MOHD. MAQBOOL TANTRAY

v.

STATE OF J & K

(Criminal Appeal No. 342 of 2009)

FEBRUARY 4, 2010*

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

Terrorist and Disruptive Activities (Prevention) Act, 1987:

s.3(2)(ii) and s.364 r/w s.120-B RPC – Out of several persons prosecuted for abduction and murder of an MLA, only 3 brought to trial – Two acquitted – Only one convicted u/s 3(2)(ii) TADA and s.364/120-B RPC – Sentence of 14 years imprisonment u/s 3(2)(ii) of TADA and 5 years u/s 364/120-B RPC imposed – Plea that in view of the convict having shown his remorse while making the confession before the SSP, the sentence be reduced to the period already undergone – HELD: It is indeed true that a conviction under the TADA is a very serious matter and calls for a deterrent punishment – At the same time, the facts of each case cannot be ignored – In the instant case, all the co-accused of the appellant have either been acquitted or have not been brought to trial – Appellant has expressed his regrets for the circumstance which had ultimately led to the murder of the deceased – Trial court has given a positive finding that the appellant was only involved with the abduction part and had nothing to do with the murder of the MLA – Appellant has undergone more than 11½ years of sentence after facing protracted trial spread over almost 20 years – He had been released on bail for a period of 1 ½ years and during this period his conduct and behaviour had remained exemplary – In the circumstances, while dismissing the appeal, sentence reduced from 14 years to that already undergone – Sentence

*Judgment received on 13.4.2010

– Ranbir Penal Code – s.364 r/w s.120-B. [para 4, 5 and 7]

Gurdeep Singh alias Deep vs. State (Delhi Admn.) 1999 **(2) Suppl. SCR 693 = (2000) 1 SCC 498, relied on.**

Case Law Reference:

1999 (2) Suppl. SCR 693	**Relied on**	**Para 4**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 342 of 2009.

From the Judgment & Order dated 11.2.2009 of the 3rd Additional Sessions Judge, Jammu (Designated Court under TADA) in File No. 20/Ch.

Mohan Jain, ASG, E.C. Agrawala, Amit Kumar Sharma, Nishant Katoch, Dinesh Thakur, Rohini Mukherjee, Prabhat Kumar, Vibhav Mishra, T.V. Ratnam, Arvind Kumar Sharma, Jaspreet Aulakh, P.K, Dey, B. Krishna Prasad, Anis Suhrawardy, S. Mehdi Imaz, Tabreez Ahmed for the appearing parties.

The following Order of the Court was delivered

ORDER

1. We have heard the learned counsel for the parties at length.

2. The appellant Mohd. Maqbool Tantray along with 17 others was tried for offences punishable under Sections 302/392/364 etc. of the Ranbir Penal Code [for short 'the RPC'] and Section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 [hereinafter referred to as 'the TADA'] for being involved in the abduction and murder of former MLA Mir Mustafa on the 25th March, 1990. Eleven of the accused were discharged on the statement made by the Public Prosecutor, three died during the pendency of the trial and one absconded and three were brought to trial including the

appellant. In the trial three co-accused of the appellant herein were acquitted but the court relying on the evidence of various prosecution witnesses and in particular on the confessional statement given by the appellant to the SSP Mr. A.K. Suri, convicted him for offences punishable under Section 364 read with Section 120B of the RPC and sentenced him to undergo rigorous imprisonment for five years and to pay a fine of Rs. 1000/-, in default to undergo imprisonment for six months and under Section 3(2)(ii) of TADA to undergo rigorous imprisonment for 14 years and to pay a fine of Rs. 5000/-, in default of payment of fine to further undergo imprisonment for a period of one year, both the sentences to run concurrently. The present appeal has been filed impugning the judgment of the trial court as the appeal under TADA lies directly to the Supreme Court.

3. Mr. Agrawala, the learned counsel for the appellant has not argued the matter on merits but has pointed out that in view of the above facts more particularly that eleven out of 18 accused had been discharged and the two co-accused of the appellant herein had been acquitted vide the impugned judgment and the additional fact that the trial had continued for almost twenty years and that the appellant had also undergone almost 11½ years of the sentence and that he had made a confession before the SSP which showed his remorse it was appropriate that the sentence be reduced to that already undergone.

4. For the proposition that in a case of a confession made by a remorseful rependant convict some leniency in the sentence was called for the learned counsel has placed reliance on the judgment of this Court in *Gurdeep Singh alias Deep v. State (Delhi Admn.)* (2000) 1 SCC 498. The learned Solicitor General has, however, pointed out that the appellant was one of the prime movers in the incident which had led to the death of Mir Mustafa and as Section 2 of TADA provided for a life sentence, the appellant had already been dealt with in a lenient

way and no further latitude should be shown to him.

5. It is indeed true that a conviction under the TADA is a very serious matter and calls for a deterrent punishment. At the same time, the facts of each case cannot be ignored. We see that all the co-accused of the appellant have either been acquitted or have not been brought to trial. We also see from the record that the appellant has expressed his regrets for the circumstance which had ultimately led to the murder of Mir Mustafa. The trial court has given a positive finding that the appellant was only involved with the abduction part and had nothing to do with the murder of the MLA. We also see from the record that appellant has undergone more than 11½ years of the sentence after facing protracted a trial spread over almost 20 years. We have also been told by Mr. Agrawal that he had been released on bail for a period of 1½ years and during this period his conduct and behaviour had remained exemplary. We also notice that in *Gurdip Singh's* case (supra) this Court observed as under:

> "25. Before concluding we would like to record our conscientious feeling for the consideration by the legislature, if it deem fit ad proper. Punishment to an accused in criminal jurisprudence is not merely to punish the wrongdoer but also to strike a warning to those who are in the same sphere of crime or to those intending to join in such crime. This punishment is also to reform such wrongdoers not to commit such offence in future. The long procedure and the arduous journey of the prosectuion to find the whole truth is achieved sometimes by turning on the accused as approvers. This is by giving incentive to an accused to speak the truth without fear of conviction. Now turning to the confessional statement, since it comes from the core of the heart through repentance, where such accused is even ready to undertake the consequential punishment under the law, it is this area which needs some encouragement to such an accused through some respite

may be by reducing the period of punishment, such incentive would transform more such incoming accused to confess and speak the truth. This may help to transform an accused to reach the truth and bring to an end successfully the prosecution of the case."

6. We find that the aforesaid observations would apply to the present case as well.

7. We, accordingly, while dismissing the appeal, reduce the sentence from 14 years to that already undergone.

8. The appeal stands disposed of accordingly.

R.P. Appeal disposed of.

PANNEY @ PRATAP NARAIN SHUKLA & ANR.
v.
STATE OF U.P.
(Criminal Appeal No. 304 of 2006)

DECEMBER 9, 2009*

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860:

s. 302 – Death of victim caused by bomb, firing a pistol and cutting his neck – Out of four accused, one absconding – Conviction by trial court of two of the accused – Death sentence awarded – Death reference declined by High Court and appeal of accused also dismissed – HELD: The bomb used, being a country made one, with uncertain content and performance, the possibility of sustaining injuries by witnesses who were standing at a distance of 4-5 steps away from the site of explosion, would be rather remote – Evidence of Investigating Office that splinters had been picked up from within a radius of about 4 feet from the site of explosion, also indicates that no damage could be expected beyond that distance – In a case of injuries by bomb, incised wounds are clearly possible – Time of death as stated by prosecution is supported by medical evidence – Two courts below having found the accused guilty, there is no reason to interfere with the findings of fact recorded – Medical jurisprudence – Constitution of India, 1950 – Article 136.

Modi's Medical Jurisprudence and Toxicology ***741 –*** **referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 304 of 2006.

From the Judgment & Order dated 26.10.2005 of the High

*Judgment received on 31.3.2010

Court of Judicature at Allahabad in Crl. Appeal No. 6628 of 2004.

Ajay Veers Singh, B.S. Jain, S.N. Shukla, Nitin Jain, Mohd, Irshad Hanif for the Appellants.

Prashant Chaudhary, S.K. Dwivedi, Garvesh Kabra, Shrish Kumar Misra for the Respondent.

The following Order of the Court was delivered

ORDER

This appeal arises out of the following facts:

About a month before the incident Shivdhari, son of (Ram Awadh Yadav) PW.1, the first informant, had purchased some land from Rudra Narain Shukla. The execution of the sale annoyed the accused appellants as they too were interested in the land.

At about 7.00 p.m. on 7th November, 2003, Shivdhari had gone to the house of Shyam Kunwar of village Bhedi and on exhortation of the accused Harihar Shukla, & Panney @ Pratap Narain Shukla hurled a bomb on Shivdhari which fell on his abdomen and exploded, whereas Channey @ Prabhu Narain Shukla thereafter fired from a country made pistol of 12 bore on the abdomen of Shivdhari and Vishwajit, the absconding accused, cut his neck with a Gandasi. Shivdhari died immediately on the spot. On hearing the sound of the explosion Ram Awadh Yadav and his sons Ramdhari, Tilakdhari and Dalsingar rushed to the spot, flashed a torch and saw the accused running away. Ram Awadh Yadav thereafter rushed to the police station at a distance of one furlong and lodged the report. Pursuant to the report, the S.H.O. Chandra Bali Yadav (PW.5), reached the place of incident, made the necessary inquiries, picked up the spent cartridges and also recovered the splinters of the bomb which had been hurled at the deceased. He also recorded the statements of some of the witnesses under Section 161 of the Cr.P.C. but not of Tilakdhari

whose statement was recorded after a gap of 8 days.

On the completion of the investigation, the accused Harihar Shukla, Panney and Channey were charged for an offence punishable under Sec.302 of the IPC and as they pleaded not guilty, they were brought to trial. The trial Court in the course of its judgment dated 10th December, 2004 acquitted Harihar Shukla on the ground that he had not participated in the murder and awarded a sentence of death to the other two accused. The matter was then referred to the High Court for confirmation of the death sentence, whereas the accused also filed an appeal challenging their conviction. The murder reference was declined and the appeal too was dismissed.

This appeal by way of special leave has been filed by Panney and Channey, the two convicted accused.

Mr. Ajay Veer Singh, the learned counsel for the appellants has raised several arguments during the course of hearing. He has first pointed out the medical evidence contradicted the ocular testimony inasmuch that had the bomb been hurled on the deceased from a very close range as suggested the witnesses who had seen the incident from a distance of four or five feet would have suffered injuries as well and as this had not happened a doubt was cast on the story. He has also pleaded that from the medical evidence it appeared that there were three explosive wounds with charred and blackened margins, but the splinter injuries beyond the primary wounds had no such markings on the dead body which again falsified the prosecution story and suggested the use of more than one bomb. He has further pointed out that no pellets had been recovered from the body and the use of the country made 12 bore pistol was thus in doubt. It has finally been submitted that the incident had allegedly happened at 7.00 p.m. on 7th November, 2003, but from the evidence of the eye-witnesses it appeared that it had happened in the early hours of 8th November, 2003, which falsified the presence of the eye witnesses.

The learned State counsel has, however, supported the judgment of the trial Court.

It is true, as has been contended by Ajay Veer Singh that the bomb had exploded a short distance away from the witnesses and in normal circumstances some injuries would have been received by them as well. We are, however, of the opinion that the bomb used was a country made one, with uncertain content and performance. The ocular evidence further falsifies the argument that the bomb had exploded 4 feet away from the witnesses. It is clear from the evidence that the eye witnesses were standing at a distance of 4-5 steps away from the site of the explosion. This would ordinarily be about 20 feet in which case the possibility of the bomb causing any injury to the witnesses would be rather remote. It has come in the evidence of the Investigating Officer that splinters had been picked up within a radius of about 4 feet from the site of the explosion meaning thereby that no damage could be expected beyond that distance more particularly as the bomb was a crude home made one, with uncertain performance.

