BHARAT SANCHAR NIGAM LTD.
v.
TELEPHONE CABLES LTD.
(Civil Appeal No. 868 of 2010)

JANUARY 22, 2010

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

Arbitration and Conciliation Act, 1996*: ss.7 and 11 – Government contracts – Tender – Allegation of arbitrariness in tender process – Aggrieved bidder filed application for referring matter to arbitration – Held: On facts, documents show that arbitration clause was applicable only to contract awarded by placing a purchase order and not in regard to any dispute to the tender or bid or non-placing of purchase order – Thus, arbitration clause did not exist in regard to tender stage dispute or pre-contract differences, at a stage when there was no privity of contract – Since a purchase order was not placed, there was no contract or agreement and the terms of arbitration clause did not come into existence – Government contracts – Tender.*

Judgment/Order*: Observations of courts reserving liberty to litigant to seek further remedy – Duty of court while making such observations – Held: Courts should take care to ensure that reservation of liberty is made only where it is necessary – Such reservation should always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law – Such liberty should not be allowed to be misused by litigants.*

Public undertakings*: Problems faced by public undertakings – Discussed.*

On 27.3.2001, the appellant invited bids for supply of 441 LCKM of cables. The selected bidders were to be

arranged in the decreasing order of 'vendor rating' and the bidder with highest Vendor Rating (V-1) was to be considered for placing the order for about 30% of the tendered quantity and balance quantity was to be distributed amongst the remaining selected bidder in ratio of their Vendor Rating.

There were several bidders including the respondent and NICCO. Appellant awarded V-1 rating to NICCO. Respondent was treated as one of the 'other bidders' and was placed order for a quantity of 0.536 LCKM. Respondent filed writ petition alleging that the appellant had arbitrarily adjudged NICCO as the person with the highest Vendor Rating thereby pushing it down to the category of 'other bidders' which adversely affected the size of its order.

On 29.4.2004, High Court allowed the writ petition holding that assessment of Vendor Rating done by the appellant in regard to NICCO was not proper and directed the appellant to redo the Vendor Rating by following the formulae laid down in the tender document, as indicated in the judgment. When the High Court passed judgment, the contracts were already awarded in respect of most of the tendered quantity and only a negligible quantity remained, therefore, it issued the direction that if on re-assessment the respondent was rated as V-1, then it should be given the benefit in the balance supplies that were yet to be made. The High Court then observed that if after adjusting the balance amount, the respondent was still entitled to further supplies then it would be open to it to pursue its remedies against the appellant for compensation/damages as available to it in law.

The Special Leave Petition filed against the judgment of High Court came to be dismissed and thus the judgment of High Court attained finality. By the time the

said decision was rendered, appellant as per its policy, had already carried forward the balance quantity of the tender dated 27.3.2001 to the next tender issued in 2002 and had even placed the purchase orders on the successful bidders against the said tender issued in 2002. According to the appellant, no balance quantity was available and no order for any further quantity could be placed with the respondent, even if the respondent was to be given V-1 rating on a re-evaluation. The respondent was aggrieved that the appellant did not adjudge it as V-1 and did not place orders for further quantities, as per the direction of the High Court. According to the respondent, on account of failure on the part of appellant to adjudge it with V-1 rating, and consequential failure to place a purchase order for 30% tendered quantity, it was denied the opportunity to manufacture and supply a quantity of 5.306 LCKM of cables, resulting in a loss of profit at the rate of Rs.200/- per CKM (or Rs.2 crores per LCKM) on the quantities for which it did not get an order; and therefore it was entitled to Rs.10,61,20,000/- as damages from the appellant. The respondent issued a notice dated 26.10.2005 calling upon the appellant to pay the said amount as compensation. Appellant rejected the claim by its reply dated 10.7.2006. Respondent therefore filed a second writ petition on 27.9.2006 seeking a direction to the appellant to comply with the decision rendered on 29.4.2004 by paying a sum of Rs.10,61,20,000/-. However same was dismissed as withdrawn reserving liberty to take appropriate civil liberties. Therefore, respondent filed application for referring the matter to arbitration. High Court allowed the said application and appointed a retired Judge of the Delhi High Court as an Arbitrator.

In appeal to this Court, the questions which arose for consideration was whether there existed an arbitration

agreement between the parties and if there was an arbitration agreement, whether the respondent, having availed the public law remedy in regard to its grievance, would be entitled to again seek remedy by way of arbitration.

Allowing the appeal, the Court

HELD: 1.1. The bid documents did not constitute a contract, or an agreement or an agreement to enter into a contract. It was merely an invitation to make an offer. It informed the prospective bidders, how they should make their bids; how the bids would be processed by the appellant; how contracts would be entered by placing purchase orders; and what terms would govern the contracts, if purchase orders were placed. As per the scheme of Bid documents, there is a clear division of the terms that would govern the tender process, and the terms that would govern the contract, when the bids are accepted. One part regulated the tender process that led to placing of purchase orders. That part contained a provision as to what should be the forum of dispute resolution, if there was a dispute at the tender or bidding stage. The other part stipulated the terms and conditions which would govern the contract, if and when purchase orders were placed. That part also contained a provision as to what should be the forum if there was a dispute after the contract was entered. Clause 30 of Instructions to Bidders makes it clear that in regard to tender-stage disputes, the forum will be Civil Courts. Clause 20 of General Conditions on the other hand was intended to operate when contracts were made and it specified that if disputes arose in regard to the contracts, the forum for dispute resolution would be the Arbitral Tribunal. [Paras 12 and 13] [306-D; 307-A-D]

1.2. Clause 1 of the General Conditions of Contract (Section III) makes it clear that the General Conditions of

Contract contained in Section III of the document shall apply in contracts made by the purchaser for the procurement of goods. Clause 20 of Section III states that arbitration is available in regard to 'any question, dispute or difference arising under this agreement or in connection therewith'. Therefore, it is evident that the General Conditions of Contract (Section III) and clause 20 therein providing for arbitration, would not apply in regard to any dispute in regard to the tender or bid, or non-placing of a purchase order, but would apply only in regard to any contract awarded by appellant by placing a purchase order. A contract is entered in pursuance of the bid, when a purchase order is placed by appellant on a bidder. When a purchase order is not placed, there is no contract or agreement and if there is no contract or agreement, the terms of General Conditions including the arbitration clause do not come into existence. In other words there is no arbitration agreement at all. The appellant intended to have arbitrations only where it had entered into contracts and there were disputes relating to such contracts. It did not intend to have arbitrations in regard to tender stage disputes or *pre-contract* differences, at a stage when there was no privity of contract. [Para 14] [307-E-H; 308-A]

1.3. Section II (Instructions to Bidders) and Section IV (Special Conditions) which are relevant at the bid stage do not contain any arbitration clause. The Instruction to Bidders contains a specific provision that if there is a dispute or claim arising out of the tender till (issue of authorization for) placement of the purchase order, only courts will have jurisdiction. Of course, as and when appellant placed a purchase order on a bidder, the purchase order contained a term that the General conditions of contract, forming part of the bid documents would be a part of the contract documents, and

consequently the arbitration clause applied to the contracts entered between appellant and the bidders. Therefore, only when a purchase order was placed, a 'contract' would be entered; and only when a contract was entered, the General Conditions of Contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not an arbitration agreement *in praesenti*, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed. In this case, the dispute raised is in regard to a claim for Rs.10,61,28,000/- as damages on account of the appellant not placing a purchase order, that is loss of profit @ Rs.200/- per CKM for a quantity of 5.306 LCKM. Obviously the respondent cannot invoke the arbitration clause in regard to that dispute as the arbitration agreement was non-existent in the absence of a purchase order. The arbitration agreement was available in regard to the contract for 0.536 LCKM. But in the absence of any purchase order in respect of 5.306 LCKM by the appellant on the respondent, respondent cannot seek recourse to the arbitration agreement contained in clause 20 of Section III of the bid document, in regard to a dispute relating to that quantity for which order was not placed. It is not sufficient to show that there was an arbitration agreement in regard to some contract between the parties. To constitute an arbitration agreement for the purpose of Sections 7 and 11 of the Arbitration and Conciliation Act, two requirements should be satisfied. The first is that there should be an arbitration agreement between the parties to the dispute. The second is that it should relate to or be applicable to the dispute in regard to which

appointment of Arbitrator is sought. In the absence of an arbitration agreement, the application under section 11 of the Act was not maintainable. [Paras 15, 17, 18] [308-C-E; 309-F-H; 310-A-F]

Dresser Rand S.A. vs. *Bindal Agro Chem. Ltd.* **(2006) 1 SCC 751;** *Yogi Agarwal v. Inspiration Clothes & U* **2009 (1) SCC 362, relied on.**

2. Where the terms of the bid documents barred any claim being made on account of the rejection or non-acceptance of any bid, the bid inviter would not incur any liability to any aggrieved bidder, and the bidder would not have any cause of action in private law. But as the bids were invited by the appellant, which is 'State' for the purpose of Article 12, a writ petition was entertained, when respondent alleged arbitrariness in the process of assigning vendor-rating. In the absence of a finding in regard to arbitrariness, bias or *malafides* in the decision but only a mere error in assessment, the High Court ought not to have interfered in the tender process. In fact, it did not set aside the contract awarded to NICCO. But the High Court chose to issue a direction for re-assessment of the vendor rating and if respondent was found to have V-1 rating, then place a purchase order for the quantity that remained over after all the purchase orders. This was unobjectionable as a public law remedy. Having done so, there was no justification for the High Court to make any observation regarding compensation, as that was impermissible on the facts and circumstances, either in public law or private law. In fact, it was not based on any prayer. That unwarranted observation while disposing of the first writ petition, though it did not cast any liability on the appellant, was sufficient to persuade the designate of the Chief Justice while exercising jurisdiction under section 11 of the Act to assume that the High Court in the order dated

29.4.2004 had ordered the respondent to pursue the remedy against the appellant for compensation/damages and therefore, an arbitrator should be appointed to decide the claim. [Para 22] [312-A-F]

3. Instances abound where observations of the court reserving liberty to a litigant to further litigate have been misused by litigants to pursue remedies which were wholly barred by time or to revive stale claims or create rights or remedies where there were none. Courts should take care to ensure that reservation of liberty is made only where it is necessary, such reservation should always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law. [Para 23] [312-G-H]

4. The public undertakings are subjected to vexatious litigations and other travails which their competitors in the private sector do not normally face. When public undertakings used to have monopoly and discharged public duties, control by the government and legislature and judicial review by the Judiciary was an absolute necessity to safeguard public interest and ensure transparency and accountability. But when public undertakings are required to compete with private sector, in commercial areas, controls by the executive and legislature (sometimes referred to as political bondage) and judicial review of their action, became a handicap which impedes their progress. A public undertaking is required to ensure fairness, non-discrimination and non-arbitrariness in their dealings and decision making process. Their action is open to judicial review and scrutiny under the Right to Information Act, 2005. They are required to take out advertisements and undergo elaborate and time-consuming selection processes, whether it is purchase of materials or engaging of contractors or making appointments. Just to ensure that

everyone is given a fair and equal opportunity, public undertakings are required to spend huge amounts and enormous time in elaborate tender processes. A proposal for a purchase of the value of Rupees Ten lakhs may involve a 'material procurement expenditure' of Rupees Two Lakhs in advertisements and tender evaluation cost, and a total tender process period ranging from three to six months. A competing private undertaking can go straight into market and negotiate directly and get the same material for Rupees five lakhs without any expenditure in a week. Public undertakings to avoid being accused of *malafides*, bias or arbitrariness spend most of their time and energy in covering their back rather than in achieving development and progress. When courts grant stay, the entire projects or business ventures stand still or get delayed. Even if ultimately the stay is vacated and the complaint is rejected as false, the damage is done as there is enormous loss to the public undertaking in terms of time and increase in costs. The private sector is not open to such scrutiny by courts. When the public sector is tied down by litigations and controls, the private sector quietly steals a march, many a time at the cost of the public sector. If the public sector has to survive and thrive, they should be provided a level playing field. [Para 24] [313-B-H; A-C]

Case Law Reference:

(2006) 1 SCC 751	**relied on**	**Para 16**
2009 (1) SCC 362	**relied on**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 868 of 2010.

From the Judgment & Order dated 1.8.2008 of the High Court of Delhi at New Delhi in A.P. No. 461 of 2007.

Randhir Beri, Lalit Bhardwaj and Ashok Mathur for the Appellant.

C.A. Sundaram, Manu Nair, Arun Mohan, Rohini Musa, Abhishek Gupta, Anandh Kannan and Zafar Inayat (for Suresh A. Shroff & Co.) for the Respondent.

The Order of the Court was delivered by

ORDER

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

2. The appellant, by 'Notice Inviting Tenders' dated 27.3.2001, invited bids for supply of 441 LCKM of different sizes of Polythene Insulated Jelly Filled cables ('PIJF cables' for short). The tender procedure (vide clause 13 of Special Conditions of Contract) required an evaluation of the bids, so as to limit the number of bidders selected for placing orders against the tender, to two-third of the participating and eligible bidders in each group; and the bidders for placement of orders were to be selected from the list of technically and commercially responsive bidders in each group arranged in decreasing order of 'Vendor Rating' starting from the highest. The bidder with the highest Vendor Rating (V-1) was to be considered for placing the order for about 30% of the tendered quantity and the balance quantity was to be distributed among the remaining selected bidders in each group in direct ratio of their Vendor Rating. Thus the quantity for which a purchase order was to be placed by BSNL on a bidder depended upon the 'Vendor Rating' of such a bidder.

The first round of litigation

3. There were several bidders including the respondent and NICCO Corporation Ltd. BSNL awarded the highest vendor rating (V-1), to NICCO. The respondent claimed that on a proper

evaluation of bidders, it should have been given the highest Vendor Rating (V-1) in regard to 10P x 0.5 (UA) size cable instead of NICCO; that if it had been adjudged as V-1, it would have secured a Purchase Order for a quantity of 5.842 LCKM from BSNL; that as NICCO was adjudged as V-1, the appellant treated the respondent as one of the 'other bidders' and consequently placed an order only for a quantity of 0.536 LCKM; and that resulted in a shortfall of 5.306 LCKM in the order placed on it. The respondent therefore filed Writ Petition [C] No.5808/2001 in the Delhi High Court on 18.9.2001 alleging that BSNL had arbitrarily adjudged NICCO as the person with the highest Vendor Rating thereby pushing it down to the category of 'other bidders' which adversely affected the size of its order. It prayed for the following reliefs :

(a) to quash the Advance Purchase Orders dated 11.9.2001 issued by BSNL to NICCO.

(b) to issue a direction to BSNL to issue fresh Advance Purchase Orders in terms of the Vendor Rating as on 22nd May, 2001 (date of the opening of the Tender) to it (respondent herein); and

(c) to quash the Revised Delivery Rating of NICCO as set out in the Internal Office memo dated 27.7.2001.

4. A Division Bench of the Delhi High Court allowed the said writ petition by order dated 29.4.2004 (reported in (2004) Delhi Law Times 112). It held that assessment of Vendor Rating done by BSNL in regard to NICCO was not proper. It therefore directed BSNL to redo the Vendor Rating by following the formulae laid down in the tender document, as indicated in the judgment. As the High Court was aware that by then contracts had already been awarded in respect of most of the tendered quantity and only a negligible quantity remained, it issued the following consequential direction :

"In this court's order dated 9.10.2002, it is recorded that

there are some supplies which are to be made for which no orders have been placed. … If the petitioner is rated as V-1, then it shall be given the benefit in the balance supplies that are yet to be made."

The High Court then proceeded to make the following observation, even though there was no claim for compensation/ damages in the writ petition :

"If after adjusting the balance amount the petitioner is still entitled to further supplies then it will be open to the petitioner to pursue its remedies against the respondents for compensation/damages that may be available to it in law."

The special leave petition filed by BSNL against the said judgment was dismissed by this court on 1.4.2005. The decision of the High Court thus attained finality.

The second round of litigation

5. By the time the said decision was rendered on 29.4.2004, BSNL, as per its policy, had already carried forward the balance quantity of the Tender dated 27.3.2001 to the next tender issued in 2002 and had even placed the purchase orders on the successful bidders against the said tender issued in 2002. (BSNL claimed that its counsel had erroneously submitted to the court during hearing of the first writ petition that some quantity still remained to be ordered. Be that as it may). Therefore, according to BSNL, no balance quantity was available and no order for any further quantity could be placed with the respondent, even if the respondent was to be given V-1 rating on a re-evaluation. The respondent was aggrieved that the BSNL did not adjudge it as V-1 and did not place orders for further quantities, as per the direction of the High Court. According to the respondent, on account of the failure on the part of BSNL to adjudge it with V-1 rating, and consequential failure to place a purchase order for 30% tendered quantity, it

was denied the opportunity to manufacture and supply a quantity of 5.306 LCKM of cables, resulting in a loss of profit at the rate of Rs.200/- per CKM (or Rs.2 crores per LCKM) on the quantities for which it did not get an order; and therefore it was entitled to Rs.10,61,20,000/- as damages from BSNL.

6. The respondent issued a notice dated 26.10.2005 calling upon the appellant to pay the said amount as compensation. The demand was reiterated on 28.4.2006. BSNL rejected the claim by its reply dated 10.7.2006. The respondent therefore filed a second writ petition (WP [C] No.18393/2006) on 27.9.2006 seeking a direction to the appellant to comply with the decision rendered on 29.4.2004 by paying a sum of Rs.10,61,20,000/- with interest from the date of demand (26.10.2005) till the date of payment, with costs of Rs.20,000/-. The said writ petition came up for consideration on 11.12.2006 before a learned Single Judge of the High Court and arguments were heard for some time. When the respondent found that it would not be possible for it to get a direction for payment of compensation in the writ petition, it sought to withdraw the petition, with liberty to take appropriate civil remedies. The second writ petition was therefore dismissed as withdrawn reserving liberty as prayed.

The third round of litigation

7. Thereafter, the respondent issued a notice dated 30.6.2007 through counsel, to BSNL suggesting that the disputes between them (for payment of Rs.10,61,20,000/- as damages to respondent) be referred to arbitration. BSNL by its reply dated 17.7.2007 rejected the request for arbitration. The respondent therefore filed an application under section 11(6) of the Arbitration and Conciliation Act, 1996 ('the Act' for short) in Arbitration Petition No. 461/2007 for appointment of an Arbitrator to decide its claim for Rs.10,61,21,000/-. The appellant resisted the said petition on the ground that there could be no arbitration in regard to the said claim. A learned Single Judge of the Delhi High Court, by the impugned order

dated 1.8.2008, has allowed the said application and appointed a retired Judge of the Delhi High Court as an Arbitrator.

Questions for consideration

8. On the contentions urged, two questions arise for consideration:

(i) Whether there exists an arbitration agreement between the parties ?

(ii) Even if there is an arbitration agreement, whether the respondent, having availed the public law remedy in regard to its grievance, will be entitled to again seek remedy by way of arbitration?

Relevant provisions of the bid documents

9. The Bid Documents in regard to the tender issued on 27.3.2001 consisted of twelve sections. Section I consisted of Notice Inviting Tenders. Section II consisted of Instructions to Bidders. Section III consisted of General Conditions of Contract. Section IV consisted of Special Conditions of Contract. Sections V and VI consisted of Schedule of Requirements and Technical Specifications. Schedule VII consisted of Bid Form and Price Schedules. Schedule XI contained the Price Variation Table. Sections VIII, IX, X and XII contained formats of Bid Security form, Performance security bond, Bidder's Authorization Letter and Declaration.

10. Definition clause 1(f) of Instructions to Bidders defined 'Purchase Order' as meaning "the order placed by the Purchaser on the Supplier, signed by the Purchaser including all attachments and appendices thereto and all documents incorporated by reference therein. The purchase order shall be deemed as 'Contract' appearing in the document." Clause 28 of Instructions to Bidders clarified that the issue of purchase order shall constitute the award of contract on the bidder.

Clause 26 of Instructions to bidders made it clear that BSNL could reject any or all bids. The said clause is extracted below:

> "The Purchaser reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids, at any time prior to award of contract without assigning any reason whatsoever and without thereby incurring any liability to the affected bidder or bidders on the grounds of purchaser's action."

Clause 30 of the Instructions to bidders related to jurisdiction and the same is extracted below :

> "COURT JURISDICTION: The contract shall be governed by Indian laws and *courts at Delhi/New Delhi will have jurisdiction to entertain any dispute or claim arising out of this tender till issue of authorization letters to Circles for placement of Purchaser Orders(P.O.s*)"
>
> *(emphasis supplied)*

11. Section III (General Conditions of Contract) started with the preamble (in clause 1) that the General Conditions shall apply to contracts made by BSNL for the procurement of goods. Clause 20 of the General Conditions of Contract provided for arbitration and relevant portion thereof is extracted below :

> "20. ARBITRATION:
>
> (20.1.) In the event of any question, dispute or difference arising under this agreement or in connection therewith except as to the matters, the decision of which is specifically provided under this agreement, the same shall be referred to sole arbitration of the CMD, BSNL, New Delhi or in case his designation is changed or his office is abolished then in such case to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD, BSNL or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996…….. "

The first question

12. At the outset, what should be noticed is that there was no contract or agreement between the parties (except in regard to the contracted quantity of 0.536 LCKM for which an order was placed by BSNL, but which is not the subject matter of the present dispute). Bid documents did not constitute a contract, or an agreement or an agreement to enter into a contract. It was merely an invitation to make an offer. It informed the prospective bidders, how they should make their bids; how the bids would be processed by BSNL; how contracts would be entered by placing purchase orders; and what terms would govern the contracts, if purchase orders were placed. Some sections of the bid documents governed the tender process which preceded the placing of purchase orders. Some sections contained the forms in which the bid should be made by the bidder. Other sections of bid documents contained provisions which would govern the contracts, when purchase orders were placed by BSNL by accepting the bid. For example, Section I (Notice Inviting Tenders) and Section II (Instructions to bidders) had nothing to do with the performance of the contract. They relate to the pre-contract process of bidding, that is who would be eligible to make bids and how the bids should be made. On the other hand, Section III had nothing to do with the bidding process or selection of suppliers, but contained provisions which would govern the performance - that is the terms and conditions of the contract – if and when contracts were entered by placing purchase orders. The arbitration clause (clause 20) is a part of Section III of the Bid documents.

13. As per the scheme of Bid documents, there is a clear division of the terms that will govern the tender process, and the terms that will govern the contract, when the bids are accepted. One part regulated the tender process that led to placing of purchase orders. That part contained a provision as to what should be the forum of dispute resolution, if there was a dispute at the tender or bidding stage. The other part stipulated the terms and conditions which will govern the contract, if and when purchase orders were placed. That part also contained a provision as to what should be the forum if there was a dispute after the contract was entered. Clause 30 of Instructions to Bidders makes it clear that in regard to tender-stage disputes, the forum will be Civil Courts. Clause 20 of General Conditions on the other hand was intended to operate when contracts were made and it specified that if disputes arose in regard to the contracts, the forum for dispute resolution will be the Arbitral Tribunal.

14. Clause 1 of the General Conditions of Contract (Section III) makes it clear that the General Conditions of Contract contained in Section III of the document shall apply in *contracts made by the purchaser for the procurement of goods.* Clause 20 of Section III, that is the arbitration clause makes it clear that arbitration is available in regard to 'any question, dispute or difference arising *under this agreement* or in connection therewith'. Therefore, it is evident that the General Conditions of Contract (Section III) and clause 20 therein providing for arbitration, will not apply in regard to any dispute in regard to the tender or bid, or non-placing of a purchase order, but will apply only in regard to any contract awarded by BSNL by placing a purchase order. A contract is entered in pursuance of the bid, when a purchase order is placed by BSNL on a bidder (vide clauses 1(f) and 28 of Section II – Instructions to Bidders). When a purchase order is not placed, there is no contract or agreement and if there is no contract or agreement, the terms of General Conditions including the arbitration clause do not come into existence. In

other words there is no arbitration agreement at all. BSNL intended to have arbitrations only where it had *entered into* contracts and there were disputes relating to *such contracts.* It did not intend to have arbitrations in regard to tender stage disputes or *pre-contract* differences, at a stage when there was no privity of contract.

15. It is also very significant that Section II (Instructions to Bidders) and Section IV (Special Conditions) which are relevant at the bid stage do not contain any arbitration clause providing that if there is any dispute between BSNL and a bidder in regard to the bid/tender process, the dispute will be settled by arbitration. On the other hand, the Instruction to Bidders contains a specific provision that if there is a dispute or claim arising out of the tender till (issue of authorization for) placement of the purchase order, only courts will have jurisdiction. Of course, as and when appellant placed a purchase order on a bidder, the purchase order contained a term that the General conditions of contract, forming part of the bid documents would be a part of the contract documents, and consequently the arbitration clause applied to the contracts entered between BSNL and the bidders.

16. We may in this behalf usefully refer to the decision in *Dresser Rand S.A.* vs. *Bindal Agro Chem.Ltd* (2006) 1 SCC 751 wherein this Court held:

> "27. The tender document or the invitation to bid of BINDAL (containing the "instructions to bidders" and the "general conditions of purchase"), by itself, is neither an agreement nor a contract. The instructions to bidders informed the intending bidders how the bid should be made and laid down the procedure for consideration and acceptance of the bid. The process of bidding or submission of tenders would result in a contract when a bid or offer is made by a prospective supplier and such bid or offer is accepted by BINDAL. The second part of the Invitation to Bid consists of the 'General Conditions of

Purchase', that is, the conditions subject to which the purchase order will be placed or offer will be accepted. The 'General Conditions of Purchase' were made available as a part of the Invitation to bid, so as to enable the prospective suppliers to ascertain their obligations and formulate their offers suitably."

"32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself. The purpose of Revision No. 4 dated 10.6.1991 was that if and when a purchase order was placed by BINDAL, that would be governed by the "general conditions of purchase" of BINDAL, as modified by Revision No. 4. But when no purchase order was placed, neither the 'general conditions of purchase' nor the arbitration clause in the 'General Conditions of Purchase' became effective or enforceable."

17. Therefore, only when a purchase order was placed, a 'contract' would be entered; and only when a contract was entered, the General Conditions of Contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not an arbitration agreement *in praesenti*, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed. In this case, the dispute raised is in regard to a claim for Rs.10,61,28,000/- as damages on account of BSNL not placing a purchase order, that is loss of profit @ Rs.200/- per CKM for a quantity

of 5.306 LCKM. Obviously the respondent cannot invoke the arbitration clause in regard to that dispute as the arbitration agreement was non-existent in the absence of a purchase order.

18. The respondent contended that BSNL has entered into a contract with it in respect of a quantity (0.536 LCKM), and as the dispute raised was whether the contract quantity should be more, the arbitration clause was in force and available. The contention has no merit. The arbitration agreement was available in regard to the contract for 0.536 LCKM. But in the absence of any purchase order in respect of 5.306 LCKM by BSNL on the respondent, respondent cannot seek recourse to the arbitration agreement contained in clause 20 of Section III of the bid document, in regard to *a dispute* relating to that *quantity for which order was not placed*. It is not sufficient to show that there was an arbitration agreement in regard to some contract between the parties. To constitute an arbitration agreement for the purpose of Sections 7 and 11 of the Act, two requirements should be satisfied. The first is that there should be an arbitration agreement between the parties to the dispute. The second is that it should relate to or be applicable to the dispute in regard to which appointment of Arbitrator is sought (See *Yogi Agarwal v. Inspiration Clothes & U* - 2009 (1) SCC 362). For the foregoing reasons, we hold that in the absence of an arbitration agreement, the application under section 11 of the Act was not maintainable.

Some collateral issues

19. This case makes it necessary to refer to two areas of concern. The first relates to misuse by litigants, of routine observations made by courts reserving liberty to a litigant to seek further remedy, while disposing the matters, to claim non-existent rights and remedies. Second relates to the unenviable position to which public undertakings are reduced, for lack of freedom and unnecessary litigation.

Misuse of liberty reserved for further action

20. In the first writ petition filed by the respondent, the issue was whether the BSNL while evaluating the bidders had committed an error in adjudging NICCO as V-1 (vendor with the highest rating). The assessment of vendor rating (VR) was governed by the following formula : VR = 0.6PR + 0.3DR + 0.1 QR (PR, DR and QR referring to price rating, delivery rating and quality rating). The formula for arriving at PR was simple. QR did not involve any formula. But the formula prescribed to arrive at DR was complicated. The High Court found that the delivery rating (DR) of NICCO was modified by BSNL on a representation by NICCO, which led to NICCO, being adjudged as V-1. The High Court found that the modification of Delivery Rating was not warranted and consequently held that the vendor rating of NICCO was not proper. But it did hold that there was any malafides, bias or arbitrariness in the process of assessment of vendor rating by BSNL. In other words, the rating of NICCO as V-1 was apparently on account of a bonafide error in assessment or wrong understanding of the principles relating to assessment of Vendor Rating. The High Court directed correction of that error. The High Court was also aware that by the time it decided the writ petition, BSNL had completed the process of placing of purchase orders and only a very small quantity remained unallotted (In fact according to BSNL even this quantity had been transferred to next year's tender). Consequently, the High Court while disposing of the first writ petition directed the BSNL to reassess the vendor rating, and if as a result the respondent secured V-1 rating, to allot to it, any unallotted quantity of cables. So far so good.

21. But the High Court did not stop there. It proceeded to observe at the end of the order that after giving effect of balance supply, if the respondent was entitled to further supplies, it will be open to the respondent to pursue its remedies against the appellant *for compensation/damages that may be available to it in law.*

22. Where the terms of the bid documents barred any claim being made on account of the rejection or non-acceptance of any bid, the bid inviter would not incur any liability to any aggrieved bidder, and the bidder would not have any cause of action in private law. But as the bids were invited by BSNL, which is 'state' for the purpose of Article 12, a writ petition was entertained, when respondent alleged arbitrariness in the process of assigning vendor-rating. In the absence of a finding in regard to arbitrariness, bias or malafides in the decision but only a mere error in assessment, the High Court ought not to have interfered in the tender process. In fact, it did not set aside the contract awarded to NICCO. But the High Court chose to issue a direction for re-assessment of the vendor rating and if respondent was found to have V-1 rating, then place a purchase order for the quantity that remained over after all the purchase orders. This was unobjectionable as a public law remedy. Having done so, there was no justification for the High Court to make any observation regarding compensation, as that was impermissible on the facts and circumstances, either in public law or private law. In fact, it was not based on any prayer. That unwarranted observation while disposing of the first writ petition, though it did not cast any liability on BSNL, was sufficient to persuade the designate of the Chief Justice while exercising jurisdiction under section 11 of the Act to assume that the High Court in the order dated 29.4.2004 had ordered the respondent to pursue the remedy against the appellant for compensation/damages and therefore, an arbitrator should be appointed to decide the claim.

23. Instances abound where observations of the court reserving liberty to a litigant to further litigate have been misused by litigants to pursue remedies which were wholly barred by time or to revive stale claims or create rights or remedies where there were none. It is needless to say that courts should take care to ensure that reservation of liberty is made only where it is necessary, such reservation should

always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law.

Position of public undertakings

24. The second issue relates to the vulnerable position of public undertakings. More and more they are subjected to vexatious litigations and other travails which their competitors in the private sector do not normally face. When public undertakings used to have monopoly and discharged public duties, control by the government and legislature and judicial review by the Judiciary was an absolute necessity to safeguard public interest and ensure transparency and accountability. But when public undertakings are required to compete with private sector, in commercial areas, controls by the executive and legislature (sometimes referred to as political bondage) and judicial review of their action, became a handicap which impedes their progress. A public undertaking is required to ensure fairness, non-discrimination and non-arbitrariness in their dealings and decision making process. Their action is open to judicial review and scrutiny under the Right to Information Act, 2005. They are required to take out advertisements and undergo elaborate and time-consuming selection processes, whether it is purchase of materials or engaging of contractors or making appointments. Just to ensure that everyone is given a fair and equal opportunity, public undertakings are required to spend huge amounts and enormous time in elaborate tender processes. A proposal for a purchase of the value of Rupees Ten lakhs may involve a 'material procurement expenditure' of Rupees Two Lakhs in advertisements and tender evaluation cost, and a total tender process period ranging from three to six months. A competing private undertaking can go straight into market and negotiate directly and get the same material for Rupees five lakhs without any expenditure in a week. Public undertakings to avoid being accused of malafides, bias or arbitrariness spend most of their time and energy in covering their back rather than in achieving

development and progress. When courts grant stay, the entire projects or business ventures stand still or get delayed. Even if ultimately the stay is vacated and the complaint is rejected as false, the damage is done as there is enormous loss to the public undertaking in terms of time and increase in costs. The private sector is not open to such scrutiny by courts. When the public sector is tied down by litigations and controls, the private sector quietly steals a march, many a time at the cost of the public sector. We are not advocating less of judicial review. We are only pointing out that if the public sector has to survive and thrive, they should be provided a level playing field. How and when and by whom is the question for which answers have to be found. Be that as it may.

Conclusion :

25. In view of our finding on the first issue, the second question does not survive for consideration.

26. Therefore, we allow this appeal, set aside the order and dismiss the application under Section 11 of the Arbitration Act.

D.G. Appeal allowed.

M. NIZAMUDDIN

v.

M/S. CHEMPLAST SANMAR LTD. AND ORS.

(Civil Appeal No. 2284 of 2010)

MARCH 10, 2010

[K.G. BALAKRISHNAN, CJI., R.M. LODHA AND DR. B.S. CHAUHAN, JJ.]

Coastal Regulation Zone Notification, 1991:

Paragraph 3(3)(i) – Uppanar river and its banks adjacent to the plant in Thiyagavalli village where the pipeline crosses Uppanar river does not come under the CRZ area – On facts, MOEF rightly granted permission to the onshore pipelines insofar as these pass through the CRZ abutting the sea, i.e. 500 meters from the HTL and no clearance was required for laying of pipelines under the Uppanar river – Coastal Zone Management Plan of Tamil Nadu, 1996 – Environment Protection Act, 1986 – s.2(d).

Paragraph 2(ii) – Transfer of VCM (hazardous substance) beyond port area to the PVC plant through pipelines – Permissibility – Held: Paragraph 2(ii) permits transfer of hazardous substances from ships to ports, terminals and refineries and vice-versa, in the port areas.

Coastal Zone Management Plan of Tamil Nadu, 1996:

Demarcation plan prepared by National Institute of Oceanography – Held: Shall not prevail over the 1996 Plan.

Interpretation of statutes:

Mischief rule – If exception is added to remedy the mischief or defect, it should be so construed that remedies the mischief and not in a manner which frustrates the very

purpose – Purposive construction to be employed to avoid a lacuna and to suppress the mischief and advance the remedy – Coastal Regulation Zone Notification, 1991 – Paragraph 2(ii).

Chemplast Ltd. proposed to set up a project for manufacturing Poly-Vinyl Chloride (PVC) at Cuddalore District, Tamil Nadu. Chemplast was also required to import, a raw material Vinyl Chloride Monomer (VCM) for manufacturing PVC. Chemplast proposed to install a Marine Terminal Facility (MTF) near the seashore at Chittrapettai village for receiving and transferring VCM from ships to the PVC plant through underground pipeline.

Ministry of Environment and Forests (MOEF) granted environmental clearance on 19.12.2005 under the provisions of Coastal Regulation Zone Notification, 1991. TNPCB in the light of the environmental clearance dated 19.12.2005 granted by MOEF accorded its consent on 14.9.2006 for the PVC plant as well as MTF and pipeline project of the Chemplast.

Chemplast made an application on February 6, 2008 to the Executive Engineer, PWD seeking permission for carrying seawater and raw-materials through pipelines laid 3.50 meter below the river bed. The Executive Engineer granted permission on February 27, 2008 subject to the conditions set out therein. In less than a month on March 19, 2008, the Executive Engineer, cancelled the permission observing that VCM may cause pollution and health hazard to the public.

The order cancelling permission was challenged by Chemplast by filing writ petition before the High Court. The High Court allowed writ petition. Thereafter appellant filed PIL praying that the order passed by Executive Engineer on February 27, 2008 be quashed and

Chemplast be directed to forbear from laying of pipelines for drawing VCM raw material from jetty to their plant. High Court dismissed the writ petition. A writ petition was filed under Article 32 of the Constitution of India before Supreme Court by another individual challenging the permission granted by MOEF on 19.12.2005. Three more writ petitions came to be filed before High Court challenging environmental clearances granted by the MOEF to Chemplast. The appellant also sought transfer of these petitions to this Court. IA7 was made therein for deletion of respondent 21 and 22. The writ petition, appeal against the impugned judgment of High Court, transfer petitions and IAs were heard together in these matters.

The questions which arose for consideration in these matters were whether Uppanar river and its banks at the point where pipelines pass, fall in the CRZ III area; and whether paragraph 2(ii) of 1991 Notification restricts transfer of VCM (hazardous substance) beyond port area to the PVC plant through pipelines.

Dismissing the writ petition and the appeal as well as IA for initiating contempt proceedings against MOEF and disposing of the Transfer Petitions and IA7, the Court

HELD: 1.1. Coastal Regulation Zone Notification, 1991 was issued by the MOEF declaring the coastal stretches as Coastal Regulation Zone (CRZ) and regulating activities in such area. 1991 Notification was amended from time to time. Paragraph 3(3)(i) of 1991 Notification required the Coastal States and UT Administrations to prepare Coastal Zone Management Plans for identification and classification of the CRZ areas within their respective territories in accordance with the guidelines given in Annexures I and II of the Notification. It further mandated Coastal States and UT Administrations to obtain approval of such plans from the

Central Government. As a matter of fact, the said provision provided a period of one year for preparation of such plans from the date of the Notification, but the Coastal States and UT Administrations remained dormant for many years in this regard. However, consequent upon directions of this Court, the State of Tamil Nadu submitted its Coastal Zone Management Plan to the MOEF on August 23, 1996 which was approved on September 27, 1996 (1996 Plan) containing 31 sheets corresponding to maps for different stretches of the coastline of the State of Tamil Nadu with certain conditions/modifications/ classifications. Sheet no.10 pertained to the coastal stretch of Cuddalore District. The MOEF, based on sheet no. 10 (1996 Plan) stated in their affidavit that the land portion of the banks of Uppanar river adjacent to the plant in Thiyagavalli village where the pipeline crosses Uppanar river does not come under the CRZ area. [Paras 26 and 28] [333-C-D; 337-H; 338-A-E]

1.2. The Coastal Zone Management Plan of Tamil Nadu, 1996 does not reflect the area on both sides of the Uppanar river through which the pipelines pass as CRZ area. By 1998 amendment, it has been provided in 1991 Notification that High Tide Line (HTL) shall be demarcated uniformly in all parts of the country by the demarcating authority or authorities so authorized by the central government in accordance with the general guidelines issued in this regard. By further amendment on May 21, 2002, sub-paragraph (ii) was inserted in the first paragraph of 1991 Notification providing therein that the distance from the HTL shall apply to both sides in the case of rivers, creeks and backwaters. The said amendment provided that the distance up to which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance up to which the tidal effects are experienced which shall be

determined based on salinity concentration of 5 ppt. It is perfectly true that at the time of preparation and approval of 1996 Plan, the amendments of December 29, 1998 and May 21, 2002 in 1991 Notification had not seen the light of the day and the declaration made in first para that the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by tidal action (in the landward side) upto 500 meters from the HTL and the land between the LTL and the HTL are CRZ was kept in view but in the absence of any modification carried out thereafter, 1996 Plan remained operative. The authorities authorized to demarcate HTL cannot override the plan prepared and approved under paragraph 3(3)(i) as the said paragraph leaves no manner of doubt that Coastal Zone Management Plan prepared by the Coastal State (or for that matter State Coastal Zone Management Authority) and duly approved by the MOEF is the relevant plan for identification and classification of CRZ areas. The plan prepared by National Institute of Oceanography thus, cannot be said to have superseded 1996 Plan for the Cuddalore coastal stretch. More so, while giving approval on September 27, 1996 to 1996 Plan, the MOEF appended a condition that government of Tamil Nadu would not make any change in the approved categorization of CRZ area without its prior approval. Thus, 1996 Plan for the purposes of demarcation and classification of CRZ area in the State of Tamil Nadu has to be treated as final and conclusive and was rightly treated as such by the MOEF. The Uppanar river and its banks at the relevant place where the pipelines laid by the Chemplast pass do not fall under CRZ III area as per 1996 Plan and no environmental clearance is needed for such pipelines. The MOEF rightly granted permission to the onshore pipelines insofar as these pass through the CRZ abutting the sea, i.e. 500 meters from the HTL and no clearance was required for laying of pipelines under the Uppanar river. [Paras 29, 30 and 31] [338-G; 339-A-G-H; 340-A-D]

2.1. From the materials available on record that include the Environment Impact Assessment Report (EIA) and Risk Analysis Report (RA), it cannot be said that existence of Uppanar river has been suppressed by the Chemplast in its proposals although in these reports Uppanar river has been described as Uppanar canal. Similarly, in Section 5 of RA, reference is made to pipeline crossing Uppanar canal. The position is clarified by Chemplast in their subsequent application made on November 14, 2005. [Para 32] [340-D-F]

2.2. Paragraph 2(ii) of 1991 Notification prohibits manufacture or handling or storage or disposal of hazardous substances, as specified in the Notifications issued by MOEF (dated 28th July, 1989, 27th November, 1989 and 5th December, 1989), except transfer of hazardous substances from ships to ports, terminals and refineries and vice-versa, in the port areas. The VCM is hazardous substance as notified by notification dated November 27, 1989. It is also an admitted position, that handling of a substance includes transfer as per Section 2(d) of the Environment (Protection) Act, 1986. The expression, "except transfer of hazardous substances from ships to ports, terminals and refineries and vice versa in the port areas" was added in paragraph 2(ii) on 9th July, 1997. In the original 1991 Notification there was no exception clause. It appears to have been added for the purpose of enabling transfer of hazardous substances from ships to ports, ships to terminals and ships to refineries and vice versa. Such transfer of hazardous substances are not confined to terminals and refineries located in the port areas. Interpreting otherwise would make the said provision unworkable and would also result in absurdity inasmuch as the hazardous substance would be brought in to the port, refinery or terminal in the port area from the ship and would remain

there and could not be taken beyond the port area because of the prohibition. This surely could not have been the intention of the Executive in adding the exception clause. [Para 33] [341-F-H; 342-A-E]

2.3. It is well settled that if exception has been added to remedy the mischief or defect, it should be so construed that remedies the mischief and not in a manner which frustrates the very purpose. Purposive construction has often been employed to avoid a lacuna and to suppress the mischief and advance the remedy. It is again a settled rule that if the language used is capable of bearing more than one construction and if construction is employed that results in absurdity or anomaly, such construction has to be rejected and preference should be given to such a construction that brings it into harmony with its purpose and avoids absurdity or anomaly as it may always be presumed that while employing a particular language in the provision absurdity or anomaly was never intended. Notwithstanding imperfection of expression and that exception clause is not happily worded, by applying purposive construction, the expression, 'in the port areas' should be read as, 'in or through the port areas'. The exception in paragraph 2 (ii) then would achieve its objective and read, 'except transfer of hazardous substances from ships to ports, ships to terminals and ships to refineries and vice versa, in or through the port areas'. This construction will be harmonious with paragraph 3(2)(ii) which permits the activity of laying pipelines in the CRZ area. As a matter of fact, the MOEF in their affidavit before this Court have clearly stated that the permission granted to Chemplast on 19th December, 2005 is in exercise of the powers conferred under paragraph 3(2)(ii) of 1991 Notification. There is not infirmity in the permission granted by the MOEF on 19th

December, 2005. Having held that, there is no illegality in the permission granted by the Executive Engineer on February 27, 2008 either. The project was established by investing huge amount of about Rs. 600 crores and had already been commissioned after obtaining necessary approvals and, therefore, it would not be in the interest of justice nor in the public interest now to interfere with the project. The alternative solution suggested for carrying VCM across Uppanar river to the plant is rejected. [Paras 33 and 35] [342-E-H; 343-A-C; 343-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2284 of 2010.

From the Judgment & Order dated 31.10.2008 of the High Court of Judicature at Madras in Writ Petition No. 21791 of 2008.

WITH

W.P. (C) No. 130 of 2009, T.P.(C) No. 365-367 of 2009.

Parag P. Tripathi, ASG, Ranjit Kumar, Vikas Singh, Dr. Rajeev Dhawan, R. Balasubramanian, K.K. Venugopal, Vijay Narayan, Altaf Ahmed, R.F. Nariman, V. Balaji, Narendra Kumar, Abhishek Anand, C. Kannan, Parvesh Thakur (for Rakesh K. Sharma), Aman Ahluwalia, Kunal Bahri Shreekant N. Terdal, K.V. Mohan, K.V. Balakrishnan, Gopal Sankaranarayanan, R. Nedumaran, T. Harish Kumar, P. Prasanth, V. Vasudevan, Sushma Manchanda, Senthil Jagadeesan (N.P.) for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted in SLP (Civil) No. 7101 of 2009.

2. In this group of five matters before us, civil appeal is directed against the judgment of Madras High Court passed

on October 31, 2008 whereby a writ petition in the nature of Public Interest Litigation (PIL) filed by the appellant – M. Nizamudeen - has been dismissed. Out of the other four matters; one is a writ petition being W.P. (C) No. 130 of 2009 preferred directly before this Court under Article 32 of the Constitution while the other three matters are transfer petitions seeking transfer of Writ Petition nos. 37043 of 2006, 8125 of 2007 and 23122 of 2007 filed before the Madras High Court.

3. M/s. Chemplast Sanmar Limited (for short, 'Chemplast') proposed to set up a project for manufacturing Poly-Vinyl Chloride (PVC) at Semmankuppam village, SIPCOT Industrial Complex, Phase-II, Cuddalore District (Tamil Nadu). An Environmental Impact Assessment Report (EIA) as well as Risk Analysis Report (RA) for the proposed PVC project was obtained by Chemplast and, then, they made proposal (vide application dated May 27, 2002) to the concerned authorities for setting up the said project. The feasibility of the project was considered by public hearing panel in the meeting held on June 7, 2002. The proposal of Chemplast was sent by the government of Tamil Nadu with its recommendations, after accepting the conditional consent issued by Tamil Nadu Pollution Control Board (for short 'TNPCB'), to the Ministry of Environment and Forests, Government of India (for short, 'MOEF'). The MOEF examined the proposal submitted by the Chemplast in light of the questionnaire, EIA, RA and other relevant documents and accorded environmental clearance to the project proposed by Chemplast on November 28, 2005 subject to strict compliance to the specific and general conditions laid down therein.

4. One of the raw-materials for manufacturing PVC is Vinyl Chloride Monomer (VCM). VCM is not available indigenously and Chemplast planned to import the said raw-material for their plant use from international suppliers. Chemplast in their proposal also proposed to install a Marine Terminal Facility (for short, 'MTF') near the seashore at Chitrapettai Village for receiving and transferring VCM from the ships to the PVC plant through underground pipeline.

5. The District Coastal Zone Management Committee in its meeting held on June 7, 2005 considered the proposal of Chemplast for setting up of MTF including the conveyance mains and resolved to recommend to the Tamil Nadu State Coastal Zone Management Authority (TNSCZMA) to consider in principle clearance for the following facilities:

> "01. Laying of pipe lines for the transportation of Vinyl Chloride Monomer (VCM) as permitted vide Ministry of Environment and Forests, Coastal Regulation Zone Notification dated 19th February 1991 In paragraph 2 (Prohibited Activities), in sub paragraph (ii) with proviso "except transfer of hazardous substances from ships to ports terminals and refineries and vice-versa In the port areas".
>
> 02. Treated effluent lines and sea water intake and return lines as permitted vide Ministry of Environment and Forests, Costal Regulation Zone Notification dated 19th February 1991 in paragraph 2 (Prohibited Activities) in sub paragraph (xii) with proviso "except facilities for carrying treated effluents and waste water discharges into the sea, facilities for carrying sea water for cooling purposes, oil, gas and similar pipelines and facilities essential for activities permitted under this Notification'.
>
> 03. Constructions for jetty activities and control room as permitted vide Ministry of Environment and Forests, Coastal Regulation Zone Notification dated 19th February 1991 in paragraph 3 (Regulation of Permissible Activities) in sub paragraph 2 of (ii) with proviso "operational constructions for ports and harbours and light houses and constructions for activities such as jetties, wharves, quays and slipways'."

6. The aforesaid recommendations were considered by the TNSCZMA and they resolved in its meeting held on October 17, 2005 to recommend to the state government to forward the proposal to the MOEF for the issue of CRZ clearance to Chemplast with the following conditions :

"1. The unit shall comply safety measures stipulated by the Navigational Safety in Ports Committee (NSPC), Goa and shall obtain the clearance from NSPC before Commissioning of the jetty.

2. The unit shall inform in advance to the Assistant Director of Fisheries Department, Cuddalore as and when the loading and unloading of VCM is done from the ship.

3. The unit shall obtain NOC from the Tamil Nadu Pollution Control Board before commissioning of the jetty and the unit shall comply with the norms prescribed by the Tamil Nadu Pollution Control Board from time to time.

4. The unit shall submit the Disaster Management Plan to the District Authorities before commissioning of the jetty.

5. The Unit shall transport and dispose the treated effluent and R.O rejects of the Desalination Plant by conducting Hydrological study through National Institute of Ocean Technology/National Institute of Oceanography.

6. The Unit shall install double walled pipeline in a concrete trench for the transport of VCM from the Jetty to the Plant.

7. The Unit shall install Emergency shutdown valves in the Jetty and leak detection system in the onshore pipeline.

8. The unit shall install adequate fire fighting equipment to encounter any eventuality due to fire.

9. The unit's marine activity shall not give any hindrance to the public as well as to the aquatic life.

10. The unit shall provide and operate sufficient Navigational lighting Indication system during the night hours,

11. The waste water after treatment in the effluent treatment plant should not be discharged into the sea."

7. Pursuant thereto, the Director, Department of Environment, Government of Tamil Nadu considered the resolution dated October 17, 2005 of the TNSCZMA and forwarded the proposal to the state government by his communication dated October 28, 2005.

8. The government of Tamil Nadu by its communication dated November 9, 2005 informed the National Coastal Zone Management Authority its acceptance of the recommendation made by the TNSCZMA and recommended the proposal of Chemplast seeking environmental clearance for setting up of MTF. Along with its communication dated November 9, 2005, the state government sent, inter-alia : (i) questionnaire for environmental appraisal for MTF (ii) EIA prepared by LT Ramboll; (iii) RA prepared by LT Ramboll; and (iv) minutes of the 34th meeting of the TNSCZMA held on 17.10.2005.

9. Chemplast submitted further application to the MOEF on November 14, 2005. The MOEF, then, considered the proposal involving the activities namely, (i) construction of island jetty at 1000 meters from the shoreline; (ii) laying of sub-sea pipelines from jetty to landfall point; (iii) construction of port office with communication facilities; and (iv) laying of onshore piping from landfall point to the CRZ area and thereon to the plant. The MOEF took into consideration, inter alia, that the MTF will be located offshore of Chitrapettai village; that the landfall point will be at Chitrapettai village, which is 2500 meters from the PVC plant; that the total length of the pipelines onshore will be 3500 meters; that the offshore pipelines and the onshore pipelines will be laid in a covered RCC trench; that the island jetty would be consisting of an operating platform, berthing dolphins,

mooring dolphins and interconnecting walkway; that the platform and dolphins will be RCC structures suitable for open sea marine service; that sub sea pipelines will be laid with proper insulation and mechanical protection; that piping design would also take into effect stresses arising out of risers, temperature variation, buckling, buoyancy and sea bed erosion. In the backdrop of aforesaid facts and aspects, the MOEF granted environmental clearance on December 19, 2005 under the provisions of Coastal Regulation Zone Notification, 1991 (for short, '1991 Notification') as amended from time to time for construction of revetment for setting up of MTF on the specific and general conditions set out therein including all the conditions stipulated by the government of Tamil Nadu in the letter dated November 9, 2005 and recommendations of the TNSCZMA.

