induced him to buy 4,50,800 shares of "Presto Finance Ltd." and under the assurance of BSE, he deposited the entire purchase amount, amounting to Rs.71.19 lacs. Petitioner's further case was that BSE and its members intentionally and deliberately cheated him by giving him delivery of forged share certificates and refused to cancel the said dealing when the same was

H

discovered and instead asked the petitioner to go to the Liquidator of Presto Finance Ltd. for claiming damages. He filed a writ petition before High Court under Article 226 of the Constitution for a direction upon the Union of India and SEBI to withdraw the recognition granted to BSE for alleged non-compliance with the provisions of Sections 7 and 9 of the Securities Contracts (Regulation) Act, 1956. A further direction was also sought for cancellation of SEBI registration of all relevant 90 members of BSE for fraudulently inducing investors to trade in forged scrips of M/s Presto Finance Ltd. and to declare the Rules, Bye-laws and Regulations of the BSE as illegal, void and *ultra vires* the 1956 Act as also the Constitution of India. High Court summarily dismissed the writ petition holding that action was initiated against the Company as far back as in 1998-99 under Section 11B of the SEBI Act and SEBI came to a finding that all the Directors of the Company were guilty of dealing in fake and bogus shares and cheating the investing public at large. The High Court also observed that the market regulator took due steps in the matter of individual transactions and the remedy of the petitioner, who was aggrieved by the acts of the promoters of the company in question, as well as its Directors, would be in approaching the appropriate Court to initiate criminal prosecution against the offenders. The High Court also noted that no material was produced by the petitioner for issuing directions for de-recognition of the BSE or to declare its Rules, Bye-laws and Regulations to be illegal, void and *ultra vires*.

The questions which arose for consideration in the present SLP were whether in the absence of publication of the Rules and Bye-laws of the Bombay Stock Exchange, which had been framed prior to its recognition in 1956 under the 1956 Act, its activities could be said to be without authority and whether in listing the shares of

M/s. Presto Finance Ltd. on the Stock Exchange, the Bombay Stock Exchange had acted in a manner which failed to ensure fair dealing and to protect the investors.

Dismissing the Special Leave Petition, the Court

HELD: 1. The petitioner did not make out any case of *malafides* or irregularity on the part of the Bombay Stock Exchange with regard to the listing and subsequent de-listing of the scrip of M/s Presto Finance Ltd. The publication of the Rules and Bye-laws of the Stock Exchange was not intended in the Securities Contract (Regulation) Act, 1956, as otherwise some provision would have been made in the Act with regard to pre-recognition Rules and Bye-laws. While the Act provides for publication of amendments to the Rules and Bye-laws after grant of recognition, the Act is silent with regard to the publication of the pre-recognition Rules or Bye-laws which were already in existence and had been acted upon all along. [Para 25] [799-G-H; 800-A-C]

2. The scrip of M/s. Presto Finance Ltd. was listed on the Bombay Stock Exchange after it had been listed in the Stock Exchange at Ahmedabad. However, as soon as information was received that the said company was involved in fraudulent dealing of its scrip, again on intimation from the Ahmedabad Stock Exchange, the said scrip was delisted and debarred from trading by the BSE. The Bombay Stock Exchange had not acted in a manner which tended to promote the share scrip of M/s. Presto Finance Ltd. with any *malafide* motive. That apart, the delay of 10 years in approaching the High Court over the transactions in the said scrip cannot be ignored since, a long standing decision should not be easily interfered with, having regard to the fact that over the years, people have already settled their business in accordance therewith. Except for the bald allegations that the Bombay Stock Exchange had acted in a manner which

was contrary to the interest of the securities market and investors in listing the share scrips of M/s. Presto Finance Ltd. for trading, there is nothing else to establish any ulterior motive on the part of the Stock Exchange in listing the said scrip and, in fact, in terms of remedial measures the Stock Exchange also invited all those who had been given forged scrips, to submit the same to the Stock Exchange for further action. [Para 22] [798-B-G]

Raj Narain Pandey & Ors. v. Sant Prasad Tewari & Ors. **(1973) 2 SCC 35, relied on.**

3. Since the said Rules and Bye-laws had been in existence from long before the enactment of Securities Contracts (Regulation) Act, 1956 and the grant of recognition to the Stock Exchange, the same did not require publication in terms of Section 4 of the 1956 Act. All amendments to the Rules and Bye-laws made after grant of recognition had been duly published in the Gazette. [Para 23] [798-H; 799-A-B]

Ritesh Agarwal v. SEBI (2008) 8 SCC 205*; Stock Exchange, Mumbai v. Vijay Bubna & Ors.* **1999 (2) LJ 289;** *Dr. Indramani Pyarelal Gupta & Ors. v. W.R. Natu & Ors.* **AIR 1964 SC 274;** *V.V. Ruia v. S. Dalmia* **AIR 1968 Bombay 347, referred to.**

4. Even if the 1956 Act did not contemplate publication of the pre-recognition Rules and Bye-laws, the position is and would continue to be rather ambivalent if the amended Rules and Bye-laws were published in the Official Gazette while the main Rules and Bye-laws remain unpublished. It may, therefore, be in the fitness of things to have the said Rules and Bye-laws also published in the Official Gazette and the State Gazette to prevent questions similar to those raised in this Special Leave Petition from being raised in future. [Para 27] [800-D-E]

Case Law Reference :

(2008) 8 SCC 205	**referred to**	**Para 8**
1999 (2) LJ 289	**referred to**	**Para 12**
AIR 1964 SC 274	**referred to**	**Para 12**
AIR 1968 Bombay 347	**referred to**	**Para 12**
(1973) 2 SCC 35	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 21686 of 2006.

From the Judgment & Order dated 01.03.2006 of the High Court of Bombay at Mumbai in Civil Writ Petition (Lodg.) No. 429 of 2006.

Manohar Lal Sharma, Mushtaq Ahmad for the Petitioner.

Shyam Diwan, Pratap Venugopal, Deepti, Purushottam Jha, Angely Anta (for K.J. John & Co.) Jaideep Gupta, Suruchii Aggarwal, Anish KV for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Claiming to be a Sub-broker with one Yogesh B. Mehta, a Member of the Bombay Stock Exchange (hereinafter referred to "BSE"), the petitioner herein filed a writ petition before the Bombay High Court under Article 226 of the Constitution against the Union of India, the Securities and Exchange Board of India (hereinafter referred to as the "SEBI") and the BSE, inter alia, for a direction upon the Union of India and SEBI to withdraw the recognition granted to BSE for alleged non-compliance with the provisions of Sections 7 and 9 of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as "the 1956 Act"). A further direction was also sought for for cancellation of SEBI registration of all

relevant 90 members of the Stock Exchange for fraudulently inducing investors to trade in forged scrips of M/s Presto Finance Ltd. and to declare the Rules, Bye- laws and Regulations of the BSE as illegal, void and ultra vires the 1956 Act as also the Constitution of India. Various ancillary and interim reliefs were also prayed for connected with the main reliefs.

2. The case of the Petitioner is that he had been induced by the BSE and its Members to buy 4,50,800 shares of "Presto Finance Ltd." and under the assurance of the Exchange, he had deposited the entire purchase amount, amounting to Rs.71,19,817.30 with the Exchange. It is the Petitioner's further case that the Exchange and its Members had intentionally and deliberately cheated him by giving him delivery of 1,56,100 forged share certificates and refused to cancel the said dealing when the same was discovered and instead asked the Petitioner to go to the Liquidator of Presto Finance Ltd. for claiming damages.

3. Appearing in support of the Special Leave Petition, Mr. Manohar Lal Sharma, learned Advocate, submitted that the SEBI as a statutory body established under Section 3 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the "SEBI Act"), was empowered under Section 11 of the Act to protect the interests of the investors in securities and to promote the development of and to regulate the securities market by such measures as it thought fit for prohibiting fraudulent and unfair trade practice relating to the securities market.

4. Mr. Sharma further submitted that the BSE is a body of individuals which has been granted recognition as a "Stock Exchange" under Section 4 of the 1956 Act, subject to the provisions of Section 9 thereof, to function as a Stock Exchange in Bombay. Under Section 12 of the SEBI Act, SEBI has granted registration to the Members of the BSE to deal in the securities market in the country within the ambit of the said Act

and the Regulations made thereunder. Mr. Sharma submitted that the main object of the BSE is to protect the interests both of the brokers and dealers and of the public interested in securities. Rules, Bye-laws and Regulations had, therefore, been framed by the BSE for trading and settlement of shares through the BSE terminal. Mr. Sharma submitted that the said Rules, Bye-laws and Regulations were contrary to the provisions of the 1956 Act, and were, therefore, void and ultra-vires the Act and the Constitution. The Writ Petitioner had, therefore, been compelled to move the High Court in its writ jurisdiction, inter alia, for the reliefs indicated hereinabove.

5. Referring to the Prospectus of M/s Presto Finance Ltd., Mr. Sharma pointed out that since it had been indicated out therein that the shares of Presto Finance Ltd. were to be listed both on the Regional Exchange at Ahmedabad and in the BSE, the Petitioner and other investors were induced into investing in the shares of the company which were ultimately de-listed from trading in both the Stock Exchanges on account of fraudulent dealings, which left the Petitioner holding a large number of forged shares traded by the Company from the BSE. Mr. Sharma urged that the BSE had completely failed to protect the interests of the investors as it was bound to do under Section 4 of the 1956 Act.

6. Mr. Sharma contended that the very existence of the BSE and its activities must be held to have been vitiated from its very inception since it had failed to comply with the provisions of Section 4 of the Act of 1956 relating to grant of recognition to Stock Exchanges by the Central Government and, in particular, Sub-section (3) thereof, which reads as follows :-

> "4(3). Every grant of recognition to a Stock Exchange under this section shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the Stock Exchange is situate, and such recognition shall have effect as from the date of its publication in the Gazette of India."

7. Mr. Sharma submitted that since the recognition granted to BSE has neither been published in the Gazette of India or in the Official Gazette of the State, such recognition did not have any effect at all and in addition to the above, ever since its recognition, the BSE has not also complied with the provision of Section 9 of the aforesaid Act and framed Byelaws for the regulation and control of contracts with the previous approval of SEBI. It was submitted that Sub-section (4) of Section 9 also provides for publication of the Byelaws and reads as follows :-

> "9(4). Any Bye-laws made under this section shall be subject to such conditions in regard to previous publication as may be prescribed and when approved by the Securities and Exchange Board of India in the Gazette of India and in which the principal office of the recognised Stock Exchange is situate, and shall have effect as from the date of its publication in the Gazette of India:
>
> Provided that if the Securities and Exchange Board of India Government is satisfied in any case that in the interest of the trade or in the public interest any Bye-law should be made immediately, it may, by order in writing specifying the reasons therefor, dispense with the condition of previous publication."

8. Referring to the decision of this Court in *Ritesh Agarwal vs. SEBI* [(2008) 8 SCC 205], wherein the question as to whether proceedings should also be taken against minors in view of Section 11 of the Contract Act, 1872, was under consideration, this Court held that since the father of the minors had committed fraud in their names, it is he who should have been proceeded against. Mr. Sharma urged that once it was shown that a promoter had committed fraud, as in this case, in listing its shares with the Exchange, thereby inducing investors to invest in such shares, it must be held that the Exchange had failed to comply with the provisions of clause (a) of Sub-section (1) of Section 4 of the 1956 Act, which makes it mandatory that

the Rules and Byelaws of a Stock Exchange have to be in conformity with such conditions as may be prescribed with a view to ensure fair dealing and to protect investors. [Emphasis supplied]

9. On behalf of BSE, Mr. Shyam Diwan, learned Senior Advocate, submitted that all Stock Exchanges, including the BSE, acted on the basis of information received from other Stock Exchanges in the country. In the instant case, since the Scrip of Presto Finance Ltd. had been listed for trading on the Ahmedabad Stock Exchange, the same were also listed for trading on the Bombay Stock Exchange, but as soon as information of fraud was received from the former Stock Exchange, BSE immediately stopped trading in the said Scrip. Mr. Diwan submitted that it was required to be noted that the Petitioner had approached the Court ten years after the incident, which in itself, was sufficient ground for dismissal of the Writ Petition.

10. Mr. Diwan submitted that the BSE had been established in 1875 as "The Native Shares and Stock Brokers Association" and was the first Stock Exchange in the country which obtained permanent recognition in 1956 from the Government of India under the 1956 Act and had played a pivotal role in the development of the Indian Capital Market. The recognition granted to the BSE was duly published by the Ministry of Finance, Government of India, in its Stock Exchange Division in the Gazette of India dated 31st August, 1957. Thereafter, the Stock Exchange Rules, Bye-laws and Regulations were framed in 1957 and advance print of the same, together with all amendments up to date, was sent to the Government of India. Receipt and approval of the same by the Government of India under the 1956 Act was also conveyed to the Secretary of the Stock Exchange by the Deputy Secretary in the Ministry of Finance, Department of Economic Affairs, by his letter dated 1st May, 1959. Mr. Diwan submitted that the Rules, Regulations and Bye-laws of the Bombay Stock

Exchange had been acted upon since they were framed and the Petitioner also claims to have traded on the Stock Exchange as a Sub-broker through Yogesh Mehta, said to be a member of the Stock Exchange. Mr. Diwan submitted that when the Rules, Bye-laws and Regulations had been continuously acted upon for more than 50 years, it would be inequitable to hold that the same were not valid on account of non-publication in the Official Gazette or the Gazette of India in terms of Sub-section (4) of Section 9 of the 1956 Act.

