STATE OF KERALA & ANR.

v.

B. SIX HOLIDAY RESORTS (P) LTD. & ETC.

(C.A. Nos. 983-990 of 2003 & Ors. Etc.)

JANUARY 13, 2010

[R.V. RAVEENDRAN AND SURINDER SINGH NIJJAR, JJ.]

Foreign Liquor Rules: (Kerala)

r. 13(3), last proviso (as substituted on 20.2.2002 w.e.f. 1.7.2001) – Effect of on pending applications for FL-3 Licence – Applications for grant of licence made in the years 2000 and 2001 – Rejected on 20.2.2002, keeping in view the Rules as in force on 20.2.2002 – HELD: Having regard to the fact that the State has exclusive privilege of manufacture and sale of liquor, and no citizen has a fundamental right to carry on trade or business in liquor, the applicants did not have a vested right to get a licence – The application for licence requires verification, inspection and processing – In such circumstances, the application for FL-3 licence should be decided only with reference to the rules/law prevailing or in force on the date of consideration of the application and not as on the date of application – Consequently, the direction by the High Court that the application for licence should be considered with reference to the Rules as they existed on the date of application cannot be sustained and is set aside – Abkari Act 61 of 1977 (Kerala) - Liquor. [Para 15-16]

r.13(3), last proviso (as substituted on 20.2.2002) – Proviso challenged as being beyond the main provision in r.13(3) – HELD: A proviso may either qualify or except certain provisions from the main provision or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled or it

can temporarily suspend operation of the main provision – Ultimately, the proviso has to be construed upon its terms – Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid – If the policy is not open to challenge, the amendments to implement the policy are also not open to challenge – In the instant case, when the amendment was made on 20.2.2002, the object of the newly added proviso was to stop the grant of fresh licences until a policy was finalized – Rule 13(3) provides for grant of licences to sell foreign liquor in Hotels (Restaurants) – It contemplates the Excise Commissioner issuing licences under the orders of the State Government in the interest of promotion of tourism in the State, to hotels and restaurants conforming to standards specified therein – It also provides for the renewal of such licences – The substitution of the last proviso to r. 13(3) by Notification dated 20.2.2002 providing that no new licences under the said Rule shall be issued, does not nullify the licences already granted –Nor does it interfere with renewal of the existing licences – If on account of the fact that sufficient licences had already been granted or in public interest, the State takes a policy decision not to grant further licences, it cannot be said that the same would defeat the Rules – It merely gives effect to the policy of the State not to grant fresh licences until further orders – The challenge to the validity of the proviso is therefore rejected – It is clarified that (i) if any licences have been granted or regularized in the case of any of the applicants during the pendency of this litigation, on the basis of any further amendments to the Rules, the same will not be affected by this decision; (ii) if any licence has been granted in pursuance of any interim order, the licence shall continue till the expiry of the current excise year for which the licence has been granted and (iii) this decision will not come in the way of any fresh application being made in accordance with law or consideration thereof by the State Government. [Para 17-18]

Kuldeep Singh v. Govt. of NCT of Delhi **2006 (3) Suppl. SCR 335 = (2006) 5 SCC 702;** *State of Tamil Nadu v. Hind Stone & Ors.* **1981(2) SCR 742 = 1981 (2) SCC 205;** *Union of India & Ors. v. Indian Charge Chrome & Anr*. **(1999) 7 SCC 314;** *Municipal Corporation v. Ganges Rope Co.Ltd*. **2003 (6) Suppl. SCR 1212 = (2004 (1) SCC 663, relied on.**

Case Law Reference:

2006 (3) Suppl. SCR 335	**relied on**	**para 9**
1981 (2) SCR 742	**relied on**	**para 10.1**
(1999) 7 SCC 314	**relied on**	**para 10.2**
2003 (6) Suppl. SCR 1212	**relied on**	**para 11**

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 983-990 of 2003.

From the Judgment & Order dated 16.07.2002 of the High Court of Kerala at Ernakulam in O.P. Nos. 7112, 7868 & 9963 of 2002 and W.A. Nos. 910, 951, 962, 1423 & 1444 of 2002.

WITH

C.A. Nos. 999-1003 of 2003 & 998 of 2003.

P.P. Rao, Jaydeep Gupta, G. Prakash, B. Anand, Pratheek Viswanathan, Beena Prakash, Roy Abraham, Seema Jain, Himinder Lal, E. M. S. Anam, Sunil Kumar Jain for the appearing parties.

The Judgment of the Court was delivered by:

O R D E R

R.V. RAVEENDRAN, J. 1. The appeals relate to non-grant of FL-3 Licence under the Foreign Liquor Rules ('the rules' for short) framed under the Akbari Act. The appeals arise from the common judgment dated 16.7.2002 of the Kerala High Court

in a batch of cases wherein the amendment dated 20.2.2002 to Rule 13(3) of the Rules and consequential rejection of applications for FL-3 licences were challenged. CA Nos. 983-990 of 2003 are filed by the State and the other appeals are by the applicants for FL-3 licences.

2. For convenience, we will refer to the facts of the case of M/s. B.Six Holiday Resorts (P) Ltd. (referred to as 'the applicant' for short), who is the respondent in C.A. No. 983 of 2003 and the appellant in C.A. No. 998 of 2003.

3. The applicant constructed a resort hotel at Munnar. The applicant's restaurant therein was classified by the Ministry of Tourism, Government of India, as an approved restaurant. On 11.12.2000, the applicant made an application for a FL-3 licence under the Rules. As the said application was not considered, the applicant approached the High Court. The High Court, disposed of the writ petition (O.P.No.824/2001) by order dated 9.1.2001 with a direction to the excise authorities to consider and dispose of the application within three weeks. The application was considered and rejected by order dated 19.5.2001 on the ground that the Managing Director of the applicant had been convicted in an excise offence. The said rejection was challenged in O.P. No. 17106/2001 contending that the person convicted was not the Managing Director when the application was made. The second writ petition was allowed on 20.6.2001 with a direction to re-consider the application and pass a fresh order, taking note of the fact that the convicted Managing Director was no longer in office and there was new Managing Director at the time of the application. The Special Secretary (Taxes), Government of Kerala, reconsidered the application and by order dated 6.10.2001 rejected the application on following four grounds: (i) the applicant was not a classified restaurant as contemplated under Rule 13(3) of the Rules; (ii) the facilities contemplated under Rule 13(3) were not available in the applicant's hotel; (iii) only hotels run by Kerala Tourism Development Corporation and India Tourism

Development Corporation were entitled to FL-3 licences; and (iv) the current policy of the government was not to grant any fresh licences. The applicant filed yet another writ petition (O.P. No. 31993/2001) challenging the rejection. A learned Single Judge dismissed it by order dated 6.11.2001. He held that though the first three grounds of rejection were not tenable, in view of policy of the Government not to grant FL-3 licences for the time being, a mandamus could not be issued to the State Government to grant a licence contrary to its policy. The writ appeal filed by the applicant was allowed on 14.12.2001. The Division Bench of the High Court agreed with the learned single Judge that the first three grounds of rejection were not tenable. In regard to the fourth ground of rejection, the division bench felt that the policy put forth, was rather vague and the Government cannot abdicate its function under the Rules to consider and grant licences, by alleging some vague policy. It therefore directed the Excise Commissioner to decide the applicant's application for FL-3 licence within two weeks by a speaking order.

4. Thereafter, the applicant gave a representation dated 19.12.2001. The Excise Commissioner considered it and again rejected the application on 27.12.2001 on the ground that the applicant's hotel was only a restaurant approved by Ministry of Tourism, Government of India, but it was not a classified restaurant (two star and above) as required under Rule 13(3). Feeling aggrieved, the applicant initiated contempt proceedings. The High Court on being informed that a new Excise Commissioner had taken charge, granted an opportunity to the new incumbent to reconsider the matter and pass a fresh order by 22.2.2002. At that stage, by notification dated 20.2.2002, the Foreign Liquor Rules were amended by foreign Liquor (Amendment) Rules, 2002, with retrospective effect from 1.7.2001. By the said amendment, the last proviso under sub-Rule (3) of Rule 13 was substituted by the following proviso:

> "Provided that no new licences under this Rule shall be issued."

The notification contained the following explanatory note to indicate the purpose of the amendment:

> "Government have decided as its policy not to grant any new FL-3 Hotel (Restaurant) Licences and also decided not to renew any defunct licences of the above category with effect from 1.7.2001 until further orders. In order to carry out the above decision, necessary amendments have to be made in the relevant rules"

On the same date, i.e. 20.2.2002, the Excise Commissioner considered the application of the applicant and again rejected the request for grant of licence in view of proviso to the amended rule, prohibiting grant of new licences.

5. The applicant challenged the amendment to the Rule and the consequential rejection of its application in O.P. No. 7112 of 2002. The said writ petition (along with other writ petitions and writ appeals involving similar issue) were disposed of by the impugned order dated 16.7.2002. The High Court considered the following four grounds of challenge: (a) that the repeated rejection of the application by the Excise department and the amendment of the Rules by notification dated 20.2.2002 were unreasonable, arbitrary and was in bad faith and was, therefore, liable to be interfered; (b) that the proviso to Rule 13(3) was invalid as it was violative of the main Rule; (c) that the amendment to the Rules by notification date 20.2.2002, was bad as it was made merely get over the judgment of the High Court directing fresh consideration; and (d) that giving retrospective effect to the Rules was beyond the rule making power of the State Government under the Act. The High Court rejected the ground (a),(b) and (c) and upheld the validity of the amendment. It however accepted ground (d) and declared that the retrospective effect given to the last proviso to Rule 13(3) added by notification dated 20.2.2002 was illegal and unenforceable and that the amendment would be effective only prospectively from the date of issue, that is with effect from

20.2.2002. As a consequence, the court directed the excise authorities to consider the application dated 19.12.2001 (preceded by application dated 11.12.2000) submitted by the applicant (and reiterated on 19.12.2001) on the basis of the rules as were operative as on 19.12.2001. In other words, the High Court held that the application had to be considered with reference to the rules as they existed on the date of application and not on the date of consideration of the application.

6. The State has challenged the said judgment rendered in the case of the applicant and other similar matters in the first batch of appeals (CA Nos. 983 to 990 of 2003). The State has accepted the finding of the High Court that the retrospective operation of the rules is bad and that the amendment should be given effect only prospectively. But it is aggrieved by the direction that the applications filed by the applicants for FL-3 licences should be considered on the basis of the rules as they stood on the date of application. It is submitted by the State that the Court ought to have directed the applications for FL-3 licences to be considered with reference to the rules in force when the application was considered.

7. The applicant, as also other restaurateurs whose applications for FL-3 licences made in the years 2000 and 2001 were also rejected, have challenged the decision of the High Court upholding the validity of the amendment and non-grant of licence in CA No. 998 of 2003 and CA Nos. 999-1003 of 2003.

8. Two issues arise for consideration on the contentions urged:

(i) Whether an application for grant of FL-3 Licence should be considered with reference to the Rules as they existed when the application was made or in accordance with the Rules in force on the date of consideration?

(ii) Whether the amendment to Rule 13(3) of Foreign Liquor Rules substituting the last proviso is valid?

Re : Question (i)

9. This question is directly covered by the decision of this Court in *Kuldeep Singh v. Govt. of NCT of Delhi* (2006) 5 SCC 702 relating to grant of licences for sale of Indian made foreign liquor. This Court held:

> "It is not in dispute that the State received a large number of applications. It was required to process all the applications. While processing such applications, inspections of the proposed sites were to be carried out and the contents thereof were required to be verified. For the said purpose, the applications were required to be strictly scrutinized. Unless, therefore, an accrued or vested right had been derived by the Appellants, the policy decision could have been changed. What would be an acquired or accrued right in the present situation is the question.
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> In case of this nature where the State has the exclusive privilege and the citizen has no fundamental right to carry on business in liquor, in our opinion the policy which would be applicable is the one which is prevalent on the date of grant and not the one, on which the application had been filed. If a policy decision had been taken on 16.9.2005 not to grant L-52 licence, no licence could have been granted after the said date.

10. We may in this context refer to some earlier decision laying down the principle that applications for licences have to be considered with reference to the law prevailing on the date of consideration.

(10.1) In *State of Tamil Nadu v. Hind Stone & Ors*. (1981

(2) SCC 205), this Court considered the validity of government action in keeping applications pending for long and then rejecting them by applying a rule subsequently made. This Court while holding that such action is not open to challenge observed:

> "The submission was that it was not open to the Government to keep applications for the grant of leases and applications for renewal pending for a long time and then to reject them on the basis of Rule 8C notwithstanding the fact that the applications had been made long prior to the date on which Rule 8C came into force. While it is true that such applications should be dealt with within a reasonable time, it cannot on that account be said that the right to have an application disposed of in a reasonable time clothes an applicant for a lease with a right to have the application disposed of on the basis of the rules in force at the time of the making of the application. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application".

(10.2) We may next refer to the decision in *Union of India & Ors. V. Indian Charge Chrome & Anr.* (1999) 7 SCC 314 wherein this Court held:

> "Mere making of an application for registration does not confer any vested right on the applicant. The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration."

11. The applicant contended that it had a vested right because of the several time-bound orders of the High Court and those orders were deliberately floated by the Excise authorities. An identical contention was rejected by this Court while considering the issue with reference to sanction of a licence under the Building Rules, in *Howrah Municipal Corporation v. Ganges Rope Co.Ltd.* (2004 (1) SCC 663). This Court held:

> "Neither the provisions of the Act nor general law creates any vested right, as claimed by the applicant company for grant of sanction or for consideration of its application for grant of sanction, on the then existing Building Rules as were applicable on the date of application. Conceding or accepting such a so-called vested right of seeking sanction on the basis of unamended Building Rules, as in force on the date of application for sanction, would militate against the very scheme of the Act contained in Chapter XII and the Building Rules which intend to regulate the building activities in a local area for general public interest and convenience. It may be that the Corporation did not adhere to the time limit fixed by the court for deciding the pending applications of the company but we have no manner of doubt that the Building Rules with prohibition or restrictions on construction activities as applicable on the date of grant or refusal of sanction would govern the subject matter and not the Building Rules as they existed on the date of application for sanction. No discrimination can be made between a party which had approached the court for consideration of its application for sanction and obtained orders for decision of its application within a specified time and other applicants whose applications are pending without any intervention or order of the court.
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> The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in

relation to "ownership or possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction. In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfilment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules……."

12. Where the Rule require grant of a licence subject to fulfillment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on various factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application.

13. The applicant submitted that it had originally filed an application on 11.12.2000 and in pursuance of the decision of the High Court on 14.12.2001, it submitted an application on 19.12.2001 and that application was considered and disposed of on 27.12.2001. The applicant contended that even if the principle laid down in *Kuldeep Singh* was applied, the application having been considered and disposed of by the concerned authority on 27.12.2001, the law in force on that day ought to have been applied. The applicant further contended that the amendment to the rules which came into effect only on 20.2.2002, was not applicable on 27.12.2001 and therefore the rejection on 27.12.2001 was bad and consequently the impugned order of the High Court may be construed as requiring the authority to decide the matter as on 27.12.2001. We find that the said contention does not have any merit. It is true that the application was given on 19.12.2001. It is true that the application was considered and rejected on 27.12.2001 on a ground which may not be sound. It is also true that the amendment to the rules which was introduced by notification dated 20.2.2002 was not in force or effect on 27.12.2001. But the said order dated 27.12.2001 was neither challenged nor set aside by the High Court. The applicant chose to file a contempt application alleging that the excise authorities had disobeyed the order dated 14.12.2001. In the contempt case, the High Court made an order on 12.2.2002 that the new Excise Commissioner should pass an order on the application. Therefore the only question is whether the order passed by the Excise Commissioner on 20.2.2002 was in accordance with the Rules as they stood on 20.2.2002. Under the amended rules, no new FL-3 licence could be issued. Consequently, the rejection of the application by order dated 20.2.2002 was in accordance with the rules and cannot be faulted.

14. Learned counsel appearing for the applicant next contended that the decision in *Kuldeep Singh* was not with reference to any statutory rules, but with reference to a policy of the executive and therefore inapplicable. We find no force

in this argument. It is true that in that case there were no statutory rules and what was considered was with reference to a policy. But the ratio of the decision is that where licence sought related to the business of liquor, as the State has exclusive privilege and its citizens had no fundamental right to carry on business in liquor, there was no vested right in any applicant to claim a FL-3 licence and all applications should be considered with reference to the law prevailing as on the date of consideration and not with reference to the date of application. Whether the issue relates to amendment to Rules or change in policy, there will be no difference in principle. Further the legal position is no different even where the matter is governed by statutory rules, is evident from the decisions in *Hind Stone* (supra) and *Howrah Municipal Corporation* (supra).

15. Having regard to the fact that the State has exclusive privilege of manufacture and sale of liquor, and no citizen has a fundamental right to carry on trade or business in liquor, the applicant did not have a vested right to get a licence. Where there is no vested right, the application for licence requires verification, inspection and processing. In such circumstances it has to be held that the consideration of application of FL-3 licence should be only with reference to the rules/law prevailing or in force on the date of consideration of the application by the excise authorities, with reference to the law and not as on the date of application. Consequently the direction by the High Court that the application for licence should be considered with reference to the Rules as they existed on the date of application cannot be sustained.

Re: Question (ii)

16. The applicants for licence submitted that Rule 13(3) contemplates FL-3 licences being granted on fulfillment of the conditions stipulated therein; and the newly added proviso, by barring grant of new licence had the effect of nullifying the main provision itself. It was contended that the proviso to Rule 13(3) added by way of amendment on 20.2.2002 was null and void

as it went beyond the main provision in Rule 13(3) and nullified the main provision contained in Rule 13(3).

17. Rule 13(3) provides for grant of licences to sell foreign liquor in Hotels (Restaurants). It contemplates the Excise Commissioner issuing licences under the orders of the State Government in the interest of promotion of tourism in the State, to hotels and restaurants conforming to standards specified therein. It also provides for the renewal of such licences. The substitution of the last proviso to Rule 13(3) by the notification dated 20.2.2002 provided that no new licences under the said Rule shall be issued. The proviso does not nullify the licences already granted. Nor does it interfere with renewal of the existing licences. It only prohibits grant of further licences. The issue of such licences was to promote tourism in the State. The promotion of tourism should be balanced with the general public interest. If on account of the fact that sufficient licences had already been granted or in public interest, the State takes a policy decision not to grant further licences, it cannot be said to defeat the Rules. It merely gives effect to the policy of the State not to grant fresh licences until further orders. This is evident from the explanatory note to the amendment dated 20.2.2002. The introduction of the proviso enabled the State to assess the situation and reframe the excise policy. It was submitted on behalf of the State Government that Rule 13(3) was again amended with effect from 1.4.2002 to implement a new policy. By the said amendment, the minimum eligibility for licence was increased from Two-star categorization to Three-Star categorization and the ban on issue of fresh licences was removed by deleting the proviso which was inserted by the amendment dated 20.2.2002. It was contended that the amendments merely implemented the policies of the government from time to time. There is considerable force in the contention of the State. If the State on a periodical re-assessment of policy changed the policy, it may amend the Rules by adding, modifying or omitting any rule, to give effect to the policy. If the policy is not open to challenge, the

amendments to implement the policy are also not open to challenge. When the amendment was made on 20.2.2002, the object of the newly added proviso was to stop the grant of fresh licences until a policy was finalized. A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid. The challenge to the validity of the proviso is therefore rejected.

18. In view of the above, the appeals filed by the State are allowed in part and the appeals filed by the applicants for licences are dismissed, subject to the following clarifications:

(i) If any licences have been granted or regularized in the case of any of the applicants during the pendency of this litigation, on the basis of any further amendments to the Rules, the same will not be affected by this decision;

(ii) If any licence has been granted in pursuance of any interim order, the licence shall continue till the expiry of the current excise year for which the licence has been granted.

(iii) This decision will not come in the way of any fresh application being made in accordance with law or consideration thereof by the State Government.

R.P. Appeals disposed of.

MAYA MATHEW

v.

STATE OF KERALA & ORS.

(Civil Appeal No. 1833 of 2005)

FEBRUARY 18, 2010

[R.V. RAVEENDRAN AND H.L. DATTU, JJ.]

Service Law:

Special Rules for the Kerala State Homeopathy Services, 1989:

r. 3, Table, Entry 5, Note (2) – Appointment to posts of Medical Officers by direct recruitment and by transfer in the ratio prescribed – Note (2) prescribing that in absence of candidates by transfer, vacancies to be filled by direct recruitment – Writ petition before High Court contending that vacancies were to be filled up by applying fixed ratio or percentage to the cadre strength of the post to which recruitment/transfer was to be made as provided under Note (3) to r.5 of general Rules – Dismissed – HELD: Note (2) to Entry 5 of the Table under r.3 of Special Rules, which was inserted in the Rules in 1999, would prevail over Note (3) to Rule 5 of the general Rules which was added in 1992 – Therefore, ratio of direct recruitment and appointment by transfer has to be applied with reference to vacancies which were notified and not with reference to the cadre strength – There is no ground to interfere with the decision of the High Court – Kerala State and Subordinate Services Rules, 1958 – r.5, Note (3) inserted in 1992 – Interpretation of Statutes.

Interpretation of Statutes:

General Rules and Special Rules governing the same subject – Applicability of – Rules of interpretation – Explained – Special Rules for the Kerala State Homeopathy Services,

1989 – r.3, Table, Entry 5, Note (2) inserted in 1999 – Kerala State and Subordinate Services Rules, 1958 – r.5, Note (3) inserted in 1992.

S. Prakash & Anr. vs. *K.M. Kurian & Ors.* **1999 (3) SCR 610 = (1999) 5 SCC 624; and** *Prasad Kurien & Ors.* vs. *K.J. Augustin & Ors.* **2008 (3) SCR 1 = (2008) 3 SCC 529, referred to.**

Case Law Reference:

1999 (3) SCR 610	**referred to**	**para 8**
2008 (3) SCR 1	**referred to**	**para 8**

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 1833 of 2005.

From the Judgment & order dated 29.11.2002 of the High Court of Kerala at Ernakulam in Writ Appeal No. 3295 of 2001.

C.S. Rajan, M.T. George for the Appellant.

Vipin Nair, P.B. Suresh, Vivek Sharma (for Temple Law Firm) T.G. Narayanan Nair, P.V. Dinesh, T.P. Sindhu, P.V. Vinod, Athouba K.P. Rajesh for the Respondents.

The Order of the Court was delivered by

O R D E R

R.V. RAVEENDRAN, J. 1. The appellant is a Pharmacist (Homeopathy) in the Homeopathy Department of State of Kerala. The Kerala State Homeopathy Services are governed by the 'Special Rules for the Kerala State Homeopathy Services, 1989('Special Rules', for short). All sub-ordinate services in the State of Kerala including the State Homeopathy Services are also governed by the Kerala State and Sub-ordinate Services Rules, 1958 ('General Rules' for short).

2. Rule 3 of the Special Rules provides that the method of appointment to different categories of posts shall be in the manner specified in the Table given under the said rule. Entry No.5 in the said Table relating to Medical Officers (inserted by G.O. dated 27.5.1999, with effect from 12.4.1999) is extracted below:

Category of Post	Method of appointment
Medical Officer	1. By direct recruitment
	2. By transfer from the category of Nurse (Homeopathy)
	3. By transfer from the category of Pharmacist (Homeopathy)
	4. By transfer from the category of Clerks (Homoeo Department)
	Note: 1. A ratio of 5:1:1:1 shall be maintained in making appointments between direct recruitment, transfer from Nurses (Homeopathy), Pharmacist (Homeopathy) and Clerks in Homeopathy Department.
	2. The appointment by transfer of Nurse (Homeopathy), Pharmacist (Homeopathy), Clerk (Homeopathy) will be done by a selection through the Kerala Public Service Commission from among the three categories. *In the absence of candidates by transfer those vacancies in each category will be filled up by direct recruitment from open quota and the backlog for such categories will not be restored."*

[emphasis supplied)

3. Rule 5 of the General Rules is a general rule relating to the manner of recruitment. The following was added as Note (3) to the said Rule 5 of the General Rules by the Kerala State Subordinate Services (Amendment) Rules, 1992 :

> "Note (3) : Whenever a ratio or percentage is fixed for different methods of recruitment/ appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying fixed ratio or percentage to the cadre strength of the post to which the recruitment/transfer is made and not to the vacancies existing at that time."

4. The Homeopathy department reported 55 vacancies in the post of Medical Officers (Homeopathy) to the Kerala Public Service Commission, for purposes of recruitment. The Commission, by notification dated 1.2.2000, invited applications for filling up the said 55 posts of Medical Officer (Homeopathy) by dividing them (in the ratio of 5:1:1:1) as follows:

(i)	Direct recruitment	32
(ii)	Transfer from Nurses (Homeopathy)	7
(iii)	Transfer from Pharmacist (Homeopathy)	7
(iv)	Transfer from Clerks	7

5. The appellant and two others filed a writ petition before the High Court seeking a direction to the state government to report to the Public Service Commission 32 vacancies of Medical Officers (Homeopathy) to be filled by appointment by transfer of Pharmacists (Homeopathy). They contended that the cadre strength of Medical Officers (Homeopathy) was 442; that having regard to the ratio of 5:1:1:1 for making appointments (provided in the Special Rules, vide Note (1) to Entry 5 of the Table), out of the said 442 posts, 277 posts could be filled by direct recruitment and the balance of 165 posts had to be filled

by transferees from the posts of Nurses, Pharmacists and Clerks in the Homeopathy department at the rate of 55 each; that due to non-availability of qualified persons in the categories from which appointments were to be made by transfer, only 23 from the category of Pharmacists, one each from the categories of Nurses and Clerks were holding the post of Medical Officers, and all other Medical Officers (Homeopathy) were direct recruits; that as the direct recruits were occupying posts in excess of their quota, when making further recruitments, the vacancies to be filled have to be determined by applying the fixed ratio to the cadre strength and not the vacancies then existing; and that as the direct recruits were in excess of their quota and transferees were occupying less than their entitlement, the allocation of 55 vacancies to different categories had to be reworked; and all 55 vacancies ought to be distributed among Pharmacists, Nurses and Clerks without providing for any direct recruitment. The writ petitioners relied upon Note (3) to Rule 5 of the General Rules which requires that the ratio should be with reference to the cadre strength and not the actual vacancies existing at the time of recruitment. The appellant contends that Note (3) to Rule 5 of the General Rules will prevail over Note (2) to entry 5 of the Table under Rule 3 of the Special Rules.

6. The respondents resisted the petition. They contended that having regard to Note (2) to Entry 5 of the Special Rules, when in a recruitment, transfer quota posts have to be filled by direct recruits, due to non-availability of candidates from transfer categories, the backlog in regard to such transfer categories cannot be restored in future recruitments. As a result, the number of vacancies to be filled under each category (that is direct recruitment and by transfers) at any subsequent recruitment can be only by applying the ratio for appointment to the number of vacancies existing at the time of such subsequent recruitment and not with reference to the cadre strength. They submitted that the provisions of the Special Rules will prevail over the provisions of the General Rules.

7. A learned Single Judge held that the writ petitioners can claim the quota for Pharmacists only in respect of the vacancies that existed (as on 12.4.1999) and vacancies that arose subsequently. He therefore disposed of the writ petition by order dated 28.6.2001 with a direction to the respondents to fill up the available vacancies by applying the quota mentioned in the Special Rules with reference to the existing vacancies of Medical Officers (Homeopathy), that is vacancies available as on 12.4.1999 and vacancies which arose thereafter. He further directed that if there was any dearth of qualified Pharmacists, Nurses, Clerks within the quota intended for them, those vacancies should be filled by direct recruitment and the backlog shall not be required to be restored in any future recruitment. The appellant challenged the said order by filing a writ appeal. A Division Bench of the High Court by the impugned order dated 29.11.2002, dismissed the writ appeal holding that the recruitment will be governed by the Special Rules.

8. The said order is challenged in this appeal by special leave. The appellant reiterated her submissions in the writ petition relying upon two decisions of this Court in *S. Prakash & Anr.* vs. *K.M. Kurian & Ors.*, (1999) 5 SCC 624 and *Prasad Kurien & Ors.* vs. *K.J Augustin & Ors.*, (2008) 3 SCC 529.

9. The question for consideration is whether the respondents were justified in determining the number of posts to be filled by direct recruitment, and posts to be filled by transfer from the three transfer categories, by applying the prescribed ratio of 5:1:1:1 to the existing vacancies instead of the cadre strength.

10. In this case, the general law contained in Note (3) of Rule 5 of the General Rules, came into effect in the year 1992. On the other hand, Note (2) to Entry 5 of the Table under Rule 3 of the Special Rules which is repugnant to note (3) of Rule 5 of the General Rules came into effect on 12.4.1999.

11. The rules of interpretation when a subject is governed

by two sets of Rules are well settled. They are:

(i) When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the later law repeals the earlier law. The rule making authority while making the later rule is deemed to know the existing law on the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule;

(ii) When two provisions of law - one being a general law and the other being special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect.

(iii) If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law.

(iv) Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law.

12. Having regard to the fact that several Special Rules had been tailor made to suit and meet the special requirements of different specified services, the General Rules recognized the need for the Special Rules to prevail over the General Rules. Rule 2 of the General Rules providing for it, is extracted below:

"2. *Relation to the Special Rules* – If any provision in the General Rules contained in the part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall in respect of that service, prevail over the provision in the General Rules in this part."

Therefore, the provision of Special Rules (Note (2) under Entry 5 of the Table) will prevail over the provision of the General Rules (Note (3) under Rule 5). Even without such a specific provision, contextually, the said later special Rule would have prevailed over the said prior general Rule.

13. The question whether there can be an exception to the primacy given to special Rules by Rule 2 of the General Rules, was considered by this Court in *S. Prakash* and *Prasad Kurien,* with particular reference to Note (3) of Rule 5 of the General Rules.

(13.1) In *S. Prakash,* this Court considered whether the provisions of Special Rules - Kerala Agricultural Income Tax and Sales Tax Service Rules, will have to yield to Note (3) to Rule 5 of the General Rules. This Court held:

"14. From the aforesaid discussion, it is clear that if the intention of the rule-making authority was to establish a rule of universal application to all the services in the State of Kerala for which the Special Rules are made, then the Special Rules will give way to the General Rules enacted for that purpose. This has to be found out from the language used in the rules which may be express or by implication. *If the language is clear and unqualified, the subsequent General Rule would prevail despite repugnancy. If the intention of the rule-making authority is to sweep away all the Special Rules and to establish a uniform pattern for computation of the ratio or percentage of direct recruits and by transfer, in such a case, the Special Rules will give way……* The language

of Note (3) is crystal clear and is for removal of any ambiguity by using positive and negative terms. It applies to all the Special Rules whenever a ratio or percentage is prescribed in the rules. It also emphatically states that it has to be computed on the cadre strength of the post to which the recruitment is to be made and not on the basis of the vacancies existing at that time."

(emphasis supplied)

(13.2) In *Prasad Kurien,* while considering whether the Special Rules - Kerala Excise and Prohibition Subordinate Service Rules, 1974, vis-a-vis note (3) to Rule 5 of the General Rules, this Court followed the dictum in *S. Prakash*.

(13.3) These decisions reiterate the position that if the intention of the rule making authority is to make a later general rule to apply to all services in the State, for which different earlier special rules exist, then the existing special rules will give way to such later General Rule. That is, where the general rule is made subsequent to the special rule and the language of the general rule signified that it was intended to apply to all services and prevail over any prior special rules, the intention of the rule making authority should be given effect by applying the subsequent general rule instead of the earlier special rule. This court held that the language of Note (3) to Rule 5 of General Rules showed that it was intended to prevail over existing Special Rules which indicated a contrary position. What is significant is that the two decisions considered the Special Rules that were earlier in point of time to the General Rules as amended by the 1992 Amendment rules which introduced Note (3) to Rule 5 of the General Rules. This Court held, on reading the General Rules in conjunction with the Special Rules, that Note (3) to Rule 5 of General Rules will prevail over the corresponding provisions in the Special Rules showing a different intention, when deciding whether the ratio of each feeder category should be determined with reference to the cadre strength or existing vacancies.

14. What logically follows from the principle enunciated in the two decisions is that if any Special Rule is subsequent to the General Rule, then the question of examining whether the prior general rule will prevail over a latter special rule will not arise at all having regard to the categorical provision contained in Rule 2 of the General Rules. The principle laid down in those decisions will not apply where the Special Rule is made subsequent to the General Rule. Though the Special Rules are of the year 1989, Entry 5 with its Notes (1) and (2) relating to Medical Officers, prescribing the ratio as also a condition that the backlog will not be restored, was inserted by an amendment with effect from 12.4.1999, vide G.O. dated 27.5.1999. The special rule, being later in point of time to the general rule, it is not permissible to carve out an exception as was done in *S. Prakash and Prasad Kurien.* Entry 5 of the Table with Notes (1) and (2) in the Special Rules being subsequent to the insertion of Note (3) to Rule 5 of General Rules, and being clear and specific in its terms, will prevail over Note (3) of Rule 5 of the General Rules. The said decisions are therefore of no assistance.

15. Learned counsel for the appellant submitted that even before the 1999 amendment, the entry relating to Medical Officers in the Special Rules contained a provision similar to Note (2) of the Entry 5, inserted by the 1999 amendment; that the said old Special Rule was superseded by Note (3) of Rule 5 of General Rules; and therefore re-insertion of the provision in the Special Rules will not supersede the General Rule. We are afraid that the said contention has no merit. When the Rule Making Authority being aware of the existence of Note (3) in Rule 5 of the General Rules, chooses to subsequently make a contrary provision in the Special Rules, it is to be inferred that the subsequent rule is intended to prevail over the general rule. We therefore hold that Note (2) to Entry 5 of the Table under Rule 3 of Special Rules will prevail over Note (3) to Rule 5 of the General Rules.

16. It therefore follows that the ratio of 5:1:1:1 has to be applied with reference to vacancies which were notified and not with reference to the cadre strength. There is no ground to interfere with the decision of the High Court. Appeal is dismissed. Application for intervention is dismissed.

R.P. Appeal dismissed.

PUNJAB STATE ELECTRICITY BOARD & ANR.
v.
NARATA SINGH & ANR.
(Civil Appeal No. 2384 of 2007)

FEBRUARY 23, 2010

[J.M. PANCHAL AND K.S. RADHAKRISHNAN, JJ.]

Service Law:

Punjab Civil Services Rules – Rule 3.17(ii) – Employee working on different departments and projects of State Government on work-charged basis – Superannuated from the service under Electricity Board, where initially employed on work-charged basis and later regularized – Demanding pensionary benefits after taking into account the entire service rendered by him on work-charged basis under the State Government – Held: The entire service rendered by the employee was qualified for grant of pension under the rules – Policy decision of the Board indicates that the benefit of policy decision of the State Government whereby liability of pension was allocated in respect of temporary service rendered under the State Government, was to be available to an employee of the Board.

Respondent No. 1 worked with Irrigation and Power Department of the State of Punjab on work-charged basis for a period of about 1 ½ years. Thereafter he worked as work-charged employee with the Bhakra Dam Project. Resigning therefrom he joined the Beas Dam Project and worked at the said project as work-charged employee. He was retrenched from the project on payment of retrenchment compensation. Thereafter he was employed on work-charged basis as a fresh appointee with appellant- Electricity Board. Later, he was regularized. He retired on attaining the age of

superannuation. He moved a representation requesting the Board to grant him pension and other retiral benefits after taking into account the entire service rendered by him on work-charged basis under the State Government. The representation was rejected by the Board. Thereupon he filed writ petition. The High Court allowed the writ petition, directing the Board to include work-charged service rendered by him with the State, for the purpose of determining qualifying service for grant of pension. The Board had thereafter issued a Finance Circular No. 24/92 dated 29.5.1992 deciding to include the period of work-charged service of an employee with the Board for the purpose of grant of pensionary benefits as well as for counting the said period for determining qualifying service for grant of pension. Respondent No. 1 filed Special Leave Petition against the order of High Court. The Supreme Court remitted the matter to High Court for reconsidering the matter. On remand, Single Judge of High Court dismissed the petition. In writ appeal respondent No. 1 filed applications for bringing on record certain documents in support of his claim. Division Bench directed the Board to consider the case of respondent No. 1 in the light of the new documents. The Board after reconsidering the matter rejected the claim on the ground that the claim of respondent No. 1 was not covered by Regulation Circular No. 54 of 1985 bearing Memo No. 257861/REG. 6/Vol. 5 dated 25.11.1985 because he had rendered service in the work-charged capacity outside the Board which service was non-pensionable so far as the State Government was concerned. The Division Bench after considering the order of the Board as well as Rule 3.17 (ii) of the Punjab Civil Services Rules and a decision of High Court in *Kesar Chand's case* concluded that the Rule which excluded the counting of work-charged service, which were regularised subsequently, was bad in law and, therefore, the case of respondent No. 1 was not covered

by Circular No. 54 of 1985. Thus the Division Bench allowed the claim of respondent No. 1.

The question for consideration before this Court was whether the work-charged service rendered by respondent No. 1 under the State Government prior to securing employment with the Board, would qualify for grant of pension under the Punjab Civil Services Rules.

Dismissing the appeal, the Court

HELD: 1. By Memo dated 25.11.1985, the Board adopted letter dated 20.5.1982 of the Department of Finance, Government of Punjab, in order to allocate liability of pension in respect of temporary service rendered under the State Government. A bare glance at letter dated 20.5.1982 makes it very clear that allocation of pensionary liability in respect of temporary service rendered under the Government of India and the State Government was agreed upon on certain conditions being fulfilled, one of which was that the period of temporary service rendered under the Central/State Government should be such which could be taken into consideration for determining qualifying service for grant of pension under the Rules of respective Government. In order to determine whether work-charged service rendered by respondent No.1 under the State Government could have been taken into consideration for the purpose of calculating qualifying service, one has to refer to definition of "temporary post" as defined in Punjab Civil Services Rules and not to the Rule referred to by the Board. [Para 5] [41-H; 42-A-C]

2. The decision of High Court in *Kesar Chand's* case that Rule 3.17(ii) of the Punjab Civil Services Rules was violative of Article 14 of the Constitution of India was not disturbed by Supreme Court. The distinction made between an employee who was in temporary or officiating

service and who was in work-charged service as mentioned in Rule 3.17(ii) disappeared when the said rule was struck down. The effect was that an employee holding substantively a permanent post on the date of his retirement was entitled to count in full as qualifying service the periods of service in work -charged establishments. In view of this settled position, there is no manner of doubt that the work-charged service rendered by the respondent No.1 under the Government of Punjab was qualified for grant of pension under the rules of Government of Punjab and, therefore, the Board was not correct in rejecting the claim of the respondent for inclusion of period of work-charged service rendered by him with the State Government for grant of pension, on the ground that service rendered by him in the work-charged capacity outside the Board and in the departments of the State Government was a non-pensionable service. [Para 5] [42-G-H; 43-A-B]

Kesar Chand vs. State of Punjab and Ors. **1988 (5) SLR 27, affirmed.**

3. The apprehension that acceptance of the case of respondent No.1 would result into conferring a status on them as that of employees of the State of Punjab has no factual basis. The Board, on its own free volition, had issued letter adopting the policy of the State Government. Merely because the employees of the Board like respondent No.1 are entitled to count period of duty performed by them as work-charged employees in the State Government for the purposes of pension etc., it would not be proper to conclude that they became the employees of the State of Punjab. In fact, having larger interest of the employees, the Board had decided to adopt the policy decision of the State Government which can never be termed as arbitrary or irrational. [Para 6] [43-F-H; 44-A-C]

4. It is not correct to say that the two Circulars, namely, one dated March 31, 1982 and another dated May 20, 1982 cover only the employees of the State Government and the Central Government and that the Board, which is a distinct legal entity from the State of Punjab, is not covered by the same. The effect of adoption of the two Circulars, i.e., one of the Central Government and another of the State Government is that a work-charged employee who has rendered services either under the Central Government or the State Government would be entitled to count the period of service so rendered by him for the purpose of claiming pensionary benefits as an employee of the Board. [Para 7] [43-F-H; 44-A-C]

5. It is wrong to say that adoption of Circulars by the Board does not create a reciprocal arrangement between the Board and the State of Punjab and/or Central Government. The language of the three Circulars is clear and unambiguous and, therefore, those Circulars will have to be interpreted plainly. The conjoint and meaningful reading of the two Circulars dated March 31, 1982 and May 20, 1982 with Circular dated November 25, 1985 of the Board unequivocally and clearly creates an arrangement between the Central Government, State Government and the Board under which an employee of the Board who had earlier occasion to render service as a work -charged employee either in the Central Government or in the State Government would be entitled to count the period of service so rendered, when the question arises as to whether he has put in qualifying service for grant of pension by the Board arises. [Para 8] [44-G-H; 45-A-C]

6. It is not correct to say that the respondent No.1 is already given the benefit of his previous service rendered as work-charged employee under the Board while

counting qualifying service for the purpose of pension and would not be entitled to benefit of Memo dated November 25, 1985 adopting policy decisions of the Government of Punjab because the same was subsequently cancelled. It is true that the policy decision mentioned in Memo dated November 25, 1985 was rescinded by the Board in the year 2004. However, the Resolution of the year 2004 does not indicate at all, that it is retrospective in nature nor it is the case of the appellants that the Resolution of the year 2004 has retrospective effect. Therefore, on the basis of the Resolution of the year 2004, the respondent No.1 cannot be denied the benefit of counting of previous service rendered by him as work-charged employee under the Government of Punjab for the purpose of determining qualifying service under the Board for grant of pension. [Para 10] [44-G-H; 45-A-C]

7. The policy decision of the Board indicates that the benefit of policy decision of the State Government was to be available to an employee of the Board w.e.f. March 31, 1982. A conjoint and meaningful reading of the Memo dated November 25, 1985 issued by the Board and the policy decision of the State Government as reflected in letter dated May 20, 1982 of the Department of Finance makes it more than clear that the benefit would be admissible to one who having been retrenched from the service of the State Government, secured on his own, employment under the Board either with or without interruption between the date of retrenchment and date of new appointment. There is no manner of doubt that respondent No.1 was retrenched from the service of the State Government. The record shows that on his own, respondent No.1 secured employment under the Board with interruption between the date of retrenchment and date of new appointment. Therefore, it is wrong to say that respondent No.1 having joined service of the Board

after a lapse of more than four years from the date on which he was retrenched by the State Government would not be entitled to the benefit of the Memo dated November 25, 1985. [Para 11] [46-D-H; 47-A-B]

8. It is true that the documents which were sought to be relied upon at the appellate stage were not produced by respondent No.1 before the Single Judge who had decided the writ petition filed by him. However, there is no manner of doubt that those documents were brought on record by filing applications which were allowed. The order allowing the applications was never challenged by the appellants before the higher forum. The appellants, by their conduct, had permitted the said order to attain finality. The appellants were given sufficient opportunity to meet with the case of respondent No.1 based on new documents. The existence of the documents relied upon by respondent No.1 at the appellate stage was never disputed by the appellants. On the facts and in the circumstances of the case, consideration of new documents by the Court does not have any vitiating effect on the ultimate decision of the Court. [Para 12] [47-C-H; 48-A]

9. It is not correct to say that the High Court judgment should not be construed to mean as giving direction to the appellant to include previous service rendered by respondent No. 1 as work-charged employee of the State Government, as the High Court has expressed the opinion that the work-charged service of the appellant with the Board must be counted for determining qualifying service for the purpose of pension. The reference to Rule 3.17(ii) of the Punjab Civil Services Rules as well as the decision in *Kesar Chand's* case and the order passed by the Board rejecting the claim of respondent No.1 makes it abundantly clear that the High Court has directed the appellants to count the

period of service rendered by respondent No.1 in work-charged capacity with the State Government for determining qualifying service for the purpose of pension. Further, respondent No.1 has been directed to deposit the amount of Employee's Contributory Fund which he had received from the appellants along with interest as per the directions of the Board before the pension is released to him. All these directions indicate that the High Court had come to the conclusion that the period of service rendered by respondent No.1 in work-charged capacity under the State Government should be taken into consideration for determining qualifying service for the purpose of pension. Non-mention of such direction in the impugned judgment is merely a slip and the appellants cannot derive any advantage from this. [Para 13] [48-B-H]

Case Law Reference:

1988 (5) SLR 27 Affirmed. Para 5

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2384 of 2007.

From the Judgment & Order dated 25.01.2006 of the High Court of Punjab and Haryana at Chandigarh in L.P.A. No. 674 of 1995 in C.W.P. No. 10911 of 1991.

Satinder Gulati, Kamaldeep Gulati and Dr. Kailash Chand for the Appellants.

P.S. Patwalia, Aman Preet Singh Rahi, K.G. Bhagat, Ajay, Tushar Bakshi, Saswat Acharya and Debasis Misra for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. This appeal by special leave is

directed against judgment dated January 25, 2006 by the Division Bench of the High Court of Punjab and Haryana at Chandigarh in LPA No.694 of 1995 by which the appellants have been directed to count previous service rendered by respondent No.1, Narata Singh, in the Departments of Punjab State as work charged employee for the purpose of determining qualifying service for pension payable to him as an employee of the Punjab State Electricity Board (for short, the `Board').

2. The admitted facts which emerge from the record of the case are as under: The respondent No.1 worked with Irrigation and Power Department of the State of Punjab on work charged basis from February 1, 1952 to September 18, 1953. From September 25, 1953, he worked as work charged employee with the Bhakra Dam Project and resigned therefrom on January 27, 1962. He thereafter joined the Beas Dam Project on February 1, 1962 and worked at the said project till April 15, 1978 as work charged employee. He was retrenched from the said project with effect from April 15, 1978 and was paid retrenchment compensation of Rs.11,803.20 and gratuity of Rs.8559/- by the competent authority of the project. Bhakra Dam Project and Beas Dam Project are under the Department of Irrigation and Power, State of Punjab and, thus, even as per the appellants, the services rendered by the respondent No.1 as work charged employee in the two projects was, in fact, service under the State of Punjab.

The appellant No. 1, i.e., Punjab State Electricity Board is a statutory body constituted under Section 5 of the Electricity (Supply) Act, 1948. The respondent No.1 was employed on work charged basis as a special foreman by the Board as a fresh appointee. He worked in the same capacity from August 6, 1982 to January 5, 1984. With effect from January 6, 1984, he was appointed on regular basis. He retired from the service of the Board with effect from July 31, 1990 on attaining the age of superannuation. The respondent No.1 thereafter moved a representation requesting the Board to grant him pension and

other retiral benefits after taking into account the entire service rendered by him on work charged basis under the State Government. By an order dated January 25, 1991, the respondent No.1 was paid a sum of Rs.29,250/- being the amount payable to him as death-cum- retirement gratuity. The relevant regulation framed by the Board provides that an employee who has served for a minimum period of qualifying service of 10 years would be entitled to pension. The claim of the Board is that the respondent No.1 had served the Board for 7 years, 11 months and 25 days including the work charged service in the Board and was, therefore, not qualified for grant of pension. The claim of the respondent No.1 was that service rendered by him in the State of Punjab as work charged employee should be counted for determining qualifying service for the purpose of pension. Therefore, he instituted C.W.P. No.10911 of 1991 before the High Court of Punjab and Haryana seeking inclusion of work charged service for the purpose of determining qualifying service. A Division Bench of the Punjab and Haryana High Court at Chandigarh, vide order dated January 28, 1992, allowed the writ petition of the respondent No.1 and directed the Board to include work charged service rendered by the respondent No.1 with the State of Punjab for the purpose of determining qualifying service for grant of pension to him. It may be mentioned that the Board had issued a Finance Circular No.24/92 dated May 29, 1992 deciding to include the period of work charged service of an employee with the Board for the purpose of grant of pensionary benefits as well as for counting the said period for determining qualifying service for grant of pension.

Feeling aggrieved by the said decision, the appellants filed special leave petition (C) No.7515 of 1992 before this Court. The said petition was allowed by an order dated October 12, 1992 in the following terms :

"Special Leave granted.

Heard counsel on both sides. The question which is

required to be considered is in regard to the service rendered by the respondent No.1 Narata Singh with the Bhakra Management Board and later the Beas Management Board. The question to be considered is whether that service was regulated by the Contributory Provident Fund Scheme and Gratuity Scheme and whether the respondent No.1 had already taken benefit thereof. If so, the effect of that benefit received by the respondent No.1 would have to be considered. It appears that the matter had not been considered from that angle by the High Court. We, therefore, set aside the impugned order of the High Court and remit the matter to the High Court for reconsideration on merit. The appeal is disposed of accordingly. There will be no order as to costs.

Sd/- (A.M. Ahmadi)

Sd/- (M.M. Punchhi)

October 12, 1992

New Delhi."