Mr. Ajay Veer Singh's argument that three separate bombs had been used is again falsified by the medical evidence. We see from the post-mortem report that the explosive injuries were on the lower chest and the abdomen in an area of about 20 cm x 8 cm. and the injuries beyond that area were caused by stray splinters. Merely because the Doctor recorded three separate injuries would not, therefore, lead to the conclusion that three bombs had been used.

The learned counsel has also submitted that the incised injuries found on the dead body had not been explained is also not acceptable for the reason that in Modi's Medical Jurisprudence and Toxicology page 741 it has been indicated that in a case of injuries by a bomb explosion, incised wounds are clearly possible.

It has been submitted by Mr. Ajay Veer Singh that the

behaviour of the witnesses was abnormal inasmuch that they did not interfere at the time of the attack on Shivdhari. This submission is unacceptable in the light of the brutality and ruthlessness of the attack inasmuch that a bomb and pistol had been used and the neck of the deceased had also been severed in this eventuality the eye witnesses would have stayed far away from the accused, fearing a similar fate.

Mr. Ajay Veer Singh has also emphasized that from the evidence it appeared that the prosecution itself was uncertain about the time of the incident. He has pleaded that as per the prosecution story the incident had happened at about 7.00 p.m. on the 7th November 2003 but from the statement of PW.2 it looks as if it had happened in the early hours of the next morning. It is true that PW.2 had stated at one stage that the incident had happened in the morning a short while before the police had arrived. It is, however, not clear as to whether this was the first visit of the Police Officer or a subsequent one as the police station was only one furlong away from the place of incident. Moreover, the story that the incident had happened in the early hours on 8th November, 2003, is not spelt out by the medical evidence. The Doctor opined that the deceased had taken his last meal three hours before his death. We are of the opinion that if that be so and the story of the defence is to be believed the murder would then have been committed at about three or four a.m. which would be highly probable, as the last meal would then have to be taken at about 1.00 a.m. The prosecution story is, however, consistent with the medical evidence in that the deceased had died at 7.00 p.m. and the food would have taken three or four hours before death which would be normal human behaviour. Moreover as two courts have found against the appellants on a clear cut discussion, we would be hesitant to interfere with the findings of fact recorded.

The appeal is dismissed accordingly.

R.P. Appeal dismissed.

KAILASH NATH
v.
STATE OF U.P.
(Criminal Appeal No. 1416 of 2008)

DECEMBER 10, 2009*

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860:

ss. 302/149 and 307/149 – Eight persons involved in causing death of one of the victims and injuring the other by gunshots – Conviction by trial court – High Court convicting only one accused who fired the shots and acquitting others giving them benefit of doubt – Plea that since the High Court itself had opined false implication of other persons who had not caused injuries, accused should also be acquitted – HELD: Merely because some of the accused who had not caused any injuries to the deceased or the witnesses have been given benefit of doubt would not mean that they were not present – It is only as a matter of abundant caution that the benefit has been given to them – Further, the manner and time of attack indicate that it could not be made by one or two persons – In any case, the High Court has, by way of abundant caution, given the benefit of doubt to those who had not caused any injury, but the appellant who is stated to have caused gun shot wounds to the deceased and to PW-1 cannot be treated in the same manner – PW-1, the injured witness is also the wife of the deceased – She gave a long description of the incident and despite her cross-examination she stood by story of shots fired by appellant – Statement of PW-5, the scribe of FIR, who had been sleeping on the ground floor of the house a very short distance away, also merits acceptance – Besides, the time and place of incident and the weapon used have not been controverted by the defence – Even

* Jud Recd. on 22.4.2010

otherwise, medical evidence clearly supports the prosecution version – As regards motive, the evidence reveals the extent of animosity between the parties with murders and counter murders and litigations going back to the 1960s – Further, in a case of direct evidence, any uncertainty as to the motive could not be said to be fatal to the prosecution story – Appeal dismissed – Criminal Law – Motive. [Para 5,8,9 and 11]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1416 of 2008.

From the Judgment & Order dated 24.8.2007 of the High Court of Judicature at Allahabad Lucknow Bench, Lucknow in Criminal Appeal No. 628 of 1981.

K.V. Vishwanathan, Rishad Murtaza, M. Shoeb Alam, Anup Kumar, Neha, Abhishek, M. Sahu, B. Sunita Rao for the Appellant.

Ratnakar Dash, Shail Kumar Dwivedi, Manoj Dwivedi, Gunnam Venkateswara Rao, Vandana Mishra for the Respondent.

The following Order of the Court was delivered

ORDER

1. The prosecution story is as under:-

1.1. Chhoti - P.W. 1, the complainant in the case was earlier married to Kallu Singh of village Tendwar, P.S. Maholi, District Sitapur and had three sons from him namely, Virendra, Surendra and Mahendra. Kallu Singh aforesaid had an uncle named Ram Singh and Ram Singh had a son named Lallu Singh. Kallu Singh owned a house in village Tendwar. A short distance therefrom was the residential house of Vikram Singh -P.W. 5 nephew of Kallu Singh. Kallu Singh aforesaid was murdered about 12 years before the date of the present incident and as per the prosecution story a partition had been effected

between Kallu Singh and Lallu Singh with regard to the mango grove in Khasra No. 165 which jointly belonged to them. The story further goes that Lallu Singh sold his portion of the grove to Kailash, the appellant herein, in the year 1970 as he was living with him at that time. It also appears that Lallu Singh did not pay any amount to Chhoti or the sons of Kallu Singh though they claimed a share in this property as well. It further appears that two years after the murder of Kallu Singh, Chhoti - P.W. started living with Deep Singh in her house as her second husband and it was Deep Singh who continued to look after the properties of Kallu Singh and his sons born from Chhoti. Deep Singh, who also happened to be a distant cousin of Kallu Singh, had two brothers Vikram Singh and Lakhan Singh. In the year 1976, Kallu Singh's sons from Chhoti i.e. Virender, Surender and Mahender had filed a suit claiming the land covered by Khasra No. 165 which Lallu Singh had sold to Kailash Nath appellant and it was Deep Singh who had pursued the matter in court on behalf of the plaintiffs. A few days before the incident negotiations took place between the appellant and Lallu Singh about the proposed sale of yet another mango grove covered by Khasra No. 243 in which Kallu Singh's family also claimed a share. Deep Singh, on receiving this information, and in deep consternation went to the appellant and protested against the proposed sale. This fact annoyed the appellant and he told Deep Singh that he would one day kill him as he had been an obstacle in all his transactions. It appears that this latest incident was the fall out of some earlier incidents where the parties had quarrelled over property or other matters and Deep Singh in fact had moved applications before the DIG and the Superintendent of Police apprehending danger from Kailash and his associates.

1.2. At about 1:00a.m. on the 17th June, 1980, Deep Singh and Chhoti were sleeping on the roof of the Baithak in their house in village Tendwar on one cot, on which a quilt had been spread out. A lantern was also kept burning on the railing of the roof of the baithak. Kallu Singh's sons Virender and

Surender were sleeping on their cots in a part of the baithak adjoining the main residential house whereas the other ladies of the family were sleeping inside and Vikram Singh in his home a short distance away, Chhoti was, however, rudely awakened on hearing the sound of a gun shot and she saw Deep Singh lying besides her with a gun shot injury and bleeding profusely. She immediately got up and noticed that accused Balwant Singh (since dead) was present near the cot and re-loading his weapon whereas Kailash Nath, Rampal and five others were standing close by. Chhoti, thereupon, fell to her knees and pleaded with the appellant not to harm her husband but he nevertheless fired a shot killing him at the spot and also caused injuries to Chhoti. The noise which came about attracted P.W.'s 4 and 5 to the place of incident on which the accused ran away but before they did so they were identified by the witnesses in the light of the torch which they were carrying. Vikram, P.W. thereupon wrote (on the dictation of Chhoti) a report Exhibit Ka-1 at about 5:00a.m. and reached the Police Station, Maholi at about 7:15a.m. on which a formal FIR was lodged at that time. After recording the FIR, Kesho Prasad Rai, P.W. 8, Inspector of Police and the SHO, reached the place of incident and sent Chhoti for her medical examination to the Primary Health Centre, Maholi. He also made the necessary spot investigation, recovered one spent .12 bore cartridge, a blood stained lathi, a blood stained quilt and also a portion of the blood stained cot, which were duly sealed and deposited in the Malkhana in the police station. Dr. Habib Ahmad, P.W. 3, also examined Chhoti at 10:30 a.m. on the 17 th June, 1980 and detected 2 gun shot injuries with blackening and charring thereon and on an x-ray examination found some pellets embedded in her body as well. On the completion of the investigation, all the accused, 8 in number, were charged for offences punishable under Sections 302/147/148/149 of the IPC. It appears that accused Balwant died before commencement of the trial. The trial was, accordingly, held with respect to the remaining 7 accused, who were convicted for offences punishable under Sections 302/149 of the IPC and sentenced to life imprisonment and under

Section 307/149 IPC to three years rigorous imprisonment. An appeal was thereafter filed in the High Court. During its pendency, appellant Ratnu also died. The High Court went into the matter with respect to five of the appellants and observed that as four out of them had caused no injuries to the deceased and as there was a long history of animosity between the parties it could be a case of false implication of some of them. The High Court, accordingly, gave the benefit of doubt to four but dismissed the appeal of the appellant herein, Kailash Nath, who is now the only person left in the fray.

2. Mr. K.V. Vishwanathan, the learned senior counsel for the appellant has raised three basic arguments during the course of hearing. He has first pointed out that in the light of the fact that Chhoti P.W. 1 had not seen the shot being fired by Balwant as she had been asleep at that time and had woken up in alarm and seen that Deep Singh had already been injured and as only one injury had been suffered by the deceased as per the prosecution, the story of a second shot by the appellant was not believable. Elaborating this argument, Mr. Vishwanathan has pointed out that the fact whether one shot or two shots had been fired had to be determined from the pellet holes in the clothes that the deceased and the injured had been wearing but as the clothes had not been taken into possession, a presumption should be drawn against the prosecution and it must be held that one and not two shots had been fired which would clear the appellant. It has also been pleaded that there appeared to be no apparent motive for the incident and the suggestion with regard to the animosity on account of the various land transactions etc. which had been spelt out by the prosecution, had been found by the High Court to be unacceptable and the High Court had accepted the story given in Ex Ka. 5 to K. 7. He has also pointed out that as the complaints allegedly made by Deep Singh long before his death that he apprehended danger at the hands of the appellant and his associates had seen the light of the day for the first time in court, their veracity was doubtful. It has finally been pleaded by

Mr. Vishwanathan that animosity between the parties was admitted and in the light of the observations of the High Court, the appellant too was entitled to the benefit of doubt which had been given to the other accused.

3. Mr. Ratnakar Dash, the learned senior counsel representing the State of Uttar Pradesh has, however, controverted the arguments raised by Mr. Vishwanathan. He has pointed out that though the motive had been proved beyond doubt but in the face of the direct evidence in the person of Chhoti, P.W. 1 who was also an injured eye witness, the absence of motive would have no effect on the prosecution story. He has pleaded in elaboration that the place of incident, the time of the incident and the weapons used in the crime have not been disputed by the defence and in the light of the fact that the FIR had been recorded by 7:15a.m. at the Police Station which was situated 12 miles away from the place of the incident, supported the prosecution story in its entirety. He has also pointed out that as per the doctor's evidence the injuries had been caused with a shotgun.

4. We have heard the learned counsel for the parties at great length and gone through the record very carefully.

5. It would be relevant that Chhoti, P.W. 1, is an injured witness. She is also the wife of the deceased. We see from the record that in the course of her extensive cross examination Chhoti was not in any way, fazed. She gave a long description of the incident and despite her cross-examination she stood by the story of the shot fired by the appellant. We also observe that the time and place of incident and the weapon used have not been controverted by the defence. Even otherwise, we notice that the medical evidence clearly supports the prosecution version. Dr. M.M. Gupta - P.W. 6 found the following injuries on the dead body:

"1. Injury No. 1 firearm entry wound 8cms from up to downward X 5cms side to side on the head towards front

side of forehead in the central line above the root of the nose. Around this injury up to the neck in the area of 29 cms up to down and 18 cms side to side blackening signs and tatooing were present.