11. Mr. Diwan then urged that the scheme of Section 4 of the 1956 Act relating to grant of recognition to Stock Exchanges, makes it clear that before such grant of recognition, the Central Government has to be satisfied that the Rules and Bye-laws of the Stock Exchange applying for registration were in conformity with such conditions as might be prescribed with a view to ensuring fair dealing and to protect investors. Mr. Diwan submitted that under Section 9 of the 1956 Act the recognized Stock Exchange is required to make Bye-laws for the regulation and control of contracts and any Bye-laws made under the said section would be subject to such conditions in regard to previous publication as may be prescribed, and, when approved by SEBI, is to be published in the Gazette of India and also in the official Gazette of the State in which the principal office of the recognized Stock Exchange is situate, and shall have effect as from the date of its publication in the Gazette of India.

12. Mr. Diwan reiterated that it would be amply clear from the above that the Rules and Bye-laws framed by the Stock Exchange before grant of recognition under Section 4 were not required to be published in the manner indicated in Sub-Section (3) of Section 4 of the 1956 Act. Mr. Diwan submitted that only amendments effected to the Rules and Bye-laws after grant of recognition would require publication as provided for in Sub-Section (4) of Section 9 of the above Act. Mr. Diwan also urged that since the BSE had been functioning as perhaps the

most important Stock Exchange in India, since it was granted permanent recognition in 1956, its performance over the past 33 years cannot be diluted and has to be taken into consideration while considering the case sought to be made out by the Petitioner. Learned counsel submitted that, although, the question now sought to be raised had not at any point of time been raised in this Court, the same question did arise before the Bombay High Court in Appeal No.1101/98 arising out of Arbitration Petition No.130/98, *Stock Exchange, Mumbai vs. Vijay Bubna & Ors.,* reported in 1999 (2) LJ 289. In the said decision, where the primary issue was whether an Arbitral Tribunal constituted under the Bye-laws framed by the BSE under the 1956 Act was in contravention of the provisions of Section 10 of the Arbitration and Conciliation Act, 1996, the question arose as to whether the said Bye-laws of the BSE required publication in the Official Gazette. Upon construction of the provisions of the Bye-laws of the BSE and the decision of this Court in *Dr. Indramani Pyarelal Gupta & Ors. Vs. W.R. Natu & Ors.* [AIR 1964 SC 274], the High Court held that the Bye-laws of the BSE were subordinate legislation and that the same were statutory in nature having the force of enactment within the meaning of Sub-Section (4) of Section 2 of the Arbitration and Conciliation Act, 1996. Mr. Diwan drew our attention to paragraph 42 of the judgment in which reference was made to another decision of the Bombay High Court in the case of *V.V. Ruia vs. S. Dalmia* [AIR 1968 Bombay 347], where the question arose as to whether the Bye-laws of the BSE, which were made prior to its recognition under Section 4, needed publication under Sub-Section (4) of Section 9 of the 1956 Act. It was held that the Bye-laws made by the Bombay Stock Exchange prior to its recognition did not require publication in the Official Gazette, on account of the fact that for the purpose of obtaining recognition from the Central Government, the Stock Exchange was required to submit a copy of the Bye-laws and Rules and it is only after scrutiny thereof that recognition was granted under Section 4. It was also mentioned that if, after recognition, any subsequent Bye-

law was made under Section 9 of the Act, then, by virtue of Sub-Section (4) of Section 9 such a post-recognition Bye-law required publication.

13. Mr. Diwan then referred to the decision in *V.V. Ruia*'s case (supra,) referred to by the Division Bench of the High Court in the aforesaid judgment, wherein it had been held that the Bye-laws made by the Stock Exchange prior to its recognition in 1956 did not require publication under Section 9(4) of the 1956 Act.

14. Mr. Diwan's next contention was that a procedure, which had been consistently followed over a long period, should not be interfered with except for very compelling reasons as that could otherwise lead to chaos and unsettle the position which had been settled over such period.

15. Referring to the Three-Judge Bench decision of this Court in *Raj Narain Pandey & Ors. Vs. Sant Prasad Tewari & Ors.* [(1973) 2 SCC 35], Mr. Diwan submitted that while interpreting the doctrine of stare decisis, this Court had held that a decision of long-standing on the basis of which many persons would, in the course of time, have arranged their affairs, should not lightly be disturbed by a superior court not strictly bound itself by the decision. It was further observed that in the matter of the interpretation of a local statute, the view taken by the High Court over a number of years should normally be adhered to and not disturbed. A different view would not only introduce an element of uncertainty and confusion, it would also have the effect of unsettling transactions which might have been entered into on the faith of those decisions. It was held that the doctrine of stare decisis can be aptly invoked in such a situation.

16. Apart from being guilty of delay and laches, Mr. Diwan submitted that the petitioner was himself in default, not being a registered sub-broker of the BSE, although, he claimed to be a sub-broker of Yogesh B. Mehta, a member of the Stock

Exchange. Mr. Diwan submitted that the Special Leave Petition bristled with malice in law and was, therefore, liable to be dismissed with costs.

17. Mr. Jaideep Gupta, learned Advocate who appeared for SEBI, took us through the letter dated 1st August, 1996, addressed on behalf of the Ahmedabad Stock Exchange to Shri L.K. Singhvi, Executive Director, SEBI, informing him of the Report of the Committee in the matter of Presto Finance Ltd. In the said letter it was indicated that based on a number of complaints received from the investors in the scrip of Presto Finance Ltd., a Special Committee consisting of three members, including SEBI, and a nominated public representative, had been constituted and after inquiry it had recommended that the trading in the scrip of Presto Finance Ltd. should not be recommended and might be de-listed permanently. Mr. Jaideep Gupta referred to the inquiry report of the Assistant Police Inspector, General Branch, Crime Branch, C.I.D., Mumbai, submitted to the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai, stating that the BSE had acted promptly and diligently to protect the interest of the market and as such no offence had been committed by BSE and those who were involved in the transactions of the shares of Presto Finance Ltd. in 1996. It was stated that on the contrary, the complainant was not a registered sub-broker of the Bombay Stock Exchange and had himself violated the provisions of Section 23(h) of the 1956 Act, as he had also dealt with the above transactions as sub-broker, without being registered with the BSE.

18. Mr. Gupta submitted that based on the complaints received from various investors relating to the issuance of fake and forged share certificates of M/s. Presto Finance Ltd., the Stock Exchange, Ahmedabad, had constituted a Special Committee, as indicated hereinabove, and had found the Managing Director and other Directors of the company to be guilty of irregularities. Accordingly, in a proceeding under

Section 11B of the SEBI Act, 1992, SEBI had taken stringent measures against the Managing Director and other Directors of the company for having received payments for issuance of fake and forged shares of the company. Mr. Gupta pointed out that on such finding, in the interest of investors in securities and the securities market, SEBI had debarred Shri Hitendra Vasa and the companies promoted by him and the group companies of M/s. Presto Finance Ltd., from accessing the capital market for a period of five years with effect from 22nd April, 1998.

19. Mr. Gupta submitted that as far as SEBI was concerned, on receipt of information about the fraudulent share scrips issued by M/s. Presto Finance Ltd., immediate steps had been by SEBI to have the share scrips of the said company de-listed from the Ahmedabad Stock Exchange as well as from the Bombay Stock Exchange.

20. Mr. Gupta submitted that no fault could be found with BSE in listing the shares of Presto Finance Ltd., since the same had been listed on the Ahmedabad Stock Exchange earlier, but as soon as information was received from the Ahmedabad Stock Exchange that there was an element of fraud involved, and the scrips had been delisted in the Ahmedabad Stock Exchange, BSE took immediate steps to delist the scrips and to close trading of the said shares in order to protect the securities market and the investors who traded in such securities. Mr. Gupta submitted that the entire allegations made by the petitioner against the Bombay Stock Exchange was devoid of any merit and did not warrant any interference in these proceedings.

21. As would be evident from the pleadings and submissions made on behalf of the respective parties, the main question which we are called upon to consider is whether in the absence of publication of the Rules and Bye-laws of the Bombay Stock Exchange, which had been framed prior to its recognition in 1956 under the 1956 Act, its activities could be said to be without authority. The further question which falls for

consideration is whether it can be said, as has been urged on behalf of the petitioner, that in listing the shares of M/s. Presto Finance Ltd. on the Stock Exchange, the Bombay Stock Exchange had acted in a manner which failed to ensure fair dealing and to protect the investors.

22. As we have noticed hereinbefore, the scrip of M/s. Presto Finance Ltd. was listed on the Bombay Stock Exchange after it had been listed in the Stock Exchange at Ahmedabad and on receipt of information thereof. However, as soon as information was received that the said company was involved in fraudulent dealing of its scrip, again on intimation from the Ahmedabad Stock Exchange, the said scrip was delisted and debarred from trading by the BSE. In our view, the Bombay Stock Exchange had not acted in a manner which tended to promote the share scrip of M/s. Presto Finance Ltd. with any malafide motive. Apart from the above, the delay of 10 years in approaching the High Court over the transactions in the said scrip cannot be ignored since, as observed by this Court in *Raj Narain Pandey's* case (supra) a long standing decision should not be easily interfered with, having regard to the fact that over the years, people have already settled their business in accordance therewith. Except for the bald allegations that the Bombay Stock Exchange had acted in a manner which was contrary to the interest of the securities market and investors in listing the share scrips of M/s. Presto Finance Ltd. for trading, there is nothing else to establish any ulterior motive on the part of the aforesaid Stock Exchange in listing the said scrip and, in fact, in terms of remedial measures the Stock Exchange also invited all those who had been given forged scrips, to submit the same to the Stock Exchange for further action.

23. On the question of non-publication of the Bye- laws, we agree with the views of the Bombay High Court in *V.V. Ruia's* case (supra) that since the said Rules and Bye-laws had been in existence from long before the enactment of 1956 Act and the grant of recognition to the Stock Exchange, the same

did not require publication in terms of Section 4 of the 1956 Act. In any event, as has been submitted by Mr. Diwan on behalf of the BSE, all amendments to the Rules and Bye-laws made after grant of recognition had been duly published in the Gazette.

24. Upon considering the case made out by the petitioner in the writ petition, the Bombay High Court held that the writ petition, which was lacking in particulars relating to the constitutional challenge, was not the appropriate remedy for the petitioner, who, along with a member of the Stock Exchange, had traded in the shares of the above-mentioned company. The High Court also observed that upon the complaints made to SEBI, action had been initiated against the Company as far back as in 1998-99 under Section 11B of the SEBI Act and SEBI had come to a finding that all the Directors of the Company, including one Hitendra Vasa, were guilty of dealing in fake and bogus shares and cheating the investing public at large. The High Court also observed that the market regulator had taken due steps in the matter of individual transactions and the remedy of the petitioner, who was aggrieved by the acts of the promoters of the company in question, as well as its Directors, would be in approaching the appropriate Court to initiate criminal prosecution against the offenders. Observing that it would not be appropriate to issue any blanket writ, as claimed by the Petitioner, when admittedly his case was restricted to dealing in shares of one of the companies listed at the Stock Exchange, the High Court summarily dismissed the writ petition. While doing so, the High Court also noted that no material had been produced by the petitioner for issuing directions for de-recognition of the BSE or to declare its Rules, Bye-laws and Regulations to be illegal, void and ultra vires.

25. Agreeing with the views expressed by the High Court, we are of the view that the Petitioner has not been able to make out any case of malafides or irregularity on the part of the Bombay Stock Exchange with regard to the listing and

subsequent de-listing of the scrip of M/s Presto Finance Ltd. and we are also of the view that the publication of the Rules and Bye-laws of the Stock Exchange was not intended in the Securities Contract (Regulation) Act, 1956, as otherwise some provision would have been made in the Act with regard to pre-recognition Rules and Bye-laws. While the Act provides for publication of amendments to the Rules and Bye-laws after grant of recognition, the Act is silent with regard to the publication of the pre-recognition Rules or Bye-laws which were already in existence and had been acted upon all along.

26. In that view of the matter, we see no reason to interfere with the order of the Bombay High Court impugned in the present Special Leave Petition and the same is, therefore, dismissed, but without any order as to costs.

27. Before parting, we would, however, indicate that even if the 1956 Act did not contemplate publication of the pre-recognition Rules and Bye-laws, the position is and would continue to be rather ambivalent if the amended Rules and Bye-laws were published in the Official Gazette while the main Rules and Bye-laws remain unpublished. It may, therefore, be in the fitness of things to have the said Rules and Bye-laws also published in the Official Gazette and the State Gazette to prevent questions similar to those raised in this Special Leave Petition from being raised in future.

D.G. Special Leave Petition dismissed.

C.I.T., MUMBAI
v.
M/S. EMPTEE POLY-YARN PVT. LTD.
(Civil Appeal No. 786 of 2010)

JANUARY 20, 2010

[S.H. KAPADIA AND H.L. DATTU, JJ.]