After remand, the case was heard by a learned Single Judge of Punjab and Haryana High Court. The learned Single Judge by order dated March, 10, 1995 dismissed the petition filed by the respondent No.1. Thereupon the respondent No.1 challenged the said judgment by filing a Letters Patent Appeal No.674 of 1995. During the pendency of the appeal, respondent No.1 filed an application on August 27, 2004 under Section 151 of the Code of Civil Procedure for bringing on record certain documents in support of his claim that service rendered by him in the State of Punjab should be taken into consideration for the purpose of determining qualifying service rendered by him in the Board. The record further shows that he filed another application for bringing on record certain documents in support of his claim. The Division Bench of the High Court noticed that those documents were neither

considered by the learned Single Judge nor by the Board and, therefore, the Division Bench, by an order dated August 24, 2005, directed the Board to consider the case of the respondent No.1 for the grant of pensionary benefits, in the light of new documents filed in the appeal within four months from the date of the order. After passing the said order, the hearing of the appeal was adjourned. Pursuant to the directions given by the High Court, the Board reconsidered the case of the respondent No.1 for grant of pensionary benefits in the light of the documents produced by him on the record of the appeal and rejected the said claim by a speaking order dated November 16, 2005. The order passed by the Board was produced before the Court hearing LPA No.674 of 1995. The main ground on which the claim of the respondent No.1 for grant of pensionary benefits in the light of the new documents was rejected was that the case of the respondent No.1 was not covered by Regulation Circular No.54 of 1985 bearing Memo No.257861/REG.6/Vol.5 dated November 25, 1985 because he had rendered service in the work charged capacity outside the Board, i.e., in the Departments of the State Government, namely, Bhakra Management Board and Beas Management Board and that the said service was a non-pensionable service so far as the State Government was concerned. The Division Bench considered the order dated November 16, 2005 passed by the Board rejecting the claim of the respondent No.1 as well as Rule 3.17(ii) of the Punjab Civil Services Rules and the Full Bench decision of the Punjab and Haryana High Court rendered in *Kesar Chand vs. State of Punjab & Ors.* [1988 (5) SLR 27]. The Division Bench noticed that the Full Bench of the Punjab and Haryana High Court had struck down Rule 3.17(ii) of the Punjab Civil Services Rules which, inter alia, provided that period of service in work charged establishments shall not be counted as qualifying service. After noticing the ratio laid down by the Full Bench, the Division Bench concluded that Rule which excluded the counting of work charged service of an employee whose services were regularized subsequently was bad in law and, therefore, the conclusion of the Board that the

case of the respondent No.1 was not covered by Circular dated November 25, 1985 because services rendered by him as work charged employee in the departments of the State Government was non-pensionable service so far as the Government of Punjab was concerned, was wrong. In view of the said conclusion, the Division Bench by the impugned judgment has allowed the claim of the respondent No.1 to include work charged service rendered by him with the State of Punjab for grant of pension and directed the Board to count the said period for determining qualifying service for the purpose of pension, giving rise to the instant appeal.

3. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the appeal. The argument that the respondent No.1 had served the Board for 7 years, 11 months and 25 days and was, therefore, not qualified for grant of pension as he had not put in minimum qualifying service of 10 years, is devoid of merits. It is true that the Board is a statutory body constituted under Section 5 of the Electricity (Supply) Act, 1948 and entitled to make regulations in exercise of power conferred by Section 79 of the said Act. It is also true that the regulation relating to pension requires that an employee of the Board must serve for a minimum period of 10 years so as to claim pensionary benefits and that the total service of the respondent No.1 with the Board is of 7 years, 11 months and 25 days. However, the claim made by the respondent No.1 that previous service rendered by him in work charged capacity with the State Government should be taken into consideration for the purpose of determining qualifying service for grant of pension is rightly upheld by High Court. It is relevant to notice that there were many cases where employees who had rendered temporary service under the State Government were retrenched but later on had secured employment under the Central Government and claimed pensionary benefits from the Central Government wherefrom eventually they had retired. There were also cases where employees who had rendered

temporary service under the Central Government had secured employment under the State Government and were claiming pensionary benefits from the State Government wherefrom eventually they had retired. Therefore, the question of allocation of pensionary liability in respect of temporary service rendered under the Government of India and State Governments was considered by the Central Government. The Central Government consulted the State Governments and it was decided that as proportionate pensionary liability in respect of temporary service rendered under the Central Government or the State Governments to the extent of such service could have qualified for grant of pension under the Rules of the respective Government, will be shared by the governments concerned on a service share basis, so that the Government servants are allowed the benefit of counting their qualifying service both under the Central Government and the State Governments for grant of pension by the Government from where they eventually retire. This decision was reflected in letter dated March 31, 1982 addressed by the Under Secretary to Government of India to the Secretary to Government of all the States Finance Department (except Government of Jammu and Kashmir and Nagaland). The abovementioned policy decision taken by the Central Government was considered by the finance Department of Government of Punjab. It was decided by the Government of Punjab that proportionate pensionary liability in respect of temporary service rendered under the Central Government/ State Government to the extent such service could have qualified for grant of pension under the rules of respective Government will be shared by the Government concerned on a service share basis, so that the Government servants are allowed the benefit of counting their qualifying service both under the Central Government and the State Government for grant of pension by the Government from where they eventually retire. This policy decision taken by the Government of Punjab is reflected in a letter dated May 20, 1982 addressed to all the Heads of Departments, Registrar, Punjab and Haryana High Court, Commissioner of Divisions, District and Sessions Judge

and Deputy Commissioners in the State. The abovementioned policy decisions taken by the Central Government and the Government of Punjab were taken into consideration by the Board which issued a Memo dated November 25, 1985 with reference to the subject of allocation of pensionary liability in respect of temporary service rendered in the Government of India and State Government and adopted the policy decision reflected in the letter dated May 20, 1982 of the Government of Punjab, with effect from March, 31, 1982 as per the instructions and conditions stipulated in the said letter. This is quite evident from Memo No.257861/8761/REG.6/V.5 dated November 25, 1985 issued by the under Secretary/P&R/ for Secretary,PSEB, Patiala.

4. The effect of adoption of the policy decisions of the Central Government and the State Government was that a temporary employee, who had been retrenched from the service of Central/State Government and had secured employment with the Punjab State Electricity Board, was entitled to count temporary service rendered by him under the Central/State Government to the extent such service was qualified for grant of pension under the Rules of the Central/ State Government.

5. The short question which arises for determination of this Court is whether the work charged service rendered by the respondent No.1 under the Government of Punjab prior to securing employment with the Board would qualify for grant of pension under the Punjab Civil Services Rules. This dispute deserves to be determined because the contention of the appellant is that the High Court was neither justified in referring to the definition of "temporary post" as given in Regulation 3.17(ii) of Punjab Civil Services Rules nor the Full Bench decision in *Kesar Chand* (supra) but the High Court should have taken into consideration the definition of "temporary post" as per Regulation 2.58 of PSEB MSR Vol.I Part-I, 1972. As noticed earlier, by memo dated 25.11.1985, the Board

adopted letter dated 20.5.1982 of the Department of Finance, Government of Punjab in order to allocate liability of pension in respect of temporary service rendered under the State Government. A bare glance at letter dated 20.5.1982 makes it very clear that allocation of pensionary liability in respect of temporary service rendered under the Government of India and the State Government was agreed upon on certain conditions being fulfilled, one of which was that the period of temporary service rendered under the Central/State Government should be such which could be taken into consideration for determining qualifying service for grant of pension under the Rules of respective government. In order to determine whether work charged service rendered by the respondent No.1 under the State Government could have been taken into consideration for the purpose of calculating qualifying service, one has to refer to definition of "temporary post" as defined in Punjab Civil Services Rules and not to the Rule referred to by the Board. Rule 3.17(ii) of the Punjab Civil Services Rules reads as under:

> "If an employee was holding substantively a permanent post on the date of his retirement, his temporary or officiating service under the State Government, followed without interruption by confirmation in the same or another post, shall count in Full as qualifying service except in respect of :-
>
> (i) ... ...
>
> (ii) periods of service in work-charged establishment; and"

A bare reading of the above-quoted rule makes it clear that periods of service in work charged establishments were not counted as qualifying service. Therefore, the work charged employees had challenged validity of the said Rule. The matter was considered by the Full Bench of Punjab and Haryana High Court. In *Kesar Chand vs. State of Punjab & Ors.* [1988 (5) SLR 27], the Full Bench held that Rule 3.17(ii) of the Punjab Civil Services Rules was violative of Article 14 of the Constitution of

India. The Full Bench decision was challenged before this Court by filing a special leave petition which was dismissed. Thus, the ratio laid down by the Full Bench judgment that any rule which excludes the counting of work charged service of an employee whose services have been regularized subsequently, must be held to be bad in law was not disturbed by this Court. The distinction made between an employee who was in temporary or officiating service and who was in work charged service as mentioned in Rule 3.17(ii) of the Punjab Civil Services Rules disappeared when the said rule was struck down by the Full Bench. The effect was that an employee holding substantively a permanent post on the date of his retirement was entitled to count in full as qualifying service the periods of service in work charged establishments. In view of this settled position, there is no manner of doubt that the work charged service rendered by the respondent No.1 under the Government of Punjab was qualified for grant of pension under the rules of Government of Punjab and, therefore, the Board was not correct in rejecting the claim of the respondent for inclusion of period of work charged service rendered by him with the State Government for grant of pension, on the ground that service rendered by him in the work charged capacity outside PSEB and in the departments of the State Government was a non-pensionable service.

6. The apprehension that acceptance of the case of the respondent No.1 would result into conferring a status on them as that of employees of the State of Punjab has no factual basis. It is true that the State Government has power to frame rules governing services of its employees under Article 309 of the Constitution whereas the Board has power to prescribe conditions of service by framing regulations under Section 79(c) of the Electricity (Supply) Act, 1948. However, governance of a particular institution and issuance of instructions to fill up the gap in the fields where statutory provisions do not operate, is recognised as a valid mode of administration in modern times. It is not the case of the Board that it was compelled to adopt

the policy of the State Government. The Board, on its own free volition, had issued letter adopting the policy of the State Government. Merely because the employees of the Board like respondent No.1 are entitled to count period of duty performed by them as work charged employees in the State Government for the purposes of pension etc., it would not be proper to conclude that they became the employees of the State of Punjab. In fact, having larger interest of the employees, the Board had decided to adopt the policy decision of the State Government which can never be termed as arbitrary or irrational.

7. The contention, that the two circulars, namely, one dated March 31, 1982 and another dated May 20, 1982 cover only the employees of the State Government and the Central Government and the Board, which is a distinct legal entity from the State of Punjab, is not covered by the same, is merely stated to be rejected. It is neither the case of the respondent No.1 nor the case of the State Government that employees of the Board are covered by the circulars dated March 31, 1982 and May 20, 1982. However, it is their case that the employees of the Board were entitled to benefit contemplated by those two circulars as soon as the policy laid down in those two circulars was adopted by the Board vide letter dated November 25, 1985. The effect of adoption of the two circulars, i.e., one of the Central Government and another of the State Government is that a work charged employee who has rendered services either under the Central Government or the State Government would be entitled to count the period of service so rendered by him for the purpose of claiming pensionary benefits as an employee of the Board.

8. It is wrong to argue that adoption of circulars by the Board does not create a reciprocal arrangement between the Board and the State of Punjab and/or Central Government. The language of the three circulars is clear and unambiguous and, therefore, those circulars will have to be interpreted plainly. The

conjoint and meaningful reading of the two circulars dated March 31, 1982 and May 20, 1982 with circular dated November 25, 1985 of the Board unequivocally and clearly creates an arrangement between the Central Government, State Government and the Board under which an employee of the Board who had earlier occasion to render service as a work charged employee either in the Central Government or in the State Government would be entitled to count the period of service so rendered, when the question arises as to whether he has put in qualifying service for grant of pension by the Board arises. The respondent No.1 has never requested the Board to consider his case for promotion de hors the circular dated November 25, 1985. Having regard to the facts of the case, this Court is of the opinion that the High Court was justified in issuing mandamus as prayed for by the respondent No.1.

9. The plea that case of the respondent No.1 should have been rejected because it has financial repercussions is totally devoid of merits. Before adopting the policy underlying two circulars, the Board must have taken into consideration the financial implications as well as demands of the employees and thereafter must have resolved to adopt those circulars. It has been brought to the notice of the Court that subsequently circular dated November 25, 1985 was rescinded by the Board. However, there is no manner of doubt that those employees who were covered by the circular dated November 25, 1985 till it was in force would be entitled to claim benefits under the same.

10. The argument that the respondent No.1 is already given the benefit of his previous service rendered as work charged employee under the Board while counting qualifying service for the purpose of pension and would not be entitled to benefit of memo dated November 25, 1985 adopting policy decisions of the Government of Punjab because the same was subsequently cancelled, has no force. It is true that the policy decision mentioned in memo dated November 25, 1985 was

rescinded by the Board in the year 2004. However, the Resolution of the year 2004 does not indicate at all, that it is retrospective in nature nor it is the case of the learned counsel for the appellants that the Resolution of the year 2004 has retrospective effect. Therefore, on the basis of the Resolution of the year 2004, the respondent No.1 cannot be denied the benefit of counting of previous service rendered by him as work charged employee under the Government of Punjab for the purpose of determining qualifying service under the Board for grant of pension.

11. It was stressed that the service of the respondent No.1 with the Government of Punjab came to an end on April 15, 1978 when he was retrenched whereas after a lapse of more than four years, he joined the services of the Board on August 6, 1982 and, therefore, the gap being not condonable under Rule 4.23 of the Punjab Civil Services Rules, the claim of the respondent No.1 should have been rejected, has no substance. The policy decision of the Board indicates that the benefit of policy decision of the Government of Punjab was to be available to an employee of the Board with effect from March 31, 1982. A conjoint and meaningful reading of the memo dated November 25, 1985 issued by the Board and the policy decision of the Government of Punjab as reflected in letter dated May 20, 1982 of the Department of Finance makes it more than clear that the benefit would be admissible to one who having been retrenched from the service of the State Government, secured on his own, employment under the Board either with or without interruption between the date of retrenchment and date of new appointment. There is no manner of doubt that the respondent No.1 was retrenched from the service of the State Government. This fact is not only admitted in the list of events supplied by the learned counsel for the appellant but is also mentioned in the impugned judgment. The record shows that on his own, the respondent No.1 secured employment under the Board with interruption between the date of retrenchment and date of new appointment. Therefore, it is

wrong to argue that the respondent No.1 having joined service of the Board after a lapse of more than four years from the date on which he was retrenched by the State Government would not be entitled to the benefit of the memo dated November 25, 1985.

12. It was contended that the additional documents produced by the respondent No.1 before the court in appeal could not have been taken into consideration and, therefore, the impugned judgment should be set aside. It is true that the documents which were sought to be relied upon at the appellate stage were not produced by the respondent No.1 before the learned Single Judge who had decided the writ petition filed by him. However, there is no manner of doubt that those documents were brought on record by filing applications which were allowed. The order allowing the applications was never challenged by the appellants before the higher forum. The appellants, by their conduct, had permitted the said order to attain finality. As those documents were neither considered by the learned Single Judge nor by the Board, the Division Bench had directed the Board to reconsider the claim of the respondent for pension by inclusion of service rendered by him as work charged employee under the State Government. That direction was accepted and implemented by the appellants by considering the case of the respondent No.1 in the light of new documents. Thereafter, the claim of the respondent No.1 was rejected by a speaking order and the speaking order was produced before the Court. The Court had thereafter heard the learned counsel for the parties and, thus, the appellants were given sufficient opportunity to meet with the case of the respondent No.1 based on new documents. The existence of the documents relied upon by the respondent No.1 at the appellate stage was never disputed by the appellants. On the facts and in the circumstances of the case, this Court is of the firm opinion that neither the appellants were taken by surprise when the respondent No.1 produced new documents which were considered by the Court nor any prejudice was caused

to them. Therefore, consideration of new documents by the Court does not have any vitiating effect on the ultimate decision of the Court.

13. The learned counsel for the appellants pointed out the finding recorded by the Division Bench in the impugned judgment to the effect that "we are, therefore, clearly of the opinion that the work charged service of the appellant with the Board must be counted for determining qualifying service for the purpose of pension" and argued that the judgment of the High Court should not be construed to mean as giving direction to the appellant to include previous service rendered by the respondent No.1 as work charged employee of the State Government for pension purposes. So far as this argument is concerned, it is true that the Division Bench of the High Court has expressed the above opinion in the impugned judgment. However, the reference to Rule 3.17(ii) of the Punjab Civil Services Rules as well as the Full Bench decision of the Punjab and Haryana High Court in *Kesar Chand vs. State of Punjab & Ors.* [1988 (5) SLR 27] and speaking order dated November 16, 2005 passed by the Board rejecting the claim of respondent No.1 makes it abundantly clear that the High Court has directed the appellants to count the period of service rendered by the respondent No.1 in work charged capacity with the State Government for determining qualifying service for the purpose of pension. Further, the respondent No.1 has been directed to deposit the amount of Employee's Contributory Fund which he had received from the appellants along with interest as per the directions of the Board before the pension is released to him. All these directions indicate that the High Court had come to the conclusion that the period of service rendered by the respondent No.1 in work charged capacity under the State Government should be taken into consideration for determining qualifying service for the purpose of pension. Non-mention of such direction in the impugned judgment is merely a slip and the appellants cannot derive any advantage from this.

14. The net result of the above discussion is that this Court does not find substance in any of the arguments advanced on behalf of the appellants. The appeal lacks merit and, therefore, deserves to be dismissed. Therefore, the appeal fails and is dismissed. There shall be no order as to costs.

15. The appellants are directed to implement the directions given by the High Court in the impugned judgment as early as possible and not later than three months from the date of receipt of the writ of this Court.

K.K.T. Appeal dismissed.

SANGUNTHALA (DEAD) THR. LRS.
v.
SPECIAL TEHSILDAR (L.A.) & ORS.
(Civil Appeal Nos. 6240-6243 of 2001 etc.)

FEBRUARY 24, 2010

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

Land Acquisition Act, 1894 – s. 23 – Acquired land – Classification – Market value – Determination of – The lands were acquired for construction of houses – They were potential house sites – Even at the time of acquisition, there were buildings on the lands – Compensation determined by Land Acquisition Officer – Enhanced by reference court, classifying the land as house sites – High Court holding the land as agricultural land – Held: The market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility – The market value of the acquired lands were rightly determined by reference court, classifying the same as house sites.

Words and Phrases: 'Market value' – Meaning of, in the context of s. 23 of Land Acquisition Act, 1894.

The land in question was acquired under Land Acquisition Act, 1894. Compensation amount thereof was determined by Land Acquisition Officer. The same was enhanced by reference court classifying the lands as house sites. High Court set aside the order of reference court and determined the market value of the lands as agricultural lands , holding that the lands on the date of acquisition were agricultural lands. Hence, the present appeals.

Allowing the appeals, the Court

HELD: 1.1. The burden of establishing/proving the market value of the lands is always on the claimants. The court has to treat the reference as an original proceeding before it, for determination of the market value afresh on the basis of the material produced before it. The claimant in the position of a plaintiff has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in court. The material produced and proved by the other side will also be taken into account for this purpose. [Para 29] [65-A-B]

Periyar and Pareekanni Rubbers Ltd. v. State of Kerala **AIR 1990 SC 2192;** *Special Deputy Collector and Anr.v. Kurra Sambasiva Rao and Ors.* **(1997) 6 SCC 41;** *Kiran Tandon v. Allahabad Development Authority and Anr.* **(2004) 10 SCC 745, relied on.**

1.2. The 'market value' is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when let out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value, disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding principle would be the conduct of hypothetical willing vendor who would offer the land and that of a purchaser who, in normal human conduct, would be willing to buy as a prudent man in normal market conditions but not of an anxious purchaser dealing at arm's length nor a fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. [Para 34] [66-G-H; 67-A-C]

1.3. The market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when let out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of facts depending upon its condition, situation, user to which it is put and whether it is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing or has prospect of development have to be taken into consideration. [Para 35] [67-D-E]

1.4. The reference court was right in holding that while determining the value of the property acquired one has to see whether the land has got the building potentiality to be used for the building purposes in the immediate or in near future. High Court fell into an error in concluding that the acquired lands were agriculture lands and erroneously reversed the conclusions arrived by the reference court. [Paras 13 and 14] [58-G; 59-H]

1.5. The reference court has rightly appreciated the evidence. While examining the evidence of C.W. Nos. 1, 2, 4, 6, 8 to 14, 17 to 19 and 21, it concluded that they have categorically stated that the lands were near the residential housing colonies and abutting the road. [Para 16] [60-D]

1.6. The evidence of RWs 1, 2 and 3 also supports the conclusion that even at the time of the Notification u/s. 4(1), there were buildings on the land acquired and they are all abutting the main road and are at a distance of 1 K.M. from residential colonies. [Para 23] [63-D]

1.7. The presence of number of buildings on the

lands acquired and the said lands being occupied by the buildings are to be treated as house sites. The basic purpose that has been traced out in the evidence and as admitted by the RWs that the lands were acquired for the purpose of putting up residential quarters. As a portion of the land is being considered as house site, the adjoining lands have the potential of being put in better use as house sites in the near future. [Para 24] [63-F]

1.8. It should also be taken into consideration that the disputed lands were situated near the factory premises and further were adjoining the main road which connects the road. As such the aforesaid lands are potential house sites. [Para 26] [64-B]

1.9. In view of the admitted case that the lands acquired were potential house sites, the views taken by the High Court while calculating the compensation cannot be agreed to. R-13 and R-15 are the two sale deeds containing particulars of the sale transactions held 3 years prior to the Section 4(1) Notification. The reference court after close perusal of the aforesaid documents held that the same discloses that out of more than 100 sales, number of sales in respect of the lands is sold as house sites in village Thathaiyangarpatti and the adjacent survey numbers in Thekkampatty village were also sold as house sites. [Para 32] [65-H; 66-A-B]

Avinash Dhavaji Naik v. State of Maharashtra **(2009) 11 SCC 171;** *Atma Singh (Dead) through Lrs. and Ors. v. State of Haryana and Anr.* **(2008) 2 SCC 568, relied on.**

1.10 The High Court and the Land Acquisition Officer failed to take into consideration the advantages and facilities, which were available in the acquired land. The purpose for which the acquisition is being made is an important factor. In the present case it has come on evidence from R.W. 2 that the lands were acquired to build

quarters for the workers of the Company. The reference court rightly fixed the amount of compensation to be Rs. 1,75,000/- and the said finding is upheld. [Paras 36, 37, 38 and 39] [67-F; 67-H; 68-B; 68-C]

Nelson Fernandes and Ors. v. Special Land Acquisition Officer, South Goa and Ors. **(2007) 9 SCC 447, referred to.**

2. So far as the question of grant of higher compensation than what is claimed by the claimants goes, the reference court has rightly observed, that even before the representation before the Land Acquisition Officer, the claimants had stated that in event of their being not satisfied with the award, they reserve the right to go before the Civil Court for determination of just and reasonable compensation. [Para 39] [68-D]

3. The claim of the appellant(s) for solatium, interest and other benefits under the statute should be governed by the principles laid down in *Sunder's case .* [Para 40] [68-F]

Sunder v. Union of India **2001 (7) SCC 211 – relied on.**

P. Ram Reddy and Ors. v. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and Ors. **(1995) 2 SCC 305;** *Land Acquisition Officer, ELURU and Ors. v. Jasti Rohini (Smt.) and Anr.* **(1995) 1 SCC 717;** *The Collector, Raigarh v. Dr. Harisingh Thakur and Anr.* **AIR 1979 SC 472;** *Raghubans Narain Singh v. The Uttar Pradesh Government, through Collector of Bijnor* **AIR 1967 SC 465;** *State of Orissa v. Brij Lal Misra and Ors.* **(1995) 5 SCC 203;** *Viluben Jhalejar Contractor (Dead) by Lrs. v. State of Gujarat* **(2005) 4 SCC 789;** *Attar Singh and Anr. v. Union of India and Anr.* **(2009) 9 SCC 289, referred to.**

Case Law Reference:

(1995) 2 SCC 305	**Referred to**	**Para 13**

(1995) 1 SCC 717	**Referred to**	**Para 15**
AIR 1979 SC 472	**Referred to**	**Para 15**
AIR 1967 SC 465	**Referred to**	**Para 15**
(1995) 5 SCC 203	**Referred to**	**Para 18**
(2005) 4 SCC 789	**Referred to**	**Para 19**
(2009) 9 SCC 289	**Referred to**	**Para 19**
AIR 1990 SC 2192	**Relied on.**	**Para 28**
(1997) 6 SCC 41	**Relied on.**	**Para 28**
(2004) 10 SCC 745	**Relied on.**	**Para 28**
(2009) 11 SCC 171	**Relied on.**	**Para 33**
(2008) 2 SCC 568	**Relied on.**	**Para 34**
(2007) 9 SCC 447	**Referred to.**	**Para 37**
(2001) 7 SCC 211	**Relied on.**	**Para 40**

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 6240-6243 of 2001.

From the Judgment & Order dated 23.01.2001 of the High Court of Judicature at Madras in A.S. Nos. 135, 139, 140 and 143 of 1997.

WITH

C.A. Nos. 6244-6248 of 2001 & 495-504 of 2002.

A.T.M Rangaramanujam, M.A. Chinnasamy, Senthil Kumar, S. Rajappa (NP), V. Ramasubramanian (NP), for the Appellants.

S. Thananjayan, Arputham Aruna & Co. (NP), T.Harish Kumar (NP) for the Respondents.

The Judgment of the Court was delivered by:

GANGULY, J. 1. These appeals have been filed challenging the judgment and order dated 23.1.01 of Madras High Court.

2. Facts relevant to the present dispute are that an extent of 196 acres of lands were acquired for the purpose of expansion of Tamil Nadu Magnesite Limited, a State owned company. Various notifications under Section 4 (1) of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") were issued in the month of February, March and May 1984.

3. In connection with giving compensation for that acquisition, the Land Acquisition Officer had fixed the market value at the rate of Rs.18,000/- per acre for irrigated dry land and Rs.15,000/- per acre for unirrigated dry land in Award Nos. 1 to 9 and 11 of 1986.

4. As the claimants felt aggrieved by and dissatisfied with the awards, they asked for reference under Section 18 of the Act. The Reference Court, i.e. the Court of Subordinate Judge Salem, after considering the documentary and oral evidence, treated the lands as potential house sites and fixed the market value at Rs.1,75,000/- per acre.

5. The case as put forward by the claimants before the Reference Court and this Court was that the compensation was not fixed by the Collector on a proper basis and the acquired land is potential house site and the valuation ought to have been done on that basis. It was also their submission that relevant sale deeds were ignored while fixing up the value and the data sale deed selected by the Officer was absolutely unreliable. It was urged that in several cases, the Officer did not award compensation for well, cement channel and for the super structures and trees. While in some of the cases the Land Acquisition Officer had not awarded interest for the lands which are taken possession in advance from the land owners. Neither

was the compensation paid for the change of residence and place of avocation.

6. Per contra, the respondents urged that the Land Acquisition Officer had fixed the value after verifying the records of nearby land owners on such transactions and after verifying all the aspects. It was further submitted that the value fixed by the Land Acquisition Officer is correct and the value claimed by the claimants is very high and there was no objection by the owners for those lands at the time of acquisition. So there is no necessity for enhancement of compensation. It was urged that the documents relied upon by the claimants are in no way relevant for fixing the higher values.

7. The Reference Court taking into account the admission of R.W. 2 that there are number of buildings on the land acquired and the plots of land which are occupied by the building are to be treated as house sites, held that the classification of lands into irrigated and unirrigated lands made by the Land Acquisition Officer was unreasonable and erroneous. The Reference Court held that the Officer should have taken into consideration the proximity of lands acquired to the other residential colonies, the factories and that the lands itself was used as housing plots.

8. The Reference Court fixed Rs. 1,75,000/- per acre as the amount taking note of the fact that although the lands acquired are situated in different survey numbers but they are adjacent to each other and are acquired as one block for the same purpose.

9. The High Court vide its judgment dated 23.01.2001 passed in Appeal Suit Nos. 134 to 143 of 1997 and C.M.P No. 16081 of 2000 in Cross Objection Sr. No. 14276 of 1997 while setting aside the order of Reference Court took into consideration the fact that plots of lands acquired were agricultural lands initially and continued to be so till they were acquired. The High Court relied on the fact that the claimants

in their representation before the Land Acquisition Officer have claimed different amounts and majority of them claimed compensation only at the rate of Rs. One Lakh per acre. The High Court held that the Reference Court had given no reason at all for awarding compensation higher than what had been claimed. The High Court after taking into note the existence of 2 housing colonies held that it could not be concluded that the vast extent of land acquired in the case would also become a housing colony on its own and was of the view that there was no sufficient material to establish that the lands in dispute could be converted into a housing site in near future.

10. It was held that lands in question were valuable agricultural lands where horticulture and other crops were raised and they were garden lands, sufficiently irrigated. The market value was fixed at Rs.75,000/- per acre uniformly for all the lands involved in the above acquisition. The award of interest on solatium and on additional grounds was held to be contrary to the principles laid down by the Apex Court.

11. The claimant(s)/appellant(s) being aggrieved by the aforesaid order of the High Court approached this Court.

12. The main bone of contention on behalf of the appellant is regarding the classification of lands and their value fixed by the High Court. It was argued before this Court that the acquired lands are potential house sites and that the High Court was not justified in ignoring the documentary evidence in that regard.

13. This Court finds that the Reference Court was right in holding that while determining the value of the property acquired one has to see whether the land has got the building potentiality to be used for the building purposes in the immediate or in near future. In *P. Ram Reddy and others v. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and others* (1995) 2 SCC 305, this Court held that:

"Market value of land acquired under the LA Act is the main

component of the amount of compensation awardable for such land under Section 23(1) of the LA Act. The market value of such land must relate to the last of the dates of publication of notification or giving of public notice of substance of such notification according to Section 4(1) of the LA Act."

This Court went on to further hold that:-

"Such market value of the acquired land cannot only be its value with reference to the actual use to which it was put on the relevant date envisaged under Section 4(1) of the LA Act, but ought to be its value with reference to the better use to which it is reasonably capable of being put in the immediate or near future. Possibility of the acquired land put to certain use on the date envisaged under Section 4(1) of the LA Act, of becoming available for better use in the immediate or near future, is regarded as its potentiality. It is for this reason that the market value of the acquired land when has to be determined with reference to the date envisaged under Section 4(1) of the LA Act, the same has to be done not merely with reference to the use to which it was put on such date, but also on the possibility of it becoming available in the immediate or near future for better use, i.e., on its potentiality……"

(See para 8)

14. The High Court, however, has taken note of the deposition of C.W. 1 who has admitted that excepting the plots of land under acquisition, all other lands are agriculture lands. The aforesaid witness also admitted that his land under acquisition was agriculture land at the time of notification. C.W.6 has also admitted that initially all the acquired lands were agriculture lands. But High Court ignored other materials on record and fell into an error in concluding that the acquired lands were agriculture lands and erroneously reversed the conclusions arrived by the Reference Court.

15. The High Court relied on the case of *Land Acquisition Officer, ELURU and others v. Jasti Rohini (Smt.) and another* [(1995) 1 SCC 717], *The Collector, Raigarh v. Dr. Harisingh Thakur and another* [AIR 1979 SC 472] and *Raghubans Narain Singh v. The Uttar Pradesh Government, through Collector of Bijnor,* [AIR 1967 SC 465], wherein this court has held that the market value, on the basis of which compensation is payable under Section 23 of the Act, means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition with all its existing advantages and its potential possibilities when laid out in its most advantageous manner, excluding any advantages due to the carrying out of the scheme for which the property is compulsorily acquired.

16. We, however, feel that the view taken by the learned High Court is not tenable. In our view the learned Reference Court has rightly appreciated the evidence in this regard. While examining the evidence of C.W. Nos. 1, 2, 4, 6, 8 to 14, 17 to 19 and 21 it concluded that they have categorically stated that the lands were near the residential housing colonies and abutting the Itteri road which connects the Tanmag road and are situated abutting the road from Thekkampatti village. According to C.W 4 and 6 Gandhi Nagar Colony is at a distance of 100 feet.

17. It will be worthwhile to refer to Section 23 of the Act. Section 23 reads as under:

"23. Matters to be considered on determining compensation:-

(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration-

First, the market- value of the land at the date of the publication of the [notification under section 4, sub- section

(1)];

Secondly, the damage sustained by the person interested, by reason of the taking of any standing crops trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of serving such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector' s taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;

fifthly, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change, and sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land.

1A) In addition to the market value of the land, as above provided, the Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under section 4, sub- section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

Explanation: - In computing the period referred to in this sub- section, any period or periods during which the proceedings for the acquisition of the land were held up

on account of any stay or injunction by the order of any Court shall be excluded.]

(2) In addition to the market value of the land as above provided, the Court shall in every case award a sum of [thirty per centum] on such market value, in consideration of the compulsory nature of the acquisition."

18. This Court in the case of *State of Orissa v. Brij Lal Misra and others,* [(1995) 5 SCC 203], held that:

"Section 23(1) of the Act charges determination of the amount of compensation for the acquired land taking into account firstly the market value of the land at the date of the publication of the notification under Section 4(1) of the Act. The question, therefore, would be that what would be the market value of the land. The market value prevailing on the date of the notification including potentiality the land possessed of or realisable potentiality existing as on the date of the notification would be the relevant fact for consideration to determine market value."

(See para 3)

19. Further in the case of *Viluben Jhalejar Contractor (Dead) by Lrs. v. State of Gujarat,* (2005) 4 SCC 789, this Court illustrated some positive and negative factors that could have a bearing on the market value of land under Section 23. [See para 20 pg. 797] While upholding the aforesaid view it was held in the case of *Attar Singh and another v. Union of India and another,* (2009) 9 SCC 289, that determination of market value of the land may also depend upon the facts and circumstances of each case.

20. R.W.3 in his evidence stated that about 50 company quarters were constructed on the acquired land and 6 or 7 factory buildings were there. The construction made for factory was within 40 acres and about 30 acres were constructed for residential quarters. He admitted that there are houses of

agriculturists in the acquired land. He also admitted that the acquired land was on the northern side of the road from Thekkampatti and Anna Nagar Colony was just interior to that being at a distance of 1 K.M. from interior to the road. He also said that there may be terraced buildings on the acquired land.

21. R.W. 2 in his evidence stated that there are about 50-60 houses at Anna Nagar. He also said that it was correct to say that there were lands on both sides of the acquired land which belong to the agriculturists. He also categorically admitted that land was acquired to build quarters for the labourers.

22. R.W. 1 in his evidence admitted that the land adjacent to the acquired land goes from Thekkampatti to Sengaradu. According to him Gandhi Nagar colony has 150 residential houses.

23. As such the evidence of these witnesses supports conclusion that even at the time of the notification under Section 4 (1) there were buildings including the terraced buildings on the land acquired and they are all abutting the main road and are at a distance of 1 K.M. from residential colonies like Anna Nagar and Gandhi Nagar.

24. In the light of the above material facts this Court feels that the presence of number of buildings on the lands acquired and the said lands being occupied by the buildings are to be treated as house sites. The basic purpose that has been traced out in the evidence and as admitted by the RWs that the lands were acquired for the purpose of putting up residential quarters. As a portion of the land is being considered as house site, the adjoining lands have the potential of being put in better use as house sites in the near future.

25. The other important factor is the proximity of the plots to two residential colonies i.e. Anna Nagar and Gandhi Nagar. As it has come on record that the Anna Nagar colony has about 50-60 houses and Gandhi Nagar colony has about 150 houses,

as such it is reasonable and proper to conclude that the present lands under dispute were near the residential colonies.

26. It should also be taken into consideration that the disputed lands were situated near the factory premises and further were adjoining the main road which connects the Tanmag road. As such the aforesaid lands are potential house sites.

27. In the judgment under appeal, the High Court took into consideration the fact that in the representation before the LAO, the claimants have claimed different amounts ranging from Rs.80,000/- to Rs. Two Lakhs and the majority of the claimants have claimed compensation only at the rate of Rs. One Lakh per acre. The High Court opined that no reason was given by the Reference Court for not accepting the claims of the claimants excepting stating that the claimants have claimed lesser amount.

28. It is settled that the burden of establishing/proving the market value of the lands is always on the claimants. In *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala* [AIR 1990 SC 2192], this Court held that it is the duty of the Court to determine just and fair market value. It was further held that the claimants should produce necessary evidence on the value of land since the burden of proof is on them to establish the higher compensation claimed. While agreeing with the judgment in *Periyar and Pareekanni Rubbers Ltd* (Supra), this Court in the case of *Special Deputy Collector & Another v. Kurra Sambasiva Rao & Others,* (1997) 6 SCC 41, held that in a claim for enhancement of compensation the burden of proof was on the claimants that land was capable of fetching higher compensation. Further in the case of *Kiran Tandon v. Allahabad Development Authority and another,* [(2004) 10 SCC 745], it was held that the burden of proving that the amount of compensation awarded by the Collector is inadequate lies upon the claimant and he is in the position of a plaintiff.

29. The Court, therefore, has to treat the reference as an original proceeding before it for determination of the market value afresh on the basis of the material produced before it. The claimant in the position of a plaintiff has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in Court. The material produced and proved by the other side will also be taken into account for this purpose. [See Para 10 page 754 of *Kiran Tandon* (supra)]

30. The claimants have placed reliance on sale deeds Ex. C 7, 8, 11 and 12 for the purpose of valuation of land. The Reference Court has considered that sale deeds as Ex. C 8 & 11 can be adopted as the basis for acquired lands. Ex. C8 is in respect of sale of house plots and is dated 11.03.83 which is nearly one year prior to the notification under Section 4 (1) and on that basis the value of lands acquired under notification was fixed at Rs. 1,75,000/- per acre. It was held by the Reference Court that though the lands were acquired in different survey numbers but they were adjacent to each other and are acquired as one block for the same purpose.

31. The High Court, however, refused to rely on the aforesaid documents as the High Court opined that Ex. C8 was not admissible since the vendor or the vendee has not been examined. The High Court held that the sale of 1½ cents of land on the condition that they should be used for house sites appears to be unusual. With respect to the other document i.e. Ex. C11 the High Court considered the admission of CW 15 that the land was not sold as house sites. It was also held by the High Court that the Reference Court was wrong in not deducting developmental charges from the value arrived. Basing its conclusion on the facts that the lands are agriculture lands the market value was fixed at Rs. 75,000/ per acre.

32. In view of the admitted case that the lands acquired were potential house sites we do not agree with the views taken by the High Court while calculating the compensation. R-

13 and R-15 are the two sale deeds containing particulars of the sale transactions held 3 years prior to the Section 4 (1) notification. The Reference Court after close perusal of the aforesaid documents held that the same discloses that out of more than 100 sales, number of sales in respect of the lands is sold as house sites in village Thathaiyangarpatti and the adjacent survey numbers in Thekkampatty village were also sold as house sites.

33. This Court in *Avinash Dhavaji Naik v. State of Maharashtra,* (2009) 11 SCC 171, has observed as following:

> "14. The potentiality of a land for the purpose of development as also for building purposes would depend upon a large number of factors. For the said purpose, the court may not only have to bear in mind the purpose for which the lands were sought to be acquired but also the subsequent events to some extent.
>
> 15. In a case of this nature the court may proceed on the presumption that such a vast tract of land viz. 96 villages were sought to be acquired at the same time for construction of New Bombay. We are not unmindful of the fact that development in the entire area was not possible at one point of time. Development of the area must have taken place in phases. We are also not unmindful of the fact that the price of the land may skyrocket depending upon the development as also future potentiality."

34. In *Atma Singh (Dead) through Lrs., and others v. State of Haryana and another,* [(2008) 2 SCC 568], it was observed that the expression "market value" has been the subject-matter of consideration by this Court in several cases. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when let out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the

property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding principle would be the conduct of hypothetical willing vendor who would offer the land and that of a purchaser who, in normal human conduct, would be willing to buy as a prudent man in normal market conditions but not of an anxious purchaser dealing at arm's length nor a fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz. a price outcome of hypothetical sale expressed in terms of probabilities. [See para 4]

35. It has been further held in *Atma Singh* (Supra) that the market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when let out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of facts depending upon its condition, situation, user to which it is put and whether it is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether near about town is developing or has prospect of development have to be taken into consideration. [See para 5]

36. Following those principle laid down by this Court we hold that the High Court and the Land Acquisition Officer failed to take into consideration the advantages and facilities, as discussed above, which were available in the acquired land. Moreover, the very purpose for which the land was being acquired is also a relevant factor.

37. The purpose for which the acquisition is being made is an important factor. This Court in the case of *Nelson Fernandes and others v. Special Land Acquisition Officer, South Goa and others* (2007) 9 SCC 447, held that both the

Special Land Acquisition Officer, the District Judge and the High Court have failed to notice that the purpose of acquisition is for Railways and that the purpose is a relevant factor to be taken into consideration for fixing the compensation. [See para 29, page 459]

38. In the present case it has come on evidence from R.W. 2 that the lands were acquired to build quarters for the workers of the Company.

39. As such we observe that the Reference Court rightly fixed the amount of compensation to be Rs. 1,75,000/- and we are inclined to uphold the said finding. As far as the question of grant of higher compensation than what is claimed by the claimants goes, the Reference Court has observed, and in our opinion rightly so, that even before the representation before the Land Acquisition Officer, the claimants had stated that in event of their being not satisfied with the award, they reserve the right to go before the Civil Court for determination of just and reasonable compensation.

40. For the reasons above, the judgment of the High Court is set aside and the order of the Reference Court is upheld. So far as the claim of the appellant(s) for solatium, interest and other benefits under the statute is concerned, we direct that the same should be governed by the principles laid down in *Sunder v. Union of India,* (2001) 7 SCC 211, and the principles laid down in para 26, page 231 of the judgment be followed. Para 26 of the judgment in *Sunder* (supra) is set out below:

> "Once it is held as it inevitably must be that the solatium provided for under Section 23(2) of the Act forms an integral and statutory part of the compensation awarded to a landowner, then from the plain terms of Section 28 of the Act, it would be evident that the interest is payable on the compensation awarded and not merely on the market value of the land. Indeed the language of Section 28 does not even remotely refer to market value alone and in terms

talks of compensation or the sum equivalent thereto. The interest awardable under Section 28 therefore would include within its ambit both the market value and the statutory solatium. It would be thus evident that the provisions of Section 28 in terms warrant and authorise the grant of interest on solatium as well."

41. In so far as the enhanced compensation as determined by this Court is concerned, the same should be distributed to the appellant(s) and concerned parties by the District Judge of Salem by cheques drawn in their names as early as possible, preferably within three months from the date of service of this order on the District Judge. The respondents are to take steps accordingly.

42. The appeals are thus allowed with no order as to costs.

K.K.T. Appeals allowed.

SECURITIES AND EXCHANGE BOARD OF INDIA
v.
AJAY AGARWAL
(Civil Appeal No. 1697 of 2005)

FEBRUARY 25, 2010

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

Securities and Exchange Board of India Act, 1992 – Enactment of – Purpose – Held: The Act was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of investors – The Act is pre-eminently a social welfare legislation.

Securities and Exchange Board of India Act, 1992:

s.11 – Amendment of – Done on several occasions – To keep pace with "felt necessities of time" – Amendment made in sub-section (4) of s.11 in 2002 – Objects and reasons discussed.

s.11B – Introduction of – Vide amendment made in 1995 – Objects and reasons discussed.

s.11B – Applicability of – With retrospective effect – Held: s.11-B being procedural in nature can be applied retrospectively – If law affects matters of procedure, then prima facie it applies to all actions, pending as well as future – On facts, entire basis of the order of Appellate Tribunal that s.11-B cannot be applied retrospectively, was passed on an erroneous basis.

Constitution of India, 1950 – Art. 20(1) – Protection under, against ex-post facto law – When available – Held: It is available only where the person concerned is held guilty

of having committed an "offence" and is subjected to "penalty".

Words and Phrases – "offence" – Meaning of – Discussed – Code of Criminal Procedure, 1973 – s.2(n) – General Clauses Act, 1897.

Interpretation of Statutes – Social welfare legislation – Interpretation of –Duty of the Court – Held: When Court is called upon to interpret provisions of a social welfare legislation, paramount duty of the Court is to adopt an interpretation to further the purposes of law and if possible eschew the one which frustrates it.

Based upon a complaint received from a member of the Bombay Stock Exchange, the appellant-Board initiated preliminary investigation into affairs relating to public issue of a company. The complaint was to the effect that there was mis-statement in the prospectus filed by the company at the time of the public issue and that the investors were misguided.

Show cause notice was issued to respondent, Joint Managing Director of the company, asking it to show cause why directions should not be issued u/s.11B of the Securities and Exchange Board of India Act, 1992 restraining the company and its Directors from accessing the capital market for a suitable period.

After considering the reply of the respondent, the appellant-Board, in exercise of its powers under s.4(3) r/w s.11 and s.11-B of the Act, passed order dated 31st March, 2004, restraining the respondent from associating with any corporate body in accessing the securities market and also prohibiting him from buying, selling or dealing in securities, for a period of five years.

Respondent filed appeal contending that on the date, the violations were alleged against him, the appellant-Board did not have the power either under s.11B or under s.11(4)(b) of the Act since the enabling provisions came by way of amendment in 1995 and 2002 respectively, while the alleged violations surfaced prior to coming into effect of those amendments. This contention weighed with the Appellate tribunal and the respondent was given the protection against *ex-post facto* law. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The order of the Appellate Tribunal is quashed and the order of the appellant-Board is upheld. [Para 54] [90-B]

Govinddas and others v. Income Tax Officer and another - **1976 (103) ITR 123 (S.C.), distinguished.**

M/s Reliance Jute and Industries Ltd. v C.I.T West Bengal, Calcutta **1980 (1) SCC 139 and** *Controller of Estate Duty, Gujarat-I, Ahmedabad v. M.A. Merchant and etc.* **AIR 1989 SC 1710, referred to.**

2. Though s.11B and s.11(4)(b) of the Securities and Exchange Board of India Act, 1992 came by way of amendment in 1995 and 2002 respectively, by the time the appellant-Board passed the order on 31st March 2004, all the amendments were on the statute. Even if the said amendments to the Act were allowed to operate prospectively, by the time the order was passed by the Board, it was empowered by the said amendments to do so. Therefore, without giving any retrospective operation to those provisions, the impugned order could be passed by the Board inasmuch as the amendments in question empowered the Board to pass such an order when it passed the order. [Paras 21, 22 and 23] [83-E; 83-F; 83-G]

3.1. In the present case, s.11-B of the Act was invoked even at the show cause stage. Therefore, it cannot be said that any provision has been invoked in the midst of any pending proceeding initiated by the Board. The respondent was, thus, put on notice that the Board is invoking its power under s.11-B which was available to it under the law on the date of issuance of show cause notice. [Para 25] [84-B]

3.2. In the premises, it cannot be said that any new provision has been invoked in connection with any pending proceeding. Nor can it be contended by the respondent that there was any unfairness in the proceeding. Respondent was given adequate notice of the charges in the show cause notice. He was given an opportunity to reply to the show cause notice and, thereafter, a fair opportunity of hearing was given before the order was passed by the Board. The entire gamut of a fair procedure was thus observed. [Para 26] [84-C-D]

3.3. Also, there is no challenge to the amended provisions of the law. Even if the law applies prospectively, the Board could not be prevented from acting in terms of the law which existed on the day the Board passed its order. [Para 27] [84-E]

4.1. It cannot be held that protection under Article 20(1) of the Constitution in respect of *ex-post facto* laws is available to the respondent. [Para 38] [87-B]

4.2. The right of a person of not being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a Fundamental Right guaranteed under our Constitution only in a case where a person is charged of having

committed an "offence" and is subjected to a "penalty". [Para 29] [84-H; 85-A-B]

4.2. In the instant case, the respondent has not been held guilty of committing any offence nor has he been subjected to any penalty. He has merely been restrained by an order for a period of five years from associating with any corporate body in accessing the securities market and also has been prohibited from buying, selling or dealing in securities for a period of five years. The order of restrain for a specified period cannot be equated with punishment for an offence, as defined under the General Clauses Act, 1897. On a comparison of the two definitions of "offence", one under s.2(n) of the Code of Criminal Procedure, 1973 and the other under the General Clauses Act, it is found that there are common links between the two. An offence would always mean an act of omission or commission which would be punishable by any law for the time being in force. [Paras 30, 32, 33 and 34] [85-C; 85-F; 85-H; 86-A]

Rao Shiv Bahadur Singh and another v. State of Vindhya Pradesh **AIR 1953 SC 394;** *State of West Bengal v. S.K. Ghosh* **AIR 1963 SC 255 and** *Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd. and others* **(1996) 2 SCC 471, relied on.**

5.1. From the legislative intent for enacting the Securities and Exchange Board of India Act, 1992, it transpires that the same was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of the investors. The requirement of such an enactment was felt in view of substantial growth in the capital market by increasing participation of the investors. In fact such enactment was necessary in order to ensure the confidence of the investors in the capital market by

giving them some protection. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors. [Paras 39 and 40] [87-C; 87-D]

5.2. It is a well known canon of construction that when Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it. [Para 41] [81-E]

6.1. A perusal of s.11, sub-section 2(a) of the Act makes it clear that the primary function of the Board is to regulate the business in stock exchanges and any other securities markets and in order to do so it has been entrusted with various powers. Section 11 had to be amended on several occasions to keep pace with the 'felt necessities of time'. One such amendment was made in Sub Section (4) of s.11 of the Act, which gives the Board the power to restrain persons from accessing the securities market and to prohibit such persons from being associated with securities market to buy and sell or deal in securities. Such an amendment came in 2002. From the statement of objects and reasons of the Amendment Act of 2002, it appears that the Parliament thought that in view of growing importance of stock market in national economy, SEBI will have to deal with new demands in terms of improving organisational structure and strengthening institutional capacity. Therefore, certain shortcomings which were in the existing structure of law were sought to be amended by strengthening the mechanisms available to SEBI for investigation and enforcement, so that it is better equipped to investigate and enforce against market malpractices. [Paras 43, 44, 45 and 46] [87-G-H; 88-A-B; 88-C; 88-D-E]

6.2. s.11-B of the Act which empowers the Board to issue certain directions also came up by way of amendment in 1995 by Act 9 of 1995. The Statements of Objects and Reasons of such amendment show one of the objects is to empower the Board to issue regulations without the approval of the Central Government. s.11-B of the Act thus empowers the Board to give directions in the interest of the investors and for orderly development of securities market, which is one of the twin purposes to be achieved by the said Act. Therefore, by the 1995 amendment by way of s.11-B, the appellant Board has been empowered to carry out the purposes of the said Act. [Para 47] [88-E-G]

7.1. In the absence of any challenge to the provisions, which came by way of amendment, it cannot be said that even though Board is statutorily empowered to exercise functions in accordance with the amended law, its power to act under the law, as amended, will stand frozen in respect of any violation which might have taken place prior to the enactment of those provisions. It is nobody's case that Board has exercised those powers in respect of a proceeding which was initiated prior to the enactment of those provisions. In fact Board issued the show cause notice in terms of s.11-B and considered the reply of the respondent. In such a situation, there has been no infraction in the procedure. Therefore, the entire basis of the order of the Appellate Tribunal that provision of s.11-B cannot be applied retrospectively has been passed on an erroneous basis. Provisions of s.11-B being procedural in nature can be applied retrospectively. It is a time honoured principle if the law affects matters of procedure, then *prima facie* it applies to all actions, pending as well as future. [Paras 48, 49, 50, 51] [88-H; 89-A-C; 89-D; 89-D-F]

7.2. No one has a vested right in any course of

procedure. A person's right of either prosecution or defence is conditioned by the manner prescribed for the time being by the law and if by the Act of Parliament, the mode of proceeding is altered, and then no one has any other right than to proceed under the alternate mode. [Para 52] [89-G-H]

K.Eapan Chako v. The Provident Investment Company (P.) Ltd. **AIR 1976 SC 2610 and** *Union of India v. Sukumar Pyne* **AIR 1966 SC 1206, relied on.**

Maxwell's *Interpretation of Statutes,* **11th Edition, p.216, referred to.**

Case Law Reference:

1976 (103) ITR 123 (S.C.)	**distinguished**	**Para 13**
1980 (1) SCC 139	**referred to**	**Para 16**
AIR 1989 SC 1710	**referred to**	**Para 16**
AIR 1953 SC 394	**relied on**	**Para 35**
AIR 1963 SC 255	**relied on**	**Para 36**
(1996) 2 SCC 471	**relied on**	**Para 37**
AIR 1976 SC 2610	**relied on**	**Para 5**
AIR 1966 SC 1206	**relied on**	**Para 53**

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 1697 of 2005.