10. The environmental clearance dated December 19, 2005 granted by the MOEF clarified that the stipulations/ conditions set out therein will be enforced among others under the Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981, Environment (Protection) Act, 1986, the Hazardous Chemicals (Manufacture, Storage and Import) Rules, 1989, the 1991 Notification and its subsequent amendments and the Public Liability Insurance Act, 1991 and the Rules made thereunder. Chemplast was also directed to ensure that the proposal complies with the provisions of the approved Coastal Zone Management Plan of Tamil Nadu, 1996 (for short, '1996 Plan').

11. The TNPCB in light of the environmental clearance dated December 19, 2005 granted by the MOEF accorded its consent on September 14, 2006 for the PVC plant as well as MTF and pipeline project of the Chemplast.

12. Chemplast made an application on February 6, 2008 to the Executive Engineer, PWD, Vellar Basin Division, WRO, Vridhachalam (for short, 'Executive Engineer') seeking permission for carrying seawater and raw-materials through pipelines laid 3.50 meter below the river bed. The Executive

Engineer granted permission on February 27, 2008 subject to the conditions set out therein. In less than a month on March 19, 2008, the Executive Engineer, cancelled the aforesaid permission observing that VCM may cause pollution and health hazard to the public.

13. The order cancelling permission was challenged by Chemplast by filing writ petition before the High Court of Judicature at Madras. The High Court allowed writ petition on July 18, 2008 and set aside the order of the Executive Engineer passed on March 19, 2008 revoking the permission granted on February 27, 2008. It was then that the appellant - M. Nizamudeen - filed PIL before the Madras High Court praying therein that the order passed by the Executive Engineer on February 27, 2008 be quashed and Chemplast be directed to forebear from laying of pipelines for drawing VCM raw-material from jetty to their plant in Semmankuppam village. In the writ petition, M. Nizamudeen did not challenge environmental clearances granted by MOEF on November 28, 2005 and December 19, 2005. The High Court, vide its Judgment dated October 31, 2008, dismissed the writ petition which is subject matter of challenge in the civil appeal.

14. It appears that after Petition for Special Leave to Appeal challenging the judgment of Madras High Court came to be filed by M. Nizamudeen before this Court that a writ petition under Article 32 of the Constitution has been preferred directly before this Court by A. Bhunanenthiran praying therein that the permission granted by the MOEF on December 19, 2005 be quashed and a Writ of Mandamus be issued to the MOEF, TNSCZMA and TNPCB to ensure that no prohibited activity, viz., handling of any hazardous chemical through pipelines or otherwise takes place in CRZ areas on both sides of Uppanar river.

15. Be it noted here that three more writ petitions (Writ Petition nos. 37043/2006, 8125/2007 and 23122/2007) came to be filed before Madras High Court challenging environmental

clearances granted by the MOEF to the Chemplast. The appellant - M. Nizamudeen - has sought transfer of these petitions to this Court. I.A. No. 7 has been made therein for deletion of respondent nos. 21 and 22. As the issues are common, these writ petitions are transferred to this Court and respondent nos. 21 and 22 are deleted from array of parties.

16. We heard learned senior counsel and counsel for the parties at considerable length.

17. Mr. Ranjit Kumar, learned senior counsel for the appellant - M. Nizamudeen – submitted: that 100 meters from the High Tide Line (HTL) on both sides of Uppanar river are CRZ-III areas where handling of hazardous substance is prohibited; that VCM is hazardous substance notified under the Notification of MOEF issued on November 27, 1989 and handling of a substance includes transfer, as per Section 2(d) of Environment (Protection) Act, 1986; that Chemplast did not seek any permission in respect of the pipelines in the CRZ on both sides of Uppanar river, rather existence of Uppanar river itself was suppressed in the proposals made; that 1996 Plan was neither annexed nor referred to in the proposals made before the competent authorities, nor was even brought to the notice of the High Court and it is being referred to and relied upon for the first time by Chemplast before this Court; that Chemplast while submitting proposals to the competent authorities itself annexed a demarcation map prepared by the National Institute of Oceanography (NIO) to show the High Tide Line/Low Tide Line [HTL/LTL] and the relevant CRZ area; that the said demarcation map prepared by NIO, for the purpose of environmental clearance, must prevail over 1996 Plan and in any case 1996 Plan has become redundant by the amendments in 1991 Notification.

18. Mr. Ranjit Kumar, learned senior counsel also submitted that a close look at the environmental clearance dated December 19, 2005 granted by the MOEF would show that it neither covers nor includes the activities of laying of

pipelines across and underneath Uppanar river and drawing of VCM through pipelines. He lastly submitted that Executive Engineer had no authority to permit laying of pipelines in the CRZ of Uppanar river.

19. Dr. Rajeev Dhavan, learned senior counsel for writ petitioner - A. Bhunanenthiran - adopted the submissions of Mr. Ranjit Kumar and further submitted that identification and demarcation of CRZ of any particular State involve two distinct processes and, although, 1996 Plan does not show the land portion of the banks of Uppanar river under CRZ area but the very concept of CRZ areas surrounding rivers changed in 2002. He would submit that 1998 amendment in 1991 Notification lays down that demarcation of CRZ has to be done by the authorized agencies and, therefore, the initial determination of CRZ has to be reassessed in light of the demarcation of the HTL / LTL and CRZ area carried out by authorized demarcating agencies.

20. Dr. Rajeev Dhavan, learned senior counsel would submit that the application made on May 27, 2002 was abandoned by Chemplast because the statutory designated authority, in its inspection held in the month of June 2005, declared the relevant area to be CRZ and the District Coastal Zone Management Committee and TNSCZMA had examined the earlier application for the port area alone. He submitted that realising that the CRZ extended to the Uppanar river, Chemplast made devious hidden changes in its application made on November 14, 2005. Learned senior counsel submitted that the permission granted by MOEF on December 19, 2005 is limited to MTF and no more. He reiterated that the phrase “and thereon to the plant” in the permission dated December 19, 2005 does not cover permission for the pipeline all the way to the Uppanar river.

21. Learned senior counsel urged that 1996 Plan is obsolete and must make way for the plan prepared by NIO and the demarcation of CRZ by the NIO being final, the said plan must prevail over 1996 Plan.

22. According to Dr. Rajeev Dhavan, CRZ-III status has to be attributed to both banks of the Uppanar river through which the pipeline carrying the hazardous substance VCM is to be taken to the plant. Referring to the 1991 Notification as amended in 2002, Dr. Rajeev Dhavan submitted that VCM can be brought on to the port area but not carried any further by pipeline in or across CRZ area including the CRZ-III area in relation to rivers, creeks and backwaters where the salinity concentration is 5 ppt for a distance of 100 meters from the HTL or the width of the river whichever is less. He referred to public trust doctrine and precautionary and public interest principles and submitted that in relation to the CRZ, the public interest to protect the environment is paramount and the benefit of doubt and precaution should be given to the environment. Learned senior counsel submitted that interest of Chemplast and the industry must yield to the public interest in the environment. He would submit that although there has been no challenge to the permission granted on November 28, 2005 to the PVC plant utilizing the VCM but, since the tanks of Chemplast probably fall in the CRZ area, this Court must order the plant to be CRZ compliant by shifting the storage tanks. As regards carriage of VCM, Dr. Rajeev Dhavan suggested that VCM can be carried in tankers at minus 13 degree centigrade which cannot be done by pipeline by going upstream and crossing a bridge and this being an alternative solution, the Court may accept the same which would be consistent with the public interest principles.

23. On the other hand, Mr. K.K. Venugopal, learned senior counsel for the Chemplast submitted that PIL filed before the High Court and also directly before this Court are not bona fide as the petitioners in these matters have been set up by a corporate rival, viz., Cuddalore Powergen Corporation Limited (CPCL) who wanted the land in question at a much cheaper price. CPCL instigated and got these persons who had objected to the scheme in 2002. Learned senior counsel submitted that after obtaining necessary approvals and

permissions, the plant at the cost of about Rs. 600 crores has been set up and after having obtained the consent to operate, the plant has started its commercial production. He also submitted that 1996 Plan still holds the field and as per that plan, particularly, sheet no. 10 prepared for the Cuddalore District, the tidal influence in the Uppanar river ends above Thiyagavalli village and below Kudigadu village of Cuddalore Old Town area and, therefore, the area on both sides of Uppanar river through which the pipeline traverses is not CRZ area at all. Mr. K.K. Venugopal contended that the plan prepared by the NIO is not approved plan and the said plan cannot override 1996 Plan approved by the central government under 1991 Notification. Learned senior counsel also submitted that laying of pipelines for transfer of VCM is not a prohibited activity as contended by the petitioners as the interpretation given by them to paragraph 2(ii) of 1991 Notification is too restrictive and narrow.

24. Learned counsel for Union of India urged that the point at which the pipelines pass under the Uppanar river and its banks is not a part of CRZ as per 1996 Plan prepared by the state government and approved by the central government and, therefore, no permission or environmental clearance is required for that portion of the pipeline that passes under the Uppanar river nor such permission was granted. He submitted that environmental clearance was only required for the MTF and that portion of the pipeline that falls within the CRZ abutting the sea, i.e. within 500 meters from HTL and vide permission dated December 19, 2005, environmental clearance was granted for this portion of the pipeline only. He would also submit that the interpretation given to paragraph 2(ii) of 1991 Notification by the petitioners is not correct interpretation and that exception in paragraph 2(ii) needs to be construed in a purposive manner.

25. In view of the contentions advanced by the senior counsel and counsel for the parties, the first question which we

have to look to is, whether Uppanar river and its banks at the point where pipelines pass, fall in the CRZ III area. If the answer to this is in the affirmative, obviously, the pipelines crossing underneath Uppanar river would require environmental clearance. The other main question we have to consider in connection with these matters is, whether paragraph 2(ii) of 1991 Notification restricts transfer of VCM (hazardous substance) beyond port area to the PVC plant through pipelines. Other considerations would depend on answer to these two core issues.

26. In considering the first question, we need to look to 1991 Notification which came to be issued by the MOEF declaring the coastal stretches as Coastal Regulation Zone (CRZ) and regulating activities in such area. 1991 Notification has been amended from time to time. To the extent it is relevant, it reads :

> "Now, therefore, in exercise of the powers conferred by Clause (d) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986, and all other powers vesting in its behalf, the Central Government hereby declares the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by tidal action (in the landward side) upto 500 metres from the High Tide Line (HTL) and the land between the Low Tide Line (LTL) and the HTL as Coastal Regulation Zone; and imposes with effect from the date of this Notification, the following restrictions on the setting up and expansion of industries, operations or processes etc. in the said Coastal Regulation Zone (CRZ).
>
> [1][(i) For the purposes of this notification, the High Tide Line means the line on the land up to which the highest water line reaches during the spring tide. The High Tide Line shall be demarcated uniformly in all parts of the country by the demarcating authority or authorities so authorised by the Central Government, in accordance with the general guidelines issued in this regard]
>
> [2][(ii) The distance from the High Tide Line shall apply to both sides in the case of rivers, creeks and backwaters and may be modified on a case to case basis for reasons to be recorded in writing while preparing the Coastal Zone Management Plans provided that this distance shall not be less than 100 meters or the width of the creek, river or backwaters, which ever is less. The distance up to which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance up to which the tidal effects are experienced which shall be determined based on salinity concentration of 5 parts per thousand (ppt). For the purpose of this notification, the salinity measurements shall be made during the driest period of the year and the distance upto which tidal effects are experienced shall be clearly identified and demarcated accordingly in the Coastal Zone Management Plans.;]
>
> 2. *Prohibited Activities :*
>
> The following activities are declared as prohibited within the Coastal Regulation Zone, namely :
>
> (i) .....
>
> (ii) manufacture or handling or storage or disposal of hazardous substances as specified in the Notifications of the Government of India in the Ministry of Environment & Forests No. S.O. 594(E) dated 28th July, 1989, S.O. 966(E) dated 27th November, 1989 and GSR 1037(E) dated 5th December, 1989; [3][except transfer of hazardous

1. Substituted by S.O.1122(e), dated 29th December, 1998. Gazette of India (Extra) No. 849, dated 19.12.1998.

2. Inserted as per S.O.(E). No. 550 (E), dated 21st May, 2002.

3. Added by S.O. 494(E), dated 9th July, 1997. Gazette of India (Extra) No. 393, Part II, Sec. 3(ii), dated 9th July, 1997.

substances from ships to ports, terminals and refineries and vice versa, in the port areas:]

…….

3. *Regulation of Permissible Activities :*

All other activities, except those prohibited in para 2 above, will be regulated as under :

1. ……

2. The following activities will require environmental clearance from the Ministry of Environment and Forests, Government of India, namely:

(i) ……..

(ii) [4][Operational constructions for ports, harbours and light houses and construction activities of jetties, wharves, Slipways, pipelines and conveying systems including transmission lines provided that environmental clearance in case of constructions or modernization or expansion of jetties and wharves in the Union Territory of Lakshadweep for providing embarkation and disembarkation facilities shall be on the basis of a report of scientific study conducted by the Central Government or any agency authorized or recognized by it suggesting environmental safeguard measures required to be taken for minimizing damage to corals and associated biodiversity.]

(3) (i) The coastal States and Union Territory Administrations shall prepare, within a period of one year from the date of this Notification, Coastal Zone Management Plans identifying and classifying the CRZ areas within their respective territories in accordance with the guidelines given in Annexures-I and II of the Notification and obtain approval (with or without modifications) of the

4. Substituted by Notification No. S.O. No. 636 (E), dated 30.5.2003.

Central Government in the Ministry of Environment & Forests;

(ii) Within the framework of such approved plans, all development and activities within the CRZ other than those covered in para 2 and para 3 (2) above shall be regulated by the State Government, Union Territory Administration or the local authority as the case may be in accordance with the guidelines given in Annexures-I and II of the Notification; and

(iii) In the interim period till the Coastal Zone Management Plans mentioned in para 3(3)(i) above are prepared and approved, all developments and activities within the CRZ shall not violate the provisions of this Notification. State Governments and Union Territory Administrations shall ensure adherence to these regulations and violations, if any, shall be subject to the provisions of the Environment (Protection) Act, 1986."

27. Indian Council for Enviro-Legal Action filed a writ petition before this Court challenging some of the amendments made in 1991 Notification; they also raised the grievance that the MOEF except for issuing the 1991 Notification had taken no steps to follow up its own directions contained in that Notification. This Court while disposing of writ petition filed by Indian Council for Enviro-Legal Action [(1996) 5 SCC 281], inter alia, issued the following directions:

"(1) ……

(2)……..

(3) Considering the fact that the Pollution Control Boards are not only overworked but simultaneously have a limited role to play insofar as it relates to controlling of pollution for the purpose of ensuring effective implementation of the notifications of 1991 and 1994, as also of the Management Plans, the Central Government should consider setting up

under Section 3 of the Act, State Coastal Management Authorities in each State or zone and also a National Coastal Management Authority.

(4) The States which have not filed the Management Plans with the Central Government are directed to file the complete plans by 30-6-1996. The Central Government shall finalise and approve the said plans, with or without modifications within three months thereafter. It is possible that the plans as submitted by the respective State Governments and Union Territories may not be acceptable to the Ministry of Environment and Forests. Returning the said plans for modifications and then resubmission of the same may become an unnecessary, time-consuming and, perhaps, a futile exercise. In order to ensure that these plans are finalised at the very earliest, we direct that the plans as submitted will be examined by the Central Government who will inform the State Government or the Union Territory concerned with regard to any shortcomings or modifications which the Ministry of Environment and Forests may suggest. If necessary, a discussion amongst the representatives of the State Governments and the Ministry of Environment and Forests should take place and thereafter the plans should be finalised by the Ministry of Environment, if necessary, by carrying out such modifications as may be required. The decision by the Ministry of Environment and Forests in this regard shall be final and binding.

A report with regard to the submission and the finalisation of the plans should be filed in this Court and the case will be listed for noting compliance in September 1996.

……."

28. Paragraph 3(3)(i) of 1991 Notification requires the Coastal States and UT Administrations to prepare Coastal Zone Management Plans for identification and classification of the CRZ areas within their respective territories in accordance with the guidelines given in Annexures I and II of the Notification. It further mandates Coastal States and UT Administrations to obtain approval of such plans from the Central Government. As a matter of fact, the said provision provided a period of one year for preparation of such plans from the date of the Notification, but the Coastal States and UT Administrations remained dormant for many years in this regard. However, consequent upon directions of this Court, the State of Tamil Nadu submitted its Coastal Zone Management Plan to the MOEF on August 23, 1996 which was approved on September 27, 1996 (1996 Plan) containing 31 sheets corresponding to maps for different stretches of the coastline of the State of Tamil Nadu with certain conditions/modifications/ classifications. Sheet no.10 pertains to the coastal stretch of Cuddalore District. The MOEF, based on sheet no. 10 (1996 Plan) have stated in their affidavit that the land portion of the banks of Uppanar river adjacent to the plant in Thiyagavalli village where the pipeline crosses Uppanar river does not come under the CRZ area. This position is reiterated by the TNSCZMA in their affidavit filed before this Court:

> "……as per the approved Coastal Zone Management Plan, the banks of Uppanar River adjacent to the Plant in Thiyagavalli Village where the pipeline crosses River Uppanar does not come under CRZ area……."

29. We were also shown a copy of sheet no.10 from which it did not transpire that Uppanar river and its banks where the pipelines pass have tidal influence and come under the CRZ area. That 1996 Plan does not reflect the area on both sides of the Uppanar river through which the pipelines pass as CRZ area is not in dispute. The contention of the senior counsel for the petitioner/appellant is that 1996 Plan has become redundant and obsolete in view of change in the CRZ regime due to amendments in 1991 Notification, first on December 29, 1998 and then on May 21, 2002.

30. By 1998 amendment, it has been provided in 1991 Notification that HTL shall be demarcated uniformly in all parts of the country by the demarcating authority or authorities so authorized by the central government in accordance with the general guidelines issued in this regard. By further amendment on May 21, 2002, sub-paragraph (ii) was inserted in the first para of 1991 Notification providing therein that the distance from the HTL shall apply to both sides in the case of rivers, creeks and backwaters. The said amendment provides that the distance up to which development along rivers, creeks and backwaters is to be regulated shall be governed by the distance up to which the tidal effects are experienced which shall be determined based on salinity concentration of 5 ppt. It further provides that salinity measurements shall be made during the driest period of the year and distance up to which tidal effects are experienced shall be clearly identified and demarcated in the Coastal Zone Management Plans. It is perfectly true that at the time of preparation and approval of 1996 Plan, the amendments of December 29, 1998 and May 21, 2002 in 1991 Notification had not seen the light of the day and the declaration made in first para that the coastal stretches of seas, bays, estuaries, creeks, rivers and backwaters which are influenced by tidal action (in the landward side) upto 500 meters from the HTL and the land between the LTL and the HTL are CRZ was kept in view but in the absence of any modification carried out thereafter, 1996 Plan remains operative. The authorities authorized to demarcate HTL, we are afraid, cannot override the plan prepared and approved under paragraph 3(3)(i) as the said paragraph leaves no manner of doubt that Coastal Zone Management Plan prepared by the Coastal State (or for that matter State Coastal Zone Management Authority) and duly approved by the MOEF is the relevant plan for identification and classification of CRZ areas. The plan prepared by NIO, thus, cannot be said to have superseded 1996 Plan for the Cuddalore coastal stretch.

31. Moreso, while giving approval on September 27, 1996

to 1996 Plan, the MOEF appended, inter alia, a condition that government of Tamil Nadu would not make any change in the approved categorization of CRZ area without its prior approval. Seen thus, 1996 Plan for the purposes of demarcation and classification of CRZ area in the state of Tamil Nadu has to be treated as final and conclusive and has been rightly treated as such by the MOEF. We hold, as it must be, that the Uppanar river and its banks at the relevant place where the pipelines laid by the Chemplast pass do not fall under CRZ III area as per 1996 Plan and no environmental clearance is needed for such pipelines. The stand of the MOEF is, which seems to us to be correct, that they have granted permission to the onshore pipelines insofar as these pass through the CRZ abutting the sea, i.e. 500 meters from the HTL and no clearance has been granted as it was not required for laying of pipelines under the Uppanar river.

32. Here, we may also deal with the objection of the petitioners that Chemplast has suppressed the material facts regarding the existence of Uppanar river in its proposals. In the first place, there seems to be no substance in the said objection. From the materials available on record that include the Environment Impact Assessment Report (EIA) and Risk Analysis Report (RA), it cannot be said that existence of Uppanar river has been suppressed by the Chemplast in its proposals although in these reports Uppanar river has been described as Uppanar canal. In EIA prepared by L & T Ramboll, in Section 3.6.2.2., it is stated:

> "The onshore pipeline to the extent possible is routed in a direct line from the landfall point to the Plant in order to minimise the length. The route crosses the Uppanar canal where the pipeline will be trenched sufficiently deep into the canal bed to avoid impact from grounding vessels, dropped objects or dragged anchors. The pipeline section crossing the Uppanar will be of a type similar to the marine pipeline section. As regards the onshore section, the

selection of pipeline type and installation is discussed in the following paragraphs :

The main options for the land pipeline will be :

- Trenched, sub terrain pipe line (-1.0 to -1.5 m)
- Pipeline on low supports at the terrain surface (+0.2 to +0.5m)
- Overhead pipeline on masts/columns above bus/truck passage heights (+4.5 to 5m)

(Approximate levels given from existing natural ground level)"

Similarly, in Section 5 of RA, reference is made to pipeline crossing Uppanar canal. The position is clarified by Chemplast in their subsequent application made on November 14, 2005. In the second place, and more importantly, this objection pales into insignificance in view of our finding that the land portion of the banks of Uppanar river where the pipelines laid by Chemplast pass Uppanar river does not fall under CRZ III area.

33. Now, we advert to the other main issue concerning paragraph 2(ii) of 1991 Notification. This paragraph prohibits manufacture or handling or storage or disposal of hazardous substances, as specified in the Notifications issued by MOEF (dated 28th July, 1989, 27th November, 1989 and 5th December, 1989), except transfer of hazardous substances from ships to ports, terminals and refineries and vice-versa, in the port areas. That VCM is hazardous substance notified vide notification dated November 27, 1989 is not in dispute. There is also no dispute, rather it is an admitted position, that handling of a substance includes transfer as per Section 2(d) of the Environment (Protection) Act, 1986. It was contended by the senior counsel for the appellant/petitioner that transfer of VCM in CRZ area is completely prohibited and VCM cannot be carried through the CRZ except in the port area. Their argument is that VCM can be brought onshore by pipeline to the port area

but not in the CRZ area. The arguments of learned senior counsel have put in issue the scope of expression, "except transfer of hazardous substances from ships to ports, terminals and refineries and vice versa in the port areas" which was added in paragraph 2(ii) on 9th July, 1997. We are called upon to ascertain the true meaning and intention of the Executive in bringing this exception. In the original 1991 Notification there was no exception clause. It appears to have been added for the purpose of enabling transfer of hazardous substances from ships to ports, ships to terminals and ships to refineries and vice versa. Is such transfer of hazardous substances confined to terminals and refineries located in the port areas? The answer in the affirmative may make the said provision unworkable and would also result in absurdity inasmuch as the hazardous substance would be brought in to the port, refinery or terminal in the port area from the ship and would remain there and could not be taken beyond the port area because of the prohibition. This surely could not have been the intention of the Executive in adding the exception clause. It is well settled that if exception has been added to remedy the mischief or defect, it should be so construed that remedies the mischief and not in a manner which frustrates the very purpose. Purposive construction has often been employed to avoid a lacuna and to suppress the mischief and advance the remedy. It is again a settled rule that if the language used is capable of bearing more than one construction and if construction is employed that results in absurdity or anomaly, such construction has to be rejected and preference should be given to such a construction that brings it into harmony with its purpose and avoids absurdity or anomaly as it may always be presumed that while employing a particular language in the provision absurdity or anomaly was never intended. Notwithstanding imperfection of expression and that exception clause is not happily worded, we are of the view that by applying purposive construction, the expression, 'in the port areas' should be read as, 'in or through the port areas'. The exception in paragraph 2 (ii) then would achieve its objective and read, 'except transfer of hazardous substances

from ships to ports, ships to terminals and ships to refineries and vice versa, in or through the port areas'. This construction will be harmonious with paragraph 3(2)(ii) which permits the activity of laying pipelines in the CRZ area. As a matter of fact, the MOEF in their affidavit before this Court have clearly stated that the permission granted to Chemplast on 19th December, 2005 is in exercise of the powers conferred under paragraph 3(2)(ii) of 1991 Notification. We do not find any infirmity in the permission granted by the MOEF on 19th December, 2005. Having held that, there is no illegality in the permission granted by the Executive Engineer on February 27, 2008 either.

34. In view of our foregoing discussion in respect of the two core issues, we do not deem it necessary to deal with the objection raised by Mr. K.K. Venugopal, learned senior counsel for the Chemplast about the maintainability of PILs and that the petitioners have been instigated and set up by a corporate rival – Cuddalore Powergen Corporation Limited.

35. By way of footnote, we may observe that the project has been established by investing huge amount of about Rs. 600 crores and has already been commissioned after obtaining necessary approvals and, therefore, it shall not be in the interest of justice nor in the public interest now to interfere with the project. The alternative solution suggested by Dr. Rajeev Dhavan for carrying VCM across Uppanar river to the plant is noted to be rejected.

36. In the result, Civil Appeal and Writ Petition (Civil) No. 130 of 2009 are dismissed. Writ Petition Nos. 37043 of 2006, 8125 of 2007 and 23122 of 2007 filed before Madras High Court and transferred to this Court are dismissed. Transfer Petitions and I.A. No. 7 stand disposed of. I.A. No. 4 filed by the appellant - M. Nizamudeen - for initiating proceedings for perjury against the MOEF is dismissed. The parties shall bear their own cost.

D.G. Matters disposed of

KRISHAN SINGH

v.

EXECUTIVE ENGINEER, HARYANA STATE AGRICULTURAL MARKETING BOARD, ROHTAK (HARYANA)

(Civil Appeal No. 2335 of 2010)

MARCH 12, 2010

[HARJIT SINGH BEDI AND A.K. PATNAIK, JJ.]

Industrial Disputes Act, 1956:

ss. 25F, 11-A – Termination without notice – Labour Court held that termination was illegal and directed reinstatement with 50% back wages – High Court set aside award of Labour Court and instead directed employer to pay compensation of Rs.50,000/- to the workman – Justification of – Held: Not justified – Labour Court took into consideration evidence on record and settled law while passing award – The decision of High Court had no basis.

Appellant was working as a daily wager under respondent from 1.6.1988. His services were dispensed with in December, 1993. He served notice on respondent but did not receive response. State Government referred the dispute to Labour Court. The Labour Court passed an award holding that the appellant had admittedly completed 267 days from 01.06.1988 to 30.04.1989 and his services were terminated without any notice and in violation of Section 25F of the Industrial Disputes Act and, therefore he was entitled to be re-instated in his previous post with continuity of service and 50% back wages from the date of demand notice, i.e. 30.12.1997. Respondent filed writ petition before High Court. High Court allowed the same and directed the respondent to pay compensation of Rs.50,000/- to the appellant. Hence the appeal.

Allowing the appeal, the Court

HELD: 1. Section 11A of the Industrial Disputes Act clearly provides that where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct re-instatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Wide discretion is, therefore, vested in the Labour Court while adjudicating an industrial dispute relating to discharge or dismissal of a workman and if the Labour Court has exercised its jurisdiction in the facts and circumstances of the case to direct re-instatement of a workman with 50% back wages taking into consideration the pleadings of the parties and the evidence on record, the High Court in exercise of its power under Articles 226 and 227 of the Constitution of India should not interfere with the same, except on well-settled principles laid down for a writ of certiorari against an order passed by a Court or a Tribunal. [Para 8] [350-D-H; 351-A]

Mahboob Deepak v. Nagar Panchayat, Gajraula & Anr. **(2008) 1 SCC 575;** *Ghaziabad Development Authority & Anr. v. Ashok Kumar & Anr.* **(2008) 4 SCC 261, held inapplicable.**

2. In the present case, the respondent had not taken any stand before the Labour Court in his objections that the post in which the workman was working was not sanctioned or that his engagement was contrary to statutory rules or that he was employed elsewhere or that

there was no vacancy. In the absence of any pleadings, evidence or findings on any of these aspects, the High Court should not have modified the Award of the Labour Court directing re-instatement of the appellant with 50% back wages and instead directing payment of compensation of Rs.50,000/- to the appellant. [Para 11] [352-A-C]

Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors. **(2006) 4 SCC 1, distinguished.**

Harjinder Singh v. Punjab State Warehousing Corporation **JT 2010 (1) SC 598, referred to.**

Case Law Reference:

(2008) 1 SCC 575	**held inapplicable**	**Para 4**
(2008) 4 SCC 261	**held inapplicable**	**Para 4**
(2006) 4 SCC 1	**distinguished**	**Para 5**
JT 2010 (1) SC 598	**referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2335 of 2010.

From the Judgment & Order dated 9.12.2008 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 5257 of 2007.

Shekhar Prit Jha for the Appellant.

Randhir Badhram, B.S. Sharma, P.D. Sharma for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted.

2. The appellant worked as a daily wager under the respondent from 01.06.1988. His services were dispensed with in December, 1993. He served a notice of demand dated 30.12.1997 on the respondent contending that his services were terminated orally without complying with the mandatory provisions of Section 25F of the Industrial Disputes Act, 1947 (for short "the Act") and that he may be re-instated in service with full back wages from the date of illegal termination and he may be regularized according to Government policy. The respondent did not respond to the demand made by the appellant and by order dated 23.07.1999, the State Government referred the dispute under Section 10 of the Act to the Labour Court. The appellant and the respondent filed their claim-statement and the objection respectively before the Labour Court, Rohtak, and led evidence in support of their respective cases. Thereafter, the Labour Court passed the Award dated 18.07.2006 holding that the appellant had admittedly completed 267 days from 01.06.1988 to 30.04.1989 and his services were terminated without any notice or notice pay and without payment of retrenchment compensation and the termination was, therefore, in violation of Section 25F of the Act and the appellant was entitled to be re-instated in his previous post with continuity of service and 50% back wages from the date of demand notice, i.e. 30.12.1997.

3. The respondent challenged the Award of the Labour Court before the High Court of Punjab and Haryana in a writ petition registered as C.W.P. No.5257 of 2007 and by order dated 09.12.2008, the High Court allowed the writ petition, set aside the Award dated 18.07.2006 of the Labour Court and directed the respondent instead to pay compensation of Rs.50,000/- to the appellant within a period of four months. Aggrieved by the order dated 09.12.2008 of the High Court, the appellant has filed this appeal.

4. Shri Shekhar Prit Jha, learned counsel for the appellant, submitted that the High Court has relied on the decisions of this

Court in *Mahboob Deepak v. Nagar Panchayat, Gajraula & Anr.* [(2008) 1 SCC 575] and *Ghaziabad Development Authority & Anr. v. Ashok Kumar & Anr.* [(2008) 4 SCC 261] for setting aside the Award of the Labour Court. He submitted that in *Mahboob Deepak's* case, the workman was removed for financial irregularities, but the appellant in the present case was not removed for financial irregularities. He submitted that *Ghaziabad Development Authority & Anr. v. Ashok Kumar & Anr.* (supra) was not a case of violation of Section 25F of the Act as in the present case. He submitted that the two decisions on which the High Court has relied upon to set aside the Award of the Labour Court therefore do not apply to the facts of the present case. He submitted that it is now well-settled that if pre-conditions for retrenchment of a workman who has worked for more than a year stipulated in Section 25F of the Act are not complied with, the termination of the service of the workman is illegal. He submitted that the Labour Court having found that these pre-conditions had not been complied with in the case had rightly directed re-instatement of the appellant with 50% back wages.

5. Shri Randhir Badhram, the learned counsel for the respondent, on the other hand, submitted that the High Court has rightly set aside the Award of the Labour Court relying on the decisions of this Court in *Ghaziabad Development Authority and Another v. Ashok Kumar & Anr.* (supra) and *Mahboob Deepak v. Nagar Panchayat, Gajraula & Anr.* (supra). He also relied on *Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors.* [(2006) 4 SCC 1] in support of his submission that this is not a fit case where the appellant could be regularized in service.

6. The only question that we have to decide in this case is whether the High Court was right in setting aside the Award dated 18.07.2006 of the Labour Court directing reinstatement of the appellant with 50% back wages and directing instead payment of compensation of Rs.50,000/- to the appellant. We

find that the dispute that was referred to by the State Government under Section 10 of the Act to the Labour Court was: "whether the termination of the services of the appellant was justified and if not, to what relief he was entitled to?" As per the claim-statement filed by the appellant before the Labour Court, he was appointed by the respondent as a daily wager against a regular post on 01.06.1988 under the Junior Engineer at Meham and the appellant worked there for different periods until the respondent terminated his services in December, 1993 without any notice and without complying with the provisions of Section 25F of the Act. The respondent in its objections did not take a plea that the engagement of the appellant was either against a post which was not sanctioned or contrary to the statutory rules and admitted in the objections that the services of the appellant were engaged for different periods during 1988-1989, 1989-1990, 1990-1991 and 1992-1993. The respondent also furnished a statement of the works in which the appellant was engaged during the years 1988-1989 and 1989-1990, which was marked as Exb. MW-1. Taking into consideration Exb. MW-1, the Labour Court held that the appellant has completed 267 days from 1.6.1988 to 30.4.1989 and without any notice or notice pay and without retrenchment compensation. In the relief portion of the Award, the Labour Court held that as the services of the appellant had been terminated illegally, he was entitled to be re-instated in his previous post with continuity of service and 50% back wages from the date of demand notice, i.e. 31.12.1997.

7. In a recent judgment of this Court in *Harjinder Singh v. Punjab State Warehousing Corporation* [JT 2010 (1) SC 598], the Labour Court, Gurdaspur, by its Award directed re-instatement of the workman with 50% back wages, but the Award of the Labour Court was modified by a learned Single Judge of the Punjab and Haryana High Court in the writ petition and this Court has held that the order of the learned Single Judge of the High Court was liable to be set aside only on the ground that while interfering with the Award of the Labour Court,

the learned Single Judge did not keep in view the parameters laid down by this Court for exercise of jurisdiction by the High Court under Articles 226 and/or 227 of the Constitution. Learned Brother G.S. Singhvi, J., in his opinion, has observed that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the preamble of the Constitution and the provisions contained in Part IV of the Constitution including Articles 38, 39(a) to (e), 43 and 43A thereof. Learned Brother Asok Kumar Ganguly, J. agreeing with learned Brother G. S. Singhvi, J., has also observed that this Court has a duty to interpret statutes with social welfare benefits in such a way as to further the statutory goal and not to frustrate it.

8. Section 11A of the Act clearly provides that where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct re-instatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. Wide discretion is, therefore, vested in the Labour Court while adjudicating an industrial dispute relating to discharge or dismissal of a workman and if the Labour Court has exercised its jurisdiction in the facts and circumstances of the case to direct re-instatement of a workman with 50% back wages taking into consideration the pleadings of the parties and the evidence on record, the High Court in exercise of its power under Articles 226 and 227 of the Constitution of India will not interfere with

the same, except on well-settled principles laid down by this Court for a writ of certiorari against an order passed by a Court or a Tribunal.

9. The High Court, however, has relied on the decision of this Court in *Mahboob Deepak v. Nagar Panchayat, Gajraula & Anr.* (supra) and on reading of the aforesaid decision, we find that this Court in the aforesaid decision has mentioned the following factors, which are relevant for determining whether an award of re-instatement should or should not be passed:-

(i) whether in making the appointment, the statutory rules, if any, had complied with;

(ii) the period he had worked;

(iii) whether there existed any vacancy; and

(iv) whether he obtained some other employment on the date of termination or passing of the award."

This Court further held in the aforesaid decision that in the light of these principles the relief of re-instatement granted by the Labour Court in that case was wholly unsustainable and has accordingly directed payment of a sum of Rs.50,000/- by way of damages to the workman with interest at the rate of 9% per annum.

10. The High Court has also relied on the decision of this Court in *Ghaziabad Development Authority & Anr. v. Ashok Kumar & Anr.* (supra) and on reading of the aforesaid decision we find that the contention of the management before the Labour Court was that the post, in which the workman was working in that case, was not sanctioned after 31.03.1990 and this was not disputed by the workman and this Court held that if there did not exist any post, the Labour Court should not have directed re-instatement of the workman in service.

11. The aforesaid two decisions of this Court in *Mahboob*

Deepak v. Nagar Panchayat, Gajraula & Anr. (supra) and *Ghaziabad Development Authority & Anr. v. Ashok Kumar & Anr.* (supra) have no application to the facts in this case. In the present case, the respondent has not taken any stand before the Labour Court in his objections that the post in which the workman was working was not sanctioned or that his engagement was contrary to statutory rules or that he was employed elsewhere or that there was no vacancy. In the absence of any pleadings, evidence or findings on any of these aspects, the High Court should not have modified the Award of the Labour Court directing re-instatement of the appellant with 50% back wages and instead directed payment of compensation of Rs.50,000/- to the appellant.

12. The decision of this Court in *Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors.* (supra) cited by the counsel for the respondent relates to regularization in public employment and has no relevance to an Award for re-instatement of a discharged workman passed by the Labour Court under Section 11A of the Act without any direction for regularization of his services.

13. In the result, we allow this appeal and set aside the impugned order dated 09.12.2008 of the High Court of Punjab and Haryana in C.W.P. No.5257 of 2007 and direct that the appellant will be re-instated as a daily wager with 50% back wages forthwith. No costs.

D.G. Appeal allowed.

JABAR SINGH

v.

DINESH & ANR.

(Criminal Appeal No. 487 of 2010)

MARCH 12, 2010

[HARJIT SINGH BEDI AND A.K. PATNAIK, JJ.]

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000:

s. 49 – Juvenile – Determination of age – Jurisdiction of competent authority and trial court – Application rejected by trial court – High Court allowing the application and remitting the matter to trial court for trial of applicant in accordance with the provisions of the Act, treating him to be a juvenile on the date of commission of offence – HELD: Section 49 is attracted when a person is brought before the competent authority, namely, the Juvenile Justice Board and not otherwise – In the instant case, applicant was not brought before the competent authority and, therefore, it had no jurisdiction to make inquiry as to the age of the applicant as provided u/s 49(1) – The applicant was facing trial before the Court of Session when he filed the application claiming juvenility and it was, therefore, for the trial court to decide upon his claim – Section 49 contains no provision prohibiting the court before which a claim of juvenility is raised to determine the age of the claimant – Trial court, therefore, had jurisdiction to inquire into the age of the applicant – Trial court after taking into the material produced and the evidence adduced rightly rejected the claim of the applicant that he was juvenile at the time of commission of the offence – Section 7-A and r.12 laying down the procedure to be followed in the case of claim for juvenility had not come into force on 14.2.2006, the date of the order of the trial court and, therefore, the trial court was not required to follow the procedure laid down in s.7-A of the Act or r.12 of the

Rules – In the absence of any statutory provision laying down the procedure to be followed in determining a claim of juvenility raised before it, the court had to decide the claim of juvenility of the appellant on the materials or evidence brought on record by the parties and s.35 of the Evidence Act – Juvenile Justice (Care and Protection of Children) Rules 2007 – r.12 – Evidence Act, 1872 – s.35. [Para 7-9]

s. 53 – Revisional jurisdiction of High Court – Order of trial court rejecting the claim of applicant that he was a juvenile on the date of commission of the offence – Set aside by High Court – HELD: The age of applicant was a question of fact, which was to be decided on the evidence brought on record before the court – Trial court arrived at the finding that the claim of the applicant that he was less than 18 years at the time of commission of the alleged offence, was not believable – While arriving at this finding of fact, the trial court had not only considered the evidence produced by the applicant but also considered the fact that either in the earlier cases or during the investigation of the instant case, the applicant had not raised this plea – Trial court had also considered the physical appearance of the applicant – Such determination on a question of fact could not be disturbed by the High Court in exercise of its revisional powers – While exercising revisional powers, High Court cannot convert itself to an appellate court and reverse the findings of fact arrived at by the trial court on the basis of evidence or material on record, except where the High Court is not satisfied as to the legality or propriety of the order passed by the trial court – The trial court, in the instant case, has given good reasons for discarding the evidence adduced by the applicant in support of his claim that he was a juvenile at the time of commission of the alleged offence and there was no scope to hold that the order of the trial court was either illegal or improper, and the High Court should not have substituted its own finding for that of the trial court by re-appreciating the evidence – The order of the High Court is set aside and the matter is remitted to

the trial court for trial of applicant in accordance with law treating him not to be a juvenile at the time of the commission of the alleged offence – Evidence Act, 1872 – s. 35. [para 12-14]

EVIDENCE ACT, 1872:

s. 35 – Relevancy of entry in public record – Applicant claiming before trial court to be a juvenile – Evidence regarding date of birth – HELD: The entry of date of birth of the applicant in the admission form, the school records and transfer certificate did not satisfy the conditions laid down in s.35 inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by law and, therefore, the entry was not relevant u/s 35 for the purpose of determining the age of the applicant at the time of commission of the alleged offence – Juvenile Justice (Care and Protection of Children) Act, 2000 – ss. 49 and 53. [para 12]

Jyoti Prakash Rai @ Jyoti Prakash v. State of Bihar **2008 (3) SCR 818 = (2008) 15 SCC 223;** *Ravinder Singh Gorkhi v. State of U.P.* **2006 (2) Suppl. SCR 615 = (2006) 5 SCC 584, relied on**

Chandavarkar Sita Ratna Rao v. Ashalata S. Guram **1986 (3) SCR 866 = (1986) 4 SCC 447, referred to**

Birad Mal Singhvi v. Anand Purohit **1988 Suppl. SCR 1 = 1988 (Supp) SCC 604 = AIR 1988 SC 1796, cited.**

Case Law Reference:

2008 (3) SCR 818	**relied on**	**para 4**
2006 (2) Suppl. SCR 615	**relied on**	**para 4**
1986 (3) SCR 866	**referred to**	**para 4**

1988 Suppl. SCR 1	**cited**	**para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 487 of 2010.

From the Judgment & Order dated 18.8.2006 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Revision Petition No. 166 of 2006.

M.R. Calla, Pratiksha Sharma, Rishi Matoliya, Mukul Kumar, P.D. Sharma for the Appellant.

Dr. Manish Singhvi, AAG, Devnashu Kr. Devesh, R. Gopalakrishnan (for Aruneshwar Gupta), Kumar Katikay, Ranvijay, Sukpal Singh, Amarjit Singh Bedi for the Respondent.

The Order of the Court was delivered by

O R D E R

A.K. PATNAIK, J. 1. Leave granted.

2. The appellant is the father of Prahalad Singh, who is alleged to have been murdered by the Respondent No.1, and he has filed this appeal against the order dated 18.08.2006 of the High Court of Rajasthan in S.B. Criminal Revision Petition No. 166 of 2006 in which the High Court has held that the Respondent No.1 was a juvenile on the date of commission of the offence and has directed that the matter will be remitted for trial under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, "the Act").

3. The relevant facts very briefly are that on 11.07.2004 one Bhomaram lodged a complaint in Pratap Nagar Police Station, Jodhpur, against the Respondent No.1 and others alleging the offence under Section 302 of the Indian Penal Code (for short, "the IPC") along with other offences under the IPC. A criminal case was registered and after investigation, the police filed chargesheet against inter alia the Respondent No.1 and the

case was transferred by the Sessions Judge to the Special Judge, SC/ST (Prevention of Atrocities) Cases, Jodhpur, for trial. Before the charges could be framed in the case, an application was filed on behalf of Respondent No.1 under Section 49 of the Act, stating therein that the date of birth of Respondent No.1 was 05.10.1988 and, therefore, on 11.07.2004, when the offence is alleged to have been committed, the Respondent No.1 was less than 18 years of age and he was, thus, a juvenile and has to be tried separately from the other accused under the Act. The State of Rajasthan, in its reply, stated inter alia that the Respondent No. 1 did not disclose that he was a juvenile at any time during the investigation of the case or during the trial of other criminal cases for which he was being tried and that he has taken this plea for the first time to avoid the trial for the heinous crime and that the application of Respondent No.1 should be rejected. The Respondent No.1 examined witnesses and produced documents in support of his claim that he was a juvenile. The State of Rajasthan did not produce any evidence. The trial court, after hearing the parties and considering the evidence, rejected the application of the Respondent No.1 by order dated 14.02.2006. Aggrieved, the Respondent No.1 filed S.B. Criminal Revision Petition No. 166 of 2006 before the High Court and by the impugned order dated 18.08.2006, the High Court allowed the Revision Petition, set aside the order dated 14.02.2006 passed by the trial court and remitted the matter to the trial court for trial of the Respondent No.1 treating him to be a juvenile on the date of commission of the alleged offence in accordance with the provisions of the Act.

4. Mr. M.R. Calla, Senior Counsel appearing for the appellant, submitted that this Court has held in *Jyoti Prakash Rai @ Jyoti Prakash v. State of Bihar* [(2008) 15 SCC 223] that the beneficial provisions of the Act are to be applied only for the purpose of the interpretation of the Act and not for arriving at a conclusion whether a person is juvenile or not and

the question whether an offender was juvenile on the date of commission of the offence or not is essentially a question of fact which is required to be determined on the basis of the materials brought on record by the parties. He submitted that in *Ravinder Singh Gorkhi v. State of U.P.* [(2006) 5 SCC 584] this Court has further held that Section 35 of the Evidence Act, which provides that an entry in a register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such register is kept, would be a relevant fact, will only apply if the conditions mentioned in Section 35 are fulfilled. He submitted relying on the aforesaid decisions of this Court that Section 35 of the Evidence Act could not be applied to the entry of date of birth of Respondent No.1 in the school records produced on behalf of Respondent No.1 before the trial court and on the evidence as produced, the trial court rightly held that the date of birth of the Respondent No.1 cannot be believed to be 05.10.1988. He submitted that the trial court after scrutinizing the evidence, oral and documentary, produced by the Respondent No.1 has held that the evidence produced by Respondent No.1 have been created by the Respondent No. 1 for escaping conviction for a grave offence such as murder and was not believable and by physical appearance, Respondent No.1 looks to be over 18 years of age and on 11.07.2004 he was an adult and not a juvenile. He submitted that this finding of the trial court on a question of fact with regard to the age of Respondent No.1 could not be disturbed by the High Court in a Revision because it is well-settled that the High Court cannot re-appreciate evidence produced before the trial court and arrive at a conclusion different from that of the trial court. In support of this proposition, he relied on *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* [(1986) 4 SCC 447] in which this Court has held that the High Court, while exercising its jurisdiction under Articles 226/227 of the Constitution, should not interfere with a finding of fact of the inferior court or tribunal, except where the finding was perverse and not based on any

material evidence or has resulted in manifest injustice. He submitted that in this decision, this Court has further taken the view that if the trial court came to a conclusion which was possible on the evidence, the High Court will not disturb the conclusion arrived at by the trial court merely because the High Court is of the view that a different conclusion is also possible on the same evidence. He vehemently argued that the High Court has lost sight of these limitations of its jurisdiction and on the basis of its own appraisal of the evidence taken a view that the Respondent No.1 was a juvenile on the date of the commission of the offence and has set aside the order of the trial court.

5. Dr. Manish Singhvi, learned counsel appearing for the State of Rajasthan, submitted that the Juvenile Justice (Care and Protection of Children) Rules 2007 (for short, "the Rules"), which have come into force on 26.10.2007, provide in Rule 12 the procedure to be followed in determination of age and Sub-Rule (3) of Rule 12 provides that the age determination inquiry shall be conducted by the Court or the Juvenile Justice Board or, as the case may be, the Child Welfare Committee by seeking evidence by obtaining the matriculation or equivalent certificate, if available, and in the absence of such certificate, the date of birth certificate from the school first attended, and in the absence of such certificate, the birth certificate given by a corporation or a municipal authority or a panchayat, and only in the absence of these three kinds of certificates the medical opinion could be sought from a duly constituted Medical Board which will declare the age of the juvenile or child. He, however, submitted that these rules had not come into force when the trial court considered and rejected the application of Respondent No.1 claiming juvenility by its order dated 18.08.2006. He submitted that the reasons given by the trial court in the order dated 18.08.2006 were very sound and the High Court ought not to have set aside the findings of the trial court merely on the basis of entries in the school records relating to the date of birth of Respondent No. 1, particularly when there

was over-writing on these entries. He cited *Birad Mal Singhvi v. Anand Purohit* [1988 (Supp) SCC 604 = AIR 1988 SC 1796] in which this Court, referring to its earlier decisions, has held that the date of birth mentioned in a school register or a school certificate has no probative value unless either the parents are examined or the persons who have special knowledge of the date of birth of the person and on whose information the entry has been made have been examined.

6. Mr. Kumar Karthikey, learned counsel appearing for Respondent No.1, on the other hand, supported the impugned order passed by the High Court and submitted that the High Court has considered the evidence adduced by Respondent No. 1, both oral and documentary, and has rightly come to a finding that the date of birth of Respondent No.1 was 05.10.1988. He submitted that the proviso to sub-section (1) of Section 7A of the Act is clear that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions of the Act and the Rules even if the juvenile has ceased to be so on or before the date of commencement of the Act and, therefore, the argument on behalf of the State of Rajasthan that at the stage of investigation Respondent No.1 did not take a plea that he was a juvenile at the time of commission of the alleged offence has no merit. He further submitted that under Section 49 of the Act it is only the competent authority which has the jurisdiction to make due enquiry as to the age of a person brought before it and the competent authority in the present case is the Juvenile Justice Board and it is for the Juvenile Justice Board and not the court to determine the age of Respondent No.1.

7. Section 49(1) of the Act is quoted herein below:

"Presumption and determination of age.—(1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the

child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be."

The opening words of sub-section (1) of Section 49, quoted above, shows that only when a person is "brought before the competent authority" under any of the provisions of the Act, the competent authority is required to make due enquiry as to the age of that person and for that purpose take such evidence as may be necessary and record a finding whether the person is a juvenile or not. Section 49 is, therefore, attracted when a person is brought before the competent authority and not otherwise. In the present case, the Respondent No. 1 was not brought before the competent authority, namely, the Juvenile Justice Board. Hence, Section 49 was not attracted and the competent authority had no jurisdiction to make enquiry as to the age of Respondent No. 1 as provided under sub-section (1) of Section 49.

8. In fact, Respondent No.1 was before the trial court when he filed an application claiming juvenility and it was, therefore, for the trial court to make an enquiry and take such evidence as may be necessary to determine the age of Respondent No.1 and decide upon his claim of juvenility. Section 49 of the Act contains no provision prohibiting the court before which a claim of juvenility is raised, to determine the age of the person before the court. The trial court, therefore, had the jurisdiction to inquire into the age of Respondent No.1 and for that purpose take such evidence as may be necessary and record a finding whether Respondent No.1 was a juvenile or not at the time of commission of the offence. As a matter of fact, after the trial court in the present case determined the age of Respondent No.1 and rejected his claim to juvenility by the order dated 14.02.2006, Section 7A has been introduced in the Act with effect from 22.08.2006 laying down the procedure to be followed when claim of juvenility is raised before any court. This

insertion of Section 7A in the Act indicates that Parliament never intended to oust the jurisdiction of the court to decide a claim of juvenility raised before it, and that the court always had the power to decide a claim of juvenility raised before it. Hence, the contention raised on behalf of Respondent No.1 that it was only the competent authority which had the jurisdiction to decide whether Respondent No.1 was a juvenile at the time of commission of the alleged offence or not, has no merit.