2. Fire arm exit wound measuring 2cms X 2cms on the head 7 cms above the ear 11 cms above the outer portion of the eye brow and on the backside.

On dissection I found that frontal bone had got fractured below the injury No. 1 in which a hole measuring 5 cms side to side X 4.5 cms upto downward was available. Fracture of size 3 cms X 2.5 cms. Was found in the parietal bone which was apparent below the Injury No. 2. A fracture measuring 9cms. Long X linear was found in parietal bone which was commencing from the entry wound. Fracture in the — — bone measuring 6 cms X linear was available which was radiating from the exist wound.

3. Entry shadow of four pellets on the shoulder at deltoid region just below the shoulder lip in the area of 9 cms X 8 cms an size measuring 0.4 cm X 0.4 cm X ski deep. No tattooing or blackening signs were available. The distance of two wounds was 1.5 cms to 1.09 cms.

4. Abrasion in the area of 2 cms X 0.2 cm. Towards hair backside on the upper portion of the arm 7.5 cms above the tip of the elbow.

5. Abrasions in the area of 0.5 cm X 0.5 cm. On the left forearm outside portion 6 cms. Below the tip of the elbow.

6. Abrasion in the area of 1 cm XC 0.5 cm on the backside of the left forearm 6.5 cms. above the ankle on the radial side.

7. On the backside of index finger and left thumb blackening and tatooing was available in the area of 13 cms X 7.5. cms 3 cms from the ankle.

On internal examination I found that upper membrances of the brain had burst and the brain was in liquid in connection. From here I found 5 Tiklis and 20 small pellets and having taken them out, it had been sent to S.P. Sitapur in sealed condition. About 6 ozs semi-digested food material has been found in his abdomen. Excrement had been filled here and there in the small intestine. Excrement in the upper portiion of the large intestine had been filed and Readini was lying empty."

6. Injury No. 1 is the wound of entry with charring and blackening and injury no. 2 of the exit of injury no. 1. Injury Nos. 3-7 appear to be by an independent shot as they are placed far apart from injury no. 1 which is from point blank range. It is also clear from the evidence that 12 small pellets and 5 wads were found embedded in the head of the deceased. Further in his cross examination, the Doctor has stated that even injury Nos. 3,4,5 and 6 could be caused with a fire arm. If that be so, the spread of the injuries would clearly reveal that not one but two shots had hit Deep Singh as he lay on the bed. The statement of the doctor also reveals the presence of two gun shot injuries on the person of Chhoti and after a radiological examination radio opaque shadows were seen on her person confirming the prosecution story that these too had been caused by a shot gun.

7. The fact that the incident happened on the roof of the baithak is also borne out from the statement of the Investigating Officer, P.W. 8, Kesha Prasad Rai. He deposed that on reaching the place of incident he had picked up an empty cartridge, various weapons and other items already referred to above from near the dead body on the roof itself. As a matter of fact the defence has not challenged the fact that incident had happened in the house but it has been argued that the injuries had been sustained by Chhoti in the house though not on the roof. We find no basis for this suggestion which needs to be rejected straightaway.

8. We are also of the opinion that statement of P.W. 5 Vikram Singh, the scribe of the FIR, also merits acceptance. Undoubtedly he had not been injured but it has come in evidence that he had been sleeping on the ground floor of his house a very short distance away.

9. Mr. Vishwanathan has, however, dwelt very extensively on the lack of motive and on the contrary the motive for false implication. He has pointed out that there was no categoric evidence to show (apart from the mere ipse dixit of the Pws') that the relations between the parties prior to the incident were strained and on the contrary it appears that some quarrel between the groups had taken place and as the deceased belonged to the opposite group it had been thought proper to sort him out once and for all and Chhoti had been used as a willing tool. It has been pointed out that the High Court itself had not believed the story of the mango groves and had per force fallen back on the documents Ex. Ka, 5 to K. 7 to show motive but as these documents had been produced in the court for the first time during trial, their veracity was clearly in doubt. It is true that the High Court has given a finding showing an absence of motive. The fact, however, remains that de hors these documents the other evidence reveals the extent of animosity between the parties with murders and counter murders and litigations going back to the 1960s. It has also come in evidence that Kallu Singh, the first husband of Chhoti had been murdered and one of the P.W. was Vikram Singh who also testified that on account of various issues there was much animosity between the parties. We are further of the opinion that in a case of direct evidence, any uncertainty as to the motive could not be said to be fatal to the prosecution story.

10. Mr. Vishwanathan has also submitted that as the High Court had itself opined on the possibility of false implication of several persons who had not caused any injuries, the same yard stick should apply to the appellant as well as the evidence against him was much to the same effect.

11. It is true that some of the observations made by the High Court do appear to suggest that the prosecution story was not categoric and could have been concocted. We are of the opinion that these observations are way beyond the record and merely because some of the accused who had not caused any injuries to the deceased or the witnesses would not mean that they were not present and it is only as a matter of abundant caution that the benefit has been given to those accused. Further, it cannot be ignored that an attack made at dead night in a residential house, where several inmates are present and a possibility of a swift counter attack by the inmates cannot be ruled out, the entire incident had to be well arranged and organised and could not be made by one or two persons. It has come in the evidence that Chhoti's house was being used by three of her grown up sons as well. In any case, the High Court has, by way of abundant caution, given the benefit of doubt to those who had not caused any injury and on the same yard stick, the appellant who is stated to have caused a gun shot wound to the deceased and to Chhoti P.W., cannot be treated in the same manner.

12. We, accordingly, dismiss the appeal.

R.P. Appeal dismissed.

PTC INDIA LTD.
v.
CENTRAL ELECTRICITY REGULATORY COMMISSION
THROUGH SECRETARY
(Civil Appeal No. 3902 of 2006 etc.)

MARCH 15, 2010

[K.G. BALAKRISHNAN, CJI., S.H. KAPADIA, R.V. RAVEENDRAN, B. SUDERSHAN REDDY AND P. SATHASIVAM, JJ.]

Electricity Act, 2003: ss. 111, 178, 121 and 79(1) – Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power u/s. 178 – Vires of the Regulation challenged before Appellate Tribunal – Jurisdiction of Appellate Tribunal u/s. 111 to examine the validity of the Regulations – Power of judicial review u/s. 121 on the Appellate Tribunal – Power of CERC to cap the trading margins by making Regulations – Held: A regulation u/s. 178 is made under the authority of delegated legislation and its validity can be tested only in judicial review and not by way of appeal before the Appellate Tribunal u/s. 111 – Section 121 does not confer power of judicial review of the validity of the Regulations made u/s. 178, on the Appellate Tribunal – Applying the principle of "generality versus enumeration", CERC empowered to cap the trading margin under the authority of delegated legislation u/s. 178 – Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

Administrative law:

Rules and Regulations vis-à-vis Law enacted by legislative – Nature of – Similarity between.

Quasi judicial orders and judicial decisions – Similarity between.

Order and 'Regulation' – Distinction between.

Legislation:

Substitution of a statutory provision – Effect of – Held: Substitution of a provision is a combination of repeal and fresh enactment.

Appellants challenged the *vires* of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 as null and void before the Appellate Tribunal for Electricity and had prayed for quashing of the said Regulations. The Tribunal dismissed the appeals holding that its jurisdiction was restricted by the limits imposed by the parent Statute, i.e., the Electricity Act, 2003. The Tribunal held that the appropriate course of action for the appellants was to proceed by way of judicial review under the Constitution of India. Hence the present appeals.

The questions for consideration before the Court were: (i) Whether the Appellate Tribunal constituted under the 2003 Act has jurisdiction u/s. 111 of the Act, to examine the validity of the 2006 Regulations (ii) Whether capping of trading margins could be done by the Central Electricity Regulatory Commission (CERC) by making a Regulation in that regard u/s. 178 of 2003 Act and (iii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity u/s. 121 of the 2003 Act.

Dismissing the appeals, the Court

HELD: 1.1. A regulation u/s. 178 is made under the authority of delegated legislation and consequently its

validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of Electricity Act, 2003. [Para 59] [684-H; 685-A]

1.2. The decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law. [Para 37] [664-H; 655-A-C]

Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors. **(1990) 3 SCC 223, referred to.**

1.3. Price fixation exercise is actually legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation u/s. 62 made appealable u/s. 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the appropriate Commission u/s. 62, whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to subject-matter "trading margin" in a different statutory context. [Para 38] [665-D-F]

1.4. Section 79 delineates the functions of CERC broadly into two categories – mandatory functions and advisory functions. Tariff regulation, licensing (including

inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, CERC is the decision-making authority. Such decision-making u/s. 79 (1) is not dependant upon making of regulations u/s. 178 by CERC. Therefore, functions of CERC enumerated in Section 79 are separate and distinct from function of CERC u/s. 178. The former is administrative/ adjudicatory function whereas the latter is legislative. [Para 39] [666-H; 667-A-C]

M/s. Narinder Chand Hem Raj and Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors. **(1971) 2 SCC 747;** *Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors.* **(1985) 1 SCC 641, relied on.**

1.5. On reading Sections 76(1) and 79(1) one finds that CERC is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which CERC is empowered to take, have got to be in conformity with the regulations u/s. 178, wherever such regulations are applicable. Measures u/s. 79(1), therefore, have got to be in conformity with the regulations u/s. 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation u/s. 178 is not a pre-condition to the Central Commission taking any

steps/measures u/s. 79(1). If there is a regulation, then the measure u/s. 79(1) has to be in conformity with such regulation u/s. 178. The dichotomy between the power to make a regulation u/s. 178 on one hand and the various enumerated areas in Section 79(1) in which CERC is mandated to take such measures as it deems to fulfil the objects of 2003 Act. [Para 40] [667-F-H; 668-A-C]

1.6. In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the CERC, in specified areas, to be discharged by orders (decisions). [Para 59] [684-E-F]

1.7. In the instant case, instead of fixing a trading margin (including capping) on a case to case basis, CERC thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under 2003 Act. Making of a regulation u/s. 178 became necessary because a regulation made u/s. 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation u/s. 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations u/s. 178 and which could not have been done across the board by an order of the CERC u/s. 79(1)(j). [Para 40] [669-B-E]

National Hydro-electric Power Corporation Ltd. v. CIT **2010 (1) SCALE 5;** *M/s Southern Technologies Ltd. v. Joint Commissioner of Income Tax, Coimbatore* **2010 (1) SCALE 329, relied on.**

1.8. Applying the test of "general application", a

regulation stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an order has to be in conformity with the regulations. However, that would not mean that a regulation is a pre-condition to the order (decision). Therefore, it cannot be said that under the 2003 Act, power to make regulations u/s. 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in s. 178(2). Apart from Section 178(1) which deals with "generality" even u/s. 178(2)(ze), CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of the 2003 Act. Trading is an activity recognized under the 2003 Act. While deciding the nature of an order (decision) *vis-à-vis* a regulation under the Act, one needs to apply the test of general application. [Para 43] [672-E-H]

U.P. State Electricity Board, Lucknow v. City Board, Mussoorie **(1985) 2 SCC 16;** *M/s Jagdamba Paper Industries (Pvt.) Ltd. and Ors. v. Haryana State Electricity Board and Ors.* **AIR 1983 SC 1296;** *Kerala State Electricity Board v. S.N. Govinda Prabhu and Bros. and Ors.* **(1986) 4 SCC 198, relied on.**

Hindustan Zinc Ltd. etc. v. Andhra Pradesh State Electricity Board and Ors. **(1991) 3 SCC 299;** *Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors.* **(1985) 1 SCC 641;** *City Board, Mussoorie v. State Electricity Board and Ors.* **AIR (58) 1971 Allahabad 219, referred to.**