From the Judgment & Order dated 09.12.2004 as modified by order dated 03.02.2005 by the Securities Appellate Tribunal Mumbai in Review Application No. 122 of 2004 in Appeal No. 85 of 2004.

Altaf Ahmed, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma for the Appellant.

Indrajeet Das (for Kuldip Singh, NP) for the Respondent(s).

The Judgment of the Court was delivered by:

GANGULY, J. 1. The question which arises for consideration in this appeal is whether Section 11-B of the Securities and Exchange Board of India Act, 1992 (for short, 'the Act') could be invoked by the Chairman of the Securities and Exchange Board of India (for short, 'SEBI') in conjunction with Sections 4(3) and 11 for restraining the respondent from associating with any corporate body in accessing the securities market and prohibiting him from buying, selling or dealing in securities.

2. The factual background in which the present appeal arises is noted as under.

3. The respondent was appointed the Joint Managing Director of Trident Steel Limited (hereafter referred to as "the said Company) on or about 20th May 1993. The Board initiated certain preliminary investigations about the affairs relating to public issues by the said Company on the basis of a complaint received from a member of Bombay Stock Exchange (for short B.S.E.). The public issue of the said Company was of 52 lacs shares of Rs.10 each at a premium of Rs.3.50 per share aggregating to Rs.7 crore 2 lacs. The Lead Managers to the issue were Bank of Baroda and Apple Industries Limited. Such issues opened on 26th November, 1993 and closed on December 1993 and one of the Directors of the Company appeared to be the chief promoter of the same.

4. The complaint was to the effect that there was misstatement in the prospectus filed by the company at the time of the public issue with regard to alleged non-disclosure of pledge of 7 lac 50 thousand shares held in the company by directors of the company to avail of working capital from Bank of Baroda. The second aspect of the complaint was that the

Directors of the company had also given a non-disposal undertaking to Bank of Baroda in respect of the same shares and that the prospectus does not mention the same. The further complaint is that 2000 investors complained regarding non-receipt of dividend and the such complaint was filed before the Investor Service Cell, B.S.E. The company while replying to the investors stated that it had not declared any dividend during the preceding year in respect of which complaint has been made. Therefore, prima facie, a case of misstating the facts in the prospectus and misguiding the investors was made out. It appears that the company had deliberately not dispatched share certificates to investors based in Jalgaon and failed to produce the share transfer records and proof of records of the applicants in Jalgaon.

5. In the course of investigation it appeared that the Directors of the company had pledged their personal holding of 7 lac 50 thousand shares with the Bank of Baroda and its Director, namely, Mr. A.A. Kazi and Dowell Leasing and Financing Limited had given non-disposal undertaking to Bank of Baroda. This was not disclosed in the prospectus of the company. This appears to be, prima facie, a case of violation of SEBI guidelines for disclosure for investor protection. Thus an important aspect of the capital structure of the company had not been disclosed in the prospectus as a result of which the investors were misguided. In view of such complaint having been received investigation was undertaken. Ultimately, a show cause notice dated 22.12.99 was issued to the respondent asking it to show cause why directions under Section 11-B of the Act restraining the company and its Directors from accessing the capital market for a suitable period will not be issued. A reply was demanded within 15 days from the receipt of the show cause notice.

6. Pursuant to such show cause notice the respondent gave his reply on 1.3.2000 and 10.7.2002. Thereafter, an opportunity of personal hearing was granted to the respondent

on 14.5.2002 and the same was adjourned to 5.7.2002 and on that date the Board made its submissions. Ultimately, on 31st March, 2004 Chairman of the Board passed an order, the concluding portion whereof is as under:

> "Therefore, in exercise of the powers conferred upon me by virtue of Section 4(3) read with Section 11 and Section 11B of SEBI Act, I hereby direct that Shri Ajay Agarwal be restrained from associating with any corporate body in accessing the securities market and also be prohibited from buying, selling or dealing in securities for a period of five years.
>
> This direction shall come into force with immediate effect".

7. Against the said order an appeal being Appeal No.85 of 2004 was filed before the Tribunal.

8. Before the Appellate Forum the only point argued is that Section 11-B of the Act came by way of amendment to the said Act with effect from 25th January, 1995 whereas the public issue in respect of which the impugned order was passed was of November 1993 and the prospectus was of October 1993. Both public issue and prospectus were prior to 1995. The shares were listed with effect from 15.2.1994. Therefore, it was urged on behalf of the appellant that the alleged misconduct if any was for a period of time when Section 11-B was not on the statute book. Thus, the question arose whether any direction can be issued under Section 11-B for the alleged misconduct said to have been committed prior to introduction of Section 11-B. The Appellate Tribunal was of the view that the provision of Section 11-B cannot be invoked in respect of the alleged misconduct which took place at a point of time when Section 11-B was not on the statute book. While passing the said order the Appellate Forum recorded that the respondent before the said Forum, the appellant herein, wants to withdraw the impugned order.

9. In fact, against the said recording a review was filed for

reviewing the contents of paragraphs 13 and 14 of the order passed by the Appellate Tribunal.

10. Paragraphs 13 and 14 of the order passed by the Appellate Tribunal are set out below:

> "13. We have heard the learned counsel for the respondent. The learned counsel fairly conceded that such wide powers as in section 11-B cannot be retrospectively applied.
>
> 14. The learned counsel for the respondent seeks leave of this court to withdraw the impugned order".

11. After reviewing the said order the Appellate Tribunal ultimately deleted paragraph 14 by the order dated 9.12.04.

12. Again in the order dated 9.12.04 it was unfortunately mentioned that the order was passed with the consent of the parties. Subsequently the said recital in the order, as noted above, was deleted.

13. Assailing order of the Appellate Tribunal, the learned counsel for the appellant-Board mainly urged that the finding given by the Tribunal that the powers under Section 11-B can only be used prospectively and not retrospectively had been given on an erroneous appreciation of the legal provision under the said Act. It appears that the Appellate Tribunal passed its order by relying on the decision of this Court in the case of *Govinddas and others v. Income Tax Officer and another* - 1976 (103) ITR 123 (S.C.).

14. The decision of this Court in *Govinddas* (supra) was on totally different facts and legal questions.

15. It is well known that the substantive laws to be applied for determination of tax liability must be the law which is in force in the relevant assessment year.

16. It is well settled that law to be applied for assessment is the one which is extant in the assessment year unless there is an amendment which is made retrospective either expressly or by necessary implication. See *M/s Reliance Jute and Industries Ltd. v C.I.T West Bengal, Calcutta [*1980 (1) SCC 139 at p.141 para 6]. Same principles have been followed in the case of *Controller of Estate Duty, Gujarat-I, Ahemadabad v. M.A. Merchant and etc.,* [AIR 1989 SC 1710 at p.1713 para 8].

17. In *Govinddas (supra)***,** this Court held that Subsections (1) to (5) of Section 171 of the 1961 Act provide for the machinery of assessment of Hindu Undivided Family after partition. Subsection (6) of Section 171 of 1961 Act is the substantive provision imposing tax liability on the members which is payable by the joint family. But these provisions are, rightly held to be, not applicable for recovery of tax assessed on the Hindu Undivided Family for a period prior to the enactment of those provisions. Therefore, this Court held that the income tax officer was not correct in taking recourse to sub-sections (6) to (7) of Section 171 of the Income Tax Act, 1961 for the purpose of recovery of tax assessed on the Hindu Undivided Family for assessment in respect of the years 1950-1951 and 1956-1957 since the relevant provisions of 1961 Act were not given any retrospective operation. It is not in dispute that the assessment of tax in respect of the assessment year for the Hindu Undivided Family was completed under the corresponding provisions of the 1922 Act. Therefore, the Supreme Court held that such a case would be governed by Section 25-A of the old Act which does not impose any liability on members of the Hindu Undivided Family in case of partial partition since no such liability existed under Section 25-A of the old Act.

18. It is clear from the aforesaid discussion that the ratio in *Govinddas's* case does not apply to this case in as much as no tax liability has been created under the order of the Board.

19. The appellate Tribunal without at all discussing the facts and law involved in *Govinddas* erroneously applied its ratio in the impugned order.

20. It may be noted in this connection that the impugned order was passed by the Board in exercise of its power under Section 4(3) read with Section 11 and Section 11-B of the said Act. Under Section 11 of the said Act the Board has the power of restraining a person from accessing the securities market or prohibiting any person associated with securities market to buy, sell or deal in securities. Such power is given to the Board under Section 11(4)(b) of the said Act. Section 11(4)(b) of the said Act is as follows:

> "11(4)(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities"

21. Therefore, restrain order passed on the respondent strictly speaking was not under Section 11-B of the said Act. However, the provisions of Section 11(4)(B) of the said Act also came by way of amendment in 2002. It should, however, be noted that by the time the Board passed the order on 31st March 2004 all the amendments were on the statute.

22. Therefore, the question here is not of retrospective operation of the amendments. Even if the amendments to the said Act are allowed to operate prospectively by the time the order was passed by the Board, it was empowered by the aforesaid amendments to do so.

23. Therefore, without giving any retrospective operation to those provisions, the impugned order can be passed by the Board in as much as the amendments in questions empowered the Board to pass such an order when it passed the order. So, the question that survives is whether the Board could pass the order in respect of allegations which surfaced prior to the coming into effect of those amendments in 1995 and 2002.

24. It is here that question of protection against ex-post facto laws fall for consideration.

25. In this connection it may be noticed that Section 11-B of the Act was invoked even at the show cause stage. Therefore, it cannot be said that any provision has been invoked in the midst of any pending proceeding initiated by the Board. The respondent was, thus, put on notice that the Board is invoking its power under Section 11-B which was available to it under the law on the date of issuance of show cause notice.

26. In the premises, it cannot be said that any new provision has been invoked in connection with any pending proceeding. Nor can it be contended by the respondent that there was any unfairness in the proceeding. Respondent was given adequate notice of the charges in the show cause notice. He was given an opportunity to reply to the show cause notice and, thereafter, a fair opportunity of hearing was given before the order was passed by the Board. The entire gamut of a fair procedure was thus observed.

27. This Court also finds that there is no challenge to the amended provision of the law. Even if the law applies prospectively, the Board cannot be prevented from acting in terms of the law which exists on the day the Board passed its order.

28. It was urged on behalf of the respondent that on the date when the violations were alleged against him, the Board did not have the power either under Section 11-B or under Section 11 (4)(b) as those provisions came subsequently by way of amendment. This contention weighed with the appellate forum and the respondent was given the protection against ex post facto law even though it was not clearly mentioned in the order of the Appellate Forum.

29. The right of a person of not being convicted of any offence except for violation of a law in force at the time of the

commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a Fundamental Right guaranteed under our Constitution only in a case where a person is charged of having committed an "offence" and is subjected to a "penalty".

30. In the instant case, the respondent has not been held guilty of committing any offence nor has he been subjected to any penalty. He has merely been restrained by an order for a period of five years from associating with any corporate body in accessing the securities market and also has been prohibited from buying, selling or dealing in securities for a period of five years.

31. The word 'offence' under Article 20 sub-clause (1) of the Constitution has not been defined under the Constitution. But Article 367 of the Constitution states that unless the context otherwise requires, the General Clauses Act, 1897 shall apply for the interpretation of the Constitution as it does for the interpretation of an Act.

32. If we look at the definition of 'offence' under General Clauses Act, 1897 it shall mean any act or an omission made punishable by any law for the time being in force. Therefore, the order of restrain for a specified period cannot be equated with punishment for an offence as has been defined under the General Clauses Act.

33. Under Criminal procedure code, 'offence' has been defined under Section 2(n) as follows:

> "2(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1871 (1 of 1871);"

34. On a comparison of the aforesaid two definitions we

find that there are common links between the two. An offence would always mean an act of omission or commission which would be punishable by any law for the time being in force.

35. Article 20(1) was interpreted by the Court in *Rao Shiv Bahadur Singh and another v. State of Vindhya Pradesh* (AIR 1953 SC 394). Justice Jagannadhads speaking for Constitution Bench, on a comparison of similar provisions in English Law and American Constitution, opined that the language used in Article 20 is in much wider terms. This Court held that:

> "...what is prohibited is the conviction of a person or his subjection to a penalty under 'ex post facto' laws. The prohibition under the Article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an 'ex post facto' law"

36.The ratio of this judgment has again been affirmed in *State of West Bengal v. S.K. Ghosh,* (AIR 1963 SC 255), wherein another Constitution Bench of this Court speaking through Justice Wanchoo, as His Lordship then was, held that a forfeiture by a District Judge under Section 13(3) of Criminal Laws Amendment Ordinance of 1944 cannot be equated to a forfeiture under Section 53 of IPC inasmuch as forfeiture under Section 13(3) of the Ordinance involved embezzlement of government money or property and the same is not punishment or penalty within the meaning of Article 20(1) of Constitution (See paras 14 and 15 of the judgment).

37. Even if penalty is imposed after an adjudicatory proceeding, persons on whom such penalty is imposed cannot be called an accused. It has been held that proceedings under Section 23(1A) of Foreign Exchange Regulation Act, 1947 are adjudicatory in character and not criminal proceedings (See *Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd. and others,* (1996) 2 SCC 471). Persons who are subjected to such

penalties are also not entitled to the protection under Article 20(1) of the Constitution.

38. Following the aforesaid ratio, this Court cannot hold that protection under Article 20(1) of the Constitution in respect of ex-post facto laws is available to the respondent in this case.

39. If we look at the legislative intent for enacting the said Act, it transpires that the same was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of the investors. The requirement of such an enactment was felt in view of substantial growth in the capital market by increasing participation of the investors. In fact such enactment was necessary in order to ensure the confidence of the investors in the capital market by giving them some protection.

40. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors.

41. It is a well known canon of construction that when Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it.

42. Keeping this principle in mind if we analyse some of the provisions of the Act it appears that the Board has been established under Section 3 as a body corporate and the powers and functions of the Board have been clearly stated in Chapter IV and under Section 11 of the said Act.

43. A perusal of Section 11, Sub-Section 2(a) of the said Act makes it clear that the primary function of the Board is to regulate the business in stock exchanges and any other securities markets and in order to do so it has been entrusted with various powers.

44. Section 11 had to be amended on several occasions to keep pace with the 'felt necessities of time'. One such amendment was made in Sub Section (4) of Section 11 of the said Act, which gives the Board the power to restrain persons from accessing the securities market and to prohibit such persons from being associated with securities market to buy and sell or deal in securities. Such an amendment came in 2002.

45. From the statement of objects and reasons of the Amendment Act of 2002, it appears that the Parliament thought that in view of growing importance of stock market in national economy, SEBI will have to deal with new demands in terms of improving organisational structure and strengthening institutional capacity.

46. Therefore, certain shortcomings which were in the existing structure of law were sought to be amended by strengthening the mechanisms available to SEBI for investigation and enforcement, so that it is better equipped to investigate and enforce against market malpractices. (See Paragraph 3 of the Statement of objects and reasons).

47. Section 11-B which empowers the Board to issue certain directions also came up by way of amendment in 1995 by Act 9 of 1995. The Statements of Objects and Reasons of such amendments show one of the objects is to empower the Board to issue regulations without the approval of the Central Government. (See para 3(e) of the Statements of Objects and Reasons). Section 11-B of the Act thus empowers the Board to give directions in the interest of the investors and for orderly development of securities market, which, as noted above, is one of the twin purposes to be achieved by the said Act. Therefore, by the 1995 amendment by way of Section 11-B Board has been empowered to carry out the purposes of the said Act.

48. As noted above, there is no challenge to those

provisions which came by way of amendment. In the absence of any challenge to those provisions, it cannot be said that even though Board is statutorily empowered to exercise functions in accordance with the amended law, its power to act under the law, as amended, will stand frozen in respect of any violation which might have taken place prior to the enactment of those provisions. It is nobody's case that Board has exercised those powers in respect of a proceeding which was initiated prior to the enactment of those provisions. In fact Board has issued the show cause notice in terms of Section 11-B and considered the reply of the respondent. In such a situation, there has been no infraction in the procedure.

49. Therefore, the entire basis of the order of the Appellate Tribunal that provision of Section 11-B cannot be applied retrospectively has been passed on an erroneous basis, as discussed herein above.

50. Provisions of Section 11-B being procedural in nature can be applied retrospectively.

51. The appellate Tribunal made a manifest error by not appreciating that Section 11-B is procedural in nature. It is a time honoured principle if the law affects matters of procedure, then prima facie it applies to all actions, pending as well as future. See *K.Eapan Chako v. The Provident Investment Company (P.) Ltd.,* [AIR 1976 SC 2610] wherein Chief Justice A.N. Ray laid down those principles.

52. Maxwell in his "*Interpretation of Statutes"* also indicated that no one has a vested right in any course of procedure. A person's right of either prosecution or defence is conditioned by the manner prescribed for the time being by the law and if by the Act of Parliament, the mode of proceeding is altered, and then no one has any other right than to proceed under the alternate mode. [Maxwell *Interpretation of Statutes,* 11th Edition, p.216].

53. These principles, enunciated by Maxwell, have been quoted with approval by the Supreme Court in its Constitution Bench judgment in *Union of India v. Sukumar Pyne* [AIR 1966 SC 1206 at p.1209]

54. For the reasons discussed above, this Court is constrained to quash the order of the Appellate Tribunal and upholds the order of the Chairman of the Board.

55. The appeal is allowed. There will be, however, no orders as to costs.

B.B.B. Appeal allowed.

MAHARASHTRA UNIVERSITY OF HEALTH SC. & ORS.
v.
SATCHIKITSA PRASARAK MANDAL & ORS.
(Civil Appeal No. 2050 of 2010)

FEBRUARY 25, 2010

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

Maharashtra University Health Sciences Act, 1998 – ss. 2(35) and 53 – Complaint by unapproved lecturers against college and its authorities – Grievance Committee constituted u/s.53 taking action against the authorities – High Court, following the principle of ejusdem generis held that unapproved teacher since do not come within the definition of 'teachers' u/s. 2(35), the Committee has no jurisdiction to take cognizance of the complaint – Held: Definition of teacher u/s. 2(35) is wide enough to include even unapproved teacher – Grievance Committee has the jurisdiction to entertain complaint and undertake the statutory exercise conferred u/s. 53 of the Act – Matter remitted to High Court.

Interpretation of Statutes – When general words are juxtaposed with specific words, general words cannot be read in isolation – Their colour and contents are to be derived from their context – The ejusdem generis principle applies only when a contrary intention does not appear – No Statute can be interpreted in such a way as to render a part of it otiose – Doctrines/Principles – Principle of "ejusdem generis" Applicability of – Discussed.

On the complaint from respondent Nos. 5 and 6 (the lady lecturers and employees of the respondent-college), of ill-treatment and sexual harassment against the authorities of the said college, the Grievance Committee of the University by its communication directed the 1st and 2nd respondents to take steps against the 3rd and 4th respondents with a direction to suspend them and it

was also directed that the 5th respondent may be reinstated. It was also directed that approval granted in respect of the service of 3rd and 4th respondent be frozen. The respondent-college refused to comply with the direction issued by the University.

Assailing those communications, the college authorities and those two teachers filed a writ petition contending that the University had no authority to issue those communications. The High Court, following the principle of "*ejusdem generis*" held that 5th and 6th respondent, being unapproved teachers, do not come within the definition of `teachers' u/s. 2(35) and hence, the Grievance Committee constituted u/s. 53 of the Act, has no jurisdiction to take cognizance of their complaint. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. In view of combined reading of Section 2(35) with Section 53 of Maharashtra University Health Sciences Act, 1998 in respect of unapproved teachers, it cannot be said that Grievance Committee has no jurisdiction to entertain complaint and undertake the statutory exercise conferred on it under Section 53 of the Act. [Para 20] [102-B]

2. The definition of teachers u/s. 2(35) is wide enough to include even unapproved teacher. The definition has two parts, the first part deals with full time approved Demonstrators, Tutors, Assistant Lecturers, Lecturers etc. and the second part deals with *other persons* teaching or giving instructions on full time basis in affiliated colleges or approved institutions in the University. [Para 21] [102-C-D]

3. Even though the approved teachers and those 'other persons' who are teaching and giving instructions fall in two different classes both are encompassed with

the definition of teacher u/s. 2(35) of the Act. The word 'and' before 'other persons' is disjunctive and indicate a different class of people. [Para 22] [102-E]

4. A class is a conceptual creation taking within its fold numerous categories of persons with similar characteristics. Here in the group of 'other persons' who, on full time basis, are teaching or giving instructions in colleges affiliated with the University and they are also teachers even if they are unapproved. This seems to be the purport of Section 2(35) of the Act. [Para 23] [102-F-G]

5. The High Court has not properly appreciated the principle of *ejusdem generis* **in understanding the scope of Section 2(35) r/w Section 53 of the Act. The expression** "*ejusdem generis*" **which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context." It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication. [Paras 25 and 26] [103-A; 103-B-D]**

'The Origins and Logical Implications of the Ejusdem Generis **Rule' by Glanville Williams, 7 Conv (NS) 119, referred to.**

6. The *ejusdem generis* principle is a facet of the principle of '*Noscitur a sociis',* **which contemplates that a statutory term is recognised by its associated words. When general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour**

and their contents are to be derived from their context. [Para 27] [103-E-F]

Attorney General v. Prince Ernest Augustus of Hanover, **(1957) AC 436 at 461, referred to.**

7. The *ejusdem generis* principle applies only when a contrary intention does not appear. In that instant case, a contrary intention is clearly indicated inasmuch as the definition of 'teachers' under Section 2(35) of the Act, is in two parts. The first part deals with enumerated categories but the second part which begins by the expression "and other" envisages a different category of persons. Here 'and' is disjunctive. So, while construing such a definition, the principle of *ejusdem generis* cannot be applied. [Para 28] [103-G-H; 104-A]

K.K. Kochuni v. State of Madras and Kerala **AIR 1960 SC 1080, relied on.**

Quazi v. Quazi **(1979) 3 All England Reports 897, referred to.**

8. No Statute can be interpreted in such a way as to render a part of it *otiose*. Where there is a different legislative intent, as in the present case, the principle of *ejusdem generis* cannot be applied to make a part of the definition completely redundant. [Paras 33 and 34] [105-F; 105-G]

Amar Chandra Chakraborty v. The Collector of Excise, Govt. of Tripura, Agartala and Ors. **AIR 1972 SC 1863, relied on.**

9. By giving such a narrow and truncated interpretation of 'teachers' u/s. 2(35), High Court has not only ignored a part of Section 2(35) but it has also given an interpretation which is incompatible with the avowed purpose of Section 53 of the Act. [Para 35] [105-H; 106-A]

10. High Court fell into an error by holding that the Grievance Committee has no jurisdiction to entertain the complaints made by 5th and 6th respondent since they are not approved teachers. The purpose of setting up the Grievance Committee u/s. 53 of the Act is to provide an effective grievance redressal forum to teachers and other employees. Any interpretation of 'teachers' under Section 2(35) of the Act which denies the persons covered under Section 2(35) an access to the said forum completely nullifies the dominant purpose of creating such a forum. Unapproved teachers need the protection of this forum more than the approved teachers. By creating such a forum, the University virtually exercised its authority and jurisdiction as a *loco-parentis* over teachers-both approved and unapproved and who are working in various colleges affiliated with it. The idea is to give such teachers and employees a protection against any kind of harassment which they might receive in their work place. The creation of such a forum is in tune with protecting the 'dignity of the individual' which is one of the core constitutional concepts. Therefore, the doctrine of *ejusdem generis* cannot be pressed into service to defeat this dominant statutory purpose. [Paras 36, 37 and 38] [106-B-D; 106-E]

Guy T. Helvering v. Stockholms Enskilda Bank **293 US 84, 88-89, 79 L Ed 211, 55 S Ct 50, 52 (1934), referred to.**

11. The matter is remitted to the High Court to dispose of the writ petition in the light of the observations made in this judgment about jurisdiction of Grievance Committee. However, the order of reinstatement made in respect of 5th and 6th respondent shall be maintained and their continuity in service cannot be disturbed without following the provision of University Acts and Statutes. [Para 41] [107-E-F]

Case Law Reference:

(1979) 3 All-England Reports 897	**Referred to.**	**Para 29**
AIR 1960 SC 1080	**Relied on.**	**Para 30**
AIR 1972 SC 1863	**Relied on.**	**Para 31**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2050 of 2010.

From the Judgment & Order Dated 08.06.2007 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Writ Petition No. 1976 of 2006.

U.U. Lalit, Prasenjit Keswani and Gaurav Agrawal for the Appellants.

Satyajit A. Desai, Anagha S. Desai and G. Ramakrishna Prasad for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. Maharashtra University of Health Sciences through its Registrar and its Grievance Committee and Management Council as appellants impugn the judgment dated 8.6.07 rendered by the Nagpur Bench of Bombay High Court on several writ petitions filed by the Management Council and the employees.

3. The basic facts of the case are as under:

The appellant No.1, the Maharashtra University of Health Sciences has been constituted under Maharashtra University of Health Sciences Act, 1998 (for short 'the said Act'). The 2nd appellant is the Committee constituted under Section 53 of the said Act and the 3rd appellant is the Management Council of the appellant No.1 and also constituted under the said Act.

4. The 1st respondent in this appeal is a public trust registered under the Bombay Public Trust Act, 1950 and the said trust runs several colleges including the 2nd respondent. The 3rd respondent is the Principal of the said college and the 4th respondent is a Lecturer therein. Both the 5th and 6th respondents were appointed Lecturers in the said college but their appointments were not approved but they continued to work as lecturers in the said college.

5. On 7.8.05 a representation was made by the 5th respondent to the effect that after she had served the said college for the last three and a half year suddenly she was informed on 6.8.05 that the college authorities accepted her resignation. That was shocking to her since the 5th respondent could never resign as she had several liabilities and had no other income. The education of her two children had to be looked after while her husband was disabled in view of an accident and her father-in-law was a retired person. In her representation to the Vice Chancellor of the appellant-University she stated that at the time of her appointment, college authorities took her signature on a resignation letter without mentioning any date and that might have been used to remove her from the college. The University on receipt of the said representation sent a letter to the said college on 19th August, 2005 for its explanation and explanation was submitted by the said college on 31.08.05.

6. Thereafter, the appellant-University formed a Committee to look into the grievance of the 5th respondent and the said Committee after visiting the college and conducting an enquiry on 29.08.05, 01.09.05 and 02.09.05 submitted its report to the appellant-University.

7. Again on 09.09.05, the 5th respondent submitted another representation to the Grievance Committee of the appellant-University which was also forwarded to the said college for its response. That was submitted by the said college on 04.10.05 and 08.11.05. Thereafter, the appellant-University

gave the 5th respondent a hearing in respect of her complaint which she raised in her representation. The said meeting was held before the Grievance Committee and the Grievance Committee gave a detailed report on the basis of its enquiry. Before the report was given, the 5th respondent and the person against whom complaint was lodged were examined along with some witnesses. Thereafter, the Grievance Committee took a decision to refer the matter to the State Commission for Women for further investigation and it was decided that the report of the said Commission was to be considered in the next meeting of the Committee.

8. Thereafter, on 18th January, 2006 the 6th respondent lodged a further complaint with the police station Sadar against the 4th respondent as a result of which offence punishable under Section 509 of I.P.C was registered against the 4th respondent and the Summary Criminal Case No.4332/06 was registered in the Court of J.M.F.C., Nagpur. On 19.01.06, 5th respondent also lodged report with the police station and on the basis of the said report an offence came to be registered on 04.02.06 vide Crime No.22/06 under Sections 468, 471, 354, 509, 506 read with Section 34 of the Indian Penal Code. In connection with the aforesaid criminal case, the 3rd and 4th respondents were arrested by the police on 05.02.06 and were remanded to police custody for two days. They were granted bail by the Court of J.M.F.C., Nagpur on 08.02.06. The Principal of the college was also granted anticipatory bail on 06.02.06 and which order was subsequently confirmed on 23.02.06.

9. Then on 18.02.06, the services of the 6th respondent were terminated by the said college.

10. In view of the complaint of the 6th respondent, the University called the 1st, 2nd and 4th respondents for hearing on 08.03.06 before the Grievance Committee and on 04.03.06 the 6th respondent sent a complaint to the appellant-University seeking action against the respondents. In that complaint the 6th respondent gave details of ill-treatment and sexual

harassment which she and other lady lecturers and employees of the college including the 5th respondent were subjected to by the authorities of the said college. In view of such complaints, the Grievance Committee of the University met on 8th March, 2006 to consider the issues in the light of complaints received by the 6th respondent against the college authorities. Pursuant to the meeting of the Grievance Committee, the University by its communication dated 21st March, 2006 directed the 1st and 2nd respondents to take steps against the 3rd and 4th respondents with a direction to suspend them and it was also directed that the 5th respondent may be reinstated. It was also directed that approval granted in respect of the service of 3rd and 4th respondent be frozen. A reply was sent by the 1st respondent to the order of the appellant-University dated 21.03.06. Thereafter, the appellant-University further informed the college authorities that the decision to freeze the approval of the 3rd and 4th respondents was taken under the provision of Clause 25.2 of the University Direction No.25/01 and it was done in accordance with Section 16 (8) of the said Act. The governing body of the respondent college in its meeting held on 27.03.06 refused to comply with the direction issued by the University by its letter dated 21st March, 2006 and this fact was communicated to the appellant by the said college. On 1st April 2006, the 1st and 2nd respondents addressed a letter of the same date and contended therein that the appellant-University does not have the power to freeze the approval of appointment of permanent teachers like the 3rd and 4th respondents and the appellant was asked to withdraw its communication dated 29th March, 2006.

11. Assailing those communications dated 21st March, 2006 and 29th March, 2006 of the appellants, the respondents namely, the Trust, the College Authorities and those two teachers filed a writ petition being 1976/06 contending therein that the appellant-University has no authority to issue those communications. That writ proceeding was heard on contest by the Hon'ble High Court.

12. By the impugned judgment dated 08.06.07, the Hon'ble High Court partly allowed the writ petition and quashed the orders passed by the University in respect of action taken against those respondents on the basis of the allegations of 5th and 6th respondent of sexual harassment at the work place.

13. Challenging the said judgment, this Court has been moved.

14. The main question on which the matter was argued by the appellants was that the High Court was in error in deciding that the Grievance Committee constituted under Section 53 of the said Act, has no jurisdiction to take cognizance of any complaint filed by the 5th and 6th respondent, as they are not approved teachers of the respondent college.

15. In order to appreciate the legal issues involved in this argument, it is better to set out the definition of 'teacher' under Section 2(35) of the said Act. Section 2(35) of the said Act runs as under:-

> "2(35) "teachers" means full time approved Demonstrators, Tutors, Assistant Lecturers, Lecturers, Readers, Associate Professors, Professors and other persons teaching or giving instructions on full time basis in affiliated colleges or approved institutions in the university;"

16. Section 53 of the said Act provides as follows:

> "53. (1) There shall be a Grievances Committee in the University to deal with the grievances of teachers and other employees of the University, Colleges, institutions and recognised institutions and to hear and settle grievances as far as may be practicable within six months, and the committee shall make a report to the Management Council.
>
> (2) It shall be lawful for the Grievances Committee to entertain and consider grievances or complaints and

report to the Management Council for taking such action as it deems fit and the decisions of the Management Council on such report shall be final.

(3) The Grievances Committee shall consist of the following members, namely:

(a) The Pro-Vice Chancellor, - Chairperson

(b) Four members of the management council nominated by the Management Council from amongst themselves – Members

(c) The Registrar - Member Secretary

(4) The Registrar shall not have a right to vote."

17. Construing the aforesaid two Sections, the High Court, following the principle of "*ejusdem generis*" held that 5th and 6th respondent, being unapproved teachers, do not come within the definition of 'teachers' under Section 2(35) quoted above.

18. This Court cannot accept the aforesaid decision of the High Court for various reasons indicated hereinafter.

19. If the definition of teachers, as quoted above, is properly perused it would appear that within the definition of teachers not only full time approved Demonstrators, Tutors, Assistant Lecturers, etc., are included but the definition is wide enough to include *"and other persons teaching or giving instructions on full time basis in affiliated colleges or approved institutions in the university."* Similarly, the Grievance Committee which is established under Section 53 of the said Act has also been given wide powers to deal with not only the grievances of teachers but also of other employees of the University, college, institution and to settle their grievances as far as may be practicable within a certain time-frame. Sub-section (2) of Section 53 of the said Act provides for consequential steps which the Grievance Committee may take

after entertaining the grievances of the category of persons named in Section 53(1). Section 53(3) provides for the constitution of the Grievance Committee and Section 53(4) is procedural in nature.

20. On a combined reading of Section 2(35) with Section 53 of the said Act, this Court is of the opinion that in respect of unapproved teachers also Grievance Committee has the jurisdiction to entertain complaint and undertake the statutory exercise conferred on it under Section 53 of the said Act.

21. The definition of teachers under Section 2(35) is wide enough to include even unapproved teacher. In fact the said definition has two parts, the first part deals with full time approved Demonstrators, Tutors, Assistant Lecturers, Lecturers etc. and the second part deals with *other persons* teaching or giving instructions on full time basis in affiliated colleges or approved institutions in the University.

22. Even though the approved teachers and those 'other persons' who are teaching and giving instructions fall in two different classes both are encompassed with the definition of teacher under Section 2(35) of the Act. The word 'and' before 'other persons' is disjunctive and indicates a different class of people.

23. A class is a conceptual creation taking within its fold numerous categories of persons with similar characteristics. Here in the group of 'other persons' fall those who, on full time basis, are teaching or giving instructions in colleges affiliated with the University and they are also teachers even if they are unapproved. This seems to be the purport of Section 2(35) of the Act.

24. It cannot be disputed that 5th and 6th respondent were engaged in teaching on full time basis in the respondent college, which is an affiliated college of the appellant-University.

25. This Court is constrained to observe that the Hon'ble High Court has not properly appreciated the principle of *ejusdem generis* in understanding the scope of Section 2(35) read with Section 53 of the Act.

26. The Latin expression "*ejusdem generis*" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context." It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication (See Glanville Williams, 'The Origins and Logical Implications of the *Ejusdem Generis* Rule' 7 Conv (NS) 119).

27. This *ejusdem generis* principle is a facet of the principle of *Noscitur a sociis*. The Latin maxim *Noscitur a sociis* contemplates that a statutory term is recognised by its associated words. The Latin word '*sociis*' means 'society'. Therefore, when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context [See similar observations of Viscount Simonds in *Attorney General v. Prince Ernest Augustus of Hanover,* (1957) AC 436 at 461 of the report]

28. But like all other linguistic canons of construction, the *ejusdem generis* principle applies only when a contrary intention does not appear. In instant case, a contrary intention is clearly indicated inasmuch as the definition of 'teachers' under Section 2(35) of the said Act, as pointed out above, is in two parts. The first part deals with enumerated categories but the second part which begins by the expression "and other"

envisages a different category of persons. Here 'and' is disjunctive. So, while construing such a definition the principle of *ejusdem generis* cannot be applied.

29. In this context, we should do well to remember the caution sounded by Lord Scarman in *Quazi v. Quazi* – [(1979) 3 All-England Reports 897]. At page 916 of the report, the learned Law Lord made this pertinent observation:-

> "If the legislative purpose of a statute is such that a statutory series should be read ejusdem generis, so be it; the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule, like many other rules of statutory interpretation, is a useful servant but a bad master."

30. This Court while construing the principle of *ejusdem generis* laid down similar principles in the case of *K.K. Kochuni v. State of Madras and Kerala,* [AIR 1960 SC 1080]. A Constitution Bench of this Court in *Kochuni* (supra) speaking through Justice Subba Rao (as His Lordship then was) at paragraph 50 at page 1103 of the report opined:-

> "...The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference *in the absence of an indication to the contrary."*
>
> (Emphasis supplied)

31. Again this Court in another Constitution Bench decision in the case of *Amar Chandra Chakraborty v. The Collector of Excise, Govt. of Tripura, Agartala and others,* AIR 1972 SC 1863, speaking through Justice Dua, reiterated the same principles in paragraph 9, at page 1868 of the report. On the

principle of *ejusdem generis*, the learned Judge observed as follows:-

> "…The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) *there is no indication of a different legislative intent."*
>
> (Emphasis supplied)

32. As noted above, in the instant case, there is a statutory indication to the contrary. Therefore, where there is statutory indication to the contrary the definition of teacher under Section 2(35) cannot be read on the basis of *ejusdem generis* nor can the definition be confined to only approved teachers. If that is done, then a substantial part of the definition under Section 2(35) would become redundant. That is against the very essence of the doctrine of *ejusdem generis*. The purpose of this doctrine is to reconcile any incompatibility between specific and general words so that all words in a Statute can be given effect and no word becomes superfluous (See Sutherland: Statutory Construction, 5th Edition, page 189, Volume 2A).

33. It is also one of the cardinal canons of construction that no Statute can be interpreted in such a way as to render a part of it otiose.

34. It is, therefore, clear where there is a different legislative intent, as in this case, the principle of *ejusdem generis* cannot be applied to make a part of the definition completely redundant.

35. By giving such a narrow and truncated interpretation of 'teachers' under Section 2(35), High court has not only

ignored a part of Section 2(35) but it has also unfortunately given an interpretation which is incompatible with the avowed purpose of Section 53 of the Act.

36. The purpose of setting up the Grievance Committee under Section 53 of the Act is to provide an effective grievance redressal forum to teachers and other employees. Any interpretation of 'teachers' under Section 2(35) of the Act which denies the persons covered under Section 2(35) an access to the said forum completely nullifies the dominant purpose of creating such a forum. It goes without saying that unapproved teachers need the protection of this forum more than the approved teachers. By creating such a forum the University virtually exercised its authority and jurisdiction as a loco-parentis over teachers-both approved and unapproved and who are working in various colleges affiliated with it. The idea is to give such teachers and employees a protection against any kind of harassment which they might receive in their work place. The creation of such a forum is in tune with protecting the 'dignity of the individual' which is one of the core constitutional concepts.

37. Therefore, the doctrine of *ejusdem generis* cannot be pressed into service to defeat this dominant statutory purpose. In this context we may usefully recall the observations of the Supreme Court of United States in *Guy T. Helvering v. Stockholms Enskilda Bank,* 293 US 84, 88-89, 79 L Ed 211, 55 S Ct 50, 52 (1934), as under:-

> "while the rule is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of ejusdem generis is only one. If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense

suggested by the rule, *we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail."*

(Emphasis supplied)

38. Therefore, with great respect, this Court is constrained to hold that the Hon'ble High Court possibly fell into an error by holding that the Grievance Committee has no jurisdiction to entertain the complaints made by 5th and 6th respondent since they are not approved teachers.

39. Various other factual aspects were considered by the High Court but since the High Court has come to a clear erroneous conclusion that Grievance Committee has no jurisdiction in dealing with the complaint filed by the 5th and 6th respondent, the very basis of the High Court judgment is unfortunately flawed and cannot be sustained.

40. For the reasons aforesaid, the appeal is allowed. The judgment of the High Court is set aside.

41. The High court shall now dispose of the writ petition filed before it in the light of the observations made hereinbefore about the jurisdiction of the Grievance Committee. However, this Court makes it clear that the order of reinstatement made in respect of 5th and 6th respondent shall be maintained and their continuity in service cannot be disturbed without following the provision of University Acts and Statutes.

42. The appeal is allowed with the directions mentioned hereinabove. Parties are left to bear their own costs.

K.K.T. Appeal allowed.

ASSISTANT C.I.T., VADODARA
v.
ELECON ENGINEERING CO. LTD.
(Civil Appeal No. 2057 of 2010)

FEBRUARY 26, 2010

[S.H. KAPADIA AND H.L. DATTU, JJ.]

Income Tax Act, 1961: s.43A, Explanation 3 – Assessment year 1986-87 – Roll over premium charges paid in respect of foreign exchange forward contracts – Treatment of – Held: Roll over charges represent the difference on account of change in foreign exchange rates – Under Explanation 3 to s. 43A, if liability is incurred in foreign exchange by entering into forward contract for purchase of fixed asset, gain or loss arising from such forward contract is required to be capitalised – s.43A applies to the entire liability remaining outstanding at the year-end, and it is not restricted merely to the instalments actually paid during the year.

The question which arose for consideration in these appeals was whether the roll over premium charges paid by the assessee for the assessment year 1986-87 in respect of foreign exchange forward contracts had to be capitalised in terms of Explanation 3 to Section 43A of the Income Tax Act, 1961.

Allowing the appeal, the Court

HELD: 1. Exchange differences are required to be capitalized if the liabilities are incurred for acquiring the fixed asset, like plant and machinery. It is the purpose for which the loan is raised that is of prime significance. In order to ascertain whether the purpose of the loan is to finance the fixed asset or working capital, the relevant loan agreement and the correspondence between the

parties concerned are required to be looked into. In the present case, the relevant contract and correspondence were not produced by the assessee, therefore, the Court proceeded on the basis that the purpose of the loan taken by the assessee was to finance the purchase of plant and machinery. [Para 8] [118-D-F]

CIT v. Gujarat Alkalis and Chemicals Limited **(2008) 2 SCC 475, held inapplicable.**

India Cements Ltd. v. Commissioner of Income-Tax, Madras, **(1966) 60 ITR 52, referred to.**

2. Section 43A of the Income Tax Act, 1961, before its substitution by a new Section 43A by Finance Act, 2002, was inserted by Finance Act, 1967 with effect from 1.4.1967, after the devaluation of the rupee on 6th June, 1966. It applied where as a result of change in the rate of exchange there was an increase or reduction in the liability of the assessee in terms of the Indian rupee to pay the price of any asset payable in foreign exchange or to repay moneys borrowed in foreign currency specifically for the purpose of acquiring an asset. The Section has no application unless an asset was acquired and the liability existed, before the change in the rate of exchange. When the assessee buys an asset at a price, its liability to pay the same arises simultaneously. This liability can increase on account of fluctuation in the rate of exchange. An assessee who becomes the owner of an asset (machinery) and starts using the same, it becomes entitled to depreciation allowance. To work out the amount of depreciation, one has to look to the cost of the asset in respect of which depreciation is claimed. Section 43A was introduced to mitigate hardships which were likely to be caused as a result of fluctuation in the rate of exchange. Section 43A lays down, firstly, that the increase or decrease in liability should be taken into account to modify the figure of actual cost and, secondly,

such adjustment should be made in the year in which the increase or decrease in liability arises on account of fluctuation in the rate of exchange. It is for this reason that though Section 43A begins with a *non-obstante* clause, it makes Section 43(1) its integral part. This is because Section 43A requires the cost to be recomputed in terms of Section 43A for the purposes of depreciation. A perusal of Section 43A makes it clear that insofar as the depreciation is concerned, it has to be allowed on the actual cost of the asset, less depreciation that was actually allowed in respect of earlier years. However, where the cost of the asset subsequently increased on account of devaluation, the written down value of the asset has to be taken on the basis of the increased cost minus the depreciation earlier allowed on the basis of the old cost. One more aspect needs to be highlighted. Under Section 43A, as it stood at the relevant time, it was provided that where an assessee had acquired an asset from a country outside India for the purposes of his business, and in consequence of a change in the rate of exchange at any time after such acquisition, there is an increase or reduction in the liability of the assessee as expressed in Indian currency for making payment towards the whole or part of the cost of the asset or for repayment of the whole or part of the moneys borrowed by him for the purpose of acquiring the asset, the amount by which the liability stood increased or reduced during the previous year shall be added to or deducted from the actual cost of the asset as defined in Section 43(1). This analysis indicated that during the relevant assessment year adjustment to the actual cost was required to be done each year on the closing date, i.e., year-end. Subsequently, Section 43A underwent a drastic change by virtue of a new Section 43A inserted vide Finance Act, 2002. Under the new Section 43A such adjustment to the cost had to be done only in the year in which actual payment is made. Under Explanation 3 to Section 43A, if

the assessee had covered his liability in foreign exchange by entering into forward contract with an authorized dealer for the purchase of fixed assets, the gain or loss arising from such forward contract was required to be taken into account. [Para 9] [118-G-H; 119-A-H; 120-A-B]

3. During the relevant assessment years, Section 43A applied to the entire liability remaining outstanding at the year-end, and it was not restricted merely to the instalments actually paid during the year. Therefore, at the relevant time, the year-end liability of the assessee had to be looked into. Further, it cannot be said that roll over charge has nothing to do with the fluctuation in the rate of exchange. In the present case, the Notes to the Accounts for the year ending 31st December, 1986 (Schedule 17) indicated adverse fluctuations in the exchange rate in respect of liabilities pertaining to the assets acquired. This Note clearly established existence of adverse fluctuations in the exchange rate which made the assessee opt for forward cover and which made the assessee pays roll over charges. The word "adverse" in the Note itself presupposed increase in the liability incurred by the assessee during the year ending 31st December, 1986. Roll over charges represent the difference arising on account of change in foreign exchange rates. Roll over charges paid/ received in respect of liabilities relating to the acquisition of fixed assets should be debited/ credited to the asset in respect of which liability was incurred. However, roll over charges not relating to fixed assets should be charged to the Profit & Loss Account. [Para 10] [121-A-F]

Case Law Reference:

(1966) 60 ITR 52	**referred to**	**Para 3**
(2008) 2 SCC 475	**held inapplicable**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2057 of 2010.

From the Judgment & Order dated 21.7.2008 of the High Court of Gujarat at Ahmedabad in Tax Appeal No. 144 of 2001.

WITH

C.A. No. 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065 of 2010.

Parag P. Tripathi, ASG, Kunal Bahrai, H. Raghavendra Rao, Sunita Rani Singh, B.V. Balaram Das for the Appellant.

Pravin H. Parekh, Shakun Sharma, Sumit Goel, Pallavi Shrivastava, Rajat Nair (for Parekh & Co.) for the Respondent.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Leave granted.

2. This batch of civil appeals concerns the nature of roll over premium charge incurred by the assessee as also the scope and applicability of Section 43A of the Income Tax Act, 1961 ("the Act" for short), in the context of such charges.

3. The lead matter in this batch of civil appeals is civil appeal arising out of S.L.P.(C) No.8363 of 2009. It concerns assessment year 1986-87. Assessee is a manufacturing company. It manufactures gears and mechanical handling equipments. It procured a foreign currency loan for expansion of existing business. Since the repayment of loan was stipulated in instalments, assessee desired to ensure that foreign currency required for repayment of the loan be obtained at a pre-determined rate and cost. Accordingly, the assessee booked forward contracts with Citibank for delivery of the required foreign currency on the stipulated dates. The contract was entered into for entire outstanding amount and the delivery of foreign currency was obtained under the contract for

instalment due from time to time. The balance value of the contract, after deducting the amount withdrawn towards repayment, was rolled over for a further period up to the date of the next instalment. Assessee filed its return of income for assessment year 1986-87 on 30.6.1986. A revised return was filed by it on 27.3.1989 declaring a total income of Rs.2,10,08,640/-. The A.O. disallowed an amount of Rs.8,86,280/-, being the roll over premium charges paid by the assessee in respect of foreign exchange forward contracts to Citibank N.A. on the ground that the said charges were incurred in connection with the purchase of a capital asset (plant and machinery), hence, it was not admissible for deduction under Section 36(1)(iii) or under Section 37 of the Act. On appeal, the CIT (A) held that the roll over premium charge(s) incurred by the assessee was allowable as it was incurred by the assessee to mitigate the risk involved in higher payment because of adverse fluctuation of rate of exchange. According to CIT (A), roll over premium charge(s) constituted an expenditure incurred for raising loans on revenue account, hence, the said expenditure was allowable under the Act. It may be noted that CIT (A) did not refer to a specific section under which assessee was entitled to such deduction. The CIT(A) did not examine Section 43A of the said Act. The CIT(A) relied upon the judgment of the Supreme Court in support of its findings in the case of *India Cements Ltd. v. Commissioner of Income-Tax, Madras* – (1966) 60 ITR 52.

4. Vide order dated 21.3.2001, the Tribunal held that roll over premium charges (carry forward charges) were required to be paid to the authorized dealer as consideration for permitting the unutilized amount of the contract (balance value of the contract) to be availed of at a latter date and in the circumstances roll over premium charges had to be capitalized under Explanation 3 to Section 43A of the said Act. Consequently, the Tribunal upheld the order of the assessment.