Income Tax Act, 1961:

s. 80 IA – 'Manufacture' – Twisting and texturising of partially oriented yarn (POY) – HELD: Keeping in view the process in the light of the opinion given by the expert, which has not been controverted, POY is a semi-finished yarn not capable of being put in warp or weft, it can only be used for making a texturized yarn, which, in turn, can be used in the manufacture of fabric – Thus, POY cannot be used directly to manufacture fabric – According to the expert, crimps, bulkiness etc. are introduced by a process, called as thermo mechanical process, into POY which converts POY into a texturized yarn – If thermo mechanical process is examined in detail, it becomes clear that texturising and twisting of yarn constitutes 'manufacture' in the context of conversion of POY into texturized yarn - Besides, under the Income Tax Act, as amended in 2009, the test given by Supreme Court in M/s. Oracle Software's case has been recognised when the definition of the word 'manufacture' is made explicit by Finance Act No.2/2009 which states that 'manufacture' shall, inter alia, mean a change in bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure – Thus, it may be mentioned that the thermo mechanical process also bring about a structural change in the yarn itself, which is one of the important tests to be seen while judging whether the process is manufacture or not – The structure, the character, the use and the name of the product are indicia to be taken into account while deciding the question whether the process is a manufacture or not.*

C.I.T. vs. M/s. Oracle Software India Ltd.* **2010 (1) SCALE 425, relied on.

Commissioner of Central Excise, Mumbai-V vs. Swastik Rayon Processors **2007 (209) E.L.T. 163 (S.C.), held inapplicable.**

'Manufacture – Examination of the process applicable to the product – HELD: Repeatedly the Supreme Court has recommended to the Department, be it under Excise Act, Customs Act or the Income Tax Act, to examine the process applicable to the product in question and not to go only by dictionary meanings – This recommendation is not being followed over the years – Even when the assessee gives an opinion on a given process, the Department does not submit any counter opinion wherever such counter opinion is possible – Prima facie, however, in the instant case, there is no possibility of any counter opinion to the opinion given by the Mumbai University – This judgment is to be confined to the facts of the present case – It is not being said that texturising or twisting per se in every matter amounts to manufacture – It is the thermo mechanical process embedded in twisting and texturising when applied to a partially oriented yarn, that makes the process a manufacture – Central Excise Act, 1944 – Customs Act, 1962 – Constitution of India, 1951 – Article 141.

Words and Phrases:

Expression 'manufacture' – Meaning of in the context of s.80 IA of the Income Tax Act, 1961.

Case Law Reference:

2010 (1) SCALE 425	**relied on**	**para 7**

2007 (209) E.L.T. 163 (S.C.) held inapplicable para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 786 of 2010.

From the Judgment & Order dated 27.02.2008 of the High Court of Judicature at Bombay in ITA No. 1393 of 2000.

WITH

C.A. No. 787, 788, 789, 790, 791, 792 of 2010

Arijit Prasad, Rahul Kaushik, B.V. Balaram Das for the Appellant.

V. Lakshmi Kumaran, Alok Yadav, Ankur, M.P. Davanath for the Respondent.

The following Order of the Court was delivered

ORDER

1. Leave granted.

2. Heard learned counsel on both sides.

3. The short question which arises for determination in this batch of Civil Appeals is: Whether twisting and texturising of partially oriented yarn ('POY' for short) amounts to 'manufacture' in terms of Section 80IA of the Income Tax Act, 1961?

4. The lead matter in this batch of Civil Appeals is *C.I.T., Mumbai vs. M/s. Emptee Poly-Yarn Pvt. Ltd.* (Civil Appeal arising out of S.L.P.(C) No.26482/2008), in which the relevant Assessment Year is 1996-97.

5. Repeatedly this Court has recommended to the Department, be it under Excise Act, Customs Act or the Income Tax Act, to examine the process applicable to the product in question and not to go only by dictionary meanings. This

recommendation is not being followed over the years. Even when the assessee gives an opinion on a given process, the Department does not submit any counter opinion wherever such counter opinion is possible. Prima facie, however, in this case, we do no see possibility of any counter opinion to the opinion given by the Mumbai University, vide letter dated 10th July, 1999.

6. With the above preface, we are required to examine the above question as to whether twisting and texturising of POY amounts to 'manufacture'. At the outset, we wish to clarify that our judgment should not be understood to mean that per se twisting and texturising would constitute 'manufacture' in every case. In each case, one has to examine the process undertaken by the assessee.

7. Having examined the process in the light of the opinion given by the expert, which has not been controverted, we find that POY is a semi-finished yarn not capable of being put in warp or weft, it can only be used for making a texturized yarn, which, in turn, can be used in the manufacture of fabric. In other words, POY cannot be used directly to manufacture fabric. According to the expert, crimps, bulkiness etc. are introduced by a process, called as thermo mechanical process, into POY which converts POY into a texturized yarn. If one examines this thermo mechanical process in detail, it becomes clear that texturising and twisting of yarn constitutes 'manufacture' in the context of conversion of POY into texturized yarn. At this stage, we may also reproduce, hereinbelow, para 10 of our judgment in the case of *C.I.T. vs. M/s. Oracle Software India Ltd.,* reported in 2010 (1) SCALE 425.

> "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".

8. Applying the above test to the facts of this case, it is clear that POY simplicitor is not fit for being used in the manufacture of a fabric. It becomes usable only after it undergoes the operation/process which is called as thermo mechanical process which converts POY into texturised yarn, which, in turn, is used for the manufacture of fabric. One more point needs to be mentioned. Under the Income Tax Act, as amended in 2009, the test given by this Court in *M/s. Oracle Software's case* (supra) has been recognised when the definition of the word 'manufacture' is made explicit by Finance Act No.2/2009 which states that 'manufacture' shall, inter alia, mean a change in bringing into existence of a new and distinct object or article or thing with a different chemical composition or *integral structure.* Applying this definition to the facts of the present case, it may be mentioned that the above thermo mechanical process also bring about a structural change in the yarn itself, which is one of the important tests to be seen while judging whether the process is manufacture or not. The structure, the character, the use and the name of the product are indicia to be taken into account while deciding the question whether the process is a manufacture or not.

9. Before concluding, we may point out that the learned counsel appearing for the Department cited before us a judgment of a Division Bench of this Court in the case of *Commissioner of Central Excise, Mumbai-V vs. Swastik Rayon Processors,* reported in 2007 (209) E.L.T. 163 (S.C.), in which it has been held that twisting of cellulosic filament yarn with a blended yarn comprising of polyester and viscose will not amount to manufacture under Section 2(F) of the Central Excise Act. In our view, the said judgment has no application to the facts and circumstances of this case. As stated above, POY is a semi-finished product. It is a raw material/input. That raw material or input gets converted into a texturised yarn by

reason of the thermo mechanical process. POY is unfit for manufacture of fabric. POY, as stated above, means partially oriented yarn whereas a cellulosic filament yarn is a final product in the sense that it can be used directly for manufacture of fabric. If this definition is kept in mind, the judgment in the case of *Swastik Rayon Processors's case* (supra) will not apply to the facts of the present case.

10. We once again repeat the caution which we have mentioned hereinabove. Our judgment in the present case is to be confined to the facts of the present case. We are not saying that texturising or twisting per se in every matter amounts to manufacture. It is the thermo mechanical process embedded in twisting and texturising when applied to a partially oriented yarn which makes the process a manufacture. In the circumstances, the judgment in the *Swastik Rayon Processors's case* (supra) will not apply.

11. Applying the above test to the facts of the present case, we find no infirmity in the impugned judgments of the High Court. Accordingly, the Civil Appeals filed by the Department are dismissed with no order as to costs.

R.P. Appeals filed by Department dismissed.

STATE OF KARNATAKA & ORS.
v.
GANPATHI CHAYA NAIK & ORS.
(Civil Appeal No. 795-798 of 2010)

JANUARY 22, 2010

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

Service law - Regularization/absorption - Daily wagers in continuous service for more than ten years since the date of their appointment - Regularization of service - Claim of - Held: Not sustainable since daily wagers were not recruited as per the Recruitment Rules - Order of tribunal as upheld by High Court directing the employer to consider in the cases of daily wagers for regularization, set aside.

Plea - New plea - Raising of - Before Supreme Court - Permissibility of - Held: Not permissible.

Respondent-daily wagers claimed regularization of service on the ground that they had been in continuous service for more than ten years since their initial appointment. Appellant-State contended that the respondents had not been recruited as per the Recruitment Rules and the scheme of regularization pertained only to those persons who had been working prior to 01.7.1984, whereas respondents were recruited after the said date. Tribunal directed the appellants to consider the cases of the respondents for regularization of their service on merits. High Court upheld the same. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. Merely because a temporary employee or a casual wage worker is continued for a time beyond the

term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules the claims of the respondents for regularization or absorption cannot be sustained. The orders passed by the High Court as also the tribunal is set aside. [Para 6] [811-E-F]

2. The respondents did not argue about their rights under the Industrial Disputes Act, 1947 at any stage till the hearing of the appeal before this Court. A faint argument was sought to be made by their counsel which, however, was not permitted to be raised as neither there was any pleading in support of the same nor any argument in the Courts below at any stage. Further, even a case of the said nature has not been pleaded before this Court. Therefore, such a plea could not be raised before this Court by the respondents. Therefore, in these appeals the rights of the respondent under the said Act is not adjudicated upon. [Para 8] [813-H; 814-A-B]

Union of India & Anr. v. Kartick Chandra Mondal and Anr. **2010 (1) JT. 206;** *Secretary, State of Karnataka and Others v. Umadevi (3) and Ors.* **(2006) 4 SCC 1;** *Official Liquidator v. Dayanand and Others* **(2008) 10 SCC 1 , relied on.**

Case Law Reference:

2010 (1) JT. 206	**Relied on.**	**Para 6**
(2006) 4 SCC 1	**Relied on.**	**Para 6**
(2008) 10 SCC 1	**Relied on.**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 795-798 of 2010.

From the Judgment & Order dated 5.1.2004 of the High

Court of Karnataka at Bangalore in W.P. Nos. 53790, 53804-53806 of 2003.

WITH

C.A. Nos. 799-805, 806-810, 811-813, 814-817 & 818 of 2010.

Sanjay R. Hedge, A. Rohan Singh, Amit Kr. Chawla for the Appellants.

R.S. Hegde (for P.P. Singh), Hari Shankar, Sudarshan Singh Rawat, K. Saradai Devi, Rajesh Mahale for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave Granted in all the Special Leave Petitions.

2. The common question which arises for consideration in all these appeals is whether the orders passed by the Division Bench of the High Court of Karnataka, Bangalore in different Writ Petitions filed before it by the appellants herein dismissing the said Writ Petitions and upholding the directions given by the Karnataka Administrative Tribunal, Bangalore ("KAT" for short") to the appellants to consider the cases of the respondents for regularization of their service on merits are sustainable.

3. The facts which are necessary to answer the aforesaid question are being culled out here. The respondents in all these appeals were working on daily wages either as plantation watchmen or wireless operators or helpers. The respondents in all these appeals claimed regularization of their service in light of the fact that they had been in continuous service for more than ten years since the day of their initial appointment. The appellants, however, refuted their claim on the ground that the scheme of regularization pertained to only those persons

who had been working prior to 01.07.1984.

4. The learned counsel appearing on behalf of the respondents, on the other hand, supported the decision of the High Court of Karnataka.

5. We have heard all the learned counsel appearing for the parties. In light of the submissions made by the counsel appearing for the parties, we have carefully perused the documents available on record. The learned counsel appearing for the appellants submitted that the High Court as also the KAT had erred in allowing the claim of the respondents for regularization of their services as the respondents had failed to establish their rights for regularization. The counsel appearing for the appellants further submitted before us that the claim of the respondents for regularization was not sustainable in view of the fact that they had not been recruited as per the Recruitment Rules and also because the respondents had been recruited after 01.07.1984 whereas the scheme of regularization pertained to only those who had been working prior to the aforesaid date. It was also contended before us by the learned counsel appearing for the appellants that the respondents not being recruited through the proper procedure were back-door entrants into government service, and therefore, regularization of their services would be in violation of Articles 14 and 16 of the Constitution of India.

6. At this juncture, we intend to refer to a few recent decisions of this Court on the issue involved herein. In *Civil Appeal No. 2090 of 2007* which was pronounced on 15.01.2010, one of us (Mukundakam Sharma J.) had the opportunity to deal with a similar question concerning regularization of the casual workers. This Court, while allowing the petition dismissed the claim of the casual workers for regularization or absorption. In coming to the aforesaid conclusion, this Court placed reliance on two recent and landmark decisions of this Court. In *Secretary, State of Karnataka and Others v. Umadevi (3) and Others* reported in

(2006) 4 SCC 1 , this Court, in paragraphs 43 and 45 of the judgment, observed as follows: -

> "43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. ……………"

> "45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked

> for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arm's length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. … … … … … … … … … … … … … … … … … .
> ……………………………………………………………..
> …………………………………………. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

7. Subsequent to the aforesaid decision, the issue again arose for consideration before the 3-Judges Bench of this Court in the *Official Liquidator v. Dayanand and Others* reported in (2008) 10 SCC 1 wherein this Court, in paragraphs 68 and 116, observed as follows:-

> "68. The abovenoted judgments and orders encouraged the political set-up and bureaucracy to violate the soul of Articles 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoils system which prevailed in the United States of America in the sixteenth and seventeenth centuries got a firm foothold in this country. Thousands of persons were employed/ engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system."