9. The trial court passed the order on 14.02.2006 rejecting the claim of Respondent No.1 that he was a juvenile at the time of commission of the offence and Section 7A of the Act laying down the procedure to be followed when claim of juvenility is raised before any court had not come into force by 14.02.2006. When the trial court passed the order rejecting the claim of Respondent No.1 of juvenility on 14.02.2006, the Rules, including Rule 12 laying down the procedure to be followed in determination of age of a juvenile in conflict with law, had also not come into force. The trial court, thus, was not required to follow the procedure laid down in Section 7A of the Act or Rule 12 of the Rules. In the absence of any statutory provision laying down the procedure to be followed in determining a claim of juvenility raised before it, the court had to decide the claim of juvenility of Respondent No.1 on the materials or evidence brought on record by the parties and Section 35 of the Evidence Act. This Court has held in *Ravinder Singh Gorkhi* (supra) that in case of a dispute with regard to the age of the person who is alleged to have committed the offence, the Court has to appreciate the evidence having regard to the facts and circumstances of the case and it will be the duty of the court to accord the benefit to a juvenile, provided he is found to be a juvenile and not to give the same benefit to a person who, in fact, is not a juvenile and cause injustice to the victim. Again in *Jyoti Prakash* (supra) this Court has held that in the absence of any evidence which is relevant under Section 35 of the Indian Evidence Act, the age of a person who has committed the offence must be determined keeping in view the factual matrix involved in each case.

10. On a reading of the order dated 14.02.2006 of the trial court, we find that the trial court has found that AW1 Shivraj examined on behalf of Respondent No.1 stated before the court that he looks after the administrative work of Jesus Mary Public School and this work was being previously looked after by his son Anand, who had expired. AW1 has further stated that Exhibit-1 was the admission form in relation to Respondent No.1 in which the date of birth of Respondent No.1 was mentioned as 05.10.1988 and in this admission form the uncle of Respondent No.1 had put his signatures marked by the court as Exhibit-1E to 1F and on the basis of this information in the admission form an entry was made in the scholar's register (Exhibit-2) that the date of birth of Respondent No.1 was 05.10.1988. The trial court, however, has taken note of the fact that AW1 in his cross-examination could not say who had filled up the admission form and on what basis the date of birth of Respondent No.1 was written as 05.10.1988. The trial court has further observed that AW1 has admitted that the scholar's register (Exhibit-2) was not in his handwriting and that he had never seen the boy whose name was mentioned in Exhibit-2. The trial court has held that there was over-writing in the date of birth of Respondent No.1 in Exhibit-1 and from a perusal of the document it was not clear on what basis the date of birth of the Respondent No.1 was written and for this reason the date of birth of the Respondent No.1 cannot be believed to be 05.10.1988. The trial court has also held that the father of Respondent No.1 Sukhram was also examined before the court as AW4 and that he had stated that he got prepared the horoscope of his son (Exhibit-12) from Pandit Jagdish Prasad Sharma who had expired and that Respondent No.1 was born on 05.10.1988 in village Surpura, District Jodhpur. The trial court has, however, held that according to the evidence of AW4 the horoscope (Exhibit-12) was approximately 17-18 years old but by merely looking at the document it was clear that the document was not so old and on the basis of Exhibit-12, therefore, the date of birth of Respondent No. 1 cannot be said to be proved as 05.10.1988. The trial court has further held in

its order that the uncle of Respondent No. 1 Pancharam was examined as AW5 who is said to have furnished the date of birth of Respondent No.1 in the admission form (Exhibit-1) as 05.10.1988, but in his examination-in-chief AW5 has clarified that he had mentioned the date of birth on the saying of his brother Sukhram. The trial court has further held that since the basis of the date of birth was not written in the admission form (Exhibit-1), and no independent witness had been produced before the court such as the mid-wife or nurse who had participated in the birth of Respondent No.1 which is said to have taken place on 05.10.1988 in village Surpura, the court cannot believe that the date of birth of Respondent No.1 was 05.10.1988 particularly when in eight other criminal cases pending in various courts relating to incidents of the years 2002, 2003 and 2004, Respondent No.1 had not taken the plea that on the date of the incident he was a juvenile and cannot be tried by the ordinary courts but by the juvenile courts in accordance with the Act. The trial court has also held that the evidence, documentary and oral, produced on behalf of Respondent No.1 in connection with his age, appeared to have been created for escaping the punishment for the alleged offence of murder and that from the appearance of Respondent No.1, it looked that the Respondent No. 1 was above 18 years of age on 11.07.2004 when the alleged offence under Section 302 of the IPC was committed.

11. In the impugned order passed in revision, the High Court reversed the findings of the trial court and held that even if Respondent No.1 had not raised a plea that he was a juvenile in other criminal cases or during the course of investigation of the present criminal case, such a plea could be raised by him at any stage during the course of trial and even at the appellate stage. The High Court further held that the date of birth of Respondent No.1 in the admission forms, school records, and transfer certificates were good proof in relation to the age of Respondent No.1 and simply because by physical appearance the Respondent No.1 did not look like a juvenile, the court

cannot hold that Respondent No.1 was not juvenile at the time of commission of the alleged offence. The High Court concluded that the trial court has miserably failed to appreciate the evidence in its correct perspective and the findings recorded by the trial court in relation to the age of Respondent No.1 were contrary to the established principles of law in relation to appreciation of evidence and deserved to be set aside.

12. We are of the considered opinion that the High Court was not at all right in reversing the findings of the trial court in exercise of its revisional jurisdiction. The entry of date of birth of Respondent No.1 in the admission form, the school records and transfer certificates did not satisfy the conditions laid down in Section 35 of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and, therefore, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determining the age of Respondent No.1 at the time of commission of the alleged offence. As has been held by this Court in *Ravinder Singh Gorkhi and Jyoti Prakash* (supra) the age of Respondent No.1 was a question of fact, which was to be decided on the evidence brought on record before the court and it was for the trial court to appreciate the evidence and determine the age of Respondent No.1 at the time of commission of the alleged offence and in this case, the trial court has arrived at the finding that the claim of Respondent No.1 that he was less than 18 years at the time of commission of the alleged offence, was not believable. While arriving at this finding of fact, the trial court had not only considered the evidence produced by Respondent No.1 but also considered the fact that either in the earlier cases or during the investigation of the present case, the Respondent No. 1 had not raised this plea. While arriving at this finding of fact, the trial court had also considered the physical appearance of Respondent No.1. Such determination on a question of fact made by the trial court on

the basis of the evidence or material before it and other relevant factors could not be disturbed by the High Court in exercise of its revisional powers.

13. A plain reading of Section 52 of the Act shows that no statutory appeal is available against any finding of the court that a person was not a juvenile at the time of commission of the offence. Section 53 of the Act which is titled "Revision", however, provides that the High Court may at any time, either of its own motion or on an application received on that behalf, call for the record of any proceeding in which any competent authority or court of session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order, and may pass such order in relation thereto as it thinks fit. While exercising such revisional powers, the High Court cannot convert itself to an appellate court and reverse the findings of fact arrived at by the trial court on the basis of evidence or material on record, except where the High Court is not satisfied as to the legality or propriety of the order passed by the trial court. The trial court, as we have discussed, has given good reasons for discarding the evidence adduced by the Respondent No.1 in support of his claim that he was a juvenile at the time of commission of the alleged offence and there was no scope to hold that the order of the trial court was either illegal or improper and the High Court should not have substituted its own finding for that of the trial court on the age of Respondent No.1 at the time of commission of the alleged offence by re-appreciating the evidence.

14. In the result, we allow this appeal and set aside the impugned order dated 18.08.2006 of the High Court in S.B. Criminal Revision Petition No. 166 of 2006 and remit the matter to the trial court for trial of Respondent No.1 in accordance with law treating him not to be a juvenile at the time of the commission of the alleged offence.

R.P. Appeal allowed.

STATE OF WEST BENGAL & ANR.
v.
WEST BENGAL MINIMUM WAGES INSPECTORS ASSOCIATION & ORS.
(Civil Appeal No. 3855 of 2007)

MARCH 15, 2010

[R.V. RAVEENDRAN AND SWATANTER KUMAR, JJ.]

Service law:

West Bengal Services Revision of Pay and Allowances Rules, 1981 – Parity in pay scale – Prior to 1981 Rules, posts of Inspectors-AWM (subject posts) and Inspector (Co-operative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers)-reference categories in same pay scale no. 9 and under 1981 Rules reference category posts given higher pay scale – Claim for parity by Inspectors-AWM on basis of previous equal pay – Held: Grant of parity in pay scale depends upon comparative job evaluation and equation of posts – Benefit of higher pay scale can only be claimed by establishing that holders of subject post and reference category posts, discharge identical or similar duties and functions and that the continuation of disparity is irrational and unjust – Inspectors-AMW neither pleaded nor proved the same – Thus, the claim cannot be granted – Pay Review Committee did not consider the duties and responsibilities attached to different categories of posts while recommending higher pay scale to subject posts – State Government justified in rejecting the said recommendation – State Government directed to extend the benefit of Pay Scale No.10 (4500-9700) to Inspectors-AMW as recommended by Fourth Pay Commission.

The respondents were employed as Inspectors-AMW-(*subject post*) in Pay Scale No. 9 (300-600) and were

subsequently absorbed into regular service. The Inspector (Co-operative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers)-(*reference category posts*) were also in Pay Scale No. 9. Under the West Bengal Services Revision of Pay and Allowances Rules, 1981, the 'reference category posts' were granted Pay Scale No. 11 (Rs.425-1050) whereas Inspectors-AMW were continued in Pay Scale No. 9. The respondents filed writ petition seeking higher Pay Scale No.11. The Single Judge of High Court permitted the respondents to make a representation to the appropriate forum. During pendency of appeal, the Third Pay Commission recommended that there was no need to upgrade Inspectors-AMW to a higher pay scale. The Pay Review Committee recommended that they should be assigned the higher Pay Scale No.10 (Rs. 1390-2970) with effect from 1.1.86. The State Government did not accept the recommendations. Thereafter, the Fourth Pay Commission recommended Pay Scale No.10 for the post of Inspectors-AMW. The Division Bench of High Court directed that the respondents be given the same scale that would be given to those four posts under the Fourth Pay Commission.

The questions which arose for consideration in the appeal are (1) whether the respondents were entitled to the reliefs sought in the writ petition as originally filed; (2) whether the respondents are entitled to higher pay scale on the basis of the recommendations of the Pay Review Committee made in the year 1990; and (3) whether the respondents are entitled to higher pay scale as per the recommendations of the Fourth Pay Commission and, if so, from what date?

Allowing the appeal, the Court

HELD: 1. The order of the Division Bench of the High Court is set aside. However, in view of the submission

made by the State Government, the State Government is directed to extend the benefit of Pay Scale No.10 (4500-9700) to the Inspectors-AMW, to take effect notionally from 1.1.1996, with actual monetary benefits with effect from 1.1.2008. [Para 21] [385-B-C]

Re: Question (1)

2.1. The principles relating to granting higher scale of pay on the basis of equal pay for equal work are well settled. The evaluation of duties and responsibilities of different posts and determination of the Pay scales applicable to such posts and determination of parity in duties and responsibilities are complex executive functions, to be carried out by expert bodies. Granting parity in pay scale depends upon comparative job evaluation and equation of posts. The principle "equal pay for equal work" is not a fundamental right but a constitutional goal. It is dependent on various factors such as educational qualifications, nature of the jobs, duties to be performed, responsibilities to be discharged, experience, method of recruitment etc. Comparison merely based on designation of posts is misconceived. Courts should approach such matters with restraint and interfere only if they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to any particular section of employees. The burden to prove disparity is on the employees claiming parity. [Para 15] [381-C-F]

State of U.P. vs. Ministerial Karamchari Sangh **(1998) 1 SCC 422;** *Associate Bank Officers' Association vs. State Bank of India* **(1998) 1 SCC 428;** *State of Haryana and Anr. vs Haryana Civil Secretariat Personal Staff Association* **(2002) 6 SCC 72;** *State of Haryana vs. Tilak Raj* **(2003) 6 SCC 123;** *S.S. Chandra v. State of Jharkhand* **2007 (8) SCC 299;** *Uttar Pradesh State Electricity Board v. Aziz Ahmad* **2009 (2) SCC 606, referred to.**

2.2. Parity cannot be claimed merely on the basis that earlier the *subject post* and the *reference category posts* were carrying the same scale of pay. In fact, one of the functions of the Pay Commission is to identify the posts which deserve a higher scale of pay than what was earlier being enjoyed with reference to their duties and responsibilities, and extend such higher scale to those categories of posts. The Pay Commission has two functions; to revise the existing pay scale, by recommending revised pay scales corresponding to the pre-revised pay scales and, secondly, make recommendations for upgrading or downgrading posts resulting in higher pay scales or lower pay scales, depending upon the nature of duties and functions attached to those posts. Therefore, the mere fact that at an earlier point of time, two posts were carrying the same pay scale does not mean that after the implementation of revision in pay scales, they should necessarily have the same revised pay scale. One post which is considered as having a lesser pay scale may be assigned a higher pay scale and another post which is considered to have a proper pay scale may merely be assigned the corresponding revised pay scale but not any higher pay scale. Therefore, the benefit of higher pay scale can only be claimed by establishing that holders of the *subject post* and holders of *reference category posts*, discharge duties and functions identical with, or similar to, each other and that the continuation of disparity is irrational and unjust. The respondents-Inspectors-AMW claimed parity not on the basis of equal pay for equal work, but on the basis of previous equal pay. They have neither pleaded nor proved that the holders of post of Inspectors (Cooperative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers) were discharging duties and functions similar to the duties and functions of Inspector-AMW. Hence, the prayers in the original writ petition could not have been granted. The Single Judge

rightly held that whether the posts were equivalent and whether there could be parity in pay are all matters that have to be considered by expert bodies and the remedy of the respondent was to give a representation to the concerned authority and the court cannot grant any specific scale of pay to them. [Paras 17] [382-E-H; 383-A-E]

Re: Question (2)

3. The Third Pay Commission did not accept the representation of the Inspectors–AMW seeking a higher pay scale. It held that they are entitled only to Pay Scale No.9. When the respondents made a grievance in that behalf, it is no doubt true that the Pay Review Committee considered the representation and made a recommendation that the posts which were in the pay scale of Rs.300-600 including those which were in the same pay scale but started with a higher initial start of Rs.330, should be granted the scale of pay of Rs.425-1050, as per RPA Rules 1981. The said Committee did not take note of the fact that different posts having the same pay scale, may have different duties and functions and some may deserve a higher pay scale than the others. The Government rejected the recommendation of the said Committee, for valid and justifiable reasons. The State Government categorically stated that the Pay Review Committee's general recommendation that all posts carrying a particular scale of pay should all be given automatically the same higher pay scale could not be accepted, as the Committee did not make the recommendation after considering the duties and responsibilities attached to different categories of posts. Therefore, the State Government was justified in acting on the recommendation of the Third Pay Commission and rejecting the recommendation by the Pay Review Committee. [Para 18] [383-F-H; 384-A-D]

Re: Question (3)

4. The Fourth Pay Commission recommended in 1999 that the Inspectors-AMW should be extended the benefit of Pay Scale No.10. In view of the pendency of the dispute relating to pay scale in the appeal before the High Court, the Government did not take a final decision on the recommendation of the Fourth Pay Commission insofar as the post of Inspectors-AMW. When the matter came up today, the counsel for the State submitted on instructions that the State is willing to accept the recommendation of the Fourth Pay Commission and extend the higher Pay Scale No.10, notionally with effect from 1.1.1996. He also submitted that in the case of several other posts, where similar recommendations had been made, while notional effect was given for the revised pay scale with effect from 1.1.1996, actual financial benefits were given with effect from 1.1.2008; and that the State Government will be willing to give similarly, actual effect (financial benefits) to Inspectors-AMW from 1.1.2008. In view of the said submission, it is unnecessary to examine the third question on merits. [Paras 19 and 20] [384-D-H; 385-A]

Case Law Reference:

(1998) 1 SCC 422	**Referred to.**	**Para 15**
(1998) 1 SCC 428	**Referred to.**	**Para 15**
(2002) 6 SCC 72	**Referred to.**	**Para 15**
(2003) 6 SCC 123	**Referred to.**	**Para 15**
2007 (8) SCC 299	**Referred to.**	**Para 15**
2009 (2) SCC 606	**Referred to.**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3855 of 2007.

From the Judgment & Order dated 27.1.2005 of the High Court of Calcutta in F.M.A.No. 31 of 1999.

Bhaskar P. Gupta, Rana Mukherjee, Joydeep Kar, Sunaina Kumar, Godowill Indeevar for the Appellants.

P.P. Rao, Altaf Ahmed, K. Bandyopadhyay, Pijush K. Roy, G. Ramakrishna Prasad for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN J. 1. This question involved in this appeal by special leave is whether the respondents, holding the post of Inspector Agricultural Minimum Wages (for short, 'Inspector – AMW'), were entitled to parity in pay scale, from April 1981, with those holding the posts of Inspector (Cooperative Societies), Extension Officers (Panchayat) and KGO-JLRO (now Revenue Officers). For convenience the post of Inspector-AMW which is the subject matter of this appeal will be referred as the 'subject post'. The other three posts with reference to which parity is sought will be referred to as the 'reference category posts'. For convenience, we give below the pay scales of the four categories of employees :

Sl. No.	Name of Posts	1970 (I Pay Commission)	1981 (II Pay Commission)	1990 (III Pay Commission)	1998 (IV Pay Commission)
1.	Inspector Agricultural Minimum Wages	300-600 (9)	380-910 (9)	1260-2610 (9)	4000-8850 (9)
2.	Inspector, Co-operative Societies	300-600 with higher initial at 330/-	425-1050 (11)	1390-2970 (10)	4500-9700 (10)
3.	Extension Officer, Panchayat	300-600 with higher initial at 330/-	425-1050 (11)	1390-2970 (10)	4500-9700 (10)
4.	KGO-JLRO (Now Revenue Officer)	300-600 with higher initial at 330/- + Special pay 50/	425-1050 (11)	1390-2970 (10)	4800-10925 (12) 5500-11325 (14) w.e.f. 01-01-08

[Note : The figures in brackets below the pay scale refer to the number of the pay scale]

2. The facts in brief are as follows. The respondents 3 to 295 were employed in or around 1975 as ad-hoc Inspectors-AMW, in Pay Scale No.9 (300-600). They were subsequently absorbed into regular service and appointed against permanent vacancies. Though Inspectors (Minimum Wages), Inspector (Trade Unions), Labour Inspectors, Supervisor (Labour Welfare), Investigators, Inspectors (Shops & Establishments) also in Pay Scale No.9 were included in the West Bengal Subordinate Labour Services, Inspectors-AMW were not included in the said Labour Services. The Second Pay Commission recommended the revised Pay Scale No.9 to the Inspectors - AMW subject to the condition that the minimum qualification for recruitment for the said post should be a University degree. On 28.7.1981, the Government framed the West Bengal Services Revision of Pay and Allowances Rules, 1981 (for short 'RPA Rules 1981') to implement the second Pay Commission Recommendations (effective from 2.4.1981) under which Inspectors–AMW, were assigned Pay Scale No.9 (380-910). Holders of the post of Inspector (Co-operative Societies), Extension Officer (Panchayats) and KGO-JLRO (Revenue Officers) who were also in Pay Scale No.9 earlier, but with a higher initial pay of Rs.330, were granted the higher Pay Scale No.11 (425-1050).

3. Feeling aggrieved, the respondents filed a writ petition (CR No.247(W) of 1982) for the following reliefs:- (a) a direction to the state government to revise the pay scales according to law, without discriminating them from Inspectors (Co-operative Societies), Extension Officers (Panchayat), KGO-JLRO etc., and grant them Pay Scale No.11 (Rs.425-1050) with special pay and other allowances; and (b) to quash the RPA Rules 1981, insofar as they related to Inspectors-AMW.

4. The respondents contended that three other categories

of posts (*reference category posts*), were in the same scale of Rs.300-600 as was applicable to them (Inspectors-AMW) when the RPA Rules, 1970 were in force; that the said three *reference category posts* were granted Pay Scale No.11 (Rs.425-1050) under the RPA Rules 1981 whereas they (Inspectors - AMW) were continued in the Pay Scale No.9 (Rs.380-910). It was submitted that as the minimum educational qualification for all four categories of posts were similar and as the pre-revision pay scales of all the four categories of posts were the same, the State could not discriminate by upgrading the pay of the three *reference category posts* who were earlier in the same Pay Scale, to Pay Scale No.11, while continuing them (Inspectors –AMW) in the lower Pay Scale No.9.

5. The State Government resisted the said writ petition, contending that the functions and duties of Inspectors - AMW were different from the functions and duties of Inspectors (Co-operative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers). It was also pointed out that though the pay scale applicable to Inspectors -AMW and the three *reference category posts* were the same (Pay Scale No.9) prior to RPA Rules 1981, there was a significant difference as those *three reference categories* were started on a higher initial Pay Scale of Rs.330 instead of Rs.300.

6. Learned single Judge, by order dated 8.7.1987, disposed of the said writ petition permitting the respondents to make a representation to the appropriate forum, that is, the state government or the Pay Commission. He held that the High Court in its writ jurisdiction cannot take upon itself the responsibility of giving higher scales of pay claimed by the writ petitioners. Feeling aggrieved, the respondents filed an appeal (FMAT No.2453 of 1987).

7. During the pendency of the appeal, Inspectors-AMW, through their association, made a representation before the

Third Pay Commission seeking several reliefs. The Third Pay Commission made its recommendations on 31.12.1988 expressing the view that the existing scale of pay of the Inspectors –AMW, was just and proper and there was no need to upgrade them to a higher pay scale. Therefore, the Pay Commission recommended Pay Scale No.9 corresponding to the old Pay Scale No.9 (that is Rs.380-910 revised as Rs.1260-2610).

8. Inspectors-AMW and some other aggrieved categories of employees submitted their representations in regard to their grievances against the recommendations of the Third Pay Commission. The State Government therefore, appointed a Pay Review Committee to consider the various representations relating to anomalies. The said Committee, after considering the grievances of the respondents made the following recommendations:

> "As the same time, however, the Second Pay Commission considered upward revision of pay of quite a large number of post which were in the scale of Rs.300-600 (as per ROPA Rules 1970) and recommendation the scale of Rs.380-910. Many Departments have written to us for upward revision of the scale of pay of such posts. In particulars, the Labour Department have recommended upward revision of the scale of pay of posts belonging to West Bengal Subordinate Labour Service from Rs.380-910/- to scale No.10 (which corresponds to the unrevised scale No.11 i.e. Rs.425-1050). Many of these posts are filled up by promotion cum UDC and other employees drawing pay in Scale no.9 i.e. 380-910 (as per ROPA Rules 1981).
>
> As per ROPA Rules 1970, the scale of pay of UDCs was Rs.330-550. The posts referred to in the first paragraph are undoubtfully of higher status than the posts of UDCs. This is corroborated but the fact that the qualification for

direct recruitment to these posts are not less than a degree of a recognised university and here the post can only be filled up by promotion and the feeder posts in many cases are the posts carrying the scale of pay of the UDCs. It is, therefore, felt that a large number of anamolies can be avoided if the revised scale No.10 (which corresponds to the unrevised Scale No.11) is allocated to all posts which were in the scale of pay Rs.300-600 and in some cases Rs.300-600 with higher initial start at Rs.330 (as per ROPA Rules 1970) and which were allocated scales of pay less than Scale No.11 i.e. Rs.425-1050 in the WBS(ROPA) Rules 1981.

We, therefore, strongly recommend that all the posts which were in the scale of pay of Rs.300-600 and in a few cases Rs.300-600 with higher initial start at Rs.330 and which were awarded the pay scale lower than Rs.425-1050 as per WBS(ROPA) Rules 1981 may now be awarded the revised scale No.10 with effect from 1.1.86."

9. The State Government decided not to accept the recommendations of the Pay Review Committee and continue the posts of Inspectors —AMW in Pay Scale No.9, that is, Rs.1260-2610. The relevant portion of the said decision (file note) is extracted below:

"After careful consideration we have come to the conclusion that the existing scales of pay of these posts are just and proper. Hence we recommend for them, our suggested scales of pay corresponding to their present scales.

Thus it appears that the Third Pay Commission which is a specialised body did not consider it necessary to recommend any upgradation of the scale of pay for the post of Inspector of Agricultural Minimum Wages. The

Government accepted the recommendation of the Third Pay Commission and prescribed a revised scale No.9 (1260-2610) for the post of Inspector of Agricultural Minimum Wage.

The matter was referred to the Pay Review Committee. The Pay Review Committee recommend Scale No.10 i.e. Rs.1380-2970 for the post of Inspector of Agricultural Minimum Wages. But this recommendation actually follow from a general recommendation that posts of Inspectors and equivalent which were borne in the scale of pay of Rs.300-600 as per WBS (ROPA) Rules, 1970 and for which the minimum recruitment qualification is a graduation degree of a recognised University or equivalent should be on scale No.10 (Rs.1390-2970). It is, therefore, apparent that the Pay Review Committee did not recommend Scale No.10 specifically for the post of Inspector of Agricultural Minimum Wages after taking into consideration duties and responsibilities attached to the post. The State Government has not accepted the general recommendation of the Pay Review Committee in regard to the revision of the scale of pay of the post of Inspectors and equivalent which were borne in the scale of pay of Rs.300-600 as per WBS (ROPA) Rules, 1970 and for which the minimum recruitment qualification is graduate degree of a recognised university. This being the position, any upward revision of the scale of pay of the post of Inspector of Agricultural Minimum Wages will have serious repercussions. The Government is, therefore, unable to accept the recommendation of the Pay of the Pay Review Committee in regard to the revision of scale of pay of the post of Inspector of Minimum Wages. Accordingly the post should continue to be on scale No.9 i.e. Rs.1260-2610."

10. The rules regarding the recruitment of Inspectors — AMW were amended on 5.6.1995 and these posts were

brought under the Labour Department. Consequently, the West Bengal Sub-ordinate Labour Service was also constituted on 23.6.1995 consisting of the following categories of posts: (i) Inspector of Shops and Establishment; (ii) Inspector of Minimum Wages; (iii) Inspector of Trade (Union); (iv) Labour Inspector; (v) Supervisor of Labour Welfare Centres under the Labour Directorate, West Bengal (pleased under the West Bengal); (vi) Inspector, Statistical Assistant, Investigator Scrutiny Assistant, Computer and Computing Investigation in the Statistical Section of the Labour Directorate West Bengal; and (vii) Agricultural Minimum Wages Inspector.

11. In the pending appeal, the respondents amended their writ petition on 8.12.1995 contending that the Third Pay Commission had not taken into consideration the duties and responsibilities of Inspectors–AMW, while recommending that they should continue in the same pay scale, that their grievance in regard to the anomaly was considered by the Pay Review Committee constituted to look into the anomalies and it had recommended that they should be assigned the higher Pay Scale No.10 (Rs.1390-2970) and that the State Government had wrongly refused to accept the same; and that they should, therefore, by granted unrevised Pay scale No.11 (Rs.425-1050) which corresponded to revised Pay scale No.10 (Rs.1390-2970).

12. The Fourth Pay Commission in April 1998 revised the existing pay scales and the new Pay Scale No.9 was Rs.4000-8850. In December 1999, the Fourth Pay Commission submitted the second part of its recommendation. Para 2.39.9 relating to Inspectors (AMW) is extracted below:

> "Inspectors of Agricultural Minimum Wages who are posted at the Block Level for enforcement of minimum wages in Agriculture and other schedule employments and other Labour Laws, have demanded upgradation of their

> Scale of Pay. They are now in Scale No.9. In view of their duties and responsibilities, we recommend Scale No.10 for the post."

In view of it, the respondents filed an affidavit in the pending writ appeal submitting that as the Fourth Pay Commission has recommended pay scale No.10 for the post of Inspectors (AMW) and that though the State Government had accepted the recommendation in regard to several other posts, it had not accepted the recommendation relating to Inspectors-AMW.

13. On 27.1.2005, the Division Bench allowed the writ appeal, set aside the order of the learned single Judge and directed as follows:

> "The petitioners be given the same scale from the respective date as were given to their counterparts, namely, the four posts under RPA 1981 as well as the corresponding scale under RPA 1986 and the same scale that would be given to those four posts under the Fourth Pay Commission; and accordingly their pay be fixed and the difference/arrears be paid to the petitioners within six months from the date of service of a certified copy of this order; and be paid accordingly so far as their current salary is concerned in the same scale together with all consequential benefits as are available in law to the respective petitioners."

The said order is challenged in this appeal by special leave.

14. On the contentions urged, the following questions arise for consideration:

(1) Whether the respondents were entitled to the reliefs sought in the writ petition as originally filed?

(2) Whether the respondents are entitled to higher pay

scale on the basis of the recommendations of the Pay Review Committee made in the year 1990?

(3) Whether the respondents are entitled to higher pay scale as per the recommendations of the Fourth Pay Commission and, if so, from what date?

Re : Question (1)

15. The principles relating to granting higher scale of pay on the basis of equal pay for equal work are well settled. The evaluation of duties and responsibilities of different posts and determination of the Pay scales applicable to such posts and determination of parity in duties and responsibilities are complex executive functions, to be carried out by expert bodies. Granting parity in pay scale depends upon comparative job evaluation and equation of posts. The principle "equal pay for equal work" is not a fundamental right but a constitutional goal. It is dependent on various factors such as educational qualifications, nature of the jobs, duties to be performed, responsibilities to be discharged, experience, method of recruitment etc. Comparison merely based on designation of posts is misconceived. Courts should approach such matters with restraint and interfere only if they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to any particular section of employees. The burden to prove disparity is on the employees claiming parity - vide *State of U.P.* vs. *Ministerial Karamchari Sangh*, (1998) 1 SCC 422; *Associate Bank Officers' Association* Vs *State Bank of India*, (1998) 1 SCC 428; *State of Haryana & Anr.* vs. *Haryana Civil Secretariat Personal Staff Association,* (2002) 6 SCC 72; *State of Haryana* vs. *Tilak Raj* (2003) 6 SCC 123; *S.S. Chandra v. State of Jharkhand* [2007 (8) SCC 299]; *Uttar Pradesh State Electricity Board v. Aziz Ahmad* [2009 (2) SCC 606].

16. What is significant in this case is that parity is claimed by Inspectors-AMW, by seeking extension of the pay scale applicable to Inspector (Cooperative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers) not on the basis that the holders of those posts were performing similar duties or functions as Inspectors-AMW. On the other hand, the relief was claimed on the ground that prior to RPA Rules 1981, the posts in the said three reference categories, and Inspectors-AMW were all in the same pay scale (Pay Scale No.9), and that under RPA Rules 1981, those other three categories have been given a higher Pay Scale of No.11, while they – Inspectors-AMW - were discriminated by continuing them in the Pay Scale No.9. The claim in the writ petition was not based on the ground that *subject post and reference category posts* carried similar or identical duties and responsibilities but on the contention that as the *subject post* holders and the holders of *reference category posts* who were enjoying equal pay at an earlier point of time, should be continued to be given equal pay even after pay revision. In other words, the parity claimed was not on the basis of equal pay for equal work, but on the basis of previous equal pay.

17. It is now well-settled that parity cannot be claimed merely on the basis that earlier the *subject post* and the *reference category posts* were carrying the same scale of pay. In fact, one of the functions of the Pay Commission is to identify the posts which deserve a higher scale of pay than what was earlier being enjoyed with reference to their duties and responsibilities, and extend such higher scale to those categories of posts. The Pay Commission has two functions; to revise the existing pay scale, by recommending revised pay scales corresponding to the pre-revised pay scales and, secondly, make recommendations for upgrading or downgrading posts resulting in higher pay scales or lower pay scales, depending upon the nature of duties and functions attached to those posts. Therefore, the mere fact that at an

earlier point of time, two posts were carrying the same pay scale does not mean that after the implementation of revision in pay scales, they should necessarily have the same revised pay scale. As noticed above, one post which is considered as having a lesser pay scale may be assigned a higher pay scale and another post which is considered to have a proper pay scale may merely be assigned the corresponding revised pay scale but not any higher pay scale. Therefore, the benefit of higher pay scale can only be claimed by establishing that holders of the *subject post* and holders of *reference category posts*, discharge duties and functions identical with, or similar to, each other and that the continuation of disparity is irrational and unjust. The respondents have neither pleaded nor proved that the holders of post of Inspectors (Cooperative Societies), Extension Officers (Panchayat) and KGO-JLRO (Revenue Officers) were discharging duties and functions similar to the duties and functions of Inspector-AMW. Hence, the prayers in the original writ petition could not have been granted. In fact, that is why the learned single Judge rightly held that whether the posts were equivalent and whether there could be parity in pay are all matters that have to be considered by expert bodies and the remedy of the respondent was to give a representation to the concerned authority and the court cannot grant any specific scale of pay to them.

Re: Question (2)

18. The Third Pay Commission did not accept the representation of the Inspectors–AMW seeking a higher pay scale. It held that they are entitled only to Pay Scale No.9. When the respondents made a grievance in that behalf, it is no doubt true that the Pay Review Committee considered the representation and made a recommendation that the posts which were in the pay scale of Rs.300-600 including those which were in the same pay scale but started with a higher initial start of Rs.330, should be granted the scale of pay of

Rs.425-1050, as per RPA Rules 1981. The said Committee did not take note of the fact that different posts having the same pay scale, may have different duties and functions and some may deserve a higher pay scale than the others. The Government rejected the recommendation of the said Committee, for valid and justifiable reasons. The State Government categorically stated that the Pay Review Committee's general recommendation that all posts carrying a particular scale of pay should all be given automatically the same higher pay scale could not be accepted, as the Committee did not make the recommendation after considering the duties and responsibilities attached to different categories of posts. Therefore, we are of the view that the State Government was justified in acting on the recommendation of the Third Pay Commission and rejecting the recommendation by the Pay Review Committee.

Re: Question (3)

19. The Fourth Pay Commission has recommended in 1999 that the Inspectors–AMW should be extended the benefit of Pay Scale No.10. In view of the pendency of the dispute relating to pay scale in the appeal before the High Court, the Government did not take a final decision on the recommendation of the Fourth Pay Commission insofar as the post of Inspectors-AMW.

20. When the matter came up today, learned counsel for the State submitted on instructions that the State is willing to accept the recommendation of the Fourth Pay Commission and extend the higher Pay Scale No.10, notionally with effect from 1.1.1996. He also submitted that in the case of several other posts, where similar recommendations had been made, while notional effect was given for the revised pay scale with effect from 1.1.1996, actual financial benefits were given with effect from 1.1.2008; and that the State Government will be willing to

give similarly, actual effect (financial benefits) to Inspectors-AMW from 1.1.2008. In view of the said submission, it is unnecessary to examine the third question on merits.

21. For the reasons aforesaid, we allow this appeal and set aside the impugned order of the Division Bench of the Calcutta High Court. However, in view of the submission made by the State Government, we direct the State Government to extend the benefit of Pay Scale No.10 (4500-9700) to the Inspectors - AMW, to take effect notionally from 1.1.1996, with actual monetary benefits with effect from 1.1.2008. We make it clear that this will not come in the way of the respondents representing or challenging the date on which the actual effect has been given (1.1.2008) in accordance with law, if they want the actual effect from a date between 1.1.1996 and 1.1.2008.

N.J. Appeal allowed.

OIL AND NATURAL GAS CORPORATION LTD., DEHRADUN THROUGH MANAGING DIRECTOR

v.

THE COMMISSIONER OF INCOME TAX, DEHRADUN

(Civil Appeal No. 7223 of 2008)

MARCH 15, 2010

[D.K. JAIN AND T.S. THAKUR, JJ.]

Income Tax Act, 1961:

s.37(1) – AY 1991-92 to 1994-95 and 1997-98 – Deduction on account of fluctuations in rate of exchange – Appellant-assessee availed foreign loans to cover its expenses, both capital and revenue, on import of machinery on capital account and for payment to non-resident contractors in foreign currency – Additional liability on account of fluctuations in the rate of exchange, in respect of loans taken for revenue purpose – Assessee followed mercantile system of accounting – "Loss" suffered by assessee on account of fluctuation in the rate of foreign exchange as on the date of balance-sheet – Held: Could be allowed as expenditure under s.37(1) notwithstanding the fact that the liability had not been actually discharged in the year in which the fluctuation in the rate of foreign exchange had occurred.

s.43A (as unamended, prior to 1-4-2003) – AY 1991-92 to 1994-95 and 1997-98 – Adjustment in actual cost of asset on account of change in the rate of exchange subsequent to acquisition of asset in foreign currency – Appellant-assessee availed foreign loans to cover its expenses, both capital and revenue, on import of machinery on capital account and for payment to non-resident contractors in foreign currency – Held: Assessee entitled to adjust the actual cost of imported capital assets acquired in foreign currency on account of

fluctuation in the rate of exchange at each balance-sheet date, pending actual payment of the varied liability.

The appellant-assessee is a public sector undertaking, engaged in capital intensive exploration and production of petroleum products for which it has to heavily depend on foreign loans to cover its expenses, both capital and revenue, on import of machinery on capital account and for payment to non-resident contractors in foreign currency for various services rendered. The Assessee made three types of foreign exchange borrowings — (i) in revenue account; (ii) in capital account and (iii) for general purposes, partly utilised in revenue account and partly in capital account.

As per the terms and conditions of foreign exchange borrowings, some of the loans became re-payable in the year under consideration but date of repayment of some loans fell after the end of the relevant accounting year.

The Assessee revalued in Indian currency all its foreign exchange loans in revenue account, capital account as also in its general purposes account, outstanding as on 31st March, 1991 and claimed the difference between their respective amounts in Indian currency as on 31st March, 1990 and on 31st March, 1991 as revenue loss under Section 37(1) of the Income Tax Act, 1961 in respect of loans used in revenue account, and also took into consideration the similar difference in foreign exchange on capital account loans as an increased liability under Section 43A of the Act for the purposes of depreciation.

The foreign exchange loss incurred by the Assessee in the revenue account on account of repayment of the loans made in the year under consideration was allowed by the Assessing Officer as a deduction under Section 37(1) of the Act, and he also took into consideration an

increased liability of foreign exchange loans taken in capital account and repaid in the accounting year, for the purposes of depreciation, under Section 43A of the Act. He, however, did not allow the assessee's claim for foreign exchange loss claimed on such foreign currency loans both in revenue account and in capital account which were outstanding on the last day of the accounting year under consideration and were as per the terms of borrowings, repayable at the end of the relevant accounting year. Similar treatment was given to the foreign exchange loans taken for general purposes, used partly in revenue account and partly in capital account. Thus, the Assessee's claim for foreign exchange loss/ increased liability on revaluation of these foreign exchange loans at the end of the accounting year under consideration both in the revenue account and capital account as also on loans used partly in revenue account and partly in capital account, made on the ground that it had followed mercantile system of accounting in this regard, was disallowed by the Assessing Officer. According to the Assessing Officer, such a loss could be allowed to the Assessee on discharge of liability at the time of actual repayment of these loans.

The assessee preferred appeals before the Commissioner of Income Tax (Appeals). Insofar as assessee's claim for foreign exchange loss in revenue account was concerned, the Commissioner (Appeals) affirmed the view taken by the Assessing Officer on the ground that it was a notional liability and the same had not crystallised or accrued in the relevant assessment year. However, as regards the adjustment for increased liability made by the Assessee for the purposes of Section 43A of the Act in respect of foreign exchange loans in capital account, which were outstanding as on 31st March, 1991, the Commissioner accepted the stand of the assessee and directed the Assessing Officer to

allow the benefit of such increased liability for computation of depreciation allowance on plant and machinery purchased out of such foreign exchange loans for the assessment year under consideration.

The Assessee and the Revenue filed cross-appeals before the Income Tax Appellate Tribunal. The Tribunal held that the loss claimed by the assessee on revenue account was allowable under Section 37(1) of the Act. The appeal preferred by the Revenue on the question whether the Assessee was entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange, in terms of Section 43A of the Act, was dismissed.

The Revenue filed appeal before the High Court. By a common judgment pertaining to the assessment years 1991-92 to 1994-95 and 1997-98, the High Court reversed the decision of the Tribunal on both the issues.

In appeals to this Court, the questions which arose for determination were :- (i) Whether on the facts and circumstances of the case, the additional liability arising on account of fluctuations in the rate of exchange in respect of loans taken for revenue purposes could be allowed as deduction under Section 37(1) of the Income Tax, Act, 1961 in the year of fluctuation in the rate of exchange or whether the same is allowable only in the year of repayment of such loans and (ii) Whether the assessee is entitled to adjust the actual cost of imported capital assets acquired in foreign currency on account of fluctuation in the rate of exchange at each balance-sheet date, pending actual payment of the varied liability.

Allowing the appeals, the Court

HELD: 1.1. The factors to be taken into account in order to find out if an expenditure on account of

fluctuation in the foreign currency rates, when the Assessee is following mercantile system of accounting, is deductible, are: (i) whether the system of accounting followed by the assessee is the mercantile system, which brings in the debits of the amount of expenditure for which a legal liability has been incurred even before it is actually disbursed and credits, what is due, immediately it becomes due even before it is actually received; (ii) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was *bonafide*; (iii) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it; (iv) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards and (vi) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation. [Para 10] [397-G-H; 398-A-F]

1.2. In the present case, the assessee followed mercantile system of accounting. Applying the aforesaid factors on the facts of the case, it is clear that the loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance-sheet is allowable as expenditure under Section 37(1) of the Act, notwithstanding that the liability had not been discharged in the year in which the fluctuation in the rate of foreign exchange occurred. [Paras 10] [398-F-H]

Commissioner of Income-Tax v. Woodward Governor India P. Ltd. **2009 (312) I.T.R. 254 (SC), relied on.**

Oil & Natural Gas Commission & Anr. v. Collector of

Central Excise **(1992) Supp (2) SCC 432 and** *Mahanagar Telephone Nigam Ltd. v. Chairman, Central Board, Direct Taxes & Anr.* **2004 (267) I.T.R. 647 (SC), referred to.**

2.1. Section 43A of the Income Tax Act, 1961 was amended by the Finance Act, 2002 w.e.f. 1st April, 2003. Under the unamended Section 43A, "actual payment" was not a condition precedent for making necessary adjustment in the carrying cost of the fixed asset acquired in foreign currency but under the amended Section 43A, with effect from 1st April, 2003, such payment of the decreased/enhanced liability on account of fluctuation in foreign exchange rate has been made a condition precedent for making adjustment in the carrying amount of the fixed asset. [Para 12] [399-G-H; 400-A-C]

2.2. All the assessment years in question being prior to the amendment in Section 43A of the Act with effect from 1st April, 2003, the assessee would be entitled to adjust the actual cost of the imported capital assets, acquired in foreign currency, on account of fluctuation in the rate of exchange at each of the relevant balance-sheet dates pending actual payment of the varied liability. [Para 13] [400-C-E]

Commissioner of Income-Tax v. Woodward Governor India P. Ltd. **2009 (312) I.T.R. 254 (SC), relied on.**

Case Law Reference:

2009 (312) I.T.R. 254 (SC)	**relied on**	**Para 6**
(1992) Supp (2) SCC 432	**referred to**	**Para 6**
2004 (267) I.T.R. 647 (SC)	**referred to**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7223 of 2008.

From the Judgment & Order dated 29.3.2007 of the High

Court of Uttarakhand at Nainital in Income Tax Appeal No. 50 of 2005.

WITH

C.A. Nos. 7224, 7225, 7228, 7229 and 7231 of 2008.

S. Ganesh, Ruchi Gaur Narula, Shweta Mishra, S.R. Setia for the Appellant.

B. Bhattacharya ASG, D.K. Singh, H.R. Rao, Mohd. Manan, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. In these appeals, essentially the following two questions arise for our consideration:-

(i) Whether on the facts and circumstances of the case, the additional liability arising on account of fluctuations in the rate of exchange in respect of loans taken for revenue purposes could be allowed as deduction under Section 37(1) of the Income Tax, Act, 1961 (for short "the Act") in the year of fluctuation in the rate of exchange or whether the same is allowable only in the year of repayment of such loans?

(ii) Whether the Assessee is entitled to adjust the actual cost of imported capital assets acquired in foreign currency on account of fluctuation in the rate of exchange at each balance-sheet date, pending actual payment of the varied liability? (only in C.A. No.7228/2008 – Assessment Year 1991-92)

2. As, in our opinion, both the afore-noted issues are no more *res integra,* we deem it unnecessary to state the facts in detail and with a view to appreciate the controversy, a brief

reference to the foundational facts in respect of assessment year 1991-92 would suffice. These are:

The appellant, hereinbefore referred to as "the Assessee", is a public sector undertaking, substantially owned by the Government of India. It is engaged in capital intensive exploration and production of petroleum products for which it has to heavily depend on foreign loans to cover its expenses, both capital and revenue, on import of machinery on capital account and for payment to non-resident contractors in foreign currency for various services rendered. The Assessee had made three types of foreign exchange borrowings — (i) in revenue account; (ii) in capital account and (iii) for general purposes, partly utilised in revenue account and partly in capital account. As per terms and conditions of foreign exchange borrowings, some of the loans became re-payable in the year under consideration but date of repayment of some loans fell after the end of the relevant accounting year. The Assessee revalued in Indian currency all its foreign exchange loans in revenue account, capital account as also in its general purposes account, outstanding as on 31st March, 1991 and claimed the difference between their respective amounts in Indian currency as on 31st March, 1990 and on 31st March, 1991 as revenue loss under Section 37(1) of the Act in respect of loans used in revenue account, and also took into consideration the similar difference in foreign exchange on capital account loans as an increased liability under Section 43A of the Act for the purposes of depreciation. The foreign exchange loss incurred by the Assessee in the revenue account on account of repayment of these loans made in the year under consideration was allowed by the Assessing Officer as a deduction under Section 37(1) of the Act, and he also took into consideration an increased liability of foreign exchange loans taken in capital account and repaid in the accounting year, for the purposes of depreciation, under Section 43A of the Act. He, however, did not allow to the Assessee its claim for foreign exchange loss claimed on such foreign currency loans both in

revenue account and in capital account which were outstanding on the last day of the accounting year under consideration and were as per terms of borrowings repayable after the end of the relevant accounting year. Similar treatment was given to the foreign exchange loans taken for general purposes, used partly in revenue account and partly in capital account. Thus, the Assessee's claim for foreign exchange loss/increased liability on revaluation of these foreign exchange loans at the end of the accounting year under consideration both in the revenue account and capital account as also on loans used partly in revenue account and partly in capital account, made on the ground that it had followed mercantile system of accounting in this regard, was disallowed by the Assessing Officer. According to the Assessing Officer, such a loss could be allowed to the Assessee on discharge of liability at the time of actual repayment of these loans.

3. Aggrieved, the Assessee preferred appeals before the Commissioner of Income Tax (Appeals). Insofar as Assessee's claim for foreign exchange loss in revenue account was concerned, the Commissioner (Appeals) affirmed the view taken by the Assessing Officer on the ground that it was a notional liability and the same had not crystallised or accrued in the relevant assessment year. However, as regards the adjustment for increased liability made by the Assessee for the purposes of Section 43A of the Act in respect of foreign exchange loans in capital account, which were outstanding as on 31st March, 1991, the Commissioner accepted the stand of the Assessee and directed the Assessing Officer to allow the benefit of such increased liability for computation of depreciation allowance on plant and machinery purchased out of such foreign exchange loans for the assessment year under consideration.

4. Being dissatisfied, both the Assessee as well as the Revenue carried the matter in further appeals to the Income Tax Appellate Tribunal (for short "the Tribunal"). The Tribunal

observed that the method of accounting adopted by the Assessee right from the assessment year 1982-83 is mercantile system; it has been consistently claiming loss suffered by it on account of fluctuation in foreign exchange rates on accrual basis; in respect of assessment years 1982-83 to 1986-87, the Assessee's claim on this account had been allowed by the Assessing Officer himself; in respect of assessment year 1997-98, the Assessee had shown a gain of Rs.293.37 crores on account of fluctuation in foreign exchange because the Indian Rupee had appreciated as compared to the foreign currency and that the said amount was taxed as Assessee's income. Taking all these factors into consideration, the Tribunal held that the loss claimed by the Assessee on revenue account was allowable under Section 37(1) of the Act. The appeal preferred by the Revenue on the question whether the Assessee was entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange, in terms of Section 43A of the Act, was also dismissed.

5. The Revenue took the matter in further appeal to the High Court. By a common judgment pertaining to the assessment years 1991-92 to 1994-95 and 1997-98, the High Court has reversed the decision of the Tribunal on both the issues. Terming the order of the Tribunal as perverse, having been passed without any material on record and against the statutory provisions, the High Court has held that the foreign exchange loss claimed by the Assessee being only a contingent and notional liability, it was not allowable as deduction under Section 37(1) of the Act. Insofar as the applicability of Section 43A of the Act was concerned, the High Court observed that the said provision is confined only to those liabilities which have become due as per the terms and conditions of written agreement between the Assessee and the foreign creditors but since in the present case, no such agreement was made available by the Assessee at any stage of the proceedings, the claim of the Assessee was not justified. According to the High Court, the

variation in foreign exchange was neither quantified, nor it had become due or repaid and, therefore, deductions on that account had been allowed by the Tribunal without application of mind and were, therefore, illegal. Being aggrieved by the said decision, the Assessee is before us in these appeals.

6. Mr. S. Ganesh, learned senior counsel appearing on behalf of the Assessee, submitted that in view of the decision of this Court in *Commissioner of Income-Tax vs. Woodward Governor India P. Ltd.,*[1] the decision of the High Court cannot be sustained. Learned counsel also argued that in view of the fact that the Committee on disputes had expressly refused permission to the Revenue to pursue appeals before the High Court, in the light of the decisions of this Court in *Oil & Natural Gas Commission & Anr. vs. Collector of Central Excise*[2] and *Mahanagar Telephone Nigam Ltd. vs. Chairman, Central Board, Direct Taxes & Anr.,*[3] the High Court should not have entertained the appeals preferred by the Revenue.

7. Mr. B. Bhattacharya, learned Additional Solicitor General, appearing on behalf of the Revenue, on the other hand, while candidly admitting that both the issues raised in the present appeals, have been decided by this Court in *Woodward's* case (supra), submitted that in view of the finding by the High Court that no agreement between the Assessee and the foreign creditors had been placed on record, the High Court was correct in law in allowing Revenue's appeals.

8. At the outset, we may note that although in view of the orders passed by the Committee on disputes, advising the Revenue not to file appeals against Tribunal's orders, we find some substance in the objection of learned counsel for the Assessee about the maintainability of Revenue's appeals before the High Court but as we have heard learned counsel

1. 2009 (312) I.T.R. 254 (SC).
2. (1992) Supp (2) SCC 432.
3. 2004 (267) I.T.R. 647 (SC).

for the parties on merits of the appeals, at this stage, we do not propose to go into this question. We also reject at the threshold the submission of learned counsel for the Revenue that the claim of the Assessee *qua* capital account deserved to be disallowed because no agreement between the Assessee and the foreign creditors, as observed by the High Court was placed on record, because no such objection was raised by the Revenue at any stage of the assessment proceedings nor had the Assessing Officer rejected the claim of the Assessee on that ground.