1.9. On the making of the impugned Regulations 2006, even the existing Power Purchase Agreements ("PPA") had to be modified and aligned with the said Regulations. The impugned Regulation makes an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC u/s. 178 of the

2003 Act. All contracts coming into existence after making of the impugned Regulations 2006 have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations u/s. 178 and not by passing an Order u/s. 79(1)(j) of the 2003 Act. Therefore, it becomes clear that the word "*order*" in Section 111 of the 2003 Act cannot include the impugned Regulations 2006 made u/s. 178 of the 2003 Act. [Para 43] [672-H; 673-A-D]

1.10. If a dispute arises in adjudication on interpretation of a regulation made u/s. 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178. [Para 59] [685-E]

2.1. On the question of "generality versus enumeration" principle, the enumerated factors/topics in a provision do not mean that the authority cannot take any other matter into consideration which may be relevant. The words in the enumerated provision are not a fetter; they are not words of limitation, but they are words for general guidance. [Para 49] [677-C-F]

Hindustan Zinc Ltd. etc. v. Andhra Pradesh State Electricity Board and Ors. **(1991) 3 SCC 299;** *Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors.* **(1990) 3 SCC 223, relied on.**

2.2. Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item u/s. 178(1) r/w Section 178(2)(ze). The CERC was empowered to cap the trading margin under the authority

of delegated legislation u/s. 178 vide the impugned Notification dated 23.1.2006. [Para 59] [685-F-G]

3.1. Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In the 2003 Act, the power of judicial review of the validity of the Regulations made u/s. 178 is not conferred on the Appellate Tribunal for Electricity. [Para 59] [685-B-D]

M/s Raman and Raman Ltd. v. State of Madras and Ors. **AIR 1959 SC 694, relied on.**

3.2. It is not correct to say that s. 121 has not yet been brought into force. At the outset, the material brought on record indicates that Section 121 of the original Electricity Act, 2003, was never brought into force because some MPs expressed the concern that the power, under that Section, conferred upon the Chairperson of the Appellate Tribunal, could lead to excessive centralization of power and interference with the day-to-day activities of the Commission by the Chairperson of the Tribunal. Therefore, Section 121 was amended by Electricity (Amendment) Act, 2003 (No.57 of 2003) and which amendment Act came into force from 27.1.2004. By necessary implication of the coming into force of the Electricity (Amendment) Act, 2003 (No.57 of 2003) all provisions amended by it also came into force, hence there is no requirement for a further Notification u/s. 1(3), particularly when Section 121 in its amended form has come into force w.e.f. 27.1.2004. Section 121 of the original Act stood substituted by Amendment Act No. 57 of 2003. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. Substitution is a combination of repeal and fresh enactment. [Para 58] [683-D-G]

'Principles of Statutory Interpretation' by G.P. Singh **11th Edn., p. 638, referred to.**

Case Law Reference:

(1990) 3 SCC 223	**Referred to.**	**Para 37**
	Relied on	**Para 49**
(1971) 2 SCC 747	**Relied on.**	**Para 38**
(1985) 1 SCC 641	**Relied on.**	**Para 38**
	Referred to.	**Para 48**
2010 (1) SCALE 5	**Relied on**	**Para 41**
2010 (1) SCALE 329	**Relied on.**	**Para 42**
AIR (58) 1971 Allahabad 219	**Referred to**	**Para 45**
(1985) 2 SCC 16	**Relied on.**	**Para 45**
AIR 1983 SC 1296	**Relied on.**	**Para 46**
(1986) 4 SCC 198	**Relied on.**	**Para 47,**
(1991) 3 SCC 299	**Referred to**	**Para 48**
	Relied on.	**Para 49**
(1990) 3 SCC 223	**Relied on.**	**Para 49**
AIR 1959 SC 694	**Relied on.**	**Para 53**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3902 of 2006.

From the Judgment & Order dated 28.4.2006 of the Appellate Tribunal for Electricity, New Delhi, in Appeal No. 45 of 2006.

WITH

C.A. Nos. 147, 2073, 2166, 2875 of 2007 4354, 4355 of 2006, 7437, 7438 of 2005.

C.A. Nos. 2412, 2413 of 2010.

Gopal Subramanium, Sol. Genl. of India, Vikas Singh, Harish N. Salve, P.S. Narasimha, Shanti Bhushan, K.V. Viswanathan, Bhaskar Gupta, Dr. Manish Singhvi, AAG, Amit Kapur, Mansoor Ali Shoket, Apoorva Misra, Amrita Narayana, Shiva Lakshmi Singh, Udita Singh, Aribam Guneshwar Sharma, Shrivenkastesh, Meenakshi Grover, K.D. Dayal, Harsh Shahu, Chetna N. Rai, Harsh Sahu (for Vibha Datta Makhija), Shreshta Sharma, Anupam Varma (for Vibha Datta Makhija), Pradeep Misra (NP), R. Chandrachud (for K.R. Sasiprabu) M.G. Ramachandran, K.V. Mohan, K.V. Balakrishnan, Anand K. Ganesan, Swapna Sheshadri, Ashiesh Kumar, Nikhil Nayyar, T.V.S. Raghavendra Sreyas, Ambuj Agrawal, Sanjeev K. Kapoor, Vishal Gupta, Kumar Mihir (for Khaitan & Co.), Devenahsu Kr. Devesh (for D.K. Sinha), Amit Kumar, R. Nedumaran, Suresh Chandra Tripathy, Shibashish Mishra (NP), A.S. Bhasme (NP) Sharmila Upadhyay (NP), Ruchi Gaur Narula, Deepika Goel (NP) (for Rakesh K. Sharma), Pratik Dhar, C.K. Rai, Sridhar Potaraju, G. Umapathy, Vibhu Tiwari (for Rakesh K. Sharma), C.K. Rai (for Malini Poduval) for the appearing parties.

The Judgment of the Court was delivered by

S.H. KAPADIA, J. 1. Delay condoned.

2. Leave granted.

3. In this batch of civil appeals, we are basically concerned with the doctrine and jurisprudence of delegated legislation.

QUESTIONS OF LAW:

4. The crucial points that arise for determination are: –

(i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 ("2003 Act") has jurisdiction under Section 111 to examine the validity of Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act?

(ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

(iii) Whether capping of trading margins could be done by the CERC ("Central Commission") by making a Regulation in that regard under Section 178 of the 2003 Act?

FACTS:

5. In this batch of civil appeals, appellants had challenged the vires of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 as null and void before the Appellate Tribunal for Electricity and had prayed for quashing of the said Regulations. The Tribunal, however, dismissed the appeals holding that its jurisdiction was restricted by the limits imposed by the parent Statute, i.e., the Electricity Act, 2003. By the impugned judgment, the Tribunal held that the appropriate course of action for the appellants is to proceed by way of judicial review under the Constitution.

6. In view of the importance of the question, the matter was referred by a three-Judge Bench of this Court to the Constitution Bench. While making reference to the Constitution Bench, the question formulated was - "whether the Tribunal has jurisdiction to decide the question as to the validity of the Regulations framed by the Central Commission?" Basically, the matters involve interpretation of Sections 111 and 121 of the 2003 Act.

7. *RELEVANT PROVISIONS OF THE 2003 ACT:*

PART I

PRELIMINARY

Section 1. Short title, extent and commencement.-

(3) It shall come into force on such date as the Central Government may, by notification, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Section 2 – Definitions.- In this Act, unless the context otherwise requires,—

(9) "Central Commission" means the Central Electricity Regulatory Commission referred to in sub-section (1) of section76;

(23) "electricity" means electrical energy-

(a) generated, transmitted, supplied or traded for any purpose; or

(b) used for any purpose except the transmission of a message;

(26) "electricity trader" means a person who has been granted a licence to undertake trading in electricity under section 12;

(32) "grid" means the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants;

(33) "Grid Code" means the Grid Code specified by the

Central Commission under clause (h) of sub-section (1) of section 79;

(34) "Grid Standards" means the Grid Standards specified under clause (d) of section 73 by the Authority;

(39) "licensee" means a person who has been granted a licence under section 14;

(44) "National Electricity Plan" means the National Electricity Plan notified under sub-section (4) of section 3;

(45) "National Load Despatch Centre" means the Centre established under sub-section (1) of section 26;

(46) "notification" means notification published in the Official Gazette and the expression "notify" shall be construed accordingly;

(47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;

(52) "prescribed" means prescribed by rules made by the Appropriate Government under this Act;

(57) "regulations" means regulations made under this Act;

(59) "rules" means rules made under this Act;

(62) "specified" means specified by regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act;

(64) "State Commission" means the State Electricity Regulatory Commission constituted under sub-section (1) of section 82 and includes a Joint Commission constituted

under sub-section (1) of section 83;

(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;

(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;

PART II

NATIONAL ELECTRICITY POLICY AND PLAN

Section 3 - National Electricity Policy and Plan

(1) The Central Government shall, from time-to-time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

(4) The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:

Provided that the Authority while preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite suggestions and objections thereon from licensees, generating companies and the public within such time as may be prescribed:

Provided further that the Authority shall—

(a) notify the plan after obtaining the approval of the Central Government;

(b) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (a).

PART III

GENERATION OF ELECTRICITY

Section 7 - Generating company and requirement for setting up of generating station.- Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.

Section 9 - Captive generation.- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the

destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

Section 11 - Directions to generating companies.- (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation:—For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

PART IV
LICENSING

Section 12 - Authorised persons to transmit, supply, etc., electricity- No person shall—

(a) transmit electricity; or

(b) distribute electricity; or

(c) undertake trading in electricity,

unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.

Section 14 - Grant of licence.-

The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person—

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

Section 15 - Procedure for grant of licence.-

(1) Every application under section 14 shall be made in such form and in such manner as may be specified by the Appropriate Commission and shall be accompanied by such fee as may be prescribed.

(6) Where a person makes an application under sub-section (1) of section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application,—

(a) issue a licence subject to the provisions of this Act and the rules and regulations made thereunder; or

(b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that no application shall be rejected unless the

applicant has been given an opportunity of being heard.

Section 16 - Conditions of licence.-

The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.

PART V

TRANSMISSION OF ELECTRICITY

Section 26 - National Load Despatch Centre

(1) The Central Government may establish a Centre at the national level, to be known as the National Load Despatch Centre for optimum scheduling and despatch of electricity among the Regional Load Despatch Centres.

(2) The constitution and functions of the National Load Despatch Centre shall be such as may be prescribed by the Central Government:

Provided that the National Load Despatch Centre shall not engage in the business of trading in electricity

Section 34 - Grid Standards.-

Every transmission licensee shall comply with such technical standards, of operation and maintenance of transmission lines, in accordance with the Grid Standards, as may be specified by the Authority.

Section 37 - Directions by Appropriate Government.-

The Appropriate Government may issue directions to the Regional Load Despatch Centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State

Section 38 - Central Transmission Utility and functions.-

(1) The Central Government may notify any Government company as the Central Transmission Utility:

Provided that the Central Transmission Utility shall not engage in the business of generating of electricity or trading in electricity:

Provided further that the Central Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity of such Central Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as a transmission licensee, through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the Central Transmission Utility shall be—

(a) to undertake transmission of electricity through inter-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to inter-State transmission system with—

(i) State Transmission Utilities;

(ii) Central Government;

(iii) State Governments;

(iv) generating companies;

(v) Regional Power Committees;

(vi) Authority;

(vii) licensees;

(viii) any other person notified by the Central Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by—

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Central Commission:

Provided also that the manner of payment and utilization of the surcharge shall be specified by the Central

Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

PART VI
DISTRIBUTION OF ELECTRICITY

Section 42 - Duties of distribution licensees and open access.-

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

Section 52 - Provisions with respect to electricity trader.-

(1) Without prejudice to the provisions contained in clause (c) of section 12, the Appropriate Commission may, specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader.