> "116. In our opinion, any direction by the Court for absorption of all company - paid staff would be detrimental to public interest in more than one ways. Firstly, it will compel the Government to abandon the policy decision of reducing the direct recruitment to various services. Secondly, this will be virtual abrogation of the statutory rules which envisage appointment to different cadres by direct recruitment."

8. In view of the settled position of law in this regard which has been reiterated in a number of judgments of this Court, we hold that the claims of the respondents for regularization or absorption cannot be sustained. Accordingly, we allow the appeals and set aside the orders passed by the High Court as also the KAT. The respondents did not argue about their

rights under the Industrial Disputes Act, 1947 at any stage till the hearing of the appeal before us. A faint argument was sought to be made by the counsel appearing for the respondents which, however, was not permitted to be raised as neither there was any pleading in support of the same nor any argument in the Courts below at any stage. Further, even a case of the said nature has not been pleaded before us. Therefore, such a plea could not be raised before us by the respondents. We have, therefore, in these appeals not adjudicated upon the rights of the respondents under the said Act. Liberty is, therefore, granted to the respondents to approach the appropriate forum under the said Act, if such a remedy and right is available to the respondents.

N.J. Appeals allowed.

STATE OF KARNATAKA AND ORS.
v.
GADILINGAPPA AND ORS.
(Civil Appeal Nos. 819-851 of 2010)

JANUARY 22, 2010

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

Service Law: Regularisation – Minimum prescribed qualification for the post of teacher – Not fulfilled – Claim for regularisation – Held: Not maintainable.

Precedent: Wrong committed in an earlier case – Held: Same cannot be allowed to be perpetuated.

Respondents were appointed as primary school teachers on honorary basis in the Government run schools. They, however, did not possess the T.C.H. qualification, which was the minimum prescribed qualification for the post of a teacher. The respondents, in view of the fact that they had rendered long continuous service as honorary teachers without any break, claimed regularization of their services. Their claim was rejected on the ground that they did not possess the minimum prescribed qualification of T.C.H. High Court allowed the writ petitions filed by respondents. Hence the appeals.

Allowing the appeals, the Court

HELD: 1. Admittedly, the respondents were working as Primary School Teachers for a long period of time and they had rendered service as such continuously without any break. However, none of the respondents had undergone the T.C.H. course, which was the minimum prescribed qualification at the relevant time for being appointed to the post of a teacher. Since the respondents did not possess the minimum prescribed qualification and because of which their appointment was in contravention of the Cadre and recruitment Rules, their appointments were illegal appointments. [Para 7] [818-C-E]

Secretary, State of Karnataka and Others v. Umadevi (3) and Others **(2006) 4 SCC 1;** *Official Liquidator v. Dayanand and Others* **(2008) 10 SCC 1, relied on.**

2. It is a well settled principle of law that even if a wrong committed in an earlier case, the same cannot be allowed to be perpetuated. [Para 7] [819-A]

Case Law Reference:

(2006) 4 SCC 1	**relied on**	**Para 7**
(2008) 10 SCC 1	**relied on**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 819-851 of 2010.

From the Judgment and Order dated 26.7.2004 in WP Nos. 45859-45891/2003 of the High Court of Karnataka at Bangalore.

Sanjay R. Hegde, A. Rohan Singh, Amit Kr. Chawla for the Appellants.

Rajesh Mahale for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave Granted.

2. By this appeal, the appellants herein have challenged the Order dated 26.07.2004 passed by the Division Bench of the High Court of Karnataka at Bangalore allowing the Writ Petitions filed by the respondents herein. The High Court had,

by the said Order, set aside the decision of the KAT and allowed the claim of the respondents for regularization of their services.

3. The relevant facts in brief are set out here. The respondents herein were appointed as Primary School Teachers on honorary basis in the Government run schools. The respondents, however, did not possess the T.C.H. qualification, which was the minimum prescribed qualification for the post of a teacher. The respondents, in view of the fact that they had rendered long continuous service as honorary teachers without any break, claimed regularization of their services. The appellant no.1 rejected the claim of the respondents on the ground that any consideration for regularization or absorption can be made only in regard to those candidates who possessed the minimum prescribed qualification for the post of the teachers and as the respondents did not posses the minimum prescribed qualifications of T.C.H., they could not be considered for regularization or absorption and that if they were regularized or absorbed despite their not possessing the minimum prescribed qualifications, it would amount to hostile discrimination and would be in violation of Articles 14 and 16 of the Constitution.

4. Feeling aggrieved, the respondents herein approached the KAT. Their applications were, however, rejected by the KAT. Against the decision of the KAT, the respondents herein filed Writ Petition Nos. 45859-891 of 2003 (S-KAT) before the Division Bench of the High Court of Karnataka at Bangalore. The Division Bench disposed of the aforesaid Writ Petitions in terms of a judgment of that Court in Writ Petitions 33173-33220 of 2003 (S-KAT) thereby allowing the Writ Petitions filed by the respondents herein.

5. We have heard the learned counsel appearing for the parties and carefully perused the documents on record before us. The crux of the submissions of the learned counsel appearing for the appellants is that the High Court had erred

in allowing the claims of the respondents for regularization of their services, for the respondents herein did not fulfill the minimum required qualification for being appointed as Primary School Teachers as they did not possess the T.C.H. qualification.

6. On the other hand, the learned counsel appearing for the respondents supported the decision of the High Court and endeavoured to persuade us to uphold it by dismissing the present appeal.

7. Admittedly, the respondents herein were working as Primary School Teachers for a long period of time and they had rendered service as such continuously without any break. However, after perusing the relevant documents on record what comes to light is the fact that none of the respondents had undergone the T.C.H. course, which was the minimum prescribed qualification at the relevant time for being appointed to the post of a teacher. Since the respondents did not possess the minimum prescribed qualification and because of which their appointment was in contravention of the Cadre and recruitment Rules, we are of the considered view that their appointments were illegal appointments. Furthermore, neither has it been brought to our notice nor was it specifically stated before the High Court by the respondents in the Writ Petition Nos. 45859-891 of 2003 that the respondents belonged to the Scheduled Castes or Scheduled Tribes category, which was the case of the petitioners in Writ Petitions Nos. 33173-33220 of 2003 (S-KAT) as well the main factor taken into consideration by the High Court of Karnataka while allowing the claims of the petitioners therein for regularization of their services. Besides, the Constitutional Bench had, in *Secretary, State of Karnataka and Others v. Umadevi (3) and Others* reported in (2006) 4 SCC 1, clarified in explicit terms that the decisions which run counter to the principles settled and the directions given in the *Uma Devi's* (supra) case will stand denuded of their status as precedents. Here, we also wish to

point out that it is a well settled principle of law that even if a wrong committed in an earlier case, the same cannot be allowed to be perpetuated.

8. Thus, in view of the aforesaid facts and circumstances, together with the decisions of this Court in *Uma Devi's* case (supra) and *Official Liquidator v. Dayanand and Others* reported in (2008) 10 SCC 1, the claim of the respondents for regularization cannot be sustained. We are, therefore, of the considered view that the present appeals are entitled to be allowed, which we hereby do. Liberty is, however, granted to the respondents to seek any other remedy under any other law, if such a remedy and right is available to the respondents.

D.G. Appeals allowed.

TRIMEX INTERNATIONAL FZE LTD. DUBAI
v.
VEDANTA ALUMINIUM LIMITED, INDIA
Arbitration Petition No. 10 of 2009

JANUARY 22, 2010

[P. SATHASIVAM, J.]

Contract Act, 1872: ss.4, 7 – Concluded contract containing arbitration clause – If respondent accepts the offer of petitioner following a very strict time schedule, he cannot escape from the obligations that flowed from such an action – Arbitration clause can be inferred from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication even in the absence of signed agreement – If no inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality – On facts, the Commercial Offer carried no clause making the conclusion of the contract incumbent upon the Purchase Order – Therefore, the moment commercial offer was accepted by the respondent, the contract came into existence – Since the contract contained arbitration clause, petitioner made out case for appointment of arbitrator – Arbitration.

Petitioner's case was that on 15.10.2007, it submitted a commercial offer through e-mail for supply of Bauxite to the respondent. After exchange of several e-mails, respondent conveyed acceptance of offer through e-mail on 16.10.2007 confirming the supply of 5 shipments of Bauxite. Dispute arose and petitioner served arbitration notice on the respondent. Respondent rejected the arbitration notice stating that there was no concluded contract between them. Petitioner filed arbitration petition

for appointment of arbitrator.

Allowing the arbitration petition, the Court

HELD: 1.1. On 15.10.2007 at 4.26 p.m. the petitioner submitted commercial offer wherein clause 6 contained arbitration clause i.e. "this contract is governed by Indian law and arbitration in Mumbai courts". At 5.34 p.m. though respondents offered their comments, no comments were made in respect of 'arbitration clause'. At 6.04 p.m. the petitioner sent a reply to the comments made by the respondent. Again on 16.10.2007, at 11.28 a.m. though respondents suggested certain additional information on the offer note, again no suggestion was made with regard to arbitration clause. At 11.48 a.m. the petitioner sent an e-mail extending validity of the offer by another one hour. At 01.38 p.m., the respondent made certain suggestions on the demurrage asking the petitioner to either reduce the freight rate or the demurrage rate. On the same day at 02.01 p.m., the petitioner sent a reply on the demurrage stating that the rates cannot be reduced any further. At 02.41 p.m., the respondent informed the petitioner that they would like to have a termination clause after two shipments. At 03.06 p.m., the petitioner sent a mail stating that "no owner will accept this condition. Respondent may accept two or five quickly". At 03.06 p.m. the respondent accepted the offer for five shipments. In response to the same at 03.49 p.m., the petitioner thanked the respondent for acceptance and conveyed that it was "just in time" to go to the ship owners. At 03.57 p.m. the petitioner finalized the contract with the bauxite supplier in Australia. Apart from the minute to minute correspondences exchanged between the parties regarding offer and acceptance, the offer of 15.10.2007 contained all essential ingredients for a valid acceptance by the respondents. The correspondence exchanged between the parties clearly go to show that after understanding all the details and the confirmation by the respondent, the petitioner sent a reply stating that "thanks for the confirmation, just in time to go to the ship owners". All these details clearly establish that both the parties were aware of various conditions and understood the terms and finally the charter was entered into a contract by the parties on 17.10.2007. [Para 7] [859-H; 860-A-H; 861-A-D]

1.2. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed. When petitioner opened the email of the respondent at 3:06 PM on 16.10.2007, it came to his knowledge that an irrevocable contract was concluded. Apart from this, the mandate of Section 7 of the Indian Contract Act stipulated that an acceptance must be absolute and unconditional has also been fulfilled. It is true that in the first acceptance conveyed by the respondent contained a rider, namely, cancellation after 2 shipments which made acceptance conditional. However, taking note of the said condition, the petitioner requested the respondent to convey an unconditional acceptance which was readily done through his email sent at 3:06 PM with the words "we confirm the deal for 5 shipments", which is unconditional and unqualified. The respondent was wholly aware of the fact that its agreement with the petitioner was interconnected with the ship owner. In other words, once the offer of the petitioner was accepted following a very strict time schedule, the respondent could not escape from the obligations that flowed from such an action. [Paras 9 and 10] [861-G-H; 862-A-G]

Shankarlal Narayandas Mundade v. *The New Mofussil Co. Ltd. & Ors.* **AIR 1946 PC 97, relied on.**

Pagnan SPA v. Feed Products Ltd. **1987 Vol. 2, Lloyd's Law Reports 619;** *Mamidoil-Jetoil Greek Petroleum Co. S.A. v. Okta Crude Oil Refinery AD* **(2001) Vol. 2 Lloyd's Law Reports 76 at p. 89;** *Wilson Smithett & Cape (Sugar) Ltd. v. Bangladesh Sugar and Food Industries Corporation* **(1986) Vol. 1 Lloyd's Law Reports 378, referred to.**

1.3. Unless an inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality. In the present case, where the Commercial Offer carries no clause making the conclusion of the contract incumbent upon the Purchase Order, it is clear that the basic and essential terms have been accepted by the respondent, without any option but to treat the same as a concluded contract. A specific order for 5 shipments was placed and only some minor details were to be finalized through further agreement. After the suggested modifications had crystallized over several emails. The moment the commercial offer was accepted by the respondent, the contract came into existence. [Para 12] [864-B-E]

Dresser Rand S.A. v. *Bindal Agro Chem Ltd.* **(2006) 1 SCC 751, distinguished.**

2. It is essential that the intention of the parties be considered in order to conclude whether parties were *ad idem* as far as adopting arbitration as a method of dispute resolution was concerned. In the absence of signed agreement between the parties, it would be possible to infer arbitration clause from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication. [Paras 14 and 17] [865-E-F; 866-C]

Smita Conductors Ltd. vs. *Euro Alloys Ltd.* **(2001) 7 SCC 728;** *Shakti Bhog Foods Limited* vs. *Kola Shipping Limited* **(2009) 2 SCC 134, relied on.**

3. The petitioner has made out a case for appointment of an Arbitrator in accordance with Clause 6 of the Purchase Order dated 15.10.2007 and subsequent materials exchanged between the parties. Inasmuch as in respect of the earlier contract between the same parties, Justice B.N. Srikrishna, former Judge of this Court was adjudicating the same as an Arbitrator at Mumbai, it is but proper and convenient for both parties to have the assistance of the same Hon'ble Judge. Accordingly, Hon'ble Mr. Justice B.N. Srikrishna, former Judge of this Court is appointed as an Arbitrator to resolve the dispute between the parties. [Paras 20 and 21] [868-B-F]

Great Offshore Ltd. v. Iranian Offshore Engg. & Construction Co., **(2008) 14 SCC 240, relied on.**

Case Law Reference:

1987 Vol. 2, Lloyd's Law Reports 619	**referred to**	**Para 11**
(2001) Vol. 2 Lloyd's Law Reports 76	**referred to**	**Para 11**
(1986) Vol. 1 Lloyd's Law Reports 378	**referred to**	**Para 11**
(2006) 1 SCC 751	**distinguished**	**Para 12**
AIR 1946 PC 97	**relied on**	**Para 11**
(2001) 7 SCC 728	**relied on**	**Para 15**
(2009) 2 SCC 134	**relied on**	**Para 16**
(2008) 14 SCC 240	**relied on**	**Para 19**

A

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 10 of 2009.