9. Thus, the questions surviving for determination are :- (i) that when the Assessee maintained their accounts on mercantile system of accounting and there was no finding by the Assessing Officer on the correctness or completeness of the account and that the Assessee had complied with the accounting standards, laid down by the Central Government, can the "loss" suffered by it on account of fluctuation in the rate of foreign exchange as on the date of balance-sheet be allowed as expenditure under Section 37(1) of the Act notwithstanding the fact that the liability had not been actually discharged in the year in which the fluctuation in the rate of foreign exchange had occurred and (ii) whether on account of fluctuation in the rate of exchange at the end of the previous year, the Assessee is entitled to adjust the actual cost of imported assets acquired in foreign currency?

10. Having carefully perused the decision of this Court in *Woodward's* case (supra), we are of the opinion that both the issues stand concluded by the said decision. Dealing with the said issues extensively, speaking for the Bench, S.H. Kapadia, J. summarised the following factors which should be taken into account in order to find out if an expenditure on account of fluctuation in the foreign currency rates, when the Assessee is following mercantile system of accounting, is deductible:

(iii) whether the system of accounting followed by the assessee is the mercantile system, which brings in the debits of the amount of expenditure for which a legal liability has been incurred even before it is actually disbursed and credits, what is due, immediately it becomes due even before it is actually received;

(iv) whether the same system is followed by the assessee from the very beginning and if there was a change in the system, whether the change was bona fide;

(v) whether the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it;

(vi) whether the assessee has been consistent and definite in making entries in the account books in respect of losses and gains;

(vii) whether the method adopted by the assessee for making entries in the books both in respect of losses and gains is as per nationally accepted accounting standards;

(viii) whether the system adopted by the assessee is fair and reasonable or is adopted only with a view to reducing the incidence of taxation.

Applying these factors on the facts of that case, it was held that the "loss" suffered by the Assessee, maintaining accounts regularly on mercantile system and following accounting standards prescribed by the Institute of Chartered Accountants of India (ICAI), on account of fluctuation in the rate of foreign exchange as on the date of balance-sheet was an item of expenditure under Section 37(1) of the Act, notwithstanding that the liability had not been discharged in the year in which the fluctuation in the rate of foreign exchange occurred.

11. We are of the opinion that the ratio of the said decision, with which we are in respectful agreement, squarely applies to the facts at hand and, therefore, the loss claimed by the Assessee on account of fluctuation in the rate of foreign exchange as on the date of balance-sheet is allowable as expenditure under Section 37(1) of the Act.

12. On the question whether an Assessee is entitled to adjust the actual cost of imported assets acquired in foreign currency on account of fluctuation in the rate of exchange at each balance-sheet date, pending actual payment of the varied liability with reference to unamended Section 43A of the Act, in *Woodward's* case (supra), the Court observed thus:

> "…what triggers the adjustment in the actual cost of the assets, in terms of the unamended section 43A of the 1961 Act is the change in the rate of exchange subsequent to the acquisition of asset in foreign currency. The section mandates that at any time there is change in the rate of exchange, the same may be given effect to by way of adjustment of the carrying cost of the fixed assets acquired in foreign currency. But for section 43A which corresponds to paragraph 10 of AS-II such adjustment in the carrying amount of the fixed assets was not possible, particularly in the light of section 43(1). The unamended section 43A nowhere required as condition precedent for making necessary adjustment in the carrying amount of the fixed asset that there should be actual payment of the increased/decreased liability as a consequence of the exchange variation. The words used in the unamended section 43A were "for making payment" and not "on payment" which is now brought in by amendment to section 43A, vide the Finance Act, 2002."

Opining that the amendment of Section 43A of the Act by the Finance Act, 2002 with effect from 1st April, 2003 is amendatory and not clarificatory and would thus, apply

prospectively, the Court explained that under the unamended Section 43A, adjustment to the actual cost takes place on the happening of change in the rate of exchange, whereas under the amended Section 43A, the adjustment in the actual cost is made on cash basis. In other words, under the unamended Section 43A, "actual payment" was not a condition precedent for making necessary adjustment in the carrying cost of the fixed asset acquired in foreign currency but under the amended Section 43A, with effect from 1st April, 2003, such payment of the decreased/enhanced liability on account of fluctuation in foreign exchange rate has been made a condition precedent for making adjustment in the carrying amount of the fixed asset.

13. We are of the opinion that the decision of this Court in *Woodward's* case (supra) settles the second issue as well. We respectfully concur with the same and hold that all the assessment years in question being prior to the amendment in Section 43A of the Act with effect from 1st April, 2003 the Assessee would be entitled to adjust the actual cost of the imported capital assets, acquired in foreign currency, on account of fluctuation in the rate of exchange at each of the relevant balance-sheet dates pending actual payment of the varied liability.

14. Resultantly, all the appeals are allowed; the impugned orders are set aside and both the questions formulated in para 1 (supra) are answered in favour of the Assessee, leaving the parties to bear their own costs.

B.B.B. Appeals allowed.

P.K. MOHAN RAM
v.
B.N. ANANTHACHARY AND ORS.
(Civil Appeal No. 6412 of 2002)

MARCH 15, 2010

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

Deeds and Documents – Deed executed in respect of suit property – Will or Settlement Deed – Held: The form or nomenclature of the deed is not conclusive – Court has to very carefully examine the document as a whole, look into the substance thereof, treatment of the subject by settlor/ executant, intention appearing both by the expressed language employed in the document and by necessary implication and prohibition, if any, contained against revocation thereof – On facts, by executing the deed in question, the original owner expressed his intention, in no uncertain terms, to settle the suit property in favour of 16 persons, in praesenti – The language of the deed clearly shows that all the beneficiaries were to enjoy the property along with original owner during his lifetime and after his death, each of the beneficiaries was to get a specified share – In the concluding portion of the deed, the original owner also made it clear that he will have no right to cancel the Deed for any reason whatsoever or to alter the terms thereof – Read as a whole, it is clear that the deed in question was a 'Settlement Deed' and not a 'Will'.

Transfer of Property Act, 1882 – ss.19 and 21 – "Vested interest" and "contingent interest" – Difference between – Discussed.

The original owner of the suit property executed document Ex. A-2, titled and described as "Settlement Deed", in favour of the appellant, respondent nos.1 and

2, and 13 others i.e. in total 16 beneficiaries.

After the death of the original owner, the appellant filed suit for partition of his share in the suit property. Respondent nos.1 and 2 filed written statement contending that the appellant obtained the 'Settlement Deed' by playing fraud, and on discovery thereof, the original owner executed 'Revocation Deed' Ex. B-2 and then executed a 'Will' Ex. B-3 whereby he bequeathed the property in their favour.

The trial Court passed preliminary decree in favour of appellant holding that Ex. A-2 was "Settlement Deed" and the same was not executed as a result of fraud or misrepresentation and that the settlor did not have the right to execute 'Revocation Deed' Ex. B-2 and 'Will' Ex. B-3. The judgment was upheld by the first appellate court.

On second appeal, the High Court held that even though Ex.A-2 was titled and described as 'Settlement Deed', in reality it was a 'Will' and that the appellant had no right in the suit property because the settlor had bequeathed the same in favour of respondent Nos.1 and 2.

In appeal to this Court, it was contended by the appellant that the High Court misinterpreted Ex.A-2 as a 'Will' ignoring the specific stipulation contained therein that it was a 'Settlement Deed'. With reference to s.19 of the Transfer of Property Act, 1882, it was contended that the transfer of the property rights was *in praesenti,* which coupled with an unequivocal inhibition in Ex.A-2 against cancellation/amendment thereof, clearly shows that Ex.A-2 was a 'Settlement Deed' and not a 'Will'.

Allowing the appeal, the Court

HELD: 1.1. Sections 19 and 21 of the Transfer of

Property Act, 1882 elucidate the expressions "vested interest" and "contingent interest" in the context of transfer of property. A reading of the plain language of the above sections makes it clear that an interest can be said to be a vested interest where there is immediate right of present enjoyment or a present right for future enjoyment. An interest can be said to be contingent if the right of enjoyment is made dependent upon some event which may or may not happen. On the happening of the event, a contingent interest becomes a vested interest. [Para 10] [412-G; 413-H; 414-A-B]

1.2. Although, no strait-jacket formula has been evolved, while interpreting an instrument to find out whether it is of a testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest *in praesenti* in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/ executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. The form or nomenclature of the instrument is not conclusive and the Court is required to look into the substance thereof. [Para 13] [418-G-H; 419-A-B]

1.3. A careful reading of Ex.A-2 shows that in the title itself the document has been described as Settlement Deed. By executing that document, the original owner expressed his intention, in no uncertain terms, to settle the property in favour of 16 persons who were none else than his own relatives and declared that 'from this day onwards I and you shall enjoy the land and house without creating any encumbrance or making any alienation whatsoever.' This was an unequivocal creation of right

in favour of 16 persons *in praesenti*. Though, the beneficiaries were to become absolute owners of their respective shares after the death of the settlor, the language of the document clearly shows that all of them were to enjoy the property along with settlor during his lifetime and after his death, each of the beneficiaries was to get a specified share. In the concluding portion, the settlor made it clear that he will have no right to cancel the Settlement Deed for any reason whatsoever or to alter the terms thereof. The mere fact that beneficiary Nos. 1 and 2 and after them their heirs were to receive honours at the temple or that shares were to be divided after disposal of the property cannot lead to an inference that Ex.A-2 was a 'Will'. If Ex.A-2 is read as a whole, it becomes clear that it was a 'Settlement Deed' and the trial Court and the lower appellate Court did not commit any error by recording a finding to that effect. As a sequel to this, it must be held that the High Court committed serious error by setting aside the concurrent judgments and decrees of the two courts. [Para 21] [427-F-H; 428-A-D]

1.4. Although, in their written statement respondent Nos.1 and 2 did plead that Ex. A-2 was executed by the original owner due to fraud or misrepresentation, no evidence was led by them to substantiate that allegation. Therefore, no valid ground or justification was found to entertain that plea. [Para 23] [428-E-F]

Sagar Chandra Mandal v. Digamber Mandal and others **(1909) 9 CLJ 644;** *Ramaswami Naidu and another v. Gopalakrishna Naidu and others* **AIR 1978 Madras 54;** *Ponnuchami Servai v. Balasubramanian and others* AIR **1982 Madras 281 and** *Poongavanam v. Perumal Pillai and another* **(1997) 1 MLJ 169, distinguished.**

Rajes Kanta Roy v. Santi Debi **1957 SCR 77;** *Usha Subbarao v. B.N. Vishveswaraiah* **(1996) 5 SCC 201 and**

Kokilambal v. N. Raman **(2005) 11 SCC 234, relied on.**

A. Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai **(1985) 4 SCC 85;** *Namburi Basava Subrahmanyam v. Alapati Hymavathi and others* **(1996) 9 SCC 388;** *Gangaraju v. Pendyala Somanna* **AIR 1927 Madras 197;** *Venkatasubramaniya Iyer v. Srinivasa Iyer* **AIR 1929 Madras 670 and** *Ramaswami Naidu v. M.S. Velappan and others* **(1979) 2 M.L.J.88, referred to.**

Vynior's **case Trin 7 Jac. 1Rot. 2629, (English Reports, Vol. LXXVII, Kings Bench Division VI), referred to.**

Case Law Reference:

1957 SCR 77	**relied on**	**Para 7**
(1985) 4 SCC 85	**referred to**	**Para 7**
(1996) 9 SCC 388	**referred to**	**Para 7**
AIR 1927 Madras 197	**referred to**	**Para 7**
AIR 1929 Madras 670	**referred to**	**Para 7**
Vynior's **case Trin 7 Jac. 1 Rot. 2629 (English Reports, Vol. LXXVII, Kings Bench Division VI)**	**referred to**	**Para 8**
(1909) 9 CLJ 644	**distinguished**	**Para 8**
AIR 1978 Madras 54	**distinguished**	**Para 8**
AIR 1982 Madras 281	**distinguished**	**Para 8**
(1997) 1 MLJ 169	**distinguished**	**Para 8**
(1996) 5 SCC 201	**relied on**	**Para 12**
(2005) 11 SCC 234	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6412 of 2002.

From the Judgment & Order dated 27.2.2001 of the High Court of Judicautre at Madras in S.A. No. 1090 of 1983.

R. Sundaravaradhan T.R.B. Sivakumar, K.V. Vijayakumar for the Appellant.

M.S. Ganesh, R. Ayyam Perumal, K. Seshachary, V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. This is an appeal for setting aside judgment dated 27.2.2001 passed by the learned Single Judge of Madras High Court in Second Appeal No. 1090/1983 and Civil Miscellaneous Petition No.8137/1983 whereby he reversed the judgments and decrees of the trial Court and the lower appellate Court and dismissed the suit filed by the appellant for partition of his 1/17th share in the suit property.

2. Shri K. Perumal Iyer, who owned the suit property, executed Settlement Deed dated 27.3.1969 in favour of the appellant, respondent Nos.1 and 2 and 13 others and declared that from the date of execution he and the beneficiaries shall enjoy the land and house etc. without creating any encumbrance or making any alienation whatsoever. He further declared that during his life, he will collect the rental income from the land and house and after paying the municipal taxes, remaining income would be spent by him according to his choice; that after his death, the property shall be sold at the prevailing market price by all 16 beneficiaries and out of the sale proceeds, a religious trust should be created by paying Rs.4,000/- to Devasthanam of Sri Prasanna Venkatesa Perumal in the office of the Saurashtra Sabha at Madurai for the purpose of taking out annual procession of Perumal in the sacred streets on Amavasai day in the month of Margazhi; that the honors of the

temple should be bestowed upon beneficiary Nos.1 and 2 and, after them, upon their heirs; that from the sale proceeds, the beneficiaries shall purchase an immoveable property of Rs.4,000/- in the name of Balu G. Perumal Iyer Feeding Charities and all 16 trustees shall provide for feeding of his relatives on the day of the procession of the deity (Perumal) and that if there is delay in purchasing the immovable property, the beneficiaries shall be free to advance the money on interest for the purpose of generating income which could be used for feeding; that his last rites shall be performed by beneficiary Nos.1 and 2 and all 16 persons shall together spend Rs.2000/- from their personal funds for that purpose. The settlor also indicated that he had mortgaged the land and house to Ramaseshan and Co. vide Mortgage Deed dated 24.3.1969 for a sum of Rs.1500/- which shall be redeemed by him and in the event of death before redemption, all 16 beneficiaries shall discharge the debt. The settlor further ordained that after deducting Rs.8,000/- from the sale price, the balance amount should be divided into 17 shares of which beneficiary Nos.1 and 2 shall take three shares and beneficiary Nos.3 to 16 shall take one share each. If any one of 16 beneficiaries was to die before sale of the property, the remaining persons were to get absolute right to sell the property. The settlor finally recorded that he shall have no right whatsoever to cancel the 'Settlement Deed' for any reason whatsoever or alter the terms thereof.

3. Shri K. Perumal Iyer died on 4.12.1972. After his death, the appellant filed a suit (O.S. No.626/1972) for appointment of receiver to carry out the directions mentioned in the 'Settlement Deed'. The trial Court decreed the suit, but on appeal, the High Court reversed the decree of the trial Court and dismissed the suit with an observation that the same shall not operate as *res judicata* against the fresh suit which may be filed by the plaintiff (appellant herein). After disposal of the appeal, the appellant filed O.S. No.858 of 1979 for partition of his 1/17th share in the suit property and for grant of a declaration that in view of the negative covenant contained in

the `Settlement Deed', the settlor had no right to execute Revocation Deed dated 27.2.1970 or Will dated 30.7.1972. In the written statement filed by defendant Nos.1 and 2 (respondent Nos.1 and 2 herein), it was claimed that the appellant and his brothers and sisters obtained the 'Settlement Deed' by playing fraud and on discovery thereof, Shri K. Perumal Iyer executed `Revocation Deed' and then executed the `Will' whereby he bequeathed the property in their favour. They also pleaded that the suit filed by the plaintiff (appellant herein) is barred by Order II Rule 2 of the Code of Civil Procedure (CPC) because the earlier suit filed by him for appointment of receiver for carrying out the directions contained in the `Settlement Deed' was dismissed by the High Court in A.S. No. 374/1974.

4. On the pleadings of the parties, the trial Court framed as many as 12 issues including the following:

1. Whether the will in favour of defendants 1 and 2 is valid and binding?

2. Whether the document dated 27.3.1969 is not a settlement?

3. Whether the cancellation deed dated 27.2.1970 is true and valid?

4. Whether the suit is barred by res judicata?

5. Whether the suit is barred under Order II Rule 2 of C.P.C.?

6. Whether the settlement deed was brought into existence due to fraud and misrepresentation?

5. After considering the pleadings and evidence of the parties and hearing their advocates, the trial Court vide its judgment dated 24.4.1982 held that document marked Ex.A-2 was 'Settlement Deed' and not 'Will' and that the same was

not executed as a result of fraud or misrepresentation and that the settlor did not have the right to execute `Revocation Deed' Ex.B-2 and `Will' Ex.B-3. The trial Court further held that the second suit filed by the plaintiff is not barred by *res judicata* or Order II Rule 2 CPC. In the end, the trial Court declared that the plaintiff is entitled to partition of the suit property and accordingly passed a preliminary decree in his favour.

6. Respondent Nos.1 and 2 challenged the judgment and decree of the trial Court in Appeal Suit No.102/1982, which was dismissed by the lower appellate Court vide judgment and decree dated 10.3.1983. However, the second appeal preferred by them was allowed by the learned Single Judge, who held that even though Ex.A-2 was titled and described as 'Settlement Deed', in reality it was a 'Will' executed by late Shri K. Perumal Iyer. The learned Single Judge further held that the appellant herein has no right in the suit property because the settlor had bequeathed the same in favour of respondent Nos.1 and 2 herein.

7. Shri R. Sundaravaradhan, learned senior counsel appearing for the appellant submitted that the impugned judgment is liable to be set aside because the learned Single Judge misinterpreted Ex.A-2 and held it to be a 'Will' ignoring the specific stipulation contained therein that it was a 'Settlement Deed'. Learned senior counsel referred to Section 19 of the Transfer of Property Act and argued that the transfer of the property rights in praesenti coupled with an unequivocal inhibition against cancellation/amendment thereof clearly shows that Exhibit A-2 was a 'Settlement Deed' and not a 'Will'. In support of his arguments, Shri Sundaravaradhan relied upon the judgments of this Court in *Rajes Kanta Roy v. Santi Debi* 1957 SCR 77, *A. Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai* (1985) 4 SCC 85 and *Namburi Basava Subrahmanyam v. Alapati Hymavathi and others* (1996) 9 SCC 388 and of Madras High Court in *Gangaraju v. Pendyala Somanna* AIR 1927 Madras 197, *Venkatasubramaniya Iyer v. Srinivasa Iyer* AIR 1929 Madras 670.

8. Shri M.S. Ganesh, learned senior counsel appearing for the respondents supported the impugned judgment and argued that the learned Single Judge rightly treated Ex.A-2 as a 'Will' because the settlor did not create any right in praesenti in favour of the appellant and the prohibition contained therein against cancellation/modification of 'Settlement Deed' was not inconsequential. Shri Ganesh emphasized that the rights created in favour of the beneficiaries were contingent and were to become operative after the death of the settlor and, as such, the learned Single Judge rightly treated Ext. A-2 to be a Will. Learned senior counsel placed reliance on the judgment in *Vynior's* case, Trin. 7 Jac. 1 Rot. 2629 (printed in the English Reports, Volume LXXVII, King's Bench Division VI), as also the judgments of Calcutta and Madras High Courts in *Sagar Chandra Mandal v. Digamber Mandal and others* (1909) 9 CLJ 644, *Ramaswami Naidu and another v. Gopalakrishna Naidu and others* AIR 1978 Madras 54, *Ponnuchami Servai v. Balasubramanian and others* AIR 1982 Madras 281 and *Poongavanam v. Perumal Pillai and another* (1997) 1 MLJ 169 and argued that interpretation placed by the learned Single Judge on Ex.A-2 is in consonance with the law laid down by this Court and different High Courts. Shri Ganesh also referred to the judgment of this Court in *Rajes Kanta Roy v. Santi Debi* (supra) and submitted that the contingent right, if any, created in favour of the plaintiff-appellant could not be made basis for treating Ex.A-2 as 'Settlement Deed'.

9. For deciding the question raised in this appeal, it will be useful to notice the contents of Ex.A-2. The English translation of the document produced by Shri M.S. Ganesh, learned senior counsel for the respondents, which was accepted by learned senior counsel appearing for the appellant as correct, reads thus:

"Document No.753/1969

Settlement Deed of land and house property of the value of Rs.20,000/-

xxxxxxxxxxxxxxxx

The settlement deed executed by me in respect of the land and house etc. in favour of these 16 persons is as follows: I did not beget any male or female issue. My wife Ponnammal died about 3 years ago. In accordance with the terms of the partition deed dated 29.1.1937, bearing Ramanthapuram R.O.1 162.43 to 48. 701/1937 between my brothers Balu K. Ramaswamy Iyer and Balu K. Nannaiyer and me, I got as my share the undermentioned land and house etc. valued at Rs.20,000/-. Since then I have been in uninterrupted possession and enjoyment of the same on payment of municipal taxes and so on. You 16 persons being my relatives and considering your welfare and mine and out of my love and affection for you, *I settle this property on you 16 persons by executing this settlement deed. From this day onwards I and you shall enjoy the under mentioned land and house etc. without creating any encumbrance or making any alienation whatsoever.* During my lifetime I shall collect the rental income from the under mentioned land and house etc. and after paying the municipal taxes, with the remaining income I shall spend my life as I wish till the end of my days. After my death, you 16 persons shall become eligible and have absolute right to sell the under mentioned land and house at the prevalent market price. Out of the sale proceeds thus received, you should create a religious trust by paying Rs.4,000/- to the Devasthanam of Sri Prasanna Venkatesa Perumal in the office of the Saurashtra Sabha at Madurai for the purpose of taking out annual procession of Perumal in the sacred streets on Amavasai day in the month of Margazhi. The honors at the temple should be bestowed upon persons 1 and 2 among you and after them

upon their heirs. Further, from the sale proceeds, you should purchase an immoveable property for Rs.4,000/- in the name of Balu G. Perumal Iyer Feeding Charities and you 16 persons as trustees should provide for feeding of my relations on the day of the procession of the deity (Perumal). Should there be any delay in purchasing the immovable property, you 16 persons would be fully entitled to advance money on interest or by mortgage to generate income for the feeding. Upon my death, whoever among 1 and 2 of you is present shall perform my last rites and all you 16 persons shall together spend upto Rs.2,000/- from your personal funds for that purpose. During my life time, I myself shall redeem the mortgage of the undermentioned land and house which I had mortgaged to Rameseshan & Co. of Madurai by a mortgage deed dated 24.3.1969 for a sum of Rs.1500/-. In the event I die before redeeming the mortgage, you 16 persons shall discharge that debt. As mentioned above, after deducting Rs.8,000/- from the sale price, the balance amount should be divided into seventeen shares. 1 and 2 among you shall take three shares, 3 to 16 among you shall take one share each. 1 and 2 among you shall divide the three shares equally between you. If anyone of you 16 persons dies before the sale of the property, the remaining persons excluding the deceased shall have the absolute right to sell the property. *I shall have no right whatever to cancel this settlement deed for any reason whatsoever or to alter these terms. I execute this settlement deed of my own free will."*

(emphasis supplied)

10. Sections 19 and 21 of the Transfer of Property Act, 1882 (for short, 'the 1882 Act') which elucidate the expressions "vested interest" and "contingent interest" in the context of transfer of property read as under:

"19. *Vested interest.*–Where, on a transfer of

property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.– An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

21.*Contingent interest.* – Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain even shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception. **–** Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent."

A reading of the plain language of the above reproduced

sections makes it clear that an interest can be said to be a vested interest where there is immediate right of present enjoyment or a present right for future enjoyment. An interest can be said to be contingent if the right of enjoyment is made dependent upon some event which may or may not happen. On the happening of the event, a contingent interest becomes a vested interest.

11. In *Rajes Kanta Roy v. Santi Debi* (supra), this Court considered the distinction between 'vested interest' and 'contingent interest' in the backdrop of dispute between the widow and two sons of Ramani Kanta Roy, who possessed considerable properties. Two suits filed by the parties in relation to the suit property ended in compromise decrees. On account of the alleged violation of compromise decree, Santi Debi filed an application for execution and prayed for issue of a direction for release of the arrears of her monthly allowances. She also prayed for attachment and sale of the immovable properties. Appellant, Rajes Kanta Roy filed objections under Section 47 of the Code of Civil Procedure. The same were rejected by the Subordinate Judge. Appeal filed by him was dismissed by the Calcutta High Court. One of the questions considered by this Court was whether the interest created by the deed executed by Ramani Kanta Roy was a vested or contingent interest. The Court referred to Sections 19 and 21 of the Transfer of Property Act and Sections 119 and 120 of the Indian Succession Act, Williams on Executors and Administrators (13th Edition) Vol.2, p.658, Jarman on Wills (8th Edition) Vol.II, p.1390 and p.1373 and observed:

"Apart from any seemingly technical rules which may be gathered from English decisions and text-books on this subject, there can be no doubt that the question is really one of intention to be gathered from a comprehensive view of all the terms of a document. Learned Solicitor-General frankly admitted this, and also that a court has to approach the task of construction in such cases with a

bias in favour of a vested interest unless the intention to the contrary is definite and clear. It is, therefore, necessary to consider the entire scheme of the deed of trust in the present case, having regard to the terms therein, and to gather the intention therefrom."

The Court then referred to different portions of the deed executed by Ramanai Kanta Roy and observed:

"Now, there can be no doubt about the rule that where the enjoyment of the property is postponed but the present income thereof is to be applied for the benefit of the donee the gift is vested and not contingent. (See Explanation to s.19 of the Transfer of Property Act, Explanation to s.119 of the Indian Succession Act. See also Williams on Executors and Administrators, 13th Ed., Vol.2, p.663, para.1010, and Jarman on Wills, 8th Ed., Vol.II, p.1397). This rule operates normally where the entire income is applied for the benefit of the donee. The distinguishing feature in this case is that it is not the entire income that is available to the donee for their actual use but only a portion thereof. But it is to be observed that according to the scheme of the trust deed, the reason for limiting the enjoyment of the income to a specified sum thereof, is obviously in order to facilitate and bring about the discharge of the debts. As already explained the underlying scheme of the trust deed is that the enjoyment is to be restricted until the debts are discharged. Whatever may be said of such a provision where a donee is not himself a person who is under any legal obligation aliunde to discharge such debts, the position in this case is different. The two sons are themselves persons who, if the settlor died intestate, would be under an obligation to discharge his debts out of the properties which devolve upon them. It is only the surplus which would be legally available for division between them. In such a case, the balance of the income which is meant to be applied for

the discharge of the debts is also an application of the income for the benefit of the donees. It follows that the entire income is to be applied for the benefit of the donee and only the surplus, if any is available to the donees. Hence the provision in the trust deed that lots I to IV are to devolve on Rajes and lot V on Ramendra and that the surplus income of each of these lots after the discharge of the debts is also to devolve in the same way, clearly operates as nothing more than the present allotment of these properties themselves to the donees subject to the discharge of debts notionally in the same proportion. *Thus, taking the substance of the entire scheme of this division between the two sons the position that emerges is as follows. (1) Specified lots are ear-marked for each of the two sons. (2) The present income out of those lots is to be applied for the discharge of the debts after payment of specified sums therefrom by way of monthly payments to the two sons and presumably such application is to be notionally pro rata. (3) Any surpluses which remain from out of the income of each of the lots are to go to the very person to whom the corpus of the lot itself is to belong on the termination of the trust. (4) In the event of any of the two sons dying before the termination of the trust, his interest in the monthly payments out of the income is to devolve on his heirs. These arrangements taken together clearly indicate that what is postponed is not the very vesting of the property in the lots themselves but that the enjoyment of the income thereof is burdened with certain monthly payments and with the obligation to discharge debts therefrom notionally pro rata, all of which taken together constitute application of the income for his benefit.*

It may be noticed at this stage that one of the features of a contingent interest is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such a person do not get the benefit

of the gift. But the trust deed in question specifically provides in the case of Rajes – with whose interest alone we are concerned – that even in the event of his death it is his heirs (then surviving) that would take the interest. It has been urged that the provision in cl.12(a) in favour of the heirs then surviving is in the nature of a direct gift in favour of the heir or heirs who may be alive at the date when the contingency disappears. But even so, this would make no practical difference. It is to be remembered that in this case the parties belong to the Dayabhaga school of Hindu Law – and this is admitted before us. It is also to be remembered that up to the third degree in the male line the principle of representation under the Hindu Law operates. *The net result of the provision, therefore, is that whenever the alleged contingency of discharge of debts may disappear the person on whom the interest would devolve would, in the normal course, be the very heir (the lineal descendant then surviving or the widow) of Rajes. The actual devolution of the interest, therefore, would not be affected by the alleged contingency. That being so, it is more reasonable to hold that the interest of Rajes under the deed is vested and not contingent.*

This view is confirmed by the fact that under the compromise decree which is now sought to be executed, both the judgment-debtors, Rajes and Ramendra, created a charge for the monthly payment to Santi Devi and agreed to such charge being presently executable. This shows clearly that they themselves understood the interest available to them under the trust as a vested interest."

(emphasis supplied)

12. In *Usha Subbarao v. B.N. Vishveswaraiah* (1996) 5 SCC 201, a two-Judge Bench was called upon to consider whether the appellant is entitled to share of her husband in the

properties left by her father-in-law, Dr. N.S. Nanjundiah on the basis of a Will executed by him. The appellant pleaded that the respective shares of the sons of the testator including her husband vested in them as per the Will and after the death of her husband, she is entitled to the share of her husband. The trial Court held that the succession opened on the death of the testator by virtue of which all his sons became entitled to equal shares in the properties and the recital in the Will that the partition should take place amongst the surviving children after the death of Smt. Nadiga Nanjamma is really intended to refer to the children surviving the testator. This view of the trial Court was reversed by the High Court and the suit was dismissed. This Court referred to Sections 19 and 21 of the 1882 Act, Sections 119 and 120 of the Indian Succession Act and reiterated one of the propositions laid down in *Rajes Kanta Roy v. Santi Devi* (supra) by making the following observations:

"*Although the question whether the interest created is a vested or a contingent interest is dependent upon the intention to be gathered from a comprehensive view of all the terms of the document creating the interest, the court while construing the document has to approach the task of construction in such cases with a bias in favour of vested interest unless the intention to the contrary is definite and clear."*

The ratio of the above noted two judgments was followed in another two-Judge Bench in *Kokilambal v. N. Raman* (2005) 11 SCC 234.

13. Having noticed the distinction between vested interest and contingent interest, we shall now consider whether Ex.A-2 was a Settlement Deed or a Will. Although, no strait-jacket formula has been evolved for construction of such instruments, the consistent view of this Court and various High Courts is that while interpreting an instrument to find out whether it is of a

testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest in praesenti in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. It has also been held that form or nomenclature of the instrument is not conclusive and the Court is required to look into the substance thereof.

14. Before proceeding further, we may notice the judgments on which reliance was placed by learned counsel for the parties. In *Gangaraju v. Pendyala Somanna* (supra), the learned Single Judge was called upon to construe deed dated 27.2.1917 executed by one Kristnamma. The learned Single Judge referred to the contents of the document and observed:

> "The document on the face of it is of a non-testamentary character. It was so stamped and so registered. It is called a dakal dastaveju, which means a conveyance or settlement deed. It is true that a document which is not a Will in form, may yet be a Will in substance and effect; but as was held in *Mahadeva Iyer v. Sankarasubramania Iyer* (1), if an instrument is a deed in form, in order to hold that it is testamentary or in the nature of a Will, there must be something very special in the case; and unless there are circumstances which compel the Court to treat an instrument in the form of a deed as a Will, the Court will not do so. The leading argument of the appellant is that the document created no estate in praesenti. A more literal translation of the fourth sentence in para 2 of the document is:
>
> > Therefore, on account of my affection for you, I have arranged that after my death the property shall

> belong to you.
>
> It is certainly very difficult to derive from these words any immediate interest crated in favour of the plaintiff. But the line between a Will and a conveyance reserving a life estate is a fine one, and it would be hard to define in some cases where the document has been held to be non-testamentary, wherein the personal interest which was transferred consists. *A more easily applied test is that of revocability. There is nothing in the suit document to show that Kristnamma reserved the right to revoke it. On the contrary there is an undertaking not to alienate any part of the property during his lifetime. I consider that this is equivalent to a promise not to revoke the instrument, because if the executant intended to reserve that right he could not consistently have parted with the right to alienate.* The same intention to give finality to the deposition is suggested by Ex.3, which is a conveyance of a portion of the property executed jointly by Kristnamma and the plaintiff. The fact that the plaintiff was required to join is significant, and in the schedule the property is described as that which was conveyed by Kristnamma to him. *This document seems also to lend some colour to the view that an immediate conveyance of interest was intended in Ex.F. I think that Kristnamma had the intention not to revoke the conveyance and this has always been regarded as one of the most important tests."*
>
> (emphasis supplied)

15. In *Venkatasubramaniya Iyer v. Srinivasa Iyer* (supra), the question considered was whether the document marked Exhibit – C is a Settlement or a Will. The learned Single Judge answered the question in the following words:

> "….A question of that kind is one that has to be decided primarily on the terms of the document itself. It was executed by a widow, the mother of the plaintiff, and is

styled a settlement in favour of the plaintiff. It recites certain family arrangements by which certain moveables are divided between the widow and the plaintiff, and the widow retains certain immovable property for herself. *It deals with property to an extent of over three velis left to her by her husband under his will absolutely and recites that, in respect of that on account of the request made to her by her son for the benefit of his minor son, the present defendant and out of favour to himself and in consideration of the arrangement that he would not during her lifetime encumber or alienate the rights that would come to him in the property after her death, she on her side undertakes to meet all her own expenses till her death out of the income and not to alienate the property. Thus the document prohibits both parties from alienating the rights retained or given thereby.* It directs that after the widow's death, the plaintiff and his heirs shall enjoy the property with all absolute rights. It further provides that if the widow fails to pay the kist on the property, the plaintiff shall pay and may recover from her out of her income, and that the pattah for the property shall be transferred to the plaintiff. The document is styled a settlement and registered.

It is contended by the appellant that the document is a will since the only operative portion of it is that which bequeaths the property to the plaintiff and his heirs after the death of the widow. Both the lower Courts have rejected this contention and held the document to be a settlement. I think it is clear from the tenor of the document that it is not a will. It mentions considerable property which is not disposed of by it at all. It does more than bequeath property to the plaintiff after the widow's death. He obtains by it certain rights in presenti, for example, the right as covenanted with him that the widow will not alienate the property during her lifetime. He himself is given the right to recover the unpaid kists from

her income and to have the pattah transferred to his name. There is no language indicating that the widow was retaining with her any power to revoke the document, while the surrender of her right to alienate during her lifetime indicates that she did not reserve any power to revoke. These points combined with the facts that the parties intended the document to be a settlement and styled it as such and that it was handed over to the plaintiff and not retained with the widow are sufficient to indicate that the widow was merely retaining a life-interest in the property and was transferring to the plaintiff the vested remainder. It is not of much help to refer to reported rulings in a case of this kind when the decision has to be based on the wording of a particular document, but documents of very similar wordings were held to be settlements and not wills in *Rajammal v. Authiammal* [1910] 33 Mad. 304 and in *Gangaraju v. Somanna* A.I.R. 1927 Mad. 197. These come nearer to the present case than those in *Venkatachala Chetty v. Govindaswamy Naicker* A.I.R. 1924 Mad. 605, *Thakur Ishri Singh v. Baldas Singh* [1884] 10 Cal. 792 quoted by the appellant. I can see no ground for holding that the lower appellate Court made any error of law in regarding Ex. C. on the face of it as a settlement and not a will."

(emphasis supplied)

16. In *Ramaswami Naidu v. Gopalakrishna Naidu* (supra), the High Court laid down the following broad test for construction of document:

"The broad tests or characteristics as to what constitutes a will and what constitutes a settlement have been noticed in a number of decisions. *But the main test to find out whether the document constitutes a will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant.*

If the disposition is to take effect on the death of the executant, it would be a will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. *The general principle also is that the document should be read as a whole and it is the substance of the document that matters and not the form or the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant."*

"If the clause relating to the disposition is clear and unambiguous, most of the other clauses will be ineffective and explainable and could not change the character of the disposition itself. For instance, the clause prohibiting a revocation of the deed on any ground would not change the nature of the document itself, if under the document there was no disposition in praesenti."

(emphasis supplied)

17. In *Ramaswami Naidu v. M.S. Velappan and others* (1979) 2 M.L.J.88, the Division Bench of the Madras High Court referred to the documents which were subject matter of consideration before it and observed:

"In the instant case the first plaintiff was already in charge of the properties as trustee to perform the obligations created under it and continued them after the lifetime of Meenakshi Ammal. There are also positive words whereby it was made clear that the properties should be vested in Velappan and his heirs for them to enjoy the same absolutely…….

These two dispositive clauses create an interest in praesenti. The question is whether the postponement of

such proprietary rights already vested in Velappan and his heirs, to the lifetime of Meenakshi Ammal, would make any difference. The Explanation to Section 19 of the Transfer of Property Act, providing that a vested interest is not defeated by the death of the transferee before he obtains possession, makes the legislative intent clear that such a vested interest, merely for the reason that it becomes vested after the lifetime of the settlor, would not make it a settlement not being in praesenti. We are therefore unable to agree with the contention that the interest that Velappan, the first plaintiff, obtained under the instrument is not a vested one and that it could be defeated because it is postponed till after the lifetime of Meenakshi Ammal.

In the instant case the document itself is styled as a settlement deed. It has been registered. The right to enjoy the properties and secure the benefits and the temple honours as trustee under it have become a *fait accompli* even during the lifetime of Meenakshi Ammal. There is therefore no ambulation in the matter of the vesting of the interest in the first plaintiff by any declaration or use of words either express or implied."

(emphasis supplied)

18. In *A. Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai* (supra), this Court considered whether by virtue of Settlement Deed executed by appellant A. Sreenivasa Pai in favour of his mother-in-law Padmavathi Ammal, the latter became absolute owner of the properties described in the plaint 'A' schedule and upon her death, her daughter S. Lakshmi Ammal acquired title to the said properties under the law of inheritance being the sole heir of the deceased. While dealing with the issue, the Court referred to the terms of Settlement Deed and held that A. Sreenivasa Pai desired to give the properties to V. Sreenivasa Pai absolutely subject to the life interest conferred on Padmavathi

Ammal and he had no intention to give the properties to be enjoyed by Padmavathi Ammal and by her heirs from generation to generation.

19. In *Namburi Basava Subrahmanyam v. Alapati Hymavathi and others* (supra), this Court observed that the nomenclature of the document is not conclusive and the Court has to find whether the document confers any interest in the property in praesenti so as to take effect intra vivos and whether an irrevocable interest thereby is created in favour of the recipient, all those to be gathered from the recitals of the documents as a whole and observed:

> "The said recital clearly would indicate that the settlement deed executed on that date is to take effect on that day. She created rights thereunder intended to take effect from that date, the extent of the lands mentioned in the Schedule with the boundaries mentioned thereunder. A combined reading of the recitals in the document and also the Schedule would clearly indicate that on the date when the document was executed she had created right, title and interest in the property in favour of her second daughter but only on her demise she was to acquire absolute right to enjoyment, alienation etc. In other words, she had created in herself a life interest in the property and vested the remainder in favour of her second daughter. It is settled law that the executant while divesting herself of the title to the property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on the settlor's demise. A reading of the documents together with the Schedule would give an indication that she had created right and interest in praesenti in favour of her daughter Vimalavathy in respect of the properties mentioned in the Schedule with a life estate for her enjoyment during her lifetime. Thus, it could be construed rightly as a settlement deed but not as a Will. Having divested herself of the right and title thereunder, she had,

> thereafter, no right to bequeath the same property in favour of her daughter Hymavathy. The trial court and the learned Single Judge rightly negatived the claim. The Division Bench was not, therefore, correct in law in interfering with the decree of the trial court."

20. In *Vynior's* case (supra) Lord Coke said "if I make my testament and last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." This statement of law was relied upon by the Division Bench of Calcutta High Court in *Sagar Chandra Mandal v. Digamber Mandal and others* (supra). In that case, the court was called upon to consider the true character of the instrument which was described as a Will. After noticing the contents of the documents, the Division Bench referred to *Vynior's* case and observed:

> "As to the true character of the instrument propounded by the appellant we think there can be no reasonable doubt that it is a will. A will is defined in section 3 of the Indian Succession Act as the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. Section 49 then provides that a will is liable to be revoked or altered by the maker of it, at any time when he is competent to dispose of his property by will. If therefore an instrument is on the face of it of a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality, for as Lord Coke said in Vynior's Case. "If I make my testament and last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." The principal test to be applied is, whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his decease. If it is really of this latter nature, it

is ambulatory and revocable during his life. [*Musterman v. Maberley, and in Bonis v. Morgan*]. Indeed, the Court has sometimes admitted evidence, when the language of the paper is insufficient, with a view to ascertain whether it was the intention of the testator that the disposition should be dependent on his death. [*Robertson v. Smith*]. Tested in the light of these principles, there can be no doubt that the instrument now before us is of a testamentary character. It is described as a will and states explicitly that as after the death of the testator, disputes might arise among his relations with regard to the properties left by him, he made the disposition to be carried into effect after his demise. The terms and conditions are then set out, paragraph by paragraph, and in each paragraph the disposition is expressly stated to take effect after his demise. Against all this, reliance is placed on the sixth paragraph, in which the testator says that he would be at liberty to mortgage the properties and not to sell them absolutely. Such a restraint as this upon his own power of alienation during his lifetime would be obviously void. It does not indicate any intention to make the deed irrevocable."

21. In the light of the above, we shall now consider whether the trial Court and lower appellate Court rightly treated Ex. A-2 to be a Settlement Deed and the contrary finding recorded by the learned Single Judge of the High Court is legally unsustainable. A careful reading of Ex.A-2 shows that in the title itself the document has been described as Settlement Deed. By executing that document, Shri K. Perumal Iyer expressed his intention, in no uncertain terms, to settle the property in favour of 16 persons who were none else than his own relatives and declared that 'from this day onwards I and you shall enjoy the land and house without creating any encumbrance or making any alienation whatsoever.' This was an unequivocal creation of right in favour of 16 persons in praesenti. Though, the beneficiaries were to become absolute owners of their

respective shares after the death of the settlor, the language of the document clearly shows that all of them were to enjoy the property along with settlor during his lifetime and after his death, each of the beneficiaries was to get a specified share. In the concluding portion, the settlor made it clear that he will have no right to cancel the Settlement Deed for any reason whatsoever or to alter the terms thereof. The mere fact that beneficiary Nos. 1 and 2 and after them their heirs were to receive honours at the temple or that shares were to be divided after disposal of the property cannot lead to an inference that Ex.A-2 was a 'Will'. If Ex.A-2 is read as a whole, it becomes clear that it was a 'Settlement Deed' and the trial Court and the lower appellate Court did not commit any error by recording a finding to that effect. As a sequel to this, it must be held that the High Court committed serious error by setting aside the concurrent judgments and decrees of the two courts.

22. The judgments in *Vynior's* case and those of the Calcutta and Madras High Courts on which reliance was placed by the learned senior counsel for the respondents turned on their own facts and cannot be relied upon for declaring that Ex. A-2 was a 'Will'.

23. Although, in their written statement respondent Nos.1 and 2 did plead that Ex. A-2 was executed by Shri K. Perumal Iyer due to fraud or misrepresentation, no evidence was led by them to substantiate that allegation. Therefore, we do not find any valid ground or justification to entertain that plea.

24. In the result, the appeal is allowed. The impugned judgment is set aside and those of the trial Court and the lower appellate Court are restored. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

ASHOK KUMAR DAS & ORS.
v.
UNIVERSITY OF BURDWAN & ORS.
(Civil Appeal No. 392 of 2004)

MARCH 16, 2010

[MARKANDEY KATJU AND A.K. PATNAIK, JJ.]

Burdwan University Act, 1981—s. 21(xiii)—Promotions to different grades of non-teaching staff—Resolution of the Execution Council of the University as regard criteria for promotion—Challenge to—Direction by Division Bench of High Court to the University to send proposal in the Resolution to State Government for approval—Subsequently, approval of Resolution by State Government—On appeal, held: As per the wordings of s. 21(xiii), 'with the approval of the State Government', Executive Council of the University could determine the terms and conditions of services of the staff and obtain approval of State Government subsequently—In case, State Government did not grant approval subsequent to the Resolution, action taken on the basis thereof, would be invalid—On facts, promotions to different grades of non-teaching staff on the basis of the Resolution are valid since the Resolution was approved by State Government.

The promotions to different grades of non-teaching staff of the University were being done on the basis of seniority. On 26.06.1995, the Executive Council of the University resolved that the criteria of Seniority-cum-Efficiency as enunciated in the Government Order dated 17.01.1985 would be followed for promotion. The appellants filed the writ petition challenging the Resolution of the Executive Council of the University. The Resolution was set aside and the University was directed to re-frame the guidelines for promotion in accordance with the Government Order to give promotions to the

candidates. The Division Bench of the High Court directed the University to send the proposal in the said Resolution to the State Government for its approval and in case of approval, the University would undertake the exercise of promotion of their staff. The direction was carried out and the State Government by its order dated 10.01.2002 approved the said Resolution. Hence the present appeal.

Dismissing the appeal, the Court

HELD: The words used in s. 21 (xiii) of the Burdwan University Act, 1981 are not "with the permission of the State Government" nor "with the prior approval of the Stage Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of non-teaching staff. Similarly, if words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval to the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the

State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise. Therefore, the promotions to different grades of non-teaching staff made by the University on the basis of the principles laid down in the Resolution of the Executive Council of the University adopted on 26.06.1995 are valid as the Resolution has been approved by the State Government on 10.10.2002. [Paras 10 and 11] [436-F-H; 437-A-D]

T.R. Kapur & Ors. v. State of Haryana & Ors. **AIR 1987 SC 415;** *Prem Kumar Verma & Anr. v. Union of India & Ors.* **(1998) 5 SCC 457;** *Union of India v. S.S. Uppal & Anr.* **(1996) 2 SCC 168;** *Kulwant Kumar Sood v. State of H.P. & Anr.* **(2005) 10 SCC 670;** *High Court of Delhi & Anr. Etc. v. A.K. Mahajan & Ors.* **(2009) 12 SCC 62;** *U.P. Avas Evam Vikas Parishad & Anr. v. Friends Co-operative Housing Society Ltd. & Anr.* **(1995) Supp (3) SCC 456;** *High Court of Judicature for Rajasthan v. P.P. Singh & Anr***. (2003) 4 SCC 239, reffered to.**

Black's Law Dictionary **(Fifth Edition), referred to.**

Case Law Reference:

AIR 1987 SC 415	**Referred to.**	**Para 4**
(1998) 5 SCC 457	**Referred to**	**Para 4**
(1996) 2 SCC 168	**Referred to**	**Para 4**
(2005) 10 SCC 670	**Referred to**	**Para 4**
(2009) 12 SCC 62	**Referred to**	**Para 4**
(1995) Supp (3) SCC 456	**Referred to**	**Para 6, 8, 9**
(2003) 4 SCC 239	**Referred to**	**Para 6, 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 392 of 2004.

From the Judgment & Order dated 8.8.2002 of the High Court of Calcutta in Appeal being MAT No. 2604 of 2001.

Ranjan Mukherjee, Raja Chatterjee, Avik Chatterjee, Sachin Das, G.S. Chatterjee for the Appellant.

Nagendra Rai, Azim H. Laskar, Monish Sen, Smarhar, Shantanu Sagar, Abhijit Sengupta, T.C. Sharma, Neelam Sharma, Aasheem Chandra, Joydeep Mazumdar, Vinod Kumar, Chiraranjan for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment and order dated 08.08.2002 of the Division Bench of the High Court of Calcutta in MAT No.2604 of 2001 and CAN No.1624 of 2001 filed by some members of the non-teaching staff of the University of Burdwan [For short 'the University'].

2. The facts very briefly are that promotions to different grades of non-teaching staff of the Burdwan University were being done on the basis of seniority. On 26.06.1995, the Executive Council of the University considered the principle of promotion as enunciated in the Government Order dated 17.10.1985 and resolved that criteria of 'Seniority-cum-Efficiency' as enunciated in the aforesaid Government Order dated 17.10.1985 will be followed for promotion to different grades of non-teaching staff of the University. The Executive Council of the University in its meeting on 26.06.1995 also resolved the manner in which the efficiency of a candidate for promotion will be considered along with seniority for promotions to different grades. For the first promotion, efficiency of the employee was to be determined on the basis of recording in his personal file and the report received from the Controlling

Officer of the candidate; for the second promotion, 50% weightage will be given to efficiency, out of which 25% would be allotted for work performance and 25% would be allotted to a written test for ascertaining the subject competence of the candidate and for the third promotion, the efficiency was to be determined on the basis of recording in the personal file and the report of the Controlling Officer. The Resolution of the Executive Council of the University taken in its meeting on 26.06.1995 was to be implemented with immediate effect.

3. Aggrieved by the Resolution of the Executive Council of the University, some of the appellants filed the Writ Petition being C.O. No.17139 (W) of 1995 and a learned Single Judge of the High Court of Calcutta allowed the writ petition in part and set aside the Resolution of the Executive Council of the University taken on 26.06.1995 and directed the University to re-frame its guidelines for promotion strictly in accordance with the Government Order dated 17.10.1985 in the light of the observations made in the judgment and to give promotion to the candidates on the basis of the Government Order dated 17.10.1985 after re-framing the guidelines.

4. The University challenged the judgment of the learned Single Judge before the Division Bench of the High Court of Calcutta and the Division Bench held in the impugned judgment and order that under Section 21 (xiii) of the Burdwan University Act, 1981 the Executive Council of the University was empowered to determine, with the approval of the State Government, the terms and conditions of service of non-teaching staff of Colleges other than Government Colleges, but no approval of the State Government had been taken to the Resolution of the Executive Council of the University adopted in its meeting held on 26.06.1995. By the impugned judgment and order, the Division Bench of the High Court of Calcutta directed the University to send the proposal in the Resolution of the Executive Council of the University adopted on 26.06.1995 to the State Government for its approval and further

directed that in case the State Government approves the proposal, the University will undertake the exercise of promotion of their staff. Pursuant to the impugned judgment and order of the Division Bench, the proposal was sent to the State Government and the State Government by its order dated 10.10.2002 has approved the Resolution of the Executive Council of the University adopted on 26.06.1995.