5. Aggrieved by the decision of the Tribunal, the assessee

filed an appeal(s) before the Gujarat High Court inter alia challenging the capitalization of the roll over charges paid in respect of foreign currency. The said appeal(s) was allowed by the High Court which came to the conclusion that the roll over premium charge(s) paid by the asssessee was in the nature of interest or committal charge(s), hence, the said charges were allowable under Section 36(1)(iii) of the said Act, hence this civil appeal(s).

6. According to the Department, the roll over charge was required to be capitalized in view of Section 43A of the Act. In answer to this basic argument, Mr. P.H. Parekh, learned senior counsel appearing on behalf of the assessee submitted that the roll over contract mechanism came to be devised because at the relevant time forward contracts could be entered into for a period of six months ahead of the required delivery of foreign currency for payment of instalments. However, the "term loan agreements" stipulated repayment schedule extending beyond the six months' period. Consequently, there arose a need for a mechanism whereby foreign currencies required to be remitted to meet the instalments falling due beyond six months were made available at a pre-determined exchange rates. Accordingly, the roll over contract mechanism came to be devised. Assessee accordingly entered into a contract with the foreign exchange authorized dealer (Citibank) for providing the entire amount of foreign currency outstanding at an appropriate exchange rate. The authorized dealer in turn agreed to provide, out of such contracted sum, such amount as may be necessary to meet the instalments on due dates and to carry forward the unutilized portion of the foreign currency contracted to meet the subsequent payments. Accordingly, out of the total foreign currency contracted and outstanding, as and when any instalment became due, the borrower deposited the rupee equivalent of the instalment due at the pre-determined rate and carried forward or rolled over the balance unutilized amount of the contracted foreign currency. According to the assessee, this exercise involved a cost for carrying forward the contracted

foreign currency, which was not immediately required for repayment. The said cost was called "the roll over charges". According to the assessee, such cost is akin to the interest payable on the rupee equivalent, which the authorized dealer had invested in holding the foreign currency at the borrower's account. This argument was accepted by the High Court. Thus, according to the assessee, the said roll over charges incurred by the assessee during the relevant assessment years was altogether different from increase in cost on account of exchange rate fluctuation as envisaged under Section 43A and Explanation 3 and, consequently, according to the assessee, in this case Section 43A was not applicable. According to the assessee, Section 43A, as it stood at the relevant time, applied only when there was an increase or reduction in the liability of the assessee consequent upon change in the rate of exchange of currency for payment of cost of asset or for payment of loan. According to the assessee, the roll over premium was not paid because of any fluctuation in the rate of exchange. It was paid as a premium to the dealer for the risk taken by the dealer in holding the foreign exchange at pre-determined rate on borrower's account. According to the assessee, roll over charge had nothing to do with the fluctuation in the rate of exchange and was payable even if there was no fluctuation in the liability of the assessee in Indian currency for making payment towards repayment of the money borrowed. Therefore, according to the assessee, Section 43A was not attracted. According to the assessee, the second reason why Section 43A was not applicable was because there was no increase or reduction in the liability for payment of cost of asset as a result of the change in the rate of exchange. On the contrary, according to the assessee, the said payment was made to avoid the increase or reduction in liability as a consequence of the change in the rate of exchange. According to the assessee, only certain charges were required to be added to the actual cost under Explanation 3 to Section 43A. According to the assessee, the roll over charge was not required to be added to the actual cost nor was it required to be capitalized as such roll over charge

had nothing to do with the actual cost of the asset. According to the assessee, when a forward contract is entered into with an authorized dealer, then, only at the forward rate, assets can be capitalized. This is what the assessee has in fact done. The assessee has capitalized the actual rate difference and it claimed depreciation thereof. The only controversy, according to the assessee, is in respect of the roll over charges. According to the assessee, Explanation 3 does not talk of any roll over charges to be capitalized under Section 43A. Hence, according to the assessee, in the present case, the assessee had rightly debited the roll over charges in its Profit & Loss Account under the Head Administrative Expenses – Insurance / Bank Charges. According to the assessee, roll over charges are commitment charges. They are in the nature of interest. They are paid in relation to the amounts borrowed. They are akin to the interest payable on the rupee equivalent, which the authorized dealer had invested in holding the foreign currency on the borrower's account. For the afore-stated reasons, it was submitted that roll over charges were allowable as deduction under Section 36(1)(iii) of the Act. According to the assessee, roll over charges were also meant for covering a risk on account of fluctuations between the rupee and the contracted foreign currency. Such risk is built into the roll over charges, hence, such charges were allowable as deduction under Section 36(1)(iii) of the Act. In the alternative, on behalf of the assessee, it was submitted that in the event of this Court coming to the conclusion that roll over charges were not deductible under Section 36(1)(iii) then in that event such charges were deductible under Section 37 of the Act. In support of this contention, learned counsel for the assessee placed reliance on the judgment of this Court in *CIT v. Gujarat Alkalis and Chemicals Limited,* (2008) 2 SCC 475 which held that commitment and insurance charges payable by the assessee were admissible deductions under Section 37 of the Act.

7. At the outset, we quote hereinbelow Section 43A, as it

stood at the relevant assessment years, as under:

"43A. *Special provisions consequential to changes in rate of exchange of currency*—(1) Notwithstanding anything contained in any other provision of this Act, where an assessee has acquired any asset from a country outside India for the purposes of his business or profession and, in consequence of a change in the rate of exchange at any time after the acquisition of such asset, there is an increase or reduction in the liability of the assessee as expressed in Indian currency *for making payment* towards the whole or a part of the cost of the asset or for repayment of the whole or a part of the moneys borrowed by him from any person, directly or indirectly, in any foreign currency specifically for the purpose of acquiring the asset (being in either case the liability existing immediately before the date on which the change in the rate of exchange takes effect), the amount by which the liability aforesaid is so increased or reduced during the previous year shall be added to, or, as the case may be, deducted from, the actual cost of the asset as defined in clause (1) of section 43 or the amount of expenditure of a capital nature referred to in clause (iv) of sub-section (1) of section 35 or in section 35A or in clause (ix) of sub-section (1) of section 36, or, in the case of a capital asset (not being a capital asset referred to in section 50), the cost of acquisition thereof for the purposes of section 48, and the amount arrived at after such addition or deduction shall be taken to be the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset as aforesaid.

*** *** ***

Explanation 3: Where the assessee has entered into a contract with an authorised dealer as defined in section 2 of the Foreign Exchange Regulation Act, 1947 (7 of 1947), for providing him with a specified sum in a foreign currency on or after a stipulated future date at the rate of exchange specified in the contract to enable him to meet the whole or any part of the liability aforesaid, the amount, if any, to be added to, or deducted from, the actual cost of the asset or the amount of expenditure of a capital nature or, as the case may be, the cost of acquisition of the capital asset under this sub-section shall, in respect of so much of the sum specified in the contract as is available for discharging the liability aforesaid, be computed with reference to the rate of exchange specified therein."

8. Before analysing the Section quoted above, by way of preface, we need to state that exchange differences are required to be capitalized if the liabilities are incurred for acquiring the fixed asset, like plant and machinery. It is the purpose for which the loan is raised that is of prime significance. Whether the purpose of the loan is to finance the fixed asset or working capital is the question which one needs to answer and in order to ascertain that purpose, the facts and circumstances of the case, including the relevant loan agreement and the correspondence between the parties concerned are required to be looked into. In the present case, it appears that the relevant contract and correspondence has not been produced by the assessee. We are proceeding on the basis that the purpose of the loan taken by the assessee from ICICI was to finance the purchase of plant and machinery.

9. Section 43A, before its substitution by a new Section 43A vide Finance Act, 2002, was inserted by Finance Act, 1967 with effect from 1.4.1967, after the devaluation of the rupee on 6 June, 1966. It applied where as a result of change in the rate of exchange there was an increase or reduction in the liability of the assessee in terms of the Indian rupee to pay the price of any asset payable in foreign exchange or to repay moneys borrowed in foreign currency specifically for the purpose of acquiring an asset. The Section has no application unless an

asset was acquired and the liability existed, before the change in the rate of exchange. When the assessee buys an asset at a price, its liability to pay the same arises simultaneously. This liability can increase on account of fluctuation in the rate of exchange. An assessee who becomes the owner of an asset (machinery) and starts using the same, it becomes entitled to depreciation allowance. To work out the amount of depreciation, one has to look to the cost of the asset in respect of which depreciation is claimed. Section 43A was introduced to mitigate hardships which were likely to be caused as a result of fluctuation in the rate of exchange. Section 43A lays down, firstly, that the increase or decrease in liability should be taken into account to modify the figure of actual cost and, secondly, *such adjustment should be made in the year* in which the increase or decrease in liability arises on account of fluctuation in the rate of exchange. It is for this reason that though Section 43A begins with a non-obstante clause, it makes Section 43(1) its integral part. This is because Section 43A requires the cost to be recomputed in terms of Section 43A for the purposes of depreciation (Sections 32 and 43(1)). A perusal of Section 43A makes it clear that insofar as the depreciation is concerned, it has to be allowed on the actual cost of the asset, less depreciation that was actually allowed in respect of earlier years. However, where the cost of the asset subsequently increased on account of devaluation, the written down value of the asset has to be taken on the basis of the increased cost minus the depreciation earlier allowed on the basis of the old cost. One more aspect needs to be highlighted. Under Section 43A, as it stood at the relevant time, it was inter alia provided that where an assessee had acquired an asset from a country outside India for the purposes of his business, and in consequence of a change in the rate of exchange at any time after such acquisition, there is an increase or reduction in the liability of the assessee as expressed in Indian currency for making payment towards the whole or part of the cost of the asset or for repayment of the whole or part of the moneys borrowed by him for the purpose of acquiring the asset, the

amount by which the liability stood increased or reduced *during the previous year* shall be added to or deducted from the actual cost of the asset as defined in Section 43(1). This analysis indicates that during the relevant assessment year adjustment to the actual cost was required to be done each year on the closing date, i.e., year-end. Subsequently, Section 43A underwent a drastic change by virtue of a new Section 43A inserted vide Finance Act, 2002. Under the new Section 43A such adjustment to the cost had to be done only in the year in which actual payment is made. In this case, we are not concerned with the position emerging after Finance Act, 2002. Under Explanation 3 to Section 43A, if the assessee had covered his liability in foreign exchange by entering into forward contract with an authorized dealer for the purchase of fixed asseet, the gain or loss arising from such forward contract was required to be taken into account.

10. In the present case, one of the main arguments advanced on behalf of the assessee before us was that Section 43A was not applicable because roll over charge stood paid to avoid increase or reduction in liability as a consequence of the change in the rate of exchange. According to the assessee, Section 43A, as it stood at the material time, applied only to cases where there existed a fluctuation in the rate of exchange and since the roll over charge was paid to the authorized dealer by the assessee to avoid increase or reduction in liability on account of such fluctuation, Section 43A read with Explanation 3 thereto would not apply to such roll over charges. We find no merit in this argument advanced on behalf of the assessee. According to the assessee, the cost for carrying forward the contracted foreign currency, not immediately required for repayment, is called the roll over charge(s). As stated above, according to the assessee, Section 43A was not applicable in this case as there was no increase or reduction in liability because such roll over charges were paid to avoid increase or reduction in liability consequent upon change in the rate of exchange. To answer this submission, one needs to keep in

mind that during the relevant assessment years Section 43A applied to the entire liability remaining outstanding at the year-end, and it was not restricted merely to the instalments actually paid during the year. Therefore, at the relevant time, the year-end liability of the assessee had to be looked into. Further, it cannot be said that roll over charge has nothing to do with the fluctuation in the rate of exchange. In the present case, the Notes to the Accounts for the year ending 31st December, 1986 (Schedule 17) indicates adverse fluctuations in the exchange rate in respect of liabilities pertaining to the assets acquired. This Note clearly establishes existence of adverse fluctuations in the exchange rate which made the assessee opts for forward cover and which made the assessee pays roll over charges. The word "adverse" in the Note itself presupposes increase in the liability incurred by the assessee during the year ending 31st December, 1986. In the circumstances, we find no merit in the contention of the assessee that roll over charges have nothing to do with the fluctuation in the rate of exchange. Lastly, in this case we are concerned with capitalization of exchange difference in respect of acquisition of fixed assets acquired from abroad. According to Indian Accounting Standards by Dolphy D'Souza, roll over charges are indicative of the increase or decrease in the liability of the company in the next specified period, generally of six months. Roll over charges represent the difference arising on account of change in foreign exchange rates. Roll over charges paid/ received in respect of liabilities relating to the acquisition of fixed assets should be debited/ credited to the asset in respect of which liability was incurred. However, roll over charges not relating to fixed assets should be charged to the Profit & Loss Account. [See page 325]

11. Before concluding, we may state that this judgment is confined to the facts of the present case. We may also clarify that the judgments cited on behalf of the assessee concerning commitment charges, warranty charges, etc., do not apply to the present case. None of these judgments deal with roll over charges. Hence, it is not necessary to discuss those judgments.

12. An alternative argument was advanced on behalf of the assessee that in the event this Court holds that roll over charges are to be capitalized in terms of Explanation 3 to Section 43A as it stood prior to assessment year 2003-04, then, in that event the Tribunal may be directed to grant depreciation allowance on the written down value of the asset not only for the concerned years but also for the subsequent years till the entire value of the asset is written off. According to the assessee, such a direction is required to be given because the depreciation, according to the assessee, is available even for the assessment years after AY 1994-95. On behalf of the assessee it was further submitted, as and by way of alternative submission, that the Department may not be allowed to charge interest or penalty as the issue involved is debatable.

13. We find no merit in the alternative submissions advanced on behalf of the assessee. The Tribunal while holding that roll over charges are required to be adjusted in the carrying amount of fixed asset, has allowed the assessee the benefit of depreciation on the adjusted cost of fixed asset. Hence, it is not necessary for this Court to give direction to the Tribunal, as sought by the assessee. On the facts and circumstances there is no question of this Court directing dispensation from payment of interest and penalty.

14. For the afore-stated reasons, we find merit in this batch of civil appeals filed by the Department and set aside the impugned judgment of the High Court. Accordingly, the civil appeals filed by the Department are allowed with no order as to costs.

D.G. Appeal allowed.

CHITTOOR CHEGAIAH & ORS.
v.
PEDDA JEEYANGAR MUTT & ANR.
(Civil Appeal No. 2012 of 2002 & Ors. Etc.)

MARCH 8, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Andhra Pradesh (A.A.) Tenancy Act, 1956:

ss. 2(c), (f) and 13 – Landlord-tenant relationship – Suit for eviction on ground of non-payment of rent – Resisted on ground of res judicata and permanent lease patta – HELD: In the earlier litigation the High Court had held that it did not have jurisdiction in the matter in view of the special process prescribed in the Act and, that the title with respect to tenancy rights had been perfected owing to adverse possession – These two rulings are not in conflict with each other and are equally binding – Jurisdiction of High Court was ousted only to limited extent with respect to eviction of tenants and possession of property owing to procedure provided under the Act – But the Court continued to have jurisdiction with respect to determination of title to the property and as such held that title of ownership belonged to plaintiffs and defendants had title with respect to tenancy rights on conditions prescribed under the permanent lease patta – Therefore, earlier decision of High Court was merely with respect to tenancy title and would not bar instant eviction proceedings u/s 13 – It cannot be said that a permanent lease would not result in tenant-landlord relationship since it is implied that in such an agreement non-fulfilment of prescribed terms (non-payment of rent in the instant case) would give right to landlord to evict the tenant – The finding of the appellate authority that tenants committed default in payment of rent was rightly affirmed by High Court – Eviction of tenant not interfered with – Code of Civil Procedure, 1908 – s.11 – Res judicata – Deeds and

documents – Permanent lease patta – Tenant-Landlord relationship.

The suit property, namely, 29 acres 59 cents of land, belonged to respondent no. 1-Mutt. The head of the Mutt granted two permanent leases, and the lessees and their transferees sold the land to one 'MM'. The Mutt filed a suit against 'MM' and pursuant to a compromise during the pendency of the suit the Mutt executed a permanent lease patta dated 11.3.1931 in favour of 'MM' for the entire land. 'MM' sold 10 acres of the land and the transferee further sold the land to the father of the appellants in CA No. 2012 of 2002, under a registered sale deed dated 25.5.1938. In 1964, the Mutt filed a suit for declaration and possession against the father of the appellants. The suit was decreed. The consequent appeals bearing AS No. 130 of 1973 and AS No.2413 of 1973 were allowed by the High Court holding that the Court did not have jurisdiction over the matters owing to the special process prescribed under the Andhra Pradesh (AA) Tenancy Act, 1956 and that the title with respect to tenancy rights was perfected owing to adverse possession. This judgment achieved finality as no appeal was filed thereagainst.

In the year 1980 the Mutt filed eviction petition bearing ATC No. 35 of 1980 against the appellants and the same was dismissed on 24.8.1987. The appeal filed by the Mutt bearing ATC No. 9 of 1987 was allowed by the Additional District Judge on 3.6.1996. The revision petitions were dismissed by the High Court on 17.11.2000. Aggrieved, the appellants filed the appeals.

It was contended for the appellants that in view of the permanent lease patta dated 11.3.1931, and the judgment of the High Court in AS No. 130 of 1973, which became final, the Mutt lost the right to recover the land from the appellants and that judgment would operate as re judicata.

The questions for consideration before the Court were: (i) whether the decision of the High Court in holding that the findings given in A.S. No. 130 of 1973, the earlier judgment on the same subject matter, would not operate as res judicata, when in the said decision the High Court had categorically held that the appellants perfected their title by adverse possession in the schedule property?; and (ii) whether a permanent lease would give rise to a tenant-landlord relationship within the meaning of the Andhra Pradesh (AA) Act, 1956 and the High Court was correct in holding that the Mutt was entitled to recover the suit though there was an irrevocable condition in the lease patta dated 11.03.1931 that the Mutt was entitled only for recovery of theerva (rent) and not the possession?.

Dismissing the appeals, the Court

HELD: 1.1. The Mutt had approached in appeal to the High Court in A.S. No. 130 of 1973 for declaration of the title of the property in their favour. The High Court in that instance held two things: (1) that the court did not have jurisdiction over the matters owing to the special process prescribed under the Andhra Pradesh (AA) Tenancy Act, 1956 – The court reached this conclusion by examining the Act holding that the relationship of Tenant-Landlord was established, thus confirming the jurisdiction of the Act and ousting the jurisdiction of a Civil Court – and (2) the title *with respect of tenancy rights was perfected* **owing to adverse possession. The court went on to determine the title of the property itself and held that since the suit had not been brought within the limitation period of 12 years, the appellants had perfected their title with respect to tenancy rights on the basis of adverse possession. These two rulings are not in conflict with each other, and are equally binding. The jurisdiction of the High Court was ousted only to a limited extent, i.e. with respect to the eviction of the tenants and possession of the**

property, as the procedure for that was provided under the Act. But the Court continued to have jurisdiction with respect to the determination of the title to the property. [Para 16 and 17] [138-A-H; 139-A]

1.2. The import of the High Court decision in AS No. 130 of 1973 has been misunderstood while relying on it for the purposes of res judicata. The court, in no uncertain terms, held that the title of ownership belongs to the respondents, but the appellants had the title with respect of tenancy rights. This decision was perfected by non-appeal and is binding on the parties. Thus, the appellants are not the owners of the property, but tenants on conditions prescribed under the permanent lease patta dated 11.03.1931. Therefore, the decision of the High Court in AS 130 of 1973 would not bar any proceedings under the Tenancy Act as the issue decided by the court in that instance was merely the tenancy title in favour of the appellants, while the instant case is for eviction of tenants u/s 13 of the Act. [Para 18] [139-B-D]

G. Veeraswamy v. Uppardasta Papanna **1969 An. W.R. 359;** *U. Pappanna Sastri v. Naga Venkata Satyavati* **AIR 1972 AP 53;** *K. Sesharatnamma vs.A. Satyanarayana* **1963 (2) An. W.R. 32, referred to.**

1.3. The instant proceedings emerging from the ruling of the IIIrd Additional District Judge, exercising the powers of Appellate Authority under the A.P. Tenancy Act does not suffer from any legal infirmity as the proceedings are not barred by *res judicata***. [Para 21] [140-C-D]**

2.1. A person shall qualify to be a landlord under the meaning of the Tenancy Act if he is entitled to evict the tenant. Such entitlement can arise either directly due to the agreement entered into (i.e. by providing the time period of tenancy) or by providing the conditions or terms

of tenancy violating which the tenant may be evicted u/s 13. There is no reason why a permanent lease which provides terms would not result in a tenant-landlord relationship since it is implied in such an agreement that non-fulfillment of the prescribed terms would give the right to the landlord to evict the tenant. One such term can be payment of periodic rent, which exists in the instant case. Thus, the parties qualify as tenant-landlord and are, thus, amenable to the jurisdiction of the Tenancy Act. [Para 20 and 21] [139-H; 140-A-B]

2.2. In view of categorical finding of the Appellate Authority, which was rightly affirmed by the High Court, that the tenants have committed default in payment of rent from fasli 1372 and never paid rent, they are liable to be evicted as per s. 13 of the Act. There is no reason to interfere in the order of the High Court. [Para 21] [140-D-E]

Case Law Reference:

1969 An. W.R. 359	**referred to**	**para 19**
AIR 1972 AP 53	**referred to**	**para 19**
1963 (2) An. W.R. 32	**referred to**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2012 of 2002.

From the Judgment & Order dated 17.11.2000 of the High Court of Judicature Andhra Pradesh at Hyderabad in CRP No. 2124 of 1996.

WITH

C.A. No. 2011 & 2014 of 2002

M.N. Rao, K. Ramamoorthy, S. Thananjayan, V. Sridhar Reddy, Abhijit Sengupta, VN Raghupathy, K.L. Sastry, Amit Kr.

Srivastav, R.V. Kameshwaran, BA Ramagandhan, A. Subhashini V. Rangam, D. Julius Raimei, G. Gangmai, Sridhar Potarju for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J.

Civil Appeal No. 2012 of 2002:

1. This appeal is directed against the judgment and order dated 17.11.2000 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Civil Revision Petition No. 2124 of 1996 whereby and whereunder the High Court has dismissed the petition filed by the appellants herein.

Civil Appeal No. 2014 of 2002:

This appeal is directed against the judgment and order dated 17.11.2000 in Civil Revision Petition No. 2322 of 1996 whereby the High Court has dismissed the petition filed by the appellants herein by following its judgment passed on the same day in C.R.P. No. 2124 of 1996.

Civil Appeal No. 2011 of 2002:

This appeal is filed by the appellants who were not parties before the High Court against the judgment and order dated 17.11.2000 passed by the High Court of Andhra Pradesh in C.R.P. No. 2322 of 1996.

(a) Since the issues which arose in these appeals are similar, they were heard together and are being disposed of by this common judgment. The facts in Civil Appeal No. 2012 of 2002 are sufficient for the disposal of all these appeals. They are as under:

(b) A property consisting of 29 acres 59 cents in T.S. No.11 and old T.S. No. 507 of Tirupathi town originally

belonged to the Plaintiff - Pedda Jeeyangar Mutt (hereinafter called `the Mutt') - respondent herein. The then head of the Mutt granted a permanent lease in respect of 12 acres of land to one Kotilingam Subbaraya Chetti under a registered lease deed dated 8.01.1900. He also granted a permanent lease in respect of 15 acres of land to one Shaik Budan Saheb under a registered lease deed dated 29.11.1915. Shaik Budan Saheb sold the leasehold rights in equal halves to Narasimhaiah under a deed dated 01.12.1919 and Mandaram Munikannaiah under a deed dated 19.08.1922. Narasimhaiah sold his half share purchased under deed dated 1.12.1919 to Mandaram Munikannaiah under a registered lease deed dated 19.08.1922. Thus Mandaram Munikannaiah got 15 acres from the said property and out of that he leased out 12 acres of land to Kotilingam Subbaraya Chetti by a registered lease deed dated 06.01.1919. The Mutt filed O.S. No.152 of 1930 on the file of the District Munsif's Court, Tirupathi, against Mandaram Munikannaiah in respect of total land. During the pendency of the suit, there was a compromise and the Mutt executed a registered permanent patta dated 11.03.1931 in favour of Mandaram Manikannaiah for the total land and he sold 10 acres of land to Pappaiah under a registered sale deed dated 21.09.1935 and after his death, his son Polaiah sold the said land to Chittoor Siddaiah under a registered sale deed dated 25.05.1938. Polaiah created usufructory mortgage of the property in favour of Chithoor Siddaiah under a registered deed dated 07.06.1937 and eversince he is in possession of the property. On 07.08.1964, the Mutt filed O.S. No. 59 of 1964 before the Sub-Court, Chittoor for declaration and possession which was transferred to Sub-Court, Tirupathi and renumbered as O.S. No. 7 of 1971 and the same was dismissed by the subordinate Judge. Against the said judgment, Chittoor Siddaiah (defendant No.3 in the suit) preferred A.S.No. 130 of 1973 and one S.Veeraswamy Naidu (defendant

No.4 in the suit) who was a purchaser from Mandaram Munikannaiah filed A.S. No. 243 of 1973 on the file of the High Court of Andhra Pradesh. The High Court allowed the said appeals. In the year 1980, the Mutt - respondent herein, filed eviction petition bearing A.T.C. No. 35 of 1980 and the same was dismissed by the Principal District Munsif-cum-Special Officer, Tirupathi by order dated 24.08.1987. During the pendency of A.T.C. No. 35 of 1980, the Mutt filed O.S.No. 176 of 1981 on the file of the Additional sub-Court, Tirupathi for declaration and permanent injunction and the same was disposed of by holding that the plaintiff is entitled for declaration as permanent owner but without a right to recover possession. Against the order passed in A.T.C. No. 35 of 1980, the Mutt filed ATC No.9 of 1987 under the A.P. Tenancy Act and the same was allowed by the Additional District Judge vide order dated 03.06.1996. Aggrieved by the said order, the appellants herein filed Civil Revision Petition No. 2124 of 1996 before the High Court which was dismissed by the High Court on 17.11.2000. Following the judgment in Civil Revision Petition No. 2124 of 1996, on the same day, the High Court dismissed Civil Revision Petition No. 2322 of 1996. Hence the present appeals have been filed before this Court by way of special leave petitions.

2. Heard Mr. M.N. Rao, learned senior counsel for the appellants and Mr. A.V. Rangam, learned counsel for the respondents.

3. Before going into the merits of the claim made by both the parties, it is useful to refer the definition of "cultivating tenant" in Section 2(c) and "landlord" under Section 2(f) of the Andhra Pradesh (A.A.) Tenancy At, 1956 (hereinafter referred to as `the Act'):

Section 2 (c)

"Cultivating tenant" means a person who cultivates by his

own labour or by that of any other members of his family or by hired labour under his supervision and control, any land belonging to another under a tenancy agreement, express or implied, but does not include a mere intermediary";

Section 2 (f)

""landlord" means the owner of a holding or part thereof who is entitled to evict the cultivating tenant from such holding or part, and includes the heirs, assignees, legal representatives of such owner or person deriving rights through him":

With these statutory definitions and the Mutt having approached the authorities under the Act for eviction of the appellants, let us consider the rival claims. In the earlier part of the pleadings, we have adverted to the case of both the parties, however, it is useful to trace the rival claim briefly hereinafter. As early on 29.11.1915, permanent lease was executed in favour of Sheik Budan Saheeb in respect of 15 acres of land. The suit land was sold by him into two halves one to Shri Narasimhaiah and another to Mandaram Munikannaiah. Narasimhaiah sold his share to Mandaram Munikannaiah by sale deed dated 19.08.1922.

4. The Mutt granted 12 acres of land on permanent lease to one Kotilingam Subbaraya Chetti in the year 1919 and this land was occupied by Mandaram Munikannaiah. It was pointed out that there is a condition in the lease deed dated 19.11.1915 that those land shall always remain as Modati Eeedu (1st Charge) for cist and pay Jodi payable to the Government.

5. The Mutt filed O.S. No. 152 of 1930 against Mandaram Munikannaiah in respect of the land occupied by him. During the pendency of the suit, there was a compromise and the Mutt executed a registered permanent lease Patta (though not a permanent lease) on 11.03.1931 in favour of Mandaram

Munikannaiah for the total extent of land, namely, 29 acres-59 cents. It is useful to refer the terms of permanent lease patta dated 11.03.1931:

(i) Mandaram Munikannaiah shall enjoy entire schedule property by paying Rs. 25/- to the Mutt from Fasali 1340.

(ii) In future Mandaram Munikannaiah or his legal heirs can transfer etc. the schedule mention land to any one and such fact shall be intimated to Pedda Jeeyangar the Matadhipathy, and transfer deed shall be got executed with his consent by the transferer.

(iii) The schedule mention land shall always been first Eeedu (1st Charge) for the said permanent lease amount.

(iv) The pedda Jeeyangar alone shall pay the usual jodi, Cess, etc. and cist to Government.

(v) Further Pedda Jeeyangar shall have a right to claim the excess amount paid, if any, to Government from Mandaram Munikannaiah.

(vi) Mandaram Munikannaiah shall have absolute and unlimited rights in respect of schedule mentioned land and shall enjoy the same as per his wishes in perpetuity.

(vii) The Pedda Jeeyangar have no manner of right in respect of the land except the right to recover theerva (rent).

6. By pointing out the various clauses in the permanent lease, Mr. M.N. Rao, learned senior counsel for the appellants submitted that the Mutt has no right in respect of the property except to recover theerva (rent).

7. An extent of land of 10 acres which is a subject matter of the said suit was sold to Pappaiah on 21.09.1935. After\ the death of Pappaiah, his son Polaiah became the absolute owner

of the subject matter of the suit property.By registered deed dated 07.06.1937, Polaiah created usufructry mortgage of the property in favour of Chittoor Siddaiah (father of the appellant) and eversince he has been in possession and enjoyment of the property to the knowledge of the Mutt. The materials placed further show that by a registered deed dated 25.05.1938 Polaiah sold the said 10 acres of land to Chittoor Siddaiah.

8. In order to establish its right, title and possession, the Mutt filed O.S. No. 59 of 1964 before Sub-Court, Chittoor on 07.08.1964 which was subsequently transferred to Sub-Court Tirupathi and re-numbered as O.S. No. 7 of 1971. In the said suit the Mutt is the plaintiff and Thirumala Tirupathi Devasthanam is Defendant No. 1, Defendant No. 2 - Board of Trustees of TTD, Defendant No. 3 - Chittoor Siddhaiah, father of the present appellant and Defendant No. 4 is Veeraswamy Naidu. In the plaint, it was contended that permanent lease deed which was executed in favour of Mandaram Munikannaiah was null and void and the same was barred under Section 29 of the Madras Hindu Religious and Charitable Endowments Act, 1929. On the other hand, in the written statement, it was specifically contended that the subject matter of the land has been perfected by the predecessors of the appellant by adverse possession. On 03.10.1972, the Sub-Court Tirupathi decreed the suit holding that the defendants have failed to pay the rents as tenants and, therefore, they are liable to be evicted. The plea of adverse possession was rejected. The Court also held that Defendant Nos. 3and 4 (appellants herein) are only entitled to compensation for the improvement effected in the field. Aggrieved by the said judgment and decree, the appellants herein filed appeal A.S. No. 130 of 1973 before the High Court. Defendant No. 4 has also filed an Appeal No. 243 of 1973. The Mutt has filed cross objections. The High Court by a common judgment dated 12.10.1976 held that the appellants have perfected the title in respect of tenancy rights by adverse possession and the suit was filed beyond the period of limitation. The High Court further held that the Act will apply

to the facts of the case and observed that it would be open to the parties to take steps as may be open to them under the provisions of the Tenancy Act. With the said observation, the High Court disposed of the appeals and dismissed the cross objections filed by the Mutt. It is important to point out that the judgment of the High Court in the above appeals become final as no appeal was preferred.

9. After the judgment of the High Court in A.S. No. 130 of 1973, nearly after three years the Mutt filed ATC No. 35 of 1980 under the A.P. Tenancy Act against the appellants for eviction on the ground that the appellants herein defaulted in payment of rent from 1373 fasli (1963 onwards). It was highlighted by the appellants by filing reply contending that what was granted by the Mutt in favour of Mandaram Munikannaiah on 11.03.1931 was not a permanent lease but it was only a permanent patta. It was pointed out that the father of the appellants had purchased the suit property by way of registered sale deed dated 25.05.1938 and since then they are in continuous possession and enjoyment of the suit property. Further it was contended that the appellants even otherwise have perfected the title by adverse possession and therefore there is no relationship of landlord and tenants between the Mutt and the appellants. In the same way, the ATC filed by the Mutt is barred by limitation.

10. During the pendency of ATC No. 35 of 1980, the Mutt filed O.S. No. 176 of 1981 on the file of additional Sub- Court Tirupathi for declaration and permanent injunction. The suit was disposed of holding that the plaintiff therein is entitled for declaration as permanent owner but without right to recover possession. Here again, the said finding become final as the Mutt has not challenged the same, however, appeal was filed by the appellant herein against the order of granting injunction by the learned Judge in O.S. No. 176 of 1981. The appeal A.S. No. 75 of 1989, which was also dismissed and second appeal filed by the appellants herein that is S.A. No. 1081 of 2000 is

still pending on the file of High Court of Andhra Pradesh at Hyderabad.

11. On 24.08.1987, learned Judge dismissed ATC No. 35 of 1980 holding that the appellants perfected title by adverse possession. On 03.06.1996, ATA No. 9 of 1987 filed by the Mutt was allowed without taking note of the dismissal of ATC 35 of 1980 filed by the very same Mutt. In those circumstances, Civil Revision No. 2124 of 1996 was filed by the appellants before the High Court under Article 227 of the Constitution of India. Among the several contentions, the main contention raised by the appellants herein is that the judgment of the High Court in appeal A.S. No. 130 of 1973 became final and the Mutt has lost the right to recover the land from the appellants herein. The judgment would operate as res judicata against the Mutt. However, on 17.11.2000, the High Court dismissed the Civil Revision No. 2124 of 1996 by holding that the relationship of landlord and tenant between the appellants and the first respondent-the Mutt, does not suffer from any legal infirmity, not barred by any res judicata dismissed the revision. As observed earlier, challenging the said order three appeals have been filed before this Court.

12. Now, we have to consider whether the decision of the High Court in holding that the findings given in A.S. No. 130 of 1973, the earlier judgment on the same subject matter, would not operate as res judicata, when in the said decision the High Court had categorically held that the appellants perfected their title by adverse possession in the schedule property and the suit is barred by limitation. In addition to the same, we have also to consider whether the High Court is correct in holding that ˇthe Mutt is entitled to recover the suit lands when there is irrevocable condition in the lease patta dated 11.03.1931 wherein it is stated that the Mutt is entitled only for recovery of theerva (rent) and not the possession.

13. The common judgment of the High Court dated 12.10.1973 in A.S. No. 130 and 243 of 1973 with cross

objections are available and placed before this Court as Annexure-P1. After narrating the entire events commencing from permanent lease patta, the High Court came to the conclusion a) the suit for eviction of the appellants and for recovery of possession is not maintainable before a Civil Court b) a proceeding in that direction is maintainable only before the statutory designated authority under the Andhra Pradesh Tenancy Act, 1956 c) the suit is barred by limitation and d) the appellants have perfected their title to the suit properties with respective tenancy rights.

14. Res Judicata is defined under Section11 of the Code of Civil Procedure [CPC] as under:

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."
>
> Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
>
> Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.
>
> Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
>
> Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit

shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

From the above, it is clear that a court is barred from entertaining an issue which has already been decided previously by any court of law.

15. The appellants in the present case have argued that the decision of the High Court in A.S. No. 130 of 1973 fully resolved the issues arising in the present case and, thus, would bar their agitation now. In order to determine this question, we must look closely at the decision of the High Court and see what the Court actually held.

16. The Mutt had approached in appeal to the High Court in A.S. No. 130 of 1973 for declaration of the title of the concerned property in their favour. The Court held that it did not have jurisdiction to entertain a suit for possession against the defendants owing to the A.P. Tenancy Act, 1956. It was held that it was the Tahsildar acting under the Act who was competent to entertain such matters relating to the termination of tenancy and the eviction of the cultivating tenant. The court reached this conclusion by examining the Act holding that the relationship of Tenant-Landlord is established, thus confirming the jurisdiction of the Act and ousting the jurisdiction of a Civil Court. Nevertheless, the court went on to determine the title of the property itself. Arguments were raised that the permanent lease or patta entered into would be in violation of Hindu Religious Endowments Act, and thus be infructuous. It was pointed out that the permanent lease deed 29.11.1915 is ab initio void as sanction was not obtained from the Endowment Authorities as prescribed under the Madras Hindu Religious and Charitable Endowments Act, 1929 which prohibits any alienation, lease, sale or mortgage exceeding five years and the appellants who had purchased in good faith and continuing in possession without any interruption since 1931, have perfected their title by adverse possession. The court on this point held that since the suit had not been brought within the limitation period of 12 years, the appellants had perfected their title with respect of tenancy rights on the basis of adverse possession.

17. Therefore, the High Court in that instance held two things, (1) that the court did not have jurisdiction over the matters owing to the special process prescribed under the Tenancy Act; and (2) the title with respect of tenancy rights was perfected owing to adverse possession. These two rulings are not in conflict with each other, and are equally binding. The jurisdiction of the High Court was ousted only to a limited extent, i.e. with respect to the eviction of the tenants and possession of the property, as the procedure for that was provided under

the Act. But the Court continued to have jurisdiction with respect to the determination of the title of the property.

18. The appellants seem to have misunderstood the import of the High Court decision while relying on it for the purposes of res judicata. The court, in no uncertain terms, held that the title of ownership belongs to the present respondents, but the present appellants had the title with respect of tenancy rights. This decision was perfected by non-appeal and is binding on the parties. Thus, the present appellants are not the owners of the property, but tenants on conditions prescribed under the permanent lease patta dated 11.03.1931 mentioned above. Thus, we hold that the decision of the High Court in 1973 would not bar any proceedings under the Tenancy Act as the issue decided by the court in that instance was merely the tenancy title in favour of the appellants, while the present case is eviction of tenants under Section 13 of the Act.

19. Coming to the next question, it has to be determined whether a permanent lease gives rise to a tenant-landlord relationship within the meaning of the Act. The appellants have relied upon *Chinnappa Reddy, J.'s opinion in G. Veeraswamy v. Uppardasta Papanna,* 1969 An. W.R. 359, where it was held that the Act applies only to tenancy agreements and not to permanent tenancies. We must also note two other opinions regarding the interpretation of the application of the Act. In *U. Pappanna Sastri v. Naga Venkata Satyavati,* AIR 1972 AP 53, the Court placed reliance on *K. Sesharatnamma v. A. Satyanarayana,* 1963 (2) An. W.R. 32. It was held that the pre-condition for establishing the tenant-landlord relationship is that the landlord should have reserved for himself the right to evict the tenant.

20. Thus, a person shall qualify to be a landlord under the meaning of the Act if he is entitled to evict the tenant. Such entitlement can arise either directly due to the agreement entered into (i.e. by providing the time period of tenancy) or by providing the conditions or terms of tenancy violating which the

tenant may be evicted under Section 13. We find no reason why a permanent lease which provides terms would not result in a tenant- landlord relationship since it is implied in such an agreement that non fulfillment of the prescribed terms would give the right to the landlord to evict the tenant. One such term can be payment of periodic rent, which exists in the present case. Thus, the respondents in the present case do qualify as landlords.

21. For the aforementioned reasons, we hold that the present proceedings emerging from the ruling of the IIIrd Additional District Judge, Tirupathi, exercising the powers of Appellate Authority under the A.P. Tenancy Act does not suffer from any legal infirmity as the proceedings are not barred by res judicata. Furthermore, the parties qualify as tenant-landlord and are, thus, amenable to the jurisdiction of the Tenancy Act. In view of categorical finding of the Appellate Authority that the tenants have committed default in payment of rent from fasli 1372 and never paid rent, they are liable to be evicted as per Section 13 of the Act which was rightly affirmed by the High Court. We thus find no reason to interfere in the order of the High Court, consequently, all the three appeals are dismissed with no order as to cost.

R.P. Appeals dismissed.

THAKUR KULDEEP SINGH (D) THR. L.R. & ORS.

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 8636 of 2002)

MARCH 8, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Land Acquisition Act, 1894 – ss. 4, 18, 23 (1-A) and 54 – Land Acquisition for public purpose – Property situated in Karol Bagh, Delhi – Compensation fixed by Land Acquisition Collector – Reference u/s. 18 seeking enhancement of compensation dismissed – High Court enhancing compensation @ Rs. 3000/- per sq. yd. with all other statutory benefits – On appeal, held: Market value of the acquired lands cannot be fixed merely on basis of circle rate– Sale price in respect of small piece of land cannot be the basis for determination of market value of large stretch of land – Nature of land, locality and prevailing circumstances are relevant – Evidence of the attorney of claimant that acquired plot was located within the developed commercial hub of Karol Bagh having all facilities – Thus, the amount determined by High Court is just, reasonable and acceptable.

The appellants' property was situated in Karol Bagh. The respondents acquired the same for public purpose- for Joshi Memorial Hospital. The Land Acquisition Collector determined the market value of the acquired land @ Rs. 550 per sq. yd. and in addition awarded solatium @ 30 % and additional amount u/s. 23 (1-A) of the Land Acquisition Act @ 12 %. The appellants filed reference u/s. 18 and the same was dismissed. The High Court enhanced the compensation @ Rs. 3,000/- per sq. yd. with all other statutory benefits. Hence the present cross appeals.

Dismissing the appeals, the Court

HELD: 1.1 While fixing compensation, it is the duty of the Land Acquisition Collector as well as the Court to take into consideration the nature of the land, its suitability, nature of the use to which the lands are sought to be acquired on the date of notification, income derived or derivable from or any other special distinctive feature which the land is possessed of, the sale transactions in respect of land covered by the same notification are all relevant factors to be taken into consideration in determining the market value. It is equally to consider the suitability of neighbourhood lands as are possessed of similar potentiality or any advantageous features or any special characteristics available. The Land Acquisition Collector as well as the Court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. While doing so, imagination should be eschewed and mechanical assessment of evidence should be avoided. More attention should be on the bona fide and genuine sale transactions as guiding star in evaluating the evidence. The relevant factor would be that of the hypothetical willing vendor would offer for the land and what a willing purchaser of normal human conduct would be willing to buy as a prudent man in normal market conditions prevailing in the open market in the locality in which the acquired lands are situated as on the date of notification u/s. 4(1) of the Land Acquisition Act, 1894. The Judge who sits in the armchair of the willing buyer and seek an answer to the question whether in the given set of circumstances as a prudent buyer he would offer the same market value which the court proposed to fix for the acquired lands in the available market conditions. The market value so determined should be just, adequate and reasonable. [Para 6] [148-H; 149-A-F]

1.2. In view of the purpose for which the 'circle rates' have been notified by the Ministry of Urban Affairs and Employment, market value of a plot cannot be determined solely on the basis of the circle rates. On the other hand, it cannot be ignored in toto. If other materials are available, Government rates can also be considered as corroborative evidence. The nature of the land plays an important role. Likewise, market conditions prevailing as on the date of notification are also relevant. Sale price in respect of small piece of land cannot be the basis for determination of market value of large stretch of land. [Para 13] [155-H; 156-A-B]

1.3. Merely on the basis of 'circle rate', market value for acquired lands cannot be fixed but, at the same time, the locality and the prevailing circumstances are relevant for determining the real value of the land. It is seen from the evidence of PW-2, Power of Attorney holder of the appellants that the acquired plot was located in the midst of commercial properties, had commercial potentiality and for similar properties, the rates in the locality were not less than Rs.6,000/- per sq. mtr. He tendered evidence and placed documents which includes Eicher City Map. PW-2 also highlighted that the plot was located within the developed commercial hub of Karol Bagh having all facilities. [Para 15] [156-E-G]

1.4. The High Court rightly observed that the Reference Court overlooked the evidence on record that after the property was purchased by the appellants in 1961, considerable development in and around the area had taken place. The acquired property was purchased by the appellants in the year 1961 and that the acquisition proceedings started in the year 1983 i.e. after a period of 22 years from the date of 4 Section (1) notification. The High Court also relied on a decision fixing market value @ Rs.2320/- per sq. yard for commercial plots based on

the circle rates. When the appeal was carried to this Court, by decision dated 17.02.1997, this Court enhanced the amount of compensation to Rs.3,000/- per sq. yd by observing that the land was located in a commercial hub and was adjoining to a petrol pump. The said decision relates to Chowkri Mubarkabad being a locality adjacent to Karol Bagh situated by the side of main Rohtak Road. It is also demonstrated that the same is in close proximity to Karol Bagh area and the plot in question was located in the midst of Karol Bagh. Though in the award, the Land Acquisition Collector mentioned that the plot is 2 km. away from the commercial area in the Karol Bagh admittedly, the very same Joshi Memorial Hospital was running on the land under acquisition since 1970-71 and the hospital was paying rent to the pattedars/owners. [Para 15] [156-H; 157-A-E]

1.5. On going through the location as found in the Delhi Government Map, the assertion of PW-1, an officer of the Government, PW-2, Power of Attorney of the appellants, various activities in and around the plot and considering the fact that the Land Acquisition Collector relied on the three property transactions relating to 1980-81, 1981-82 and 1982-83 and not nearer to the date of notification u/s. 4 (1) - 09.05.1983 and also of the fact that even on the date of notification the very same hospital i.e. Joshi Memorial Hospital was running on the land, even if 'circle rate', is eschewed, the amount determined by the High Court is just, reasonable and acceptable. For the same reasons and in the absence of additional material, the market value as claimed by the claimants-appellants, is not increased. [Para 16] [157-F-H; 158-A]

Delhi Development Authority vs. Bali Ram Sharma and Ors. **(2004) 6 SCC 533,** Union *of India vs. Pramod Gupta (Dead) by L.Rs. and Ors.* **(2005) 12 SCC 1;** *Ranvir Singh and*

Anr. vs. Union of India **(2005) 12 SCC 59;** *Karan Singh and Ors. vs. Union of India* **(1997) 8 SCC 186;** *Lal Chand vs. Union of India and Anr.* **JT 2009 (11) SC 490;** *Ram Lal Bansiwal vs. Union of India and Ors.* **R.F.A. No. 131/88, referred to.**

Case Law Reference:

(2004) 6 SCC 533	**Referred to.**	**Para 11**
(2005) 12 SCC 1	**Referred to.**	**Para 11**
(2005) 12 SCC 59	**Referred to.**	**Para 11**
(1997) 8 SCC 186	**Referred to.**	**Para 12**
JT 2009 (11) SC 490	**Referred to.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8636 of 2002.

From the Judgment & Order dated 18.9.2001 of the High Court of Delhi at New Delhi in R.F.A. No. 166 of 2000.

WITH

C.A. Appeal No. 8637 of 2002

Lakshmi Raman Singh, Udita Singh, Neelam Singh for the Appellant.

T.S. Doabia, Rekha Pandey, Kiran Bhardwaj, Manpreet Singh Anil Katiyar, D.S. Mahra, Rachna Srivastava for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the impugned final judgment and order dated 18.09.2001 of the Division Bench of the High Court of Delhi at New Delhi in R.F.A. No. 166 of 2000 whereby the High Court

allowed the appeal of the claimants enhancing the compensation payable to them for acquiring their land @ Rs.3000/- per sq. yds. along with solatium @ 30% and interest @ 9% p.a. for a period of one year from the date of taking possession by the Collector and thereafter @ 15% p.a. till date of payment of compensation and held that the appellants are entitled to additional amount under Section 23(1-A) of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") @ 12% p.a. from the date of notification under Section 4 of the Act till the date of award or taking over possession by the Collector.

2. Dissatisfied with the above compensation awarded by the High Court, the appellants-claimants have preferred Civil Appeal No. 8636 of 2002 praying for Rs.6000/- per sq. yd. and the respondents-Union of India filed Civil Appeal No. 8637 of 2002 against the enhancement of compensation by the High Court from Rs.550/- per sq. yd. to Rs. 3000/- per sq. yd. For convenience, we shall refer claimants-land owners as appellants and Union of India as respondents.

3. Brief facts in a nutshell are as under:

The appellants had purchased the property situated in Karol Bagh, subject matter of the present acquisition containing an area of approximately 2475 sq. yds. from the Ministry of Rehabilitation, Government of India in the year 1961 in a public auction for a consideration of Rs.1,61,000/-. By notification dated 21.10.1981, Ministry of Works and Housing (Land Division), Government of India, revised the schedule of market rates of land in different areas of Delhi/New Delhi w.e.f. 01.04.1981 dividing entire Delhi/New Delhi in VIII Groups. Ajmal Khan Road and Gaffar Market falls within Group-III and the rate for residential plots was fixed @ Rs.2000/- per sq. mt. whereas for commercial plots, it was fixed @ Rs.6000/- per sq. mt. The said notification was issued with the concurrence of the Ministry of Finance. On 09.05.1983, a notification under Section 4 of

the Act was issued by the Land & Building Department expressing its intention to acquire an area of 4952 sq. yds. of land situated in Karol Bagh for a public purpose, namely, for Joshi Memorial Hospital. The appellants herein filed their objections claiming suitable residential or commercial plot of not less than 500 sq. yds., not far away from the claimant's plot and also claimed compensation of their acquired land @ Rs.6000/- per sq. yd. in addition to a sum of Rs.1,53,293/- for superstructure standing on the acquired land. The Land Acquisition Collector, Delhi vide Award No. 7/86-87 dated 30.05.1986, determined the market value of the acquired land @ Rs.550/- per sq. yd. and, in addition, awarded solatium @ 30% and an additional amount under Section 23(1-A) of the Act @ 12% p.a. w.e.f. 09.05.1983. Dissatisfied with the said Award, the appellants-claimants filed a reference under Section 18 of the Act before the Civil Court, Delhi. The Additional District Judge vide order dated 19.11.1999, dismissed the same holding that the compensation awarded by the Land Acquisition Collector is quite adequate. Aggrieved by the said order, the appellants-claimants filed R.F.A. No. 166 of 2000 under Section 54 of the Act before the High Court. The Division Bench of the High Court by its impugned judgment allowed the same and enhanced the compensation @ Rs.3000/- per sq. yd. with all other statutory benefits.