K.K. Venugopal, Gopal Sankara Narayanan, R. Subramanian, Vikas Mehta, Rohit Bhat for the Appellant.

B

C.A. Sundaram, Rohini Musa, Abhishek Gupta, Zafar Inayat, Anandh Kannan, Binu Tamta for the Respondent.

The Judgment of the Court was delivered by

C

P. SATHASIVAM, J. 1. In this petition the Petitioner-Company seeks to invoke arbitration clause under Section 11(6) of the Arbitration & Conciliation Act, 1996 for appointment of an arbitrator as per the Arbitration Agreement contained in clause 6 of the Commercial Offer (purchase order) dated 15.10.2007 and clause 29 of the Agreement exchanged between the parties on 08.11.2007.

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2. The case of the petitioner is as follows:

The Petitioner-Company is registered in Dubai and engaged in the business of trading in Minerals across the world. Based on the orders from their purchasers, they procure mineral Ores from the suppliers, negotiate and finalize shipments with the ship owners and arrange for the shipment of Minerals across the world. The Respondent is a Company registered in India using Aluminium Ore as one of the major inputs for their operations.

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3. On 15.10.2007, the petitioner submitted a commercial offer through e-mail for the supply of Bauxite to the respondent. After several exchanges of e-mails and after agreeing on the material terms of the contract, the respondent conveyed their acceptance of the offer through e-mail on 16.10.2007 confirming the supply of 5 shipments of Bauxite to be supplied from Australia to Vizag/Kakinada. On the basis of the acceptance by the respondent, the petitioner concluded the deal with the Bauxite supplier in Australia on the same day and

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entered into a binding Charter Party Agreement with the ship owner in Oslo on 17.10.2007. A meeting was held between the representatives of the respondent and the petitioner at Lanjigarh, Orissa on 26.10.2007 and the minutes of this meeting were signed by them. The acceptance of the offer is acknowledged by the respondent in these minutes. A formal contract containing a detailed arbitration clause was also sent by the respondent to the petitioner on 08.11.2007 which was accepted by the petitioner with some changes and returned the same to the respondent the same evening. On 09.11.2007, the petitioner entered into a formal Bauxite sales Agreement with Rio Tinto of Australia for the supply of 225000 tonnes of Bauxite. On 12.11.2007, the respondent requested the petitioner to hold the next consignment until further notice. On 13.11.2007, the petitioner informed the respondent that it was not possible to postpone the cargo and requested them to sign the Purchase Agreement. On 13.11.2007 itself, the ship owners nominated the ship for loading the material on 28.11.2007. The petitioner terminated the contract on 16.11.2007 reserving the right to claim for damages. On 18.11.2007, the petitioner formally informed the ship owners about the cancellation of the carriage. On 19.11.2007, the ship owners made a claim of 1 million US$ towards commercial settlement and on 30.11.2007, the petitioner informed the respondent to pay a sum of 1 million US$ towards compensation for loss on account of the estimated loss for five shipments and 0.8 million towards compensation for loss of profit and other costs and expenses for cancellation of the order. The respondent rejected the claim of the petitioner on damages. On compensation not being paid, the ship owners served a notice on the petitioner. After negotiations, a settlement was arrived at between the ship owners and the petitioner to pay a lump-sum of 600,000 US$ to be paid in two installments. The petitioner paid the amount in two installments on 27.02.2008 and 31.03.2008. On 01.09.2008, the petitioner served a notice of claim-cum-arbitration on the respondent to make the payment immediately otherwise treat the notice for referring the dispute to arbitration as per Clause 29 of the

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H

Purchase Order and informed about nominating Mr. Shiv Shankar Bhatt, a retired Judge of the Karnataka High Court as the arbitrator from their side and requested the respondent to nominate their own arbitrator within 30 days. On 14.11.2008, the respondent rejected the arbitration notice stating that there was no concluded contract between the parties. Hence, the petitioner filed the present petition for appointment of an Arbitrator.

4. According to the respondent, as seen from the counter affidavit, there was no concluded contract between the parties and the parties are still not ad idem in respect of various essential features of the transaction. Further the draft contract received from the petitioner was yet to be accepted/confirmed by the respondent. The commercial offer provided two options of shipment lot, namely, 2 shipments and 5 shipments. The only understanding that had been arrived at between the parties as a result of the correspondence subsequent to the receipt of the commercial offer from the petitioner was that the transaction would be in respect of 5 shipments. All other terms and conditions pivotal and essential to the transaction were under negotiation as is evident from the correspondence between the parties. The product specifications, price, inclusions in the contract price, delivery point, insurance, commencement and conclusion dates of the contract, transfer of title, quality check and demurrage are all factors that are at large and remain undecided. In such a scenario, where the parties were not in one mind with respect to any aspect of the transaction, the contention of the petitioner that there existed a binding contract between the parties as also a binding arbitration agreement is wholly erroneous and misleading. Apart from the commercial offer dated 15.10.2007, subject matter of the instant proceedings, the petitioner had sent another commercial offer on 05.09.2007 bearing No. TID/F/194/2007 also for 45000 MTs of Bauxite (of Australian origin) which offer had been followed up with a purchase order executed by and between the parties. While the commercial offer, subject-matter of the instant

petition, was being negotiated and the terms discussed, a shipment of Bauxite covered under the previous commercial offer dated 05.09.2007 was received by the respondent at its plant on or around 12.11.2007. The product was being analysed to determine its utility value for the respondent at its plant. On account of such analysis being conducted, the respondent on 12.11.2007 wrote to the petitioner bringing the factum of the ongoing analysis to its notice and instructed the petitioner to defer the new shipments till the analysis was completed and the results obtained with respect to the utility value of the said product. Despite being put on notice by the respondent for deferment of shipment, the petitioner permitted the nomination of the Vessel to take place on 13.11.2007. Apart from there being no valid and binding contract/arbitration agreement between the parties, it is the stand of the respondent that in this petition, the petitioner seeks to commence proceedings to fasten a liability on to the respondent for which the respondent was not responsible in any manner whatsoever having informed the petitioner prior to the occurrence of the event giving rise to the alleged liability.

5. In the light of the above pleadings of both the parties, heard Mr. K.K. Venugopal, learned senior counsel for the petitioner and Mr. C.A. Sundaram, learned senior counsel for the respondent.

6. Mr. K.K. Venugopal, learned senior counsel for the petitioner, after taking me through the sequence of events which took place on 15.10.2007 and 16.10.2007, submitted that the contract between the petitioner and the respondent stood concluded by acceptance of the offer for five shipments by the respondent at 3.05 p.m. on 16.10.2007. He further contended that the commercial offer of 16.10.2007 was pursuant to the request of the respondent on 10.10.2007 and on the basis of a similar transaction which had been concluded in the previous month between the parties. By taking me through various e-mails exchanged between the parties, he contended that the

charter was entered into a contract by the parties on 17.10.2007 i.e. the next day. He finally submitted that from the materials it was established beyond doubt that the intention of parties in case of any dispute between them arising out of the contract which was concluded on 16.10.2007 at 3.06 p.m. shall be settled through arbitration. On the other hand, Mr. C.A. Sundaram, learned senior counsel for the respondent contended that there was no concluded contract between the parties and that the agreement between the petitioner and the respondent was only in respect of the number of shipments (two or five) and nothing more. According to him, there is no arbitration agreement and that clause 6 is vague and ambiguous. He further contended that even in the legal notice dated 01.09.2008 issued by the petitioner's counsel, there is no specific reference to clause 6 of the commercial offer but mentioned only clause 29 of the purchase order exchanged between the parties on 08.11.2007 but the present petition before this Court mentions both of them. He also pointed out that the Charter Party Agreement (CPA) entered into between the petitioner and the ship owner is only a draft. Further, there were differences in the purchase orders exchanged between the parties on 08.11.2007 and that it is only a draft form and prayed for dismissal of the present petition.

7. It is the categorical claim of the petitioner that a commercial offer containing an arbitration clause conveyed through e-mail dated 15.10.2007 for the supply of bauxite to the respondent is a valid offer. This offer was to expire by noon the following day i.e. on 16.10.2007. It is the definite case of the petitioner that after several exchanges of e-mails and agreeing on the material terms of the contract, the respondent conveyed their acceptance of the offer through e-mail on 16.10.2007 confirming the supply of five shipments of bauxite to be supplied from Australia-Vizag/Kakinada. Based on the acceptance by the respondent, it is the claim of the petitioner that they concluded the deal with the Bauxite supplier in Australia on 16.10.2007 and entered into a binding Charter

Party Agreement with the ship owner in Oslo on 17.10.2007. It was also pointed out that a formal contract containing further detailed arbitration clause was also sent by the respondent to the petitioner on 08.11.2007 which was accepted with some minor changes by the petitioner in the same evening. Though exchange of e-mails were admitted by the respondent, it is their specific stand that there was no concluded contract and in the absence of the same, the petitioner cannot enforce certain obligations reflected in those e-mails and avail arbitration clause as if the respondent has executed a formal agreement. In the light of the controversy and in view of the fact that copies of e-mails exchanged between the officers of the petitioner and respondent on various dates which are placed in the form of annexures, it is useful to refer the relevant correspondence in order to understand their claim:

A)

Annexure P 1

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Tuesday, October 09, 2007 2:37 PM
To: Rajesh Mohata; Swayam Mishra
Cc: S R Subramanyam; Shanika

Subject: LM Grade Bauxite specs '1 (2). Doc
Importance: High
Attachments: LM Grade Bauxite specs'1 (2). Doc

Dear Rajesh,

This has a reference to our earlier mails regarding the specs for the fresh cargoes. After discussions with RTA their comments are reproduced.

"Quote"

We maintain our position that we are not able to accurately measure reactive silica at our Weipa lab for us to place a bonus/penalty on and that any rejection criteria on silica is unreasonable. It is for this reason that we are only prepared to revise our offer on total silica with a Base Grade of 4.5%. We are prepared to increase this bonus/ penalty to US$1.50 per % total silica either side the Base Grade. This we believe is a fair compensation to Vedanta and is our final offer.

Unfortunately we cannot make this an open ended offer as we need to fill our shipping slots set aside for these cargoes in November and December. We have already lost the October opportunity. Freight and spot prices for bauxite have all moved up since we started this negotiation and we are making offers for 2008 cargoes at $4 higher than your offer. Therefore, we have to put a validity on this until close of business Friday, 12 October after which this offer will be subject to re-confirmation.

"Unquote"

We have prepared a revised schedule of specs which is attached. This is not yet confirmed with RTA but once you agree to go by this then we can take up with them. Rejection points are also to be agreed by them. Further the freights have gone up substantially since we last made the shipment. Hence we have to freeze the quality specs first and then take up with RTA for confirmation and then get the vessel freight.

Hence we request you to revert urgently before closing today as this area is all closed from Thursday

Best regards
Swaminathan

Low Monohydrate Grade Bauxite
Typical Analysis

Parameter	Range	Base spec	Bonus/Penalty	Rejection
Trihydrate alumina (THA)	42-46%	45% Min.	Bonus US $0.50 per tonne per percentage point fraction pro-rate above 45% Penalty US$ 0.50 per tonne per percentage point fraction pro-rate below 45% Penalty US $1.00 per tonne per percentage point fraction pro-rate below 42%.	Below 41%
Monohyd-rate alumina (MHA)	3-5%	4.5% Max.	Bonus US $0.50 per tonne per percentage point fraction pro-rate below 4.5%. Penalty US$ 0.50 per tonne per percentage point fraction pro-rate above 4.5%.	Above 5.0%
Total Silica	4-6%	4.5% Max.	Bonus US $1.50 per tonne per percentage point fraction pro-rata below 4.5%. Penalty US$ 1.50 per tonne per percentage point fraction pro-rata above 4.5%	N/A

A

B)

Shanika
From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Wednesday, October 10, 2007 11:16 AM
To: Swaminathan G
Cc: Rajesh Mohata; Shanika; SR Subramanyam; Chinmayee Panda; N. Chellappa; Hukum Chand Dahiya

B

Subject: Re: LM Grade Bauxite specs '1 (2). Doc

Attachments: LM Grade Bauxite specs'1 (2). Doc

C

Dear Mr. Swaminathan,

Please find our observation in the attached sheet. Kindly give your confirmation for the same.