5. The contention raised before us by the learned counsel for the appellants was that the Resolution of the Executive Council of the University adopted on 26.06.1995 will be effective only from 10.10.2002 when the State Government approved the Resolution and will not apply to any promotions made prior to 10.10.2002 because under Section 21 (xiii) of the Burdwan University Act, 1981 the Executive Council of the University could determine the terms and conditions of the service of the non-teaching staff of the Colleges other than Government Colleges with the approval of the State Government and not otherwise. Relying on the decisions of this Court in *T. R. Kapur & Ors. v. State of Haryana & Ors.* [AIR 1987 SC 415], *Prem Kumar Verma & Anr. v. Union of India & Ors.* [(1998) 5 SCC 457], *Union of India v. S. S. Uppal & Anr.* [(1996) 2 SCC 168], *Kulwant Kumar Sood v. State of H. P. & Anr.* [(2005) 10 SCC 670] and *High Court of Delhi & Anr., Etc. v. A. K. Mahajan & Ors.* [(2009) 12 SCC 62], learned counsel for the appellants submitted that the Resolution of the Executive Council of the University adopted on 26.06.1995 and approved by the State Government on 10.10.2002 cannot, therefore, apply to promotions to vacancies which have occurred prior to 10.10.2002. Learned counsel for the Intervenors supported the aforesaid stand of the appellants.

6. Learned counsel for the respondents Nos. 1 to 3, on the other hand, submitted that Section 21 (xiii) used the expression "approval of the State Government" and not "prior approval of the State Government" and it has been held by this Court in *U. P. Avas Evam Vikas Parishad & Anr. v. Friends Co-operative*

Housing Society Ltd. & Anr. [(1995) Supp.(3) SCC 456] and *High Court of Judicature for Rajasthan v. P. P. Singh & Anr.* [(2003) 4 SCC 239] that when an approval is required, an action holds good and only if it is disapproved it loses its force. He further submitted that promotions made on the basis of Resolution of the Executive Council of the University adopted on 26.06.1995, therefore, hold good and now that the State Government has approved the Resolution of the Executive Council of the University adopted on 26.06.1995 by order dated 10.10.2002, the promotions made on the basis of the Resolution dated 26.06.1995 of the Executive Council of the University hold good and cannot be set aside by this Court.

7. In *Black's Law Dictionary* (Fifth Edition), the word "approval" has been explained thus: "the act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another." Hence, approval to an act or decision can also be subsequent to the act or decision.

8. In *U. P. Avas Evam Vikas Parishad* (supra), this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow:

> "6. This Court in *Life Insurance Corpn. of India* v. *Escorts Ltd*. [(1986) 1 SCC 264], considering the distinction between "special permission" and "general permission", previous approval" or "prior approval" in para 63 held that: "We are conscious that the word 'prior' or 'previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) of the Act." Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act, it was stated in *Lord Krishna Textiles Mills Ltd*. v. *Workmen* [AIR 1961 SC

> 860], that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)."

9. Following the decision in *U. P. Avas Evam Vikas Parishad* (supra), this Court again held in *High Court of Judicature for Rajasthan v. P. P. Singh & Ors.* (supra) in para 40:

> "When an approval is required, an action holds good and only if it is disapproved it loses its force. Only when a permission is required, the decision does not become effective till permission is obtained. (See *U.P. Avas Evam Vikas Parishad* v. *Friends Coop. Housing Society Ltd*.)."

10. Section 21 (xiii) of the Burdwan University Act, 1981 is quoted herein below:-

> "21. Subject to the provisions of this Act, the Executive Council shall exercise the following powers and perform the following functions:
>
> (i) to (xii) .....
>
> (xiii) to determine, with the approval of the State Government, the terms and conditions of service of Librarians and non-teaching staff."

The words used in Section 21 (xiii) are not "with the permission of the State Government" nor "with the prior approval of the State Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the

University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise.

11. We, therefore, hold that promotions to different grades of non-teaching staff made by the University on the basis of the principles laid down in the Resolution of the Executive Council of the University adopted on 26.06.1995 are valid as the Resolution has been approved by the State Government on 10.10.2002. This appeal is without any merit and is dismissed with no order as to costs.

N.J. Appeal dismissed.

L.I.C. OF INDIA AND ANR.
v.
RAM PAL SINGH BISEN
(Civil Appeal No. 893 of 2007)

MARCH 16, 2010

[B. SUDERSHAN REDDY AND DEEPAK VERMA, JJ.]

Code of Civil Procedure, 1908: Order 12 r.2 – Mere marking of exhibit on a document does not dispense with its proof – On facts, in a suit by employee challenging order of dismissal, employer-appellant did not lead any oral evidence yet some of the documents filed by him were exhibited – Employee was not served with any notice of admission or denial of documents during trial – In the absence of oral evidence tendered by employer and in absence of putting his own defence to the employee during his cross examination in the court, the documents filed by employer and marked as exhibit would not establish the case of employer – Evidence Act, 1872.

Natural justice: Dismissal order – Neither the copy of inquiry report was made available to dismissed employee nor the reason for dismissal disclosed in show cause notice – Held: There was violation of principles of natural justice – Service law – Dismissal.

Evidence Act, 1872: Contents of documents are required to be proved either by primary or by secondary evidence – Admission of documents may amount to admission of contents but not its truth – Documents when not produced and marked as required under the Evidence Act cannot be relied upon by the Court – Contents of the document are not proved by merely filing in a court – Code of Civil Procedure, 1908.

Respondent was dismissed from service. His representation to the employer-appellant that reasonable

and sufficient opportunity of hearing during the domestic inquiry was not given, was rejected. The departmental appeal was also rejected. Respondent filed a suit challenging his dismissal. Appellant did not lead any oral evidence yet some of the documents filed by it were exhibited. Appellant also did not serve any notice of admission or denial of documents on the respondent during trial as contemplated under Order 12 r.2 CPC. Trial Court held that there was complete violation of principles of natural justice as neither the copy of inquiry report was made available to respondent nor it was disclosed in show cause notice as to on what premise finding of guilt was recorded by inquiry officer or by Departmental authority while passing order of dismissal. Trial Court accordingly decreed the suit and directed reinstatement alongwith the consequential benefits. High Court upheld the decision of trial Court. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. The defence that was pleaded and set up by the appellants in their written statement was not put forth to the respondent, while he was in the witness box. The records also did not reveal that procedure as contemplated in Rule 2A of Order XII , CPC was adopted either by the appellants or by the trial Court to prove the documents filed by the appellants and mark them as Exhibits. Thus, no advantage thereof could be accrued to the appellants, even if it is assumed that said documents were admitted by respondent and were then exhibited and marked. It is true that failure to prove the defence did not amount to an admission, nor did it reverse or discharge the burden of proof of the plaintiff but still the duty cast on the defendants had to be discharged by adducing oral evidence, which the appellants miserably failed to do. Thus looking to the matter from any angle, it is fully established that

appellants had miserably failed to prove and establish their defence in the case. [Paras 19, 24-25] [445-G-H; 447-B-E]

1.2. Mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. Admission by respondent of those documents cannot carry the case of the appellants any further and much to the prejudice of the respondent. It was the duty of the appellants to prove documents Exh. A-1 to Exh. A-10 in accordance with law. Filing of the Inquiry Report or the evidence adduced during the domestic enquiry would not partake the character of admissible evidence in a court of law. The documentary evidence was also required to be proved by the appellants in accordance with the provisions of the Evidence Act, which they have failed to do. The courts have committed no error in coming to the conclusion that respondent was denied opportunity of hearing, that being so, whole proceedings stand vitiated by non-adherence to the principles of natural justice. [Paras 26-27, 30] [447-F; 448-A-B, E-F]

2. Under the Law of Evidence also, it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the Court. Contents of the document cannot be proved by merely filing in a court. Looking to the manner in which the case was conducted in the trial Court, nothing can be done to grant any relief to the appellants. Respondent was able to successfully prove that there was denial of opportunity to him in the Departmental Enquiry. In this view of the matter, all subsequent actions taken thereto, would automatically

fail. The courts below committed no error in decreeing the suit of the respondent. However the question of his re-instatement would not arise as respondent already retired in the year 2000, after having attained age of superannuation. It could only be a case of some monetary benefit to him. In view of his superannuation, it would neither be fit nor proper to direct a fresh inquiry to be conducted against him. [Paras 31 and 34] [448-F-H; 449-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 893 of 2007.

From the Judgment & Order dated 30.9.2005 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Civil Special Appeal No. 42 of 1996.

P.S. Patwalia, Ramamoorthy, Indra Sawheny for the Appellants.

Chandan Ramamurthi for the Respondent.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Ignorance is a bliss, especially in the vast field of law, stands established from the narration of facts of this appeal as would fully expose it. Against findings of fact vide judgment and decree recorded by Additional District Judge No.2, Ajmer in Civil Suit No. 93 of 1982 (10/80), decided on 28.5.1993, confirmed in S.B. First appeal No. 178 of 1993 by learned Single Judge of the High Court of Judicature of Rajasthan at Jaipur and further affirmed in Special Appeal (Civil) No. 42 of 1996 by Division Bench of the said Court, decided on 30.9.2005, unsuccessful appellants/ defendants are before us, challenging the same on variety of grounds.

2. Needless to say the facts unfolded before us from the record as well as during the course of hearing reveal a sorry state of affairs as to the manner in which suit had been

contested in the trial court by the appellants herein, abutting gross negligence and callous manner, not even adhering to the provisions of the Code of Civil Procedure and the Indian Evidence Act, yet challenging the same before this Court, even after having lost from all courts.

3. Thumb-nail sketch of the facts of the case are as under:

4. Respondent herein original plaintiff was appointed by the appellants/defendants on probation as a Development officer on 5.4.1964. He was confirmed on the said post on 1.4.1966. It is not in dispute that his service conditions were regulated by Life Insurance Corporation of India (Staff) Regulations, 1960 (hereinafter shall be referred to as "Staff Regulations") framed in exercise of powers conferred under clause (b) of sub-section (2) of Section 49 of Life Insurance Corporation Act, 1956 (hereinafter referred to as the "Act").

5. Charge sheet dated 16.4.1974 imputing six charges was served on him. He was also placed under suspension. Supplementary charge sheet was also served on him on 21.10.1974. Mr. R.S. Maheshwari was appointed as Inquiry Officer, who after completion of inquiry proceedings furnished his report to Disciplinary Authority on 29.01.1976. On the basis of this, respondent was served with show-cause notice on 23.2.1976 stating inter-alia that in view of the fact that some of the serious charges stood proved against him, why order of dismissal from service be not passed against him.

6. Respondent submitted his reply to the show cause notice on 02.04.1976, pointing out irregularities committed during the course of inquiry by the Inquiry Officer. His categorical case in reply was that he has not been given adequate, proper, reasonable and sufficient opportunity of hearing during the domestic inquiry. Therefore, the whole inquiry stood vitiated on the principles of natural justice. It deserves to be quashed and no action on such an inquiry report can be taken against him.

7. However, without taking note of the submissions of the respondent, appellants by non speaking order and further without disclosing any opinion, on the basis of which respondent was held guilty of charges levelled against him, arrived at a conclusion for his dismissal from service vide order dated 11.5.1976.

8. Feeling aggrieved and dissatisfied, the respondent was constrained to prefer a departmental appeal under Regulation 40 of Staff Regulations but that too met the fate of dismissal vide order dated 20.12.1976.

9. He then submitted further mercy appeal before the Chairman of LIC but without any favourable result as the same came to be dismissed on 12.10.1977.

10. Feeling aggrieved by the aforesaid orders passed by appellants herein, respondent as plaintiff was constrained to file a suit, as an indigent person before Additional District Judge No.2, Ajmer, for declaration that the departmental inquiry proceedings culminating in order of dismissal from service, the appellate order, and further order passed by the Chairman of the appellant-Corporation as null and void. Consequently, he be held entitled for reinstatement in service with all consequential benefits. The learned trial Judge was pleased to grant permission to respondent-plaintiff to contest the suit as an indigent person.

11. Appellants herein as defendants, filed written statement, inter alia, denying that no proper or sufficient opportunity was afforded to the respondent. They further contended that despite grant of sufficient opportunity, respondent took undue adjournments on various earlier dates or had remained absent, and thereafter deliberately remained absent from the inquiry on 5.1.1976, thereby compelling the Inquiry Officer to proceed ex-parte against him. Thus, even after grant of several opportunities, he cannot legitimately contend that inquiry was hit by the principles of natural justice.

12. Thus, in general, they have denied averments of the plaint in toto and submitted that the suit being mis-conceived deserves to be dismissed with costs.

13. On the strength of the pleadings of the parties, trial court was pleased to frame six issues. The main and pertinent issue was with regard to the fact whether action of the appellants resulting in respondent's dismissal from service, rejection of appeal and further representation, was in violation of the principles of natural justice, if so, then to what reliefs respondent was entitled to.

14. Before proceeding further, it is pertinent to mention here that neither copy of Inquiry Report was made available to respondent nor it was disclosed in the show cause notice as to on what premise finding of guilt was recorded by Inquiry Officer or by the Disciplinary Authority while order of dismissal came to be passed against him.

15. To prove his averments in the suit, respondent-plaintiff tendered himself in the witness box and proved his case as also documents filed in support thereof. Surprisingly enough, appellants herein did not lead any oral evidence, yet some of the documents filed by appellants were exhibited, probably under misconception of law that they were not disputed in Court by respondent. It is also necessary to mention here that appellants had also not served any notice of admission or denial of documents on the respondent during trial as contemplated under Order XII Rule 2 of the Code of Civil Procedure (for short,'CPC').

16. After appreciating the evidence available on record, trial court was pleased to decide the issues in favour of the respondent-plaintiff, holding therein that there was complete violation of principles of natural justice inasmuch as no reasonable, proper and sufficient opportunity was afforded to him to defend himself in the departmental enquiry. Similarly, the appellate order was passed in a mechanical manner as also

the order on representation of the respondent by Chairman. In the result, the Trial Court passed a decree in favour of respondent, quashing and setting aside order of dismissal from service with further direction to reinstate him alongwith all consequential benefits including payment of salary for the intervening period.

17. Against this judgment and decree pronounced by trial court, appellants were constrained to file regular first appeal before learned single judge of the High Court which also came to be dismissed by him on 28.5.1993. Not being satisfied with the same, appellants carried Special Appeal before the Division Bench of the said High Court which also came to be dismissed on 30.9.2005. Hence, this appeal after grant of leave, by the defendants, having lost from all the three courts.

18. We have accordingly heard Mr. P.S. Patwalia, Mr. K. Ramamoorthy, learned Senior Counsel with Mrs. Indra Sawhney, learned counsel for the appellants and Ms. Chandan Ramamurthi, learned counsel for respondent and have critically examined the records.

19. It is pertinent to mention here that even though oral evidence lead by respondent plaintiff is not on record, but on certified copy thereof, being supplied to us by learned counsel for appellants, we have categorically gone through the same. It may be mentioned herein that in the same, there was not even a whisper of suggestion made to the plaintiff that he had appeared in the office on 5.1.1976 to collect his suspension allowance yet on being informed by the inquiry officer, that his inquiry too was fixed for the said date, therefore, he should come to attend it, on which respondent had informed the Inquiry Officer that he would appear, after some time along with his witnesses. In other words, even the defence that has been pleaded and set up by the appellants in their written statement was not put forth to the respondent, while he was in the witness box.

20. Thus, the question that arises for consideration is whether in absence of any oral evidence having been tendered by the appellants, and especially in absence of putting their own defence to the respondent during his cross examination in the Court, what is the effect of documents filed by appellants and marked as Exhibits.

21. Despite our persistent requests made to the learned counsel appearing for the appellants they have not been able to show compliance of Order XII Rule 1 and 2 of the CPC, meaning thereby that there has not been any compliance thereof.

22. Order XII, Rules 1 and 2 appearing in the Code of Civil Procedure reads as thus:

"ORDER XII

ADMISSIONS

1. Notice of admission of case. - Any party to a suit may give notice, by his pleading, or othewise in writing, that he admits the truth of the whole or any part of the case of any other party.

2. Notice to admit documents. - Either party may call upon the other party to admit, within seven days from the date of service of the notice any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense."

23. It is also necessary to mention here that Rule 2A of Order XII of the CPC deals with the situation where notice of

admission as contemplated in Order XII Rule 2 of the CPC has been served but is not denied then the same shall be deemed to have been admitted. Similarly, Rule 3A of the aforesaid Order grants power to the Court to admit any document in evidence, even if no notice has been served. The aforesaid provisions of law have been brought in the Code vide Amendment by Act No. 104 of 1976, w.e.f. 1.2.1977.

24. Records do not reveal that any such procedure was adopted either by the appellants or by the Trial Court to prove the documents filed by the appellants and mark them as Exhibits. Thus, no advantage thereof could be accrued to the appellants, even if it is assumed that said documents have been admitted by respondent and were then exhibited and marked.

25. No doubt, it is true that failure to prove the defence does not amount to an admission, nor does it reverse or discharge the burden of proof of the plaintiff but still the duty cast on the defendants has to be discharged by adducing oral evidence, which the appellants have miserably failed to do. Appellants, even though a defaulting party, committed breach and failed to carry out a legislative imposition, then had still to convince this Court as to what was the just cause for doing the same. Thus looking to the matter from any angle, it is fully established that appellants had miserably failed to prove and establish their defence in the case.

26. We are of the firm opinion that mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law. As has been mentioned herein above, despite perusal of the record, we have not been able to come to know as to under what circumstances respondent plaintiff had admitted those documents. Even otherwise, his admission of those documents cannot carry the case of the appellants any further and much to the prejudice of the respondent.

27. It was the duty of the appellants to have proved documents Exh. A-1 to Exh. A-10 in accordance with law. Filing of the Inquiry Report or the evidence adduced during the domestic enquiry would not partake the character of admissible evidence in a court of law. That documentary evidence was also required to be proved by the appellants in accordance with the provisions of the Evidence Act, which they have failed to do.

28. It is also worthwhile to mention here that one of the complainant Rattan Lal who was examined as witness during the departmental Inquiry was not cross-examined by respondent as he was not afforded proper opportunity in this regard.

29. Learned counsel for the appellants has strenuously submitted before us that on 5.1.1976, respondent deliberately, intentionally and with oblique motives remained absent from the Departmental Inquiry proceedings as on the same very day he had come to the office to collect his dues, was then informed about the proceedings fixed for the same day but he still remained absent. The said order sheet is neither signed by the respondent nor was this defence put up to him when he was in the witness box in cross-examination.

30. From the narration of aforesaid facts and law, we are of the considered opinion that the courts have committed no error in coming to the conclusion that respondent was denied opportunity of hearing, that being so, whole proceedings stand vitiated by non-adherence to the principles of natural justice.

31. Under the Law of Evidence also, it is necessary that contents of documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the Court. Contents of the document cannot be proved by merely filing in a court.

32. Learned counsel for the appellants Mr. P.S. Patwalia in his usual, polite yet firm vehemence contended that looking to the serious allegations levelled against him, the order of the Trial Court directing reinstatement with full back wages, which stood confirmed by Appellate Courts, would amount to rewarding a dishonest officer. But looking to the manner in which the case was conducted in the Trial Court, nothing can be done to grant any relief to the appellants. Respondent has been able to successfully prove that there was denial of opportunity to him in the Departmental Enquiry. In this view of the matter, all subsequent actions taken thereto, would automatically fail.

33. In this view of the matter, we are of the opinion that the courts below committed no error in decreeing the suit of the respondent.

34. It may further be noted that respondent has now retired in the year 2000, after having attained age of superannuation. Thus, the question of his re-instatement does not arise. It could only be a case of some monetary benefit to him. In view of his superannuation, it will neither be fit nor proper to direct a fresh inquiry to be conducted against him.

35. Thus, the appeal being devoid of any merit and substance is dismissed. Appellants to bear the cost of the litigation throughout.

36. Counsel's fee Rs.10,000/-.

D.G. Appeal dismissed.

SATYA PRAKASH & ORS.
v.
STATE OF BIHAR & ORS.
(Civil Appeal No. 2440 of 2010)

MARCH 16, 2010

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

Labour Law – Daily wage workers – Over 10 years service – Claim for regularization on the basis of judgment in *Uma Devi's case *– Held: Since the workers not appointed on any sanctioned post, not entitled to benefit of regularization* – *Uma Devi's *case explained and distinguished.*

The appellants, who had worked for more than 10 years on daily rated basis in Bihar Intermediate Education Council, filed writ petition before the High Court seeking regularization of their services. Single Judge of High Court directed the Council to consider the claim for regularization. Since there was no positive direction for regularization, appellants filed writ appeal, which came to be dismissed *in limine.*

In appeal to this court appellants contended that in Para 53 of the judgment in **State of Karnataka vs. Uma Devi and Ors.* **2006 (4) SCC 1, the employees who had worked for 10 years or more were directed to be regularized as one time measure and the same relief should be extended to the appellants.**

Disposing of the appeal, the Court

HELD: 1.1. The appellants are not entitled to get the benefit of regularization of their services since they were never appointed in any sanctioned posts. Appellants were only engaged on daily wages. In *Umadevi's* ***case*** **supreme Court held that the courts are not expected to issue any direction for absorption/regularization or**

permanent continuance of temporary, contractual, casual, daily-wage or *ad hoc* employees. Such directions issued could not be said to be in consistence with the constitutional scheme of public employment. The Court held that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. In view of the law laid down by this Court, the directions sought for by the appellants cannot be granted. Paragraph 53 of the *Umadevi's* judgment deals with irregular appointments (not illegal appointments). [Paras 6 and 7] [455-G; 455-C-F]

1.2. In *Uma Devi's* case the constitution bench has already drawn a distinction between temporary employees, daily-wagers and those who were appointed irregularly in the sense that there was non-compliance of some procedure in the selection process which did not go to the root of the selection process. Appellants will not fall in the category of the employees mentioned in paragraph 53 read with paras 15 and 16 of the Judgment in *Uma Devi's* case. Appellants' own case is that they were only engaged on daily wages basis and never appointed in service either on a temporary basis or on *ad-hoc* basis. [Paras 9 and 13] [457-D-E; 459-C-D]

State of Karnataka vs. Uma Devi and Ors. **2006 (4) SCC 1, explained and distinguished.**

S.V. Narayanappa vs. State of Mysore **(1967) 1 SCR 128;** *B.N. Nanjudappa vs. T. Thimmiah* **(1972)1 SCC 409, relied on.**

Punjab Water Supply and Sewerage Board v. *Ranjodh Singh and Ors.* **(2007) 2 SCC 491;** *State of Punjab* v. *Bahadur Singh and Ors.* **(2008) 15 SCC 737;** *C. Balachandran and Ors.* v. *State of Kerala and Ors.* **(2009) 3 SCC 179;** *State of Karnataka and Ors.* v. *G.V. Chandrashekar* **(2009) 4 SCC 342, referred to.**

2. Appellants stated that they had undergone a selection process held fourteen years back, following an advertisement published in the year 1995 but the merit list was neither prepared nor published. Selection process, though undertaken by the Council was not completed and now the Council is no more in existence. However, if the Board proposes to undertake any regular selection process to fill up the posts, the applications, if any, submitted by the appellants may also be considered after giving them age relaxation. [Para 14] [459-D-F]

State of Karnataka vs. Uma Devi and Ors. **2006 (4) SCC 1, referred to.**

Case Law Reference:

(2007) 2 SCC 491	**Referred to.**	**Para 2**
(2008) 15 SCC 737	**Referred to.**	**Para 2**
(2009) 3 SCC 179	**Referred to.**	**Para 2**
(2009) 4 SCC 342	**Referred to.**	**Para 2**
2006 (4) SCC 1	**Explained and Distinguished.**	**Paras 6 and 7**
	Referred to.	**Para 14**
(1967) 1 SCR 128	**Relied on.**	**Para 7**
(1972) 1 SCC 409	**Relied on.**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2440 of 2010.

From the Judgment & Order dated 23.9.2008 of the High

Court of Judicature at Patna in LPA No. 563 of 2008.

K.V. Vishwanathan, Manoj Pandey, Gaurav Agrawal for the Appellants.

Gopal Singh, Manish Kumar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. Appellants who had worked on daily wages for over ten years have approached this Court claiming benefit of paragraph 53 of the Constitution Bench judgment of this Court in *Secretary, State of Karnataka And Others v. Umadevi (3) And Others* (2006) 4 SCC 1. Some doubts were there with regard to the meaning and content of paragraph 53 read with paragraphs 15, 16 and paragraph 8 read with paragraph 55 of the judgment in *Umadevi's* case (supra) which has been subsequently explained by this Court in several judgments. Reference may be made to the judgment of this court in *Punjab Water Supply & Sewerage Board v. Ranjodh Singh And Others* (2007) 2 SCC 491, *State of Punjab v. Bahadur Singh And Others* (2008) 15 SCC 737, *C. Balachandran And Others v. State of Kerala And Others* (2009) 3 SCC 179, *State of Karnataka And Others v. G.V. Chandrashekar,* (2009) 4 SCC 342, etc. Almost identical situation arises for consideration in this case as well.

3. The appellants who had worked for more than 10 years on daily rated basis in the Bihar Intermediate Education Council has approached the Patna High Court for regularization of their services and a learned Single Judge of the Patna High Court directed the Council to consider their request for regularization treating them as a separate class after relaxing their age. Since no positive direction was given to the Council for regularization of their services, an appeal was preferred before the Division Bench of the Patna High Court. The Division Bench held that merely because they had worked as daily waged employees with the Council would not confer any right for regularization as

no public appointment was permissible *de hors* the recruitment rules. Letters Patent Appeal was, therefore, dismissed *in limine*. Aggrieved by the same this appeal has been preferred with a petition for special leave to appeal.

4. Mr. Gaurav Agrawal, learned counsel appearing for the appellants submitted that the appellants belong to the reserved community and that they had worked on daily wage basis in sanctioned posts from February/July, 1995 to February, 2005 and that too not on the strength of any order passed by the Court or Tribunal. Learned counsel submitted that the appellants are entitled to get the benefit of the judgment in *Umadevi's* Case(3) (supra). Reference was made to paragraph 53 of the aforesaid judgment and submitted that this Court had directed the Union of India, the State Governments and their instrumentalities to take steps to regularize as a one-time measure, the services of irregularly appointed persons who had worked for ten years or more in duly sanctioned posts. Learned counsel submitted that the same benefit be extended to persons who had worked on daily wage basis for over 10 years.

5. Learned counsel appearing for respondent Nos. 3 to 5 submitted that the Council had engaged the appellants only on daily wage basis and they were never appointed in any sanctioned posts and, therefore, they would not get the benefit of the directions contained in *Umadevi's case* (supra) which are applicable only to those qualified employees who were appointed irregularly in sanctioned posts. Learned counsel submitted that the Council in the year 1995 had decided to fill up the posts of Assistant/Routine Clerk and Peon on regular basis and an advertisement to that effect was published on 25.2.1995. Appellants and several other persons applied but no panel or merit list was prepared by the Council. Accordingly, no appointments were effected. Council, though took a decision on 16.12.1999 to complete the selection process including preparation of merit list by 15.01.2000, it did not materialize due to the creation of new State of Jharkhand by the Bihar Re-

organisation Act, 2000. Further, the Bihar Education Council itself was dissolved by the Biihar Intermediate Education Council (Repeal) Act of 2007 and hence there was no question of regularization of any employee in the Council. The functions of the erstwhile Intermediate Council are now being performed by the Bihar School Examination Board which is following its own recruitment rules. Under such circumstances, it was stated that the directions sought for by the appellants for regularization of their services in the Council cannot be granted.

6. We are of the view that the appellants are not entitled to get the benefit of regularization of their services since they were never appointed in any sanctioned posts. Appellants were only engaged on daily wages in the Bihar Intermediate Education Council. In *Umadevi's case* (supra) this Court held that the Courts are not expected to issue any direction for absorption/regularization or permanent continuance of temporary, contractual, casual, daily-wage or *ad hoc* employees. This Court held that such directions issued could not be said to be in consistent with the constitutional scheme of public employment. This Court held that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. In view of the law laid down by this Court, the directions sought for by the appellants cannot be granted.

7. Paragraph 53 of *Umadevi's* Judgment, deals with irregular appointments (not illegal appointments). Constitution Bench specifically referred to the judgment in *S.V. Narayanappa vs. State of Mysore* (1967) 1 SCR 128, *B.N. Nanjudappa vs. T. Thimmiah* (1972)1 SCC 409, in paragraph 15 of *Umadevi's* judgment as well.

8. Let us refer to paragraphs 15 and 16 of *Umadevi's*

judgment in this context. Necessity of keeping in mind the distinction between regularization and conferment of permanence in service jurisprudence has also been highlighted by this Court by referring to the following passages from *R.N. Nanjundappa's* case, which reads as follows:-

> " If the appointment itself is in infraction of the rules or *if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment.* Regularization cannot be said to be a mode of recruitment."

Further Constitution Bench referred to in *B.N. Nagarajan's* case in para 16 of the judgment and stated as follows:-

> " We have, therefore, to keep this distinction in mind and proceed on the basis that *only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized* and granting permanence of employment is a totally different concept and cannot be equated with regularization."

Then, in Umadevi's case in paragraph 53 the Court is stated as follows:-

> " One aspect needs to be clarified. There may be cases where *irregular appointments* (not illegal appointments) as explained in *S.V. Narayanappa R.N. Nanjundappa and B.N. Nagarajan* and referred to in para 15 above of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten yeas or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of *such employees* may have

to be considered on merits in the light of the principles, settled by this Court in cases above-referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a *one-time measure, the services of such irregularly appointed,* who have worked for ten years or more in duly sanctioned posts but not under cover or orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases *where temporary employees or daily wagers are being now employed.* The process must be set in motion within six months from this date."

9. Constitution Bench has, therefore, clearly drawn a distinction between temporary employees, daily-wagers and those who were appointed irregularly in the sense that there was non-compliance of some procedure in the selection process which did not go to the root of the selection process. Appellants in our view will not fall in the category of the employees mentioned in paragraph 53 read with paras 15 and 16 of the Constitution Bench Judgment.

10. Above view is further reinforced when we read paragraphs 8 and 55 in Umadevi's case, wherein similar arguments were raised but rejected by the Constitution Bench. Paragraphs 8 of the Constitution Bench judgment refers to CA No.3595-612 of 1999 filed by the Commercial Taxes Department. Respondents therein were engaged on daily wages in some of the districts in the State of Karnataka and they claimed that they had worked in that department for more than 10 years, hence, claimed regularization. They approached the Tribunal without success. They took up the matter before the High Court of Karnataka. The Karnataka High Court ordered that they are entitled to wages and allowances equal to regular employees and also gave a direction to the State Government to consider their case for regularization within four months.

11. Aggrieved by the judgment of the Karnataka High Court the Commercial Taxes Department approached this Court. Allowing the appeal preferred by the Commercial Taxes Department, this Court set aside the directions given by the High Court for regularization of services of those daily wage employees who had more than 10 years of service. The Court held as follows:-

" We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in Government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily wage earners, there would be no question of other allowances being paid to them. *In view of our conclusion, that the Courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent.* If sanctioned posts are vacant(they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. *But when regular recruitment is undertaken, the respondents in Civil Appeal No. 3595-612 and those in Commercial Tax Departments similarly situated will be allowed to compete, waiving the age restriction imposed for the recruitment*

and giving some weightage for their having been engaged for work in the Department *for a significant period of time.*

12. In our view, the appellants herein would fall under the category of persons mentioned in paragraphs 8 and 55 of the judgment and not in paragraph 53 of judgment of Umadevi's.

13. Appellants in their reply affidavit filed on 14.10.2004 before the High Court has specifically stated in paragraph 5 that they were only *engaged* as Assistant Routine Clerks and Peons on *daily wages.* Further in paragraph 20 of the affidavit it was stated that they were discharging their duties on daily wages basis since 1995 and had entertained a legitimate expectation for regularization of their services. Appellants' own case is that they were only engaged on daily wages basis and never appointed in service either on a temporary basis or on ad-hoc basis.

14. Appellants stated that they had undergone a selection process held fourteen years back, following an advertisement published in the year 1995 but the merit list was neither prepared nor published. Selection process, though undertaken by the Council was not completed and now the Council is no more in existence. However, if Board proposes to undertake any regular selection process to fill up the posts, the applications, if any, submitted by the appellants may also be considered after giving age relaxation. In Umadevi's case in paragraph 55 of the judgment, the Constitution Bench has also permitted such persons to participate in selection process waiving the age *relaxation* and giving the weightage for having been engaged or worked in the department for a *significant period* of time.

15. The appeal, therefore, lacks merits and the same is disposed of as above.

K.K.T. Appeal disposed of.

CONTSHIP CONTAINER LINES LTD.
v.
D.K. LALL AND ORS.
(Civil Appeal No. 3245 of 2005)

MARCH 16, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Consumer Protection Act, 1986:

Claim for compensation by shipper for non-delivery of consignment – Liability of insurance company and carrier of goods – On facts, held: Insurance company not liable as the insured obtained insurance policy on misrepresentation and thus failed to maintain utmost good faith – However, service provided by carrier was deficient – Liability of carrier for payment of compensation to the consignee is limited by the provisions of the 1925 Act – Bill of Lading is the document on the basis of which compensation is determinable against the carrier in terms of provisions of 1925 Act – Bill of Lading did not mention either the nature or the value of the goods – That being so, carrier is liable to pay compensation of rupee equivalent of 666.67 – Special Drawing Rights – Indian Carriers of Goods by Sea Act, 1925 – ss.2, 4 – Export-Import – Bill of Lading.

Insurance:

Marine insurance – Export of goods – FOB contract – Right of seller of goods upon delivery of goods to carrier – Held: In case of FOB contracts, goods are delivered free on board the ship – Once seller places the goods safely on board at his cost and thereby hand over possession of goods to the ship responsibility of seller would cease and delivery of goods to buyer is complete – Goods from that stage onwards would be at the risk of buyer – On facts, since consignment was sent

on FOB basis, seller reserved no right or lien qua the goods in question – Goods were from that stage onwards held by the carrier at the risk of the buyer and the property in the goods stood vested in the buyer – National Commission was right in holding that seller had no insurable interest in the goods – Sale of Goods Act, 1930 – ss.46 and 47 – Marine Insurance Act, 1963 – s.7 – Contract – Consumer Protection Act, 1986 – Export-Import.

Misrepresentation by exporter while obtaining insurance cover that the goods were despatched on CIF basis whereas the goods were, in fact, sent on FOB basis – Material departure breached the duty of utmost good faith cast upon the exporter towards insurance company – Liability of insurance company in case of mis-delivery of goods – Held: Since the exporter had not observed utmost good faith, insurance company stood absolved of its liability under the contract to reimburse loss to him.

Contract:

CIF contract and FOB contract – Distinction between – Discussed.

Words and phrases:

Expression 'insurable interest' – Meaning of, in the context of marine insurance.

Respondent-exporter received two orders for export, one for the export of steel furniture from M/s Natural Selection International and the other from M/s Pindikas for export of miniature paintings. According to the respondent, all the items meant for export in terms of the orders were packed in 122 different cartons. The miniature paintings were packed in one carton meant for export to M/s Pindikas and the iron furniture items were packed in 121 other cartons. The case of exporter was that while 121 cartons were duly delivered, one carton

comprising of miniature paintings was not delivered to M/s Pindikas. The respondent filed a claim for compensation of Rs.34.23 lacs representing the value of miniature paintings. The National Commission held that the insurance policy was obtained on the representation that the transactions between the exporter and the purchasers were on C.I.F. basis whereas the consignment had in fact been sent on FOB basis, thus, there was failure of the insured to maintain utmost good faith essential for a marine insurance policy. The Commission also noted that in the declaration of the consignment sent to the insured, no details of the conditions of shipment were mentioned and on that basis held that there was no deficiency of service on the part of the Insurance Company. Regarding the claim against the carrier, the Commission recorded a finding that the service provided by them was deficient but held that the liability of the carrier for payment of compensation to the consignee was limited by the provisions of the Indian Carriers of Goods by Sea Act, 1925. The Commission noted that since no value of goods was given in the Bill of Lading, the only amount which the exporter was entitled to was a sum equivalent to 1800$ in Indian rupee as per the then prevailing rate of exchange. The complaint against agent of carrier was dismissed. Review against the decision of National Commission was dismissed. Hence these cross appeals.

Disposing of the appeals, the Court

HELD: 1.1. The contract of insurance proceeded on the basis that the transactions between the seller and the purchaser and meant to be covered by the policy would be on CIF basis. The distinction between CIF (Cost Insurance and Freight) and FOB (Free on Board) contracts is well recognized in the commercial world. While in the case of CIF contract, the seller in the absence

of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods would be delivered at the destination etc., in the case of FOB contracts, the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer. [Para 21] [477-G-H; A-C]

1.2. The seller, in the case at hand, reserved no right or lien qua the goods in question. In the absence of any contractual stipulation between the parties, the unpaid seller's lien over the goods recognised in terms of Sections 46 and 47 of the Sale of Goods Act, 1930 stood terminated upon delivery of the goods to the carrier. The goods were from that stage onwards held by the carrier at the risk of the buyer and the property in the goods stood vested in the buyer. The National Commission was, therefore, right in holding that the seller had no insurable interest in the goods thereby absolving the insurance company of the liability to reimburse the loss, if any, arising from the mis-delivery of such goods. [Para 22] [478-D-E-G]

B.K. Wadeyar v. Daulatram Rameshwarlal **AIR 1961 SC 311, relied on.**

Lucena v. Craufurd **(1806) 2 Bos & PNR 269**; *Carter v. Boehm* **(1766) 3 Burr 1905**, **referred to.**

Halsbury's Laws of England, Fourth Edition; *Macgillivray on Insurance Law***, referred to.**

1.3. The National Commission recorded a clear finding that the insurance cover obtained by the exporter envisaged goods being despatched on CIF basis whereas the goods were, in fact, sent on FOB basis. This was a material departure which breached the duty of utmost good faith cast upon the exporter towards the insurance company. If the proposal for insurance had disclosed that the goods will be sent on FOB basis, the question whether the supplier had any insurable interest in the goods and if he had what premium the company would charge for the same may have assumed importance. Be that as it may, the duty to make a complete disclosure not having been observed by the exporter, the National Commission was justified in holding that the shipper had not observed utmost good faith and insurance company stood absolved of its liability under the contract and in dismissing the petition qua the said company. [Paras 27] [480-G-H; 481-A]

2.1. The National Commission came to the conclusion that the consignment meant to be delivered to Pindikas was misdelivered and what was offered to Pindikas did not actually contain miniature paintings meant for the said consignee. That finding is justified on the material on record from which it is evident that out of 122 cartons 121 cartons were delivered to M/s Natural Selection International while the only remaining carton when checked in the presence of the General Counsulate of India was found to contain steel furniture items. The National Commission rightly rejected the contention that the carton was not properly marked, making it difficult for the shipping company to separate the same from other cartons which were meant for M/s Natural Selection International. There is no reason to interfere with the findings of the National Commission. However, the National Commission was not justified in awarding rupee equivalent of US$ 1800 to the shipper by way of

compensation. The National Commission instead of going by the number of packages entered in the Bill of Lading had gone by the packages mentioned in the packing list. The Bill of Lading was the only document on the basis of which compensation could be determined against the carrier in terms of the provisions of Indian Carriage of Goods by Sea Act, 1925 and the Schedule thereto. A careful reading of Sections 2, 4 and Rule 5 of Article IV would show that in cases where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading and as packed in such article of transport shall be deemed to be the number of packages or units for purposes of Rule 5 as far as these packages or units are concerned. [Paras 28 and 29] [481-C-H; 482-A; 483-B]

United India Insurance Company Ltd. v. M.K.J. Corporation **(1996) 6 SCC 428;** *Modern Insulators Ltd. v. Oriental Insurance Co. Ltd.* **(2000) 2 SCC 734, referred to.**

2.2. It is not in dispute that 122 cartons despatched by the shipper were consolidated in a container, nor is it disputed that there was only one package indicated in the Bill of Lading concerning the consignment meant for Pindikas. The National Commission could not go beyond the Bill of Lading and award compensation on the basis of the packing list which may have mentioned several packages consolidated in one bigger package, delivery whereof was acknowledged in the Bill of Lading. The Commission ought to have taken the number of packages to be only one as mentioned in the Bill of Lading. The Commission also appears to have gone by the unamended provisions of Rule 5 in which the amount of compensation was stipulated to be US$ 100 per package. After the amendment to the Schedule in the year 1992 by Act 28 of 1993 the amount of compensation was

to be paid in terms of Special Drawing Rights. The shipper would be entitled to the compensation of 666.67 Special Drawing Rights per package or two Special Drawing Rights per kilogram according to the gross weight of the goods lost or damaged whichever is higher. The single package meant for Pindikas weighed 200 kgs. The amount of compensation payable by reference to the weight of the package would come to 400 Special Drawing Rights. The amount of compensation, actually payable would, however, be 666.67 Special Drawing Rights being higher of the two amounts. [Paras 30 and 31] [483-C-H]

2.3. The compensation by reference to the value of the goods lost or damaged can be claimed only if the nature or the value of such goods has been declared by the shipper before shipment and inserted in the Bill of Lading. Even assuming that the nature and the valuation of the goods had been declared by the shipper before the shipment the requirement of 'insertion of the same in the Bill of Lading' was not satisfied in the present case. The Bill of Lading did not mention either the nature or the value of the goods. That being so, compensation of rupee equivalent of 666.67 Special Drawing Rights was the only amount that could be awarded by the Commission to the shipper. In as much as the Commission awarded US$1800 it committed a mistake that calls for correction. [Para 32] [484-B-D]

Case Law Reference:

(1806) 2 Bos & PNR 269	referred to	Para 15
AIR 1961 SC 311	relied on	Para 22
(1766) 3 Burr 1905	referred to	Para 23
(1996) 6 SCC 428	referred to	Para 25
(2000) 2 SCC 734	referred to	Para 26

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3245 of 2005.

From the Judgment & Order dated 29.10.2003 of the National Consumer Disputes Redressal Commission in M.P. No. 214 of 2003.

WITH

C.A. Nos. 6232 of 2004 & 8276 of 2003.

Kailash Vasdev, N. Ganpathy, Chitranshul Sinha, Sanjeev Sachdeva, Meenakshi Midha, B.K. Satija for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These three cross appeals arise out of an order passed by the National Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to as the 'National Commission') whereby it has dismissed the complaint filed by the respondent Shri D.K. Lall, proprietor of M/s Lall Enterprises against respondent-National Insurance Company Ltd. while granting relief in part to the complainant against Contship Container Lines Ltd., the shipping company to whom the consignment in question was entrusted for delivery to the consignee in Barcelona, Spain. The facts giving rise to the controversy may be summarised as under:

2. M/s D.K. Lall Enterprises, a sole proprietary concern, claims to have received an order for export of iron furniture and iron handicraft items from M/s Natural Selection International, a Spanish purchaser of those items. A similar order for export of miniature paintings is also said to have been received by the said concern from M/s Pindikas another concern located in Spain. The case of M/s D.K. Lall Enterprises (hereinafter to as the 'Exporter') is that all the items meant for export in terms of the above orders were packed in 122 different cartons for shipment to the purchasers in Spain. According to the exporter

while miniature paintings were packed in one carton meant for export to M/s Pindikas, the iron furniture items meant for export to M/s Natural Selection International were packed in 121 other cartons. These packages were, according to the Exporter, checked and cleared by the Customs Authority at Jodhpur and finally stuffed in one simple container, for which purpose the exporter hired the services of M/s Samrat Shipping & Transport System Pvt. Ltd. through its local agent who forwarded the container to Bombay where it was put on board CMBT Himalaya, a vessel belonging to M/s Contship Container Lines Ltd.-appellant in C.A. No.6232 of 2004. It is noteworthy that the exporter had obtained a Marine Cargo/Inland transit insurance policy to cover risks enumerated in the policy.

3. The case of the exporter is that the consignment reached Barcelona, Spain on 1st March, 1997 and that while 121 cartons had been duly received by M/s Natural Selection International, one carton marked for M/s Pindikas comprising miniature paintings was not so delivered to the consignee. The claim for payment of compensation on account of the alleged deficiency of service having been denied by the Shipping Company as also by the Insurance Company the exporter filed O.P. No.272 of 1997 before the National Consumer Disputes Redressal Commission, New Delhi, claiming compensation to the tune of Rs.39,23,225/- representing the value of the miniature paintings with interest pendente lite and till realization. The respondents contested the claim made against them, inter alia, on the ground that the petitioner was not a consumer and that the case involved complicated questions of fact and law, which could not be determined in summary proceedings before the Consumer Commission. It was also alleged that the exporter had never stuffed/exported the carton containing miniature paintings and that the claim made by the exporter to that effect was false. Reference was made to the Bill of Lading according to which the particulars declared by the shipper/exporter had not been checked by the carrier. It was also alleged that under clause 17 of the Bill of Lading and Article IV Rule 5 of The Indian

Carriage of Goods by Sea Act, 1925 the liability of the carrier was limited to 2 SDRs per kg of weight, which came to 400 SDRs for the loss of the undelivered package weighing 200 kgs. equivalent to Rs.21,428/- only. The respondents further alleged that the cartons had not been properly marked with the result that the same could not be segregated before being delivered to the consignee concerned.

4. The Insurance Company also filed a separate reply, alleging that the exporter was in collusion with the buyers trying to perpetrate a fraud on them with a view to making an undeserved & unjust financial gain. The company alleged that the valuation indicated in the policy was C.I.F. + 10% whereas the invoice FOB (Free on Board) and the Bill of Lading was clean. The company asserted that the liability of the seller came to an end no sooner the consignment was loaded on to the ship leaving the exporter with no insurable interest in the consignment.

5. The Commission received three affidavits as evidence one filed by the exporter, the second by Carrier while the third was filed by Mr. Ramesh Goyal, Senior Branch Manager of the Insurance Company. By its order dated 14th July, 2003 the Commission held that the Insurance Policy had been obtained on the representation that the transactions between the exporter and the purchasers were on C.I.F. basis whereas the consignment had in fact been sent on FOB basis which absolved the Insurance Company of any liability for the failure of the insured to maintain utmost good faith essential for a marine insurance policy. The Commission noted that in the declaration of the consignment sent to the insured no details of the conditions of shipment were mentioned. There was thus, in the opinion of the Commission, absence of good faith on that account also. The Commission further held that the policy covered risks only at sea and "that ware house to ware house" coverage was limited to risk arising from inland transit alone. The terms of the policy did not according to the Commission

cover the risk till delivery was made to the consignee. The Commission on that basis held that there was no deficiency of service on the part of the Insurance Company.

6. In so far as the claim against the carrier was concerned, the Commission recorded a finding that the service provided by them was deficient but held that the liability of the carrier for payment of compensation to the consignee was limited by the provisions of the Indian Carriers of Goods by Sea Act, 1925. The Commission noted that since no value of goods was given in the Bill of Lading the only amount which the exporter was entitled to was a sum equivalent to 1800$ in Indian rupee as per the then prevailing rate of exchange with interest @ 9% from 1.7.1998 till the date of payment with costs of Rs.10,000/-. The complaint, so far as M/s Samrat Shipping & Transport System Pvt. Ltd. was concerned, was dismissed on the ground that it was acting only as an agent of the carrier. A review petition filed against the said order by Mr. D.K. Lall having been dismissed by the Commission by its order dated 29th October, 2003, the appellants have filed the present appeals to assail the correctness of the orders passed by the Commission.

7. Two distinct issues fall for our consideration, one touching the liability of the Insurance Company and the other concerning the liability of the carrier. On behalf of the insurance company a two-fold submission was advanced before us. Firstly, it was contended that since the transaction between the exporter and the purchaser in Spain was on FOB basis, the exporter had no insurable interest in the goods once the same were delivered to the carrier. It was argued that in a FOB transaction the property in goods stands transferred to the purchaser no sooner the goods are entrusted to the carrier or at least when the same cross the customs barrier for shipment. This implies that all the risks relating to such goods are that of the purchaser who alone could sue the carrier or insurance company if there was an insurance cover obtained by him for such goods. The terms of the transaction between the shipper

and the purchaser did not in the instant case reserve in favour of the shipper any right or interest in the goods so as to constitute an insurable interest within the meaning of Section 7 of the Marine Insurance Act, 1963.

8. Secondly, it was contended that a contract of insurance was based on utmost good faith not only by reason of the general principles governing such contracts but also by reason of Section 19 of the Marine Insurance Act, 1963. The shipper had not, however, observed utmost good faith while obtaining the insurance cover from the respondent-insurance company inasmuch as the shipper had taken out an insurance policy from the company on the representation that the goods were being dispatched on CIF (cost insurance and freight basis) while in reality the goods had been sent by the shipper on FOB basis which constituted a material non-disclosure hence failure of utmost good faith by him within the meaning of Section 19 of the Act aforementioned.

9. Section 3 of the Marine Insurance Act, 1963 defines marine insurance to mean an agreement whereby insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, losses incidental to a marine adventure. Section 4 of the Act provides that a contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage. Section 5 permits every lawful "marine adventure" to be the subject matter of a contract of marine insurance. The expression "marine adventure" is defined by Section 2(d) in the following words:

"2(d): "marine adventure: includes any adventure where –

(i) any insurable property is exposed to maritime perils;

(ii) the earnings or acquisition of any freight, passage

money, commission, profit or other pecuniary benefit, or the security for any advances, loans, or disbursements is endangered by the exposure of insurable property to maritime perils;

(iii) any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property by reason of maritime perils".

10. The expression "maritime perils" referred to in Section 2(d) supra is defined in Section 2(e) as under:

"2(e) : "maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and people, jettisons, barratry and any other perils which are either of the like kind or may be designated by the policy".

11. Section 7 of the Act stipulates that subject to the provisions of the Act every person interested in a marine adventure has an insurable interest. It reads:

"Section 7: Insurable interest defined – (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof".

12. What is noteworthy is the use of the words "interested in a marine adventure" appearing in Section 7 of the Act. The

expression "interested" has not been defined in the Act although sub-section (2) to Section 7 gives an indication of what would constitute 'interest' in a marine adventure. The question is whether a seller of goods on FOB basis like the complainant in the present case can be said to be 'interested in marine adventure' within the meaning of Section 7. If the answer be in the affirmative, the complainant would have an insurable interest but not otherwise.

13. The provisions of Marine Insurance Act, 1906 enacted by the British Parliament are in *pari materia* with those contained in the Indian Act. The former is in fact a precursor to the latter. The definition of 'insurable interest' given in the English legislation is the same as the one given in Section 7 of our enactment. Judicial pronouncements by English Courts would, therefore, be both relevant and helpful in understanding the true purport of the expression 'insurable interest'.

14. *Halsbury's Laws of England, Fourth Edition* has, while dealing with the expression "insurable interest" under the Marine Insurance Act, 1906 prevalent in that country, explained the purport of the expression "interest" in a marine adventure in the following words:

> "A person may be said to be interested in an event when, if the event happens, he will gain an advantage, and, if it is frustrated, he will suffer a loss, and it may be stated as a general principle that to constitute an insurable interest it must be an interest such that the peril would by its proximate effect cause damage to the assured, that is to say cause him to lose a benefit or incur a liability.

15. *Halsbury's* refers to the decision of House of Lords in *Lucena V. Craufurd* (1806) 2 Bos & PNR 269 as to the meaning of the expression "insurable interest":

> "A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which

> may attend it;…and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concerning the subject of the insurance; which relation or concern by the happening of the perils insured against, may be so effected as to produce a damage, determent or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks and dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."

16. Dealing with the question whether the seller of goods retains any insurable interest, *Halsbury* explains:

> "*When, however, the property which is the subject matter of the contract of sale has completely passed from the seller to the buyer or when it has under the contract of sale become completely at the buyers' risk, the seller ceases to have any insurable interest, and the buyer acquires one.* Thus, a contract for the sale of goods to be supplied on board, a particular vessel may be so framed that the property in them and the risk of their loss do not pass to the buyer until a complete cargo has been loaded, in which case the buyer has no insurable interest until the complete cargo has been loaded; or the contract may be so framed that the property in and the risk as to any part of the goods passed to the buyer on shipment, in which case the buyer acquires an insurable interest on any part of the goods then shipped."