4. According to the appellants, that their plot was surrounded in the north by a commercial property, namely, Jain Publishing House, in the south by Plot No. 875 which was also acquired by the impugned award for the same public purpose, namely, construction of Joshi Memorial Hospital, on the remaining half there were commercial shops, in the east there was Joshi Road and in the west of which was East Park Road and Ajmal Khan Road. In other words, according to the appellants, the entire area surrounding the plot in question as on the date of Section 4 (1) notification was commercial and that the plot had tremendous potential of being used for commercial purposes. It is also pointed out that adjacent

commercial areas are Model Basti, Ajmal Khan Road and Faiz Road. They placed further materials to show that all amenities such as water, telephone, electricity and roads were available to the acquired land much prior to the notification issued under Section 4 (1) of the Act. We have already referred to the fact that the plot of the land was purchased by the appellants from the Ministry of Rehabilitation, Government of India in the year 1961 for a consideration of Rs.1,61,000/-.

5. The Land Acquisition Collector, while fixing compensation, considered three sale transactions. The details as stated in the Award No. 7/1986-87 are as follows:-

Sl. No.	Name of Year	Total Area	Total Price Paid for the Property	Average per Sq. yds
1.	1980-1981	203 sq.yds	Rs.1,02,000	Rs.502/-
2.	1981-1982	257 sq.yds	Rs.1,70,000	Rs.664/-
3.	1982-1983	463 sq.yds	Rs.1,94,375	Rs.419/-

Taking note of the average price paid for the property transactions for the last three years and the area involved as well as other circumstances, the Land Acquisition Collector passed an award fixing Rs.550/- per sq. yd as the market value for the land under acquisition. Though he fixed compensation for other structures etc., in view of the fact that the appellants are concerned about the market value of the plot, there is no need to consider those aspects.

6. Sections 23 and 24 of the Act speak about the matters to be considered and to be neglected in determining compensation. Let us consider whether the appellants are entitled to higher compensation than that of the one fixed by the High Court or Union of India is justified in seeking reduction of the market value/compensation for the acquired land. While

fixing compensation, it is the duty of the Land Acquisition Collector as well as the Court to take into consideration the nature of the land, its suitability, nature of the use to which the lands are sought to be acquired on the date of notification, income derived or derivable from or any other special distinctive feature which the land is possessed of, the sale transactions in respect of land covered by the same notification are all relevant factors to be taken into consideration in determining the market value. It is equally to consider the suitability of neighbourhood lands as are possessed of similar potentiality or any advantageous features or any special characteristics available. The Land Acquisition Collector as well as the Court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. While doing so, imagination should be eschewed and mechanical assessment of evidence should be avoided. More attention should be on the bona fide and genuine sale transactions as guiding star in evaluating the evidence. The relevant factor would be that of the hypothetical willing vendor would offer for the land and what a willing purchaser of normal human conduct would be willing to buy as a prudent man in normal market conditions prevailing in the open market in the locality in which the acquired lands are situated as on the date of notification under Section 4(1) of the Act. In other words, the Judge who sits in the armchair of the willing buyer and seek an answer to the question whether in the given set of circumstances as a prudent buyer he would offer the same market value which the court proposed to fix for the acquired lands in the available market conditions. The market value so determined should be just, adequate and reasonable.

7. Keeping the above principles in mind, let us consider the case of both the parties. The appellants in order to sustain their claim examined one Labh Singh Chane, Under Secretary (Land), Ministry of Urban Affairs and Employment, Nirman Bhawan, New Delhi as PW-1 and the Circular issued by the Government of India, Ministry of Works and Housing (Land

Division) New Delhi on 21.10.1981 which was marked as Ex. PW 1/1. Inasmuch as the appellants heavily relied on the above circular before considering the evidence of the officer, it is useful to analyze the said circular:

"No.J-22011/8/80 LD (DOI)
Government of India
Ministry of Works & Housing
(Lands Division)
******

New Delhi, the 21st October, 1981

To

1. The Land & Development Officer,
Nirman Bhawan, New Delhi. (5 copies)

2. The Vice-Chairman,
Delhi Development Authority,
Vikas Minar, New Delhi. (5 copies)

Subject: Schedule of market rates of land in different areas of Delhi/New Delhi.

*****

Sir,

The Government of India have had under consideration the question of revision of the schedule of market rates of land in Delhi/New Delhi w.e.f. 1.4.1981. The land rates have now been revised as shown in the schedule annexed to this letter and shall be adopted for all purposes except for (i) hotels, (ii) cinemas and (iii) for the purpose of recovery of unearned increase due to the lessor, while granting permission for sale, in respect of residential leases measuring 100 sq. yds. (83.613 sq. metres) or less only.

2 (a). The market rates for commercial purposes for Group I & II are based on an FAR of 250, for Group III on FAR of 150 and for other Groups on existing FARs.

(b) Residential rates are based on the existing FAR prescribed for various areas.

NOTES: These rates will be reduced or increased proportionate to the reduction or increase in the FAR.

3. For multi-storeyed group housing by co-operative group housing societies 1½ times the residential rate and by others twice the residential rate will apply up to an FAR of 100. The rates will be increased corresponding to the increase in FAR.

4. For the purpose of calculating and recovering lessor's share of unearned increase, while granting sale permissions, in respect of the residential leases measuring 100 sq. yds. (83.613 sq. metres) or less, the land rates laid down in this Ministry's letter No. J-22011/1/75-L.II (i) dated 21st June 1979 will be applicable for a further period of two years from 1.4.1981. i.e. till 31.3.1983.

5. In so far as hotel and cinema sites are concerned, the case should be specifically considered in consultation with the Ministry of Finance.

6. For any locality not covered by the schedule annexed hereto, the rates for comparable areas will be applied.

7. These rates are effective from 1st April, 1981 to 31st March, 1983.

8. The review of these rates should be taken up by the Land and Development Officer well before the date of expiry.

9. This issues with the concurrence of the Ministry of Finance.

10. It may be noted that the revised rates are for area expressed in square metres.

Yours faithfully,
Sd/-
(R.Krishnaswamy)
Under Secretary (Lands)"

Schedule of Market Rates

S.No.	Name of the locality	Residential	Commercial
1	2	3	4
	Group I		
	Xxx xxxx		
	Group II		
	Xxx xxxx		
	Group III		
1.	Ajmal Khan Road	2,000	6,000
2.	Gaffar Market	2,000	6,000
3.	Khan Market	2,000	6,000
Xxx xxxx			
14.	Karol Bagh	2,000	6,000
Xxx xxxx			
Xxx xxxx			
	Group IV		
	Group V		
Xxx xxxx			
6.	Old and New Rohtak Road	1,200	2,400
	Group VI		
	Xxx xxxx		

Group VII
Xxx xxxx

Group VIII
Xxx xxxx"

8. Before considering the acceptability or relevancy of the circular, let us examine the evidence of PW-1 - Labh Singh Chane, Under Secretary (Land) Ministry of Urban Affairs and Employment. His evidence in chief and cross-examination are relevant which reads as under:-

"Labh Singh Chane, Under Secretary (Land) Ministry of Urban Affairs and Employment, Nirman Bhawan, New Delhi.

On S.A.

I have seen Circulars dated 21.10.81 No. J-22011/3/80-LD (DO1) copy of which is Ex. PW-1/1. We arrive at this conclusion after consulting Income-tax Department, L& DO, Delhi Admn. and DDA. Thereafter, we issue the circular. There is a committee which considers this Data and the recommendations are considered by the Government, Sanction of the Finance Ministry is taken and then we fix the rates.

Xxxx xxxxx by Shri Krishan Kumar, for Union of India:

I was not a party to the above said proceedings or the conclusion arrived at by L & DO & and our department. I have no personal knowledge about this case. I have made the above statement on the basis of documents. I am not a party to the recommendations made by the Committee. The above said rates are primarily intended for the recovery of misuse charges, recovery of unearned increase and revision of ground rent in respect of Central Government properties. The Data is obtained on the basis

of values recording in the Registered Sale-Deeds and Auction rates. I have no knowledge about the property in dispute. I cannot refer to any Sale-Deeds mentioned above.

Xxxx by Shri S.C.Arora counsel for respondents No.2 & 3:

It is correct that I have never worked with Shri R. Krishnaswami, the then Under Secretary (Lands). It is correct that I cannot identify the signatures of Shri R. Krishnaswami, but I am deposing so on the basis of the record. The record produced by me today in the court is maintained by the office.

It is wrong to suggest that I have deposed falsely.

RO & AC Sd/-

1.12.98 ADJ"

9. According to PW-1, the valuation was fixed after consulting Income-tax Department, L & DO, Delhi Admn. and DDA. He has also deposed that there is a Committee which considers the details and the recommendations are considered by the Government and after sanction of the Ministry of Finance, the Ministry of Urban Affairs and Employment would fix the rates. In the cross-examination, though he has admitted that he had no personal knowledge, however, he has explained that the details/figures in the circular dated 21.10.1981, have been made on the basis of various information/documents. He has also stated that the rates provided in the circular are primarily intended for the recovery of misuse charges, recovery of unearned increase and revision of ground rent in respect of Central Government properties. He has also informed that the data was obtained on the basis of values shown in the registered sale deeds and auctioned rates.

10. It is not in dispute that the circular referred to by PW-1 is for the purpose of recovery of unearned increase while granting permission for sale in respect of residential leases measuring 100 sq. yds or less. The rates mentioned therein are effective from 01.04.1981 to 31.03.1983. In the schedule appended to the circular Sl. No. 14 in Group III relates to Karol Bagh where the acquired lands are situated. It further shows that if it is residential plots, the value is to be fixed @ Rs.2,000/- per sq. mt. and if it is commercial plots, the rate notified is @ Rs.6,000/- per sq. mt. Sl. No.6 in Group V which relates to old and New Rohtak Road and as per the circular, the residential value fixed is Rs.1,200/- per sq. mt. and commercial value is Rs.2,400/- per sq. mt.

11. Mr. T.S. Doabia, learned senior counsel for the respondents submitted that fixing market value on the basis of 'circle rates' is not sustainable and in support of the same, he relied on the decisions of this Court in *Delhi Development Authority vs. Bali Ram Sharma & Ors.* (2004) 6 SCC 533, *Union of India vs. Pramod Gupta (Dead) by L.Rs. & Ors.,* (2005) 12 SCC 1 and *Ranvir Singh & Anr. vs. Union of India,* (2005) 12 SCC 59.

12. In *DDA's* case (supra), this Court in view of the market value fixed in the case of *Karan Singh & Ors. vs. Union of India,* (1997) 8 SCC 186 and taking note of the fact that acquisition of land under the same notification without adverting 'Government schedule of rates' fixed the market value as determined in *Karan Singh's* case (supra). In *Pramod Gupta's* case (supra), this Court did not approve the method of fixing market value based on certain notifications issued by the Union of India in the year 1965 which were meant for the residential plots. In *Ranvir Singh's* case (supra), the circle rates were not followed in determining the market value.

13. We accept that in view of the purpose for which the 'circle rates' have been notified by the Ministry of Urban Affairs

and Employment, market value of a plot cannot be determined solely on the basis of the circle rates. On the other hand, it cannot be ignored in toto. If other materials are available, Government rates can also be considered as corroborative evidence. The nature of the land plays an important role. Likewise, market conditions prevailing as on the date of notification are also relevant. Sale price in respect of small piece of land cannot be the basis for determination of market value of large stretch of land.

14. It is also useful to refer the recent decision of this Court in *Lal Chand vs. Union of India & Another,* JT 2009 (11) SC 490. A two-Judge Bench has held that the circle rates relate to urban/city areas in Delhi and are wholly irrelevant when the court has to decide the market value in regard to land situated in a village on the outskirts of Delhi. Based on this, learned counsel for the appellants submitted that this Court has not completely ignored the rates notified by the Government though it cannot be applied to the area other than urban/city.

15. It is clear from the above decisions and discussion that merely on the basis of 'circle rate', market value for acquired lands cannot be fixed but, at the same time, as observed earlier, the locality and the prevailing circumstances are relevant for determining the real value of the land. We have adverted to the assertion of the claimants about the proximity and various other attending circumstances. It is seen from the evidence of PW-2, Power of Attorney holder of the appellants that the acquired plot was located in the midst of commercial properties, had commercial potentiality and for similar properties, the rates in the locality were not less than Rs.6,000/- per sq. mtr. He tendered evidence and placed documents Ex.PW-2/1 to PW-2/11 which includes Eicher City Map. PW-2 has also highlighted that the plot was located within the developed commercial hub of Karol Bagh having all facilities. As rightly observed by the High Court, the Reference Court overlooked the evidence on record that after the property was

purchased by the appellants in 1961, considerable development in and around the area had taken place. The acquired property was purchased by the appellants in the year 1961 and it is not in dispute that the acquisition proceedings started in the year 1983 i.e. after a period of 22 years from the date of 4 (1) notification (9/5/1983). The High Court has also relied on *Ram Lal Bansiwal vs. Union of India & Ors.,* R.F.A. No. 131/88, a decision of fixing market value @ Rs.2320/- per sq. yard for commercial plots based on the circle rates. When the appeal was carried to this Court, by decision dated 17.02.1997, this Court enhanced the amount of compensation to Rs.3,000/- per sq. yd by observing that the land was located in a commercial hub and was adjoining to a petrol pump. It is pointed out that the said decision relates to Chowkri Mubarkabad being a locality adjacent to Karol Bagh situated by the side of main Rohtak Road. It is also demonstrated that the same is in close proximity to Karol Bagh area and the plot in question was located in the midst of Karol Bagh. Though in the award, the Land Acquisition Collector has mentioned that the plot is 2 km. away from the commercial area in the Karol Bagh admittedly, the very same Joshi Memorial Hospital was running on the land under acquisition since 1970-71 and the hospital was paying rent to the pattedars/owners. This information has been mentioned in the synopsis filed by the Union of India in their Civil Appeal No. 8637 of 2002.

16. We have also verified the Delhi Government Map survey of 1982. On going through the location as found in the Government Map, the assertion of PW-1, an officer of the Government, PW-2, Power of Attorney of the appellants, various activities in and around the plot and considering the fact that the Land Acquisition Collector relied on the three property transactions relating to 1980-81, 1981-82 and 1982-83 and not nearer to the date of notification under Section 4 (1) i.e. 09.05.1983 and also of the fact that even on the date of notification the very same hospital i.e. Joshi Memorial Hospital was running on the land, we hold that even if we eschew 'circle

rate', the amount determined by the High Court is just, reasonable and acceptable. For the same reasons and in the absence of additional material, we are not inclined to increase the market value as claimed by the claimants-appellants.

17. In the light of the above discussion, the appeals filed by the claimants as well as the Union of India are dismissed. No costs.

N.J. Appeal dismissed.

STATE OF M.P.

v.

SUGHAR SINGH & ORS.

(Curative Petition (Crl.) Nos.7-8 of 2009)

MARCH 9, 2010

[K.G. BALAKRISHNAN, CJI., S.H. KAPADIA, ALTAMAS KABIR AND R.V. RAVEENDRAN, JJ.]

Constitution of India, 1950:

Articles 142 r/w Or. XLVII, Supreme Court Rules, 1966 – Curative petition – In the appeals filed by State against acquittal, impleading only four out of eight accused, Supreme Court, by its judgment dated 7.11.2008, reversing the acquittal of all the accused including those who were not impleaded as respondents and were not issued notice – HELD: There is a serious violation of principles of natural justice as the acquittal of all the accused has been set aside even though only four of them were respondents before the Court and others were not heard – Judgement dated 7.11.2008 is recalled – The accused-respondents directed to be released, if in custody – The appeals are restored to the file for being heard afresh with a direction that the said four accused be impleaded as respondents and all the accused be served with notice afresh – Practice and Procedure – Supreme Court Rules, 1966 – Or. XLVII – Natural justice – Judgement – Recalled.

·CRIMINAL APPELLATE JURISDICTION:

Curative Petition (Crl.) Nos.7-8 of 2009

IN

R.P. (CRL.) D 37915 of 2008.

1. *State of M.P. v. Sughar Singh & Ors.* (2008) 1 SCR 725.

IN

Criminal Appeal Nos.1362-1363 of 2004.

From the Judgment & Order dated 3.1.2003 of the High Court of Madhya Pradesh, Jabalpur bench at Gwalior in Criminal Appeal No. 242 of 1991 and 253 of 1991.

WITH

Cur. Pet. (CRL.) NO.D 6924/2009 IN R.P.(CRL.)D 37915 of 2008 In Crl. A. Nos.1362-1363 of 2004.

Jai Prakash Pandey, Niraj Kr. Mishra for the appearing parties.

The Order of the Court was delivered

ORDER

The Sessions Judge, Shivpuri in the State of Madhya Pradesh tried eight accused persons for the offence under Section 302 read with Section 149 of the I.P.C., Section 326 read with Section 149 of the I.P.C. and other allied offences. All the accused were found guilty of the offences charged against them and for the main offence punishable under Section 302 read with Section 149 of the I.P.C. all were convicted and sentenced to undergo imprisonment for life and for the remaining offences they were sentenced to undergo rigorous imprisonment. The accused persons preferred two appeals before the High Court of Judicature of Madhya Pradesh, namely, Criminal Appeal Nos.242/1991 and 253 of 1991. The Division Bench of the High Court of Madhya Pradesh by its judgment dated 3.1.2003 set aside the conviction and sentence imposed against the accused who were the appellants before it. Aggrieved by the same, the State preferred Criminal Appeal Nos.1362-1363 of 2004. Though there were eight accused persons, only four accused were arrayed as party respondents in the said appeals namely, Sughar, Laxman, Onkar and Ramesh. Other accused, namely, Bhoja, Raghubir, Puran and Balbir were not impleaded as

respondents in these Criminal Appeals and consequently notices were not issued to them. This Court, by judgment on 7th November, 2008 in the aforesaid Criminal Appeals, reversed the acquittal of the accused by the High Court and found them guilty of the offences punishable under Section 304 Part-II read with Section 149 of the I.P.C. and sentenced them to undergo imprisonment for a period of six years. The conviction of the accused for the offences punishable under Section 148 as also Section 326 read with the Section 149 of the I.P.C. and the sentence imposed by the Sessions Court in regard to the said offences was upheld by this Court.

We have heard learned counsel for the petitioners. The respondent State, though served with a notice through standing counsel, has not chosen to enter appearance.

These Curative Petitions have been filed by accused No.2 (Raghubir) and by accused no.4 and 5 (Sughar Singh and Laxman) on the ground that acquittal of Bhoja, Raghubir, Puran and Balbir have been reversed without affording an opportunity of being heard. We see that there is serious violation of principles of natural justice as the acquittal of all the accused has been set aside even though only four of them were made respondents before this Court and the others were not heard. We are, therefore, constrained to recall the judgment passed by this Court in Criminal Appeal Nos.1362-1363 of 2004 on 7th November, 2008.

Consequently, the accused Sughar Singh, Laxman, Onkar and Ramesh, if they are in custody, are directed to be released forthwith.

In the result, these Curative Petitions are disposed of and the Criminal Appeal Nos.1362-1363 of 2004 are restored to the file for being heard afresh with a direction that the other four accused (Bhoja, Raghubir, Puran and Balbir) be impleaded as respondents and all accused be served with fresh notices.

R.P. Curative Petitions disposed of.

DHARAMVEER AND ORS.

v.

STATE OF U.P.

(Criminal Appeal No. 1348 of 2004)

MARCH 09, 2010

[HARJIT SINGH BEDI, C.K. PRASAD, JJ.]

Penal Code, 1860 – ss.148, 302/149 and 307/149 – Prosecution under – Eye-witnesses to the incident – Conviction by courts below – On appeal, held: Conviction justified – Delay in despatch of the FIR, enmity between the parties and non-examination of one of the witnesses are not fatal to prosecution case.

Constitution of India, 1950 – Article 136 – Jurisdiction under – Scope of - Power under Article 136 is very wide – Supreme Court can re-appraise the evidence and set aside concurrent finding of fact – However, appreciation of evidence is resorted to, in exceptional circumstances – Where the High Court has analysed the evidence in great detail and found the evidence reliable, there is no scope for interference.

Appellants-accused were prosecuted for having killed two persons. Trial court, relying on the evidence of Medical Officer, the post-mortem reports, and the evidence of PW.1 and PW.2 (the eye-witnesses), held that the prosecution has been able to prove its case beyond all reasonable doubt and accordingly convicted the accused for offence u/ss.148, 302/149 and 307/149 IPC. The conviction order was confrmed by the High Court. Hence, the present appeal.

Dismissing the appeal, the Court

HELD: 1. Power under Article 136 of the Constitution is very wide and nothing prevents Supreme Court to re-appraise the evidence and set aside concurrent finding

of fact holding the accused guilty. However, appreciation of evidence is resorted to, in exceptional circumstances when it comes to the conclusion that the finding of guilt recorded by the High Court is perverse, meaning thereby the High Court had recorded the finding without consideration of relevant material or consideration of irrelevant material, the consideration or non-consideration whereof shall have bearing on the finding recorded. The finding can also be considered perverse, if a person duly instructed in law will not come to that finding. Supreme Court may also interfere with the finding of fact when it finds violation of established procedure going to the root of the case. Where the High Court has analysed the evidence in great detail and found the evidence reliable there is no scope for interference by this Court. [Para 9] [168-G-H; 169-A-C]

Ganga Kumar Srivastava vs. State of Bihar **(2005) 6 SCC 211, relied on.**

Ramanbhai Naranbhai Patel and Ors. vs. State of Gujarat **(2000) 1 SCC 358, referred to.**

2.1. The case of the prosecution cannot be rejected merely on the ground that there was delay in despatch of the First Information Report. There does not seem any delay in lodging the First Information Report. Not only this, after the First Information Report was lodged, investigation proceeded, the statement of the witnesses recorded, the inquest report prepared and the dead bodies sent for post-mortem examination without delay. It is also on record that the Special Report was sent by post. In the background of the aforesaid facts, mere delay in receipt of the Special Report, in no way causes doubt to the case of the prosecution. Furthermore, none of the witnesses including the investigating officer of the case have been cross-examined on this point. [Para 13] [171-H; 172-A-D]

L/NK. Meharaj Singh vs. State of Uttar Pradesh **JT 1994 (3) SC 440;** *Pala Singh and Anr. vs. State of Punjab* **1972 (2) SCC 640, referred to.**

2.2. The evidence of an eye-witness cannot be rejected only on the ground that enmity exists between the parties. [Para 15] [173-A]

2.3. True it is that 'R' could have been an important witness to unfold the true story but his non-examination itself is not sufficient to discard the case of the prosecution. It has come in evidence of PW.1 that later on prosecution suspected that he was accomplice in the crime. Hence, his non-examination has been explained. Not only this, the evidence of the two eye-witnesses, with minor contradictions has withstood the test of cross-examination and therefore the case of the prosecution is not fit to be thrown out on these grounds. [Para 16] [173-D-E]

2.4 Why the appellants did not cause any injury to the witnesses cannot be explained by the prosecution. It will require entering into their mind. Human behaviour are sometimes strange. Merely the fact that these witnesses did not suffer any injury, will not make their evidence untrustworthy. This aspect of the matter has been considered by the High Court in right perspective. [Para 18] [173-G-H; 174-A]

Case Law Reference:

(2005) 6 SCC 211	**Relied on**	**Para 7**
(2000) 1 SCC 358	**Referred to**	**Para 8**
JT 1994 (3) SC 440	**Referred to**	**Para 11**
1972 (2) SCC 640	**Referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal No. 1348 of 2004.

From the Judgment & Order dated 1.7.2003 of the High Court of Judicature at Allahabad in Criminal Appeal No. 3083 of 2001.

J.C. Gupta, Ajit Kumar Gupta, Mridula Ray Bharadwaj for the Appellant.

Ratnakar Dass, T.N. Singh, Rajiv Dubey and Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

C.K. PRASAD, J. 1. This appeal by way of special leave filed under Article 136 of the Constitution of India is against the judgment dated Ist July, 2003, of the Allahabad High Court in Criminal Appeal No. 3083 of 2001 whereby it had affirmed the judgment and order of conviction and sentence of the appellants passed by the Special Judge, Bullandshahar in Sessions Trial No.154 of 1998.

2. The appellants Dharamveer, Sanjay, Vedi and Vinod besides other accused persons were put on trial for offence under Sections 148, 302/149 and 307/149 of the Indian Penal Code. The Trial Court convicted all the appellants under Sections 148 and 302/149 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for one year and life respectively. They were further convicted under Sections 307/149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 10 years. Sentences were directed to run concurrently. On an appeal the High Court dismissed the same.

3. Prosecution commenced on the basis of report given by PW.1 Jaipal Singh on 10/10/1997 to the In-charge out-post at Khurja junction within Khurja Police Station. According to the prosecution on 10th October, 1997 at 4 P.M. the informant PW.1, Jaipal Singh along with his nephew Sheodan (deceased) brother Jagdish(deceased) besides other persons including Shiv Charan (PW2) had gone from their village Ramgarhi to

village Auranga to participate in a *Panchayat* convened to settle the dispute between Prakash and his son. According to the informant on way back, the two deceased and Ravi Kiran were 30 to 35 steps ahead of them and after they had crossed the grove of Ravi Kiran, appellants herein armed with country-made pistols came out of millet field of Shreepal and started firing on the two deceased and Ravi Kiran. According to the prosecution Jagdish ran towards Ramgarhi and Sheodan towards Auranga and these appellants chased Jagdish and killed him whereas Sanjay, Sheesh Pal and Neetu (since acquitted) followed Sheodan and caused firearm injury causing his death in the field of Balwant.

4. On the basis of the aforesaid information Crime No.21/118/97 under Section 147, 148, 149, 307 and 302 Indian Penal Code was registered at 8.20 P.M. at Khurja Police Station. After usual investigation Police submitted charge-sheet against the appellants and ultimately they were committed to Court of Sessions where they were charged for commission of offence under Section 148, 302/149 and 307/149 of the Indian Penal Code. Appellants denied to have committed the offence and claimed to be tried. In order to bring home the charge, prosecution, altogether examined seven witnesses, out of which PW.1 Jaipal Singh and PW.2 Shivcharan are the eye-witnesses to the occurrence. PW.3, Dr.P.P. Singh is a Medical Officer who had examined Ravi Kiran and found lacerated wound on his person caused by blunt object. PW.4, Dr.S.K. Sharma is another Medical Officer, who had conducted post mortem examination on the dead bodies of Jagdish and Sheodan and found ante-mortem gun shot injuries on their person. In his opinion both the deceased died of shock and haemorrhage as a result of gun shot injuries. PW.5, Ashok Kumar is a Constable who took the dead bodies to mortuary for post mortem examination. PW.6, Madan Mohan is Sub-Inspector of Police, who after investigation submitted the charge-sheet against the appellants. PW.7, Ram Naresh Yadav is Incharge Police outpost, who proved the check-reports.

5. Besides oral evidence several documents including first information report and post mortem reports were also brought on record.

6. Relying on the evidence of Medical Officer and the post mortem reports, the trial court came to the conclusion that the two deceased met homicidal deaths. Further, relying on the evidence of PW.1 and PW.2, the trial court held that the prosecution has been able to prove its case beyond all reasonable doubt and accordingly convicted and sentenced the appellants as above. This has been affirmed by the High Court in appeal.

7. Before we advert to the submissions advanced, it is expedient to examine the scope of the power under Article 136 of the Constitution, while hearing appeal against the judgment of conviction and sentence. Mr. J.C. Gupta, learned Senior Counsel appearing on behalf of the appellants submits that powers under Article 136 of the Constitution is very wide and nothing prevents this Court to upset the concurrent findings of guilt. In support of the submission reliance has been placed on a decision of this Court in the case of *Ganga Kumar Srivastava vs. State of Bihar* (2005) 6 SCC 211 wherein it has been held as follows:

> "10. From the aforesaid series of decisions of this Court on the exercise of power of the Supreme Court under Article 136 of the Constitution following principles emerge:
>
> (i) The powers of this Court under Article 136 of the Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of the fact save in exceptional circumstances.
>
> (ii) It is open to this Court to interfere with the findings of fact given by the High Court if the High Court has acted perversely or otherwise improperly.

> (iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.
>
> (iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it. And
>
> (v) The appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record. (underlining is ours)"

8. Mr. Ratnakar Dass, learned Senior Counsel, appearing on behalf of the State, however, submits that this Court in exercise of the powers under Article 136 of the Constitution of India cannot act as a Court of Appeal and upset the concurrent findings of fact recorded by the Trial Court and the Appellate Court. Reliance has been placed on a decision of this Court in *Ramanbhai Naranbhai Patel and Ors. vs. State of Gujarat* (2000) 1 SCC 358 in which it has been held as follows:

> "10.In view of the aforesaid settled legal position, therefore, we have to see whether the findings of fact reached by the High Court agreeing with the appreciation of evidence by the Sessions Court suffer from any patent error of law or have resulted in miscarriage of justice which can call for our interference in this appeal."

9. We do not have the slightest hesitation in accepting the broad submission of Mr. Gupta that power under Article 136 of the Constitution is very wide and nothing prevents this Court to reappraise the evidence and set aside concurrent finding of fact holding the accused guilty. However, appreciation of evidence is resorted to, in exceptional circumstances when it

comes to the conclusion that the finding of guilt recorded by the High Court is perverse, meaning thereby the High Court had recorded the finding without consideration of relevant material or consideration of irrelevant material, the consideration or non-consideration whereof shall have bearing on the finding recorded. The finding can also be considered perverse, if a person duly instructed in law will not come to that finding. This Court may also interfere with the finding of fact when it finds violation of established procedure going to the root of the case. Where the High Court has analysed the evidence in great detail and found the evidence reliable there is no scope for interference by this Court.

10. Bearing in mind the principles aforesaid we proceed to examine the submissions unfolded.

11. Mr. Gupta submits that there is inordinate delay in receipt of the Special Report by the Magistrate. He points out that the occurrence had taken place on 10th October, 1997 at 4 P.M.; and the First Information Report was registered at 8 P.M., the Special Report under Section 157 of the Code of Criminal Procedure was received on 17th October, 1997. This inordinate delay in receipt of the report, according to Mr. Gupta, is sufficient to reject the case of the prosecution. In support of the submission reliance has been placed on a judgment of this Court in the case of *L/NK. Meharaj Singh vs. State of Uttar Pradesh* JT 1994 (3) SC 440 and our attention has been drawn to paragraph 12:

> "12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in

> embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.P.C. is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante timed and had not been recorded till the inquest proceedings were over at the spot by PW.8."

12. Mr. Dass, submits that mere delay in despatch of the FIR itself is not fatal to the case of the prosecution. He points out that the First Information Report was lodged immediately

and in fact the investigation started soon thereafter and even the dead body was sent for post-mortem examination within a reasonable time. Hence in his submission mere delay in despatch of the FIR is of no consequence. Reliance has been placed on a decision of this Court in the case of *Pala Singh & Anr. vs. State of Punjab* 1972 (2) SCC 640 and our attention drawn to paragraph 8 of the judgment which reads as follows:

> "8. Shri Kohli strongly criticised the fact that the occurrence report contemplated by Section 157 Cr.P.C. was sent to the Magistrate concerned very late. Indeed, this challenge, like the argument of interpolation and belated despatch of the inquest report, was developed for the purpose of showing that the investigation was not just, fair and forthright and, therefore, the prosecution case must be looked at with great suspicion. This argument is also unacceptable. No doubt, the report reached the magistrate at about 6 p.m. Section 157 Cr.P.C. requires such report to be sent forthwith by the police officer concerned to a magistrate empowered to take cognizance of such offence. This is really designed to keep the magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159. But when we find in this case that the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellant's case that they have been prejudiced by this delay."

13. Having given our thoughtful consideration to the submissions advanced, we do not find any substance in the submission of Mr.Gupta. Information in regard to the incident

was given immediately after the occurrence and the First Information Report was lodged on the same day at 8.20 p.m. The occurrence had taken place at about 4.00 p.m. on 10/10/1997 and therefore there does not seem any delay in lodging the First Information Report. Not only this, after the First Information Report was lodged, investigation proceeded, the statement of the witnesses recorded, the inquest report prepared and the dead bodies sent for post-mortem examination without delay. It is also on record that the Special Report was sent by post. In the background of the aforesaid facts, mere delay in receipt of the Special Report, in no way causes doubt to the case of the prosecution. Furthermore, none of the witnesses including the investigating officer of the case have been cross-examined on this point. Therefore, we are not inclined to reject the case of the prosecution merely on the ground that there was delay in despatch of the First Information Report.

14. Mr. Gupta, then submits that the entire prosecution case is dependent upon the evidence of PW.1 Jaipal Singh and PW.2 Shiv Charan and they being inimical to the appellants, their evidence deserve to be rejected and once it is done so, there is no evidence on record to connect the appellants with the crime. He points out there is overwhelming evidence on record to show old enmity between the prosecution witnesses and the appellants. Both the witnesses are not the residents of the village, where the occurrence had taken place and further the witnesses having no land near the place of occurrence their presence at the scene of occurrence is highly doubtful. Mr. Gupta emphasises that in order to show their presence at the place of occurrence, the story of Panchayat at village Auranga was cooked up. Non- examination of Ravi Kiran, as witness has also been highlighted. It has been contended that in order to conceal the truth this witness, who is the most competent witness, has been withheld by the prosecution.

15. All these submissions are in the realm of appreciation of evidence and the High Court has meticulously examined it. The evidence of an eye witness can not be rejected only on the ground that enmity exists between the parties. The High Court in this connection has observed as follows :

> "In view of extreme strained relations between the two sides, no independent witness could dare to depose in favour of the prosecution risking his own life. Two eyewitnesses P.W.1 Jaipal Singh and P.W.2 Shiv Charan cannot be disbelieved merely because of being related with the deceased, especially in the circumstances narrated above."

16. True it is that Ravi Kiran could have been an important witness to unfold the true story but his non-examination, in our opinion, itself is not sufficient to discard the case of the prosecution. It has come in evidence of PW.1 Jaipal that later on prosecution suspected that he was accomplice in the crime. Hence his non-examination has been explained. Not only this, the evidence of the two eye-witnesses, with minor contradictions here and there has withstood the test of cross-examination and therefore the case of the prosecution is not fit to be thrown out on these grounds.

17. Mr. Gupta submits that the two eye-witnesses namely PW.1 Jaipal Singh and PW.2 Shiv Charan were highly inimical to the accused persons and according to the prosecution itself both had come at a hand-shaking distance, they would not have been left unharmed and hence their claim to be the eye-witnesses to the incident is highly doubtful.

18. We do not find any substance in this submission of Mr. Gupta. Why the appellants did not cause any injury to these witnesses can not be explained by the prosecution. It will require entering into their mind. Human behaviour are sometimes strange. Merely the fact that these witnesses did not suffer any injury, will not make their evidence untrustworthy. This aspect

of the matter has been considered by the High Court in right perspective and it has held as follows:-

> "The statements of the witnesses show that Sheodan, Ravi Kiran and Jagdish were 30 or 35 steps ahead of other witnesses. On coming out of the crop the accused persons targeted Jagdish and Sheodan. Therefore, if injuries were not caused to other persons of the family of the victims i.e. two eyewitnesses, it does not mean that they were not present on the spot. The entire group could not be targeted by the accused as it was likely to result in the failure of their mission."

19. In the result, we do not find any merit in the appeal and it is dismissed accordingly.

20. The Appellants are on bail. Their bail bonds stand cancelled and they are directed to surrender and to serve out remainder of the sentence.

K.K.T. Appeal dismissed.

STATE OF HARYANA & ORS.
v.
MANOJ KUMAR
(Civil Appeal No. 2226 of 2010)

MARCH 9, 2010

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

CONSTITUTION OF INDIA, 1950:

Article 227 – Jurisdiction under – Sale deed executed pursuant to decree passed in a suit for specific performance of contract – Report of Joint Sub-Registrar that property was under-valued – Finding of fact recorded by District Collector and upheld by Commissioner that suit for specific performance of contract was filed to evade substantial stamp duty, set aside by High Court – HELD: High Court, under its limited jurisdiction under Article 227, erred in interfering with concurrent finding of fact of authorities below – Observations made by High Court that the authenticity of the decree passed by civil court could not be questioned and genuineness of sale deed was to be presumed, cannot be sustained – Judgment of High Court set aside – Vendee directed to pay differential stamp duty – Transfer of property – Circle rates – Registration of sale deed in pursuance of decree passed by court – Liability to pay differential stamp duty, if property found to have been under-valued in the suit.

Transfer of property – Sale deed – Registration of – Circle rate/Collector rate – HELD: In order to ensure that there is no evasion of stamp duty, issuance of notification fixing circle rates or collector rates has become imperative.

Pursuant to a decree passed in a suit for specific performance of contract, a sale deed for a commercial plot admeasuring 788 sq. yards was registered in favour

of the plaintiff-respondent for a sale consideration of Rs.2,00,000/-. The registration charges paid were Rs.31,000/-. On the report of the Joint Sub-Registrar that the property was under-valued inasmuch as the circle rate/Collector rate of the property being Rs.4200/- per sq. yard, the value of the property worked out to be Rs.33,09,600/- liable to registration charges of Rs.5,13,050/-, the District Collector directed the respondent to pay the differential stamp duty amounting to Rs. 4,82,050/- . In the appeal filed by the respondent before the Commissioner, the stand of the Revenue was that the agreement of sale was executed on 10.11.1999 with the entire sale consideration having been paid and possession of the plot delivered, but the sale deed was not executed till 9.2.2001. Rather, a suit for specific performance of agreement was filed on 14.9.2000 without impleading the appellants and the same was promptly decreed on 9.2.2001. Thus, the suit was filed only with the purpose to evade the substantial stamp duty. The Commissioner upheld the order of the District Collector. But the High Court in the writ petition filed by the respondent under Article 227 of the Constitution of India, set aside the orders of both the authorities below. Aggrieved, the State Government filed the appeal.

Allowing the appeal, the Court

HELD: 1. The Supreme Court over 50 years has been consistently observing that limited jurisdiction of the High Court under Article 227 of the Constitution of India cannot be exercised by interfering with the findings of fact and setting aside the judgments of the courts below on merits. The High Court, in the impugned judgment, has erred in interfering with the concurrent findings of fact of the authorities below under its limited jurisdiction under Article 227 of the Constitution. [Para 29 and 35] [185-G; 187-E]

Nagendra Nath Bora and Another v. Commissioner of Hills Division and Appeals, Assam & Others **1958 SCR 1240=AIR 1958 SC 398;** *Nibaran Chandra Bag v. Mahendra Nath Ghughu* **1963 Suppl. SCR 570 = AIR 1963 SC 1895;** *Mohd. Yunus v. Mohd. Mustaqim & Others* **1984 (1) SCR 211 = (1983) 4 SCC 566;** *Laxmikant Revchand Bhojwani & Another v. Pratapsing Mohansingh Pardeshi* **(1995) 6 SCC 576;** *Rena Drego (Mrs.) v. Lalchand Soni & Others* **1998 (2) SCR 197 =(1998) 3 SCC 341;** *Virendra Kashinath Ravat & Another v. Vinayak N. Joshi & Others* **1998 (2) Suppl. SCR 643 = (1999) 1 SCC 47, relied on.**

2.1. The High Court erroneously observed that "the authenticity of the decree passed by the court cannot be questioned. Therefore, the genuineness of the sale price has to be presumed." This finding of the High Court cannot be sustained. It would have far reaching ramifications and consequences. If the genuineness of the sale price entered into by the buyer and the seller cannot be questioned, then in majority of the cases it is unlikely that the State would ever receive the stamp duty according to the circle rate or the collector rate. The approach of the High Court is totally unrealistic. [Para 36] [187-G-H; 188-A]

2.2.In order to ensure that there is no evasion of stamp duty, circle rates are fixed from time to time and the notification issued to that effect. The issuance of such notification has become imperative to arrest the tendency of evading the payment of actual stamp duty. It is a matter of common knowledge that usually the circle rate or the collector rate is lower than the prevalent actual market rate but to ensure registration of sale deeds at least at the circle rates or the collector rates such notifications are issued from time to time. [Para 39] [188-E, F]

2.3 It is not disputed that in the instant case the

commercial plot of 788 sq. yards was valued by the circle rate at Rs.4,200 per sq. yard fixed by the Collector, meaning thereby that after the notification, no sale deed could be registered for an amount lesser than Rs.4,200/- per sq.yard. The High Court has not properly construed the observations of the District Collector to the effect that the suit was filed in the civil court with the intention to avoid tax and stamp duty inasmuch as the value of the property as per the circle rate was Rs.33,09,600, on which stamp duty to be paid was Rs.5,13,050/- whereas the stamp duty actually paid was only Rs.31,000/-, therefore stamp duty to the tune of Rs.4,82,050 was payable. This order was upheld by the Commissioner. The High Court while exercising its jurisdiction under Article 227 has set aside the orders passed by the authorities below without any basis or rationale. Apart from the jurisdiction, even what is factually stated in the order of the District Collector as upheld by the Commissioner, is unexceptionable and any interference was totally unwarranted. [Para 40-41] [189-B-C; D-E]

2.4. In the facts and circumstances of the case, the impugned judgment of the High Court cannot be sustained and is accordingly set aside, and the order passed by the District Collector, as upheld by the Commissioner, is restored. The respondent is directed to pay the balance stamp duty. [Para 42] [189-F, G]

State of Punjab & Others v. Mohabir Singh etc.etc. **1995 (5) Suppl. SCR 520 = (1996) 1 SCC 609;** *R. Sai Bharathi v. J. Jayalalitha & Others* **2003 (6) Suppl. SCR 85 = (2004) 2 SCC 9, cited.**

Case Law Reference:

1958 SCR 1240	**relied on**	**para 23**
1963 Suppl. SCR 570	**relied on**	**para 24**
1984 (1) SCR 211	**relied on**	**para 25**

(1995) 6 SCC 576	**relied on**	**para 26**
1998 (2) SCR 197	**relied on**	**para 27**
1998 (2) Suppl. SCR 643	**relied on**	**para 28**
1995 (5) Suppl. SCR 520	**cited**	**para 32**
2003 (6) Suppl. SCR 85	**cited**	**para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2226 of 2010.

From the Judgment & Order dated 4.2.2008 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 12094 of 2007.

Puneet Mittal, AAG, Naresh Bakshi, T.A. Mir and Ankur Aggarwal for the Appellants.

Manoj Swarup, Devesh Kumar Tripathi, Ashok Anand and Ajay Kumar for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment dated 4.2.2008 passed by the Division Bench of the High Court of Punjab & Haryana at Chandigarh in a Civil Writ Petition No. 12094 of 2007.

3. The appellants are aggrieved by the impugned judgment of the High Court by which the High Court has set aside the concurrent findings of courts below while exercising its extraordinary jurisdiction under Article 227 of the Constitution of India.

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

5. On 10.11.1999, an agreement to sell a commercial plot

measuring 788 sq.yards located on Delhi-Mathura Mewla Maharajpur, Faridabad was executed by Smt. Manjula Gulati in favour of respondent, Manoj Kumar. The entire sale consideration was paid and the actual possession was also given, but the sale deed was not executed till 9.2.2001.

6. According to the appellants, in order to evade substantial stamp duty, the respondent filed a suit, without impleading the appellants as parties to the suit, for specific performance of agreement to sell dated 10.11.1999 executed by Smt. Gulati for the sale of property measuring 788 sq.yards for a total consideration of Rs.1,95,000/-. The suit was promptly decreed in favour of the respondent by the Civil Judge (Junior Division), Faridabad. The suit as a matter of fact was filed on 14.9.2000 and decreed on 9.2.2001 and no further appeal was filed which clearly indicated that the suit was filed between the parties only with the purpose to evade the substantial stamp duty. The court directed its Reader to execute the decree and get the sale deed registered in favour of the respondent. The Reader of the court at the court's direction appeared before the Sub Registrar on 9.2.2001 and got the sale deed registered in favour of the respondent for the property for a sale consideration of Rs.2,00,000/-. According to the appellants, the court decree was obtained by concealing the material facts in order to evade the actual payable stamp duty.

7. According to the appellants, the Joint Sub Registrar, Faridabad made a report that the sale deed executed on 9.2.2001 by respondent Manoj Kumar and the owner Manjula Gulati was under-valued. According to him, no sale deed can be registered for an amount which is less than the amount fixed by the collector or the circle rate (Rs.4,200/- per Sq.Yard).

8. The total value of the land at the rate of Rs.4,200/- per Sq.Yard works out to be Rs.33,09,600/-. On that amount, the stamp duty registration charges of the sale deed payable would be Rs.5,13,050/-. In the instant case, the respondent has only paid Rs.31,000/- towards the stamp duty which was obviously

under-valued.

9. The District Collector, Faridabad in his order directed the respondent to make payment of difference of the amount of stamp duty amounting to Rs.4,82,050/-.

10. The interpretation of amended section 47(A) of the Haryana Act has to be in consonance with the notified circle rates and any value fixed below that would be in direct conflict with the prevalent law of the land and, therefore, liable to be struck down by the authorities.

11. Section 47-A of the Haryana Amendment to Stamp Act, as applicable to the parties, reads as under:-

> *S.47-A. – Instruments under-valued, how to be dealt with.* - (1) If the Registering Officer appointed under the Registration Act, 1908, while registering any instrument transferring any property, has reason to believe that the value of the property or the consideration, as the case may be, has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the value or consideration, as the case may be, and the proper duty payable thereon.
>
> (2) On receipt of reference under sub-section (1), the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an enquiry in such manner as may be prescribed by rules made under this Act, determine the value or consideration and the duty as aforesaid and the deficient amount of duty, if any, shall be payable by the person liable to pay the duty.
>
> (3) The Collector may suo motu, or on receipt of reference from the Inspector-General of Registration or the Registrar of a district, in whose jurisdiction the property or any portion thereof, which is the subject-matter of the instrument is situate, appointed under the Registration Act, 1908, shall, within three years from the date of registration

> of any instrument, not already referred to him under sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of its value or consideration, as the case may be, and the duty payable thereon and if after such examination, he has reasons to believe that the value or consideration has not been truly set forth in the instrument, he may determine the value or consideration and the duty as aforesaid in accordance with the procedure provided for in sub-section (2); and the deficient amount of duty, if any, shall be payable by the person liable to pay the duty.

12. According to the District Collector, Faridabad the respondent did not truly set-forth the true value in the instrument, therefore, order under section 47-A was passed against him.

13. The respondent aggrieved by the said order of the District Collector filed an appeal before the Commissioner, Gurgaon Division, Gurgaon (Haryana) challenging the order dated 6.12.2005. The Commissioner by order dated 8.6.2007 dismissed the appeal by holding that the Collector rate or circle rate prescribed for sale of land in village Mewla Maharajpur of commercial nature was Rs.4,200/- per sq.yard and the respondent was directed to pay the balance amount of stamp duty.

14. The respondent aggrieved by the said order of the Commissioner preferred a Civil Writ Petition No.12094 of 2007 before the High Court of Punjab and Haryana.

15. The High Court while exercising its jurisdiction under Article 227 of the Constitution has set aside the concurrent findings of facts of the courts below and observed that "where the specific performance of contract in respect of immovable property has been granted, the ostensible sale price given in the transfer deed is to be accepted by the Registering Authority."

16. According to the High Court, this was done primarily on the two grounds, firstly, "because the court has accepted that price and has decreed the suit for specific performance"; secondly, "there cannot be any opportunity with the vendee to fabricate an agreement of sale for showing the incorrect sale price because litigating parties would not ordinarily reach such an agreement and sign the fabricated document."

17. The High Court further observed that "the authenticity of the decree passed by the court cannot be questioned. Therefore, the genuineness of the sale price has to be presumed."

18. The appellants were not parties in the first place in the said suit and, therefore, either in law or on facts could not be bound by such a decree hence, such observation and finding on the fact of it is illegal and liable to set aside.

19. The High Court in the impugned judgment has set aside the concurrent findings of fact of the courts below. The appellants aggrieved by the impugned judgment of the High Court have preferred this appeal. The appellants are particularly aggrieved by the observations of the High Court that "the authenticity of the decree passed by the court cannot be questioned. Therefore, the genuineness of the sale price has to be presumed."

20. According to the appellants, the High Court failed to appreciate that the respondent had intentionally evaded payment of the true stamp duty Stamp duty charges on the circle rate or the collector rate for the sale of commercial plot of 788 sq.yards were Rs.5,13,050 whereas the respondent paid only Rs.31,000/-. Hence the respondent was under the bounden obligation to pay the balance amount of Rs.4,82,050/-.

21. The appellants also urged that when the respondent had paid the full amount of sale consideration on 10.11.1999, then why was the sale deed executed only on 9.2.2001? The

respondent has given no explanation for non-registration of sale deed for such a long time.

22. The appellants urged that the jurisdiction of the High Court under Article 227 is very limited and the High Court, while exercising the jurisdiction under Article 227, has to ensure that the courts below work within the bounds of their authority.

23. More than half a century ago, the Constitution Bench of this court in *Nagendra Nath Bora and Another v. Commissioner of Hills Division and Appeals, Assam & Others* AIR 1958 SC 398 settled that power under Article 227 is limited to seeing that the courts below function within the limit of its authority or jurisdiction.

24. This court placed reliance on *Nagendra Nath's* case in a subsequent judgment in *Nibaran Chandra Bag v. Mahendra Nath Ghughu* AIR 1963 SC 1895. The court observed that jurisdiction conferred under Article 227 is not by any means appellate in its nature for correcting errors in the decisions of subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority.