D

Thanks

Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd., Lanjigarh
Dist: Kalahandi
Pin: 766027
Orissa
9937251390

E

C)

F

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Wednesday, October 10, 2007 1:30 PM
To: Swayam Mishra
Cc: Rajesh Mohata; Shanika; SR Subramanyam; Chinmayee Panda; N. Chellappa; Hukum Chand Dahiya

G

Subject: Re: LM Grade Bauxite specs '1 (2). Doc

Importance: High

H

A

Dear Swayam,

We reviewed the reply below and this not acceptable to RTA or by ourselves.

B

We are unable to improve on the proposal given from our side which itself needs to be ratified by RTA.

Please also keep in mind the time limit and we need to have time for obtaining freights which is the most difficult aspect in the present market.

C

Your final reply may be given to us before close of office hours today.

Regards
Swami

D

D)

Shanika
From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Wednesday, October 10, 2007 7:17 PM
To: Swaminathan G
Cc: Chinmayee Panda; Hukum Chand Dahiya N. Chellappa; Rajesh Mohata; Shanika; SR Subramanyam;

E

Subject: Re: LM Grade Bauxite specs '1 (2). Doc

F

Dear Mr. Swaminathan,

Please send your rates at your proposed quality parameters on FOB basis and on CIF basis, separately.

G

We would also be interested to have separate rates for 2 shipments and for the complete offer of 2 Lac MT.

Thanks
Swayam Mishra
Commercial Department

H

Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

E)

Annexure P-2

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Monday, October 15, 2007 4:46 PM
To: Rajesh Mohata; Swayam Mishra
Cc: S R Subramanyam; Shanika

Importance: High
Attachments: Offer for Mono Bxt.Pdf

Dear Rajeshji,

Please find attached our offer for the two options as desired by you. Please note the validity of the offer until 1200 IST tomorrow. Freights are going up continuously and have jumped since we last gave you the offer. A quick decision will be helpful otherwise we may lose this freight offer too.

Awaiting an early response.

Best regards
G. Swaminathan
General Manager
Trimex International
P.O. Box 17056
Dubai-U.A.E.
Tel:971-4-8835544 Ext. 209
Fax:-971-4-8836410
Mob:-971-50-6455819

TRIMEX
The Mineral People

COMMERCIAL OFFER

Company: M/s Vedanta Alumina Ltd. Lanjigarh Kind Attn: Mr. Rajesh Mohata General Manager (Commercial)			Offer No: TID/F/223/2007 Date: October 15, 2007 Valid Until: October 16, 2007 1200 noon IST	
Product Description*	Quantity	Price per tonne	Delivery Terms	Payment Terms
Low Monohydrate Grade Bauxite (Australian Origin)	OPTION 1 (2) Shipments of 45,000 mt +/- 10% at Shipper's Option OPTION II (5) Shipments of 45, 000 mt +/- 10% at Shipper's option	US$93.50 pmt (US Dollars Ninety Three and Cents Fifty only)	CIF Free Out Visakhapat-nam, India(C) clause Cargo cover	Irrevocable L/c for 100% Invoice value to be established 30 days before each shipment -92.5% payable at sight-7.5% payable within 30 days after completion of discharge

*Please see attached Annexure I for detailed product specifications

Shipment Lot	Discharge port	Discharge rate	Demurrage/ Desp.	Shipment
OPTION I (2) Shipments OPTION II (5) Shipments	(Non Oil Mooring at Visakhapa-tnam, India)	8000mt PD SHINC. NOR ATDN SHINC WIBON,	US$ 75,000 per day pro rata Half Despatch	OPTION I In Nov. & Dec. 2007 OPTION II

		WIPON, WCCON WIFPON 12 hrs turntime USC Any time used to count		From Nov. 07 to March 08.

Additional Information/Comments:

Vessel details (all about): age-Not over 25 years, 4 x 20 mt gears, 8-10 cbm grabs

Draft: buyers to guarantee draft of 12 mtrs, at discharge port
Quantity: Draft survey at discharge port by mutually agree independent surveyor will be final.

Quality: Invoice for initial payment as per Producer's Quality Certificate Balance 7.5% payment will be based on analysis done by Independent surveyor

Bonus/Penalty: As per Annexure I

Wherever applicable any charges payable at discharge port (custom duty, taxes etc.) other than our stated sales conditions will be to buyers account.

Conditions of sale- all sales are concluded on the following terms, unless varied by written agreements between us. Neither our agents nor our associated companies are authorized to vary these terms.

1. We shall not be liable by reason of any defect (including non-conformity with specification or sample) unless we receive written notice of the defect within 15 days of delivery. Our liability in that event will be limited to product related compensation after discussions and suitable joint

analysis wherever applicable. In case of joint analysis being agreed upon for confirming the product quality/ penalty determination, the above should be arranged by the buyer within 30 days of product delivery to the customer.

2. We shall have no liability under this contract or by reason of any representation, warranty or duty for any direct, indirect, special or consequential loss or damage, costs or expenses arising out of the composition, supply, packaging, handling or use of products.

3. Unless stated otherwise, products are sold strictly to the offered sale condition and payments are due on the dates as applicable.

4. Prices are valid upto 1200 hrs IST 16.10.2007 unless withdrawn by notice from us during that period.

5. Interest may be charged on overdue amount wherever applicable as per our terms mentioned in commercial/ payment invoice.

6. This contract is governed by Indian Law & Arbitration in Mumbai courts.

For Trimex International FZE Name: G. Swaminathan
(computerized offer-Signature not required)

TRIMEX INTERNATIONAL FZE
P.O. BOX 17056,
Jabel Ali,
Dubai, UAI
Tel:971-4-8835544
Fax:-971-4-8836410
Telex: (893) 47804
Email Trimex@emiratesnet.ac.
www.trimexgroup.com

F)

Annexure P-3

Shanika
From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Monday, October 15, 2007 5:34 PM
To: Swaminathan G
Cc: Rajesh Mohata; Shanika; SR Subramanyam; Chinmayee Panda

Subject: Offer for imported Bauxite

Dear Mr. Swaminathan,

We have the following observations related to your offer:

1. Bonus/Penalty Clause for THA: Penalty US $ 1.00 per tonne per percentage point fraction pro-rata below 42%.

2. Rejection Criteria for Total Silica: Since the range is between (4-6%), so rejection will be for Total Silica > 6%.

3. Please let us have the FOB rates as well.

4. As you are stating that the freight market is expected to go up in the coming months, so the rate for the supply of 2 shipments should be less than the present rate quoted by you for 5 rates.

Looking forward for your positive response.

Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa Shanika

G)

From: Swaminathan G [swami@trimexgroup.com]
Sent: Monday, October 15, 2007 6:04 PM
To: swayam.mishra@vedanta.co.in
Cc: Rajesh.mohata@vedanta.co.in; Shanika; SR Subramanyam; ChinmayeePanda@vedanta.co.in

Subject: Re: Offer for imported bauxite

Dear Swayam,

THA penalty rate is as agreed/ratified by RTA.

Silica rejection cls not agreed by RTA. Given at our risk but we cannot make it coincide with maxm of range as it is too risky for us. In fact, we also refused rejn cls but Mr. SRS argued on this and persuaded us to put it in for your comfort.\

We only sell C N F basis.

Freight rates presently are even more firm than next year. But overall we have this package from ship owners.

Trust this clarifies.

Best regards

Swami

H)

From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Tuesday, October 16, 2007 11:28 AM
To: Swaminathan G
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Shanika; SR Subramanyam

Subject: Re: Offer for imported bauxite

Dear Mr. Swaminathan,

As assured by Mr. SRS that the material is homogeneous in nature, and looking at the result of the present shipment, we do not think that keeping a rejection limit at 6% is a risk for you.

Please let us have the cost break-up (Material+Coastal Freight). We would also like to have a rate for CIF Kakinada port.

Thanks
Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

I)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Tuesday, October 16, 2007 11:48 AM
To: Rajesh.Mohata@vedanta.co.in; Swayam Mishra
Cc: S R Subramanyam; Shanika

Subject: Offer for bauxite
Importance: High
Urgent

Dear Swayam,

The time has just expired. We still have a little more than 1 hour before our offer from Owners expires. Hence we can extend this by another 1 hour which is 1300 hrs IST today.

Please let us know your decision either way as we would like to keep all parties informed in time about the

developments.

Regards
Swami

J)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Tuesday, October 16, 2007 11:54 AM
To: Swayam Mishra
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in
S R Subramanyam; Shanika

Subject: Offer for imported bauxite

Swayam,

Where will you discharge and store in Kakinada port? Is it permissible to take it to Berth and if so what is the draft you can guarantee?

If it is anchorage, it is heavily congested and also you cannot achieve the discharge rate of even 4000t per day. Freight will shoot up and it will be unworkable.

Regards

Swami

K)

Shanika
From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Tuesday, October 16, 2007 1:38 PM
To: Swaminathan G
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in;
Shanika; S R Subramanyam; Sarika Singh

Subject: Offer for imported bauxite

Dear Mr. Swaminathan,

The Demurrage rate should be decreased and made as per last shipment. Please negotiate the same with the Vessel Owners. Either reduce the freight rate or the demurrage rate.

Kindly confirm at the earliest.

Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

L)

Shanika
From: Shanika[shani@trimexgroup.com]
Sent: Tuesday, October 16, 2007 2:01 PM
To: 'Swayam Mishra' Swaminathan G'
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; S R Subramanyam; Sarika Singh

Subject: RE: Offer for imported Bauxite
Dear Mr. Swayam,

As confirmed by Mr. Swaminathan the Demurrage rate is US$ 69,000 per day. This is the offer given by owners and cannot be reduced any further.

Regards
Shanika Peiris
Assistant Manager-Commercial

TRIMEX INITERNATIONAL FZE
P.O. BOX 17056,
Dubai, UAI
Tel:971-4-8835544, Ext. 208

Fax:-971-4-8836410
971-6522083

M)

Shanika
From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Tuesday, October 16, 2007 2:41 PM
To: shani@trimexgroup.com S R Subramanyam'; 'Swaminathan G'
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Sarika Singh

Subject: Re: Offer for imported bauxite

Dear Swaminathan,

We confirm the order for 5 shipments as per our last discussions. At the same time we would like to have a termination clause after 2 shipments.

Thanks

Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

N)

From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Tuesday, October 16, 2007 3:06 PM
To: Swaminathan G'
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; sarika.singh@vedanta.co.in; Shanika; S.R. Subramanyam; T. Prasanna Kumar Patro; N. Chellappa
Subject: Re: Offer for imported bauxite

Dear Swaminathan,
We confirm the deal for 5 shipments.

Thanks
Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

O)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Tuesday, October 16, 2007 3:49 PM
To: swayam.mishra@vedanta.co.in

Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; sarika.singh@vedanta.co.in Shanika; SR Subramanyam; tpk. Patro@vedanta.co.in; n. chellappa@vedanta.co.in

Subject: Re: Offer for imported bauxite

Dear Swayam,

Thanks for the confirmation just in time to go to Owners

Regards
Swami

P)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Tuesday, October 16, 2007 3:57 PM
To: Shaun.Barry@comalco.riotinto.com.au; Chandra.Chandrashekhar@riotinto.com.au

Cc: Shanika

Subject: 200K Bauxite for Vedanta

Dear Shaun

Deal is through for 5 Shipments.

Shall give you shipping schedule agreed with owners and details by tomorrow.

Special word of appreciation to the RTA team led by Mark for the support and patience in putting this thru. It's like carrying coal to Newcastle!!!

Thanks & Regards

Swami

Q)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Wednesday, October 17, 2007 11:12 AM
To: swayam.mishra@vedanta.co.in

Cc: ChinmayeePanda@vedanta.co.in Rajesh.mohata@vedanta.co.in; Shanika; SR Subramanyam; Suvendu.sahoo@vedanta.co.in

Subject: Re: Inactive Role of Agent.

Dear Swayam

Small check n revert and advise them suitably.

Meantime please send draft agreement.

Regards
Swami

————Original Message———-

From: Swayam Mishraswayam.mishra@vedanta.co.in

To: Swaminathan G

Cc: ChinmayeePanda@vedanta.co.in; <ChinmayeePanda@vedanta.co.in>

Rajesh.mohata@vedanta.co.in;<Rajesh.mohata@vedanta.co.in;> Shanika; SR Subramanyam; Suvendu.Sekhar Sahoo Suvendu.Sahoo@vedanta.co.in

Sent: Wed Oct 17 10:56:43 2007

Subject: Inactive role of Agent

Dear Mr. Swaminathan,

On one hand where we are going to do 5 future shipments of imported bauxite, it is sad to notice that your agent at Vizag port is not taking enough initiative to handle the first shipment even!!!

While our stevedores and representatives are constantly following up with the port authorities to grant us a berth, your agent is being too noncommittal. Please advice your agent to play a more active role in the whole process.