(emphasis supplied)

17. Reference may also be made by us to Macgillivray on Insurance Law. While dealing with insurable interest under contracts for the Sale of Goods, the author has the following to say:

> *"The unpaid seller of goods who has parted with property in them has no insurable interest in them unless either they remain at his risk or he has a lien, charge or other security interest over them for the price.* So long as the risk remains with him, he has an interest whether the property has passed or not, and the measure of his interest is the purchase price or the actual value of the goods, whichever is the greater.
>
> Even when risk and property have both passed, the seller retains an insurable interest in the goods while he still possesses them because, if he is unpaid in whole or part on account of the buyer's insolvency or for other reasons, he has an interest in respect of his lien for the purchase money. His possession of the goods would also permit him to insure on the buyer's behalf if his intention is clear and the policy does not forbid it."

(emphasis supplied)

18. We may now refer to the provisions of the Sales of Goods Act, 1930 relevant to the transfer of the property in goods to the purchaser specially in a FOB-transaction like the one in the instant case. Section 19 of the said Act provides that in a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Sections 20 to 24 of the said Act prescribe rules for ascertaining the intention of the parties as to the time at which the property is to pass to the buyer. One of the said rules is that in unconditional contracts

for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made irrespective of the fact that the time of payment of the price or the time for the delivery of the goods or both are postponed. Yet another rule contained in Section 23 of the Act is that where contract for the sale of uncertained or future goods by description are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods passes to the buyer. So also where the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Section 23(2) which stipulates that rule reads:

> *"Delivery to carrier.* - Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

19. Section 25 provides that where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such a case, notwithstanding the delivery of the goods to a buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. Section 26 of the Act provides that unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Section 26 may at this stage be extracted:

"Section 26: Risk prima facie passes with property - Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but, when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not:

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault:

Provided also that nothing in this section shall affect the duties or liabilities of either buyer or seller as a bailee of the goods of the other party."

20. Section 39, inter alia, provides that delivery of the goods to a carrier whether named by the buyer or not, is prima facie deemed to be delivery of the goods to the buyer. Sections 46 and 47 deal with unpaid seller's rights and lien and, inter alia, provide that unpaid seller shall, subject to the provisions of the Act and of any law for the time being in force, have a lien on the goods for the price while he is in possession of them and that the seller can retain the possession of the goods until payment or tender of the price in situations where the buyer has become insolvent or goods have been sold on credit, but the term of credit has expired. The lien, however, stands terminated in terms of Section 49 of the Act when the goods are delivered to a carrier for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

21. Coming to the case at hand, the contract of sale was on FOB basis even when the contract of insurance proceeded on the basis that the transactions between the seller and the purchaser and meant to be covered by the policy would be on CIF basis. The distinction between CIF (Cost Insurance and Freight) and FOB (Free on Board) contracts is well recognized in the commercial world. While in the case of CIF contract the

seller in the absence of any special contract is bound to do certain things like making an invoice of the goods sold, shipping the goods at the port of shipment, procuring a contract of insurance under which the goods will be delivered at the destination etc., in the case of FOB contracts the goods are delivered free on board the ship. Once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in terms of the Bill of Lading or other documents, the responsibility of the seller ceases and the delivery of the goods to the buyer is complete. The goods are from that stage onwards at the risk of the buyer.

22. It is common ground that the seller had, in the case at hand, reserved no right or lien qua the goods in question. In the absence of any contractual stipulation between the parties the unpaid seller's lien over the goods recognised in terms of Sections 46 and 47 of the Sale of Goods Act, 1930 stood terminated upon delivery of the goods to the carrier. The goods were from that stage onwards held by the carrier at the risk of the buyer and the property in the goods stood vested in the buyer. The principle underlying transfer of title in goods in FOB contracts was stated by a Constitution Bench of this Court in *B.K. Wadeyar v. Daulatram Rameshwarlal* (AIR 1961 SC 311) The question as to the transfer of title in the goods arose in that case in the context of a fiscal provision but the principle relating to the transfer of title in goods in terms of FOB contract was unequivocally recognised. This Court held that in FOB contracts for sale of goods, the property is intended to pass and does pass on the shipment of the goods. The National Commission was, therefore, right in holding that the seller had no insurable interest in the goods thereby absolving the insurance company of the liability to reimburse the loss, if any, arising from the mis-delivery of such goods.

23. We consider it unnecessary to delve any further on this aspect of the matter for in our opinion the claim made by the shipper against the insurance company has been rightly

rejected by the National Commission on the ground that the shipper had not observed utmost good faith while obtaining the insurance cover. The principle that insurance is a contract founded on good faith is of vintage value. In *Carter V. Boehm* (1766) 3 Burr 1905 one of the earliest cases on the subject the principle was stated by Lord Mansfield in the following words:

> "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of assured only; the underwriters trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement….The policy would be equally void against the underwriter if he concealed……Good Faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary."

24. Section 19 of the Marine Insurance Act, 1963 grants statutory recognition to the above principle. It reads:

> *"19. Insurance is uberrimae fidei.* – A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

25. In *United India Insurance Company Ltd. V. M.K.J. Corporation* (1996 (6) SCC 428) this Court declared good faith as the very essence of a contract of insurance in the following words:

> "It is a fundamental principle of Insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. Just as the insured has a duty to disclose, similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge, since obligation of good faith applies to them equally with the assured. The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded."

26. To the same effect is the decision of this Court in *Modern Insulators Ltd. V. Oriental Insurance Co. Ltd.* (2000 (2) SCC 734) where this Court observed:

> "It is the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties and good faith forbids either party from non-disclosure of the facts which the parties know. The insured has a duty to disclose and similarly it is the duty of the insurance company and its agents to disclose all material facts in their knowledge since the obligation of good faith applies to both equally."

27. The National Commission has, in the instant case, recorded a clear finding the correctness whereof has not been disputed before us that the insurance cover obtained by the exporter envisaged goods being despatched on CIF basis whereas the goods were, in fact, sent on FOB basis. This was a material departure which breached the duty of utmost good faith cast upon the exporter towards the insurance company. If the proposal for insurance had disclosed that the goods will be sent on FOB basis, the question whether the supplier had any insurable interest in the goods and if he had what premium

the company would charge for the same may have assumed importance. Be that as it may, the duty to make a complete disclosure not having been observed by the exporter, the National Commission was justified in holding that the insurance company stood absolved of its liability under the contract and in dismissing the petition qua the said company.

28. That brings us to the question whether the National Commission was justified in holding that the service rendered by the carrier was deficient, and if so, whether it was right in awarding rupee equivalent of US$ 1800 by way of compensation. The National Commission has on appreciation of the material on record come to the conclusion that the consignment meant to be delivered to Pindikas was misdelivered and what was offered to Pindikas did not actually contain miniature paintings meant for the said consignee. That finding is, in our opinion, justified on the material on record from which it is evident that out of 122 cartons 121 cartons were delivered to M/s Natural Selection International while the only remaining carton when checked in the presence of the General Counsulate of India was found to contain steel furniture items. The inference, therefore, is that the carton containing miniature paintings had been misdelivered by the carrier who ought to have taken care to deliver the same to the consignee concerned. The National Commission has rightly rejected the contention that the carton was not properly marked making it difficult for the shipping company to separate the same from other cartons which were meant for M/s Natural Selection International. There is indeed, no room for us to interfere with the findings of the National Commission. The question, however, is whether the National Commission was justified in awarding rupee equivalent of US$ 1800 to the shipper by way of compensation. There are two errors which are evident in the order by the National Commission in that regard. Firstly, the National Commission has instead of going by the number of packages entered in the Bill of Lading gone by the packages mentioned in the packing list. The Bill of Lading was the only

document on the basis of which compensation could be determined against the carrier in terms of the provisions of The Indian Carriage of Goods by Sea Act, 1925 and the Schedule thereto. Section 2 of the said Act provides that the rules set out in the Schedule shall have effect in connection with the carriage of goods by sea in ships carrying foods from any port in India to any other port whether in or outside India. Section 4 requires that every Bill of Lading or similar document of title issued in India to which Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by the Act. In terms of Rule 5 of Article IV neither the carrier nor the ship shall be liable for any loss or damage to or in connection with goods in excess of the amounts stipulated therein. Rule 5 of Article IV to the extent the same is relevant for our purposes may be extracted at this stage:

> "5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 666.67 Special Drawing Rights per package or unit or two Special Drawing Rights per kilogram of gross weight of the goods lost or damaged, whichever is higher, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading and as packed in such article of transport shall be deemed to be the number of packages or units for the purposes of this paragraph as far as these packages or units are concerned.
>
> Neither the carrier nor the ship shall be entitled to the benefit of limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or

omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

29. A careful reading of the above would show that in cases where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading and as packed in such article of transport shall be deemed to be the number of packages or units for purposes of Rule 5 as far as these packages or units are concerned.

30. It is not in dispute that 122 cartons despatched by the shipper were consolidated in a container, nor is it disputed that there was only one package indicated in the Bill of Lading concerning the consignment meant for Pindikas. The National Commission could not go beyond the Bill of Lading and award compensation on the basis of the packing list which may have mentioned several packages consolidated in one bigger package, delivery whereof was acknowledged in the Bill of Lading. The Commission ought to have taken the number of packages to be only one as mentioned in the Bill of Lading.

31. The second error committed by the National Commission is equally manifest. The Commission appears to have gone by the unamended provisions of Rule 5 in which the amount of compensation was stipulated to be US$ 100 per package. After the amendment to the Schedule in the year 1992 by Act 28 of 1993 the amount of compensation was to be paid in terms of Special Drawing Rights. As noticed above the shipper would be entitled to the compensation of 666.67 Special Drawing Rights per package or two Special Drawing Rights per kilogram according to the gross weight of the goods lost or damaged whichever is higher. The single package meant for Pindikas weighed 200 kgs. The amount of compensation payable by reference to the weight of the package would come to 400 Special Drawing Rights. The amount of compensation, actually payable would, however, be

666.67 Special Drawing Rights being higher of the two amounts.

32. It was next argued that the shipper would be entitled to the value of the goods misdelivered which according to the shipper was not less than Rs.39,23,225/-. There is no merit in that submission. We say so because compensation by reference to the value of the goods lost or damaged can be claimed only if the nature or the value of such goods has been declared by the shipper before shipment and inserted in the Bill of Lading. Even assuming that the nature and the valuation of the goods had been declared by the shipper before the shipment the requirement of 'insertion of the same in the Bill of Lading' was not satisfied in the present case. The Bill of Lading does not mention either the nature or the value of the goods. That being so, compensation of rupee equivalent of 666.67 Special Drawing Rights was the only amount that could be awarded by the Commission to the shipper. In as much as the Commission awarded US$1800 it committed a mistake that calls for correction.

33. In the result we dismiss C.A. No.8276 of 2003 but partly allow C.A. Nos.3245 of 2005 and 6232 of 2004 to the extent that the amount of compensation payable to the shipper shall stand reduced to the rupee equivalent of 666.67 Special Drawing Rights only. The order passed by the National Commission shall stand modified to the above extent leaving the parties to bear their own costs.

D.G. Appeals disposed of.

H.S. VANKANI AND ORS.
v.
STATE OF GUJARAT AND ORS.
(Civil Appeal No. 2439 of 2010)

MARCH 16, 2010

[DALVEER BHANDARI AND K.S. RADHAKRISHNAN, JJ.]

SERVICE LAW:

Seniority – HELD: Is a civil right which has an important and vital role to play in one's service career and is also significant for good and sound administration – It is reiterated that seniority once settled, should not be unsettled – Rangers (Subordinate Forest Service) Recruitment Rules, 1969 – Rangers (Subordinate Forest Service Recruitment Examination) Rules 1974.

RANGERS (SUBORDINATE FOREST SERVICE) RECRUITMENT RULES, 1969 – rr. 7, 10, 13 and 14/ RANGERS (SUBORDINATE FOREST SERVICE RECRUITMENT EXAMINATION) RULES 1974 – rr. 7, 8 (as amended in 1979), 18(as amended in 1983), 21 and 22:

Range Forest Officers in State of Gujarat – Seniority of non-graduates (1979-81 batch) and graduates (1980-81 batch) – HELD: Government had rightly taken the decision deputing the non-graduates (1979-81 batch) to a two year training course and graduates (1980-81 batch) to a one year training course – Seniority of both the batches had been rightly settled by orders dated 12.10.1982 and 5.3.1987 placing graduates (1980-81batch) above non-graduates (1979-81 batch) and the seniority so redetermined had attained finality, but, the Government committed an error in unsettling the seniority under its proceedings dated 29.9.1993 – There is no illegality in the judgment of the High court in

quashing the order dated 29.9.1993 and upholding the seniority of the candidates of 1980-81 batch over the candidates of 1979-81 batch as had been determined as early as on 12.10.1982 – Interpretation of statutes.

INTERPRETATION OF STATUTES:

Strict interpretation – HELD: Courts have to avoid a construction of an enactment that leads to an unworkable, inconsistent or impracticable results – In the instant case, strict interpretation of r.10 of 1969 Rules and r.18 of 1974 Rules was unworkable and literal interpretation would have resulted in absurd results – The decision taken by the government in deputing the non-graduates (1979-81 batch) to a two year training course and graduates (1980-81 batch) to a one year training is in due compliance with r.10 of 1969 Rules and r.18 of 1974 Rules and the seniority of the both batches has been rightly settled by orders dated 12.10.1982 and 5.3.1987 – Rangers (Subordinate Forest Service) Recruitment Rules, 1969 – Ranger (Subordinate Forest Service Recruitment Examination) Rules 1974– Maxim 'ut res magis valeat quam pereat'.

Range Forest Officers in the State of Gujarat were selected under two different sets of Rules, namely, Rangers (Subordinate Forest Service) Recruitment Rules, 1969 and Rangers (Subordinate Forest Service Recruitment Examination) Rules 1974. Earlier, the educational qualification for the post under both the Rules was Intermediate pass and the selected candidates were deputed to a two year training course in Forest Rangers Colleges. Their seniority was determined on the basis of the marks obtained in the final examination in the Forest Rangers College. With the amendment in r.8(1) of the 1974 Rules in 1979, educational qualification was substituted to graduation and further in the year 1983 two year training course provided in r.18 of 1974 Rules was

reduced to one year. The graduate candidates (1980-81 batch), the respondents, were deputed to one year training course which they completed in February 1981 and they were appointed as Range Forest Officers in March 1981; whereas the non-graduates (1979-81 batch), the appellants, though selected earlier than the respondents, completed their two year training course after the graduates of 1980-81 batch had been appointed, and, as such, they were appointed Range Forest Officers later. When the issue of seniority was raised by the appellants, the Government, by its communication dated 12.10.1982 held that graduates (1980-81 batch) would rank senior to the non-graduates (1979-81 batch), and the gradation list was published accordingly in the year 1983. This position was again reiterated by the Government by its communication dated 5.3.1987. In the provisional gradation list published in the year 1989 also the respondents were shown above the appellants. However, the Government in its proceedings dated 29.9.1993 held that non-graduates (1979-81 batch) would rank senior to graduates (1980-81 batch). The writ petition of the respondents was dismissed by the single Judge, but the Division Bench of the High Court allowed their L.P.A. Aggrieved, the non-graduates of the 1979-81 batch filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. Seniority is a civil right which has an important and vital role to play in one's service career. Seniority once settled is decisive in the upward march in one's chosen work or calling and gives certainty and assurance and boosts the morale to do quality work. It instills confidence, spreads harmony and commands respect among colleagues which is a paramount factor for good and sound administration. Courts have been repeating the ratio that the seniority once settled, shall not

be unsettled. In the instant case, the government had rightly settled the seniority by orders dated 12.10.1982 and 5.3.1987 and the gradation lists were also rightly published, but by its proceedings dated 29.9.1993, the Government committed a grave error in unsettling the inter se seniority of the graduates and non- graduates which had been settled as early as in the year 1982. [Para 23 and 25] [505-B; 505-C-E]

Union of India and Another v. S.K. Goel and Others **2007 (2) SCR 432 = (2007) 14 SCC 641,** *T.R. Kapoor v. State of Haryana* **1989 (3) SCR 1079 = (1989) 4 SCC 71,** *Bimlesh Tanwar v. State of Haryana,* **2003 (2) SCR 757 = (2003) 5 SCC 604, relied on.**

G.P. Doval vs. Chief Secretary Government of U.P. **1985 (1) SCR 70 =(1984) 4 SCC 329;** *Prabhakar and Others vs. State of Maharashtra And Others,* **1976 (3) SCR 315 = (1976) 2 SCC 890, and** *G. Deendayalan vs. Union of India & Ors* **1996 (9) Suppl. SCR 377 = (1997) 2 SCC 638;** *R.S. Ajara vs. State of Gujarat* **(1997) 3 SCC 641, held inapplicable.**

1.2. When the rules were framed, perhaps only two Government run colleges, namely, the Northern Forest Rangers College, Dehradun, and the Southern Forest Rangers College Coimbatore, were conducting the training courses, the duration of which was two years and the qualification prescribed was pass in intermediate examination. Later those colleges changed their course duration to an integrated one year course. Necessary amendments, however, were not carried out in r.10 of Rangers (Subordinate Forest Service) Recruitment Rules, 1969 or r.18 of Ranger (Subordinate Forest Service Recruitment Examination) Rules 1974 pointing out in which College the candidates with intermediate qualification had to undergo training. Before 1980-81

batch was selected, r. 8 of the 1974 Rules was amended and the minimum educational qualification was fixed as graduation. In the circumstances, the Government took a conscious decision that non-graduates of 1979-81 batch would undergo two year training course, and the graduates of 1980-81 batch would undergo the one year training course since candidates with lesser qualification required thorough training compared to the candidates with higher qualification. Such a decision was taken, evidently due to the reason that strict interpretation of r.10 of 1969 Rules and r.18 of 1974 Rules was unworkable. Later, by Notification dated 25th November, 1983, in r.18 of 1974 Rules, the period of two years for training was substituted as one year, but necessary amendments are yet to be carried out in r.10 of the 1969 Rules. [Para 23, 26] [506-D-H; 507-A-C]

1.3. Due to the basic difference in the educational qualification between the 1979-81 and 1980-81 batches, the Government took a conscious decision that it was not proper to unsettle the settled seniority even if there was delay in the appointment of non-graduates. This position was recognized in all the gradation lists published till 1.1.1989. Neither the Government order dated 12.10.1982 nor the gradation lists were challenged before any forum which had attained finality. [Para 23] [504-A-C]

1.4. The note dated 29.9.1993 stating that the candidates of 1979-81 batch should be placed above the candidates of 1980-81 batch was based on a misinterpretation of r.14 of the 1969 Rules. Rule 14 of the 1969 Rules determines the inter-se seniority of the candidates of a particular batch and does not determine the inter-se seniority between two batches, whose educational qualification, years of training and the date of joining, etc. differ. Rule 14 of 1969 Rules and r. 22 of the 1974 Rules also further re-emphasise that fact. Both

the groups are governed by these rules in the matter of their intra seniority. The note dated 29.09.1993 is, therefore, contrary to r.14 of 1969 Rules and r.22 of the 1974 Rules. [Para 23] [504-E-G]

Prafulla Kumar Swain vs. Prakash Chandra Misra **1993 (1) SCR 241 = 1993 (suppl) 3 SCC 181;** *Pramod K. Pankaj vs. State of Bihar* **2003 (5) Suppl. SCR 916 = (2004) 3 SCC 723;** *Bhey Ram Sharma vs. Haryana S.E.B.,* **1993 (2) Suppl. SCR 219 = 1994 (supp) 1 SCC 276;** *K.R. Mudgal vs. R.P. Singh* **1986 (3) SCR 993 = (1986) 4 SCC 531, referred to**

2. It is a well known rule of construction that the provisions of a statute must be construed so as to give them a sensible meaning. The legislature expects the court to observe the maxim ut res magis valeat quam pereat (it is better for a thing to have effect than to be made void). The principle also means that if the obvious intention of the statute gives rise to obstacles in implementation, the court must do its best to find ways of overcoming those obstacles, so as to avoid absurd results. It is a well settled principle of interpretation of statutes that a construction should not be put on a statutory provision which would lead to manifest absurdity, futility, palpable injustice and absurd inconvenience or anomaly. The courts have to avoid a construction of an enactment that leads to an unworkable, inconsistent or impracticable results, since such a situation is unlikely to have been envisaged by the rule making authority, which also expects rule framed by it to be made workable and never visualises absurd results. There is, therefore, no illegality in the judgment of the High court in quashing the order dated 29th September, 1993 and upholding the seniority of the candidates of 1980-81 batch over the candidates of 1979-81 batch. [Para 27, 32 and 33] [507-F-H; 508-A; 509-C-D; 509-F]

Andhra Bank v. B. Satyanarayana **2004 (2) SCR 304 = (2004) 2 SCC, 657;** *Tinsukhia Electric Supply Co. Ltd. vs. State of Assam & Ors.* **1989 (2) SCR 544 = (1989) 3 SCC, 709;** *Madhav Rao, Jivaji Rao Scindia v. Union of India* **1971 (3) SCR 9 = (1971) 1 SCC 85;** *Union of India v. B.S. Agarwal* **1997(4) Suppl. SCR 327 = (1997) 8 SCC 89,** *Paradise Printers v. Union Territory of Chandigarh* **1988 (2) SCR 157 = (1988) 1 SCC 440, referred to.**

R. (on the application of Edition First Power Ltd.) v. Central Valuation Officer and another **(2003) UKHL 20(2003) 4 ALL ER 209, referred to.**

Case Law Reference:

2007 (2) SCR 432	**relied on**	**para 25**
1989 (3) SCR 1079	**relied on**	**para 25**
2003 (2) SCR 757	**relied on**	**para 25**
1985 (1) SCR	**held inapplicable**	**para 21**
1976 (3) SCR 315	**held inapplicable**	**para 21**
1996 (9) Suppl. SCR 377	**held inapplicable**	**para 21**
1993 (1) SCR 241	**referred to**	**para 23**
2003 (5) Suppl. SCR 916	**referred to**	**para 23**
1993 (2) Suppl. SCR 219	**referred to**	**para 23**
1986 (3) SCR 993	**referred to**	**para 23**
(2003) UKHL 20 (2003) 4 ALL ER 209	**referred to**	**para 28**
2004 (2) SCR 304	**referred to**	**para 29**
1989 (2) SCR	**referred to**	**para 30**
1971 (3) SCR 9	**referred to**	**para 31**
1997 (4) Suppl. SCR 327	**referred to**	**para 31**
1988 (2) SCR 157	**referred to**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2439 of 2010.

From the Judgment & Order dated 13.6.2006 of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 1634 of 1999.

D.A. Dave, Sanjoy Ghose, Anitha Shenoy, Yashovardhan for the Appellants.

Hemanitka Wahi, Somanath Padhan, D.N. Ray, P.D. Sharma Huzefa Ahmadi, Chetan Pandya, Pradhuman Gohil, Vikash Singh, S. Hari Haran, Taruna Singh, Milind Kumar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The controversy in this case is with regard to the inter-se seniority between two batches of direct recruits Range Forest Officers viz., 1979-81 batch (non-graduates) and 1980-81 batch (graduates) of the Subordinate Forest Services of the State of Gujarat and their further promotion to the post of Assistant Conservator of Forests.

3. The recruitment to the posts of Rangers in the Subordinate Forest Services is governed by the Rangers (Subordinate Forest Service) Recruitment Rules, 1969 (in short '1969 Rules') which was framed by the Government of Gujarat in exercise of its powers conferred under the proviso to Article 309 of the Constitution of India. Appointment to the post of Rangers is made either by way of promotion from the post of Forester or by direct selection. Rule 3 of the 1969 Rules stipulated that a candidate to be eligible for appointment by

direct selection should possess a minimum educational qualification of intermediate examination of any recognized university or its equivalent examination comprising of subjects specified therein. Rule 7 lays down that the candidates have to undergo a selection process consisting of a written test and interview. Rule 10 states that the finally selected candidates have to undergo the Rangers course which reads as follows:-

> "The candidate finally selected will be required to undergo training for the Rangers Course at the Northern Forest Rangers College, Dehradun or Southern Forest Rangers College, Coimbatore for a period of two years.

4. Rule 11 says that the State Government would bear the costs for the training and that during the period of training the candidate shall receive stipend, emoluments and other allowances if any, as fixed by the Government from time to time. Rule 13 deals with appointment, which reads as follows:-

> "On successful completion of the Training Course from the Ranger's College, the candidate shall be appointed as a Ranger if he passes with higher standard certificate and as a Forester if he passes with lower standard certificate."

5. Rule 14 deals with seniority which states that the seniority of Rangers shall be governed by the respective ranks in the final examination, irrespective of the date of joining the service.

6. The Government of Gujarat, in exercise of its powers conferred under the proviso to Article 309 of the Constitution of India framed the Ranger (Subordinate Forest Service Recruitment Examination) Rules 1974 (in short '1974 Rules). Rule 7 deals with the eligibility of the candidate for appointment to the post of Rangers. Rule 8 stipulated that a candidate should possess the minimum educational qualification of intermediate examination from a recognised university in any of the subjects mentioned therein for admission to the competition examination

for recruitment to the post of Rangers. The examination conducted by the Gujarat Public Service Commission ('GPSC' in short) followed by a viva-voce and personality test. GPSC has to publish in the Gujarat Govt. Gazette the names of the candidates who qualify for the posts in the serial orders based on the total marks obtained by the candidates and they are required to undergo practical training in the forest for a period of eight weeks. Rule 18 required the candidates to undergo training for the Rangers Course at the Northern Forest Range College, Dehradun, or Southern Forest College, Coimbatore for a period of two years and that the Government would bear the cost Rule 18 reads as follows:-

> Rule-18:- The candidate shall during the period of practical training, receive stipend and traveling allowances as the Government may fix from time to time. They shall also be required to undergo training for the Rangers Course at the Northern Forest College, Dehradun or southern Forest College, Coimbatore for a period of two years."

7. Rule 21 states that on successful completion of the training course from the Rangers College, the candidate shall be appointed as a Ranger if he passes with higher standard certificate and as a Forester, if he passes with lower standard certificate. Rule 22 deals with seniority of Rangers which says that the seniority of the Rangers shall be governed by their respective ranks in the final examination at the Rangers College irrespective of the date of joining the service.

8. 1974 Rules were later amended by the Government of Gujarat invoking the powers conferred under which the proviso to Article 309 of the Constitution vide Rangers (Subordinate Forest Service Recruitment Examination (Amendment Rules) 1979, (in short '1979 Rules). Clause 1 of Rule 8 was substituted by stating that a candidate must possess a bachelor's degree in Science or Agriculture of any university recognized by the Government of Gujarat instead of the passing the intermediate

examination so as to be eligible for writing the competitive examination conducted by the GPSC for recruitment to the post of Rangers. Rule 18 of the 1974 Rules was also later amended by the Rangers (Subordinate Forest Service) examination Rules, 1983 (in short '1983 Rules) on 25th November, 1983, substituting the period of two years as one year training.

9. The Government of India had vide its letter No.3-42/77-FRY-1 dated 29th May, 1979 announced the duration of the courses at various central Rangers Colleges and State Forest Rangers Colleges. Northern Forest Rangers College, Dehradun, U.P., Central Forest Rangers College, Chandrapur, Maharashtra and Southern Forest Rangers College, Coimbatore etc. had since then, discontinued its two years course to one year integrated course, while Forest Rangers College, Balaghat, Madhya Pradesh and Eastern Forest Rangers College Furseong, West Bengal Rangers College, Rajpipla, SFS. College Burnihat, Meghalaya, etc. continued with course of two years duration. Above facts would indicate that different colleges followed their own course structures, curriculum and time schedule for successful completion of training imparted in their respective colleges.

10. Appellants herein (non-graduates) were selected to the post of Ranger Forest Officer by the GPSC in accordance with the 1969 and 1974 Rules and were deputed for training at the Rangers College Rajpipla, where the training course was of two years duration and other candidates of the same batch were sent for training to some other college where also the training course was of two years duration. In short all the non-graduates of 1979-81 batch were deputed for training to the colleges conducting courses of two years duration since the colleges mentioned in the rules had done away with the courses of two years duration to one year integrated course. Appellants completed the training course, the duration of which was two years in the month of March, 1981 and were appointed as Rangers in the Subordinate Service in the month of April, 1981.

11. The Respondents herein (graduates) selected by the GPSC in the year 1979 were sent for training at CFRC, Chandrapur, where the course duration was of one year. After successfully completing the course in February, 1981 they were appointed to the post of Forest Rangers in the month of March, 1981. Non graduates though selected earlier had to undergo two years training and hence could join service only after the graduates joined service, since they had undergone the integrated course of the duration of which was one year.

12. The controversy in this case as we have indicated is with regard to the inter-se seniority between the graduates of (1980-81 batch) who had successfully completed the training course earlier, and the non-graduates of (1979-81 batch) who had also successfully completed the course later for the post of Forest Rangers and also their further promotion to the post of Assistant Conservator of Forests. Rule 13 of 1969 Rules stipulates that on successful completion of the training course from the Rangers College, a candidate shall be appointed as Ranger if he passes the higher standard certificate. Rule 14 of 1969 Rules and Rule 22 of 1974 Rules state that the seniority of Rangers shall be governed by their respective ranks in the final examination irrespective of the dates of joining the service. Both the non-graduates of 1979-81 batch as well as the graduates of 1980-81 batch are governed by the above mentioned Rules with regard to their inter-se seniority.

13. The non-graduates (1979-80 batch) who had to undergo training for two years at Gujarat Forest Rangers' College, Rajpipla, submitted representation in February 1981 to the Chief Conservator of Forest, Vadodara claiming seniority over (1980-81 batch) contending that they could join service late not due to their fault, but due to the fact that they had to undergo two years training course while the candidates of 1980-81 batch were permitted to take an integrated Training course the duration of which was one year, with the result that they could join Service earlier than the (1979-81 batch) which, according

to them, was illegal and discriminatory and had adversely affected their seniority in service . Representations received from the non-graduates were forwarded by the Chief Conservator of forest, with his proposal for favourable consideration but was however turned down by the Government (Agriculture and Forest) Department, vide its communication to the Principal Chief Conservator of Forest dated 12.10.1982, which reads as follows:-

> "With reference to your letter No.EST-3A-7409-A-2075 dated 03.08.82 of above cited subject, it is to inform you that those who have given two years of training, their minimum educational qualification is intermediate, while the minimum educational qualification for those who have given one year training is degree of B.Sc, accordingly there is basic difference between both trainees. It is obvious that those who have less qualification required through training. Therefore it is not proper to change seniority because of late appointment due to long training, so kindly note that your proposal is not acceptable."

14. The office of the Chief Conservator of Forest later published a gradation list of Range Forest Officers, as it stood on 1st January, 1983 in which the respondents were shown as seniors to the appellants. After two years, the first appellant herein submitted yet another representation on 22.10.1985 to the Deputy Conservator of Forest claiming seniority over the 1980-81 batch. But a fresh gradation list of Range Forest Officers as it stood on 1st January, 1986 was published by the Department wherein also the respondents (1980-81 batch) were shown as seniors to the appellants.

15. The Chief Conservator of Forests again rejected the first appellant's representation vide his communication dated 05.03.1987 referring to the earlier communication of the Government dated 12th January, 1982 stating that undergraduates have to undergo a more intensive training

compared to graduates. The operative portion of the order reads as follows:-

> "….With regard to the above it is stated that by the State Government, Agriculture Department, Gandhinagar, letter No:Kra/FST/1071/81475/VA, dated 12.10.1982 it has been decided that the minimum educational qualification of those who were given two years trainee is Intermediates whereas those who are given one year's training their minimum educational qualification is B.Sc degree. Thus there is basic difference between both the trainees. Thus more intensive training is required to be given to those whose educational qualification is less. Therefore, for longer training the appointment was made late. Therefore, it has not been found proper to make any change in the seniority. This means that the Ranger Forest Officers of 1980-81 Rangers Course were given appointment first (in point of time) on completion of training on 28th February, 1981, whereas the training of Range Forest Officers of 1979-81 Rangers Course was completed on 31st March, 1981 and therefore, they were given appointments as Ranger Forest Officers subsequently, and therefore, they will not be getting seniority over the Range Forest Officers of the year 1980-81, as decided by the Government. Therefore, the seniority of Shri Vankani in gradation list of 1983 is at proper place in view of the said decision."

16. Later, a provisional gradation list of Range Forest Officers as it stood on 01.01.1989 was published by the Department wherein also the respondents were shown as seniors to the appellants. Above mentioned gradation lists and the various orders issued by the Government/ Department were never challenged by the appellants before any forum. The first appellant, and others however, submitted yet another representation on 17.05.1992 to the Secretary Forest and Environment department and an Under Secretary in the Forest and Environment Department had sent a note No.VNM/4992/

A-225/61 dated 29.09.1993 to the Principal Chief Conservator of Forest stating that the following decision has been taken in consultation with the General Administrative Department which reads as follows:-

> "….Selection of Range Forest Officer of 1979-81 batch is as per the provision of Recruitment Rules of 1969. While selection of candidates or thereafter, is as per amended Recruitment Rules thereafter. Therefore, selection of candidates of 1979-81 batch is earlier as per Recruitment Rules of 1969. Generally, candidates selected directly by the Gujarat Public Service Commission are arranged serially from the beginning as recommended by the Commission. But as per provision 14 of the Rangers Recruitment Rules 1969 for seniority of Range Forest Officer are not arranged from the date of joining, but arranged as per Rank of Final Examination of Rangers. The provision 14 of Rangers Recruitment Rules 1969 is to decide internal seniority of the concerned batch only, according to that Range Forest Officer candidates of 1979-81 batch should be placed above candidates of 1980-81 batch in the seniority list."

17. Noticing that the above mentioned order would unsettle the settled seniority the respondents preferred a representation dated 19.10.1993 before the Chief Conservator of Forest reminding that similar representations were earlier rejected and there was no justification in submitting such a note and that too without giving them an opportunity of being heard.

18. The respondents aggrieved by the above mentioned note preferred a Writ Petition SCA 449 of 1994 before the Gujarat High Court and the writ petition was heard along with three other writ petitions and a common judgment was delivered by the learned single judge of that Court on 27.10.1989. The learned single judge however dismissed the writ petition holding that though the persons selected in the 1980-81 batch were given training for a shorter period, on

account of their higher qualification, that would not give the officers in the subsequent and previous batches any ground for claiming higher seniority. The respondents herein aggrieved by the above judgment had preferred an LPA No.1634 of 1999 which was allowed by the Division Bench of the Gujarat High Court holding that the respondents herein are entitled to seniority from the date of their appointment after completing the Rangers Course with higher standard certificate and that their inter-se seniority would be governed by Rule 22 of the 1974 Rules. Further, it was also held that the contesting respondents (appellants herein) would take their seniority from the date of their appointment as Rangers after completing the Rangers Course with higher standard certificate and that their inter-se seniority would also be governed by Rule 22 of the 1974 Rules. The impugned order dated 29th September, 1993 issued by the Government was also quashed. Aggrieved by the above judgment the appellants have come up with this appeal, with leave to appeal.

19. We find while the SLP was pending, the Government passed a resolution on 19.07.2007 treating the training period also for the purpose of seniority, increment and pension which according to the respondents was to get over, the judgment of the Division Bench. A Special Civil Application No.5297 of 2009 was preferred by one Assistant Conservator of Forest before the Gujarat High Court for implementing the Government Resolution dated 19.07.2007 so as to get further promotion as Deputy Conservator of Forest and a Writ Petition SCA No.7488 of 2009 was preferred by an Assistant Conservator of Forest for a writ of certiorari to quash the above mentioned resolution. Both the SCAs were heard by the learned single judge of the Gujarat High Court and a common judgment was delivered on 08.09.2009. Learned single judge noticed that the Government Resolution dated 19.07.2007 was directly in conflict with 1974 Rules as amended in the year 1979. Learned Single judge, therefore, dismissed the SCA No.5297 of 2009 and allowed the SCA No.7488 of 2009 by quashing the Government

Resolution dated 19.07.2007. State Government it seen has accepted the above mentioned judgment and passed a Resolution on 19th January, 2010 which reads as follows :-

> "Above matter was under consideration of the Government and after careful consideration, the Government resolves that in the Resolution of even no. dated 19.07.2007 that the duration from the training period up to the result of the exam, which was to be considered as continuous for the purpose of seniority who have cleared the post -training examination within the prescribed trial are hereby, revoked. Along with this the provisions of resolution dated 19.07.2009 contained in paragraph no.2 are also revoked. The provisions of considering the service as continuous for the purpose of increment and pension, shall retain as they are.
>
> The issue with the concurrence of general administration department vide its notes dated 07.01.2010 on this Department, file of even number.
>
> By order and in the name of the Governor of Gujarat"

20. Shri Dushyant Dave, learned senior counsel appearing for the appellants, referred extensively to the provisions of 1969 Rules, 1974 Rules, and also to the Notification dated 15th September, 1979, amending the 1974 Rules and also 1983 Rules, amending Rule 18 substituting one year instead of two years for completing the Rangers course. Learned counsel submitted that the 1969 Rules, has stipulated two years' training under Rule 10 which still stands un-amended. Learned counsel submitted without while amending the 1969 Rules, the State Government was not justified in reducing the period of training to one year instead of two years for graduates. Learned counsel submitted that the Government has committed a grave error in revoking the Resolution dated 19th January, 2007 by not reckoning the training period for the purpose of seniority. Learned counsel further submitted that when the appellants and

the respondents were selected in the year 1979 and 1980 the rule stipulated two years training and hence there was no justification in reducing the training period to one year, so far as the respondents are concerned. Learned counsel submitted that the training period ought to have been reckoned for the purpose of seniority, increment, pay and pension and the Government was not justified in revoking the Resolution dated 19.7.2007, by another Notification dated 15th January, 2010 while the matter was pending before this Court.

21. Learned senior counsel also submitted that the Government was justified in issuing the Note dated 29.9.1993 holding that the candidates of 1979-81 batch should be placed above the candidates of 1980-81 batch in the seniority list and that the continuous officiation should reckon from the date of commencement of the training and not from the date of appointment. In support of his contention, learned counsel referred to the judgment of this Court in *G.P. Doval vs. Chief Secretary Government of U.P.* (1984) 4 SCC, 329. Reference was also made the judgment of this Court in *Prabhakar and Others vs. State of Maharashtra And Others,* (1976) 2 SCC 890, and *G. Deendayalan vs. Union of India & Ors.* (1997) 2 SCC 638. Learned counsel also referred to the judgment of this Court in *R.S. Ajara vs. State of Gujarat,* (1997) 3 SCC 641 and the rules should not be interpreted to prohibit counting the period of training for the purpose of seniority.

22. Mr. Huzefa Ahmadi, learned counsel appearing for the respondents, submitted there is no illegality in the impugned judgment warranting interference by this Court under Article 136 of the Constitution of India. Learned counsel submitted that the Government has committed a grave error in unsettling the seniority in the year 1993 which was settled in the year 1982. The Government had clearly indicated that two years' training was given to those persons who were non-graduates and one year training was given to the persons who were graduates and there was a basic difference between both the batches of

trainees in respect of their educational qualifications. Learned counsel submitted that Government had rightly held that extensive training was required in the case of those who had lesser qualification and hence there was no illegality in the fixation of seniority in the various gradation lists published. Learned counsel submitted that it was due to the pressure exerted by the appellants, a note was put up by the Under Secretary, Forest and Environment Department to the Chief Conservator of Forest for unsettling the seniority which was settled years back. Learned counsel submitted that though the Government had tried to overcome the judgment of the Division Bench by issuing a Resolution on 19.7.2007, it was subsequently revoked vide order dated 15.01.2010, following the judgment of the Gujarat High Court in SCA No.7488 of 2009. Referring to 1969- Rules, 1974 Rules etc. learned counsel submitted that inter se seniority between both the batches has to be reckoned from the date of appointment and not from the date of selection or from the date of commencement of the training. Learned counsel referred the Judgment of the Apex Court in *Prafulla Kumar Swain vs. Prakash Chandra Misra,* 1993 (suppl) 3 SCC 181; *Pramod K. Pankaj vs. State of Bihar,* (2004) 3 SCC 723; *Bhey Ram Sharma vs. Haryana S.E.B.,,* 1994 (supp) 1 SCC 276. Reference was also made on the decision of Apex Court in *K.R. Mudgal vs. R.P. Singh* (1986) 4 SCC 531. Ms. Hemantika Wahi, learned counsel for the respondents also endorsed the view of the respondents and also referred to the counter affidavit filed by the State Government in support of their stand.

23. We are of the view that the Government has committed a grave error in unsettling the inter se seniority of the graduates and non-graduates which was settled as early as in the year 1982. The State Government in its letter dated 12.10.1982 had taken the view that two years' training was imparted to non-graduates of 1979-81 batch and one year training was imparted only to graduates of 1980-81 batch since candidates

with lesser qualification required thorough training compared to the candidates with higher qualification. Due to this basic difference in the educational qualification between the 1979-81 and 1980-81 batches, the Government took a conscious decision that it was not proper to unsettle the settled seniority even if there was delay in the appointment of non-graduates. Subsequent to that decision, three gradation lists were published, recognizing the seniority of the respondents over the appellants. Neither the Government order dated 12.10.1982 nor the Gradation lists were challenged before any forum which in our view had attained finality. After a period of two years yet another representation was submitted which was rejected by the Conservator of Forests vide his communication dated 5.3.1987 referring to the earlier Government order dated 12.01.1982. Fresh gradation list was published on 1.1.1989 where also respondent's seniority was recognized. Representations dated 23.05.1989 and 03.05.1990 preferred by the appellants were also not favourably considered by the Government or the Chief Conservator of Forests. The Under Secretary of the Forest and Environment-Department had however put up a note on 29.09.1993 evidently under pressure from the candidates of the 1979-81 batch misinterpreting rule 14 of the 1969 Rules, stating the candidates of 1979-81 batch should be placed above the candidates of 1980-81 batch. Rule 14 of the Rules determines the inter se seniority of the candidates of a particular batch and does not determine the inter-se seniority between two batches, whose educational qualification, years of training and the date of joining, etc. differ. Rule 14 of 1969 Rules and Rule 22 of 1974 Rules also further re-emphasise that fact. The note put up by the Under Secretary on 29.09.1993 is, therefore, contrary to Rule 14 of 1969 Rules and Rule 22 of the 1974 Rules.

24. 1969, 1974, and 1979 Rules clearly stipulate how the seniority has to be reckoned. Rule 14 of 1969 Rules and 22 of 1974 Rules are in pari materia which states that seniority of the Rangers shall be governed by their respective ranks in the

final examination at the Rangers College irrespective of their joining the service and on successful completion of the training course the candidates shall be appointed as Rangers if they pass with higher standard certificate. Both the groups are governed by these rules in the matter of their intra seniority and the government had rightly settled the seniority vide orders dated 12.10.1982 and 05.03.1987 and the gradation lists were also rightly published. The Government in our view have committed a grave error in unsettling the settled seniority vide its proceedings dated 29.9.1993.

25. Seniority is a civil right which has an important and vital role to play in one's service career. Future promotion of a Government servant depends either on strict seniority or on the basis of seniority-cum-merit or merit-cum-seniority etc. Seniority once settled is decisive in the upward march in one's chosen work or calling and gives certainty and assurance and boosts the morale to do quality work. It instills confidence, spreads harmony and commands respect among colleagues which is a paramount factor for good and sound administration. If the settled seniority at the instance of one's junior in service is unsettled, it may generate bitterness, resentment, hostility among the Government servants and the enthusiasm to do quality work might be lost. Such a situation may drive the parties to approach the administration for resolution of that acrimonious and poignant situation, which may consume lot of time and energy. The decision either way may drive the parties to litigative wilderness to the advantage of legal professionals both private and Government, driving the parties to acute penury. It is well known that salary they earn, may not match the litigation expenses and professional fees and may at times drive the parties to other sources of money making, including corruption. Public money is also being spent by the Government to defend their otherwise untenable stand. Further it also consumes lot of judicial time from the lowest court to the highest resulting in constant bitterness among parties at the cost of sound administration affecting public interest. Courts are

repeating the ratio that the seniority once settled, shall not be unsettled but the men in power often violate that ratio for extraneous reasons, which, at times calls for departmental action. Legal principles have been reiterated by this Court in *Union of India and Another v. S.K. Goel and Others* (2007) 14 SCC 641, *T.R. Kapoor v. State of Haryana* (1989) 4 SCC 71, *Bimlesh Tanwar v. State of Haryana,* (2003) 5 SCC 604. In view of the settled law the decisions cited by the appellants in *G.P. Doval's* case (supra), *Prabhakar and Others* case, G. *Deendayalan, R.S. Ajara* are not applicable to the facts of the case.

26. We will now examine whatever it is possible to strictly enforce Rule 10 of 1969 Rules and Rule 18 of 1974 Rules. Rule making authority wanted the finally selected candidates to undergo training in the Northern Forest Rangers College, Dehradun, or the Southern Forest Rangers College Coimbatore, for a period of two years. When the rules were framed, perhaps only those Government run colleges alone would have been conducting those courses, the duration of which were two years and the qualification prescribed was pass in intermediate examination. Later those colleges changed their course duration to an integrated one year course. Rule 10 of 1969 Rules, 18 of 1974 Rules were therefore found to be unworkable. In the year 1979, Rule 8 of 1974 Rules was amended and the minimum educational qualification was fixed as graduation. Necessary amendments, however, were not carried out in Rule 10 of 1969 Rules or Rule 18 of 1974 Rules pointing out in which college the candidate with intermediate qualification had to undergo training, though seldom we find the rule making authority specifies the names of the colleges where the candidates have to undergo their training. Rules were therefore, found to be unworkable and Government was in an obscure situation, and therefore Government took a conscious decision that the candidates of 1979-81 batch with intermediate qualification would undergo the training, the duration of which was two years and the candidates of 1980-81 batch with

graduation as qualification would undergo the course, the duration of which was one year. Such a decision was taken, evidently due to the reason that Rule 10 of 1969 Rules and Rule 18 of 1974 Rules were found to be unworkable. Even now 1969 Rules, 1974 Rules refer to NFR College, Dehradun and South FRC Coimbatore, though those colleges had done away with two years course years back but necessary amendments are yet to be carried out in those Rules. Before 1980-81 batch was selected the educational qualification was amended, but in Rule 18, the period of two years was substituted as one year only vide Notification dated 25th November, 1983 and necessary amendments are yet to be carried out in Rule 10 of 1969 Rules.

27. Strict interpretation of Rule 10 of 1969 Rules and Rule 18 of 1974 Rules was unworkable and literal interpretation would have resulted in absurd results. When the educational qualification prescribed was pass in intermediate examination, the legislature wanted the candidates to undergo training for two years. But, when the higher educational qualification of graduation was prescribed the statute was silent as to the period of training the candidates have to undergo. Even the non-graduates were not sent for training in the colleges mentioned in the Rules but were sent to some other colleges where the duration of course was two years and the candidates of 1980-81 batch was sent for training to the colleges which conducted course of one year duration. Such a course was adopted, since the rules were found to be unworkable. It is a well known Rule of construction that the provisions of a statute must be construed so as to give them a sensible meaning. The legislature expects the court to observe the maxim ut res magis valeat quam pereat (it is better for a thing to have effect than to be made void). Principle also means that if the obvious intention of the statute gives rise to obstacles in implementation, the court must do its best to find ways of overcoming those obstacles, so as to avoid absurd results. It is a well settled principle of interpretation of statutes that a construction should not be put on a statutory provision which would lead to manifest absurdity, futility,

palpable injustice and absurd inconvenience or anomaly.

28. In this connection reference may be made to the judgment in R. (on the application of *Edition First Power Ltd) v. Central Valuation Officer and another* (2003)UKHL 20(2003) 4 ALL ER 209 at (116),(117), wherein Lord Millett said:-

> "The court will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it….."

29. Reference may also be made in the Judgment in *Andhra Bank v. B. Satyanarayana* (2004) 2 SCC, 657, wherein this Court has held:-

> " A machinery provision, it is trite, must be construed in such a manner so as to make it workable having regard to the doctrine " ut res magis valeat quam pereat".

30. In *Tinsukhia Electric Supply Co. Ltd. vs. State of Assam & Ors.* (1989) 3 SCC, 709, this Court held as follows:-

> "The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of a statute must be so construed as to make it effective and operative, on the principle *"ut res magis valent quam pereat".* It is, no doubt, true that if a statute is absolutely vague and its language wholly intractable and absolutely meaningless, the statute could be declared void for vagueness. This is not in judicial review by testing the law for arbitrariness or unreasonableness under Article 14; but what a court of construction, dealing with the language of a statute, does in order to ascertain from, and accord to,

the statute the meaning and purpose which the legislature intended for it."

31. Reference may also be made to the decision in *Madhav Rao, Jivaji Rao Scindia v. Union of India* (1971) 1 SCC 85, *Union of India v. B.S. Agarwal* (1997) 8 SCC 89, *Paradise Printers v. Union Territory of Chandigarh* (1988) 1 SCC 440.

32. The above legal principles clearly indicate that the courts have to avoid a construction of an enactment that leads to an unworkable, inconsistent or impracticable results, since such a situation is unlikely to have been envisaged by the Rule making authority. Rule making authority also expects rule framed by it to be made workable and never visualises absurd results. The decision taken by the government in deputing the non-graduates (1979-81 batch) to a two year training course and graduates (1980-81 batch) to a one year training is in due compliance with Rule 10 of 1969 Rules and Rule 18 of 1974 Rules and the seniority of the both batches has been rightly settled vide orders dated 12.10.1982 and 5.3.1987 and the government has committed an error in unsettling the seniority under its proceedings dated 29th September, 1993.

33. We, therefore, find no illegality in the judgment of the High court in quashing the order dated 29th September, 1993 and upholding the seniority of the candidates of 1980-81 batch over the candidates of 1979-81 batch.

34. Appeal therefore lacks merits, and the same is accordingly dismissed.

R.P. Appeal dismissed.

C.I.T., AHMEDABAD

v.

RELIANCE PETROPRODUCTS PVT. LTD.

(Civil Appeal No. 2463 of 2010)

MARCH 17, 2010

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

INCOME TAX ACT, 1961:

s.271(1)(c) – Penalty on concealment of income or furnishing 'inaccurate particulars' – Assessee claiming in the return a certain sum as expenditure, on the basis of expenditure made for paying the interest on the loan for purchase of IPL shares – Claim not accepted – Show cause notice u/s 271(1)(c) issued to assessee – HELD: There is no finding that any details supplied by assessee were found to be incorrect or erroneous or false – A mere making of the claim, which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars – Penalty u/s 271(1)(c), is, therefore, not attracted.

WORDS AND PHRASES:

Expression 'inaccurate particulars' as occurring in s.271(1)(c) of Income Tax Act, 1961 – Connotation of.

The assessee, an investment company, in its return showed Rs.28,77,242 as expenditure which it claimed on the basis of the expenditure made for paying the interest on the loans obtained by it by which amount the assessee purchased some IPL shares. The assesee declared a loss of Rs.26,54,554/-. The claim of the assessee was not accepted. Penalty proceedings u/s 271(1)(c) of the Act were initiated against the assessee.

The assessee in its reply to the show cause notice stated that all the details given in the return were correct, there was no concealment of income nor were any inaccurate particulars of such income furnished. The Commissioner (Appeals) deleted the penalty and his order was upheld by the Income Tax Appellate Tribunal as also the High Court.