25. This court had an occasion to examine this aspect of the matter in the case of *Mohd. Yunus v. Mohd. Mustaqim & Others* (1983) 4 SCC 566 . The court observed as under:-

> "The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority," and not to correct an error apparent on the face of the record, much less an error of law. for this case there was, in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure

adopted by him not in consonance with the procedure established by law. In exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision."

26. This court again clearly reiterated the legal position in *Laxmikant Revchand Bhojwani & Another v. Pratapsing Mohansingh Pardeshi* (1995) 6 SCC 576. The court again cautioned that the High Court under Article 227 of the Constitution cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes.

27. A three-Judge Bench of this court in *Rena Drego (Mrs.) v. Lalchand Soni & Others* (1998) 3 SCC 341 again abundantly made it clear that the High Court cannot interfere with the findings of fact recorded by the subordinate court or the tribunal while exercising its jurisdiction under Article 227. Its function is limited to seeing that the subordinate court or the tribunal functions within the limits of its authority. It cannot correct mere errors of fact by examining the evidence and re-appreciating it.

28. In *Virendra Kashinath Ravat & Another v. Vinayak N. Joshi & Others* (1999) 1 SCC 47 this court held that the limited power under Article 227 cannot be invoked except for ensuring that the subordinate courts function within its limits.

29. This court over 50 years has been consistently observing that limited jurisdiction of the High Court under Article 227 cannot be exercised by interfering with the findings of fact and set aside the judgments of the courts below on merit.

30. According to the appellants, the High Court was not justified in interfering with the findings of fact of the courts below. Consequently, the impugned judgment of the High Court is totally unsustainable.

31. Mr. Manoj Swarup, Advocate appearing on behalf of the respondent supported the impugned judgment. According to him, the enquiry under section 47-A is confined to whether value has not been truly set forth in the instrument. According to him, the Legislature has expressed its intention clearly by emphasizing the detail i.e. that value as set forth in the instrument. Or else, the Legislature would have used the terminology 'market value' or 'circle rates'.

32. Mr. Swarup placed reliance on *State of Punjab & Others v. Mohabir Singh etc.etc.* (1996) 1 SCC 609. This Court in this case held as under:

"5. It will be only on objective satisfaction that the Authority has to reach a reasonable belief that the instrument relating to the transfer or property has not been truly set forth or valued or consideration mentioned when it is presented for registration……..

6. It would thus be seen that the aforesaid guidelines would inhibit the Registering Authority to exercise his quasi-judicial satisfaction of the true value of the property or consideration reflected in the instrument presented before him for registration. The statutory language clearly indicates that as and when such an instrument is presented for registration, the sub-Registrar is required to satisfy himself, before registering the document, whether true price is reflected in the instrument as it prevails in the locality……."

33. Mr. Swarup further submitted "that circle rates have been held to constitute only one of the factors to be taken into consideration. Circle rates cannot be regarded as the last word

on the subject. This Court in the case of *R. Sai Bharathi v. J. Jayalalitha & Others* (2004) 2 SCC 9 held that:-

> "22…..The authorities cannot regard the guideline valuation as the last word on the subject of market value….."
>
> "24….It is clear, therefore, that guideline value is not sacrosanct as urged on behalf of the appellants, but only a factor to be taken note of if at all available in respect of an area in which the property transferred lies……..."

34. In the light of the above it is submitted that circle rates could have been taken as one of the factors and not the last word on the subject. The other factors being:-

(i) the price agreed upon between the vendor and the vendee

(ii) whether it was a distress sale

(iii) whether the price in the local area had gone down/ escalated – at the time of the sale

(iv) Other relevant factors

35. It is submitted that these other factors have not been considered, not even noticed by the Authority under the Act."

36. We have heard the learned counsel for the parties at length. We are clearly of the opinion that the High Court, in the impugned judgment, has erred in interfering with the concurrent findings of fact of the courts below under its limited jurisdiction under Article 227 of the Constitution. The High Court erroneously observed that the "the authenticity of the decree passed by the court cannot be questioned. Therefore, the genuineness of the sale price has to be presumed." This finding of the High Court cannot be sustained. It would have far reaching ramifications and consequences. If the genuineness of the sale price entered into by the buyer and the seller cannot be questioned, then in majority of the cases it is unlikely that the State would ever receive the stamp duty according to the

circle rate or the collector rate. The approach of the High Court is totally unrealistic.

37. The High Court in the impugned judgment has also erroneously observed that "there cannot be any opportunity with the vendee to fabricate an agreement of sale for showing the incorrect sale price because the litigating parties would not ordinarily reach such an agreement and sign the fabricated document."

38. The High Court gravely erred in not properly comprehending the facts of this case in proper perspective and which has led to grave miscarriage of justice.

39. It is not disputed that the commercial plot of 788 sq.yards located at Delhi-Mathura Mewla Maharajpur, Faridabad was valued by the Circle rate at Rs.4,200 per sq. yard fixed by the Collector of Faridabad meaning thereby that after the notification, no sale deed can be registered for an amount lesser than Rs.4,200/- per sq.yard. It may be pertinent to mention that, in order to ensure that there is no evasion of stamp duty, circle rates are fixed from time to time and the notification is issued to that effect. The issuance of said notification has become imperative to arrest the tendency of evading the payment of actual stamp duty. It is a matter of common knowledge that usually the circle rate or the collector rate is lower than the prevalent actual market rate but to ensure registration of sale deeds at least at the circle rates or the collector rates such notifications are issued from time to time by the appellants.

40. In the impugned judgment, the High Court has not properly construed the observations of the District Collector, Faridabad in which he has clearly stated as under :-

> "It appears that the suit has been filed in the Civil Court and decree passed with the intention to avoid tax and stamp duty to be paid to the Government, because when respondent had paid entire sale consideration to the

vendor, then he should have got the sale deed also executed at that time, whereas the same has not been done. Therefore, keeping into consideration the above facts, I come to this conclusion that sale deed No.11200 dated 9.2.2001 has been executed in respect of land measuring 788 sq.yard situated in village Mewla Maharajpur, which abuts Delhi Mathur Road. This plot is commercial and this fact has been concealed by the respondent. The sale deed had been registered for less value. The market value of the land in dispute as per Collector rate is Rs.33,09,600/- on which a total stamp duty of Rs.5,13,050/- was payable whereas the respondent has affixed stamp duty of Rs.31,000/-. In this manner on the above deed, the stamp duty of Rs.4,82,050/- is payable, which is ordered to be recovered from the respondent in accordance with law."

41. This order was upheld by the Commissioner. The High Court while exercising its jurisdiction under Article 227 has set aside the orders passed by the District Collector, Faridabad and upheld by the Commissioner, Gurgaon without any basis or rationale. Apart from the jurisdiction, even what is factually stated in the order of the District Collector, Faridabad as upheld by the Commissioner, Gurgaon is unexceptionable and any interference was totally unwarranted.

42. In the facts and circumstances of the case, the impugned judgment of the High Court cannot be sustained and is accordingly set aside and the order passed by the District Collector, Faridabad which was upheld by the Commissioner, Gurgaon is restored. The respondent is directed to pay the balance stamp duty within four weeks from the date of this judgment, otherwise the appellants would be at liberty to take appropriate steps in accordance with law.

43. The appeal is allowed and disposed of. The parties are directed to bear their respective costs.

R.P. Appeal allowed.

THE SECRETARY & CURATOR, VICTORIA MEMORIAL HALL

v.

HOWRAH GANATANTRIK NAGRIK SAMITY AND ORS.

(Civil appeal No. 2225 of 2010)

MARCH 09, 2010

[K.G. BALAKRISHNAN, CJ., DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Heritage – Monuments – Historic Museum – Writ petition filed alleging mismanagement, misuse and various types of abuses of the Victoria Memorial Hall (VMH) – High Court constituted Expert Committee for improving the environment of VMH – Recommendation made by Expert Committee regarding further construction within VMH area, rejected by High Court while disposing of the writ petition – Application for modification of the order, also rejected – On appeal, held: High Court did not give any specific/good or relevant reason for rejecting the recommendation made by the Expert Committee or while rejecting the application for modification – Special facts and circumstances of the case warrant review – Application for modification of the earlier order passed in the writ petition allowed, albeit with clarifications – Victoria Memorial Act, 1903 – Public Interest Litigation.

Administrative Law – Expert Body/Committee – Decision of – Scope for judicial review – Held: It would normally be wise and safe for the Courts to leave the decision to experts who are more familiar with the problems they face than the Courts generally can be.

Judgment/Order – Duty and obligation of the Court to record reasons while disposing of the case – To show proper and due application of mind to the issue before the Court –

Administration of Justice – Justice Delivery system – Principles of natural justice

Victoria Memorial Hall (VMH) is a historic museum situated in Kolkata, administered and managed by an autonomous Board of Trustees constituted under the Victoria Memorial Act, 1903.

Respondent no.1 filed writ petition in the High Court (as a Public Interest Litigation) alleging mismanagement, misuse and various types of abuses of the VMH. The High Court constituted an Expert Committee for improving the environment of VMH. The Expert Committee recommended for having a centre and exhibition area in a separate building within the VMH compound. The High Court rejected the recommendation made by the Expert Committee regarding further construction within the VMH area and disposed of the writ petition.

Appellant thereafter filed an application for modification of the said order passed by the High Court in the writ petition, seeking permission to raise construction upto height of 30 ft after demolition of the existent non-residential staff quarters. The application for modification was rejected by the High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The conclusion of the High Court, that if construction is permitted, it would not only adversely affect the ambience of the monument but would be detrimental to the present structure, has been reached without giving any plausible reason whatsoever. [Para 18] [205-B]

1.2. The Expert Committee was appointed by the High Court itself. It consisted of experts of various

subjects, rendering services in different fields. Therefore, it is unfortunate that the High Court not only brushed aside its report, so far as the instant issue is concerned, rather labelled it as a "so-called Expert Committee". The High Court failed to appreciate that the application was filed by the appellant as it was not possible for VMH to get appropriate space nearby the monument in Kolkata. More so, neither the Pollution Control Board, nor Kolkata Municipal Corporation, nor the Suptd. Archeologist of Archeological Survey of India of Kolkata Circle, raised any objection in respect of the construction of a new building. The building was proposed to be constructed by replacing the old existing constructions at a distance of at least 160 mtrs. from the monument. The Court failed to consider that museum activities were to be expanded by the appellant, which would not adversely affect the monument at all, particularly when there is no prohibition under the Victoria Memorial Act, 1903 to carry out such activities. [Para 19] [205-C-F]

1.3. The High Court failed to appreciate that the proposed building would be designed with great care, ensuring that the new construction would not, by any means, disturb the existing landscape and would be in consonance with the existing ambience and compatible with the architecture and façade of the existing monument. The height of the proposed building would not be more than 10 mtrs. while the height of the monument is more than 50 mtrs. Thus, it would not prevent the view of the monument by any means. The High Court was not justified to impose a total prohibition of construction of the Annexe in place of the existing cluster of buildings, which are in a dilapidated condition. The High Court ought to have given reasons for not accepting the report of the Expert Committee. [Para 20] [205-G-H; 206-A-B]

1.4. The High Court had directed to shift the administrative office outside the monument on wrong premises. The material on record suggests that all museums have this kind of accommodation within its campus. [Para 21] [206-B-C]

1.5. The High Court failed to appreciate that in case a historical monument contains such a centre, it cannot be a danger for its protection. More so, most of such museums have such activities throughout the world. The ground of preserving the greenery is totally misplaced and mis-conceived for the reason that building is to be constructed by demolishing the servant quarters etc. which are in a dilapidated condition. As the greenery does not exist at this place the reason given by the High Court is untenable. The other ground that campus should not be used for brisk activities is unsustainable because having the activities in such centre and exhibition area cannot be termed as 'brisk activities'. More so, the High Court had never passed any interim order during the pendency of the Writ Petition for removal of the cluster of buildings which in fact is in dilapidated condition. Therefore, the ground taken that the entire effort of the High Court to protect the monument would be frustrated was not tenable. Indisputably, the respondents have not been able even to allege that factual averments made in the application for modification were not correct. [Para 25] [209-C-F]

2.1.The High Court did not give any specific/good or relevant reason for not accepting the recommendation made by Expert Committee at initial stage or while rejecting the application for modification vide the impugned order. [Para 26] [209-G-H]

2.2. It would normally be wise and safe for the Courts to leave the decision to experts who are more familiar

with the problems they face than the Courts generally can be. [Para 27] [210-A-B]

2.3.In the instant case, the Expert Committee was appointed by the High Court itself. No allegation of malafide or disqualification against any Member of that Committee had ever been made/raised. Thus, one fails to understand as on what basis, its recommendation on the issue involved herein, has been brushed aside by the High Court without giving any reason whatsoever, particularly, when the Act governing VMH does not prohibit the use of the part of the compound for the purpose other than connected with Queen Victoria. [Para 30] [210-E-G]

The University of Mysore v. C.D. Govinda Rao and Anr. **AIR 1965 SC 491;** *The State of Bihar & Anr. v. A.K. Mukherjee & Ors*. **AIR 1975 SC 192;** *Dalpat Abasaheb Solunke etc.etc. v. Dr. B.S. Mahajan etc.etc.* **AIR 1990 SC 434;** *Central Areca Nut & Cocoa Marketing & Processing Co-operative Ltd. v. State of Karnataka & Ors.* **(1997) 8 SCC 31 and** *Dental Council of India v. Subharti K.K.B. Charitable Trust & Anr.* **(2001) 5 SCC 486, relied on.**

P.M. Bhargava & Ors. v. University Grants Commission & Anr. **AIR 2004 SC 3478 and** *Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University, Sirsa & Anr.* **(2008) 9 SCC 284, referred to.**

3.1. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the

fundamentals of sound administration justice – delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. [Para 31] [210-G-H; 211-A-B]

3.2. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Para 32] [211-D-E]

3.3. The recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected. [Para 33] [211-G-H]

3.4. In the instant case, the High Court did not assign valid and good reasons for rejecting the recommendation made by the Expert Committee for allowing the construction in question in its earlier order passed in the writ petition nor reasons were recorded in the impugned judgment rejecting the application for modification of the said earlier order. Thus, in view of the above, the orders, so far as this particular issue is concerned, remain unsustainable. [Para 34] [212-A-B]

3.5. The special facts and circumstances of the case warrant review of the impugned order passed by the High Court. Application filed by the appellant for modification of the earlier order stands allowed. However, it is clarified that in case the proposed construction is raised it would be in consonance with the existing ambience and compatible with the architecture of the monument. The appellant shall ensure that landscape of the monument would also not be disturbed by any means. [Para 35] [212-C; 212-D-E]

State of Orissa v. Dhaniram Luhar **AIR 2004 SC 1794;** *State of Rajasthan v. Sohan Lal & Ors.* **(2004) 5 SCC 573;** *Raj Kishore Jha v. State of Bihar & Ors.* **AIR 2003 SC 4664;** *Vishnu Dev Sharma v. State of Uttar Pradesh & Ors.* **(2008) 3 SCC 172;** *Steel Authority of India Ltd. v. Sales Tax Officer, Rourkela I Circle & Ors.* **(2008) 9 SCC 407;** *State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi* **AIR 2008 SC 2026;** *U.P.S.R.T.C. v. Jagdish Prasad Gupta* **AIR 2009 SC 2328;** *Ram Phal v. State of Haryana & Ors.* **(2009) 3 SCC 258;** *Mohammed Yusuf v. Faij Mohammad & Ors.* **(2009) 3 SCC 513 and** *State of Himachal Pradesh v. Sada Ram & Anr.* **(2009) 4 SCC 422, relied on.**

Case Law Reference:

AIR 1965 SC 491	**relied on**	**Para 27**
AIR 1975 SC 192	**relied on**	**Para 28**
AIR 1990 SC 434	**relied on**	**Para 28**
(1997) 8 SCC 31	**relied on**	**Para 28**
(2001) 5 SCC 486	**relied on**	**Para 28**
AIR 2004 SC 3478	**referred to**	**Para 29**
(2008) 9 SCC 284	**referred to**	**Para 29**
AIR 2004 SC 1794	**relied on**	**Para 31**
(2004) 5 SCC 573	**relied on**	**Para 31**
AIR 2003 SC 4664	**relied on**	**Para 32**
(2008) 3 SCC 172	**relied on**	**Para 32**
(2008) 9 SCC 407	**relied on**	**Para 32**

AIR 2008 SC 2026	**relied on**	**Para 32**
AIR 2009 SC 2328	**relied on**	**Para 32**
(2009) 3 SCC 258	**relied on**	**Para 32**
(2009) 3 SCC 513	**relied on**	**Para 32**
(2009) 4 SCC 422	**relied on**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2225 of 2010.

From the Judgment & Order dated 21.8.2009 of the High Court at Calcutta in W.P. No. 7987(W) of 2002.

Harish N. Salve, Ahin Chawdhary, Sangeeta Mandal, Jayasree Singh, Swati Sinha, Utam Mandal (for Fox Mandal & Co.) for the Appellant.

Subhas Datta (Respondent No. 2-in-person), Soumya Chakraborty and Rajendra Banerjee (for D.B. Vohra) for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. The appellant has preferred this appeal against the judgment and order of the High Court of Calcutta dated 21.8.2009 by which the application filed by the appellant for modification of order dated 28.9.2007 passed in Writ Petition No.7987(W) of 2002, stood rejected.

3. The facts and circumstances giving rise to this appeal are as under:

A foundation stone of Victoria Memorial Hall (hereinafter called 'VMH') was laid by the king George the Vth (the then Prince of Wales) on January 4, 1906. Between years 1908 and 1921 various objects of arts, manuscripts, medals, arms and

armours were collected and preserved for being transferred and displayed at VMH upon construction and on December 28, 1921 its construction was mostly completed. It was inaugurated by the Edward, the VIIIth (the then Prince of Wales) and was opened for public viewing. Afterwards, the Museum attained the status of National Museum of modern Indian history starting from 18th century. In the year 1925, illustrated catalogue of exhibits in VMH was published. Between years 1934 and 1935 cupolas were added to the main monument. The memorial is the repository of a largest number of Daniells' paintings in the world. It possesses the third largest painting in the world-Vassili Verestchagin's "The State Procession of the Prince of Wales into Jaipur in 1876". The memorial's philatelic collection on Indian postal history is equally large. Among other important collections, one may refer to Mughal emperor Aurangzeb's hand-written Quran or Dara Sikoh's translation of the Upanishads. Equally important and fascinating are the works of Johann Zoffany, Tilly Kettle, Hodges, Samuel Davis, Robert Home, Reynolds, Charles D'oyly, Emily Eden, George Stubbs' painting of Hastings, and Qazar, painting of Fatah Ali Shah, Tipu Sultan's personal war-diary, and the Cannon-balls of the battle of Plassey.

Other than the Curzonian scheme of collection and arrangement of the exhibits, the post-independence collections include National Leaders' Gallery as well as collections of other artifacts-Bankim Chandra's writing desk, Mahatma Gandhi's ashes, paintings of Abanindranath, Atul Bose and Jamini Roy, etc. A total of about 27,000 artifacts (e.g. painting, watercolours, stamps, coins, arms and armour) exists in the VMH.

VMH monument has a covered area of 1.7632 acres and is situated in a portion of a large campus having an area of about 57 acres. There have all along been within the Campus annexe buildings having total covered area of around 5000 Sq. meters. These annexe buildings were built for being used as non family duty quarters, garage for tractors and cars, stores

of garden equipment, dormitory, staff canteen, recreation room, union room and a block of toilets. The old annexe buildings have become dilapidated through passage of time.

In December, 2000, the Government of India advised VMH to take steps for modernisation of VMH with the help of National Institute of Design.

VMH is administered and managed by an autonomous Board of Trustees constituted under Victoria Memorial Act, 1903 (hereinafter called 'Act'). The Chairman of the Board of Trustees is the Governor of the State of West Bengal. Other members include the Chief Justice, Kolkata High Court, Mayor, Kolkata Municipal Corporation, Principal Secretaries of the Departments of Culture, Finance, Tourism, Higher Education, Accountant General of West Bengal and various other prominent citizens. For better preservation and maintenance of VMH, National Environmental Engineering Research Institute (hereinafter called as 'NEERI') had given various suggestions in April 1992 but the same remained unattended. In February, 2002 West Bengal Pollution Control Board submitted a report on air quality around the VMH in which it was suggested to make a further study into the matter by Expert Organization like NEERI.

4. Alleging mismanagement, misuse and various types of abuses of the historic museum and contending that the very existence of VMH was at stake, Writ Petition No.7987(W) of 2002 was filed as a Public Interest Litigation by the Howrah Ganatantrik Nagrik Samity, Respondent No. 1, which sought large number of reliefs, particularly, directing the respondents therein to preserve, protect and maintain the historical monument, to review present status and applicability of recommendations made by NEERI in April, 1992 for protection of the museum and to start action thereon forthwith, to stop leaking of rain water through the rooftop, to repair the structure of the museum, to prepare a complete inventory/catalogue of all the objects of the museum based on record, to remove all

sorts of office accommodations and other occupancies not related to preservation and maintenance of the museum from inside the museum, to make arrangements for more and more display of all objects of the museum to visitors through rotational process, to make complete census and numbering of trees and to prevent falling thereof, to arrange for the supply of potable water, to arrange the vehicular traffic in a manner not creating any kind of pollution and to take measures to prevent any kind of air pollution etc. etc. The High Court dealt with all the issues one by one and passed interim orders from time to time.

5. At the time of initial hearing of the Writ Petition, the High Court, vide its order dated 27.11.2003, constituted an Expert Committee for improving the environment of VMH, the appellant herein. It consisted of 14 Members viz. Member of Heritage, Conservation Committee, Kolkata; Managing Director, Ghosh Bose & Associates (P) Ltd., Kolkata; Scientist & Head, National Environmental Engineering Research Institute, Kolkata Zonal Laboratory; Suptd. Archeologist, Archeological Survey of India, Kolkata Zonal Office; Addl. Commissioner of Police, Kolkata; Chief Environmental Officer, Department of Environment, Govt. of West Bengal; Secretary and Curator, Victoria Memorial Hall; Exe. Engineer, Calcutta Central Division, Central Public Works Department (Civil Wing), Govt. of India; Chief Traffic and Transportation Engineer, Govt. of West Bengal; Senior Environmental Engineer & Incharge, Eastern Zonal Office, Central Pollution Control Board; Exe. Engineer, Presidency Circle 1, Public Works Department, Govt. of West Bengal; Deputy Chief Municipal Architect and Town Planner, Kolkata Municipal Corporation; Senior Environmental Engineer, West Bengal Pollution Control Board; and Member Secretary, West Bengal Pollution Control Board.

6. The Expert Committee made various recommendations including that the appellant should enhance its existing facilities so as to make it an eminent centre for art and culture of international standard and to find out possibility of erection of

a new building within the same campus to provide facilities for that purpose.

7. The Board of Trustees explored the means for implementation of the suggestions of the Expert Committee and held various meetings. After considering the views of the Expert Committee, the Board of Trustees after due deliberation accepted the proposal for construction of an annexe building replacing the existing cluster of annexe buildings which had become dilapidated. For this purpose, a Memorandum of Understanding with the approval of Government of India, Ministry of Culture in consultation with Ministry of Law, was signed with the Calcutta Tercentenary Trust (for short, "CTT'), a trust registered in London. Under the said Memorandum of Understanding, CTT is to provide Rs.48 crores and only the cost of the area to be occupied by the administrative office of VMH is to be borne by the VMH.

8. However, the matter was decided finally vide judgment and order dated 28th September, 2007, dealing mainly with the following issues:

A. Removal of the hawkers from the vicinity of the Hall.

B. Modernisation of the Gallery.

C. Environmental Management Plan.

D. Parking of vehicles, traffic signals and stopping goods vehicle.

E. Burning of dry leaves in the VMH Area.

F. Shifting of Administrative Office.

G. Further construction within the VMH Area.

9. So far as issue at point (G) is concerned, the Court rejected the recommendations made by the Expert Committee, refusing the permission to raise the construction in the VMH Campus.

10. The appellant moved an application to modify the order dated 28.09.2007 only to the extent that it may be permitted to raise the construction upto the height of 30 ft. in an area where it already had cluster of constructions, which is being used as a non-residential staff quarters on various grounds, inter-alia, that the appellant made a serious attempt to acquire the land/ building for having the museum and recreation centre in the close vicinity of the monument. The appellant also deposited Rupees one crore with Kolkata Municipal Corporation (hereinafter called as 'Corporation') to acquire the constructed area, but it could not get any space. The amount was refunded by the Corporation for the reason that the construction raised by the Corporation was for residential purpose.

11. The High Court considered the matter at length, took into account various issues relating to maintaining ecological balance, environment, problems relating to vehicular traffic etc., but ultimately rejected the application for modification, so far as permitting the construction of building after demolition of non-residential staff quarters was concerned. Hence, this appeal.

12. Shri Harish N. Salve, learned senior counsel appearing for the appellant, submitted that in all big museums throughout the world, administrative offices including Curators' and Director's offices are situated in the same campus. The appellant tried its best to get an alternative accommodation nearby but could not succeed in spite of its best efforts. The Act does not restrain the appellant to use the campus for the purpose other than activities connected with the memories of Queen Victoria. More so, the Expert Committee appointed by the High Court itself had made the recommendation for having such a building. The High Court rejected the application without taking into consideration the submissions raised by the appellant. The High Court did not record any reason for not granting the permission for construction. Thus, the appeal deserves to be allowed.

13. On the other hand, Shri Subhas Datta, Respondent No.2 and General Secretary of Respondent No. 1, appearing in person, has vehemently opposed the appeal contending that permitting any construction in the said campus would cause serious prejudice to the monument. New building, if permitted to be raised, would adversely affect the protection and preservation of the monument. Hence, the appeal is liable to be dismissed.

14. We have considered the rival submissions canvassed on behalf of the parties and perused the record.

15. The appellant submitted before the High Court that modification of the order was necessary and the appellant be permitted to raise the construction upto the height of 30 ft. at the same place where it has cluster of constructions which is being used as a non-residential staff quarters. The necessity had arisen for the reason that VMH is basically a museum and the process of 'acquisition of various costly' objects of art or old documents, manuscript etc. had been initiated even prior to the actual construction of the VMH. Its recognized activities conform to the definition of a museum as given in Section 1 of Article 3 of the Statute of International Council of Museum, according to which, a Museum is a non-profit permanent institution in the service of society and its development, open to the public which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purpose of education, study and enjoyment. The appellant claimed that it is institutional member of International Council of Museums and had been paying subscription to the Indian branch of International Council of Museums; that approx. 29,000 items of objects of arts are stored within the VMH building and some of those were lying idle and not displayed to the public due to dearth of space. It was contended that the height of the monument is 56.0832 meters and, therefore, the construction, if permitted, to be raised would, by no means, adversely affect the grand view of

the monument and it would not hamper any activity of the monument.

16. Thus, the High Court had to determine mainly that if such a construction is permitted, whether it would, by any means, hamper the preservation or protection of the monument?

17. The High Court dealt with all other issues regarding pollution hazards etc. and took note of the fact that large number of art crafts have been collected for a long-long time and it included art crafts not connected with Queen Victoria. The Act governing the VMH did not contain any provision permitting or restraining the use of any part of VMH compound for the purpose, other than connected with Queen Victoria. The Act contained the provisions that the Trustees may with previous approval of the Central Government, by Notification in the Official Gazette, make Regulations not inconsistent with the Act and the Rules made thereon, for enabling the body to discharge its functions under the Act. The Rules must be enacted substantially for erection, maintenance and management of memorial and care and custody of the objects. The trustees have a right to acquire a new property for the purpose of better management of the memorial. The High Court came to the conclusion that the Act "permits the trustees to acquire new property movable or immovable under the control and supervision of the Central Government and thus there is no bar in running its activities from different premises". Therefore, even for the purpose of carrying out the activities in relation to the monument, the trustees may acquire movable or immovable property outside the premises of said monument. The Court observed that the structure was unique in nature and it is one of the wonderful objects in the world and its beauty and value should not be marred in any way for the purpose of construction of auditorium, café, sitting area for guests, rest rooms etc. and any new construction within the campus would be detrimental

to the present structure situated thereon. The Court emphasised that the appellant should acquire property, movable or immovable outside the monument as has been done in Salar-Jung-Museum, Hyderabad and other places.

18. In fact, the High Court arrived at the conclusion, that if construction is permitted it would not only adversely affect the ambience of the monument but would be detrimental to the present structure. However, such a conclusion has been reached without giving any plausible reason whatsoever.

19. The Expert Committee was appointed by the High Court itself vide order dated 27.11.2003. It consisted of experts of various subjects, rendering services in different fields. Therefore, it is unfortunate that the High Court not only brushed aside its report, so far as the instant issue is concerned, rather labelled it as a *"so-called Expert Committee".* The High Court failed to appreciate that the application was filed by the appellant as it was not possible for VMH to get appropriate space nearby the monument in Kolkata. More so, neither the Pollution Control Board, nor Kolkata Municipal Corporation, nor the Suptd. Archeologist of Archeological Survey of India of Kolkata Circle, raised any objection in respect of the construction of a new building. The building was proposed to be constructed by replacing the old existing constructions at a distance of at least 160 mtrs. from the monument. The Court failed to consider that museum activities were to be expanded by the appellant therein, which would not adversely affect the monument at all, particularly when there is no prohibition under the Act to carry out such activities.

20. The High Court failed to appreciate that the proposed building would be designed with great care, ensuring that the new construction would not, by any means, disturb the existing landscape and would be in consonance with the existing ambience and compatible with the architecture and façade of the existing monument. The height of the proposed building would not be more than 10 mtrs. while the height of the

monument is more than 50 mtrs. Thus, it would not prevent the view of the monument by any means. The High Court was not justified to impose a total prohibition of construction of the Annexe in place of the existing cluster of buildings, which are in a dilapidated condition. The High Court ought to have given reasons for not accepting the report of the Expert Committee.

21. The High Court vide order dated 28.9.2007 directed to shift the administrative office outside the monument on wrong premises. The material on record suggests that all museums have this kind of accommodation within its campus. The entire administrative office including Curators', Director's office of Salarjung Museum are located within the Main Museum building. Similar is the position with the Indian Museum at Kolkata, National Museum, National Gallery of Modern Art at New Delhi, Chhatrapati Shivaji Maharaj Vastu Sangrahalaya Museum (formerly the Prince of Wales Museum) at Mumbai, Nehru Memorial Museum & Library and National Museum in New Delhi. Same is the position within internationally renowned museums, namely, British Museum, Victoria & Albert Museum, U.K., Louvre, Paris and Museums in Vienna.

22. The Expert Committee had examined the issues at length and submitted its report before the High Court, making various recommendations including :-

> *"That setting up structure and/or facility within the VMH compound for commercial amusement and recreational activities will adversely impact the environment,* will not be in consonance with the existing local ambience, and *increase the visual pollution.* The Committee recommends that no structure and/or facility should be built within the VMH compound for the purpose of amusement and recreational activities.
>
> However, the Committee found that the VMH being an eminent centre of art and culture focusing on the heritage of 17th-2Oth century India and Bengal, lacks

several modern facilities like space/facility up to international standard for visiting exhibitions, space/facility for education, research, lecture, library, meeting/reception, and space/facility to serve the public visiting the VMH.

The Committee suggests that the VMH should enhance its existing facility to take a shape of an eminent centre of art and culture of international standard. *The feasibility of building visitors' centre and exhibition area in a separate building within the VMH compound to provide the above mentioned facilities should be explored.* In any case, this should not disturb the existing landscape, and should also be in consonance with the existing ambience and compatible with the existing architecture of the monument." (emphasis added)

23. The Court dealt with the aforesaid recommendations on the issue observing:

"We, however, do not approve the suggestion of the experts appointed by this Court to find out the feasibility of building any visitor's centre and exhibition area in a separate building to be constructed within the VMH compound. *Such an idea is contrary to the concept of protection of historical monuments.* For better utilisation of the space for modernization of gallery, the existing Administrative Office may be removed to some other place and that space can be utilised for the extension of the Gallery but in no circumstances can we approve the idea of making any new construction within the VMH compound for the above purpose." (Emphasis added).

24. While deciding the application for modification, vide impugned judgment, the High Court held as under:-

"It appears that the prayer for review has been filed without appreciating the import of the said order regarding *preservation of greenery.* We find from the affidavit that

the sole object of the VMH Authority is to make the said campus a place of *brisk activities and entertainment* without caring for the protection of the monument itself which was constructed pursuant to the object of the Act. Moreover, for the purpose of the preservation of and display of the additional articles which have been subsequently acquired and which have no connection with the memory of Queen Victoria, we are of the view that there is no just reason for giving permission to construct a new building within the VMH campus. The VMH Authority is free to extend its activity in accordance with law after acquiring new property which is consistent with the object of the Act, Rules and the Regulation, but there is no ground for restricting its extended activity within the original VMH complex itself which would be perilous to the existing structure.

We have already pointed out that the Act itself approves requisition of further property, either moveable or immovable, and thus the order passed by this Court in the past has in no way created any impediment in the activities of the VMH in accordance with law; on the other hand, if the prayer of further construction is allowed for the purpose of the activities mentioned hereinabove, the constant efforts of this Court in preserving the existing memorial for the last seven years by passing various prohibitive orders would be totally frustrated." (Emphasis added).

25. In fact, the Expert Committee recommended that no part of VMH compound should be permitted to be used for any commercial amusement and recreational activities as it would increase the visual pollution. But the Committee recommended for having a centre and exhibition area in a separate building within the VMH compound. The High Court while disposing of the Writ Petition dis-approved the recommendation for having a centre and exhibition area within the VMH compound merely

observing that such an area would be contrary to the concept of protection of historical monument. The application for modification has been rejected by the High Court on the grounds that it would be contrary to preserving greenery; such a campus should not have the buildings for brisk activities and entertainment and if permission is granted, it would frustrate the effort of the High Court to preserve the existing memorial for last seven years by passing prohibitory orders.

The High Court failed to appreciate that in case a historical monument contains such a centre, it cannot be a danger for its protection. More so, as explained hereinabove, most of such museums have such activities throughout the world. The ground of preserving the greenery is totally misplaced and misconceived for the reason that building is to be constructed by demolishing the servant quarters etc. which are in a dilapidated condition. As the greenery does not exist at this place the reason given by the High Court is untenable. The other ground that campus should not be used for brisk activities is unsustainable because having the activities in such centre and exhibition area cannot be termed as 'brisk activities'. More so, the High Court had never passed any interim order during the pendency of the Writ Petition for removal of the cluster of buildings which in fact is in dilapidated condition. Therefore, the question of frustrating the entire effort of the High Court to protect the monument could not arise. Indisputably, the writ petitioners/respondents have not been able even to allege that factual averments made in the application for modification were not correct. The impugned order rendered the Memorandum of Understanding of the appellant with CTT for providing a sum of Rs.48 crores, frustrated.

26. Thus, it is evident that the High Court did not give any specific/good or relevant reason for not accepting the recommendation made by Expert Committee at initial stage or while rejecting the application for modification vide impugned order.

27. The Constitution Bench of this Court in *The University of Mysore vs. C.D. Govinda Rao and Anr.* AIR 1965 SC 491 held that "normally the Court should be slow to interfere with the opinions expressed by the experts." It would normally be wise and safe for the Courts to leave the decision to experts who are more familiar with the problems they face than the Courts generally can be.

28. This view has consistently been reiterated by this Court as is evident from the Judgments in *The State of Bihar & Anr. vs. A.K. Mukherjee & Ors.* AIR 1975 SC 192; *Dalpat Abasaheb Solunke etc.etc. vs. Dr. B.S. Mahajan etc.etc.* AIR 1990 SC 434; *Central Areca Nut & Cocoa Marketing & Processing Co-operative Ltd. vs. State of Karnataka & Ors.* (1997) 8 SCC 31; and *Dental Council of India vs. Subharti K.K.B. Charitable Trust & Anr.* (2001) 5 SCC 486.

29. However, if the provision of law is to be read or understood or interpreted, the Court has to play an important role. [Read : *P.M. Bhargava & Ors. vs. University Grants Commission & Anr.* AIR 2004 SC 3478 and *Rajbir Singh Dalal (Dr.) vs. Chaudhari Devi Lal University, Sirsa & Anr.* (2008) 9 SCC 284.

30. In the instant case, the Expert Committee was appointed by the High Court itself. No allegation of malafide or disqualification against any Member of that Committee had ever been made/raised. Thus, we fail to understand as on what basis, its recommendation on the issue involved herein, has been brushed aside by the High Court without giving any reason whatsoever, particularly, when the Act governing VMH does not prohibit the use of the part of the compound for the purpose other than connected with Queen Victoria.

31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and

obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice – delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. "*The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind."* [Vide *State of Orissa vs. Dhaniram Luhar* AIR 2004 SC 1794; and *State of Rajasthan vs. Sohan Lal & Ors.* (2004) 5 SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide *Raj Kishore Jha vs. State of Bihar & Ors.* AIR 2003 SC 4664; *Vishnu Dev Sharma vs. State of Uttar Pradesh & Ors.* (2008) 3 SCC 172; *Steel Authority of India Ltd. vs. Sales Tax Officer, Rourkela I Circle & Ors.* (2008) 9 SCC 407; *State of Uttaranchal & Anr. vs. Sunil Kumar Singh Negi* AIR 2008 SC 2026; *U.P.S.R.T.C. vs. Jagdish Prasad Gupta* AIR 2009 SC 2328; *Ram Phal vs. State of Haryana & Ors.* (2009) 3 SCC 258; *Mohammed Yusuf vs. Faij Mohammad & Ors.* (2009) 3 SCC 513; and *State of Himachal Pradesh vs. Sada Ram & Anr.* (2009) 4 SCC 422].

33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected.

34. Indisputably, the High Court did not assign valid and good reasons for rejecting the recommendation made by the Expert Committee for allowing the construction in question in its judgment and order dated 28.09.2007 nor the reasons have been recorded in the impugned judgment dated 21.08.2009 rejecting the application for modification of the earlier order. Thus, in view of the above, the orders, so far as this particular issue is concerned, remain unsustainable.

35. Thus, in view of the above, special facts and circumstances of the case warrant review of the impugned order. The appeal stands allowed. The impugned judgment and order dated 21.8.2009 is set aside. Application filed by the appellant for modification of the order dated 28.9.2007 stands allowed.

However, it is clarified that in case the proposed construction is raised it would be in consonance with the existing ambience and compatible with the architecture of the monument. The appellant shall ensure that landscape of the monument would also not be disturbed by any means.

The parties are left to bear their own costs.

B.B.B. Appeal allowed.

SANGAPPA & ORS.
v.
STATE OF KARNATAKA
(Criminal Appeal No. 448 of 2010)

MARCH 9, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Code of Criminal Procedure, 1973 – s. 378 (1) and (3) – Prosecution u/ss. 447, 504, 302 r/w s. 34 IPC – Acquittal by trial court – High Court reversing acquittal order and convicting u/s. 304 (Part-II) r/w s. 34 IPC –On appeal, held: The manner in which High Court disposed of appeal against acquittal is not correct – High Court altered the acquittal order without discussing and re-appreciating the evidence and without giving reasons for convicting the accused u/s. 304(Part II) r/w s. 34 – Penal Code, 1860 – ss. 447, 504, 302 r/w Section 34.

The appellants-accused were prosecuted for the offences punishable u/ss. 447, 504, 302 r/w Section 34 IPC. The trial court acquitted the accused of all the charges. The High Court reversing the order of acquittal, convicted the accused u/s. 304 (Part-II) r/w Section 34 IPC. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1. The manner in which the High Court disposed of the appeal u/s 378(1) and (3) Cr.P.C., is bad. It is true that in an appeal from acquittal, the High Court has full power to re-appreciate and re-assess the entire evidence upon which the order of acquittal was founded and then to come to its own conclusion. There is no limitation placed on that power of the High Court. Cr.P.C. makes no difference in the power of the appellate court, between appeal filed by the State or by other person but

the appellate court would not be justified merely because it feels that a different view should be taken for reasons which are not so strong. The High Court in exercising the power conferred by Cr.P.C. and before reaching its conclusion upon facts, shall give always proper weight and consideration to such matters as (1) the view of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that they have been acquitted at trial; (3) the right of the accused to the benefit of any doubt. [Para 9] [217-F-H; 218-A-B]

2. The High Court, in the present case, did not discuss and re-appreciate the evidence of PW-1 who is stated to be the only eye-witness to the incident, but mainly observed that "the contents of IR and the evidence of PW-1 are very well corroborated by injuries found on the dead body noted in the P.M report." This is not re-appraisal or re-appreciation of the evidence of PW-1. The High Court did not even notice the nature of injuries on the body of the deceased. There is no discussion about the medical evidence. There is no discussion as to how all the accused could be convicted with the aid of Section 34, IPC. There is nothing on record suggesting as to the basis on which the High Court arrived at conclusion that the accused would be guilty of offence under Section 304 (Part-II) and not for the offence under Section 302 read with Section 34, IPC. [Para 10] [218-C-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 448 of 2010.

From the Judgment & Order dated 10.6.2009 of the High Court of Karnataka Circuit Bench at Gulbarga in Criminal Appeal No. 556 of 2004.

BPS Patil, Ajay Kumar, M.B. Subrahmanya Prasad, R.D. Upadhyay for the Appellants.

Sanjay R. Hegde, A. Rohan Singh, Ramesh S. Jadhav, Vikrant Yadav for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. Leave granted.

2. All the accused-appellants were charged and tried for the offences punishable under Sections 447, 504, 302 read with Section 34 of the Indian Penal Code (IPC) but were acquitted of all the charges by the trial court. On appeal preferred by the State of Karnataka, the High Court reversed the order of acquittal in relation to all the appellants and convicted them under Section 304 (Part-II) read with Section 34 of the IPC and sentenced them to undergo rigorous imprisonment for a period of two years and imposed a fine of Rs.30,000/- each, in default, to suffer simple imprisonment for a period of three years.

Few Relevant Facts:

3. On 9th September, 1998 at about 6.00 p.m. one Shivalingayya lodged a first information report before the Sub-Inspector of Yedrami Police Station inter alia alleging that his son Sharanaiah was murdered by four persons namely Sangappa(A-1), Sharanappa(A-2), Malappa(A-3) and Jagadavappa (A-4). It is alleged in the report that on the fateful day Shivalingayya and his wife - Boramma (PW-1) joined their son Sharanaiah (deceased) in the fields to remove the unwanted weeds from their land. During that time all the accused persons were passing by the side of the complainant's land along with their bullocks and all of a sudden one bullock strayed into their fields and started grazing the crops. The deceased on finding that the bullock so entered into the fields asked the appellants to ensure that no damages caused to the crops. Enraged by the demand so made by the deceased all the accused started abusing the deceased. The matter did not end there. It is further alleged that Sharanappa (A-2) caught hold of the deceased, floored him to the ground and gagged his

mouth and Sangappa (A-1) attacked the deceased with a knife and the other two accused Mallapa and Jagadevappa (A-3 & A-4) respectively hit the deceased on his back and legs with stones. Shivalingayya and his wife (PW-1) made an attempt to rescue their son but A-2 and A-3 forcefully pushed them aside. In the report, it is alleged that all the accused trespassed into the fields with the common intention of committing murder of the deceased as the deceased interfered in a matter concerning some illicit relationship between the sister of the accused and one Siddanna.

4. Having received the first information report PW-11 registered a case against all the accused on the file of Yadrami Police Station for the offences punishable under Sections 447, 504, 302 read with Section 34, IPC. The next day *i.e.* 10th September, 1998, PW-11 commenced the investigation and completed the formalities including recording of the statement of witnesses and handed over the case for further investigation by the Circle Inspector (PW-12) who also visited the scene of offence and drawn panchanama in the presence of two panch witnesses (Ex. P4) and seized the several incriminating articles. The accused were arrested on 25th September, 1998.

5. The learned 1st Additional Sessions Judge, Gulbarga, on the basis of the material available on record framed charges against all the accused for the offences punishable under Sections 447 and 302 read with Section 34, IPC. The accused pleaded not guilty and claimed to be tried. The Sessions case was transferred to the Fast Track Court, Gulbarga for the trial. The Fast Track Court vide judgment and order dated 4th December, 2003 acquitted the accused of all the charges framed against them and held that the prosecution miserably failed to establish its case beyond reasonable doubt.

6. On appeal preferred by the State of Karnataka against the order of acquittal the High Court by the impugned order dated 10th June, 2009 reversed the order of acquittal and accordingly sentenced all the accused for the offence

punishable under Section 304 (Part-II) read with Section 34, IPC. Be it noted, the High Court did not record any finding whatsoever with regard to the charge for the offence punishable under Section 447 IPC.

7. We have heard learned counsel for the appellants as well as the State.

8. The trial court after an elaborate consideration of the matter refused to place any reliance on the evidence of PW-1 (Boramma) who is none other than the mother of the deceased. The trial court did not discard the evidence of PW-1 on the sole ground that she was the interested witness. The trial court carefully scrutinised the evidence of PW-4 being an interested witness. We do not propose to discuss the evidence of PW-1 in detail for the simple reason that the High Court did not assign any reason whatsoever as to why it had chosen to rely upon the evidence of PW-1 without even discussing and considering the reasons assigned by the trial court in paragraphs 13 and 14 of its judgment. The High Court merely observed that the evidence of PW-1 is very natural and credible. The High Court in the impugned Judgment did not even notice the details of the injuries found on the body of the deceased. There is no reason assigned by the High Court to set aside the finding of the trial court that the very presence of PW-1 at the scene of offence was highly doubtful. There is no mention about any recoveries in the impugned judgment.

9. We must express our reservation for the manner in which the High Court disposed of the appeal under Section 378(1) and (3) of Code of Criminal Procedure. It is true that in an appeal from acquittal the High Court has full power to re-appreciate and re-assess the entire evidence upon which the order of acquittal was founded and then to come to its own conclusion. There is no limitation placed on that power of the High Court. The Code makes no difference in the power of the appellate court, between appeal filed by the State or by other person but the appellate court would not be justified merely

because it, feels that a different view should be taken for reasons which are not so strong. This Court repeatedly held that the High Court in exercising the power conferred by the Code and before reaching its conclusion upon facts, it shall give always proper weight and consideration to such matters as (1) the view of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that they have been acquitted at trial; (3) the right of the accused to the benefit of any doubt.

10. The High Court in the present case did not discuss and re-appreciate the evidence of PW-1 who is stated to be the only eye witness to the incident but mainly observed that "the contents of IR and the evidence of PW-1 are very well corroborated by injuries found on the dead body noted in the P.M report." Surely, this is not re-appraisal or re-appreciation of the evidence of PW-1. The High Court did not even notice the nature of injuries on the body of the deceased. There is no discussion about the medical evidence. There is no discussion as to how all the accused could be convicted with the aid of Section 34, IPC. There is nothing on record suggesting as to the basis on which the High Court arrived at conclusion that the accused would be guilty of offence under Section 304 (Part-II) and not for the offence under Section 302 read with Section 34, IPC. This Court in its judgment dated May 14, 2007 *(Narendra Bhat & Anr. vs. State of Karnataka)* while dealing with similar judgment of the same High Court observed: "This Court has in a series of judgments held that a court exercising appellate power must not only consider questions of law but also questions of fact and in doing so it must subject the evidence to a critical scrutiny. The judgment of the High Court must show that the court really applied its mind to the facts of the case as particularly when the offence alleged is of a serious nature and may attract a heavy punishment. …….The judgment of the High Court is in three short paragraphs. It leaves much to be desired. No serious attempt appears to have been made by

the High Court to appreciate the evidence on record." The observations so made are equally applicable to the present case and we wish to say no more and leave the matter at there.

11. In such view of the matter, we set aside the impugned judgment and order and remit the matter to the High Court for fresh consideration and disposal in accordance with law. It is however, made clear that we have not expressed any opinion whatsoever on the merits of the case since it is for the High Court to re-appreciate the evidence and arrive at its own conclusions.

12. The appeal is allowed. We have already released the appellants on bail. They shall continue to be on bail. We request the High Court to dispose of the appeal as expeditiously as possible.

K.K.T. Appeal allowed.

KHILAN & ANR.
v.
STATE OF M.P.
(Criminal Appeal No. 1348 of 2007)

MARCH 9, 2010

[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 – s. 302/34 – Conviction under – Eight accused persons armed with deadly weapons forming unlawful assembly to kill deceased – Infliction of fatal injuries on deceased – Conviction and sentence of four accused u/s. 302/34 – Upheld by High Court but acquittal of one of the accused – On appeal held: There is no infirmity either in the appreciation of evidence or apparent miscarriage of justice – Thus, order of conviction of three accused by courts below does not call for interference – Presence and participation of the accused acquitted by High Court in the crime doubtful, thus, order of High Court in that regard upheld – Constitution of India, 1950 – Article 136.

According to the prosecution case, there was a land dispute between the parties. P, K, G, SS, D, KR, GL and B armed with deadly weapons formed an unlawful assembly and caused fatal injuries to TS. PR-PW2 and SB were the eye witness to the assault. The trial court convicted P, GL, K and SS u/s.302/34 IPC and sentenced to life imprisonment. The High Court upheld the conviction and sentence of P, K and GL but acquitted SS. Hence, the present cross appeals were filed. This Court by order dated 16.2.2010 dismissed the appeals.