(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

PART VII
TARIFF

Section 61 - Tariff regulations.-

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition,

efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commissions Act, 1998, and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

Section 62 - Determination of tariff

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for—

(a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity

in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from

the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63 - Determination of tariff by bidding process.-

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 64 - Procedure for tariff order.-

(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,—

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the

provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

PART IX
CENTRAL ELECTRICITY AUTHORITY

Section 73 - Functions and duties of Authority.-

The Authority shall perform such functions and duties as the Central Government may prescribe or direct, and in particular to—

(a) advise the Central Government on the matters relating to the national electricity policy, formulate short-term and perspective plans for development of the electricity system and co-ordinate the activities of the planning agencies for

the optimal utilisation of resources to subserve the interests of the national economy and to provide reliable and affordable electricity for all consumers;

(b) specify the technical standards for construction of electrical plants, electric lines and connectivity to the grid;

(c) specify the safety requirements for construction, operation and maintenance of electrical plants and electric lines;

(d) specify the Grid Standards for operation and maintenance of transmission lines;

(e) specify the conditions for installation of meters for transmission and supply of electricity;

(f) promote and assist in the timely completion of schemes and projects for improving and augmenting the electricity system;

(g) promote measures for advancing the skill of persons engaged in the electricity industry;

(h) advise the Central Government on any matter on which its advice is sought or make recommendation to that Government on any matter if, in the opinion of the Authority, the recommendation would help in improving the generation, transmission, trading, distribution and utilisation of electricity;

(i) collect and record the data concerning the generation, transmission, trading, distribution and utilisation of electricity and carry out studies relating to cost, efficiency, competitiveness and such like matters;

(j) make public from time-to-time the information secured under this Act, and provide for the publication of reports and investigations;

(k) promote research in matters affecting the generation, transmission, distribution and trading of electricity;

(l) carry out, or cause to be carried out, any investigation for the purposes of generating or transmitting or distributing electricity;

(m) advise any State Government, licensees or the generating companies on such matters which shall enable them to operate and maintain the electricity system under their ownership or control in an improved manner and where necessary, in co-ordination with any other Government, licensee or the generating company owning or having the control of another electricity system;

(n) advise the Appropriate Government and the Appropriate Commission on all technical matters relating to generation, transmission and distribution of electricity; and

(o) discharge such other functions as may be provided under this Act.

Section 74 - Power to require statistics and returns.-

It shall be the duty of every licensee, generating company or person generating electricity for its or his own use to furnish to the Authority such statistics, returns or other information relating to generation, transmission, distribution, trading and use of electricity as it may require and at such times and in such form and manner as may be specified by the Authority.

Section 75 - Directions by Central Government to Authority.-

(1) In the discharge of its functions, the Authority shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it

in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.

PART X
REGULATORY COMMISSIONS

Section 76 – Constitution of Central Commission.-

(1) There shall be a Commission to be known as the Central Electricity Regulatory Commission to exercise the powers conferred on, and discharge the functions assigned to, it under this Act.

Section 79 - Functions of Central Commission.-

(1) The Central Commission shall discharge the following functions, namely:—

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating

companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purpose of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:—

(i) formulation of National Electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

Section 86 - Functions of State Commission.-

(1) The State Commission shall discharge the following

functions, namely:—

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(k) discharge such other functions as may be assigned to it under this Act.

(2) The State Commission shall advise the State Government on all or any of the following matters, namely:—

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganisation and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government:

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

PART XI
APPELLATE TRIBUNAL FOR ELECTRICITY

Section 111 – Appeal to Appellate Tribunal.-

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate

Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

PART XVIII
MISCELLANEOUS

Section 177 - Powers of Authority to make regulations.-

(1) The Authority may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power conferred in sub-section (1), such regulations may provide for all or any of the following matters, namely:—

(a) the Grid Standards under section 34;

(b) suitable measures relating to safety and electric supply under section 53;

(c) the installation and operation of meters under section 55;

(d) the rules of procedure for transaction of business under sub-section (9) of section 70;

(e) the technical standards for construction of electrical plants and electric lines and connectivity to the grid under clause (b) of section 73;

(f) the form and manner in which and the time at which the State Government and licensees shall furnish statistics, returns or other information under section 74;

(g) any other matter which is to be, or may be, specified;

(3) All regulations made by the Authority under this Act shall be subject to the conditions of previous publication.

Section 178 - Powers of Central Commission to make regulations.-

(1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of following matters, namely:-

(a) period to be specified under the first proviso to section 14;

(b) the form and the manner of the application under sub-section (1) of section 15;

(c) the manner and particulars of notice under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;

(f) publication of alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;

(g) Grid Code under sub-section (2) of section 28;

(h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;

(i) rates, charges and terms and conditions in respect of intervening transmission facilities under proviso to section 36;

(j) payment of transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(k) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(l) payment of transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;

(m) reduction of surcharge and cross subsidies under the second proviso to sub-clause (ii) of clause (c) of section 40;

(n) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(o) duties of electricity trader under sub-section (2) of section 52;

(p) standards of performance of a licensee or class of

licensees under sub-section (1) of section 57;

(q) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(r) the manner for reduction of cross-subsidies under clause (g) of section 61;

(s) the terms and conditions for the determination of tariff under section 61;

(t) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(u) the procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(v) the manner of making an application before the Central Commission and the fee payable therefor under sub-section (1) of section 64;

(w) the manner of publication of application under sub-section (2) of section 64;

(x) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(y) the manner by which development of market in power including trading specified under section 66;

(z) the powers and duties of the Secretary of the Central Commission under sub-section (1) of section 91;

(za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;

(zb) the rules of procedure for transaction of business under sub-section (1) of section 92;

(zc) minimum information to be maintained by a licensee

or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zd) the manner of service and publication of notice under section 130;

(ze) any other matter which is to be, or may be specified by regulations.

(3) All regulations made by the Central Commission under this Act shall be subject to the conditions of previous publication.

Section 179 - Rules and regulations to be laid before Parliament.-

Every rule made by the Central Government, every regulation made by the Authority, and every regulation made by the Central Commission shall be laid, as soon as may be after it is made, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Section 181 - Powers of State Commissions to make regulations.-

(1) The State Commissions may, by notification, make regulations consistent with this Act and the rules generally

to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely:—

(a) period to be specified under the first proviso to section 14;

(b) the form and the manner of application under sub-section (1) of section 15;

(c) the manner and particulars of application for license to be published under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

(e) the manner and particulars of notice under clause (a) of sub-section (2) of section 18;

(f) publication of the alterations or amendments to be made in the licence under clause (c) of sub-section (2) of section 18;

(g) levy and collection of fees and charges from generating companies or licensees under sub-section (3) of section 32;

(h) rates, charges and the term and conditions in respect of intervening transmission facilities under proviso to section 36;

(i) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(j) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(k) manner and utilization of payment and surcharge under the fourth proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 39;

(l) payment of the transmission charges and a surcharge under sub-clause (ii) of clause (c) of section 40;

(m) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (c) of section 40;

(n) the manner of payment of surcharge under the fourth proviso to sub-clause (ii) of clause (c) of section 40;

(o) proportion of revenues from other business to be utilised for reducing the transmission and wheeling charges under proviso to section 41;

(p) reduction of surcharge and cross subsidies under the third proviso to sub-section (2) of section 42;

(q) payment of additional charges on charges of wheeling under sub-section (4) of section 42;

(r) guidelines under sub-section (5) of section 42;

(s) the time and manner for settlement of grievances under sub-section (7) of section 42;

(t) the period to be specified by the State Commission for the purposes specified under sub-section (1) of section 43;

(u) methods and principles by which charges for electricity shall be fixed under sub-section (2) of section 45;

(v) reasonable security payable to the distribution licensee under sub-section (1) of section 47;

(w) payment of interest on security under sub-section (4) of section 47;

(x) electricity supply code under section 50;

(y) the proportion of revenues from other business to be utilised for reducing wheeling charges under proviso to section 51;

(z) duties of electricity trader under sub-section (2) of section 52;

(za) standards of performance of a licensee or a class of licensees under sub-section (1) of section 57;

(zb) the period within which information to be furnished by the licensee under sub-section (1) of section 59;

(zc) the manner of reduction of cross-subsidies under clause (g) of section 61;

(zd) the terms and conditions for determination of tariff under section 61;

(ze) details to be furnished by licensee or generating company under sub-section (2) of section 62;

(zf) the methodologies and procedures for calculating the expected revenue from tariff and charges under sub-section (5) of section 62;

(zg) the manner of making an application before the State Commission and the fee payable therefor under sub-section (1) of section 64;

(zh) issue of tariff order with modifications or conditions under sub-section (3) of section 64;

(zi) the manner by which development of market in power including trading specified under section 66;

(zj) the powers and duties of the Secretary of the State Commission under sub-section (1) of section 91;

(zk) the terms and conditions of service of the secretary, officers and other employees of the State Commission under sub-section (2) of section 91;

(zl) rules of procedure for transaction of business under sub-section (1) of section 92;

(zm) minimum information to be maintained by a licensee or the generating company and the manner of such information to be maintained under sub-section (8) of section 128;

(zn) the manner of service and publication of notice under section 130;

(zo) the form of and preferring the appeal and the manner in which such form shall be verified and the fee for preferring the appeal under sub-section (1) of section 127;

(zp) any other matter which is to be, or may be, specified.

(3) All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.

Section 182 - Rules and regulations to be laid before State Legislature.-

Every rule made by the State Government and every regulation made by the State Commission shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

Section 183 - Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published, make such provisions not inconsistent with the

provisions of this Act, as may appear to be necessary for removing the difficulty:

Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

8. We also quote hereinbelow the impugned Notification dated 23.1.2006 fixing trading margin for inter-State trading of Electricity, which reads as follows:

"CENTRAL ELECTRICITY REGULATORY COMMISSION
NOTIFICATION
New Delhi, the 23rd January, 2006

No. L-7/25(5)/2003-CERC.- Whereas the Central Electricity Regulatory Commission is of the opinion that it is necessary to fix trading margin for inter-state trading of electricity.

Now, therefore, in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after pervious publication, the Central Electricity Regulatory Commission hereby makes the following regulations, namely:-

1. Short title and commencement.-(1) These regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.

(2) These regulations shall come into force from the date of their publication in the Official Gazette.

2.Trading Margin.- The licensee shall not charge the trading margin exceeding four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access and transmission losses.

Explanation:- The charges for the open access include the transmission charge, operating charge and the application fee.

A.K. SACHAN, Secy."

SCOPE AND ANALYSIS OF THE 2003 ACT

9. The 2003 Act is enacted as an exhaustive Code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 ("1998 Act"), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.

10. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare National Electricity Policy as well as Tariff Policy for development of the power system based on optimum utilization of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as regulation-making power

under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the Tariff Policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) after the 2003 Act (see also Section 66). In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified the Tariff Policy with effect from 6.1.2006. One of the primary objectives of the Tariff Policy is to ensure availability of electricity to consumers at reasonable and competitive rates. The Tariff Policy tries to balance the interests of consumers and the need for investments while prescribing the rate of return. It also tries to promote training in electricity for making the markets competitive. Under the Tariff Policy, there is a mandate given to the Regulatory Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The Tariff Policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments.

11. An "electricity trader" is defined under Section 2(26) to mean a person who has been given a licence to undertake trading in electricity under Section 12. Section 2(32) defines a "grid" as the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants. Under Section 2(33), a "Grid Code" is defined as a code specified by the Central Commission under Section 79(1)(h), while under Section 2(34), "Grid Standards" are those specified by the Central Authority under Section 73(d). Under Section 2(47), "open access" is defined to mean the non-discriminatory provision for access to the transmission lines or distribution

system or associated facilities given to any licensee or consumer or a person engaged in generation of electricity in accordance with the regulations specified. Section 2(62) defines the term "specified" to mean specified by regulations made by the Appropriate Commission or the Authority under the 2003 Act. Under Section 2(71), the word "trading" is defined to mean purchase of electricity for resale thereof.