In the instant appeal filed by the Revenue, the question for consideration before the Court was: whether the assessee was liable to pay the penalty u/s 271(1)(c) of the Income Tax Act, 1961?

Dismissing the appeal, the Court

HELD: 1.1. In order to attract the provisions of s.271 of the Income Tax Act, 1961, firstly, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income.Before the penalty u/s 271(1)(c) of the Act is imposed, it must be shown that the conditions under the said section exist. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. The instant case is not the one of concealment of the income. That is not the case of the Revenue either. The stand of the Revenue is that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. [Para 7 and 8] [516-G-H; 517-A-C; 518-A-B]

Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr. **2007 (7) SCR 499 =2007(6) SCC 329, explained.**

1.2. Reading the words 'inaccurate' and 'particulars'

in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or are erroneous. In the instant case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Therefore, there would be no question of inviting the penalty u/s 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars. [Para 9] [520-A-C]

1.3. It cannot be said that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. [Para 7] [517-C-D]

Commissioner of Income Tax, Delhi vs. Atul Mohan Bindal **2009 (13) SCR 464 = 2009(9) SCC 589;** *Union of India vs. Dharamendra Textile Processors* **2008 (14) SCR 13 = 2008 (13) SCC 369; and** *Union of India Vs.Rajasthan Spg. & Wvg. Mills* **2009(13) SCC 448, relied on.**

2. It was up to the authorities to accept the claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not attract the penalty u/s 271(1)(c); otherwise, in case of every return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty u/s 271(1)(c). That is clearly

not the intendment of the Legislature. In the instant case, no fault has been found with the particulars submitted by the assessee in its return. The Tribunal, as well as, the Commissioner of Income Tax (Appeals) and the High Court have correctly reached their conclusion. [Para 10 and 12] [520-G-H; 521-A-F-G]

Sree Krishna Electricals v. State of Tamil Nadu & Anr. **(2009) 23VST 249 (SC), referred to.**

Case Law Reference:

2009 (13) SCR 464	**relied on**	**para 7**
2008 (14) SCR 13	**relied on**	**para 7**
2009(13) SCC 448	**relied on**	**para 7**
2007 (7) SCR 499	**explained**	**para 8**
(2009) 23VST 249 (SC)	**referred to**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2463 of 2010.

From the Judgment & Order dated 23.10.2007 of the High Court of Gujarat at Ahmedabad in Tax Appeal No. 1149 of 2007.

B. Bhattacharya, ASG, Arijit Prasad, Varun Sarin (for B.V. Balaram Das) for the Appellant.

Santosh Agarwal, R. Chandrachud (for K.R. Sasiprabhu) for the Respondents.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

2. The only question in this appeal which has been filed by the Commissioner of Income Tax-III is as to whether the respondent-assessee is liable to pay the penalty amounting to Rs.11,37,949/- under Section 271(1)(c) of the Income Tax Act (hereinafter referred to as "the Act") ordered by the Assessing

Authority. The Commissioner of Income Tax (Appeals), however, deleted the said penalty. The order of the Commissioner (Appeals) was appealed against before the Income Tax Appellate Tribunal (hereinafter referred to "the Tribunal") which confirmed the order of the Commissioner (Appeals) and dismissed the appeal filed by the Revenue. However, the Revenue challenged the said order before the High Court which confirmed the orders passed by the Commissioner (Appeals) and the Tribunal while dismissing the Tax Appeal filed by the Revenue.

3. Few facts would be relevant.

4. The assessee is a company and the relevant Assessment Year is 2001-02. The Return was filed on 31.1.2001 declaring loss of Rs.26,54,554/-. This assessment was finalized under Section 143(3) of the Act on 25.11.2003 whereby the total income was determined at Rs.2,22,688/-. In this assessment the addition in respect of interest expenditure was made. Simultaneously penalty proceedings under Section 271(1)(c) of the Act were also initiated on account of concealment of income/furnishing of inaccurate particulars of income. The said expenditure was claimed by the assessee on the basis of expenditure made for paying the interest on the loans incurred by it by which amount the assessee purchased some IPL shares by way of its business policies. However, admittedly, the assessee did not earn any income by way of dividend from those shares. The company in its Return claimed disallowance of the amount of expenditure for Rs.28,77,242/- under Section 14A of the Act.

5. By way of response to the Show Cause Notice regarding the penalty in its reply dated 22.3.2006, the assessee claimed that all the details given in the Return were correct, there was no concealment of income, nor were any inaccurate particulars of such income furnished. It was pointed out that the disallowance made by the Assessing Authority in the Assessment Order under Section 143(3) of the Act were solely

on account of different views taken on the same set of facts and, therefore, they could, at the most, be termed as difference of opinion but nothing to do with the concealment of income or furnishing of inaccurate particulars of such income. It was claimed that mere disallowance of the claim in the assessment proceedings could not be the sole basis for levying penalty under Section 271(1)(c) of the Act. It was submitted specifically that it was an investment company and in its own case for Assessment Year 2000-01 the Commissioner (Appeals) had deleted the disallowance of interest made by the Assessment Officer and the Tribunal has also confirmed the stand of the Commissioner (Appeals) for that year and, therefore, it was on the basis of this that the expenditure was claimed. It was further submitted that making a claim which is rejected would not make the assessee company liable under Section 271(1)(c) of the Act. It was again reiterated that there was absolutely no concealment, nor were any inaccurate particular ever submitted by the assessee-company.

6. Shri Bhattacharya, Learned ASG submits that Commissioner (Appeals), the Tribunal as well as the High Court have ignored the positive language of Section 271(1)(c) of the Act. He pointed out that the claim of the interest expenditure was totally without legal basis and was made with the malafide intentions. It was further pointed out that the claim made for the interest expenditure was not accepted by the Assessing Authority nor by the Commissioner (Appeals) and, therefore, it was obvious that the claim for the interest expenditure did not have any basis. He further pointed out that the contention about the earlier claims being finalized was also not correct as the appeal was pending before the High Court against the order of the Tribunal for the year 2000-01. According to the Learned ASG, even otherwise, the expenditure on interest could not have been claimed in law, as under Section 36(1)(iii), only the amount of interest paid in respect of capital borrowed for the purposes of the business or profession could have been claimed and it was clear that the interest in the present case

was not in respect of the capital borrowed. Our attention was also invited to Section 14A of the Act, which provides that no deduction could be allowed in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act. The Learned ASG also invited our attention to provision of Section 10(33) to show that the income arising from the transfer of a capital asset could not be reckoned as an income which can form the part of the total income. In short, the contention was that the assessee in this case had made a claim which was totally unacceptable in law and thereby had invited the provisions of Section 271(1)(c) of the Act and had, therefore, exposed itself to the penalty under that provision.

7. As against this, Learned Counsel appearing on behalf of the respondent pointed out that the language of Section 271(1)(c) had to be strictly construed, this being a taxing statute and more particularly the one providing for penalty. It was pointed out that unless the wording directly covered the assessee and the fact situation herein, there could not be any penalty under the Act. It was pointed out that there was no concealment or any inaccurate particulars regarding the income were submitted in the Return. Section 271(1)(c) is as under:-

> "271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the

case of the Revenue either. However, the Learned Counsel for Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the Section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the Return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The Learned Counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In Commissioner of Income Tax, Delhi vs. Atul Mohan Bindal [2009(9) SCC 589], where this Court was considering the same provision, the Court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in *Union of India vs. Dharamendra Textile Processors* [2008(13) SCC 369], as also, the decision in *Union of India vs. Rajasthan Spg. & Wvg. Mills* [2009(13) SCC 448] and reiterated in para 13 that:-

> "13. It goes without saying that for applicability of Section 271(1)(c), conditions stated therein must exist."

8. Therefore, it is obvious that it must be shown that the conditions under Section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the Return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In *Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr.* [2007(6) SCC 329], this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty under Section 271(1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that Clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the Assessing Authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the assessee must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr. was upset. In Union of India vs. Dharamendra Textile Processors (cited supra), after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for

giving inaccurate particulars while filing Return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with Explanations indicated with the said Section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, willful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why decision in *Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr.* (cited supra) was overruled by this Court in Union of India vs. Dharamendra Textile Processors (cited supra), was that according to this Court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in case of *Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr.* (cited supra). However, it must be pointed out that in *Union of India vs. Dharamendra Textile Processors* (cited supra), no fault was found with the reasoning in the decision in Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr. (cited supra), where the Court explained the meaning of the terms "conceal" and inaccurate". It was only the ultimate inference in *Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr.* (cited supra) to the effect that mens rea was an essential ingredient for the penalty under Section 271(1)(c) that the decision in *Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr.* (cited supra) was overruled.

9. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as:-

> "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript".

We have already seen the meaning of the word

"particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars.

10. It was tried to be suggested that Section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our

opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature.

11. In this behalf the observations of this Court made in *Sree Krishna Electricals v. State of Tamil Nadu & Anr.* [(2009) 23VST 249 (SC)] as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the Return. However, the said transactions were reflected in the accounts of the assessee. This Court, therefore, observed:

> "So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's account books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside."

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its Return.

12. The Tribunal, as well as, the Commissioner of Income Tax (Appeals) and the High Court have correctly reached this conclusion and, therefore, the appeal filed by the Revenue has no merits and is dismissed.

R.P. Appeal dismissed.

RAMESHBHAI PANDURAO HEDAU

v.

STATE OF GUJARAT

(Criminal Appeal No. 548 of 2010)

MARCH 19, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

ss. 156(3) and 202 – Power of Magistrate to order investigation – HELD: Powers u/s 156(3) can be invoked by Magistrate at pre-cognizance stage whereas powers u/s 202 are to be invoked after cognizance is taken but before issuance of process – Once the Magistrate takes cognizance he is thereafter precluded from ordering investigation u/s 156(3) – In the instant case, on the complaint filed, the Magistrate having taken cognizance, rightly postponed the issuance of process and kept the complaint for court inquiry u/s 202 – There is no reason to interfere with the order of the Magistrate as upheld by the High Court.

The brother of the appellant was found dead. The post mortem report indicated that the death was as a result of natural causes. The investigating officer, on the basis of the statements of the appellant, his relatives and others as also the post-mortem report, closed the investigation. Thereafter the appellant filed a complaint before the Metropolitan Magistrate alleging that offences u/ss 302, 144 read with s.120-B IPC had been committed, and prayed for an order for inquiry u/s 156(3) CrPC. The Magistrate by his order dated 17.4.2007 postponed the issuance of process and kept the complaint for court inquiry in accordance with s.202 CrPC. The writ petition filed by the appellant having been dismissed by the High Court, he has filed the appeal.

The question for consideration before the Court was: whether the Magistrate committed any error in refusing the appellant's prayer for an investigation by the police u/s 156(3) of the Code of Criminal Procedure, 1973 and resorting to s.202 of the Code.

Dismissing the appeal, the Court

HELD: 1.1. The power to direct an investigation to the police authorities is available to the Magistrate both u/s 156(3) Cr.P.C. and u/s 202 Cr.P.C. The only difference is the stage at which the said powers may be invoked. The Courts are ad idem on the question that the powers u/s156(3) can be invoked by a Magistrate at a pre-cognizance stage, whereas powers u/s 202 are to be invoked after cognizance is taken on a complaint but before issuance of process. Once the Magistrate takes cognizance of the offence, he is thereafter precluded from ordering an investigation u/s156 (3) of the Code. [Para 13, 14 and 18] [529-G-H; 530-A; 530-E; 531-E-F]

Suresh Chand Jain vs. State of M.P. **2001 (1) SCR 257 = (2001) 2 SCC 628;** *Dharmeshbhai Vasudevbhai & Ors. vs. State of Gujarat & Ors.* **(2009) 6 SCC 576;** *Devarapalli Lakshminarayana Reddy & Ors. vs. V. Narayana Reddy & Ors.* **1976 Suppl. SCR 524 = (1976) 3 SCC 252;** *Dilawar Singh vs. State of Delhi* **(2007) 12 SCC 641; and** *Mohd. Yousuf vs. Afaq Jahan (Smt.) and Anr.* **(2006) 1 SCC 627, referred to.**

1.2. In the instant case, the Magistrate has treated the protest petition filed by the appellant as a complaint u/s 200 of the Code and has thereafter proceeded u/s 202 Cr.P.C. and kept the matter with himself for an inquiry. There is nothing irregular in the manner in which the Magistrate has proceeded and if at the stage of Sub-section (2) of s. 202 the Magistrate deems it fit, he may

either dismiss the complaint u/s 203 or proceed in terms of s.193 and commit the case to the Court of Session. There is no reason to interfere with the order of the Magistrate and the views expressed by the High Court in the impugned order on the invocation of jurisdiction by the Magistrate u/s 202 Cr.P.C. [Para 18-19] [531-F-H; 532-A; 532-B]

Case Law Reference:

2001 (1) SCR 257	**referred to**	**para 6**
(2009) 6 SCC 576	**referred to**	**para 7**
1976 Suppl. SCR 524	**referred to**	**para 9**
(2007) 12 SCC 641	**referred to**	**para 14**
(2006) 1 SCC 627	**referred to**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 548 of 2010.

From the Judgment & Order dated 2.7.2008 of the High of Gujarat in Special Criminal Application No. 1458 of 2007.

Chaitanya Joshi, Nachiketa Joshi, Sudhakar Joshi, Ranjith K.C. for the Appellant.

Meenakshi Lekhi, Hemanitka Wahi, Somnath Padan, Jesal for the Respondent.

The Order of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The Appellant is the elder brother of the deceased, Kamleshbhai, whose dead body was found near Govindbhai Ghat on Sarkhej Narol Highway on 17th October, 2006. At the time of his death, Kamleshbhai was serving with M/s Airstate International Courier and his usual working time was from 1.00

p.m. to 7.00 p.m. On 17th October, 2006, on receipt of information, the Appellant went to the above-mentioned spot and found the dead body of his brother. On 17th October, 2006 itself, post-mortem was conducted by the Medical Officer of the Civil Hospital, Ahmedabad. After the post-mortem examination was conducted, the opinion of the doctor as to the cause of death was kept pending till the reports from the FSL and HTP were made available. On 21st December, 2006, upon receipt of the said reports, the Medical Officer was of the opinion that the cause of death of the deceased was on account of cardio-respiratory arrest due to lungs pathology. In other words, Kamleshbhai's death was not found to be unnatural but as a result of natural causes. The Investigating Officer had also occasion to record the statements of the Appellant, his relatives and others. On the basis of the said statements and the report of the post-mortem examination, the investigation was closed by the Investigating Officer attached to Vatva Police Station.

3. Dissatisfied with the closure of the investigation, the Appellant filed a complaint before the Metropolitan Magistrate No.20 at Ahmedabad on 17th April, 2007, which was numbered as Enquiry Case No.17 of 2007. In the complaint, the Appellant alleged that offences had been committed under Sections 302, 114 read with Section 120-B Indian Penal Code and prayed for an order to be passed for an inquiry under Section 156(3) Cr.P.C. for taking action against the accused. Instead of directing an investigation to be conducted by higher police officials under Section 156(3) Cr.P.C., the learned Metropolitan Magistrate by his order dated 17th April, 2007, postponed the issuance of process and kept the complaint for Court inquiry, in accordance with Section 202 Cr.P.C.

4. The Appellant herein filed a Criminal Writ Petition, being Special Criminal Application No.1458 of 2007 before the Gujarat High Court, which was dismissed in limine on 2nd July, 2008, by a learned Single Judge upon holding that no case had been made out for directing investigation under Section 156(3)

Cr.P.C. It is the said order of the High Court which has been questioned in the present appeal.

5. Appearing in support of the appeal, Mr. Nachiketa Joshi, Advocate, submitted that the learned Metropolitan Magistrate, Ahmedabad, had committed an error in rejecting the Appellant's prayer for an investigation under Section 156(3) of the Code and taking recourse to Section 202 of the Code instead. It was submitted that having regard to the serious nature of the offence complained of, an inquiry by the Court under Section 202 Cr.P.C. would not be apposite in preference to an investigation by the higher police officials under Section 156(3) of the Code. Mr. Joshi submitted that the order of the learned Metropolitan Magistrate, as well as that of the High Court, failed to recognize the gravity of the offence and the attempt made to cover up the incident which has caused a miscarriage of justice. Mr. Joshi further submitted that the Courts were ill-equipped to deal with an investigation which would be required to be undertaken in the instant case and, accordingly, the orders passed by the learned Magistrate, as well as the High Court, were liable to be set aside with a direction to higher officials of the police in the District to conduct a proper investigation under Section 156(3) of the Code.

6. In support of his aforesaid submissions, Mr. Joshi referred to the decision of this Court in *Suresh Chand Jain vs. State of M.P.* [(2001) 2 SCC 628], wherein while considering the power of the Magistrate under Section 156(3) Cr.P.C., it was held that such power is vested in the Magistrate before taking cognizance of the offence. In such a case, before taking cognizance of an offence the Magistrate always has the jurisdiction to direct an investigation under Section 156(3) of the Code on a fresh complaint.

7. Mr. Joshi also referred to the decision of this Court in *Dharmeshbhai Vasudevbhai & Ors. vs. State of Gujarat & Ors.* [(2009) 6 SCC 576], wherein, while considering the power of the Magistrate to recall an order for investigation passed by

him under Section 156(3) Cr.P.C., this Court appears to have taken the same view as was expressed in *Suresh Chand Jain's* case (supra) to the effect that before taking cognizance the Magistrate can invoke his powers under Section 156(3) Cr.P.C. but once he takes cognizance, he has to proceed in accordance with the procedure embodied in Chapter XV thereof, including the power to conduct an inquiry or investigation under Section 202 of the Code.

8. Mr. Joshi's submissions were vehemently opposed on behalf of the State of Gujarat by Ms. Meenakshi Lekhi, Advocate, who contended that once a final report had been filed by the investigating authorities under Section 173(2) Cr.P.C., there was no further scope for an investigation under Section 156(3) Cr.P.C. on the basis of a fresh complaint and the only remedy available to the complainant would be by way of a complaint under Section 200 Cr.P.C. Ms. Lekhi submitted that the scheme of the Code of Criminal Procedure was such that once an investigation on a complaint had been concluded and a final report had been submitted by the investigating agency to the Magistrate under Section 173(2) of the Code, any fresh complaint by way of a protest petition could only be entertained under Section 200 and if the Magistrate so thought fit, an inquiry or investigation could be conducted under Section 202 of the Code. Ms. Lekhi submitted that the provisions of Section 202 Cr.P.C. had been correctly invoked by the Magistrate and the prayer for investigation under Section 156(3) of the Code made by the Appellant had been rightly rejected.

9. In support of her submissions, Ms. Lekhi firstly referred to the decision of this Court in *Devarapalli Lakshminarayana Reddy & Ors. vs. V. Narayana Reddy & Ors.* [(1976) 3 SCC 252]. Reference was made to paragraph 17 of the said judgment wherein the distinction between an investigation under Section 156(3) of the Code and one under Section 202 (1) of the Code has been highlighted. It was explained that while Section 156(3) occurs in Chapter XII of the Code, which deals

with the powers of the police to investigate into an offence, Section 202 thereof deals with complaints made to Magistrates where the power to direct an inquiry operates in a different sphere. While the power to direct a police investigation under Section 156(3) is exercisable at the pre-cognizance stage, the power to direct an investigation or an inquiry under Section 202(1) is exercisable at the post-cognizance stage when the Magistrate is in seisin of the case. Ms. Lekhi contended that since the police had already conducted an investigation and had filed the final report under Section 173(2) of the Code and the same having been accepted by the learned Magistrate, the only course open to the appellant was to file a fresh complaint under Section 200 of the Code. Since the appellant had filed a fresh complaint by way of a protest petition, the learned Magistrate had rightly invoked the provisions of Section 202 to order an inquiry without directing a fresh investigation as prayed for by the appellant.

10. We have carefully considered the submissions made on behalf of the respective parties and we find no reason to interfere with the order of the High Court impugned in the appeal. From the scheme of Chapters XII and XV of the Code of Criminal Procedure, it is quite clear that the two contemplate two different situations. Chapter XII deals with the power of the police authorities to investigate in respect of cognizable offence on receipt of information thereof. Section 156, which forms part of Chapter XII, deals with the power of an Officer in-charge of a police station to investigate cognizable cases and provides as follows :

> *"156. Police Officer's power to investigate cognizable cases.*- (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

11. It will thus be seen that the power of the police authorities to investigate a cognizable offence is not dependent on an order of the Magistrate. At the same time, such power may be exercised by the officer concerned on an order being passed by any Magistrate empowered under Section 190 of the Code for making such an investigation. Chapter XII deals with the conduct of investigation of both cognizable and non-cognizable offences and the steps to be taken in that regard culminating in the filing of the report of the investigation on completion thereof under Section 173(2) of the Code. At this stage it may also be indicated that under Sub-section (8) of Section 173 the police is empowered to conduct further investigation in respect of an offence even after a report under Sub-section (2) is forwarded to the Magistrate.

12. However, all these steps are to be taken by the learned Magistrate prior to taking cognizance of the offence. On the other hand, Chapter XV deals with complaints filed before the Magistrate for taking cognizance of an offence. It has been sought to be urged by Ms. Lekhi, learned counsel appearing for the State of Gujarat, that once an investigation is undertaken by the police and a final report is filed, no further order could be made on a protest petition, which is in the nature of a fresh complaint for a further investigation under Section 156(3) of the Code.

13. The settled legal position has been enunciated by this Court in several decisions to which we shall refer presently. The Courts are ad idem on the question that the powers under Section 156(3) can be invoked by a learned Magistrate at a

pre-cognizance stage, whereas powers under Section 202 of the Code are to be invoked after cognizance is taken on a complaint but before issuance of process. Such a view has been expressed in *Suresh Chand Jain's* case (supra) as well as in *Dharmeshbhai Vasudevbhai's* case (supra) and the case of *Devarapalli Lakshminarayana Reddy's* case (supra).

14. The three aforesaid cases have been cited on behalf of the parties. We may also refer to the decision of this Court in *Dilawar Singh vs. State of Delhi* [(2007) 12 SCC 641], where the difference in the investigative procedure in Chapters XII and XV of the Code has been recognized and in that case this Court also appears to have taken the view that any Judicial Magistrate, before taking cognizance of an offence, can order investigation under Section 156(3) of the Code and in doing so, he is not required to examine the complainant since he was not taking cognizance of any offence therein for the purpose of enabling the police to start investigation. Reference has been made to the decision of this Court in *Suresh Chand Jain's* case (supra). In other words, as indicated in the decisions referred to hereinabove, once a Magistrate takes cognizance of the offence, he is, thereafter, precluded from ordering an investigation under Section 156(3) of the Code.

15. It is now well-settled that in ordering an investigation under Section 156(3) of the Code, the Magistrate is not empowered to take cognizance of the offence and such cognizance is taken only on the basis of the complaint of the facts received by him which includes a police report of such facts or information received from any person, other than a police officer, under Section 190 of the Code. Section 200 which falls in Chapter XV, indicates the manner in which the cognizance has to be taken and that the Magistrate may also inquire into the case himself or direct an investigation to be made by a police officer before issuing process.

16. Reference was also made to the decision of this Court in *Mohd. Yousuf vs. Afaq Jahan (Smt.) and Anr.* [(2006) 1

SCC 627], where it has been held that when a Magistrate orders investigation under Chapter XII of the Code, he does so before he takes cognizance of the offence. Once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV of the Code. The inquiry contemplated under Section 202(1) or investigation by a police officer or by any other person is only to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further on account of the fact that cognizance had already been taken by him of the offence disclosed in the complaint but issuance of process had been postponed.

17. The law is well-settled that an investigation ordered by the Magistrate under Chapter XII is at the pre-cognizance stage and the inquiry and/or investigation ordered under Section 202 is at the post-cognizance stage. What we have to consider is whether the Magistrate committed any error in refusing the appellant's prayer for an investigation by the police under Section 156(3) of the Code and resorting to Section 202 of the Code instead, since both the two courses were available to him.

18. The power to direct an investigation to the police authorities is available to the Magistrate both under Section 156(3) Cr.P.C. and under Section 202 Cr.P.C. The only difference is the stage at which the said powers may be invoked. As indicated hereinbefore, the power under Section 156(3) Cr.P.C. to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation under Section 202 is at the post-cognizance stage. The learned Magistrate has chosen to adopt the latter course and has treated the protest petition filed by the Appellant as a complaint under Section 200 of the Code and has thereafter proceeded under Section 202 Cr.P.C. and kept the matter with himself for an inquiry in the facts of the case. There is nothing irregular in the manner in which the learned Magistrate has proceeded and if at the stage of Sub-section (2) of Section 202 the learned Magistrate deems it fit, he may

either dismiss the complaint under Section 203 or proceed in terms of Section 193 and commit the case to the Court of Sessions.

19. We, therefore, see no reason to interfere with the order of the learned Magistrate and the views expressed by the High Court in the impugned order on the invocation of jurisdiction by the learned Magistrate under Section 202 Cr.P.C. The appeal is, accordingly, dismissed.

R.P. Appeal dismissed.

MATHAI @ JOBY
v.
GEORGE & ANR.
(Special Leave Petition (C) No. 7105 of 2010)

MARCH 19, 2010

[MARKANDEY KATJU AND R.M. LODHA, JJ.]

CONSTITUTION OF INDIA, 1950:

Article 136 and 145(3) – Discretion of Supreme Court to entertain petitions under Article 136 – Matter referred to Constitution Bench – Petition filed against the order of High Court dismissing writ petition challenging the order of trial court rejecting the application of the defendant in a suit, seeking to send the will for another expert opinion as he was not satisfied with the first expert report – HELD: Prima facie such special leave petitions should not be entertained by Supreme Court – Article 136, like Article 226, is a discretionary remedy and the Supreme Court is not bound to interfere even if there is an error of law or fact in the order impugned before it – Article 136 was never meant to be an ordinary forum of appeal at all like s.96 or even s.100 CPC – Under the constitutional scheme, ordinarily the last court in the country in ordinary cases was meant to be the High Court – The Supreme Court as the apex Court in the country was meant to deal with important issues like constitutional questions, questions of law of general importance or where grave injustice had been done – However, the Court has been converted practically into an ordinary appellate court which was never the intention of Article 136 – The time has now come when an authoritative decision by a Constitution Bench should lay down some broad guidelines as to when the discretion under Article 136 of the Constitution should be exercised, i.e. in what kind of cases a petition under Article

136 should be entertained – Since the matter involves interpretation of Article 136, it should be decided by a Constitution Bench in view of Article 145(3) of the Constitution – Let the papers of this case be laid before Hon'ble the Chief Justice of India for constitution of an appropriate Bench, to decide which kinds of cases should be entertained under Article 136, and/or for laying down some broad guidelines in this connection. [Para 4,5,14,23 and 27]

N. Suriyakala vs. A. Mohandoss & Ors. **2007 (2) SCR 419;** *Bengal Chemical & Pharmaceutical Works Ltd. Vs Their Employees* **1959 AIR 633= 1959 (2) Suppl. SCR 136;** *Kunhayammed & Ors. Vs State of Kerala & Anr.* **2000 AIR 2587= 2000 (1) suppl. SCR 538;** *State of Bombay vs Rusy Mistry* **1960 AIR 391;** *Municipal Board Pratabgarh vs Mmahendra Singh Chawla* **1982 (3) SCC 331;** *Handra Singh vs State of Rajasthan & Anr.* **2003 AIR 2889= 2003 (1) Suppl. SCR 674;** *Ram Saran Das & Bros. Vs CIT* **Calcutta 1962 AIR 1326=1962 (1) Suppl. SCR 276;** *Pritam Singh vs. State* **1950 SCR 453;** *Tirupati Balaji Developers Pvt. Ltd. & Ors. Vs. State of Bihar & Ors.* **2004 AIR 2351= 2004 (1) Suppl. SCR 494;** *Jamshed Hormusji Wadia vs. Board of Trustees Port of Mumbai & Anr.* **2004 AIR 1815= 2004 (1) SCR 483;** *Narpat Singh etc. etc. Vs Jaipur Development Authority & Anr.* **2002 AIR 2036= 2002 (3) SCR 365;** *Ashok Nagar Welfare Association & Anr. Vs R.K. Sharma & Ors.* **2002 AIR 335=2001 (5) Suppl. SCR 662;** *Bihar Legal Support Society New Ddelhi vs. Chief Justice of India* **1987 AIR 38= 1987(1) SCR 295, relied on.**

R.K. Jain Memorial Lecture delivered by K.K. Venugopal **on 30.1.2010; and** *Article by Justice K.K. Mathew published* **in 1982(3) SCC (Jour) 1, referred to.**

Case Law Reference:

2007 (2) SCR 419	**relied on**	**para 6**

1959 (2) Suppl. SCR 136	**relied on**	**para 8**
2000 (1) suppl. SCR 538	**relied on**	**para 8**
1960 AIR 391	**relied on**	**para 8**
1982 (3) SCC 331	**relied on**	**para 8**
2003 (1) Suppl. SCR 674	**relied on**	**para 8**
1962 (1) Suppl. SCR 276	**relied on**	**para 9**
1950 SCR 453	**relied on**	**para 9**
2004 (1) Suppl. SCR 494	**relied on**	**para 10**
2004 (1) SCR 483	**relied on**	**para 11**
2002 (3) SCR 365	**relied on**	**para 12**
2001 (5) Suppl. SCR 662	**relied on**	**para 13**
1987(1) SCR 295	**relied on**	**para 17**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 7105 of 2010.

From the Judgment & Order dated 9.11.2009 of the High Court of Kerala at Ernakulam in WP (C) No. 31726 of 2009.

C.N. Sree Kumar for the Petitioner.

The following Order of the Court was delivered

O R D E R

1. Heard learned counsel for the petitioner.

2. This special leave petition has been filed against the judgment and order dated 09.11.2009 of the High Court of Kerala Ernakulam in W.P.(C) No. 31726/2009. By the impugned order the writ petition filed by the petitioner herein has been disposed off.

3. The petitioner herein is one of the defendants in a suit in which he has disputed the genuineness of a Will dated 13.01.2006. The Will in question was sent for expert opinion to the Forensic Science Laboratory, Thiruvananthapurm. The Forensic Science Laboratory submitted its report to the Trial Court. Not satisfied with the report the Petitioner herein wanted another opinion from another expert. The said prayer of the petitioner was rejected by the Trial Court and the writ petition filed against the order of the Trial Court has been dismissed by the impugned order. Against the High Court's order the SLP has been filed.

4. We are prima facie of the opinion that such special leave petitions should not be entertained by this Court. Now-a-days all kinds of special leave petitions are being filed in this Court against every kind of order. For instance, if in a suit the trial court allows an amendment application, the matter is often contested right up to this Court. Similarly, if the delay in filing an application or appeal is condoned by the Trial Court or the appellate court, the matter is fought upto this Court. Consequently, the arrears in this Court are mounting and mounting and this Court has been converted practically into an ordinary appellate Court which, in our opinion, was never the intention of Article 136 of the Constitution. In our opinion, now the time has come when it should be decided by a Constitution Bench of this Court as to in what kind of cases special leave petitions should be entertained under Article 136 of the Constitution.

5. Article 136, no doubt, states that the Supreme Court may in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. However, it is not mentioned in Article 136 of the Constitution as to in what kind of cases the said discretion should be exercised. Hence, some broad guidelines need to be laid down now by a Constitution bench of this Court

otherwise this Court will be flooded (and in fact is being flooded) with all kind of special leave petitions even frivolous ones and the arrears in this Court will keep mounting and a time will come when the functioning of this Court will become impossible. It may be mentioned that Article 136, like Article 226, is a discretionary remedy, and this Court is not bound to interfere even if there is an error of law or fact in the impugned order.

6. This Court in the case of *N. Suriyakala vs. A. Mohandoss and Others* (2007) 9 SCC 196 observed as under:

> "In this connection we may clarify the scope of Article 136. Article 136 of the Constitution is not a regular forum of appeal at all. It is a residual provision which enables the Supreme Court to interfere with the judgment or order of any court or tribunal in India in its discretion."

7. Article 136(1) of the Constitution states:

> "Article 136(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."

8. The use of the words "in its discretion" in Article 136 learly indicates that Article 136 does not confer a right of appeal upon any party but merely vests a discretion in the Supreme Court to interfere in exceptional cases vide *M/s. Bengal Chemical & Pharmaceutical Works Ltd. vs. Their Employees* AIR 1959 SC 633(635), *Kunhayammed & Ors. vs. State of Kerala & Anr.* 2000(6) SCC 359 and *State of Bombay vs. Rusy Mistry* AIR 1960 SC 391(395). In M*unicipal Board, Pratabgarh & Anr. vs. Mahendra Singh Chawla & Ors.* 1982(3) SCC 331 and in *Chandra Singh vs. State of Rajasthan* AIR 2003 SC 2889 (vide para 43 & 45), this Court observed that under Article 136 it was not bound to set aside an order even if it was not in conformity with law, since the power under Article

136 was discretionary.

9. Though the discretionary power vested in the Supreme Court under Article 136 is apparently not subject to any limitation, the Court has itself imposed certain limitations upon its own powers vide *Ram Saran Das and Bros. vs. Commercial Tax Officer, Calcutta & Ors.* AIR 1962 SC 1326(1328) and *Kunhayammed vs. State of Kerala* 2000(6) SCC 359 (para 13). The Supreme Court has laid down that this power has to be exercised sparingly and in exceptional cases only. Thus, in *Pritam Singh vs. The State* AIR 1950 SC 169, this Court observed (vide para 9) as under :-

> "On a careful examination of Art.136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under is to be exercised sparingly and in exceptional cases only, *and as far as possible a more or less uniform standard should be adopted in granting special leave* in the wide range of matters which can come up before it under this article."

10. In *Tirupati Balaji Developers Pvt. Ltd. vs. State of Bihar* AIR 2004 SC 2351, this Court observed about Article 136 as under:-

> "It is an extraordinary jurisdiction vested by the Constitution in the Supreme Court with implicit trust and faith, and extraordinary care and caution has to be observed in the exercise of this jurisdiction. Article 136 does not confer a right of appeal on a party but vests a vast discretion in the Supreme Court meant to be exercised on the considerations of justice, call of duty and eradicating injustice."

11. In *Jamshed Hormusji Wadia vs. Board of Trustees, Port of Mumbai* AIR 2004 SC 1815 (para 33), this Court observed as under :-

> "The discretionary power of the Supreme Court is plenary

in the sense that there are no words in Article 136 itself qualifying that power. The very conferment of the discretionary power defies any attempt at exhaustive definition of such power. The power is permitted to be invoked not in a routine fashion but in very exceptional circumstances as when a question of law of general public importance arises or a decision sought to be impugned before the Supreme Court shocks the conscience. This overriding and exceptional power has been vested in the Supreme Court to be exercised sparingly and only in furtherance of the cause of justice in the Supreme Court in exceptional cases only when special circumstances are shown to exist."

In the same decision this Court also observed as under :-

"It is well settled that Article 136 of the Constitution does not confer a right to appeal on any party; it confers a discretionary power on the Supreme Court to interfere in suitable cases. Article 136 cannot be read as conferring a right on anyone to prefer an appeal to this Court; it only confers a right on a party to file an application seeking leave to appeal and a discretion on the Court to grant or not to grant such leave in its wisdom. When no law confers a statutory right to appeal on a party, Article 136 cannot be called in aid to spell out such a right. The Supreme Court would not under Article 136 constitute itself into a tribunal or court just settling disputes and reduce itself to a mere court of error. The power under Article 136 is an extraordinary power to be exercised in rare and exceptional cases and on well-known principles."

12. In *Narpat Singh vs. Jaipur Development Authority* (2002) 4 SCC 666, this Court observed as under :-

"The exercise of jurisdiction conferred by Art.136 of the Constitution on the Supreme Court is discretionary. It does not confer a right to appeal on a party to litigation; it only

confers a discretionary power of widest amplitude on the Supreme Court to be exercised for satisfying the demands of justice. On one hand, it is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations or situations occasioning gross failure of justice; on the other hand, it is an overriding power whereunder the Court may generously step in to impart justice and remedy injustice."

13. In *Ashok Nagar Welfare Association vs. R.K. Sharma* AIR 2002 SC 335, this Court observed that even in cases where special leave is granted, the discretionary power vested in the Court continues to remain with the Court even at the stage when the appeal comes up for hearing.

14. Now-a-days it has become a practice of filing SLPs against all kinds of orders of the High Court or other authorities without realizing the scope of Article 136. Hence we feel it incumbent on us to reiterate that Article 136 was never meant to be an ordinary forum of appeal at all like Section 96 or even Section 100 CPC. *Under the constitutional scheme, ordinarily the last court in the country in ordinary cases was meant to be the High Court.* The Supreme Court as the Apex Court in the country was meant to deal with important issues like constitutional questions, questions of law of general importance or where grave injustice had been done. If the Supreme Court entertains all and sundry kinds of cases it will soon be flooded with a huge amount of backlog and will not be able to deal *with important questions relating to the Constitution or the law or where grave injustice has been done, for which it was really meant* under the Constitutional Scheme. After all, the Supreme Court has limited time at its disposal and it cannot be expected to hear every kind of dispute.

15. Mr. K.K. Venugopal, Senior Advocate and a very respected lawyer of this Court in his R.K. Jain Memorial Lecture delivered on 30.01.2010 has pointed out that an alarming state of affairs has developed in this Court *because*

this Court has gradually converted itself into a mere Court of Appeal which has sought to correct every error which it finds in the judgments of the High Courts of the country as well as the vast number of tribunals. Mr. Venugopal has further observed that this Court has strayed from its original character as a Constitutional Court and the Apex Court of the country. He further observed that if the Apex Court seeks to deal with all kinds of cases, it necessarily has to accumulate vast arrears over a period of time which it will be impossible to clear in any foreseeable future. According to him, this is a self-inflicted injury, which is the cause of the malaise which has gradually eroded the confidence of the litigants in the Apex Court of the country, *mainly because of its failure to hear and dispose of cases within a reasonable period of time.* He has further observed that it is a great tragedy to find that cases which have been listed for hearing years back are yet to be heard. He has further observed as under :

> "We have, however, to sympathize with the judges. They are struggling with an unbearable burden. The judges spend late nights trying to read briefs for a Monday or a Friday. When each of the 13 Divisions or Benches have to dispose off about 60 cases in a day, the functioning of the Supreme Court of India is a far cry from what should be desiderata for disposal of cases in a calm and detached atmosphere. The Judges rarely have the leisure to ponder over the arguments addressed to the court and finally to deliver a path-breaking, outstanding and classic judgment. All this is impossible of attainment to a Court oppressed by the burden of a huge backlog of cases. The constant pressure by counsel and the clients for an early date of hearing and a need to adjourn final hearings which are listed, perforce, on a miscellaneous day i.e. Monday or a Friday, where the Court finds that it has no time to deal with those cases, not only puts a strain on the Court, but also a huge financial burden on the litigant. I wonder what a lawyer practising in 1950 would feel if he were today

> to enter the Supreme Court premises on a Monday or a Friday. He would be appalled at the huge crowd of lawyers and clients thronging the corridors, where one finds it extremely difficult to push one's way through the crowd to reach the Court hall. When he enters the Court hall he finds an equally heavy crowd of lawyers blocking his way. I do not think that any of the senior counsel practicing in the Supreme Court, during the first 3-4 decades of the existence of the Court, would be able to relate to the manner in which we as counsel argue cases today. In matters involving very heavy stakes, 4-5 Senior Advocates should be briefed on either side, all of whom would be standing up at the same time and addressing the court, sometimes at the highest pitch possible.
>
> All these are aberrations in the functioning of an Apex Court of any country."

16. Mr. Venugopal has pointed out that in the year 1997 there were only 19,000 pending cases in this Court but now, there are over 55,000 pending cases and in a few years time the pendency will cross one lakh cases. In 2009 almost 70,000 cases were filed in this Court of which an overwhelming number were Special Leave Petitions under Article 136. At present all these cases have to be heard orally, whereas the U.S. Supreme Court hears only about 100 to 120 cases every year and the Canadian Supreme Court hears only 60 cases per year.

17. In *Bihar Legal Support Society vs. Chief of Justice of India and Anr.* (1986) 4 SCC 767 (vide para 3) a Constitution Bench of this Court observed as under :-

> *"It may, however, be pointed out that this Court was never intended to be a regular court of appeal* against orders made by the High Court or the sessions court or the magistrates. It was created for the purpose of laying down the law for the entire country .....It is not every case where the apex court finds that some injustice has been

done that it would grant special leave and interfere. That would be converting the apex court into a regular court of appeal and moreover, by so doing, the apex court would soon be reduced to a position where it will find itself unable to remedy any injustice at all, on account of the tremendous backlog of cases which is bound to accumulate. *We must realize that in the vast majority of cases the High Courts must become final even if they are wrong".*

18. In this connection Paul Freund has set out the opinion of Mr. Justice Brandeis', the celebrated Judge of the U.S. Supreme Court in the following words:

"... he was a firm believer in limiting the jurisdiction of the Supreme Court on every front as he would not be seduced by the Quixotic temptation to right every fancied wrong which was paraded before him. ..... Husbanding his time and energies as if the next day were to be his last, he steeled himself, like a scientist in the service of man, against the enervating distraction of the countless tragedies he was not meant to relieve. His concern for jurisdictional and procedural limits reflected, on the technical level, an essentially stoic philosophy. For like Epictetus, he recognized 'the impropriety of being emotionally affected by what is not under one's control'.

The only way found practicable or acceptable in this country (U.S.A.) for keeping the volume of cases within the capacity of a court of last resort is to allow the intermediate courts of appeal finally to settle all cases that are of consequence only to parties. This reserves to the court of last resort only questions on which lower courts are in conflict or those of general importance to the law."

19. Justice K.K. Mathew, an eminent Judge of this Court, in an article published in (1982) 3 SCC (Jour) 1, has referred to the opinion of Mr. Justice Frankfurter, the renowned Judge of the U.S. Supreme Court as follows :

"The function of the Supreme Court, according to Justice Frankfurter, was to expound and stabilize principles of law, to pass upon constitutional and other important questions of law for the public benefit and to preserve uniformity of decision among the intermediate courts of appeal. The time and attention and the energy of the court should be devoted to matters of large public concern and they should not be consumed by matters of less concern, without special general interest, merely because the litigant wants to have the court of last resort pass upon his right. The function of the Supreme Court was conceived to be, not to remedying of a particular litigant's wrong, but the consideration of cases whose decision involved principles, the application of which were of wide public or governmental interest and which ought to be authoritatively declared by the final court. Without adequate study, reflection and discussion on the part of judges, there could not be that fruitful interchange of minds which was indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions and therefore Justice Frankfurter considered it imperative that the docket of the court be kept down so that its volume did not preclude wise adjudication. He was of the view that any case which did not rise to the significance of inescapability in meeting the responsibilities vested in the Supreme Court had to be rigorously excluded from consideration".

20. According to Justice Mathew, the Supreme Court, to remain effective, must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. It is Justice Mathew's opinion that -

"To say that no litigant should be turned out of the Supreme Court so long as he has a grievance may be good populistic propaganda but the consequence of accepting such a demand would surely defeat the great purpose for

which the Court was established under our constitutional system. *It is high time we recognize the need for the Supreme Court to entertain under Article 136 only those cases which measure up to the significance of the national or public importance.* The effort, then, must therefore be to voluntarily cut the coat of jurisdiction according to the cloth of importance of the question and not to expand the same with a view to satisfy every litigant who has the means to pursue his cause."

21. Mr. Venugopal has suggested the following categories of cases which alone should be entertained under Article 136 of the Constitution.

(i) All matters involving substantial questions of law relating to the interpretation of the Constitution of India;

(ii) All matters of national or public importance;

(iii) Validity of laws, Central and State;

(iv) After Kesavananda Bharati, (1973) 4 SCC 217, the judicial review of Constitutional Amendments; and

(v) To settle differences of opinion of important issues of law between High Courts.

22. We are of the opinion that two additional categories of cases can be added to the above list, namely (i) where the Court is satisfied that there has been a grave miscarriage of justice and (ii) where a fundamental right of a person has prima facie been violated. However, it is for the Constitution Bench to which we are referring this matter to decide what are the kinds of cases in which discretion under Article 136 should be exercised.

23. In our opinion, the time has now come when an authoritative decision by a Constitution Bench should lay down

some broad guidelines as to when the discretion under Article 136 of the Constitution should be exercised, i.e., in what kind of cases a petition under Article 136 should be entertained. If special leave petitions are entertained against all and sundry kinds of orders passed by any court or tribunal, then this Court after some time will collapse under its own burden.

24. It may be mentioned that in *Pritam Singh vs. The State* AIR 1950 S.C. 169 a Constitution Bench of this Court observed (vide para 9) that "a more or less uniform standard should be adopted in granting Special Leave". Unfortunately, despite this observation no such uniform standard has been laid down by this Court, with the result that grant of Special Leave has become, as Mr. Setalvad pointed out in his book ` My Life', a gamble. This is not a desirable state of affairs as there should be some uniformity in the approach of the different benches of this Court. Though Article 136 no doubt confers a discretion on the Court, judicial discretion, as Lord Mansfield stated in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 "means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful"

25. The Apex Court lays down the law for the whole country and it should have more time to deliberate upon the cases it hears before rendering judgment as Mr. Justice Frankfurter observed. However, sadly the position today is that it is under such pressure because of the immense volume of cases in the Court that Judges do not get sufficient time to deliberate over the cases, which they deserve, and this is bound to affect the quality of our judgments.

26. Let notice issue to the respondents. Issue notice also to the Supreme Court Bar Association, Bar Council of India and the Supreme Court-Advocates-on-Record Association.

27. Since the matter involves interpretation of Article 136 of the Constitution, we feel that it should be decided by a Constitution Bench in view of Article 145(3) of the Constitution.

Let the papers of this case be laid before Hon'ble the Chief Justice of India for constitution of an appropriate Bench, to decide which kinds of cases should be entertained under Article 136, and/or for laying down some broad guidelines in this connection.

28. The Constitution Bench may also consider appointing some senior Advocates of this Court as Amicus Curiae to assist in the matter so that it can be settled after considering the views of all the concerned parties.

R.P. Matter referred to Constitution Bench.

K. NEELAVENI

v.

STATE REP. BY INSP. OF POLICE AND ORS.

(Criminal Appeal No. 574 of 2010)

MARCH 22, 2010

[D.K. JAIN AND C.K. PRASAD, JJ.]

Code of Criminal Procedure, 1973 – ss.482, 190 and 239 – Charge sheet under ss.406 and 494 IPC – Quashed by High Court, even before exercise of discretion by Magistrate under s.190, CrPC – Justification of – Held: On facts, not justified – High Court ought not to have interfered when the Magistrate had not even examined as to whether the accused persons deserved to be discharged in terms of s.239,CrPC – High Court ought to have allowed the provisions of CrPC its full play – Penal Code, 1860 – ss.406 and 494.

On the basis of complaint lodged by the appellant-wife, police submitted charge-sheet under ss. 406 and 494 IPC against the husband and in-laws of the appellant i.e. respondent nos. 2 to 13.

The accused-respondents approached the High Court for quashing of the charge sheet even before any order was passed by the Magistrate in terms of s.190, CrPC.

The High Court quashed the charge-sheet on the ground that it did not reveal ingredients constituting offences under ss.494 and 406. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. From a perusal of the allegations made in the FIR, it is evident that the appellant-wife has clearly

alleged that her husband had married another lady and the said marriage had taken place in the presence and with the support of other accused persons. The appellant had also stated that from the second marriage a girl child was born. In the FIR, it had clearly been alleged that besides gold ornaments other household articles were given in marriage and further the appellant was subjected to cruelty and driven out from the matrimonial home by the accused persons. [Para 8] [554-B-D]

1.2. The allegations made in the FIR, at such a stage, have to be accepted as true, and allegations so made *prima facie*, constitute offences under ss. 406 and 494, IPC. It has to be borne in mind that while considering the application for quashing of the charge sheet, the allegations made in the FIR and the materials collected during the course of the investigation are required to be considered. Truthfulness or otherwise of the allegation is not fit to be gone into at this stage as it is always a matter of trial. Essential ceremonies of the Marriage were gone into or not is a matter of trial. [Para 8] [554-D-F]

1.3. The High Court erred in holding that the charge sheet does not reveal the ingredients constituting the offences under ss. 494 and 406, IPC. [Para 9] [554-G]

2. It seems that accused persons approached the High Court for quashing of the charge sheet even before any order was passed by the Magistrate in terms of s.190, CrPC. When a report is submitted to the Magistrate he is required to be *prima facie* satisfied that the facts disclosed therein constitute an offence. It is trite that the Magistrate is not bound by the conclusion of the investigating agency in the police report i.e. in the charge sheet and it is open to him after exercise of judicial discretion to take the view that facts disclosed in the report do not constitute any offence for taking cognizance. Quashing of ss.406 and 494, IPC from the charge sheet even before

the exercise of discretion by the Magistrate under s.190, CrPC is undesirable. In the facts and circumstances of the case, quashing of the charge sheet under ss.406 and 494, IPC at this stage in exercise of the power under s.482, CrPC was absolutely uncalled for. [Para 10] [554-H; 555-A-D]

3. Offences under ss.406, 494 and 498A are triable by a Magistrate, First Class and as all these offences are punishable with imprisonment for a term exceeding two years, the case has to be tried as a warrant case. The procedure for trial of warrant case by a Magistrate instituted on a police report is provided under Chapter XIX Part A, CrPC. Section 239, CrPC *inter alia* provides that if upon considering the police report and the document sent with it under s.173 and making such examination, if any, of the accused and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. It seems that the accused persons even before the case had reached that stage filed an application for quashing of the charge sheet under ss.406 and 494, IPC. The High Court ought not to have interfered after the submission of the charge sheet and even before the Magistrate examining as to whether the accused persons deserved to be discharged in terms of s.239, CrPC. [Para 11] [555-D-H; 556-A]

4. There is yet another reason which the High Court ought to have considered before quashing the charge sheet under ss.406 and 494, IPC. All the offences are triable by Magistrate and quashing of the charge sheet under ss.406 and 494, IPC had not resulted into exonerating the accused persons from facing the trial itself. Matter would have been different had the offences

under ss.406 and 494, IPC been triable as sessions case. In matter like this the High Court ought to have allowed the provisions of the Code of Criminal Procedure its full play. [Para 12] [556-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 574 of 2010.

From the Judgment & Order dated 29.9.2008 of the High Court of Judicature at Madras in Criminal O.P. 23473 of 2008.

Guru Krishna Kumar, Sumit Kumar for the Appellant.

R. Shunmugarundaramn, R.V. Kameshwaran, S. Thananjayan for the Respondents.

The Judgment of the Court was delivered by

C.K. PRASAD, J. Leave granted.

1. The appellant-wife aggrieved by the order dated 29th September, 2008 passed by the High Court of Judicature at Madras in Criminal O.P. No. 23473 of 2008, whereby it had quashed the charge sheet under Sections 406 and 494 of the Indian Penal Code, has preferred this appeal seeking special leave to appeal.

2. Shorn of unnecessary details, the facts giving rise to the present appeal are that the appellant-wife K. Neelaveni on 07/11/2002 gave a written report to the Inspector of Selaiyur Police Station, inter alia, alleging that her marriage was performed with accused respondent No. 2 - S.K. Siva Kumar on 3rd September, 1997 in which gold ornaments and various other household articles were given by her parents. She had further alleged that her husband used to abuse her and her family members under influence of alcohol and demanded Rs. 50,000/- from her parents. According to the First Information Report, when she was pregnant, on scan it was found that she

was carrying a female foetus, her husband and his family members started harassing her and insisted for aborting the child. On her refusal to give consent for abortion according to the informant on 18.1.1998, her husband, mother-in-law, brother-in-law and sister-in-law assaulted her and had driven her out from the matrimonial home and the husband left her on way to her parents house. She gave birth to a girl child on 25.6.1998.