Now giving reasons for dismissing the appeals, the Court

HELD:

Criminal Appeal No. 1348 of 2007:

1.1. The trial court concluded that the four accused namely P, K, G and SS had inflicted the fatal injuries on the deceased. It was upon the thorough consideration of the evidence that the trial court rendered its verdict. [Para 15] [230-E-F]

1.2. In appeal the High Court re-appreciated the entire evidence, even more elaborately. The High Court had independently reached its conclusions. It is noticed that the medical evidence given by the doctor clearly shows that the deceased had suffered five incised injuries. The injuries resulted in the instantaneous death of TS. The High Court reiterates the reason for disbelieving the testimony of SB. On examination of the evidence given by PW 2-PR it is noticed that PW2 had merely stated that his Mama goes to the fields in the morning after taking tea. He usually comes back to take lunch in the afternoon. The witness never stated that on that particular date also the deceased had only taken tea. No clarification with regard to this was sought from the doctor by either party. In any event this single factor would not be sufficient to falsify the evidence led by the prosecution. The High Court also discarded the evidence of SB on the ground that the identity of B has not been established. There was only one injury on the deceased which could have been caused by a blunt weapon. SB had insisted that B had assaulted the deceased with the lathi. The High Court also came to the conclusion that merely because the witnesses had been closely related to the deceased and there is enmity between the families is no reason to discard the evidence which is consistent and is corroborated. The weapons were recovered at the instance of the appellant. It is also concluded that TS had died due to the cumulative effect of all the injuries which

were sufficient to cause death in the ordinary course of nature. The said conclusion is also buttressed by the circumstance that TS died immediately upon the injuries being inflicted. Therefore, the High Court had endorsed the approach of the trial court. Upon a close examination of the evidence of PW2, the High Court came to a conclusion that the presence and participation of SS in the crime was doubtful. It is observed that although the evidence of PW2 and PW4-SL is consistent with regard to the role played and the weapons used by P, G and K. However it suffers from material discrepancies/ inconsistencies in relation to the role played and the weapons used by SS. It is observed that the statement of P is inconsistent with his statement during investigation u/s. 161 Cr.P.C. In the report as well as in his statement u/s. 161 Cr.P.C. he has stated that SS was carrying luhangi. However, in his statement he changed his version and stated that he was carrying and used farsa. This apart during investigation luhangi was recovered and seized from his possession. Even PW4 mentioned that SS was having luhangi in his hand. Consequently he had been given been benefit of the doubt and acquitted. [Para 16] [230-G-H; 231-A-H; 232-A-B]

1.3. It becomes quite evident that appreciation of the evidence by the courts below cannot be said to have resulted in grave injustice to the accused/appellants. The findings recorded by the trial court have been reaffirmed by the High Court on an independent appreciation of the evidence. In the absence of any infirmity either in the appreciation of the evidence or apparent miscarriage of justice, it would not be appropriate for this Court to interfere with the judgments of the courts below. Both the courts have painstakingly examined the entire evidence led by the parties. Cogent reasons have been given in support of the conclusions reached by both the courts.

In such circumstances this Court would be rather reluctant to intervene. Even though the powers of this Court under Article 136 of the Constitution are very wide, but they are exercised only in exceptional cases where substantial and grave injustice has been done to the aggrieved party. [Para 17] [232-C-E]

Arunachalam v. P.S.R. Sadhanantham **(1979) 2 SCC 297;** *State of U.P. v. Babul Nath* **(1994) 6 SCC 29;** *Ganga Kumar Srivastava v. State of Bihar* **(2005) 6 SCC 211, referred to.**

1.4. On going through the evidence in the instant case, it cannot be concluded that the appellants have been able to establish any exceptional circumstances or any miscarriage of justice which would shock the conscience of this Court; and that the opinion expressed by the courts below was either manifestly perverse or unsupportable from the evidence on record. It is not possible for this Court to convert itself into a court to review evidence for a third time. Inspite of the strenuous efforts made by the counsel for the appellants, the instant case neither raises any exceptional issue nor has resulted in miscarriage of justice. [Para 21] [234-F, G, H]

Criminal Appeal No. 1540 of 2008:

The evidence of the prime witness PR-PW2 in relation to SS was inconsistent and contradictory in nature. There was a direct conflict in the evidence given by PW2 and PW4. There was also discrepancies in the statement made in Court and the statements made earlier during investigation as also in the report. Consequently, the High Court expressed an opinion that the presence and participation of SS in the crime is doubtful. This being a possible and a plausible view would not call for any interference in exercise of the jurisdiction under Article 136 of the Constitution of India. [Para 1] [235-C-D]

Case Law Reference:

(1979) 2 SCC 297	**Referred to.**	**Para 18**
(1994) 6 SCC 29	**Referred to.**	**Para 19**
(2005) 6 SCC 211	**Referred to.**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1348 of 2007.

From the Judgment & Order dated 10.4.2006 of the High Court of Madhya Pradesh Jabalpur Bench at Gwalior in Criminal Appeal No. 120 of 1998.

WITH

Crl.A.No. 1540 of 2008

Harinder Mohan Singh, Kaushal Yadav, Durgesh Yadav and Shabana for the Appellants.

S.K. Dubey, B.S. Banthia, Naveen Sharma, Yogesh Tiwari and N. Annapoorani for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. On 16.2.2010 this Court had passed the following order:

"Mr. S.K. Dubey, learned senior counsel appearing for the respondent submitted that arising out of the same judgment, the State of M.P. has also filed another Criminal Appeal No.1540/2008 against the acquittal of Sangram Singh and requests that the said appeal may also be heard along with the present appeal.

Criminal Appeal No.1540/2008 is taken on board.

The appeals are dismissed in terms of the signed order. The reasoned order will follow."

2. We now proceed to give the reasons.

3. This appeal has been filed by the two appellants against the judgment of the High Court of Judicature of Madhya Pradesh in Criminal Appeal No. 120/98 dated 10.4.2006. The High Court has been pleased to dismiss the appeal of the petitioner and upheld the conviction and sentence under Section 302/34 IPC.

4. We may briefly notice the salient facts involved in this appeal. It was the case of the prosecution that eight accused persons, namely, Prema, Khilan, Gaindalal, Sangramsingh, Durzan, Kashi Ram, Gyarsia Lal and Bihari had formed an unlawful assembly. They armed themselves with deadly weapons and assaulted Toophan Singh, in furtherance of their common object to kill him, in which they succeeded. It was stated by the complainant, Prabhulal (PW2) that on 8.12.1991 when he had gone to the fields to answer a call of nature, he heard the cries of his Mama, Toophan Singh, shouting "mar diya-mar diya". He went running to the spot and saw that accused Prema, Gainda and Khilan armed with farsas and Sangram armed with luhangi along with Durzan, Kashi, Gyarsia Lal and Bihari armed with lathis, were assaulting his Mama, Toophan Singh. As a result of the assault Mama, Toophan Singh, fell on the ground. When he tried to intervene the appellant, Prema exhorted the other accused to kill the complainant also. All the accused tried to catch him but he ran away and reached his home. After hearing about the assault from the complainant (PW2), Phool Singh (PW7) and two other persons, Meharban and Rajaram went to the spot. However, the assailants ran away. On an examination of Toophan Singh, they found that he had died. He had received deep cut wounds over his head and blood was oozing out of them. Sushila Bai who was working in the field is said to be an eye-witness of the assault. It is also the case of the prosecution that the Prema and his sons had a dispute over land with the deceased and his family. The incident was reported by Prabhulal, son of Anant

Singh, on the same day at about 1300 hrs. On the information being received, Crime No.108/91 was registered at Police Station, Kachnar under Sections 147, 148, 302/149 IPC. Upon conclusion of the investigation charge sheet was filed and all the eight accused were sent up for trial. All the accused pleaded not guilty. They all took up the plea that due to enmity, they have been falsely implicated.

5. Upon conclusion of the trial the Addl. Sessions Judge acquitted Durzan, Kashi Ram, Gyarsia Lal and Bihari of all the charges. Prema, Gainda Lal, Khillan and Sangram Singh were convicted of murder of Toophan Singh under Section 302/34 and sentenced to life imprisonment and Rs.500/- each as fine. It was further directed that in case of default they would undergo a further sentence of two months R/I.

6. Aggrieved by the aforesaid judgment the present petitioners/appellants along with Sangram Singh challenged the same in appeal before the High Court.

7. The High Court upon re-appreciation of the entire evidence upheld the conviction and sentence of the appellants, Prema, Khillan and Gainda. However, the conviction and sentence of Sangram Singh was set aside and he was duly acquitted.

8. Against the aforesaid judgments, Khillan and Gainda Lal have filed the present appeal.

9. We have heard the counsel for the parties. Learned counsel for the appellant submitted that the prosecution version is inherently improbable. The evidence of the prosecution witnesses suffers from inherent contradictions. According to learned counsel it is a clear-cut case of false implication due to old enmity between the twofamilies. The presence of PW2, Prabhulal, in the field at 10 am isquite unnatural and doubtful. According to the learned counsel, in villages people go for their ablutions early in the morning when it issemi-darkness. Nobody

would be seen answering a call of natureat 10 am. In any event, the statements of this witness are contradictory. He claims to have taken a utensil with him to wash his face. There was no occasion for him to go to the field for washing his face as the houses of the parties were located in the fields and were very nearby. Learned counsel further submitted that on the basis of the same evidence four persons were acquitted by the Trial Court and one by the Appeal Court. Therefore, for the same reasons the appellants were entitled to the benefit of doubt and acquittal. Making detailed reference to the evidence of the witnesses for the prosecution, learned counsel submitted that there are different versions given by the prosecution witnesses. Learned counsel submitted that Toophan Singh could not have gone to the fields at 7 o'clock in the morning without wearing any warm clothes. He could not have been wearing only underpants in the month of December. Learned counsel further submitted that Toophan Singh had actually seen Sushila Bai in a compromising position with Baba. He was, therefore, attacked by Baba of Toarai. According to the learned Counsel, Toophan Singh actually died when the tractor in which he was being taken for treatment overturned.

10. Learned counsel further submitted that the complainant Prabhulal (PW2) had categorically stated his Mama, Toophan Singh, used to take the buffaloes to the fields for grazing every day. On 8.12.1991, he had also gone to the fields at about 7 am. He had further stated that his Mama used to go to the fields after drinking tea and return in the afternoon for lunch. According to the learned counsel if the deceased had gone after only drinking tea, he would not have had half digested food in his stomach. In the post mortem report, it is quite clearly stated that the stomach of the deceased contained half digested food. This could only be if the deceased had eaten about 3 to 4 hours before he died.

11. In order to discuss the entire evidence the Trial Court formulated three main issues which needed to be decided in the case.

Issue No.1 is "whether on 8.12.1991 at 10 am Toophan Singh died and his death is homicide?" The Trial Court notices the evidence of Dr. Natwar Singh (PW1) who had conducted the post mortem on the deceased on 9.12.1991. This witness stated that the following injuries were found on the deceased:-

(i) An incised chopped wound over mid of the scalp on both the mid parietal region centrally of shape "c", of size 5cm x 5 cm x upto brain cut (meningitis and brain matter) clotted blood present.

(ii) An incised wound 2.5 cm x 1.5 cm x bone deep over right arm lower 1/3rd on lateral aspect obliquely.

(iii) An incised wound transversely oblique over mid of left thigh on lateral aspect of (illegible).

(iv) An incised wound over left thigh middle 1/3rd on lateral aspect transversely 5 cm x 3 cm x muscle cut 1 x = below the injury no 3.

(v) An incised wound over mid of left leg on ant. Aspect of size 3 cm x 1.5 cm x bone deep.

(vi) A contusion over left scrotum on anterior lateral aspect 5cm x 3cm."

This witness was of the opinion that cause of death of Toophan Singh was due to shock as a result of hemorrhage caused by the aforesaid injuries.

12. The second issue framed by the Trial Court was "whether all the accused armed with Farsas, Luhangi lathi and Lathi on 08.12.1991 at 10 AM in furtherance of common object and knowledge assaulted Tufan Singh in Village Aam Khera Patharia?"

13. Thereafter Trial Court evaluated the evidence of

Prabhulal (PW 2), Shrilal (PW 4), Phool Singh (PW 7). Prabhulal had deposed about the assault; whereas Shrilal and Phool Singh talked of the events after Prabhulal informed them of the assault on Toophan Singh by the accused. The Trial Court noticed that there was hardly any credible evidence about the assault by Durzan, Kashi Ram, Bihari and Gyarsia Lal. Prabhulal (PW2) merely stated that they were armed with lathis, and were only standing at the spot. They did not participate in the crime. Therefore, they have been acquitted.

14. The Trial Court rejects the submissions on behalf of the defence that independent witnesses have deliberately not been examined. It is concluded that merely because of enmity between the two groups and the close relationship of the witnesses with the deceased the evidence of Prabhulal (PW2) Shri Lal (PW4) and Phool Singh (PW7) cannot be disbelieved. For accepting their evidence the Trial Court notices that the report was immediately lodged in which Prabhulal and Phool Singh was shown. Investigation was also immediately started. The Statements of Shri Lal under Section 161 Cr.P.C. were recorded on the same day. The three witnesses are consistent on the material facts of the incident. The ocular evidence is corroborated by the evidence of Dr. Natwar Singh (PW1) with regard to the nature of the injuries, time and cause of death. The injuries which were found over the dead body were mainly caused by sharp edged weapon which may be farsas as well as luhangi. The Trial Court then notices the submission that semi digested food had been found in the intestine, even though, Prabhulal (PW2) had stated that usually the deceased was taking tea in the morning. The Trial Court was of the opinion that Prabhulal (PW2) had merely stated that the deceased usually consumed tea only but there was no statement to the effect that on that particular day the deceased had not eaten anything else. The Trial Court thereafter notices the evidence of Sushila Bai (PW9). It is noticed since she did notsupport the prosecution case she had been declared hostile. The Trial Court disbelieved the witness since 5 incised injuries had been

caused on the body of the deceased which could only have been caused by a sharp weapon. Sushila Bai had said that Baba had assaulted the deceased with a lathi. The defence version that Baba had assaulted Toophan, because Sushila Bai had been found in a compromising position with the Baba, was disbelieved as no question was put to her on behalf of the accused when she was examined as PW 9. The Trial Court also concludes that the injuries on the deceased were not the result of the tractor turning turtle on he was being carried. According to Dr. Natwar Singh (PW1), there were five incised injuries on Toophan Singh. Only injury No.6 could have been caused by a blunt weapon. The Trial Court also noticed that the weapons of offence had been recovered at the instance of the accused. On the basis of the above the Trial Court concluded that the four accused namely Prema, Khillan, Gainda and Sangram Singh had inflicted the fatal injuries on the deceased.

15. The third issue framed by the Trial Court is whether on the aforesaid date, time and place the accused persons formed unlawful assembly to kill Toophan Singh with deadly weapons and using the force and aggressions committed while assaulting Toophan Singh. In considering this issue the Trial Court has reiterated that the murder was committed by the accused Prema, Khillan, Gainda and Sangram Singh. It is also noticed that the participation of Durzan, Kashi Ram, Gyarsia lal and Bihari is not proved by their mere presence. These persons had no intention to kill Toophan Singh nor had they formed unlawful assembly to kill him. From the above, it is quite evident that it was upon the thorough consideration of the evidence that the Trial Court has rendered its verdict.

16. In appeal the high court re-appreciated the entire evidence, even more elaborately. The high court had independently reached its conclusions. It is noticed that the medical evidence given by Dr. Natwar Singh clearly shows that the deceased had suffered five incised injuries. The injuries have resulted in the instantaneous death of Toophan Singh. The

High Court reiterates the reason for disbelieving the testimony of Sushila Bai. On examination of the evidence given by Prabhulal it is noticed that PW2 had merely stated that his Mama goes to the fields in the morning after taking tea. He usually comes back to take lunch in the afternoon. The witness ˇnever stated that on that particular date also the deceased had only taken tea. No clarification with regard to this was sought from the doctor by either party. In any event this single factor would not be sufficient to falsify the evidence led by the prosecution. The High court also discarded the evidence of Sushila Bai on the ground that the identity of Baba has not been established There was only one injury on the deceased which could have been caused by a blunt weapon. Sushila Bai had insisted that Baba had assaulted the deceased with the lathi. The High Court also comes to the conclusion that merely because the witnesses had been closely related to the deceased and there is enmity between the families is no reason to discard the evidence which is consistent and is corroborated. The weapons have been recovered at the instance of the appellant. It is also concluded that Toophan Singh had died due to the cumulative effect of all the injuries which were sufficient to cause death in the ordinary course of nature. The aforesaid conclusion is also buttressed by the circumstance that Toophan Singh died immediately upon the injuries being inflicted. Therefore the High court had endorsed the approach of the learned Trial Court. Upon a close examination of the evidence of PW2 Prabhulal, the High Court came to a conclusion that the presence and participation of Sangram Singh in the crime was doubtful. It is observed that although the evidence of PW2, Prabhulal, and Shri Lal PW4 is consistent with regard to the role played and the weapons used by Prema, Gainda and Khillan. However it suffers from material discrepancies/ inconsistencies in relation to the role played and the weapons used by Sangram Singh. It is observed that the statement of Prabhulal is inconsistent with his statement during investigation under Section 161 of Cr.PC (Ex.D1). In the report Ex.P2 as well as in his statement under Section 161 of Cr.PC he has stated

that Sangram Singh was carrying luhangi. However, in his statement he had changed his version and stated that he was carrying and used farsa. This apart during investigation luhangi was recovered and seized from his possession. Even Shri Lal PW4 has mentioned that Sangram Singh was having luhangi in his hand. Consequently he had been given been benefit of the doubt and acquitted.

17. From the above, it becomes quite evident that appreciation of the evidence by the courts below cannot be said to have resulted in grave injustice to the accused/appellants. The findings recorded by the trial court have been reaffirmed by the High Court on an independent appreciation of the evidence. In the absence of any infirmity either in the appreciation of the evidence or apparent miscarriage of justice, it would not be appropriate for this Court to interfere with the judgments of the courts below. Both the courts ˇhave painstakingly examined the entire evidence led by the parties. Cogent reasons have been given in support of the conclusions reached by both the courts. In such circumstances this Court would be rather reluctant to intervene. Even though the powers of this Court under article 136 of the Constitution are very wide, but they are exercised only in exceptional cases where substantial and grave injustice has been done to the aggrieved party.

18. The scope and ambit of the power of this Court under Article 136 of the Constitution of India to interfere in findings of acquittal or conviction recorded by the courts below has been a subject matter of discussion in a number of decisions of this Court. We may notice here only three of the earlier judgments. In the case of *Arunachalam v. P.S.R. Sadhanantham* (1979) 2 SCC 297 this Court has observed as follows:

> "The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the court to set limits to

itself within which to exercise such power. It is now the well-established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted `perversely or otherwise improperly."

19. Again in the case of *State of U.P. v. Babul Nath* (1994) 6 SCC 29 this Court, while considering the scope of Article 136 as to when this Court may possibly upset the findings of fact, it is observed as follows:

"5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

20. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of *Ganga Kumar Srivastava v. State of Bihar* (2005) 6 SCC 211. In paragraph 10 of the aforesaid judgment this Court culled out the principles emerging from the earlier decisions in the following words:

"(i) The powers of this Court under Article 136 of the

Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact *save in exceptional* circumstances.

(ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted *perversely or otherwise improperly.*

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where *the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."*

21. We have been taken through the evidence in the present case by the learned counsel for the parties. We are unable to conclude that the appellants have been able to establish any exceptional circumstances or any miscarriage of justice which would shock the conscience of this Court. We are unable to conclude that the opinion expressed by the courts below was either manifestly perverse or unsupportable from the evidence on record. It is not possible for this Court to convert itself into a court to review evidence for a third time. In spite of the strenuous efforts made by the learned counsel for the appellants, we are of the considered opinion that the present case neither raises any exceptional issue nor has resulted in

miscarriage of justice.

22. For the reasons stated above, the appeal is dismissed.

Criminal Appeal No. 1540 of 2008 -

1. We have earlier noticed in the judgment rendered in Criminal Appeal No.1348/2007 that the evidence of the prime witness, Prabhulal (PW2) in relation to Sangram Singh was inconsistent and contradictory in nature. There was a direct conflict in the evidence given by Prabhulal and Shri Lal (PW4). There was also discrepancies in the statement made in Court and the statements made earlier during investigation as also in the report Ex.P2. Consequently the High Court has expressed an opinion that the presence and participation of Sangram Singh in the crime is doubtful. This being a possible and a plausible view would not call for any interference in exercise of our jurisdiction under Article 136 of the Constitution of India.

2. In view of the judgment passed in Criminal Appeal No.1348 of 2007, this appeal is also dismissed.

N.J. Reasons given for dismissal of the Appeals.

JAVED MASOOD AND ANR.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 1522 of 2008)

MARCH 09, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860: s.302 – Conviction under, by courts below, on the basis of evidence of eye witnesses – Justification of – Held: On facts, not justified – Entire prosecution case rested upon the Parcha Bayan lodged by PW-5 – PW-5 was brother of deceased and a highly interested witness – Evidence of PW-6 completely ruled out presence of PW-5 at the scene of offence — Once his presence is disbelieved, whole case of prosecution would collapse – The police personnel who came on the spot after incident and took deceased to hospital deposed that PWs were not present at the scene of offence – Police personnel were independent witness and there was no reason for them to depose falsely.

Constitution of India, 1950: Article 136 – Scope of – Held: Concurrent findings of facts are not usually interfered with in exercise of jurisdiction under Article 136 by re-appreciation of the evidence unless it is clearly established that courts below altogether ignored vital piece of evidence and rested their conclusion placing reliance on the evidence which could not be accepted on the face of it.

Prosecution case was that on the fateful day, accused persons equipped with deadly weapons reached the spot of occurrence and started inflicting injuries on the deceased and others. Thereafter accused persons fled away. The police van reached the spot and removed the deceased to the hospital where he was

declared dead. PW-5 lodged a Parcha Bayan. The prosecution in support of its case examined 33 witnesses. Trial Court accepted the prosecution case and convicted the appellants under Sections 148, 201 and 302 IPC. On appeal, High Court set aside conviction under Sections 148 and 201. It however upheld conviction under Section 302 IPC. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The concurrent findings of facts are not usually interfered with in exercise of jurisdiction under Article 136 of the Constitution of India by re-appreciation of the evidence unless it is clearly established that the courts below altogether ignored vital piece of evidence and rested their conclusion placing reliance on the evidence which cannot be accepted on the face of it. [Para 8] [244-F-G]

1.2. The evidence of PW-6 is very crucial. It is in his evidence that on the fateful day the deceased alone had come on a motorcycle to his shop at about 12.30 p.m. to repay an old debt. There was conversation between them for about 15 minutes. While the deceased was sitting in the shop he went into the basement of the shop to find as to any old tyres were available to sell as requested by the deceased and when he returned to the shop the deceased was not found in the shop. Then he found crowd in the street and when he went to the place to know as to what transpired found the deceased lying completely soaked in blood. He had died at the place of occurrence. Within 5-10 minutes the police came in gypsy and removed the body to hospital in gypsy. It was specifically stated in his evidence that PW-5 who was brother of the deceased came to the spot after 10 minutes of the removal of the dead body and enquired from him regarding the occurrence. He also stated in his evidence

that he had not given the names of any individuals to the police in as much as he had not seen the actual occurrence of the incident. He repeatedly stated that PW-5, PW-13, PW-7 and PW-14 were not present when the police kept the dead body of deceased in gypsy. He also explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached. The evidence of PW-13 and PW-14 was more or less the same as of PW-5. [Paras 10 and 11] [245-D-H; 246-A-C]

1.3. PW-18 was a Police Constable who along with driver PW-30 went in the gypsy to the spot and lifted the injured person into gypsy to take him to the hospital. He stated in his evidence that at that time except himself, driver PW-30 and Circle Inspector nobody else was present. He specifically stated that PW-5, PW-14 and PW-13 were not present at the place of occurrence at the time when he reached the scene of offence. PW-29 is another Policeman who corroborated the evidence of Constable PW-18. In the same manner PW-30 driver of the gypsy corroborated the evidence of PW-18 and PW-29 stating that no one was present when they have lifted the body from the scene of occurrence and placed the same in gypsy. All of them were police personnel and on duty at the relevant time. There was no reason for them to depose falsely. It was nobody's case that PWs 6, 27, 29 and 30 were not independent witnesses. There is no reason to disbelieve the evidence of PW-6. The evidence of PW-6, if it is to be taken into consideration, makes the presence of PWs 5, 13 and 14 highly doubtful at the scene of occurrence. There is no reason whatsoever to discard the evidence of PW-6 who is an independent witness. He was not present at the actual scene of offence when the

deceased was subjected to attack even though PW-5, in his evidence stated as if PW-6 was also present at the time of attack. But PW-6 in categorical terms stated, by the time he went to the scene of offence within a couple of minutes, the deceased was lying dead in a pool of blood and neither PW-5 nor PWs 13 and 14 were present at the scene of offence. PW-5 is none other than the brother of deceased and a highly interested witness whose evidence was required to be carefully scrutinised. The testimony of PW-6 cannot easily be surmounted by the prosecution. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the High Court as to how evidence of PW-6 can be ignored. In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. [Paras 12 and 13] [246-D-H; 247-A-F]

Mukhtiar Ahmed Ansari v. State (NCT of Delhi) **(2005) 5 SCC 258, relied on.**

1.4. It is clear that the evidence of PW-6 completely rules out the presence of PW-5 at the scene of offence. It is thus clear that PW-5 was not speaking truth, being interested witness obviously made an attempt to implicate the appellant in the case due to previous enmity. The entire prosecution case rests upon the Parcha Bayan lodged by PW-5. Once his presence is disbelieved, the whole case of the prosecution collapses like a pack of cards. In addition, the evidence of PWs 18, 29 and 30 who are all independent witnesses, also cast a serious shadow on the evidence of PWs 5, 13 and 14 as regards their presence at the scene of offence. It is under those circumstances, it is difficult and impossible to place any

reliance whatsoever on the evidence of PW-5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the appellants of the charge under Section 302, IPC. For the same reasons, the evidence of PWs 13 and 14 also is to be discarded. None of them was speaking truth. The Courts below altogether ignored these vital aspects of the matter. On such careful analysis, it is difficult to accept the evidence of PWs 5, 13 and 14 to sustain the conviction and sentence imposed on the appellants. There is no other acceptable evidence on record based on which the charge could be held proved against the appellants. [Paras 15 and 16] [248-E-H; 249-A]

Case Law Reference:

(2005) 5 SCC 258 relied on Para 13

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1522 of 2008.

From the Judgment & Order dated 4.3.2008 of the High Court for Rajasthan, Jaipur Bench at Jaipur in D.B. Criminal Appeal No. 1089 of 2003.

A. Sharan, A.K. Singh, Samir Ali Khan for the Appellant.

R. Gopalakrishnan for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal pursuant to the special leave granted is directed against the concurrent judgments.

2. The two appellants were tried for offences punishable under Sections 147, 323, 324, 302 of IPC. The trial court convicted both of them for the offences punishable under Sections 148, 201 and 302 IPC. On appeal, the High Court, however, confirmed the sentences awarded against the appellants for the offences punishable under Section 302 of the

IPC while setting aside the conviction of the appellants of the charges under Sections 201 and 148 IPC. The prosecution case is as follows :

On May 25, 1999 at about 1.00 p.m., Chuttu @ Nizamuddin (PW-5) lodged a Parcha Bayan (Ex.P-12) before the Police Sub-Inspector of Kotwali, Tonk inter-alia stating that at about 12.30 in the noon he along with Saleem (PW-7) and Noor (PW-13) were getting a truck repaired at Rajasthan Tyrewala near Roadways Depot, Tonk. One Mohamaad Deen @ Mulla (deceased) came at the shop of Ayub Bhai (PW-6). All of a sudden about 10-12 persons equipped with deadly weapons such as gupties, swords, knives and gandasas came there and surrounded the deceased. Javed Masood (A.1), Syed Najeeb Hassan (A.2), Ashraf and Aziz were armed with gupties and others were equipped with swords and knives. Javed Masood inflicted blow with gupti on the chest of the deceased, Najeeb and others inflicted blows on neck, face and back. One Gullo and Sadiqque gave blows with swords on hands of deceased. Thereafter the assailants fled away from the scene of occurrence under the impression that Mohammad Deen @ Mulla was dead. Meanwhile police patrol van reached at the spot and removed the deceased to the hospital where he was declared dead. On the basis of Parcha Bayan, the FIR No.184/99 (Ex.P-48) was registered and investigation commenced. On completion of investigation, charge-sheet was filed against the appellants and investigation was kept pending under Section 173(8) Cr.P.C. against the rest of the individuals named in the Parcha Bayan. The prosecution in support of its case examined as many as 33 witnesses and got marked certain documents and material objects in evidence. The appellants denied the charges and claimed trial.

3. The trial court accepted the prosecution case and convicted and sentenced the accused, as stated above. The trial court held that the prosecution proved its case beyond reasonable doubt against the appellants and held them guilty

of having entered into a criminal conspiracy, unlawful assembly and committing murder of the deceased. The High court, however, confirmed the conviction of the appellants only under Section 302 IPC and acquitted them of the rest of the charges.

4. In the appeal before the High Court and as well as before us, it was contended on behalf of the defence that the incident took place out of acute enmity. The evidence of highly interested eye-witness should be rejected as there is likelihood of implicating some innocent persons.

5. Shri Amarender Sharan, learned senior counsel, inter-alia, submitted that the presence of alleged eye-witnesses at the scene of offence is highly doubtful and no reliance can be placed on their evidence. He relied on the evidence of Mohammad Ayub-PW-6 and police personnel–Laxmi Narayan-PW-29, Suresh Kumar-PW-18 and Ranjeet Singh-PW-30 in this regard. The learned counsel appearing for the State supported the judgment under appeal.

6. As has been rightly held by the courts below that the death of Mohammad Deen @ Mulla was homicide in nature. As per post-mortem report (Ex.P-43) following ante mortem injuries were found on the dead body:

1. Incised wound 1" x ½" sub cut deep right parietal posterior part, elliptical

2. Incised wound 1" x ½" pharyngeal cavity deep elliptical vertical bleeding + Rt. carotid region ant. to ear lobule.

3. Incised wound ½" x ¼" muscle deep on Rt. parotid region anterior to injury No. 2 vertical elliptical.

4. Contusion 3" x 2" lt. forehead above lt. eye brow with black eye.

5. Incised wound 1" x 1/8" sub cut elliptical 1½" lateral to eye on face right vertical.

6. Incised wound elliptical 1½" x ½" muscle deep on upper 1/3rd forearm Lt. vertical.

7. Incised wound elliptical 1½" x ½" muscle deep on lt. arm upper 1/3 vertical.

8. Penetrating incised wound 1½" x ½" Rt. chest cavity deep 2" above & ½" medial to right nipple on anterior right chest wall elliptical, directing down & medial aspect.

9. Penetrating incised wound 1½" x ½" chest cavity deep elliptical, oblique 1¼" medial to injury No. 8 giving downward & laterally on ant. chest wall (Rt.)

10. Incised wound 1½" x ¾" muscle deep elliptical oblique direction medial & lateral aspect Rt. lower chest mammary line interiorly.

11. Penetrating Incised wound 1½" x ½" abdominal cavity deep on left hypochondrium on abdominal wall elliptical obliquely placed 2" below sub costal Lt. marg & 2" lt. lateral to mid line.

12. Incised wound ½" x 1/8" sub cuticle 4½" below left nipple transverse elliptical.

13. Abrasion 3 No. 2½", 2", 1" linear oblique each parallel to each other 4" lat. & above to umblicus on lt. Ant. abdominal wall.

14. Incised wound 4" x ½" muscle oblique above down 2" lateral to (Rt. nipple, on Rt. chest anterior lat.)

15. Incised wound 1½" x ¼" muscle deep elliptical horizontally in mid axillary region (right).

16. Penetrating Incised wound 1½" x ½" chest cavity deep Rt. mid axillary region ½" below injury No. 15, elliptical vertical bleeding.

17. Incised wound 1½" x ½" x scapular deep horizontal elliptical Rt. back chest inter scapular region.

18. Incised wound 1¼" x ¼" muscle deep left to mid line of back on chest vertical elliptical

19. Incised wound 1¼" x ¼" muscle deep transverse ½" right medial to mid line on Rt. back of chest

20. Incised wound ½" x ¼" muscle deep on left lower to chest back in lower part elliptical horizontal.

21. Abrasion (three) ¼" x ¼" each three No. number Rt. knee joint.

22. Abrasion (two) ¼" x ¼" on left knee joint.

7. The cause of death according to the medical opinion was due to the excessive haemorrhage on account of injuries caused to right lung and liver. The injuries found on the chest were penetrating in nature.

8. The short question that arises for consideration in this appeal is as to whether the courts below committed any manifest error in relying on the evidence of Chuttu (PW-5), Noor (PW-13) and Rayees (PW-14) to convict the appellants for the charge under Section 302 IPC. It is well settled and needs no restatement at our hands that concurrent findings of facts are not usually interfered with by this court in exercise of its jurisdiction under Article 136 of the Constitution of India by reappreciating the evidence unless it is clearly established that the courts below altogether ignored vital piece of evidence and rested their conclusion placing reliance on the evidence which cannot be accepted on the face of it.

9. Chuttu (PW-5) who lodged the FIR is an important witness. He more or less confirmed in the examination-in-chief as to what has been stated by him in Parcha Bayan (Ex.P-12). He specifically alleged that Javed Masood (A.1) inflicted gupti

blow on the chest of the deceased and Najeeb (A.2) had inflicted with gupti on abdomen and chest. It is in his evidence that the occurrence was witnessed by Husain (PW-4), Rayees (PW-14) and Ayub Bhai Tyrewala (PW-6). He stated that while assault was going on the deceased he remained shouting and no one came to rescue the deceased. Meanwhile, a white coloured police gypsy arrived at the scene of offence in which the deceased was removed to hospital where Mullaji was declared dead. He admitted that police gypsy reached just after two minutes of occurrence. He also admitted that there was an enmity between him and the appellants as Javed Masood lodged a case against him and PW 14 and others.

10. The evidence of Ayub Bhai (PW-6) is very crucial. It is in his evidence that on the fateful day the deceased alone had come on a motorcycle to his shop at about 12.30 p.m. to repay an old debt. The deceased requested for sale of some more tyres on credit basis to which he refused. There was conversation for about 15 minutes in that regard. While the deceased was sitting in the shop he went into the basement of the shop to find as to any old tyres were available to sell as requested by the deceased and when he returned to the shop the deceased was not found in the shop. Then he found crowd in the street parallel to his shop and went to the place to know as to what transpired and found the deceased was lying overturned completely soaked in blood. He had died at the place of occurrence. Within 5-10 minutes the police came in gypsy and removed the body to hospital in gypsy. It is specifically stated in his evidence that PW-5-Chuttu who is none other than the brother of the deceased came to the spot after 10 minutes of the removal of the dead body and enquired from him regarding the occurrence and he informed that the police took him to the hospital. He also stated in his evidence that he has not given the names of any individuals to the police in as much as he had not seen the actual occurrence of the incident. It is also in his evidence that immediately after the incident he telephoned to one Habib with a request to

communicate the message to Chuttu about the occurrence. He repeatedly stated that Chuttu (PW-5), Noor (PW-13), Saleem (PW-7) and Rayees (PW-14) were not present when the police kept the dead body of Mullaji (deceased) in gypsy. He also explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached.

11. The evidence of Noor (PW-13) and Rayees (PW-14) is more or less the same as of PW-5 and therefore no detailed discussion is required about their evidence.

12. Suresh Kumar (PW-18) is a Police Constable who along with driver Ranjit Singh (PW-30) went in the gypsy to the spot and lifted the injured person into gypsy to take him to the hospital. He stated in his evidence that at that time except himself, driver Ranjit Singh (PW-30) and Circle Inspector nobody else was present. He specifically stated that Chuttu (PW-5), Rayees (PW-14) and Noor (PW-13) were not present at the place of occurrence at the time when he reached the scene of offence. Laxshami Narayan (PW-29) is another Policeman who corroborated the evidence of Constable Suresh Kumar (PW-18) stating that he and Constable Suresh Kumar and driver Ranjit Singh (PW-30) kept the body of the injured (deceased) in the gypsy and went to Sahadat hospital. There was crowd near the injured person but no relative of deceased was present. In the same manner Ranjit Singh (PW-30) driver of the gypsy corroborated the evidence of PW-18 and PW-29 stating that no one was present when they have lifted the body from the scene of occurrence and placed the same in gypsy. All of them were police personnel and on duty at the relevant time. There is no reason for them to depose falsely. It is nobody's case that PWs 6, 27, 29 and 30 are not independent witnesses. There is no reason to disbelieve the evidence of PW-6 and no valid reason has been suggested as to why his

evidence cannot be relied on and taken into consideration. The evidence of PW-6, if it is to be taken into consideration, makes the presence of PWs 5, 13 and 14 highly doubtful at the scene of occurrence. We do not find any reason whatsoever to discard the evidence of PW-6 who is an independent witness. He was not present at the actual scene of offence when the deceased was subjected to attack even though PW-5, in his evidence stated as if PW-6 was also present at the time of attack. But PW-6 in categorical terms stated, by the time he went to the scene of offence within a couple of minutes, the deceased was lying dead in a pool of blood and neither PW-5 nor PWs 13 and 14 were present at the scene of offence. PW-5 is none other than the brother of deceased and a highly interested witness whose evidence was required to be carefully scrutinised and precisely for that reason we have looked into the evidence of PW-5 with care and caution. The testimony of Mohammad Ayub (PW-6) cannot easily be surmounted by the prosecution. He has testified in clear terms that PWs 5, 13 and 14 were not present at the scene of occurrence. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the Division Bench as to how evidence of PW-6 can be ignored.

13. In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. This court in *Mukhtiar Ahmed Ansari vs. State (NCT of Delhi*[1]*)* observed:

> "30. A similar question came up for consideration before this Court in *Raja Ram v. State of Rajasthan,* (2005) 5 SCC 272. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the

1. (2005) 5 SCC 258.

> deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the Doctor and it was binding on the prosecution.
>
> 31. In the present case, evidence of PW1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his *Maruti* car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, accused can rely on that evidence."

14. The proposition of law stated in the said judgment is equally applicable to the facts in hand.

15. It is clear that the evidence of PW-6 completely rules out the presence of Chuttu (PW-5) at the scene of offence. It is thus clear that PW-5 was not speaking truth, being interested witness obviously made an attempt to implicate the appellant in the case due to previous enmity. Be it noted that the entire prosecution case rests upon the Parcha Bayan (Ext. P12) lodged by PW-5. Once his presence is disbelieved, the whole case of the prosecution collapses like a pack of cards. In addition, the evidence of PWs 18, 29 and 30 who are all independent witnesses, also cast a serious shadow on the evidence of PWs 5, 13 and 14 as regards their presence at the scene of offence. It is under those circumstances, we find it difficult and impossible to place any reliance whatsoever on the evidence of PW-5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the appellants of the charge under Section 302, IPC. For the same reasons, the evidence of PWs 13 and 14 also is to be discarded. None of them was speaking truth.

16. The Courts below altogether ignored these vital aspects of the matter which compelled us to carefully analyze

their evidence. On such careful analysis, we find it difficult to accept the evidence of PWs 5, 13 and 14 to sustain the conviction and sentence imposed on the appellants. There is no other acceptable evidence on record based on which the charge could be held proved against the appellants.

17. For the aforesaid reasons the conviction of the appellants and the sentence imposed on them is set aside and they are directed to be released forthwith.

18. The appeal is accordingly allowed.

D.G. Appeal allowed.

SYED BASHIR-UD-DIN QADRI

v.

NAZIR AHMED SHAH & ORS.

(Civil Appeal Nos. 2281-2282 of 2010)

MARCH 10, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998:

ss. 2(d)(v) 2(p),22 and 27 r/w s.31 – Person suffering from cerebral palsy – Appointed as Rehbar-e-Taleem(Teaching Guide) – Writ petition filed challenging the appointment – High Court summoning the teacher in Court, and on its assessment, directing the education authorities to identify some other suitable job to accommodate him – Services of the appointee as Rehbar-e-Taleem disengaged – HELD: The instant case is not one of the normal cases relating to a claim for employment, but involves a beneficial piece of legislation providing for reservation of 1% vacancies for the persons with 'locomotor disability' which is the result of cerebral palsy – Section 31 lays down that aids and appliances be provided to such persons – In the instant case, the results achieved by the appointee in different classes were exceptionally good – High Court dealt with the matter mechanically without even referring to the provisions of the Act, and chose a rather unusual method in assessing the capacity of the appointee to function as a teacher by calling him to appear before the Court and to respond to questions put to him, in spite of the fact that the Committees constituted to assess his performance as a teacher found him suitable – Orders of High Court and Chief Education Officer disengaging the appointee from functioning as Rehbar-e-Taleem set aside – Authorities directed to allow him to resume his duties with continuity of

service from the date of his disengagement – Doctrine of reasonable accommodation – Social justice – Practice and procedure.

The appellant, a person suffering from cerebral palsy, was appointed as "Rehbar-e-Taleem" (Teaching Guide) under the provisions of s.22 of the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998. Respondent no. 1 filed a writ petition before the High Court challenging the appointment of the appellant. The single Judge of the High Court quashed the appointment of the appellant and directed the Director of School Education to identify a suitable job to accommodate the appellant. The High Court was informed that the appellant could be considered for appointment to the vacant posts of Library Bearer or the Laboratory Assistant. Consequently, an order disengaging the appellant from the post of Rehbar-e-Taleem was passed. The Letters Patent Appeal filed by the appellant having been dismissed by the High Court, he filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1. It has to be kept in mind that this case is not one of the normal cases relating to a person's claim for employment. This case involves a beneficial piece of social legislation to enable persons with certain forms of disability to live a life of purpose and human dignity. This is a case which has to be handled with sensitivity and not with bureaucratic apathy, as appears to have been done as far as the appellant is concerned. [Para 28] [267-B-C]

1.2. The object of the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998 is to provide equal opportunities, care, protection, maintenance, welfare, training and rehabilitation to persons with disabilities.

Section 2(d)(v) recognizes "locomotor disability" which is the result of cerebral palsy. Section 22, which requires the Government and local authorities to formulate schemes for ensuring employment of persons with disabilities, reserves 1% of the vacancies available for persons suffering from locomotor disability or cerebral palsy. Chapter VI of the Act makes provision for affirmative action and s. 31 thereof requires the Government to provide aids and appliances to persons with disabilities. While a person suffering from cerebral palsy may not be able to write on a blackboard, an electronic external aid could be provided which could eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum effort. [Para 29, 30 and 31] [267-C-D; 268-A-C]

1.3. It is only to be expected that the movement of a person suffering from cerebral palsy would be jerky on account of locomotor disability and that his speech would be somewhat impaired, but despite the same, the Legislature thought it fit to provide for reservation of 1% of the vacancies for such persons. So long as the same did not impede the person from discharging his duties efficiently and without causing prejudice to the children being taught, there could be no reason for a rigid approach to be taken not to continue with the appellant's services as Rehbar-e-Taleem, particularly, when his students had themselves stated that they had got used to his manner of talking and did not have any difficulty in understanding the subject being taught by him. [Para 32] [268-D-F]

1.4. It is also to be noted that the results achieved by the appellant in the different classes were extremely good; his appearance and demeanour in school had been highly appreciated by the Committee which was constituted pursuant to the orders of the High Court to

assess the appellant's ability in conducting his classes. An earlier Committee consisting of the Joint Director of Education and the Chief Education Officer had also reported that the appellant was found reading and talking well and he was able to teach. Apart from the fact that the appellant is a victim of cerebral palsy, there is nothing on record to show that he had not been performing his duties as Rehbar-e-Taleem efficiently and with dedication. It is unfortunate that inspite of the positive aspects of the appellant's functioning as Rehbar-e-Taleem and the clear and unambiguous object of the 1998 Act, the High Court adopted a view which was not compatible therewith. [Para 33, 34 and 35] [268-F-H; 269-B; 269-E; 269-F-G]

2.1. The High Court has dealt with the matter mechanically, without even referring to the 1998 Act or even the provisions of ss.22 and 27 thereof. Instead, the High Court chose a rather unusual method in assessing the appellant's capacity to function as a teacher by calling him to appear before the Court and to respond to the questions put to him. The High Court appeared to be insensitive to the fact that as a victim of cerebral palsy, the appellant suffered from a slight speech disability which must have worsened on account of nervousness when asked to appear before the Court to answer questions. The intimidating atmosphere in which the appellant found himself must have triggered a reaction which made it difficult for him to respond to the questions put to him. [Para 35] [269-G-H; 270-A-B]

2.2. Since the Committees constituted to assess his performance as a teacher notwithstanding his disability had formed a favourable impression about him, his tenure as a Rehbar-e-Taleem ought to have been continued without being pitch-forked into a controversy which was uncalled for. The approach of the local authorities, as well as the High Court, was not in consonance with the

objects of the 1998 Act and scheme of the State Government to fill up a certain percentage of vacancies with disabled candidates, and was too pedantic and rigid. The order of the High Court and that of the Chief Education Officer, disengaging the appellant from functioning as Rehbar-e-Taleem, cannot, therefore, be sustained and are set aside. The authorities are directed to allow the appellant to resume his functions as Rehbar-e-Taleem in the school concerned, with continuity of service from the date of his disengagement as Rehbar-e-Taleem. The period during which the appellant was disengaged from his service as Rehbar-e-Taleem till the date of his resuming duty shall not be treated as break in service and he shall be entitled to all notional service benefits for the said period. [Para 36 and 37] [270-C-E; 270-F-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2281-2282 of 2010.

From the Judgment & Order dated 7.9.2007 and dated 21.11.2007 of the High Court of Judicature for Jammu & Kashmir, Single Bench at Srinagar in Division Bench SWP No. 103 of 2007 and LPA No. 204 of 2007.

Colin Gonslaves, Vijay Hansaria, Jayshree Satpute, Jyoti Mendiratta, G.M. Kaswoosa, Sneha, Ashok Mathur, Anis Suhrawardy, Shamama Anis, S. Mehdi Emam, Tabraz Ahmad for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The appellant is a person suffering from cerebral palsy and these appeals are the story of his struggle to make himself self-dependent and to find an identity for himself against enormous odds. Despite his handicaps, the appellant completed his graduation under the University of Kashmir and

was awarded a B.Sc. degree by the University on 28th February, 2004.

3. On 28th April, 2004, the State of Jammu & Kashmir launched a scheme known as "Rehbar-e-Taleem" which literally translated means a "Teaching Guide". Under the Scheme, a Village Level Committee was constituted to select persons to be appointed as "Rehbar-e-Taleem" who would be deemed to be community workers for a period of five years on a monthly honorarium after which they would be considered for regularisation as General Line Teachers in the Education Department. The said stipulation came with the rider that in the event the teacher was unable to fulfil the age qualification, his employment would be on contractual basis for the future.

4. The appellant also applied for appointment as Rehbar-e-Taleem and in January, 2005, a merit list of four candidates was prepared by the Zonal Education Officer, Awantipora, for filling up three vacancies in the post of Rehbar-e-Taleem in the newly upgraded Kanjinag School under the Sarva Shiksha Abhiyan. On 16th February, 2005, the Chief Education Officer, Pulwama, published the list of the three proposed candidates for appointment as Rehbar-e-Taleem, in which the appellant was placed in the first position, inviting objections with regard to the list published along with documentary proof. Pursuant thereto, the Respondent No.1 herein, Nazir Ahmad Shah, sent a letter to the Director of School Education, Srinagar, objecting to the appellant's selection on the ground that being physically handicapped he was not fit for being appointed as Rehbar-e-Taleem.

5. As the respondents were not issuing an appointment letter to the appellant, he filed a Writ Petition, being SWP No.363 of 2005, before the Jammu and Kashmir High Court in Srinagar on 25th April, 2005, for a Writ in the nature of Mandamus to command the respondents therein to issue appointment letter in his favour in terms of the list issued by them.

6. During the pendency of the writ petition the Jammu and Kashmir Government issued a Gazette Notification on 21st October, 2005, providing for 3% reservation for appointment by direct recruitment for physically challenged candidates. In the said Notification it was particularly indicated that reservations in recruitment would be available for physically challenged persons for services and posts specified under Section 22 of the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1998 (hereinafter referred to as "the 1998 Act"). Section 22 of the said Act, which deals with reservation of posts, provides that the Government shall appoint in every establishment such percentage of vacancies, not less than 3%, for persons or class of persons with disabilities and suffering from :

(i) blindness or low vision – 1%;

(ii) hearing impairment – 1%;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability – 1%.

7. The writ petition filed by the appellant was heard and disposed of on 31st August, 2006, with a direction that candidates should be appointed only after they were found physically fit for the job and that the concerned respondent should consider the possibility of absorbing the appellant under the quota of handicapped persons. Pursuant to the orders of the High Court, on 15th September, 2006, the Director of School Education, Kashmir, constituted a committee comprising of the Joint Director (EE), Personnel Officer, DSEK and Chief Education Officer, Srinagar, to enquire into the appellant's claim for appointment as Rehbar-e-Taleem. The said Committee submitted its report on 13th November, 2006, certifying that the appellant was found reading and talking well and able to teach, but his problem was that he could not write. On an overall assessment and with particular regard to the State's policy on rehabilitation of the physically handicapped, the Committee

was of the view that the appellant be given a chance and that his appointment as Rehbar-e-Taleem could also restore his self-esteem. On receipt of the said report, the Director of School Education, Kashmir, directed the Chief Education Officer, Pulwama, to issue a letter to the appellant engaging him as Rehbar-e-Taleem in Middle School, Kanjinag. Such order of engagement was issued to the appellant by the Chief Education Officer, Pulwama, on 25th November, 2006. The said order of the Chief Education Officer, Pulwama, was followed by Order No.147-ZEO of 2006 issued by the Zonal Education Officer, Awantipora, on 27th November, 2006 for engaging the appellant as Rehbar-e-Taleem in UPS, Kanjinag. On receipt of the letter of engagement, the appellant joined UPS, Kanjinag, and submitted his joining report to the Head Master of the school.

8. On 1st February, 2007, Mr. Nazir Ahmed Shah, the candidate who was placed in the 4th position in the merit list, filed SWP No.103/2007 before the Jammu and Kashmir High Court at Srinagar praying for quashing of the report of the Committee and to cancel the order of the Director of School Education, Kashmir, appointing the appellant as Rehbar-e-Taleem in UPS, Kanjinag, and prayed that he be appointed as Rehbar-e-Taleem in place of the appellant.