Thanks
Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

R)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Saturday, October 20, 2007 09:08 AM
To: swayam.mishra@vedanta.co.in

Cc: Shanika; SR Subramanyam;

Subject: Contract for bauxite shipments Importance: High

Dear Swayam,

As per the agreements with Owners the following is the schedule of shipments:

(1) Laycan agreed with owners:
November 2007-15th/30th
December 2007-Suggested 5th/20th (to be agreed)
January 2008-15th/30th
February 2088-14th/28th
March 2008-15th/30th

In view of this, we need to quickly complete the execution of agreement and establishing of L/c as discussed on Thursday. I am awaiting the draft agreement so that we can move forward. Also please confirm if you have surrendered the Original B/L for the present consignment to Master as vessel is likely to finish soon.

Matter most urgent.
Regards,
Swami

Annexure P-4

VAL SITE, Lanjigarh

Minutes of the Meeting

M/s Vedanta Aluminium Limited	M/s Timex Group
Mr. Rajesh Mohata	Mr. G. Swaminathan
Mr. Venkat Rao	Mr. S.R. Subramaniam
Mr. Swayam Mishra	
Mr. N. Chellappa	
Ms. Sarika Singh	

*The Agenda of the meeting was:

1. Supply of Bauxite from Katni
2. Supply of Bauxite from Gujarat

3. Imported Bauxite from Australia

Bauxite from Katni

1. Trimex will give its commercial offer within 20th Nov. 2007 to VAL.

Bauxite from Gujarat

1. VAL has asked Trimex to re-work the offer to provide a supply schedule till March 30th, 2008 against Trimex's deadline of June 2008.

2. The rate offered by Trimex is Rs. 1250 PMT (FOB) Okha/Porbander). VAL has asked for a decrease in rates. Trimex will provide its final offer by 29.10.2007.

3. For the existing contract of supply of 10000 MT of bauxite through rakes, further movements will ensue after the due discussions. For the punitive charges levied by railways against the 1st Rake moved from Okha, Trimex has been advised to take up the issue with the Railways officials at Okha.

Imported Bauxite from Australia

1. For the shipments under the proposed new contract of 2 Lacs MT. Trimex requested to clearly mention the following clauses:

(i) As per Trimex offer No. TID/F/223/2007 dated 15th October 2007 and accepted by VAL, the price is on CIF-FO basis. As per Trimex under such a situation the berthing responsibility should be with VAL.

(ii) A copy of base Charter Party Agreement and fixture terms shall be provided by Trimex, which should be deemed incorporated in the Purchase agreement.

(iii) The Discharge rate agreed should be clearly mentioned in the Purchase agreement.

2. VAL will confirm on the feasibility of discharging the cargo at Kakinada port and accordingly TRIMEX will discuss with the Vessel Owners.

3. For the demurrage incurred in the shipment of MV Nena C vide Order No. VAL/OPRN/526 dated 10.09.07, Trimex claims that the same is on VAL's account as the agreement was on CIF-Visakhapatnam basis. VAL will give its opinion on the same.

4. Trimex has asked to finalise on the new contract and the demurrage by end of office hours on 30.10.2007.

Sd/-
(Rajesh Mohata)
Sd/-
(N. Chellapa)
Sd/-
(Venkat Rao)
Sd/-
(Sarika Singh)
Sd/-
(Swayam Mishra)

Sd/-
(G. Swaminathan)
Sd/-
(SR Subramaniam)

S)

Annexure P-5

Swaminathan G
From: Swaminathan G
Sent: Tuesday, October 30, 2007 12:23 PM

To: 'Swayam Mishra'; Rajesh.Mohata@vedanta.co.in
Cc: SR Subramanyam; Shanika;
ChinmayeePanda@vedanta.co.in

Subject: FW:BULKHANDING TBN/TRIMEX-WEIPA/VIJZAG

Dear Swayam,

With reference to our discussions, please find the fixture terms for the new contract. We are getting the draft CP for this COA and hence we shall send that shortly instead of the base CP as it will contain all amendments for this business. We are expecting this any time today from Owner.

Regards

Swami

T)

Annexure P-6

srs
From: Shanika (shani@trimexgroup.com)
Sent: Friday, November 02, 2007 6:40 PM
To: 'Swayam Mishra'
CC: 'SR Subramanyam'; Rajesh.Mohata@vedanta.co.in

Subject: Draft CP for 5 x 45000 mt LM Bauxite
Attachments: LM Bxt COA PC.pdf; LM Bxt COA RC.doc

Attn: Mr. Swayam Mishra

Copy of draft C/P just received from owners is attached. It is very likely that Owners will nominate the performing vessel for the first shipment in November 2007. Hence, we request you to expedite finalization of contract and L/c so as to avoid any delays.

Rgards

Shanika Peris
Assistant Manager-Commercial

TRIMEX INTERNATIONAL
P.O. BOX 17056,
Dubai, UAE
Tel:971-4-8835544 Ext. 208
Fax:-971-4-8836410, 971-5-6522083

U)

Shanika
From: Swaminathan G [swami@trimexgroup.com]
Sent: Wednesday, November 07, 2007, 08:45 AM
To: Swayam Mishra
Cc: ChinmayeePanda@vedanta.co.in
Rajesh.mohata@vedanta.co.in; Shanika, S R Subramanyam; Venkateshwar Rao; KS Bala

Subject: Re: Import Consginment (2 lacs)
Importance: High
Top Priority/Most Urgent

Dear Swayam,

At the outset wish you all a very Happy Diwali.

We got a feed back from owners late last night that they will look at your request on arrival draft at 11.5 mts and Kakinada port on a case basis at the time of each nomination without Guarantee. This is due to the reason they are not sure what kind of vessel will be in position in that area.

Meanwhile, as already mentioned let us proceed with contract and L/c as we are left with bare minimum time before Owner will nominate a vessel for the first laycan starting 15-30 Nov anytime from tomorrow. We have to establish our L/c on RTA and this is already overdue.

We should have too much pressure at last minute and could result in demurrage at loadport as holidays are on from tomorrow in Middle East and India.

Please rush the agreement for signature.

Best Regards

Swami

V)

Shanika
From: Shanika [shani@trimexgroup.com]
Sent: Wednesday, November 07, 2007, 11:20 AM
To: Swayam Mishra
Cc: ChinmayeePanda@vedanta.co.in
Rajesh.mohata@vedanta.co.in; S R Subramanyam; 'Swaminathan G'

Subject: Agreement for 5 x 45, 000 mt LM Bauxite
Importance: High
Urgent

Attn: Mr. Swayam Mishra

We have just received feed back from Owners. On 11.5 meters Draft they have indicated an increase of US$3.5 pmt which will make the price US$97.00 pmt CIF Free Out kakinada if you were to have an option additionally for Kakinada. The following terms would be applicable:

-Discharge port to be declared before vessels arrival at load port.

- Discharge basis Kakinada "One Safe Berth"

All other discharge port terms etc., will be the same. You may introduce this into the Contract as an additional clause and prepare draft urgently and sent it to us.

Regards
Shanika Peiris
Assistant Manager-Commercial
Shanika

W)

From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent:Thursday, November 08, 2007 12:28 PM
To: shani@trimexgroup.com
Cc: ChinmayeePanda@vedanta.co.in; Rajesh.mohata@vedanta.co.in; Sarika Singh; S.R. Subramanyam; 'Swaminathan G'; Venkateshwar Rao; N. Chellappa

Subject: Option on Draft and Port

Dear Shanika,

Please confirm if the increase in rate is due to the decrease in draft or change in port.

Thanks

Swayam Mishra
Commercial Department
Vedanta Aluminium Ltd. Lanjigarh
Distt: Kalahandi
Pin: 766 027
Orissa

X)

Annexure P-8

From: Swayam Mishra [swayam.mishra@vedanta.co.in]
Sent: Thursday, November 08, 2007 2:28 PM
To: Swaminathan G
Cc: Rajesh.mohata@vedanta.co.in; Shanika; S.R. Subramanyam; N. Chellappa; Sarika Singh; Chinmayee Panda; Venkateshwar Rao;

Subject: Draft Contract for Import Bauxite—5 shipments

Attachments: Trimex-imported-5 shipments 1.doc

Dear Mr. Swaminathan,

Please find attached the draft contract.

Thanks

Swayam Mishra

Commercial Department

PURCHASE ORDER

M/s Trimex International FZE
Dubai

Sub: Purchase Order for supply of Low Monohydrate Grade Bauxite

Ref: Offer No. TID/F/223/2007, Dated 15.10.2007 and our subsequent discussions held there on.

Dear Sir,

With reference to the above offer and subsequent discussions we had with you, we are pleased to place this Purchase Order on you for supply of 225000 +/- 10% MT Low Monohydrate Grade Bauxite as per the following terms and conditions……….

…..Definition of Term

29. Arbitration

The Parties hereto shall endeavour to settle all disputes and differences relating to and/or arising out of the Contract amicably.

In the event of the Parties failing to resolve any dispute amicably the same shall be referred to Arbitration in accordance with the Arbitration and Conciliation Act 1996, as is prevalent in India. Each Party shall be entitled to

nominate an Arbitrator and the two Arbitrators so nominated shall jointly nominate a third presiding Arbitrator. The Arbitrators shall give a reasoned award.

The place of arbitration shall be Mumbai, Maharashtra in accordance with Indian Law and the language of the arbitration shall be English.

The Parties further agree that any arbitration award shall be final and binding upon both the Parties.

The Parties hereto agree that the Seller shall be obliged to carry out its obligations under the Contract even in the event a dispute is referred to Arbitration.

30. Governing Law

This Contract shall be construed in accordance with and governed by the laws of Indian and in the event of any litigation the Courts in Mumbai shall have exclusive jurisdiction.

This order is being issued in duplicate. You are requested to send the duplicate copy duly signed as a token of acceptance of the terms and conditions.

Thanking you

Yours faithfully

For Vedanta Alumina Limited

Rajesh Mohata
GM-Commercial

AA)

Re: Draft Contract

SHANIKA

From: Swaminathan G [swami@trimexgroup.com]

Sent: Thursday, November 08, 2007 6:29 PM
To: swayam.mishra@vedanta.co.in
Cc: SR Subramanyam; Shanika; Rajesh.Mohata@vedanta.co.in; Chinmayee.Panda@vedanta.co.in

Subject: Re: Draft Contract

In final stage
Shall send very soon

Regards

AB)

Annexure P-10

SHANIKA

From: Swaminathan G [swami@trimexgroup.com]
Sent: Thursday, November 08, 2007 7:30 PM
To: Swayam Mishra
Cc: Rajesh.Mohata@vedanta.co.in; Chinmayee.Panda@vedanta.co.in; SR Subramanyam; Shanika; in.chellappa@vedanta.co.in; sarika.singh@vedanta.co.in; Venkateshwar Rao

Subject: Trimex-Imported_5 shipments 1.doc
Importance : High

Attachments: Trimex-Imported_5 shipments 1.doc

Dear Swayam,

Please find the draft contract with clarification on various points as discussed in meetings and on phone today.

Please confirm the same in order.

Best regards

Swami.

AC)

Annexure P-12

From: Rajesh Mohata [mail to: Rajesh.Mohata@vedanta.co.in]
Sent: Monday, November 12, 2007 2:18 PM
To: Swaminathan G; Shanika; SR Subramanyam
Cc: Venkateshwar Rao; Swayam Mishra; Umesh Mehta

Subject: Trimex International

Dear Mr. Swaminathan,

We have recently received bauxite from first import congisnment at Plant. Our operation team is in process to find out recovery and value addition for using this bauxite in actual plant condition. This may take some time. In view of this we may have to hold procurement for the next consignment.

We request you to put on hold the next consignment till further advise.

Regards

Rajesh Mohata
Vedanta Aluminium Ltd.

Mobile +91 99372 51229

(Please note with immediate effect our company name changed to "Vedanta Aluminium Ltd.")

AD)

SHANIKA

From: Swaminathan G [swami@trimexgroup.com]
Sent: Monday, November 12, 2007 3:20 PM
To: Rajesh Mohata
Cc: Venkateshwar Rao; Swayam Mishra; Umesh Mehta;

Shanika; SR Subramanyam

Subject: Re: Trimex International
Importance : High

Dear Mr. Rajesh,

This is a bit shocking at this juncture as vessel nomination is due from the Owners any time now against the COA.

First, we have to go them urgently and ask them to defer the first vessel by 15 days until 1st December as proposed by you on phone. In that case there will be two vessels in December subject to RTA agreement. There might be claims from them. But before we talk to them we need VAL's confirmation that any claims from Owners for the delay or cancellation of any or all shipment(s) under this contract will be fully guaranteed to us and that VAL will pay the amount without demur.

Matter urgent as we have to act fast before Owners nominate any vessel.

As far as RTA is concerned we shall take-up and hope they will agree to a revised schedule as they are fully booked for December and thereafter this will have also to be agreed with Owners.

Please respond by return mail for us to talk to RTA/ Owners.

We shall try and do our best but before that we need VAL's clear confirmation on above.