3. Informant in the written report had further alleged that her husband had married another lady namely, Bharathi without her consent with the help and in the presence of other accused persons. She had further alleged that a female child was born to them in the wedlock.

4. On the basis of the aforesaid written report, a case under Sections 406, 494 and 498A of the Indian Penal Code was registered against the accused persons. Police after usual investigation submitted charge sheet under Sections 406. 494 and 498A of the Indian Penal Code.

5. Accused persons namely respondent Nos. 2 to 13 filed petition before the High Court for quashing the charge sheet under Sections 406 and 494 of the Indian Penal Code, inter alia, contending that in the absence of any material to show that "the second marriage was duly performed with religious rites and essential ceremonies" charge sheet under Section 494 of the Indian Penal Code is fit to be quashed. It was, further, contended that allegations made in the First Information Report and the materials collected during the course of investigation do not fulfill the ingredients of offence under Section 406 of the Indian Penal Code. Aforesaid submissions found favour with the High Court and it had quashed the charge sheet under Sections 406 and 494 of the Indian Penal Code. While doing so the High Court observed as follows:-

"As rightly contended by the learned counsel for the petitioners, a careful reading of the complaint of the

second respondent, statements of witnesses recorded under Section 161 Cr.P.C. and the charge sheet do not reveal the ingredients constituting the offences under Section 494 and 406 IPC, yet the first respondent has chosen to file the charge for the said offences. Therefore, this court is constrained to quash the charge sheet as against the petitioners as far as the offences under Sections 406 and 494 IPC alone are concerned. It is made clear that the charge sheet as against the petitioners under Section 498A IPC is not quashed."

6. Mr. Guru Krishna Kumar, the learned counsel on behalf of the appellant submits that the conclusion arrived at by the High Court that the charge sheet did not reveal the ingredients constituting the offences under Sections 494 and 406 of the Indian Penal Code is erroneous. He draws our attention to the First Information Report and submits that there is an allegation of the second marriage and even birth to a child and hence it cannot be said that ingredients constituting offence under Section 494 of the Indian Penal Code do not exist. He pointed out that the High Court while considering the application for quashing of the charge sheet was obliged to take into account the allegations made in the First Information Report and the materials collected during the course of investigation. He submits that in case the allegations made in the First Information Report and the materials collected during the course of the investigation are taken into account, same constitute an offence under Section 494 of the Indian Penal code. It has further been pointed out that gold ornaments and household articles were given to the husband and she was driven out from the matrimonial home on a refusal to consent for abortion. Accordingly, Mr. Guru Krishna Kumar submits that allegation in the First Information Report and the materials collected during the course of investigation clearly constitute offences under Sections 406 and 494 of the Indian Penal Code.

7. Mr. R. Shunmugasundaram, learned senior counsel

appearing on behalf of respondent Nos. 2 to 13, however, submits that the ingredients of an offence under Sections 406 and 494 of the Indian Penal Code do not exist and, therefore, the High Court did not err in quashing the charge sheet under Sections 406 and 494 of the Indian Penal code.

8. We have given our thoughtful consideration to the submissions advanced and we are inclined to accept the submission of Mr. Guru Krishna Kumar, learned counsel for the appellant. From a perusal of the allegations made in the First Information Report, it is evident that the appellant has clearly alleged that her husband had married another lady namely Bharathi and the said marriage had taken place in the presence and with the support of other accused persons. She had also stated that from the second marriage with Bharathi a girl child was born. In the First Information Report, it had clearly been alleged that besides gold ornaments other household articles were given in marriage and further she was subjected to cruelty and driven out from the matrimonial home by the accused persons. In our opinion, the allegations made in the First Information Report, at this stage, have to be accepted as true, and allegations so made prima facie, constitute offences under Sections 406 and 494 of the Indian Penal Code. It has to be borne in mind that while considering the application for quashing of the charge sheet, the allegations made in the First Information Report and the materials collected during the course of the investigation are required to be considered. Truthfulness or otherwise of the allegation is not fit to be gone into at this stage as it is always a matter of trial. Essential ceremonies of the Marriage were gone into or not is a matter of trial.

9. From what we have said above, we are of the opinion that the High Court erred in holding that the charge sheet does not reveal the ingredients constituting the offences under Sections 494 and 406 of the Indian Penal Code.

10. It seems that accused persons approached the High Court for quashing of the charge sheet even before any order

was passed by the Magistrate in terms of Section 190 of the Code of Criminal Procedure. In our opinion, when a report is submitted to the Magistrate he is required to be prima facie satisfied that the facts disclosed therein constitute an offence. It is trite that the Magistrate is not bound by the conclusion of the investigating agency in the police report i.e. in the charge sheet and it is open to him after exercise of judicial discretion to take the view that facts disclosed in the report do not constitute any offence for taking cognizance. Quashing of Sections 406 and 494 of Indian Penal Code from the charge sheet even before the exercise of discretion by the Magistrate under Section 190 of the Code of Criminal Procedure is undesirable. In our opinion, in the facts and circumstances of the case, quashing of the charge sheet under Sections 406 and 494 of the Indian Penal Code at this stage in exercise of the power under Section 482 of the Code of Criminal Procedure was absolutely uncalled for.

11. It is relevant here to state that offences under Sections 406, 494 and 498A are triable by a Magistrate, First Class and as all these offences are punishable with imprisonment for a term exceeding two years, the case has to be tried as a warrant case. The procedure for trial of warrant case by a Magistrate instituted on a police report is provided under Chapter XIX Part A of the Code of Criminal Procedure, 1973. Section 239 inter alia provides that if upon considering the police report and the document sent with it under Section 173 and making such examination, if any, of the accused and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused and record his reasons for so doing. It seems that the accused persons even before the case had reached that stage filed an application for quashing of the charge sheet under Sections 406 and 494 of the Indian Penal Code. In our opinion, the High Court ought not to have interfered after the submission of the charge sheet and

even before the Magistrate examining as to whether the accused persons deserved to be discharged in terms of Section 239 of the Code of Criminal Procedure.

12. There is yet another reason which the High Court ought to have considered before quashing the charge sheet under Sections 406 and 494 of the Indian Penal Code. All the offences are triable by Magistrate and quashing of the charge sheet under Sections 406 and 494 of the Indian Penal Code had not resulted into exonerating the accused persons from facing the trial itself. Matter would have been different had the offences under Sections 406 and 494 of the Indian Penal Code been triable as sessions case. In matter like this the High Court ought to have allowed the provisions of the Code of Criminal Procedure referred to above its full play.

13. For all these reasons we are unable to sustain the order impugned in the present appeal.

14. We hasten to add that all the observations made in this judgment are for the purpose of disposal of this appeal and shall have no bearing during the course of trial.

15. In the result, we allow the appeal and set aside the impugned judgment.

B.B.B. Appeal allowed.

SMT. POONAM
v.
SUMIT TANWAR
(Writ Petition (Civil) No. 86 of 2010)

MARCH 22, 2010

[AFTAB ALAM AND DR. B.S. CHAUHAN, JJ.]

CONSTITUTION OF INDIA, 1950:

Articles 32 and 142 – Writ petition against order of Family Court by which it asked the parties to abide by s.13-B(2) of Hindu Marriage Act – HELD: Is not maintainable – Judicial orders passed by courts are not amenable to be corrected by issuing a writ under Article 32 – Remedy of a person aggrieved by decision of a judicial tribunal is to approach the superior tribunal for redress and such decision cannot be circumvented by resorting to Article 32 – Family Court passed the order strictly in accordance with law and it cannot be said that the order has infringed any of the fundamental/legal rights of parties – Besides, it is not generally assumed that a judicial decision passed by a court would violate any fundamental right of a party – Hindu Marriage Act, 1955 – ss. 13-B(1) and (2) – Judgment.

Article 32 and 226 read with Article 12 – Writ jurisdiction of Supreme Court and High Courts – Scope of – Explained.

ADMINISTRATION OF JUSTICE:

Advocate – Responsibility of – Failure of counsel to render assistance to Court – HELD: In case counsel for the petitioner is not able to render any assistance, Court may decline to entertain the petition – If a factual/legal issue is not raised, court should not decide the same as its decision may be violative of principles of natural justice – In the instant

case, petition under Article 32 of the Constitution challenging order of Family Court in a petition u/s 13-B(1) of Hindu Marriage Act asking the parties to wait for six months was filed without any sense of responsibility either by the parties or their counsel – The proxy Advocates as well as the Advocate-on-Record, were unable to explain as to how the writ petition was maintainable – Such a practice is tantamount to not only disservice to the institution, but it also affects the administration of justice – Conduct of all of them has been reprehensible – Hindu Marriage Act, 1955 – ss.13-B(1) and (2) – Constitution of India, 1950 – Articles 32 and 142 – Supreme Court Rules, 1966 – Orders IV and XVIII – Advocate-on-Record – Practice and Procedure – Natural Justice.

The parties got married on 30.11.2008. On 9.9.2009 a petition u/s 13-B (1) of the Hindu Marriage Act, 1955 was filed. The Family Court by its order dated 25.11.2009 held that the marriage could not be dissolved straightaway and observed that the parties could file the petition of second motion u/s 13-B(2) of the Act. Aggrieved, the wife filed the writ petition under Article 32 of the Constitution of India.

Dismissing the petition, the Court

HELD: 1.1. It is settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial Tribunal is to approach for redress a superior Tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of the Constitution and only on the proof of infringement thereof. If by adjudication by a court of competent jurisdiction, the right claimed has been negatived, a petition under Article 32 of the Constitution is not

maintainable. It is not generally assumed that a judicial decision pronounced by a court may violate any of the fundamental rights of a party. Judicial orders passed by courts in or in relation to proceedings pending before them are not amenable to be corrected by issuing a writ under Article 32. [Para 9] [566-F-H]

Sahibzada Saiyed Muhammed Amirabbas Abbasi & Ors. vs. the State of Madhya Bharat (now Madhya Pradesh) & Ors. **1960 SCR 138 = AIR 1960 SC 768;** *Smt. Ujjam Bai vs. State of Uttar Pradesh & Anr.* **1963 SCR 778 = AIR 1962 SC 1621; and** *Naresh Shridhar Mirajkar vs. State of Maharashtra* **1966 SCR 744 = AIR 1967 SC 1, referred to.**

1.2. The citizens are entitled to appropriate relief under the provisions of Article 32 of the Constitution, provided it is shown to the satisfaction of the Court that a fundamental right of the petitioner had been violated. The distinction between a writ petition under Article 226 and the one under Article 32 of the Constitution is that the remedy under Article 32 is available only for enforcement of the fundamental rights, while under Article 226 of the Constitution, a writ court can grant relief for any other purpose also. Even if it is found that injury caused to the writ petitioner alleging violation of a fundamental right is too indirect or remote, the discretionary writ jurisdiction may not be exercised. More so, a writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or a "State" within the meaning of Article 12 of the Constitution. [Para 7 and 8] [565-G-H; 566-A-C-D]

Daryao & Ors. vs. State of U.P. & Ors. **1962 SCR 574 = AIR 1961 SC 1457;** *M.C. Mehta vs. Union of India* **2006 (2) SCR 264 =AIR 2006 SC 1325;** *A.K. Gopalan vs. State of Madras* **1950 SCR 88 =AIR 1950 SC 27;** *Bhagwandas Gangasahai vs. Union of India & Ors.* **AIR 1956 SC 175;**

Kalyan Singh vs. State of Uttar Pradesh & Ors. **1962 Suppl. SCR 76 =AIR 1962 SC 1183;** *Fertilizer Corporation Kamagar Union, Sindri & Ors. vs. Union of India & Ors.* **1981 (2) SCR 52 = AIR 1981 SC 344;** *State of Rajasthan & Ors. vs. Union of India* **1978 (1) SCR 1 = AIR 1977 SC 1361;** ***Anandi Mukta Sadguru Trust vs. V.R. Rudani*** **1989 (2) SCR 697 =AIR 1989 SC 1607;** *VST Industries Ltd. vs. VST Industries Workers' Union & Anr.* **2000 (5) Suppl. SCR 438 = (2001) 1 SCC 298; and** *State of Assam vs. Barak Upatyaka U.D. Karamchari Sanstha* **2009 SCR 467 =AIR 2009 SC 2249, referred to.**

1.3. In the instant case, the Family Court, has passed an order strictly in accordance with law asking the parties to wait for statutory period of six months to file the second motion in the case. In such a fact-situation, it is not permissible to suggest that the said order has violated or infringed any of the fundamental rights or any legal right of the parties. Therefore, the writ petition is maintainable. [Para 10] [567-C, D]

2.1. In case the counsel for the party is not able to render any assistance, the court may decline to entertain the petition. Further, if petitioner's counsel is not able to raise a factual or legal issue, though such a point may have merit, the court should not decide the same as the opposite counsel does not "have a fair opportunity to answer the line of reasoning adopted" in this behalf. Such a judgment may be violative of principles of natural justice. In the instant case, the proxy Advocates as also the Advocate-on-Record have not been able to explain as to under what circumstances the writ petition under Article 32 of the Constitution was maintainable for such a relief claimed and as to whether the Court has the power to issue a writ to the court/tribunal to violate a mandatory statutory provision. However, the Advocate-on-Record tendered absolute and unconditional apology and

assured that he will not lend his name merely for filing the petition by other counsel in future. [para 3,4,16 and 17] [564-D; 565-A; 569-E-F]

Thakur Sukhpal Singh vs. Thakur Kalyan Singh & Anr. **1963 SCR 733 =AIR 1963 SC 146;** *The Bar Council of Maharashtra vs. M. V. Dabholkar & Ors.* **1976 (2) SCR 48 = AIR 1976 SC 242;** *T.C. Mathai & Anr. vs. District & Sessions Judge, Thiruvananthapuram* **1999 (2) SCR 305 = AIR 1999 SC 1385;** *D.P. Chadha vs. Triyugi Narain Mishra & Ors.* **2000(5) Suppl. SCR 345 =AIR 2001 SC 457;** *New Delhi Municipal Committee vs. State of Punjab* **1996 (10) Suppl. SCR 472 = AIR 1997 SC 2847;** *Re: Sanjiv Datta* **1995 (3) SCR 450 = (1995) 3 SCC 619;** *Vijay Dhanji Chaudhary vs. Suhas Jayant Natawadkar* **2009 (16) SCR 518 = (2010) 1 SCC 166, relied on.**

Mst. Fakrunisa & Ors. vs. Moulvi Izarus Sadik & Ors., **AIR 1921 PC 55, relied on.**

2.2. In the case of Manish Goel*, it has been held that this Court, in exercise of its powers under Article 142 of the constitution, generally should not issue any direction to waive the statutory requirement. The instant case is not the one where there had been any delay in disposal of the case by the Family Court. The petition has been filed without any sense of responsibility either by the parties or their counsel. Such a practice is tantamount to not only disservice to the institution but it also adversely affects the administration of justice. Conduct of all of them has been reprehensible. [Para 5 and 20] [565-B; 571-E, F]

Manish Goel vs. Rohini Goel* **[2010] 2 SCR 414; *Prem Chand Garg & Anr. vs. Excise Commissioner, UP & Anr.* **1963 Suppl. SCR 885 = AIR 1963 SC 996;** *Supreme Court Bar Association v. Union of India & Anr.* **1998 (2) SCR 795 = AIR 1998 SC 1895 and** *E.S.P. Rajaram & Ors. v. Union of*

India & Ors. **2001 (1) SCR 203 = AIR 2001 SC 581, relied on.**

Case Law Reference:

[2010] 2 SCR 414	**relied on**	**para 5**
1963 Suppl. SCR 885	**relied on**	**para 5**
1998 (2) SCR 795	**relied on**	**para 5**
2001 (1) SCR 203	**relied on**	**para 5**
1962 SCR 574	**referred to**	**para 7**
2006 (2) SCR 264	**referred to**	**para 7**
1950 SCR 88	**referred to**	**para 7**
AIR 1956 SC 175	**referred to**	**para 7**
1962 Suppl. SCR 76	**referred to**	**para 7**
1981 (2) SCR 52	**referred to**	**para 7**
1978 (1) SCR 1	**referred to**	**para 7**
1989 (2) SCR 697	**referred to**	**para 8**
2000 (5) Suppl. SCR 438	**referred to**	**Para 8**
2009 SCR 467	**referred to**	**para 8**
1960 SCR 138	**referred to**	**para 9**
1963 SCR 778	**referred to**	**para 9**
1966 SCR 744	**referred to**	**para 9**
1963 SCR 733	**relied on**	**para 11**
AIR 1921 PC 55	**relied on**	**para 12**
1976 (2) SCR 48	**relied on**	**para 13**

1999 (2) SCR 305	**relied on**	**para 14**
2000 (5) Suppl. SCR 345	**relied on**	**para 15**
1996 (10) Suppl. SCR 472	**relied on**	**para 17**
1995 (3) SCR 450	**relied on**	**para 18**
2009 (16) SCR 518	**relied on**	**para 19**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 86 of 2010.

Under Article 32 of the Constitution of India.

Rajiv Dutta, Dr. Ashwani Bhardwaj, Sandeep Tyagi for the Petitioner.

The Order of the Court was delivered by

O R D E R

DR. B.S. CHAUHAN, J. 1. This Writ Petition has been filed under Article 32 of the Constitution of India for awarding the decree of divorce, annulling the marriage of the parties herein; and/or issue directions waiving the statutory period of six months provided under Section 13-B(2) of the Hindu Marriage Act, 1955 (hereinafter referred to as, "The Act, 1955").

2. The facts and circumstances giving rise to the present case are that the petitioner and the respondent got married on 30.11.2008 according to Hindu rites in Delhi. They separated just after two days of their marriage i.e. on 02.12.2008. A petition for dissolution of marriage by consent being HMA No. 197/09 dated 09.09.2009 was filed under Section 13-B(1) of The Act, 1955. The Family Court of Delhi, vide order dated 25.11.2009 accepted the said HMA No. 197/2009 (titled as *Poonam vs. Sumit Tanwar*) observing as under :-

"7. In view of Section 13(B)(2) of the Hindu Marriage Act,

the marriage between the parties cannot be dissolved straightaway in the present case. As per the statutory requirement, parties are advised to make further efforts for reconciliation in order to save their marriage. In case they are unable to do so, the parties may come up with the petition of second motion under Section 13-B(2) of the Hindu Marriage Act as per law. The present petition under Section 13-B(1) of the Hindu Marriage Act is hereby allowed and stands disposed of……...".

3. Being aggrieved by the order of the Family Court, the present Writ Petition has been filed. The matter came up for preliminary hearing on 19.03.2010. Mr. A., an proxy counsel, was not able to explain as under what circumstances, a Writ Petition under Article 32 of the Constitution is maintainable for such a relief and as to whether the Court has the power to issue a writ to the Court/Tribunal to violate a mandatory statutory provision. The learned counsel was also not able to explain under what circumstances a writ petition lies; who is amenable to writ jurisdiction; and which are the necessary parties in a writ petition? The matter was passed over and the proxy counsel was asked to come along with Mr. B., Advocate-on-Record, who had signed and filed the petition. In the second round when the matter was taken up, another proxy counsel appeared and introduced himself as brother of Mr. B., Advocate-on-Record. The second proxy counsel also expressed his inability to render any assistance to the Court on any legal issue. Being faced with an inordinate and unfortunate situation that the matter had been filed in the Apex Court of the Country and the appearing counsel was not able to render any assistance, the matter was adjourned for Monday i.e. for 22.03.2010 and the learned Advocate-on-Record Mr. B. was requested to appear in the Court.

4. Mr. B. learned Advocate-on-Record appeared in Court today and could not furnish any explanation whatsoever to defend the petition, nor he could explain how this petition is

maintainable. However, he tendered absolute and unconditional apology and assured that he will not lend his name merely for filing the petition by other counsel in future.

5. This very Bench decided a Special Leave Petition (Civil) No. 2954/2010 (Manish Goel vs. Rohini Goel) vide Judgment and Order dated 05.02.2010 observing that this Court, in exercise of its powers under Article 142 of the Constitution, generally should not issue any direction to waive the statutory requirement. The Courts are meant to enforce the law and therefore, are not expected to issue a direction in contravention of law or to direct the statutory authority to act in contravention of law. While deciding the said case, reliance has been placed upon a large number of Judgments of this Court including Constitution Bench Judgments of this Court viz. *Prem Chand Garg & Anr. vs. Excise Commissioner, UP & Anr.* AIR 1963 SC 996; *Supreme Court Bar Association v. Union of India & Anr.* AIR 1998 SC 1895 and *E.S.P. Rajaram & Ors. v. Union of India & Ors.* AIR 2001 SC 581.

6. In the said case, a similar relief was claimed, however, it was rejected observing that statutory period of six months for filing a second petition under Section 13-B(2) of The Act, 1955 has been prescribed for providing an opportunity to the parties to reconcile and withdraw the petition for dissolution and as it was not a case where there has been any obstruction to the stream of justice nor there had been injustice to the parties, which was required to be undone, this Court refused to grant the relief under Article 136 of the Constitution of India.

7. The citizens are entitled to appropriate relief under the provisions of Article 32 of the Constitution, provided it is shown to the satisfaction of the Court that the Fundamental Right of the petitioner had been violated. (Vide *Daryao & Ors. vs. State of U.P. & Ors.* AIR 1961 SC 1457). This Court has a constitutional duty to protect the Fundamental Rights of Indian citizens. (Vide *M.C. Mehta vs. Union of India* AIR 2006 SC 1325).

The distinction in a Writ Petition under Article 226 and Article 32 of the Constitution is that the remedy under Article 32 is available only for enforcement of the Fundamental Rights, while under Article 226 of the Constitution, a Writ Court can grant relief for any other purpose also. (Vide *A.K. Gopalan vs. State of Madras* AIR 1950 SC 27; *Bhagwandas Gangasahai vs. Union of India & Ors.* AIR 1956 SC 175; *Kalyan Singh vs. State of Uttar Pradesh & Ors*. AIR 1962 SC 1183; *Fertilizer Corporation Kamagar Union, Sindri & Ors. vs. Union of India & Ors.* AIR 1981 SC 344).

Even if it is found that injury caused to the writ petitioner alleging violation of Fundamental Right is too indirect or remote, the discretionary writ jurisdiction may not be exercised as held by this Court in *State of Rajasthan & Ors. vs. Union of India* AIR 1977 SC 1361.

8. More so, a writ lies only against a person if it is a statutory body or performs a public function or discharges a public or a statutory duty, or a "State" within the meaning of Article 12 of the Constitution. (Vide *Anandi Mukta Sadguru Trust vs. V.R. Rudani* AIR 1989 SC 1607; *VST Industries Ltd. vs. VST Industries Workers' Union & Anr.* (2001) 1 SCC 298; and *State of Assam vs. Barak Upatyaka U.D. Karamchari Sanstha* AIR 2009 SC 2249).

9. It is settled legal proposition that the remedy of a person aggrieved by the decision of the competent judicial Tribunal is to approach for redress a superior Tribunal, if there is any, and that order cannot be circumvented by resorting to an application for a writ under Article 32 of the Constitution. Relief under Article 32 can be for enforcing a right conferred by Part III of the Constitution and only on the proof of infringement thereof. If by adjudication by a Court of competent jurisdiction, the right claimed has been negatived, a petition under Article 32 of the Constitution is not maintainable. It is not generally assumed that a judicial decision pronounced by a Court may violate the Fundamental Right of a party. Judicial orders passed by the

Court in or in relation to proceeding pending before it are not amenable to be corrected by issuing a writ under Article 32 of the Constitution. (Vide *Sahibzada Saiyed Muhammed Amirabbas Abbasi & Ors. vs. the State of Madhya Bharat (now Madhya Pradesh) & Ors.* AIR 1960 SC 768; *Smt. Ujjam Bai vs. State of Uttar Pradesh & Anr.* AIR 1962 SC 1621; and *Naresh Shridhar Mirajkar vs. State of Maharashtra* AIR 1967 SC 1)

10. In the instant case, the Family Court, Delhi has passed an order strictly in accordance with law asking the parties to wait for statutory period of six months to file the second motion in the case. In such a fact-situation, it is not permissible to suggest that the aforesaid order has violated or infringed any of the fundamental rights or any legal right of the parties. Therefore, we are not able to understand as under what circumstances, the writ is maintainable. The learned counsel appearing for the petitioner is not able to explain under what circumstances, the petition has been filed and as to whether such a petition is maintainable or whether relief of dissolution of marriage could be sought by the parties directly from this Court in a case, wherein the marriage had taken place only a year and three months ago. The counsel was not able even to explain that even if the Court considers to issue the writ, to whom it would be issued as the only parties in the case are wife and husband, who are seeking the divorce by consent. The learned counsel is not able to enlighten the Court as to whether the Family Court could be impleaded in this petition. He expressed his inability to answer any question.

11. In T*hakur Sukhpal Singh vs. Thakur Kalyan Singh & Anr.,* AIR 1963 SC 146, this Court has held that in absence of proper assistance to the Court by the lawyer, there is no obligation on the part of the Court to decide the case, for the simple reason that unless the lawyer renders the proper assistance to the Court, the Court is not able to decide the case. It is not for the Court itself to decide the controversy. The

counsel cannot just raise the issues in his petition and leave it to the Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the Court itself to find out what the points for determination can be and then proceed to give a decision on those points.

12. While deciding the said case, this Court placed reliance upon the judgment of *Privy Council in Mst. Fakrunisa & Ors. vs. Moulvi Izarus Sadik & Ors.,* AIR 1921 PC 55 wherein it had been observed as under:–

> "In every appeal it is incumbent upon the appellants to show some reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered to justify the alteration of the judgment that stands. Their Lordships are unable to find that this duty has been discharged."

13. In *The Bar Council of Maharashtra vs. M. V. Dabholkar & Ors.* AIR 1976 SC 242, this Court had observed as under :-

> "Be it remembered that the central function of the legal profession is to promote the administration of justice. If the practice of law is thus a public utility of great implications and a monopoly is statutorily granted by the nation, it obligates the lawyer to observe scrupulously those norms which make him worthy of the confidence of the community in him as a vehicle of justice – social justice……Law is no trade, briefs no merchandise."

14. In *T.C. Mathai & Anr. vs. District & Sessions Judge, Thiruvananthapuram* AIR 1999 SC 1385, this Court observed:

> "The work in a Court of law is a serious and responsible function. The primary duty of a.....court is to administer.....justice. Any lax or wayward approach, if

adopted; towards the issues involved in the case, can cause serious consequences for the parties concerned.....In the adversary system which is now being followed in India, both in civil and criminal litigation, it is very necessary that the Court gets proper assistance from both sides……Efficacies discharge of judicial process very often depends upon the valuable services rendered by the legal profession"

15. In *D.P. Chadha vs. Triyugi Narain Mishra & Ors.,* AIR 2001 SC 457, this Court has observed as under:–

".....Mutual confidence in the discharge of duties and cordial relations between Bench and Bar smoothen the movement of the chariot. As responsible officers of the Court, as they are called ---- and rightly, the counsel have an overall obligation of assisting the Courts in a just and proper manner in the just and proper administration of justice."

16. Thus, in view of the above, law can be summarised to the effect that, in case, the counsel for the party is not able to render any assistance, the Court may decline to entertain the petition.

17. There is another aspect of the matter. In case, petitioner's counsel is not able to raise a factual or legal issue, though such a point may have a good merit, the Court should not decide the same as the opposite counsel does not "have a fair opportunity to answer the line of reasoning adopted" in this behalf. Such a judgment may be violative of principles of natural justice. (vide *New Delhi Municipal Committee vs. State of Punjab* AIR 1997 SC 2847).

18. While dealing with a similar issue, this Court in *Re: Sanjiv Datta* (1995) 3 SCC 619 observed as under:-

"Of late, we have been coming across several instances which can only be *described as unfortunate both for the*

legal profession and the administration of justice. It becomes, therefore, our duty to bring it to the notice of the members of the profession that it is in their hands to improve the quality of the service they render both to the litigant-public and to the courts, and to brighten their image in the society. *Some members of the profession have been adopting perceptibly casual approach to the practice of the profession* as is evident from their absence when the matters are called out, the filing of incomplete and inaccurate pleadings — many times even illegible and without personal check and verification, the non-payment of court fees and process fees, the failure to remove office objections, the failure to take steps to serve the parties, et al. *They do not realise the seriousness of these acts and omissions. They not only amount to the contempt of the court but do positive disservice to the litigants and create embarrassing situation in the court leading to avoidable unpleasantness and delay in the disposal of matters.* This augurs ill for the health of our judicial system……. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society." (emphasis added)

19. In *Vijay Dhanji Chaudhary vs. Suhas Jayant Natawadkar* (2010) 1 SCC 166, this Court has taken note of the ongoing rampant unethical practice by some of the Advocates-on-Record, duly enrolled under the provisions of the Supreme Court Rules, 1966, as many special leave petitions are being filed by them being merely as name-lenders, without having, or taking any responsibility for the case. As a result of prevalence of such a practice, in such cases, the Advocates-on-Record do not appear when matters are listed before the Court, nor do they take any interest or responsibility for processing or conducting the case. They also play no role in preparation of the petitions, nor ensure that requirements of Rules are fulfilled and defects are cured. If role of an Advocate-

on-Record is merely to lend his name for filing cases without being responsible for conduct of a case, the very purpose of having the system of Advocates-on-Record would get defected.

In the said case, this Court did not merely dismiss the petition for not rendering any assistance by the appearing counsel in absence of the Advocate-on-Record, rather issued notice to the Supreme Court Bar Association and the Advocates-on-Record's Association asking for suggestions for improving the system and to compel such mere name-lending Advocates-on-Record to serve the purpose for which they have been enrolled. The matter is to come for further consideration after those Associations submit their suggestions for observance and strict adherence to the Rules, as is evident from the proceedings in that case dated 30.11.2009, 08.03.2010, 15.03.2010 and 18.03.2010.

20. The aforesaid facts reveal that application for dissolution of marriage was filed only on 9.9.2009 before the Family Court and the said application was disposed of vide order dated 25.11.2009 asking the parties to wait for six months. Thus, it is not a case that there had been any delay in disposal of the case by the Family Court. The petition has been filed without any sense of responsibility either by the parties or their counsel. Such a practice is tantamount to not only disservice to the institution but it also adversely affects the administration of justice. Conduct of all of them has been reprehensible.

For the reasons aforesaid, this petition is dismissed.

R.P. Writ Petition dismissed.

RAJEEV KUMAR & ANR.
v.
HEMRAJ SINGH CHAUHAN & ORS.
(Civil Appeal Nos. 2653-2654 of 2010)

MARCH 23, 2010

[R.V. RAVEENDRAN AND ASOK KUMAR GANGULY, JJ.]

Jurisdiction – Service dispute – Application before CAT – Appellants not impleaded therein – Writ petition challenging the order of tribunal – Impleadment of appellants by High Court – Held: Appellants approaching High Court for the first time in respect of the disputes over which CAT has jurisdiction, is legally not sustainable – In service matters, High Court is not the court of first instance – On facts, despite having knowledge of pendency of the proceedings before CAT, appellants could not have approached High Court at the first instance – Appellants also had alternative remedy of review before CAT – Impugned judgment was in violation of judgment in **L. Chandra Kumar*** *which embody a rule of law in view of Article 141 of Constitution – Central Administrative Tribunal (Procedure) Rules, 1987 – r. 17 – Constitution of India, 1950 – Article 141 – Service Law.*

Two original applications were filed before Central Administrative Tribunal (CAT) by the respondents. Appellants were not made parties therein. One application was dismissed while the other was partly allowed. When the said Judgment was challenged before High Court by the respondents, appellants filed impleadment application, which was allowed by High Court. High Court ultimately set aside the judgment of CAT. Hence the present appeals.

The question for consideration before the Court was whether the appellants could participate in the

controversy in question at the stage when the matter was before High Court and they were not parties before Central Administrative Tribunal.

Dismissing the appeals, the Court

HELD: 1. The approach made to the High Court for the first time by the appellants in respect of their service disputes over which Central Administrative Tribunal (CAT) has jurisdiction, is not legally sustainable. The High Court fell into an error by allowing the appellants to treat the High Court as a court of first instance in respect of their service disputes, for adjudication of which CAT has been constituted. [Para 15] [578-B-C]

2. The grievances of the appellants in this appeal are that they were not made parties in proceedings before the Tribunal. But in the impleadment application filed before the High Court it was not averred by them that they were not aware of the pendency of the proceeding before the Tribunal. Rather, from the averments made in the impleadment petition, it appears that they were aware of the pendency of the proceedings before the Tribunal. It was therefore, open for them to approach the Tribunal with their grievances. Not having done so, they cannot approach the High Court and treat it as the Court of first instance in respect of their grievances by 'overlooking the jurisdiction of the Tribunal'. The CAT also has the jurisdiction of Review u/r. 17 of Central Administrative Tribunal (Procedure) Rules, 1987. So, it cannot be said that the appellants were without any remedy. [Para 16] [578-D-F]

3. The principles laid down in the case of *L. Chandra Kumar* **virtually embody a rule of law and in view of Article 141 of the Constitution, the same is binding on the High Court. The High Court fell into an error by allowing the appellants to approach it in clear violation of the**

Constitution Bench judgment of this Court in *L. Chandra Kumar.* **[Para 18] [578-H; 579-A]**

** L. Chandra Kumar vs. Union of India and Ors.* **(1997) 3 SCC 261, followed.**

4. As the appellants cannot approach the High Court by treating it as a court of first instance, their Special Leave Petition before Supreme Court is also incompetent and not maintainable. [Para 17] [578-G]

Case Law Reference:

(1997) 3 SCC 261 followed. Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2653-2654 of 2010.

From the Judgment & Order dated 14.11.2008 of the High Court of Delhi at New Delhi in Writ Petition (Civil) Nos. 19103-04 of 2006.

V.N. Sheety, L.N. Rao, S.L. Misra, Shail Dwivedi, AAG, Ravindra Kumar, T.V. Ratnam, Naresh Kaushik, Kiran Bhardwaj, Anil Katiyar, B. Krishna Prasad, Binu Tamta, Upendra Nath Misra, Nikhil Majithia, Anuvrat Sharma, Kapil Misra, Shiva Kumar Sinha, Jitendra Mohan Sharma, Sandeep Singh and Sandeep Malik for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The appellants in these appeals are Non-State Civil Service Officers (hereinafter referred to as the "Non-SCS Officers"). They filed an impleadment application in the Delhi High Court for being impleaded as respondents in Writ Petition No.19103-04 of 2006 filed by Hemraj Singh Chauhan and Others before the High Court whereupon the High Court by an

order dated 23rd April 2008 allowed them to intervene and further allowed them to make submissions at the time of hearing of the writ petition. They were also given liberty to file affidavits.

3. Pursuant to the said order of the Hon'ble High Court, these appellants filed affidavits. After the High Court passed its impugned judgment dated 14.11.08 they have filed these appeals assailing the said judgment.

4. At the outset of their arguments this Court wanted learned counsel for the appellants to satisfy this Court about their locus to participate in the controversy at the stage when the matter was before the High Court in view of the fact that admittedly these appellants were not parties before the Central Administrative Tribunal (hereinafter, 'C.A.T.').

5. Before the C.A.T. there were three applicants namely, Hemraj Singh Chauhan, Anwarul Haque and Ram Nawal Singh who were common both in O.A. No.1097/06 and O.A. No.1137/06. Apart from those three persons, Ramesh Chandani and K.K. Shukla were also applicants in O.A. No. 1137/06. Both the original applications were heard together.

6. The C.A.T. in its judgment dated 15.12.2006 held that O.A. No.1097/06 was without merit and dismissed the same and O.A. No.1137/06 was partly allowed and the respondents were directed to convene the meeting of D.P.C. Selection Committee to fill-up the posts which ultimately remain unfulfilled in 2001, 2002 and 2004 and to consider all eligible SCS Officers in the zone of consideration in the respective years including the Officers who were put in the select list of those years but could not be appointed in the absence of integrity certificate. The C.A.T. directed that the said order be complied within the period of four months.

7. However, on the said judgment being challenged before the High Court by Hemraj Singh Chauhan, the High Court set

aside the judgment of the C.A.T. and the Central Government and the State Government were directed to undertake the cadre reviewing exercise with reference to the vacancy position as on 1st January 2004 in the manner indicated in the High Court judgment within eight weeks from date.

8. However, while answering the objection on their locus standi, the appellants referred to the decision of the Constitution Bench of this Court in the case of *L. Chandra Kumar v. Union of India and others* – (1997) 3 SCC 261 and in particular to paragraph 99, page 311 at placitum f & g of the report and contended that in view of the law declared in *Chandra Kumar* (supra), they can come before the High Court and raise their grievances against the judgment of C.A.T. as their interests have been affected by that judgment even though they were not parties to the proceedings in which the said judgment was rendered.

9. This Court is of the view that the understanding of the ratio in *Chandra Kumar* (supra) by the learned counsel for the appellants in this case is not correct and the ratio in *Chandra Kumar* (supra) is just to the contrary.

10. The Constitution Bench in *Chandra Kumar* (supra) held that the power of the High Court under Articles 226 and 227 of the Constitution and of this Court under Article 32 of the Constitution is a part of the basic structure of our Constitution (See paragraphs 78 & 79, pages 301 and 302 of the report). The Constitution Bench also held that various Tribunals created under Articles 323-A and 323-B of the Constitution, will function as Court of first instance and are subject to the power of judicial review of the High Court under Articles 226 and 227 of the Constitution. The Constitution Bench also held that these Tribunals are empowered even to deal with constitutional questions and can also examine the vires of statutory legislation, except the vires of the legislation which creates the particular Tribunal.

11. In paragraph 93, at page 309 of the report, the Constitution Bench specifically held:

> "…We may add that the Tribunals will, however, continue to act *as the only courts of first instance* in respect of the areas of law for which they have been constituted…."
>
> (Emphasis added)

12. The Constitution Bench explained the said statement of law by reiterating in the next sentence:

> "..By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

13. On a proper reading of these two sentences, it is clear:

(a) The Tribunals will function as the only Court of first instance in respect of the areas of law for which they have been constituted.

(b) Even where any challenge is made to the vires of legislation, excepting the legislation under which Tribunal has been set up, in such cases also, litigants will not be able to directly approach the High Court 'overlooking the jurisdiction of the Tribunal'.

14. The aforesaid propositions have been repeated again by the Constitution Bench in the penultimate paragraph 99 at page 311 of the report in the following words:

> "…The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even

> in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned…."

15. In view of such repeated and authoritative pronouncement by the Constitution Bench of this Court, the approach made to the High Court for the first time by these appellants in respect of their service disputes over which C.A.T. has jurisdiction, is not legally sustainable. The Division Bench of the High Court, with great respect, fell into an error by allowing the appellants to treat the High Court as a Court of first instance in respect of their service disputes, for adjudication of which C.A.T. has been constituted.

16. The grievances of the appellants in this appeal are that they were not made parties in proceedings before the Tribunal. But in the impleadment application filed before the High Court it was not averred by them that they were not aware of the pendency of the proceeding before the Tribunal. Rather from the averments made in the impleadment petition it appears that they were aware of the pendency of the proceedings before the Tribunal. It was therefore, open for them to approach the Tribunal with their grievances. Not having done so, they cannot, in view of the clear law laid down by the Constitution Bench of this Court in *Chandra Kumar* (supra), approach the High Court and treat it as the Court of first instance in respect of their grievances by 'overlooking the jurisdiction of the Tribunal'. The C.A.T. also has the jurisdiction of Review under Rule 17 of CAT (Procedure) Rules, 1987. So, it cannot be said that the appellants were without any remedy.

17. As the appellants cannot approach the High Court by treating it as a Court of first instance, their Special Leave Petition before this Court is also incompetent and not maintainable.

18. The principles laid down in the case of *Chandra Kumar*

(supra) virtually embody a rule of law and in view of Article 141 of the Constitution the same is binding on the High Court. The High Court fell into an error by allowing the appellants to approach it in clear violation of the Constitution Bench judgment of this Court in *Chandra Kumar* (supra).

19. For the reasons aforesaid the appeals are dismissed as not maintainable. No costs.

K.K.T. Appeals dismissed.

FOOD CORPORATION OF INDIA AND ANR.
v.
NIZAMUDDIN AND ANR.
(Civil Appeal No. 2627 of 2010)

MARCH 23, 2010

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

Service Law: Compassionate appointment – Offer of voluntary retirement and request for compassionate appointment when not interlinked or conditional – Each request to be decided independently even if both the requests made in same letter – On facts, voluntary retirement on medical grounds sought after completion of 55 years of age – Application of son of retiree for compassionate appointment rightly rejected as circular dated 3.7.1996 provided that benefit of compassionate appointment was available to the dependents of departmental workers who sought voluntary retirement on medical grounds within the age limit of 55 years – Circular dated 3.7.1996 issued by FCI.

On 16.2.1998, second respondent gave a letter to the employer-appellant seeking retirement on medical grounds and appointment of his son on compassionate grounds. The employer granted permission to the second respondent to retire w.e.f. 30.4.2000. On 19.4.2003, the first respondent, son of second respondent submitted an application seeking compassionate appointment. Thereafter, on 8.3.2003, the respondents filed a writ petition before the High Court seeking a direction to employer to appoint first respondent on compassionate grounds. High court passed interim direction to the employer to pass a speaking order on the said application. The employer passed order dated 13.3.2003 holding that since the second respondent had crossed

the prescribed age of 55 years, the application for compassionate appointment could not be entertained. Subsequently, Single Judge of High Court dismissed the writ petition. However, Division Bench of High Court held that the first respondent was eligible for compassionate appointment under the relevant scheme. Hence the appeal.

Allowing the appeal, the Court

HELD: Appellant by its circular dated 3.7.1996 extended the benefit of compassionate appointment to dependants of departmental workers who sought voluntary retirement on medical grounds subject to the condition that the worker who sought voluntary retirement on medical grounds should apply within the age limit of 55 years for the purpose of availing the benefits of compassionate appointment. The second respondent sought voluntary retirement on medical grounds on 16.2.1998, after completion of 55 years. As the Scheme provided that benefit under it was available only if the worker sought voluntary retirement on medical grounds before completing the age of 55 years, the application for compassionate appointment was liable to be rejected. In this case the offer of voluntary retirement in the application was neither conditional nor interlinked. It merely contained two requests that is permission to retire voluntarily on medical grounds and request for appointment for his son, without any interlinking. Nor was the voluntary retirement conditional upon giving employment to his son. Each request had to be considered on its own merits with reference to the rules/ scheme applicable. When so done, the first respondent would not be entitled to compassionate appointment. [Paras 4, 5, 7] [584-E-F; 585-C-D; 587-F-H; 588-A]

Food Corporation of India v. Ram Kesh Yadav **(2007) 9**

SCC 531, held inapplicable.

Case Law Reference:

(2007) 9 SCC 531 held inapplicable Para 3

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2627 of 2010.

From the Judgment & Order dated 18.5.2007 of the High Court of Allahabad in Special Appeal No. 579 of 2005.

Govind Goel, Ambuj Agarwal, Nitin Singh, Brijeshwar Singh, Dr. Kailash Chand for the Appellants.

Bharat Sangal for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Second respondent was an employee of the appellant - Food Corporation of India ('FCI' for short). His date of birth was 8.2.1943. On 16.2.1998, the second respondent gave a letter seeking retirement on medical grounds and appointment of his son on compassionate grounds. The said letter is extracted below:

"Sub: Retirement on medical grounds and appointment of son/close relatives on compassionate grounds.

I am working as H.L. in F.S.D. Chandari Depot in gang No.15. My health is not good. Physically I face difficulty in Sarder/ Manda/ Handling Labour/ Ancillary job. *I, therefore request that the management may kindly retire me on medical grounds and at the same time give appointment to my Son*/close relative Shri Md. Nizamudin aged 28.2.71 years, in place as F.S.D. Chandri in this depot, because there is no other person in the family to look after us. He has promised to look after me and family after my retirement."

[Emphasis supplied]

2. In pursuance of it, after medical examination FCI, by its letter dated 29.4.2000 permitted the second respondent to retire with effect from 30.4.2000. Nearly three years later, on 19.2.2003, the first respondent who is the son of second respondent submitted an application seeking compassionate appointment. A fortnight later, on 8.3.2003, the respondents filed a writ petition before the Allahabad High Court seeking a direction to FCI to appoint the first respondent on compassionate grounds. By interim order dated 13.3.2003, the High Court directed the competent authority under FCI, to pass a speaking order on the said application. In pursuance of it the competent authority passed an order dated 13.3.2003 relevant portion of which is extracted below :

> "With reference to the above subject, your application dated 19.2.2003 for appointment to the post of handling labour in FSD Chandari, Kanpur of the Food Corporation of India, has been considered sympathetically in the light of interim order dated 13.3.03 passed by the Hon'ble High Court of Allahabad and the judgment dated 2.8.2002 passed by the Hon'ble Allahabad High Court in Petition No.43714 of 2001 Raj Nath Yadav and others vs. F.C.I. and also the departmental rules and circulars.
>
> FCI Headquarters, New Delhi issued circular No. IR/L/31(27)/87 dated 3.7.96 contemplating norms for retirement on medical grounds as well the grant of benefit of appointment on compassionate grounds to the dependent of such employee who, at the time of application, was less than 55 years of age.
>
> Since Suleman, who was working as handling labour at FSD Chandari of F.C.I., had applied for retirement on medical grounds vide application dated 16.2.98, date of birth of the said employee, as per the record of the department, being 8.12.1943, the concerned employee had crossed the prescribed age of 55 years by about 2 days. This fact has been corroborated by you in your application dated 19.2.2003. Therefore, as per rules of the department, your application cannot be entertained and your appointment on compassionate grounds is not possible. Hence your application is hereby rejected."

3. Subsequently, a learned Single Judge, by judgment dated 29.3.2005, dismissed the writ petition holding that the first respondent was not eligible for appointment in view of conditions of the circular dated 3.7.1996. However a Division Bench of the High Court allowed the appeal filed by the respondents by judgment dated 18.3.2007 purporting to follow the decision of this Court in *Food Corporation of India v. Ram Kesh Yadav* [2007 (9) SCC 531]. The said judgment is challenged in this appeal by special leave. The question for consideration is whether first respondent is entitled to claim compassionate appointment under the relevant scheme.

4. FCI by its circular dated 3.7.1996 extended the benefit of compassionate appointment to dependants of departmental workers who sought voluntary retirement on medical grounds subject to the following condition :

> "The worker who seeks voluntary retirement on medical grounds should apply within the age limit of 55 years for the purpose of availing the benefits of compassionate appointment. The retirement on medical ground should be accompanied by medical certificate…."

The application for compassionate appointment had to be made in the prescribed form, within three months from the date of retirement. Compassionate appointment was to be given only in deserving cases, that is, where there was no earning member in the family of the retired worker, or where it was found that the financial benefits which were available to the worker

on retirement were not be sufficient to meet the needs for running the family. The said scheme also provided that compassionate appointment was discretionary:

> "Notwithstanding anything contained in the above, the compassionate ground appointment is not as a matter of right but purely at the discretion of the competent authority taking into account the circumstances and conditions of the family of the medically retired workers and also subject to availability of the vacancy."

5. The second respondent sought voluntary retirement on medical grounds on 16.2.1998, after completion of 55 years. As the Scheme provided that benefit under it was available only if the worker sought voluntary retirement on medical grounds before completing the age of 55 years, the application for compassionate appointment was liable to be rejected.

6. The High Court however held that the facts of the case were similar to the case of the applicant in *Ram Kesh Yadav* and having regard to the decision of this court in that case, the first respondent was entitled to compassionate appointment. In *Ram Kesh Yadav,* legal position under the Scheme dated 3.7.1996 was explained thus :

> "10. As rightly contended by FCI, the issue of voluntary retirement of an employee on medical grounds and the issue of compassionate appointment to a dependant of such retired employee are independent and distinct issues. An application for voluntary retirement has to be made first. Only when it is accepted and the employee is retired, an application for appointment of a dependant on compassionate grounds can be made. Compassionate appointment of a dependant is not an automatic consequence of acceptance of voluntary retirement. Firstly, all the conditions prescribed in the scheme dated 3-7-1996 should be fulfilled. Even if all conditions as per guidelines

> are fulfilled, there is no "right" to appointment. It is still a matter of discretion of the competent authority, who may reject the request if there is no vacancy or if the circumstances and conditions of the family of the medically retired worker do not warrant grant of compassionate appointment to a dependant. Therefore, the observation of the High Court in *Nizamuddin* that allowing the request of the employee for voluntary retirement on medical grounds and rejecting the application of the dependant for compassionate appointment on the ground of non-fulfillment of conditions of scheme would amount to taking inconsistent stands, is clearly erroneous."

In the case of *Ram Kesh Yadav*, the composite application dated 26.4.1999 of the employee seeking voluntary retirement on medical grounds stated : "I desire to go on retirement on medical ground, if my above named son would be provided with an employment in my place as handling labour." In view of the peculiar wording of the letter seeking voluntary retirement this Court held that the aforesaid general principle will not apply and proceeded to hold as follows :

> "14. When FCI accepted the offer unconditionally and retired the second respondent from service by office order dated 29-7-2000, it was implied that it accepted the conditional offer in entirety, that is the offer made (voluntary retirement) as also the condition subject to which the offer was made (appointment of his dependant son on compassionate grounds). In his application, the second respondent made it clear that he desired to retire voluntarily on medical grounds only if his son (the first respondent herein) was provided with employment. If FCI felt that such a conditional application was contrary to the scheme or not warranted, it ought to have rejected the application. Alternatively, it ought to have informed the employee that the compassionate appointment could not be given to his son because he (the employee) had already completed 55

years of age and that it will consider his request for retirement on medical grounds delinking the said issue of retirement, from the request for compassionate appointment. In that event, the employee would have had the option to withdraw his offer itself. Having denied him the opportunity to withdraw the offer, and having retired him by accepting the conditional offer, FCI cannot refuse to comply with the condition subject to which the offer was made."

But this Court made it clear that the above position was in an exceptional situation where the offer of voluntary retirement was inextricably interlinked and conditional upon his son being offered appointment and the employer accepted and acted upon the conditional offer. This Court however reiterated the general rule as follows :

"19. We have upheld the direction for grant of employment only because of the acceptance of an interlinked conditional offer. Where the offer to voluntarily retire and request for compassionate appointment are not interlinked or conditional, *FCI would be justified in considering and deciding each request independently, even if both requests are made in the same letter or application. Be that as it may."*

[emphasis supplied]

7. In this case the offer of voluntary appointment in the application was neither conditional nor interlinked. The words used are "I therefore request that the management may kindly retire me on medical grounds and at the same time give appointment to my son." It merely contains two requests (that is permission to retire voluntarily on medical grounds and request for appointment for his son), without any interlinking. Nor was the voluntary retirement conditional upon giving employment to his son. Therefore, *Ramkesh Yadav* will not

apply. Each request had to be considered on its own merits with reference to the rules/scheme applicable. When so done it is clear that the first respondent will not be entitled to compassionate appointment.

8. We accordingly allow this appeal, set aside the judgment of the Division Bench and restore the order of the learned Single Judge dismissing the writ petition.

D.G. Appeal allowed.