9. On the orders of the Jammu and Kashmir High Court, the appellant was examined by the Head of the Department of Neurology in the Sher-e-Kashmir Institute of Medical Sciences (SKIMS), Soura, Srinagar, and in his report, the Head of the Department of Neurology indicated that the appellant was suffering from cerebral palsy with significant speech and writing difficulties, which would make it difficult for him to perform his duties as a teacher.

10. On the basis of such report, the Director of School Education, Kashmir on 17th July, 2007, constituted a Committee to examine the working of the appellant in the school. The said Committee made an on-the-spot assessment

on 17th July, 2007, and expressed the view that the appellant was well-versed with the subject he taught and did justice with his teaching prowess. On 7th September, 2007, the Jammu and Kashmir High Court disposed of the writ petition fled by Nazir Ahmed Shah by quashing the appellant's appointment and directed the Director of School Education, Kashmir, to identify a suitable job where the appellant could be accommodated to enable him to earn a suitable living.

11. Aggrieved by the said order of the learned Single Judge, the appellant filed L.P.A. No.204/2007 on 22nd October, 2007. During the pendency of the Letters Patent Appeal on 8th November, 2007, the Head Master, Government Middle School, Kanjinag, issued a letter indicating that the appellant had satisfactorily completed one year in the school. However, soon thereafter, on 21st November, 2007, the High Court dismissed the appellant's Letters Patent Appeal. In terms of the order passed by the Division Bench of the High Court, the Director of School Education, Kashmir, directed the Chief Education Officer, Pulwama, to identify the post of Library Bearer and to submit a report to the High Court. Upon identification of such posts for the appellant by the Chief Education Officer, Pulwama, the Director of School Education, Kashmir directed the Chief Education Officer, Pulwama, to implement the order of the High Court passed in SWP No.103/2007. In response to the above, on 3rd January, 2008, the Director of School Education, Kashmir, informed the High Court that two posts of Library Bearer and two posts of Laboratory Assistant were vacant, against which the appellant could be considered. Soon thereafter, on 19th January, 2008, the Chief Education Officer, Pulwama, issued an order disengaging the appellant from the post of Rehbar-e-Taleem.

12. Aggrieved by the order of the learned Single Judge in the writ petition filed by Nazir Ahmad Shah (SWP No.103 of 2007), resulting in the passing of the order of his disengagement from the post of Rehbar-e-Taleem, the

appellant preferred the Special Leave Petition (now Appeal) basically on the ground that the same was contrary to the provisions of Section 22 of the 1998 Act whereunder it has been provided that the Government shall appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disabilities among which locomotor disability or cerebral palsy was also identified.

13. Appearing in support of the Appeal, Mr. Colin Gonsalves, learned Senior Advocate, submitted that once the State Government with the help of an expert Committee identifies teaching posts to be suitable for appointment of candidates suffering from cerebral palsy in terms of section 21 of the 1998 Act, then it would not be open for someone to contend that a person suffering from cerebral palsy, who is unable to write and whose speech is somewhat slurred, should be disqualified from teaching. Mr. Gonsalves submitted that the main characteristic of a person suffering from cerebral palsy is his inability to write and speak in a fluent manner. Despite such handicap, the Legislature thought it fit to accommodate 1% of the vacancies available for appointment of a person suffering from the said disease. Mr. Golsalves urged that by holding the disabilities, which constitute the effects of cerebral palsy, against the appellant, the respondents were negating the very object of Section 22 of the 1998 Act.

14. Mr. Gonsalves also urged that without challenging the provisions of Section 22 of the 1998 Act, which provided for reservation of 1% of the vacancies for persons suffering from cerebral palsy and the subsequent Notification issued in pursuance thereof, it was not open to the respondents to question the appellant's appointment as Rehbar-e-Taleem. Mr. Gonsalves submitted that the provisions of Section 22 of the 1998 Act not having been challenged, any challenge to the appointment of a person with such a medical disability would not be sustainable. Mr. Gonsalves submitted that apart from the above, it would also have to be shown that the person

appointed was completely incapable of imparting education because of his disablements and that retaining him in the teaching post would prejudice the students. Mr. Gonsalves pointed out that, on the other hand, the Joint Director and the Chief Education Officer, Srinagar, assessed the appellant's ability to teach and noticing that he was unable to write, still felt that he should be given a chance and that his appointment as Rehbar-e-Taleem would help restore a sense of self-esteem in him. In this case, the Block Medical Officer, Tral, also issued a certificate in favour of the appellant on 14.3.2007, in which the words "clinically he is fit for any Govt. job" have been mentioned. Of course, the genuineness of the said certificate has been questioned by the respondent and it has been submitted on the basis of a supporting letter from the Block Medical Officer, Trial, that the aforesaid phrase had not been written by him but had been inserted later into the certificate after the same had been issued.

15. Mr. Gonsalves then submitted that the submission made on behalf of the Respondent No.1 that the post of Rehbar-e-Taleem had not been mentioned as reserved in the Scheme and would not, therefore, come within the scope of Section 22 of the 1998 Act, was not tenable, since it is only when exemption is granted under the proviso to Section 22 by the State Government that the reservation provision would cease to exist. No exemption having been sought for in the present case, it could not be argued that the provisions for reservation in Section 22 would not apply to the Scheme relating to the appointment of persons as Rehbar-e-Taleem. It was submitted that the general principle relating to disability law deals with substance and not the nomenclature for any particular post and the same would include the nomenclature used for other jobs and posts having identical functions. Mr. Gonsalves submitted that what was of importance in giving effect to the provisions of the 1998 Act is the principle of reasonable accommodation as provided for in Section 27 of the aforesaid Act which deals with the Scheme for ensuring employment for

persons with disabilities. Mr. Gonsalves urged that the object of the 1998 Act is to try and rehabilitate and/or accommodate persons suffering from physical disabilities to have equal opportunities of employment in keeping with their physical disabilities so that they were not only able to provide for themselves but were also able to participate in mainstream activity and live a life of dignity in society.

16. Mr. Gonsalves submitted that the problem of rehabilitating disabled persons was not special to India alone, but was common to most of the other countries as well. He submitted that being conscious of the problem, most countries had enacted laws to make provision for the rehabilitation of persons with disabilities by taking recourse to the doctrine of reasonable accommodation to enable a handicapped person to use his or her abilities with the help of aids and/or adjustments. Referring to the decision in Appeal No.447 August Term 1994 of the United States Court of Appeal for the Second Circuit in the case of Kathleen Borkowski vs. Valley Central School District, Mr. Gonsalves pointed out that the central question in the said appeal was whether the teacher with disabilities, whose disabilities directly affected her capacity to perform her job, necessitated that her employer provide a teacher's aide as a form of reasonable accommodation under the relevant legal provisions. In the said case, on account of a motor vehicle accident, the plaintiff Kathleen Borkowski had suffered major head trauma and sustained serious neurological damage and though her condition improved significantly after years of rehabilitative therapy, she did not recover completely resulting in continuing difficulties with memory and concentration. In addition, her balance, coordination and mobility continued to show the effects of her accident. Ms. Borkowski obtained employment as Library Teacher with the School District on a probationary term, but ultimately because of her failure to effectively control her class, the Superintendent of the School District decided that Ms. Borkowski's tenure should not be extended. Claiming discrimination, Ms.

Borkowski challenged the said decision before the United States District Court for the Southern District of New York which granted summary judgment in favour of the defendant Valley Central School District holding that having someone else to do a part of her job may sometimes mean eliminating the essential functions of the job, at other times providing an assistance to help the job may be an accommodation that does not remove an essential function of the job from the disabled employee. On such finding, the Court of Appeals set aside the order of the District Court and remanded the matter to the District Court for a fresh decision upon taking into consideration the doctrine of reasonable accommodation to enable a teacher to perform his/her functions as a teacher, which he/she was otherwise eligible and competent to perform.

17. Several other decisions on the same lines were also supplied by Mr. Gonsalves which only repeated what had been said in Kathleen Borkowski's case.

18. Mr. Gonsalves submitted that in the instant case the High Court had adopted a very unusual procedure in disqualifying the appellant and holding him unfit for teaching, despite the certificate given by the Headmaster of the School that the appellant had satisfactorily completed one year's service during which period he had conducted himself and the class assigned to him with efficiency. The said certificate dated 8.11.2007 indicates that he attended his classes regularly and for the academic year 2006-07 he had achieved the following results:

S.No.	Class	Subjects	Pass Percentage
1.	8th	Science	100%
2.	6th	Science	100%
3.	4th	Science	83%

19. Mr. Gonsalves submitted that during the pendency of

the proceedings before the High Court, by an interim order dated 4th June, 2007, the Court had directed a Committee to be formed comprising of the Director, School Education and Head of the Neurological Department, SKIN, to examine the appellant and to report on :

> "(a) What is the nature and extent of petitioner's handicap whatever;
>
> (a) Whether with said handicap he could discharge the normal duties of teacher in a Government school."

20. The report as submitted indicated that the appellant was suffering from Cerebral Palsy which affected his speech and writing as a result whereof he could not perform the job of a teacher. Mr. Gonsalves submitted that on the basis of the said report the High Court adopted the novel procedure of summoning the appellant to satisfy itself as to the appellant's condition and as to whether he could discharge his functions as a teacher. Based on its own assessment, the High Court found the appellant to be ineligible for appointment in a teaching job. Mr. Gonsalves submitted that at the time of questioning by the High Court, the appellant was not represented by any one and it is not unnatural and/or unlikely that a person, who was already suffering from a disablement such as Cerebral Palsy which affected his speech, was further intimidated which rendered him unable to respond fluently to the questions put by the Court.

21. Mr. Gonsalves submitted that taking all other things into account, and, in particular the report of the Expert Committee appointed pursuant to the order dated 4.6.2007 of the High Court, which was of the view that the speech of the appellant is comprehensible up to 80% to 90% as indicated by the students themselves and the further certificate given that the appellant could handle lower classes easily even if the roll is big and where the teaching is done through models, the High Court had erred in rejecting the appellant's case for

appointment as Rehbar-e-Taleem. Mr. Gonsalves urged that the Committee had noticed that the appellant was well-dressed and had a proper sense of self-confidence as compared to the other staff and that the attitude of the appellant seemed to have a positive effect on the students. Mr. Gonsalves urged that the High Court had erred in understanding the object of the provisions of the 1998 Act in relation to persons with disabilities, such as the appellant before us. Mr. Gonsalves submitted that the order of the High Court lacked sensitivity and understanding and the same was contrary to the object for which the 1998 Act was enacted, and was, therefore, liable to be set aside.

22. The submissions made on behalf of the appellant were strongly opposed by Mr. Vijay Hansaria, learned Senior Advocate appearing for the Respondent No.1, Nazir Ahmed Shah, who was the writ petitioner before the High Court. Mr. Hansaria submitted that admittedly the Appellant was suffering from cerebral palsy, but the extent of disablement on account thereof made him unfit for appointment as Rehbar-e-Taleem, which fact was corroborated by the certificate issued by the Head of the Department of Neurology, Sher-e-Kashmir Institute of Medical Sciences, dated 6th July, 2007, in which it was opined that the Appellant was suffering from cerebral palsy with significant speech and writing difficulties and that with such a handicap, it would be difficult for him to perform the duties of a teacher. Added to the said disability was the inability of the Appellant to speak fluently. It was submitted that without being able to write on the blackboard, it was next to impossible for a primary school teacher to teach children at the primary stage. Reference was made to the report of the Committee which had been constituted pursuant to the order passed by the High Court on 4th June, 2007, to examine the working of the Appellant in the school. Apart from indicating that he was able to make himself understood to the students, who seemed to understand his teachings despite his speech impediments, the Committee also indicated that the Appellant was unable to take chalk in

hand and write anything on the blackboard or draw any diagram, which was essential and vital for making students understand the lesson. It was the view of the Committee that use of the blackboard was a vital requirement for making students understand the lesson and this was a serious handicap which confronted the Appellant since the process of teaching was incomplete without the use of the blackboard. Mr. Hansaria pointed out that in the said Report it had also been stated that in order to overcome the difficulty of not being able to write, the Appellant requested the students to write the lessons on the blackboard, but, of course, a student could not be a substitute for a teacher in the matter of drawing diagrams and writing lessons on the blackboard. Accordingly, the Committee felt concerned as to whether it would be possible for the Appellant to be able to hold a big class and though in the final analysis the Appellant seems to be intelligent and well-versed with the subject taught by him, which would have made him a good teacher, his speech and writing impediments were in his way. Mr. Hansaria referred to the disability certificate issued by the Chief Medical Officer, Pulwama, on 17th December, 2006, showing the Appellant to be suffering from dystonic cerebral palsy on account of which he was severely disabled physically to the extent of 60%.

23. Mr. Hansaria urged that the physical impairment of the Appellant was sufficient to make him ineligible for being continued as Rehbar-e-Taleem since it was against the interests of the students.

24. In addition to the above, Mr. Hansaria expressed grave doubts about the authenticity of the certificate said to have been issued by the Block Development Officer, Tral, holding the Appellant to be clinically fit for any Government job while finding him physically handicapped due to cerebral palsy. Mr. Hansaria referred to the letter written by the Block Development Officer concerned in which he denied having written the last sentence in the certificate and that the same was a forgery.

25. Mr. Hansaria submitted that on the aforesaid grounds, the order passed by the High Court did not warrant any interference and the Appeal was liable to be dismissed.

26. Mr. Anis Suhrawardy, who appeared for the State of Jammu and Kashmir, submitted that the State Government had acted in the best interest of the students on the basis of the reports received from different Committees appointed both by the High Court and under the orders of the High Court for evaluating the performance of the Appellant during the period of his appointment as Rehbar-e-Taleem. Mr. Suhrawardy submitted that while the appellant's performance was found to be reasonably good, his physical disabilities were of such nature that they interfered with his performance as a teacher. The said view had been expressed both by the medical authorities as well as the Committee consisting of Senior Officers which had made an on the spot assessment of the appellant's ability to perform his duties as a teacher. Even though holding that the appellant was handling his classes competently and his general demeanor and appearance conveyed a positive message to the others in the school, his primary function as a teacher was compromised on account of his inability to write and his lack of complete clarity of speech.

27. Mr. Suhrawardy submitted that while it is true that the 1998 Act had provided for a 1% reservation for people suffering from locomotor disorders and/or cerebral palsy, such policy as contained in Section 22 of the Act could not have contemplated the appointment of a person with such disabilities as impaired his essential functioning as a teacher. Accordingly, acting on the advice of the Expert Committee, the State Government had no other option but to disengage the appellant from functioning as a Rehbar-e-Taleem, but, at the same time, identified another post in which he could be accommodated.

28. Having regard to the nature of the problem posed in this appeal in relation to the Jammu and Kashmir Persons with Disabilities (Equal Opportunities, Protection of Rights and Full

Participation) Act, 1998, we have given our anxious consideration to the submissions made on behalf of the respective parties and the provisions of the aforesaid Act in arriving at a decision in the present case. It has to be kept in mind that this case is not one of the normal cases relating to a person's claim for employment. This case involves a beneficial piece of social legislation to enable persons with certain forms of disability to live a life of purpose and human dignity. This is a case which has to be handled with sensitivity and not with bureaucratic apathy, as appears to have been done as far as the appellant is concerned.

29. As has been indicated hereinbefore, the object of the 1998 Act is to provide equal opportunities, care, protection, maintenance, welfare, training and rehabilitation to persons with disabilities. Section 2(d)(v) recognizes "locomotor disability" which is the result of cerebral palsy. Locomotor disability has also been separately defined in Section 2(j) to mean disability of the bones, joints or muscles leading to substantial restriction of the movement of the limbs or any form of cerebral palsy. A "person with disability" has been defined in Section 2(p) to mean a person suffering from not less than 40% of any disability as certified by a Medical Authority. Keeping the same in mind, Chapter V of the 1998 Act provides for employment of persons with disabilities. Section 21 deals with identification of posts which can be reserved for persons with disabilities. As we have indicated hereinbefore, Section 22 deals with reservation of posts and 1% of the vacancies available, is required under Section 22 to be reserved for persons suffering from locomotor disability or cerebral palsy in the posts identified for each disability. We have also noticed earlier, the provisions of Section 22 of the 1998 act which provide for schemes for ensuring employment of persons with disabilities. Under the said Section, the Government and local authorities are required to formulate schemes for ensuring employment of persons with disabilities.

30. Chapter VI of the Act makes provision for affirmative action and Section 31 thereof provides as follows :-

"31. Aids and appliances to persons with disabilities.

The Government shall by notification make schemes to provide aids and appliances to persons with disablities."

31. As submitted by Mr. Gonsalves, while a person suffering from cerebral palsy may not be able to write on a blackboard, an electronic external aid could be provided which could eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum effort.

32. It is only to be expected that the movement of a person suffering from cerebral palsy would be jerky on account of locomotor disability and that his speech would be somewhat impaired, but despite the same, the Legislature thought it fit to provide for reservation of 1% of the vacancies for such persons. So long as the same did not impede the person from discharging his duties efficiently and without causing prejudice to the children being taught, there could, therefore, be no reason for a rigid approach to be taken not to continue with the appellant's services as Rehbar-e-Taleem, particularly, when his students had themselves stated that they had got used to his manner of talking and did not have any difficulty in understanding the subject being taught by him.

33. Coupled with the above is the fact that the results achieved by him in the different classes were extremely good; his appearance and demeanour in school had been highly appreciated by the Committee which had been constituted pursuant to the orders of the High Court to assess the appellant's ability in conducting his classes. Reference may also be made to the observations made by an earlier Committee consisting of the Joint Director of Education and the Chief Education Officer, Srinagar, wherein it was observed as follows :-

"4. The candidate (petitioner) was called to the office in presence of Director School Education. He was found reading and talking well and thus assessed by Committee to be able to teach. His problem is that he cannot write.

5. On the overall consideration, with particular regard to the state policy on the rehabilitation of the physically handicapped, the Committee is of the view that the boy (petitioner) be given a chance. His appointment as ReT could also help restore a sense of self esteem in him. The Middle School, Kanjinagh having already six teaching staff in position, the petitioner not being able to write should not come in the way of his selection."

34. In the aforesaid background of events, the disengagement of the appellant as Rehbar-e-Taleem by virtue of the order of the Chief Education Officer, Pulwama, dated 19th January, 2008, goes against the grain of the 1998 Act. Apart from the fact that the appellant is a victim of cerebral palsy, which impairs the movements of limbs and also the speech of a victim, there is nothing on record to show that the appellant had not been performing his duties as Rehbar-e-Taleem efficiently and with dedication. On the other hand, his performance as a teacher was reflected in the exceptionally good results that he achieved in his discipline in the classes taught by him.

35. It is unfortunate that inspite of the positive aspects of the appellant's functioning as Rehbar-e-Taleem and the clear and unambiguous object of the 1998 Act, the High Court adopted a view which was not compatible therewith. The High Court has dealt with the matter mechanically, without even referring to the 1998 Act or even the provisions of Sections 22 and 27 thereof. Instead, the High Court chose a rather unusual method in assessing the appellant's capacity to function as a teacher by calling him to appear before the Court and to respond to questions put to him. The High Court appeared to be insensitive to the fact that as a victim of cerebral palsy, the

appellant suffered from a slight speech disability which must have worsened on account of nervousness when asked to appear before the Court to answer questions. As has been submitted by Mr. Gonsalves, the intimidating atmosphere in which the appellant found himself must have triggered a reaction which made it difficult for him to respond to the questions put to him.

36. In our view, since the Committee constituted to assess his performance as a teacher notwithstanding his disability had formed a favourable impression about him, his tenure as a Rehbar-e-Taleem ought to have been continued without being pitch-forked into a controversy which was uncalled for. We are convinced that the approach of the local authorities, as well as the High Court, was not in consonance with the objects of the 1998 Act and scheme of the State Government to fill up a certain percentage of vacancies with disabled candidates, and was too pedantic and rigid. The order of the High Court cannot, therefore, be sustained and has to be set aside.

37. The appeals, accordingly, succeed and are allowed. The impugned order of the High Court and that of the Chief Education Officer, Pulwama, dated 19th January, 2008, disengaging the appellant from functioning as Rehbar-e-Taleem, are hereby set aside. Consequently, the authorities are directed to allow the appellant to resume his functions as Rehbar-e-Taleem in the Middle School, Kanjinag, immediately upon communication of this order with continuity of service from the date of his disengagement as Rehbar-e-Taleem. The period during which the appellant was disengaged from his service as Rehbar-e-Taleem till the date of his resuming duty in such post shall not be treated as break in service and he shall be entitled to all notional service benefits for the said period.

R.P. Appeals allowed.

JITEN BESRA

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1499 of 2007)

MARCH 10, 2010

[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 – s.302 – Appellant convicted by Courts below for killing his parents-in-law – On basis of circumstantial evidence viz. i) enmity of appellant with his parents-in-law; ii) blood stains on clothes of appellant and iii) presence of appellant in the village of deceased on the fateful night – Conviction challenged – Held: Circumstances of the case did not point out towards the guilt of appellant, without any other inference being probable – Evidence of PWs suggests that appellant was on visiting terms with his parents-in-law, hence, circumstance of enmity cannot be relied upon as an incriminating circumstance – Circumstance of blood stains on clothes of appellant is of no consequence since clothes of appellant or deceased persons were never sent to Forensic Science Laboratory – Mere presence of appellant in the village also not an incriminating circumstance, particularly, when he was on visiting terms with his parents-in-law – Appellant entitled to get benefit of doubt – Hence, acquitted – Evidence – Circumstantial evidence – Appreciation of.

According to the prosecution, the appellant killed his parents-in-law. The prosecution examined, in all, 15 witnesses which included PW1 (appellants' wife), PWs 2 to 13(persons from the locality), PW14 (the doctor who conducted post-mortem of the dead bodies) and PW15 (the Investigating Officer). The trial court convicted appellant by placing reliance upon the evidence of prosecution witnesses and the circumstantial evidence

viz. (i) presence of appellant in the village of deceased on the fateful night; (ii) strained relationship of appellant with his parents-in-law; and (iii) blood stains on the clothes of appellant. The High Court affirmed the conviction of the appellant. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Benefit of doubt is given to the accused-appellant and he is acquitted of all the charges. [Para 9] [279-E]

2.1. PW-1, the author of the FIR, had barely stated about the strained relationship of her and her husband i.e. the accused-appellant as also between her deceased parents and the accused. According to her, she had seen her husband to be present after she came back and realized that her parents were done to death. She also asserted that his clothes were blood stained at that time. Very strangely, however, in the FIR which she made almost immediately, PW1 had stated that one unknown person had committed the murder of her parents. She also admitted that the FIR was written in her house and a number of persons were present there, including the accused. This was a very important piece of evidence, the relevance of which does not seem to have been realized by the Courts below. Even as regards the so-called enmity, which is one of the circumstances held against the accused, she admitted that she could not remember any mis-behaviour committed by the accused towards her. From her cross-examination, it is clear that the accused was on visiting terms to her. This does not suggest in any manner that there was such a fierce enmity between the accused and the deceased persons or even PW1. [Para 6] [277-A-E]

2.2. The evidence of other witnesses like PW-2 is of no consequence. He is silent on the question of any

enmity. In fact he appears to be a scribe of the FIR. He also admitted that the accused was present when the FIR was being written. However, he did not assert anything regarding the so-called enmity of the accused with the deceased persons. All that he has asserted was that the accused had strained relationship with his wife and his parents-in-law. The evidence of PW-3 only asserted that the clothes of the accused were soaked in blood and the relationship between the accused and his wife and his parents-in–law were strained. To the same extent is the evidence of PWs 4 to 13. Beyond saying that the relations were strained and further that the clothes of accused were blood stained, all these witnesses have stated nothing more. None of them has, however, stated that the accused was not even on visiting terms. On the other hand, their evidence suggests that the accused was on the visiting terms. Therefore, the first circumstance of enmity relied upon by the Courts below hardly cuts any ice. In fact, that could not have been relied upon as an incriminating circumstance at all. It may be that the accused might be having strained relationship with the wife and her parents but it is clear that he was on visiting terms with them. He was working in some other village which is hardly about 15 kms. away from their village. Under such circumstances, the Courts should have weighed the circumstance as to whether the strained relationship was of such fierce nature that the accused would go to the extent of committing murder of both the parents-in-law. [Para 6] [277-E-H; 278-A-D]

3. As regards the blood stains on the clothes of the accused, this circumstance is of no consequence for the simple reason that the clothes of the accused were never sent to the Forensic Science Laboratory. That is the fact clearly admitted by PW-15, the Investigating Officer. Therefore, the origin of the so-called blood allegedly found on the clothes of the accused was not known nor

was it established that it was the blood of the deceased that was allegedly found on the *Lungi* of the accused. This witness also admitted that initially PW-1 did not say anything against the accused person and it was only subsequently that she amended her statement and complained against the accused which statement was much later. Once it is established that the clothes of the accused or deceased persons were never sent to the Forensic Science Laboratory, it is clear that nobody knew the blood group of the accused or of the deceased persons. Under such circumstances, that circumstance loses all its significance. [Para 7] [278-E-H]

4. The last circumstance relied upon by the Courts was the presence of the accused in the house. There is no evidence collected by the prosecution that the accused alone was present in the hut. On the other hand, it has clearly come in the cross-examination of the witnesses that his parents-in-law were not alone in the hut and in fact the younger brother of PW1 was also present there. This is apart from the fact that the mere presence of the accused in the village by itself cannot amount to an incriminating circumstance, particularly, when the witnesses have admitted that he was on the visiting terms with his parents-in-law. At least no witness denied that he was on the visiting terms. Thus, in this case all the alleged incriminating circumstances could not be said to have been established. Once that was clear and once it is found that the circumstances could not point out towards the guilt of the accused, without any other inference being probable, the accused must get the benefit of doubt. There is hardly any discussion regarding this aspect in the judgments of the Trial Court as well as the High Court. Those judgments, therefore, cannot be sustained. [Para 8] [279-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1499 of 2007.

From the Judgment & Order dated 3.1.2007 of the High Court at Calcutta in C.R.A. No. 287 of 2003.

Dr. Vipin Gupta and Subhadra Chaturvedi (A.C.) for the Appellant.

Avijit Bhattacharjee, Subrata Biswas for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. By this appeal, accused Jiten Besra challenges the judgment of the High Court confirming the judgment of the Trial Court whereby he was convicted for the offence under Section 302, IPC and was consequentially sentenced to suffer rigorous imprisonment for life. The accused Jiten Besra is said to have committed murder of one Nandlal Tudu and Mital Bala. The deceased Nandlal Tudu was none else but the father-in-law of the accused, being father of Malati Besra, his wife. It is contended by the prosecution that on the fateful day, Malati along with her mother had gone to attend 'Boul Song' and she was also accompanied by her sister Parbati. When they came back at dawn on 21.05.1997, they found that both her parents i.e. Nandlal and Mital Bala were dead.

2. A written complaint was lodged by Malati in Boro Police Station wherein it was alleged that one unknown miscreant might have killed her parents out of previous enmity. The investigation ensued on the basis of this First Information Report and the investigating agency came to the conclusion that it was appellant Jiten Besra who was the perpetrator of the crime. In support of it, the charge-sheet was filed and after the committal of the case to the Sessions Judge, during the trial, the prosecution examined, in all, 15 witnesses which included Malati (PW-1), PWs-2 to 13, who were persons from locality, Partha Sarathi Dhar (PW-14), the doctor who conducted the postmortem of the bodies of the deceased persons and Ram Narayan Datta (PW-15) who was the Investigating Officer. The

defence of the appellant was that he was being falsely implicated and there was no evidence against him whatsoever.

3. The defence did not prevail and the accused came to be convicted by the Trial Court relaying on the evidence of the prosecution witnesses. The High Court dismissed the appeal and that is how the appellant is before us.

4. A glance at the High Court and the Trial Court judgments suggests that the Trial Court had relied on few circumstances as also the evidence of the prosecution witnesses. The circumstances relied upon are:

(i) the presence of Jiten Besra in the village on the fateful night;

(ii) strained relationship with his parents-in-law; and

(iii) the blood found on clothes.

The same three circumstances have been relied upon by the High Court also. We must hasten to add that the circumstances on which the Trial Court and the High Court have relied upon are not clearly stated nor do we find any discussion on one very important aspect that in case of the circumstantial evidence the circumstances relied upon must be proved first and should not only point towards the guilt of the accused but they should be of such nature that no other inference except the guilt of the accused, is possible thereupon. We have, therefore, to examine the evidence ourselves from that angle.

5. Learned counsel appearing on behalf of the appellant has contended that even if all the three circumstances are taken to be proved, such inference of the guilt on the part of the accused is not possible. The contention raised is that both the Courts below have erred firstly, in relying upon the unproved circumstances and secondly, even the witnesses examined including Malati were not sufficient to reach the only conclusion regarding the guilt of the accused.

6. The first witness Malati (PW-1) had barely stated about the strained relationship of her and her husband i.e. the accused as also between her deceased parents and the accused. This witness was the author of the FIR. According to her, she had seen her husband to be present after she came back and realized that her parents were done to death. She also asserted that his clothes were blood stained at that time. Very strangely, however, in the First Information Report which she made almost immediately, she had stated that one unknown person had committed the murder of her parents. She also admitted that the FIR was written in her house and a number of persons were present there, including the accused. This was a very important piece of evidence, the relevance of which does not seem to have been realized by the Courts below. Even as regards the so-called enmity, which is one of the circumstances held against the accused, she admitted that she could not remember any mis-behaviour committed by the accused towards her. From her cross-examination, it is clear that the accused was on visiting terms to her. This does not suggest in any manner that there was such a fierce enmity between the accused and the deceased persons or even Malati. The evidence of other witnesses like Santosh Baskey (PW-2) is of no consequence. He is silent on the question of any enmity. In fact he appears to be a scribe of the FIR. He also admitted that the accused was present when the FIR was being written. However, he did not assert anything regarding the so-called enmity of the accused with the deceased persons. All that he has asserted was that the accused had strained relationship with his wife and his parents-in-law. The evidence of Panchanan Baskey (PW-3) only asserted that the clothes of the accused were soaked in blood and the relationship between the accused and his wife and his parents-in–law were strained. To the same extent is the evidence of Binod Mandy (PW-4), Laxmi Hansda (PW-5), Sarbeswar Besra (PW-6), Balaram Baskey (PW-7) Haripada Murmu (PW-8), Jagari Tudu (PW-9), Ukil Tudu (PW-10) Khudiram Hembram (PW-11), Hapan Hembram (PW-12) and

Durgacharan Hansda (PW-13). Beyond saying that the relations were strained and further that the clothes of accused were blood stained, all these witnesses have stated nothing more. None of them has, however, stated that the accused was not even on visiting terms. On the other hand, their evidence suggests that the accused was on the visiting terms. Therefore, the first circumstance of enmity relied upon by the Courts below hardly cuts any ice. In fact, that could not have been relied upon as an incriminating circumstance at all. It may be that the accused might be having strained relationship with the wife and her parents but it is clear that he was on visiting terms with them. He was working in some other village which is hardly about 15 kms. away from their village. Under such circumstances, the Courts should have weighed the circumstance as to whether the strained relationship was of such fierce nature that the accused would go to the extent of committing murder of both the parents-in-law.

7. As regards the blood stains on the clothes of the accused, this circumstance is of no consequence for the simple reason that the clothes of the accused were never sent to the Forensic Science Laboratory. That is the fact clearly admitted by PW-15, Ram Narayan Datta who was the Investigating Officer. Therefore, the origin of the so-called blood allegedly found on the clothes of the accused was not known nor was it established that it was the blood of the deceased that was allegedly found on the *Lungi* of the accused. This witness also admitted that initially Malati (PW-1) did not say anything against the accused person and it was only subsequently that she amended her statement and complained against the accused which statement was much later i.e. on 24.05.1997. Once it is established that the clothes of the accused or deceased persons were never sent to the Forensic Science Laboratory, it is clear that nobody knew the blood group of the accused or of the deceased persons. Under such circumstances, that circumstance loses all its significance.

8. The last circumstance relied upon by the Courts was the presence of the accused in the house. There is no evidence collected by the prosecution that the accused alone was present in the hut. On the other hand, it has clearly come in the cross-examination of the witnesses that his parents-in-law were not alone in the hut and in fact the younger brother of Malati was also present there. This is apart from the fact that the mere presence of the accused in the village by itself cannot amount to an incriminating circumstance, particularly, when the witnesses have admitted that he was on the visiting terms with his parents-in-law. At least no witness denied that he was on the visiting terms. Thus, in this case all the alleged incriminating circumstances could not be said to have been established. Once that was clear and once it is found that the circumstances could not point out towards the guilt of the accused, without any other inference being probable, the accused must get the benefit of doubt. There is hardly any discussion regarding this aspect in the judgments of the Trial Court as well as the High Court. Those judgments, therefore, cannot be sustained.

9. Accordingly, we allow the appeal giving the benefit of doubt to the accused and acquit him of all the charges. He be set at liberty forthwith unless required in any other offence.

B.B.B. Appeal allowed.

UNION OF INDIA & ORS.

v.

M/S. NEELAM ENGINEERING & CONSTRUCTION COMPANY

(Civil Appeal No. 2283 of 2010)

MARCH 10, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Arbitration Act, 1940 – ss. 14(2), 17, 29, 30 and 33 – Petition for making the Arbitration Award a Rule of Court – Objections u/ss. 30 and 33 to set aside the Award – Rejection of objection since it was filed prior to filing of the Award – On appeal, held: Filing objection against something which did not exist on the date when objection was filed cannot be accepted and should be rejected – On facts, when appellants filed objections, the Award had not been received in court and notice was issued to Arbitrator to file original Award – There was no occasion for such objection to be filed in terms of Article 119 of the Limitation Act, 1963 – Thus, objections were filed prematurely even prior to the filing of the Award and could not be treated as a valid objection – Order of courts below upheld – Limitation Act, 1963 – Article 119.

The question which arose for consideration in this appeal was whether the courts below were justified in rejecting the objections filed by the appellant u/ss. 30 and 33 of the Arbitration Act, 1940 for setting aside the Award since the objection had been filed prior to filing of the Award.

Dismissing the appeal, the Court

HELD: 1.1. In view of Article 119 of the Limitation Act, 1963, the period of limitation for filing an application commences only after the date of service of the notice

of the making of the Award. The *raison d'etre* for filing objection u/ss. 30 and 33 of the Arbitration Act, 1940, is the Award which has to be filed in Court either by the Arbitrator or at the instance of any of the parties requiring the Arbitrator to do so. Even the Court may direct the Arbitrator to file his Award on the application made by any of the parties thereto. Filing an objection against something which did not exist on the date when the objection was filed is unacceptable and must be rejected. The objections filed u/ss. 30 and 33 of the Act by the appellants, therefore, have been rightly held to be premature and such objection could not be treated as a valid objection filed after the filing of the Award, u/ss. 30 and 33 of the Act in view of the provisions of Article 119 of the Limitation Act, 1963. While the original Award was filed in court on 27th May, 1998, the objections filed u/ss. 30 and 33 of the Act, for setting aside the Award was filed on 3rd January, 1998. Therefore, there was no occasion for such an objection to be filed in terms of Article 119 of the Limitation Act, 1963. [Paras 16] [289-C-F]

1.2. The objection filed by the appellant u/ss. 30 and 33 of the Act, for setting aside the Award on 3rd January, 1998, was on account of the fact that the respondent had filed a petition in the Civil Court on 27th February, 1996, for making the Award a Rule of Court. At the time when the objection was filed, it was noted on 18th February, 1998, that the Award had not been received in Court and notice was issued to the Arbitrator to file the original Award in pursuance whereof the original Award was filed in Court on 27th May, 1998. [Para 17] [289-G-H; 290-A]

East India Hotels Ltd. vs. Agra Development Authority **(2001) 4 SCC 175;** *Nilkantha Shidramappa Ningashetti vs. Kashinath Somanna Ningashetti and Ors.* **(1962) 2 SCR 551;** *Secretary to Government of Karnataka and Anr. vs. V. Harishbabu* **(1996) 5 SCC 400;** *Ratanji Virpal and Co. vs. Dhirajlal Manilal* **AIR 1942 Bom. 101, referred to.**

Case Law Reference:

(2001) 4 SCC 175	**Referred to.**	**Para 11**
(1962) 2 SCR 551	**Referred to.**	**Para 12**
(1996) 5 SCC 400	**Referred to.**	**Para 13**
AIR 1942 Bom. 101	**Referred to.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2283 of 2010.

From the Judgment & Order dated 6.12.2006 of the High Court of Judicature at Punjab & Haryana at Chandigarh in Civil Revision No. 229 of 2005.

Indira Jaising, ASG, Binu Tamta, Kiran Bhardwaj, Anil Katiyar, D.S. Mahra for the Appellants.

Mahabir Singh, Rakesh Dahiya, Gagan Deep Sharma, Ajay Pal for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. An Agreement No.GE/CHD-61/88-89 was entered into between the Appellant, Union of India, and the Respondent, M/s Neelam Engineering & Construction Company, for providing additional security lighting arrangement in various zones at TBRL Range, Ramgarh, near Chandigarh. Certain disputes arose between the Appellants and the Respondent which were referred to the arbitration of Col. T.S. Plaha, appointed as the sole Arbitrator for adjudication of the said disputes between the parties. The sole Arbitrator made his Award on 27th January, 1996, for a sum of Rs.1,70,020/-, together with interest at the rate of 18% per annum from 31st December, 1991, till the date of decree or payment, whichever was earlier, in favour of the Respondent. On 27th February, 1996, the Respondent filed a

petition in the Civil Court under Sections 14(2), 17 and 29 of the Arbitration Act, 1940, for making the Award dated 27th January, 1996, a Rule of Court.

3. After an interval of about two years, on 3rd January, 1998, the Appellants filed an objection petition under Sections 30 and 33 of the Arbitration Act, 1940, for setting aside the Award published by the sole Arbitrator, on the ground that the Arbitrator had misconducted himself while giving his finding on the claims of the parties.

4. On 18th February, 1998, the Court directed the Arbitrator to file the Award in Court. When the matter was listed for hearing on 27th May, 1998, the Court recorded that reply had been received to the objection petition which had been filed and that the original arbitration file had been received from the Arbitrator. The case was, therefore, adjourned till 27th July, 1998, for filing rejoinder. After considering the application made by the Respondent under Sections 14(2), 17 and 29 of the Arbitration Act, 1940, and the objection filed by the Appellant, the Civil Court rejected the said objection by holding that since the objection had been filed prior to filing of the Award, the same was premature and could not be taken note of and further that the objection had been filed beyond the period of limitation as prescribed under Article 119 of the Limitation Act. The Civil Court accordingly allowed the Appellants' application under Sections 14(2), 17 and 29 of the Arbitration Act, 1940, and ordered that the Award dated 27th January, 1996, be made a Rule of Court, and granted interest at the rate of 18% per annum thereupon from the date of order till realization.

5. Aggrieved by the said order of the learned Civil Judge, Junior Division, Chandigarh, the Appellants herein filed an appeal against the same before the learned Additional District Judge, Chandigarh, being C.R. No.52 dated 8th August, 2003, under Section 39 of the aforesaid Act.

6. The submissions which had been made before the

learned Civil Judge, Junior Division, Chandigarh, were reiterated in the Appeal. It was contended that while the Award was passed by the Arbitrator on 22nd January, 1996, the petition under Sections 14(2), 17 and 29 of the Arbitration Act, 1940, was filed by the Respondent Company on 27th February, 1996. Directions were, thereafter, given by the Trial Court to the Arbitrator to produce the Award in Court and the same appears to have been sent by the learned Arbitrator by post and was received by the Trial Court on 18th February, 1998. It also appears that notice was issued to both the parties, but ultimately on account of inadvertence, on subsequent dates it was recorded that the Award had not been received. Ultimately, on 27th May, 1998, the Trial Court recorded that the original arbitration file had been received and the case was adjourned till 27th July, 1998, for filing rejoinder. The Appeal Court, therefore, held that legally and technically both the parties came to know about the filing of the Award in Court for the first time on 27th May, 1998, although, the Award had been received through the post in the Court on 18th February, 1998. Having regard to the above, 27th May, 1998, was held to be the date when the parties had notice of filing of the Award. It was also observed that under Article 119 of the Limitation Act, 1963, a party to an Arbitration Award could file objection, with a prayer to set aside or modify the Award, within 30 days from the date of notice of filing of the Award in Court. The Appeal Court also recorded the fact that in this case without waiting for the filing of the Award in Court, the Appellants herein filed their objections to the Award on 3rd January, 1998, before the Award had been received in the Court and the parties had notice thereof. It was accordingly held that it could not be said that the objections were barred by limitation, but they were in fact pre-mature and could not, therefore, be taken note of. In fact, during the course of arguments, it was also the case of the Respondent Company that the objection filed on behalf of the Appellants could not be held to be barred by limitation, but was pre-mature and the Appellants were not competent to file the said objection before the Award was received in the Court.

7. Aggrieved by the order of the Appeal Court, the Appellants filed a Civil Revision in the High Court. However, the said Civil Revision was dismissed by the High Court as per the order impugned in this appeal.

8. Learned Additional Solicitor General, Ms. Indira Jaising, submitted that both the Trial Court and the High Court erred in holding that the objection filed on behalf of the Appellants under Sections 30 and 33 of the Arbitration Act, 1940, could not be taken note of, having been filed even before notice of filing of the Award had been issued. Ms. Jaising contended that since the objection was already on record, the same ought to have been taken into consideration while considering the respondent's application under Section 14(2) of the above Act for making the Award a Rule of Court, instead of holding the same to be pre-mature and disregarding the same. Ms. Jaising submitted that in order to do complete justice to the parties, the Trial Court should not have relied upon technicalities, which only served to defeat the very purpose of Sections 30 and 33 of the above Act. Ms. Jaising submitted that this was not a case of negligence on the part of the Appellants, but that the Appellants had acted promptly on receiving a copy of the Award.

9. Ms. Jaising submitted that the consequence of the order passed by the learned Trial Judge, as endorsed by the Appeal Court and the High Court, will have far reaching consequences since under the Award the Appellants are to pay the awarded amount to the Respondent together with interest at the rate of 18% per annum from 31st December, 1991 upto the date of decree or payment, whichever was earlier.

10. Ms. Jaising submitted that since notice had not been issued to the parties upon filing of the Award in Court and Article 119 of the Limitation Act, 1963, provided for a period of 30 days from the date of service of notice to file an application for setting aside an Award, it could not be contended that the objection was barred since notice had not at all been issued

to the parties after filing of the Award. Ms. Jaising submitted that the finding of the Trial Court as also that of the High Court that the object of notice was merely to make parties aware of the filing of the Award and that the said object had been satisfied, since on 27th May, 1998, the parties had knowledge of the filing of the Award in Court, was contrary to the aforesaid provisions of the Limitation Act and was liable to be set aside. Ms. Jaising submitted that the notice contemplated under Article 119 of the Limitation Act was not meant to be oral, particularly when Section 14(2) of the Arbitration Act, 1940, made it absolutely clear that upon the Arbitration Award being filed in Court, the Court is required to give notice to the parties of the filing of the Award. Ms. Jaising submitted that the language of Section 14(2) was mandatory and cast a duty upon the Court to give notice to the parties regarding the filing of the Award so that objection, if any, thereto could be taken as provided under the Act. Ms. Jaising submitted that not having done so, the High Court could not have held that the objection filed under Section 30 and 33 of the Arbitration Act, 1940, was barred by limitation.

11. Appearing on behalf of the respondent, Mr. Mahabir Singh, learned Senior Advocate, submitted that service of notice is only to inform the parties regarding filing of the Award in Court and it was not mandatory that the same would have to be in writing. In the absence of any prescribed mode of service of notice, even oral notice would be sufficient. In support of his submission, Mr. Singh referred to the judgment of this Court in *East India Hotels Ltd. vs. Agra Development Authority* [(2001) 4 SCC 175], wherein it was held that service of notice was an essential requirement under Section 14(2) of the aforesaid Act and that mere recording of the presence of the parties in Court would not amount to service of notice. This Court, in fact, observed that when the Trial Court had recorded that the Award had been filed by the Umpire and directed that the counsel for parties be informed and counsel for both the parties had in due course taken note of the said order by endorsing the

proceeding sheet, in such case the provisions of Section 14(2) would have been held to be duly complied with. It was also held that notice need not be issued in writing, but could also be oral, but that the fact of filing of the Award by the Umpire had to be informed to the learned counsel for the parties and was to be noted by them. In such a situation, it was held that the essential requirement of Sub-section (2) of Section 14 had been complied with, inasmuch as, intimation of filing of the Award had been given to the parties.

12. Mr. Mahabir Singh then referred to the decision of this Court in *Nilkantha Shidramappa Ningashetti vs. Kashinath Somanna Ningashetti and others* [(1962) 2 SCR 551], wherein the question of notice under Section 14(2) of the 1940 Act fell for consideration together with Article 158 of the Indian Limitation Act, 1908, relating to filing of objections against the Award of the Arbitrator. While dealing with the said question, a Bench of four Judges of this Court held that communication by the Court to the parties or through counsel of the information that an Award had been filed was sufficient compliance with the requirements of Sub-Section (2) of Section 14 of the 1940 Act with respect to the giving of notice to the parties concerned about the filing of the Award. This Court went on to say that notice did not necessarily contemplate communication in writing. The expression "give notice" in Sub-Section (2) of Section 14 of the 1940 Act simply means giving intimation of the filing of the Award. Such intimation need not be given in writing and could be communicated orally and that the same would amount to service of notice when no particular mode of service was prescribed.

13. Mr. Mahabir Singh also referred to the decision of this Court in *Secretary to Government of Karnataka & Anr. vs. V. Harishbabu* [(1996) 5 SCC 400], wherein also it was emphasized that in the absence of any formal mode of service, notice need not be in writing and may also be given orally. What was essential was that notice or intimation or a communication

of filing of the Award would have to be issued by the Court to the parties and served upon them. It was also held that the period of limitation for filing objections seeking the setting aside of an arbitration Award commenced from the date of service of notice issued by the Court upon the parties regarding the fling of the Award under Section 14(2) of the Act. The issuance of such notice by the Court is a mandatory requirement and limitation would begin only after notice of the filing of the Award is given by the Court.

14. Mr. Mahabir Singh, learned counsel, referred to a decision of the Bombay High Court in *Ratanji Virpal & Co. vs. Dhirajlal Manilal* [AIR 1942 Bom. 101], where a similar question had fallen for consideration of the learned Judge. While considering the provisions of Sections 14 and 31 of the Arbitration Act, 1940, the Court held that till an Award was filed in Court, no application could be filed for setting aside the same. While holding as above, the High Court took into consideration the amendment in Schedule I of the Limitation Act, 1908, where Article 158 was substituted with a new Article which provided that under the 1940 Act, to set aside an Award or to get an Award remitted for reconsideration, the period of limitation is 30 days from the date of service of notice of filing of the Award. The Bombay High Court held that in amending the Limitation Act, the legislature contemplated that an application for setting aside the Award could only be made after the date of service of notice of filing of the Award and, therefore, the limitation of 30 days is fixed after that particular date. The Court ultimately held that it was not competent for a party to the arbitration Award to file a petition for setting aside the Award till the Award had been filed. Mr. Singh submitted that having regard to the views expressed in the aforesaid judgment and having particular regard to the provisions of Article 119 of the Limitation Act, 1963, where limitation for making an application under the 1940 Act for setting aside an Award has been fixed as 30 days from the date of service of notice of the filing of the Award, the question of filing an

objection under Sections 30 and 33 of the said Act prior to the filing of the Award, did not arise. Mr. Singh submitted that the appeal was without merit and was liable to be dismissed.

15. We have carefully considered the submissions made on behalf of the Appellants and though they appear to be attractive, we are unable to accept the same.

16. In view of Article 119 of the Limitation Act, 1963, the period of limitation for filing an application commences only after the date of service of the notice of the making of the Award. The *raison d'etre* for filing objection under Sections 30 and 33 of the Arbitration Act, 1940, is the Award which has to be filed in Court either by the Arbitrator or at the instance of any of the parties requiring the Arbitrator to do so. Even the Court may direct the Arbitrator to file his Award on the application made by any of the parties thereto. Filing an objection against something which did not exist on the date when the objection was filed is unacceptable and must be rejected. All the decisions cited by Mr. Mahabir Singh take a similar view. The objections filed under Sections 30 and 33 of the Arbitration Act, 1940, by the Appellants herein, therefore, have been rightly held to be pre-mature and could not be treated to be an objection filed after the filing of the Award. While the original Award was filed in Court on 27th May, 1998, the objections filed under Sections 30 and 33 of the Arbitration Act, 1940, for setting aside the Award was filed on 3rd January, 1998. There was, therefore, no occasion for such an objection to be filed in terms of Article 119 of the Limitation Act, 1963.

17. The objection filed by the Appellant under Sections 30 and 33 of the Arbitration Act, 1940, for setting aside the Award on 3rd January, 1998, was obviously on account of the fact that the Respondent had filed a petition in the Civil Court on 27th February, 1996, for making the Award a Rule of Court. At the time when the objection was filed, it was noted on 18th February, 1998, that the Award had not been received in Court and notice was issued to the Arbitrator to file the original Award

in pursuance whereof the original Award was filed in Court on 27th May, 1998.

18. It is unfortunate that although the Appellants filed their objection under Sections 30 and 33 of the Arbitration Act, 1940, the same was done prematurely even before the filing of the Award and such objection could not be treated as a valid objection under Sections 30 and 33 of the Act in view of the provisions of Article 119 of the Limitation Act, 1963.

19. We, therefore, have no option, but to dismiss the appeal. The appeal is, accordingly, dismissed, but without any order as to costs.

N.J. Appeal dismissed.