12. Under the 2003 Act, power generation has been de-licensed and captive generation is freely permitted, subject to approval as indicated in Sections 7, 8 and 9 of the Act. However, under Section 12, a licence has been provided as a pre-condition for engaging in transmission or distribution or trading of electricity. Therefore, licensees are granted by the Appropriate Commission under Section 14 of the Act on applications made under Section 15. Section 16 provides power to the Appropriate Commission to specify any general or specific conditions which shall apply either to a licensee or to a class of licensees. Under Section 18, the Appropriate Commission is also vested with the power to amend the licence as well as to revoke it in certain stipulated circumstances, if public interest so requires (see Section 19). Under Section 23, the Appropriate Commission has the power to issue directions to licensees to regulate supply, distribution, consumption or use of electricity, if the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply and for securing the equitable distribution of electricity and promoting competition.

13. One of the most important features of the 2003 Act is the introduction of open access under Section 42 of the Act. Under the open access regime, distribution companies and eligible consumers have the freedom to buy electricity directly from generating companies or trading licensees of their choice and correspondingly the generating companies have the freedom to sell.

14. Section 52 of the 2003 Act deals with trading of

electricity activity. Under Section 52(1), the Appropriate Commission may specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader. Under Section 52(2), every trader is required to discharge its duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

15. The standards of performance of licensee(s) may be specified by the Appropriate Commission under Section 57 of the Act.

16. The 2003 Act contains separate provisions for the performance of the dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

17. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in

character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination.

18. Section 66 confers substantial powers on the Appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests.

19. Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the Appropriate Commission for the performance of statutory functions under the 2003 Act.

20. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Section 179 and 182. The Parliament has the power to modify the rules/ regulations. This power is not conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act.

SUBMISSIONS:

On behalf of M/s Tata Power Trading Co. Ltd.:

21. On the scheme of the 2003 Act it was submitted by Shri Harish N. Salve, learned senior counsel, that, under the said Act the Central Commission and SERCs have to frame regulations as well as pass statutory orders. The Act uses the expression "fixed" in Sections 8, 19, 45 & 79; it uses the expression "determined" in the proviso to Section 9(2), Sections 20, 42, 47, 57, 61 and 67(2) and the word "specified" (i.e. by way of regulations) in Sections 13, 14, 15, 16, 17, 18(2), 28(4), 34, 36, 38, 41, 42, 45, 51, 52, 53, 57, 61 and 67(2) of the 2003 Act. Under the 2003 Act, according to the learned counsel, there are a series of provisions which expressly require the Commission to frame regulations on specific aspects. According to learned counsel, each of the said three expressions have to be interpreted by the terms and in the context of the scheme of the 2003 Act and not by a priori notions of administrative law. For example, Section 61 posits the framing of regulations by the Commission, which will subject to the provisions of the 2003 Act, specify the terms and conditions for the determination of tariff. It is possible that such regulations may be licensee-specific or generic. At the same time, under Section 62 read with Section 64 refers to determination of tariff in accordance with the provisions of the Act for supply of electricity by Gencoms, transmission of electricity, wheeling and trading of electricity. Applying the Cynamide principle [1987(2)SCC720] of administrative law, such tariff Order would be characterized as delegated legislation yet under Section 111 of the 2003 Act it is made appealable to the Appellate Tribunal. According to the learned counsel, "price fixation" is ordinarily "legislative" and not "adjudicatory" in character and yet under the 2003 Act tariff fixation is by Order and subject to appeal under Section 111. According to the learned counsel, use of different expressions in the Act implies different meanings. For example, in Section

79 the expressions used are "regulate", "determine", "adjudicate", "specify" and "fix". Where the function of the Commission under Sections 79 and 86 require framing of regulations, the Act has used the expression "specified" as defined. Therefore, according to the learned counsel, the word "fix" in Section 79(1)(j) must mean to pass an appropriate order fixing trading margin which is further qualified by the Act saying "if considered necessary". In this connection, learned counsel further submitted that fixing trading margin is same as price fixation and as such margin must be fixed by an Order and not by way of regulation. Hence, according to the learned counsel, regulations cannot be framed under Section 79(1)(j) and under Section 86(1)(j) of the 2003 Act.

22. On the interpretation of Sections 178(1) and 181(1) of the 2003 Act, learned counsel submitted that where rule making powers are enumerated and there is a general delegation of power to make rules to carry out the provisions of the 2003 Act, the enumeration does not detract from the generality of the power conferred is the principle which has to be read in the context of the scheme of the 2003 Act. In this connection it was submitted that under the Act the power to frame subordinate legislation to carry out the provisions of the Act are contained in Sections 176 and 180 on Central and State Governments; in Sections 178 and 181 where power to frame regulations is conferred on Regulatory Commissions and Section 177 where the power to frame regulations is conferred on CEA. Hence, when the Central Government invokes the rule making power under Section 176(1), it cannot make rules to determine tariff since that can be done only by the appropriate Commission by virtue of Section 61 read with Section 178(2)(s). A perusal of the scheme of the 2003 Act suggests that each and every provision of the Act where framing of regulations is contemplated has a counter-part in one of the clauses as set out in Section 178(2). In any event, according to the learned counsel, where the Act requires the discharge of a function by a specific order, then a regulation cannot be framed to achieve

that very purpose merely because there is a power to frame regulations. Therefore, according to the learned counsel, trading margin can be fixed only by an order under Section 79(1)(j) and 86(1)(j) and not by regulations.

23. On the powers of the Appellate Tribunal under Sections 111 and 121 of the 2003 Act, learned counsel urged, that, the said Tribunal was established as an expert second tier regulatory authority to review the actions of the Regulatory Commissions, including regulations framed by first tier regulatory bodies even in the absence of Section 121 of the 2003 Act. In this connection, learned counsel further submitted that the powers envisaged under Section 121 are distinct from the appellate and revisional powers under Section 111(3) and under Section 111(6). A plain reading of Section 121 establishes that the Tribunal has the power to issue orders, instructions and directions to guide the Commission in the due performance of its statutory function; that the said power to issue instructions, orders and directions would include the power to frame or modify the regulations made by the first tier regulatory authority, particularly in cases where the Tribunal is satisfied that the regulation framed is either not consistent with the provisions of the Act or does not result in due performance of the duty or functions entrusted to the Commission under the 2003 Act. In the light of the provisions of Sections 111 and 121 of the 2003 Act, learned counsel urged, that, even in an appeal under Section 111 if the question of validity of delegated legislation arises, the tribunal can consider the vires and ignore a Rule which is ultra-vires the rule-making power. The fact that there is no power in the tribunal to annul the regulation cannot deny the power to statutory tribunal to ignore ultra vires subordinate legislation. Lastly, there is no need to read down Section 121 on a priori notion of classical administrative law that vires of the rules can only be challenged in the judicial review proceedings before a constitutional court.

On behalf of PTC India Ltd.

24. Shri Vikas Singh, learned senior counsel, submitted that fixation of trading margins under normal business conditions is intrinsically contradictory and harmful to power market functioning. In this connection, it was submitted that capping of trading margin does not in any manner whatsoever control the selling price of electricity sold to Discoms. Such capping of trading margin results in relegating the electricity traders to mere commission agents. The role of electricity traders is to play a dynamic role of bringing in new products in the market which is beneficial to the consumers as well as Gencoms. However, the entire object of having electricity traders stand defeated by impugned capping of trading margins. According to the learned counsel, traders in electricity bring depth to the electricity markets. They make value additions and therefore interventions in trading by regulations should not be contrary to the letter and spirit of the Act [See Section 66]. According to the learned counsel, severe regulatory intervention like imposition of margin in a voluntary market should be resorted to only in cases of market failure. According to the learned counsel, on the basis of statistical data, the trading margin is not a return guaranteed to a trader and that the actual margin which the trader is getting is lower than the prescribed cap. According to the learned counsel, none of the above facts have been appreciated by the Central Commission in capping the margin as not to exceed 4.0 paise per kWh on the electricity traded.

25. On the question of law, learned counsel submitted that the right to appeal under Section 111 in respect of adjudicatory/ administrative order cannot be defeated by colouring the decision as a regulation. In this connection learned counsel submitted that the rules/regulations framed by the executive under an Act are the law whereas regulations made by the statutory authority itself is not the regulation under which it functions, but the regulation making itself is its function. In the

former case, it is possible to argue that the Authority which is the creature of the Statute cannot question the vires of the statute, in the latter case, the Authority is not the creature of the Regulation framed by itself, hence the sanctity given to the former is far greater than the sanctity to the latter.

26. According to the learned counsel, that, the right to appeal is a substantive right and the same cannot be taken away by a device, i.e., by framing a regulation instead of simply passing an order as to denude the Appellant of its right of Appeal. In this connection, learned counsel urged that the Appellate Tribunal can hear the appeal against the regulation being the function of the Commission and can examine the sanctity of the regulation if the same is framed beyond the power of the commission to do so. In other words, if the Commission is entitled to adjudicate upon a matter, it does not have the authority under the Act to give its decision the colour of a regulation so as to denude the Tribunal of its authority under Section 111. According to the learned counsel, since the impugned regulation relegates the trading licensee to a commission agent the same is ultra vires Section 66 of the 2003 Act.

27. According to the learned counsel, under Section 79 the Commission is authorized only to fix the trading margin and since the impugned regulations are purportedly made under Section 79 the said regulations are beyond the powers of the Central Commission and are, thus, ultra vires the 2003 Act.

28. Lastly, learned counsel for PTC adopted all the arguments of Shri Harish N. Salve, learned counsel for M/s. Tata Power Trading Company Ltd.

29. Shri Narasimha, learned counsel and Others broadly adopted the above arguments advanced on behalf of M/s. Tata Power Trading Company and PTC India Ltd., hence, the same need not be reproduced.

On behalf of CERC

30. After taking us through the provisions of the 2003 Act, the National and the Tariff Policies, learned Solicitor General of India submitted that the 2003 Act contemplates three kinds of delegated legislation:

(i) Under Section 176, the Central Government is empowered to make rules for carrying out the provisions of the Act. A corresponding power is given to the State Governments under Section 180.

(ii) Under Section 177, the CEA is empowered to make regulations consistent with the Act and the rules made under Section 176.

(iii) Under Section 178, the Central Commission may make regulations consistent with the Act and the rules generally to carry out the provisions of the Act. The corresponding power under Section 181 is conferred on SERCs.

31. The rules and the regulations have to be placed before the Parliament and the State Legislatures, as the case may be, under Sections 179 and 182 respectively. According to the learned counsel, even if the Rules have been laid before the Parliament and even if there is a resolution of the Parliament approving them, the validity of the Rules has to be declared by the Court as ultra vires the Act and invalid. According to the learned counsel, there is no power conferred upon the Appellate Tribunal under Section 111 to declare the regulations framed by the Central Commission as null and void. According to the learned counsel, Tribunals are creatures of the statute. They have no inherent power that exists in civil courts. Any power exercisable by the Tribunal has to be located in the statute under which it is formed. There is no authority for the proposition that under the Indian law, a statutory tribunal has the jurisdiction to deal with the validity of subordinate legislation

and pronounce it as ultra vires. Of course, according to the learned counsel, it is open to the Parliament to expressly give to a Tribunal the power to consider the validity of subordinate legislation. However, such conferment has to be express and unambiguous, which is not there in this case.

32. According to the learned counsel, the mere fact that Section 79(1)(j) uses the word "fix" and the mere fact that the other provisions use the word "specify" does not lead to the conclusion that the Central Commission could not have issued the Trading Margin Regulations 2006 as contended by the appellants herein. The learned counsel further urged that the general power to frame regulations is not limited or controlled by enumeration of topics on which regulations may be framed. In this connection, it was submitted that a holistic reading of the Act leads to the conclusion that regulations can be made as long as they are consistent with the Act and that they are made for carrying out the provisions of the Act. The Act recognizes the need to regulate trading in electricity [See Sections 52(2), 53(1)(a), 57, 60, 178(2)(d), (o), (p) and (y)].