Regards

Swami

From the materials placed, it has to be ascertained whether there exists a valid contract with the arbitration clause. It is relevant to note that on 15.10.2007 at 4.26 p.m. the petitioner

submitted commercial offer wherein clause 6 contains arbitration clause i.e. *"this contract is governed by Indian law and arbitration in Mumbai courts".* At 5.34 p.m. though respondents offered their comments, as rightly pointed out by Mr. K.K.Venugopal, no comments were made in respect of 'arbitration clause'. It is further seen that at 6.04 p.m. the petitioner sent a reply to the comments made by the respondent. Again on 16.10.2007, at 11.28 a.m. though respondents suggested certain additional information on the offer note, here again no suggestion was made with regard to arbitration clause. At 11.48 a.m. the petitioner sent an e-mail extending validity of the offer by another one hour. At 01.38 p.m., the respondent made certain suggestions on the demurrage asking the petitioner to either reduce the freight rate or the demurrage rate. On the same day at 02.01 p.m., the petitioner sent a reply on the demurrage stating that the rates cannot be reduced any further. At 02.41 p.m., the respondent informed the petitioner that they would like to have a termination clause after two shipments. At 03.06 p.m., the petitioner sent a mail stating that "no owner will accept this condition. Respondent may accept two or five quickly". At 03.06 p.m. the respondent accepted the offer for five shipments. In response to the same at 03.49 p.m., the petitioner thanked the respondent for acceptance and conveyed that it was "**just in time**" to go to the ship owners. At 03.57 p.m. the petitioner finalized the contract with the bauxite supplier in Australia. Apart from the above minute to minute correspondences exchanged between the parties regarding offer and acceptance, as rightly pointed out by Mr. Venugopal the offer of 15.10.2007 contains all essential ingredients for a valid acceptance by the respondents namely, 1). Offer Validity period 2) Product Description 3) Quantity 4) Price per tonne 5) Delivery Terms (CIF) 6) Payment Terms (Irrevocable L/C) 7) Shipment Lots 8) Discharge Port 9) Discharge Rate with international shipping acronyms 10) Demurrage Rate 11) Period of Shipment 12) Vessel Details 13) Draft (Port/Berth Capacity corresponding to height of cargo) 14) Stipulations as to Survey by Independent

Surveyors 15) Quality benchmark 16) Bonus/Penalty Rates & 17) Applicable Laws (Indian Law) and Arbitration.

The minute to minute correspondence exchanged between the parties, all the conditions prescribed which had been laid down, awareness of urgency of accepting the offer without any further delay to avoid variation in the freight or other factors, coupled with the e-mail sent on 16.10.2007 at 3.06 p.m. under the subject *"re: offer for imported bauxite"* stated in unequivocal terms, i.e. *"we confirm the deal for five shipments",* would clearly go to show that after understanding all the details and the confirmation by the respondent, the petitioner sent a reply stating that *"thanks for the confirmation, just in time to go to the ship owners".* All the above details clearly establish that both the parties were aware of various conditions and understood the terms and finally the charter was entered into a contract by the parties on 17.10.2007.

8. Mr. C.A. Sundaram, learned senior counsel for the respondent taking me through the same emails/ correspondence submitted that such clauses being unclear and ambiguous, cannot be permitted to stand on its own footing so as to deprive the respondent of its valid defence. He also reiterated that in the absence of a concluded and binding contract between the parties, the arbitration clause contained in draft agreement cannot be relied on by the petitioner. He further pointed out that the arbitration clause as contained in the commercial offer suffers from vice of being unclear and ambiguous and, therefore, is not capable of being enforced.

9. In the light of the details which have been extracted in the earlier paragraphs, I am unable to accept the stand of the respondent. It is clear that if the intention of the parties was to arbitrate any dispute which arose in relation to the offer of 15.10.2007 and the acceptance of 16.10.2007, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or

implementation thereof, even if the formal contract has never been initialed.

10. The acceptance conveyed by the respondent, which has already been extracted supra, satisfies the requirements of Section 4 of the Indian Contract Act 1872. Section 4 reads as under:

> "Communication when complete-
>
> The communication of an acceptance is complete…. as against the acceptor, when it comes to the knowledge of the proposer."

As rightly pointed out by the learned senior counsel for the petitioner, when Mr. Swaminathan of Trimex opened the email of Mr. Swayam Mishra of Vedanta at 3:06 PM on 16.10.2007, it came to his knowledge that an irrevocable contract was concluded. Apart from this, the mandate of Section 7 of the Indian Contract Act stipulated that an acceptance must be absolute and unconditional has also been fulfilled. It is true that in the first acceptance conveyed by the respondent contained a rider, namely, cancellation after 2 shipments which made acceptance conditional. However, taking note of the said condition, the petitioner requested the respondent to convey an unconditional acceptance which was readily done through his email sent at 3:06 PM with the words *"we confirm the deal for 5 shipments",* which is unconditional and unqualified. As rightly pointed out by the learned senior counsel for the petitioner, the respondent was wholly aware of the fact that its agreement with the petitioner was interconnected with the ship owner. In other words, once the offer of the petitioner was accepted following a very strict time schedule, the respondent could not escape from the obligations that flowed from such an action.

11. The Court of Appeal in the case of *Pagnan SPA vs. Feed Products Ltd.,* [1987] Vol. 2, Lloyd's Law Reports 619 observed as follows:

> "It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which

> can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course, the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

The above principle has been consistently followed by the English Courts in the cases of *Mamidoil-Jetoil Greek Petroleum Co. S.A. v. Okta Crude Oil Refinery AD,* (2001) Vol. 2 Lloyd's Law Reports 76 at p. 89; *Wilson Smithett & Cape (Sugar) Ltd. vs. Bangladesh Sugar and Food Industries Corporation,* (1986) Vol. 1 Lloyd's Law Reports 378 at p. 386. In addition, Indian law has not evolved a contrary position. The celebrated judgment of Lord Du Parcq in *Shankarlal Narayandas Mundade v. The New Mofussil Co. Ltd. & Ors.* AIR 1946 PC 97 makes it clear that unless an inference can be drawn from the facts that the parties intended to be bound only when a formal agreement had been executed, the validity of the agreement would not be affected by its lack of formality. In the present case, where the Commercial Offer carries no clause making the conclusion of the contract incumbent upon

the Purchase Order, it is clear that the basic and essential terms have been accepted by the respondent, without any option but to treat the same as a concluded contract.

12. Though Mr. C.A. Sundaram, learned senior counsel heavily relied on the judgment of this Court in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.,* (2006) 1 SCC 751, the same is distinguishable because in that case only general conditions of purchase were agreed upon and no order was placed. On the other hand, in the case on hand, specific order for 5 shipments was placed and only some minor details were to be finalized through further agreement. This Court in *Dresser Rand S.A* (supra) rejected the contention that the acceptance of a modification to the General Conditions would not constitute the conclusion of the contract itself. On the other hand, in the present case, after the suggested modifications had crystallized over several emails. Further in para 32 in *Dresser Rand S.A* (supra) this Court held that "parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself" whereas in the case on hand, the moment the commercial offer was accepted by the respondent, the contract came into existence. Though in para 44 of the *Dresser Rand S.A* (supra), it is recorded that neither the Letter of Intent nor the General Conditions contained any arbitration agreement, in the case on hand, the arbitration agreement is found in clause 6 of the Commercial Offer. In view of the same, reliance placed by the respondent on *Dresser Rand S.A* (supra) is wholly misplaced and cannot be applied to the case on hand where the parties have arrived at a concluded contract.

13. Mr. Venugopal pointed out that the Charter Party Agreements are governed as per international shipping practices. The normal procedure is that the brokers from both sides first agree on the vital terms over phone/telex (these terms relate to Freight, Type of Ship, Lay Can (Period of shipping), Demurrage Rate, Cranes, etc.) At this stage, no agreement is formally signed but the terms are binding on both the parties,

as per the Contract of Affreightment (CoA), which in the present case was entered into on the next day, i.e. 17.10.2007. Certain minor modifications could go on from either side on mutual agreement but in the absence of any further modification, the originally agreed terms of the CoA are binding on both the parties. Till the agreement is actually signed by both the parties, the term draft is used. This does not mean that the terms are not binding as between the Petitioner and the Ship-owners. Further, according to him, the existence of the Charter Party, various international shipping practices etc. which are to be pleaded in detail before the Arbitral Tribunal once it is constituted and not before this Court since this means extensive quoting of shipping laws and decided cases which cannot be done in the present arbitration petition. The above submissions cannot be under estimated.

14. Both in the counter affidavit as well as at the time of arguments Mr. C.A. Sundaram, learned senior counsel for the respondent has pointed out various differences between the version of the respondent and the petitioner. However, a close scrutiny of the same shows that there were only minor differences that would not affect the intention of the parties. It is essential that the intention of the parties be considered in order to conclude whether parties were ad idem as far as adopting arbitration as a method of dispute resolution was concerned. In those circumstances, the stand of the respondent that in the absence of signed contract, the arbitration clause cannot be relied upon is liable to be rejected.

15. *Smita Conductors Ltd. vs. Euro Alloys Ltd.* (2001) 7 SCC 728 was a case where a contract containing an arbitration clause was between the parties but no agreement was signed between the paties. The Bombay High Court held that the arbitration clause in the agreement was binding. Finally, this Court upholding the judgment of the Bombay High Court held that the arbitration clause in the agreement that was exchanged between the parties was binding.

16. In *Shakti Bhog Foods Limited vs. Kola Shipping*

Limited, (2009) 2 SCC 134, this Court held that from the provisions made under Section 7 of the Arbitration and Conciliation Act, 1996 that the existence of an arbitration agreement can be inferred from a document signed by the parties, or an exchange of letters, telex, telegrams or other means of telecommunication, which provide a record of the agreement.

17. It is clear that in the absence of signed agreement between the parties, it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of tele-communication.

18. Though, Mr. C.A. Sundaram, relied on several decisions, in view of clear materials in the form of emails/ correspondence between the parties, those decisions are not germane to the issue on hand.

19. Before winding up, it is useful to refer the latest decision of this Court about the object of Arbitration and Conciliation Act, 1996. In *Great Offshore Ltd. vs. Iranian Offshore Engg. & Construction Co.,* (2008) 14 SCC 240, this Court while considering the objects and provisions of the Arbitration and Conciliation Act, 1996, held:

> "59 The court has to translate the legislative intention especially when viewed in light of one of the Act's "main objectives": "to minimize the supervisory role of courts in the arbitral process." [See Statements of Objects and Reasons of Section 4(v) of the Act.] If this Court adds a number of extra requirements such as stamps, seals and originals, we would be enhancing our role, not minimizing it. Moreover, the cost of doing business would increase. It takes time to implement such formalities. What is even more worrisome is that the parties' intention to arbitrate would be foiled by formality. Such a stance would run counter to the very idea of arbitration, wherein tribunals all over the world generally bend over backwards to ensure

that the parties' intention to arbitrate is upheld. Adding technicalities disturb the parties' "autonomy of the will" (1' autonomie de la volonte') i.e. their wishes. (For a general discussion on this doctrine see *Law and Practice of International Commerical Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London,* 1986 at pp.4 and 53.)

60. Technicalities like stamps, seals and even signatures are red tape that have to be removed before the parties can get what they really want—an efficient, effective and potentially cheap resolution of their dispute. The autonomie de la volonte' doctrine is enshrined in the policy objectives of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985, on which our Arbitration Act is based. (See Preamble to the Act.) the courts must implement legislative intention. It would be improper and undesirable for the courts to add a number of extra formalities not envisaged by the legislation. The courts' directions should be to achieve the legislative intention.

61. One of the objectives of the UNCITRAL Model Law reads as under:

> "the liberalization of international commercial arbitration by limiting the role of national courts, and by giving effect to the doctrine 'autonomy of will', allowing the parties the freedom to choose how their disputes should be determined". [See Policy Objectives adopted by UNCITRAL in the preparation of the Model Law, as cited in Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter, Street & Maxwell, London (1986) at p. 388 (citing UN doc.A/CN.9/07, Paras 16-27).]

62. It goes without saying, but in the interest of providing the parties a comprehensive review of their arguments, I note that once it is established that the faxed CPA is valid, it follows that a valid contract and a valid arbitration clause exist. This contract, the faxed CPA, does not suffer from a conditional clause, as did the letter of intent. Thus, the respondent's argument that the parties were not ad idem must fail."

20. In view of the settled legal position and conclusion based on acceptable documents, I hold that the petitioner has made out a case for appointment of an Arbitrator in accordance with Clause 6 of the Purchase Order dated 15.10.2007 and subsequent materials exchanged between the parties. Inasmuch as in respect of the earlier contract between the same parties, Justice B.N. Srikrishna, former Judge of this Court is adjudicating the same as an Arbitrator at Mumbai, it is but proper and convenient for both parties to have the assistance of the same Hon'ble Judge.

21. Accordingly, Hon'ble Mr. Justice B.N. Srikrishna, former Judge of this Court is appointed as an Arbitrator to resolve the dispute between the parties. It is made clear that this Court has not expressed anything on the merits of the claim made by both parties and whatever conclusion arrived at is confined to appointment of an Arbitrator. It is further made clear that it is for the Arbitrator to decide the issue on merits after affording adequate opportunity to both parties. In terms of the Arbitration clause, the place of Arbitration is fixed at Mumbai. The Arbitrator is at liberty to fix his remuneration and other expenses which shall be borne equally by both the parties.

22. Arbitration petition is allowed on the above terms. No costs.

D.G. Arbitration petition allowed.