33. Learned counsel further submitted that for the reasons mentioned herein there is no case made out by the Appellants to lift the veil over a fake regulation. The Central Commission had to initiate proceedings against 14 traders for non-compliance with licence conditions. Some traders were operating on high margins. Trading margin being the component of the final price paid by the consumers required regulation to protect the consumers. Competition among traders to capture the surplus power for sale resulted in rising prices. Even with a trading margin of 4 paise/unit, traders can make handsome profits. For the above reasons, Commission thought it fit to make the impugned Regulations. It was further contended that the doctrine of colourable exercise of power was not applicable to decide the validity of subordinate legislation.

34. Learned counsel lastly submitted that the power of judicial review cannot be located in Section 121 of the Act. The

power under Section 121 is different from the power under Section 111. According to the learned counsel, Section 121 empowers the tribunal to act only when the Commission is guilty of inaction in carrying out its statutory functions. The power to annul a legislative act cannot be read into Section 121. Even the High Court cannot direct the Legislature to enact a law and, therefore, such power cannot be read into Section 121. In order to entertain a challenge, directly or collaterally, the tribunal must have jurisdiction which must be conferred by the statute and since in the instant case tribunal is not vested with such a jurisdiction, it is not open to the Appellants to place reliance on some of the English Judgments. Thus, the Appellate Tribunal is not qualified to go behind a regulation as framed by CERC and to examine whether it acted within the bounds of the statute while framing the regulation.

DETERMINATIONS:

35. On the above submissions, one of the questions which arises for determination is – whether trading margin fixation (including capping) under the 2003 Act can only be done by an Order under Section 79(1)(j) and not by Regulations under Section 178? According to the appellant(s) it can only be done by an Order under Section 79(1)(j), particularly when under Section 178(2) power to make regulations is co-relatable to the functions ascribed to each Authority under the said 2003 Act.

36. In every case one needs to examine the statutory context to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

37. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making

functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to *Professor Wade*, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law. [See *Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors.* reported in (1990) 3 SCC 223].

38. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. This basic scheme equally applies to subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow. In the case of *M/s Narinder Chand Hem Raj and Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors.* reported in (1971) 2 SCC 747, this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other Authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been

further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if Courts cannot so direct, much less the Tribunal, unless power to annul or modify is expressly given to it. In the case of *Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors.* reported in (1985) 1 SCC 641, this Court held that subordinate legislation is outside the purview of administrative action, i.e., on the grounds of violation of rules of natural justice or that it has not taken into account relevant circumstances or that it is not reasonable. However, a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular discretionary power by a statute. In the latter case, the impugned exercise of discretion may be considered on all grounds on which administrative action may be questioned such as non-application of mind, taking irrelevant matters into consideration etc. The subordinate legislation is, however, beyond the reach of administrative law. Thus, delegated legislation – otherwise known as secondary, subordinate or administrative legislation – is enacted by the administrative branch of the government, usually under the powers conferred upon it by the primary legislation. Delegated legislation takes a number of forms and a number of terms – rules, regulations, by-laws etc; however, instead of the said labels what is of significance is the provisions in the primary legislation which, in the first place, confer the power to enact administrative legislation. Such provisions are also called as "enabling provisions". They demarcate the extent of the administrator's legislative power, the decision-making power and the policy making power. However, any legislation enacted outside the terms of the enabling provision will be vulnerable to judicial review and ultra vires.

39. Applying the above mentioned tests to the scheme of 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the

Central Commission broadly into two categories – mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head "mandatory functions" whereas advising Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependant upon making of regulations under Section 178 by the Central Commission. Therefore, functions of Central Commission enumerated in Section 79 are separate and distinct from function of Central Commission under Section 178. The former is administrative/adjudicatory function whereas the latter is legislative.

40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section

79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre-

condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).

41. To elucidate, we may refer to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004. The said Regulations have been made under Section 178 of the 2003 Act. Regulation 15 deals with various components of tariff. It includes Advance Against Depreciation ("AAD" for short). Regulations 21(1)(ii) and 38(ii) deal with computation of depreciation including AAD. Recently, this concept of AAD came for consideration before this Court in the case of *National Hydroelectric Power Corporation Ltd. v. CIT* reported in 2010 (1) SCALE 5. AAD was suggested by the Central Commission as part of the tariff in order to overcome the cash flow problems faced by Central Power

Sector Utilities for meeting loan repayment obligations. The important point to be noted is that although under Section 61 of the 2003 Act the Central Commission is empowered to specify AAD as a condition for determination of the tariff, the Central Commission in its wisdom thought it fit to bring in the concept of AAD by enacting a regulation under Section 178 giving the benefit of AAD across the board to all Central Power Sector Utilities. In other words, instead of giving the benefit of AAD on a case to case basis under Section 61, the Central Commission decided to make a specific regulation giving benefit of AAD across the board to all Central Power Sector Utilities. There is one more reason why a regulation under Section 178 with regard to AAD had to be made by CERC. Under the 2003 Act, the Central Commission is empowered under Section 61 to include depreciation as an item in the computation of tariff. However, if the rate of depreciation envisaged by the Central Commission under the 2003 Act is different from the rate(s) of depreciation prescribed under Schedule XIV of the Companies Act, 1956 then such differential rate can be prescribed under the 2003 Act only by way of regulation under Section 178 of the 2003 Act which is in the nature of subordinate legislation. It is important to note that the Companies Act, 1956 constitutes a law applicable to companies. It prescribes the format of Balance Sheet in Schedule VI. It prescribes the requirements as to Profit and Loss account vide Part II of Schedule VI. It also prescribes the rates of depreciation vide Schedule XIV. If a different rate is required to be prescribed under the 2003 Act, then it could be done only by way of subordinate legislation, which is contemplated by Regulations framed under Section 178 of the 2003 Act. Similarly, profits earned by a trading company are not only required to be presented in the manner indicated under the Companies Act but it is also required to be computed under the Income-tax Act, 1961. If such profits/income of a trading company is required to be capped under the 2003 Act, it can only be done by a subordinate legislation made under Section 178 of the 2003 Act. Accrual of income/profit under the

Companies Act, 1956 or the Income-tax Act, 1961 can only be curbed by a regulation made under the authority of subordinate legislation or primary legislation. This is exactly what is sought to be achieved by the impugned Regulation.

42. One more citation may be noticed. Reserve Bank of India is a Regulator under the RBI Act, 1934 ("1934 Act"). Under the 1934 Act, RBI is empowered not only to regulate banks but also financial institutions, NBFCs etc.. Chapter III B of the 1934 Act deals with provisions relating to financial institutions and NBFCs receiving deposits from the public. Under Section 45JA of the 1934 Act, RBI is given the power to determine policy and issue directions to NBFCs and financial institutions in public interest or in order to regulate the financial system of the country. Section 45JA, however, is confined to Chapter III B. However, under Section 58, which falls in Chapter IV, dealing with general provisions, the Board of Directors of RBI are given the power to make regulations consistent with the 1934 Act to provide for all matters for which provision is necessary. The principle of "generality versus enumeration" is also applicable to Section 58 of RBI Regulations because under Section 58(2) there is a list of topics enumerated on which regulations could be made. In other words, Section 58 (1), (2) of the 1934 Act is similar to Section 178 (1), (2) of the 2003 Act. Recently, before the Division Bench of this Court, the question arose, inter alia, as to the accounting treatment to be given by NBFCs accepting deposits from the public in the context of provision to be made for Non Performing Assets ("NPAs"). An Order was passed by RBI under Section 45JA of the 1934 Act stating that although provision for doubtful debts is required to be reduced from the assets' side of the balance sheet under the provisions of the Companies Act, 1956, for proper disclosure under the 1934 Act, such a provision should be shown in the balance sheet specifically on the liabilities' side. It is interesting to note that the Order was passed under Section 45JA which, as stated above, is part of Chapter III B of the 1934 Act, which chapter expressly deals with provisions relating to NBFCs. There was

no regulation enacted under Section 58 on the topic, namely, NPAs. The point to be noted is, that there could be an Order/decision of a regulator under the Act even in the absence of regulations. RBI like CERC is a regulator under the 1934 Act. Under Section 45JA it is empowered to issue directions in contradistinction to its powers to enact regulations under Section 58 of the 1934 Act. Giving directions under Section 45JA need not be preceded by regulations made under Section 58, however, if in a given case, RBI/Board would have enacted a regulation on making of provision for NPAs under Section 58 then the Order of RBI under Section 45JA of the 1934 Act was required to be in conformity with the said regulations. (See the judgment of this Court in the case of *M/s Southern Technologies Ltd. v. Joint Commissioner of Income Tax, Coimbatore* reported in 2010 (1) SCALE 329.)

43. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a Regulation stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations. However, that would not mean that a regulation is a pre-condition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act. Trading is an activity recognized under the said 2003 Act. While deciding the nature of an Order (decision) vis-à-vis a Regulation under the Act, one needs to apply the test of general application. On the making of the impugned Regulations 2006, even the existing Power Purchase Agreements ("PPA") had to be modified and aligned with the

said Regulations. In other words, the impugned Regulation makes an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned Regulations 2006 have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations under Section 178 and not by passing an Order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "*order*" in Section 111 of the 2003 Act cannot include the impugned Regulations 2006 made under Section 178 of the 2003 Act.

44. We may usefully refer to some decisions relevant in the context.

45. In the case of *City Board, Mussoorie v. State Electricity Board and Ors.,* reported in AIR (58) 1971 Allahabad 219, the matter arose under Electricity (Supply) Act, 1948 ("1948 Act"). Under that Act, Grid Tariff had to be fixed from time to time under Section 46(1) "in accordance with any regulations made in that behalf". Under Section 79 of the 1948 Act, the Board was also given the power to make regulations not inconsistent with the Act and the Rules made thereunder to provide for all or any of the matters enumerated therein. It was argued on behalf of the appellant that the regulations must exist before a Grid Tariff can be fixed. This argument was rejected by the High Court which held that there was nothing in the 1948 Act to suggest that existence of a regulation was a pre-condition to the determination of a grid tariff. It was held that under Section 46 of 1948 Act, the Board was given a wide discretion to frame the grid tariff depending upon various factors mentioned in the Act. According to the High Court, Section 46 of the Act was a standalone provision, therefore, the grid tariff

could be fixed even in the absence of the regulations provided such fixation is not inconsistent with the 1948 Act. However, it was further observed that if the Board had made regulations under Section 79 then order framing the grid tariff under Section 46(1) had to conform to such regulations. This view stood affirmed by this Court in the case of *U.P. State Electricity Board, Lucknow v. City Board, Mussoorie,* reported in (1985) 2 SCC 16.

46. A similar question arose for determination by this Court in the case of *M/s Jagdamba Paper Industries (Pvt.) Ltd. and Ors. v. Haryana State Electricity Board and Ors.,* reported in AIR 1983 SC 1296. In that case, enhancement in the security for meters and for payment of energy bills came to be challenged. It was argued on behalf of the appellants that the Board had not framed any Regulations under Section 79 of the 1948 Act for such enhancement. According to the appellants, the supply of electricity was controlled under an agreement between the Board and the appellants and therefore unilateral escalation of security charges by passing of an Order under Section 49 would be contrary to any acceptable notion of contract. It was contended that under Section 49(1) of the 1948 Act, the Board was conferred with statutory powers to determine the conditions on the basis of which supply had to be made. Therefore, without determining the conditions under Section 49(1), it was not open to the Board to unilaterally enhance the security charges contrary to the existing contract between the Board and the consumers. This argument was rejected by this Court which held that what apply to the tariff fixation would equally apply to the security. Section 49(1) of the 1948 Act clearly indicated that the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. It was held that since the contract between the consumer and the Board contemplated enhancement of security charges as a condition of supply of electricity, it was not open to the appellants to say that such enhancement cannot take place without regulations being framed under Section 79. This

judgment is important from another angle also. It indicates that regulations under Section 79 of 1948 Act were to be in the nature of subordinate legislation, therefore, all contracts had to be in terms of such regulations. In the present case also, if one examines the terms and conditions of the licences, power to fix trading margin is expressly contemplated by such terms. The said judgment further held that the Board is a statutory authority and has to act within the framework of the 1948 Act. If the act of the Board is not in consonance or in breach of some statutory provisions of law, rule or regulation, it is always open to challenge in a petition under Section 226 of the Constitution.

47. In the case of *Kerala State Electricity Board v. S.N. Govinda Prabhu and Bros. and Ors.,* reported in (1986) 4 SCC 198, the dispute was confined to the question concerning increase in the electricity tariff by the Board under the 1948 Act. The principal ground of challenge was that the Board had acted outside its statutory authority by formulating a price structure intended to yield sufficient revenue to offset not only the actual expenditure as contemplated by Section 59 of the 1948 Act but also expenditure not covered by that section. At this stage, we may point out that, in all these cases, the Supreme Court has considered tariff fixation, price fixation, security charges fixation at par. In that case, one of the submissions which found favour with the High Court, which accepted the submissions of the consumer, while striking down the impugned notification, was that in the absence of specification by the State Government, it was not open to the Board to adjust the tariffs. What was found by the Supreme Court was that although the expenditure did not fall strictly within Section 59 of the 1948 Act, the actual expenditure stood incurred to avoid the loss. Therefore, the Supreme Court gave a schematic interpretation to the 1948 Act and it held that the State Electricity Board was obliged to carry on its business economically and efficiently and consequently such charges were admissible even though they did not fall strictly within the ambit of Section 59. On the question as to absence of specification by the State Government, this Court

further held that the omission of the rule-making authority to frame rules cannot takeaway the right to factor in such expenses in the revised tariff structure. This judgment is one more case which indicates that making of regulations is not a pre-condition to the tariff fixation or price fixation or security charges fixation.

48. In the case of *Hindustan Zinc Ltd. etc. v. Andhra Pradesh State Electricity Board and Ors.* reported in (1991) 3 SCC 299, the main attack was to the upward revision of the tariffs for HT consumers in the writ petition before the High Court, inter alia, on the ground that the Board cannot generate a surplus in excess of the surplus specified under Section 59 of the 1948 Act. Section 59 of that Act gave power to the Board to lay down general principles for Board's finance. It was also contended that the tariff revision was made without prior consultation with the State Electricity Consultative Council as required by Section 16(5) of the 1948 Act. It was held by this Court that even in the absence of general principles being specified under Section 59 of that Act, it was open to the Board to generate a surplus in order to carry on the business in a more efficient and economic manner. Following the judgment in the case of *S.N. Govinda Prabhu* (supra), it was held that even in the absence of prior consultation with the State Electricity Consultative Council as required by Section 16(5), it was open to the Board which was vested with the power of tariff fixation to make an upward revision of tariff. In other words, specification by making rules or regulations was not a pre-condition for upward revision of tariff. It was observed that, if in a given case, it is found that such upward revision was arbitrary, then under the judicial review jurisdiction it was open to the courts to strike down such upward revision as arbitrary under Article 14. It was further observed that the "laying down procedure" before the Legislature was meant to effectively control the exercise of the delegated power of the Board, however, such laying down procedure will not make the impugned regulation immune from judicial review. (Also see the

judgment of this Court in *Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors.* reported in (1985) 1 SCC 641, paragraphs 75 to 79).

49. On the question of "generality versus enumeration" principle, it was further held in the case of *Hindustan Zinc Ltd.* (supra) that under Section 49(1) of the 1948 Act a general power was given to the Board to supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and the Board may for the purposes of such supply frame uniform tariffs under Section 49(2). The Board was required to fix uniform tariffs after taking into account certain enumerated factors. It was held that the power of fixation of tariffs in the Board ordinarily had to be done in the light of specified factors, however, such enumerated factors in Section 49(2) did not prevent the Board from fixing uniform tariffs on factors other than those enumerated in Section 49(2) as long as they were relevant and in consonance with the Act. To the same effect is the judgment of this Court in *Shri Sitaram Sugar Co. Ltd.* (supra). In that judgment also this Court held that the enumerated factors/topics in a provision do not mean that the authority cannot take any other matter into consideration which may be relevant. The words in the enumerated provision are not a fetter; they are not words of limitation, but they are words for general guidance.

50. One more aspect needs to be mentioned. The judgment of this Court in *Shri Sitaram Sugar Co. Ltd.* (supra) has laid down various tests to distinguish legislative from administrative functions. It further held that price fixation is a legislative function unless the statute provides otherwise. It also laid down the scope of judicial review in such cases.

51. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the inter-State trading of electricity can be done by making of regulations under Section 178 of 2003 Act. Power to fix the trading margin

under Section 178 is, therefore, a legislative power and the Notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. These Regulations make an inroad into contractual relationships between the parties. Such is the scope and effect of the impugned Regulations which could not have taken place by an Order fixing the trading margin under Section 79(1)(j). Consequently, the impugned Regulations cannot fall within the ambit of the word "Order" in Section 111 of the 2003 Act.

52. Before concluding on this topic, we still need to examine the scope of Section 121 of the 2003 Act. In this case, appellant(s) have relied on Section 121 to locate the power of judicial review in the Tribunal. For that purpose, we must notice the salient features of Section 121. Under Section 121, there must be a failure by a Commission to perform its statutory function in which event the Tribunal is given authority to issue orders, instructions or directions to the Commission to perform its statutory functions. Under Section 121 the Commission has to be heard before such orders, instructions or directions can be issued.

53. The main issue which we have to decide is the nature of the power under Section 121. In the case of *M/s Raman and Raman Ltd. v. State of Madras and Ors.* reported in AIR 1959 SC 694, Section 43A of Motor Vehicles Act, 1939, ("1939 Act"), as amended by Madras Act 20 of 1948, came for consideration before the Supreme Court. Section 43A conferred power on the State Government to issue "orders" and "directions", as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority or a Regional Transport Authority. The meaning of the words "orders" and "directions" came for interpretation before the Supreme Court in the said case. It was held, on examination of the Scheme of the Act, that Section 43A was placed by the

legislature before the sections conferring quasi-judicial powers on Tribunals which clearly indicated that the authority conferred under Section 43A was confined to administrative functions of the Government and the Tribunals rather than to their judicial functions. It was further held that the legislature had used two words in the section: (i) orders; and (ii) directions. This Court further noticed that under the 1939 Act there was a separate Chapter which dealt with making of "rules" which indicated that the words "orders" and "directions" in Section 43A were meant to clothe the Government with the authority to issue directions of administrative character. It was held that the source of power did not affect the character of acts done in exercise of that power. Whether it is a law or an administrative direction depends upon the character or nature of the orders or directions authorized to be issued in exercise of the power conferred. It was, therefore, held that the words "orders" and "directions" were not laws. They were binding only on the Authorities under the Act. Such orders and directions were not required to be published. They were not kept for scrutiny by legislature. It was further held that such orders and directions did not override the discretionary powers conferred on an authority under Section 60 of the 1939 Act. It was observed that non compliance of such orders, instructions and directions may result in taking disciplinary action but they cannot affect a finding given by the quasi-judicial authority nor can they impinge upon the rules enacted by the rule-making authority. It was held that such orders and directions would cover only an administrative field of the officers concerned and therefore such orders and directions do not regulate the rights of the parties. Such orders and directions cannot add to the considerations/topics prescribed under Section 47 of the 1939 Act on the basis of which an adjudicating authority is empowered to issue or refuse permits, as the case may be.

54. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words "orders", "instructions" or "directions" in Section 121 do not confer power

of judicial review in the Tribunal. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by Appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify Grid Code having regard to Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-station and generating plants. Basically, a grid is a network. Section 2(33) defines "grid code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "grid standards" to mean standards specified under Section 73(d) by the Authority. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words orders, instructions or directions in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned Regulations 2006, as rightly held in the impugned judgment.

55. One of the contentions raised by Shri Shanti Bhushan, learned senior counsel appearing on behalf of Calcutta Electricity Supply Company Ltd. needs to be considered. It was contended on behalf of CESC Ltd. that under Section 111 of the 2003 Act, an appeal lies only against an Order by the Appropriate Commission and not against Regulations framed by CERC under Section 178 of the 2003 Act. It was contended that Regulations under Section 178 are framed in exercise of delegated power in which there was an element of legislative

function. That, the Regulations framed by CERC are required to be laid before the Parliament under Section 179 of the 2003 Act. The said Regulations could be modified by the two Houses of the Parliament. In the circumstances, it was, therefore, contended that neither Section 111 nor Section 121 would be deemed to have conferred any power on the Appellate Tribunal for Electricity to supervise or sit in judgment over the Regulations. To this extent, learned counsel supported the contentions of the learned Solicitor General, appearing on behalf of CERC (respondent no.1). Further, an interesting argument was advanced by the learned counsel, namely, that, Section 121 of the 2003 Act has not yet been brought into force. In this connection, reference was made to Section 1(3) of the 2003 Act as well as to the notification dated 10.6.2003 issued under Section 1(3) of the 2003 Act by which the Central Government had fixed 10.6.2003 as the date on which Sections 1 to 120 and Sections 122 to 185 were brought into force, however, Section 121 was not brought into force till Notification dated 27.1.2004, which brought into force Electricity (Amendment) Act 2003 (No.57 of 2003) came to be issued. According to the learned counsel, Section 4 of the Electricity (Amendment) Act, 2003 (No.57 of 2003) which was brought into force on 27.1.2004 merely provided for substitution of the original Section 121 with new Section 121, without issuance of a further notification under Section 1(3) of the original Electricity Act, 2003. According to the learned counsel, there is a difference between substituting a dormant Section in an Act and in bringing a substituted section into force which has not been done in this case and, therefore, Section 121, although being part of the statute, is not brought into force, till today. To answer the above contention, we need to quote Section 1(3) and also Section 121 of the original Electricity Act, 2003 which was not brought into force though, as stated above, Sections 1 to 120 and Sections 122 to 185 were brought into force vide notification dated 10.6.2003:

"Section 1. Short title, extent and commencement. –

(3) It shall come into force on such date as the Central Government may, by notification, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision."

"Section 121. Power of Chairperson of Appellate Tribunal.- The Chairperson of the Appellate Tribunal shall exercise general power of superintendence and control over the appropriate Commission."

56. We also quote hereinbelow Sections 1 and 4 of the Electricity (Amendment) Act, 2003 (No.57 of 2003) which was brought into force on 27.1.2004:

"Section 1. (2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 4. For Section 121 of the principal Act, the following Section shall be substituted, namely:-

"121. Power of Appellate Tribunal

The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act."

57. As stated above, the Electricity (Amendment) Act, 2003 (No.57 of 2003) was brought into force by Notification dated 27.1.2004 which is reproduced hereinbelow:

"MINISTRY OF POWER
Notification
New Delhi, the 27th January, 2004

S.O.119(E). In exercise of the powers conferred by sub-section (2) of Section 1 of the Electricity (Amendment) Act, 2003 (57 of 2003), the Central Government hereby appoints the *27th January, 2004, as the date on which the provisions of the said Act shall come into force.*

[F.No.23/23/2004-R&R]
AJAY SHANKAR, Jt. Secy."

58. In our view, there is no merit in the above contention advanced on behalf of CESC Ltd. At the outset, we may state that material brought on record indicates that Section 121 of the original Electricity Act, 2003, quoted hereinabove, was never brought into force because some MPs expressed the concern that the power, under that section, conferred upon the Chairperson of the Appellate Tribunal, could lead to excessive centralization of power and interference with the day-to-day activities of the Commission by the Chairperson of the Tribunal. Therefore, Section 121 was amended by Electricity (Amendment) Act, 2003 (No.57 of 2003) which is also quoted hereinabove and which amendment Act came into force from 27.1.2004. In our view, by necessary implication of the coming into force of the Electricity (Amendment) Act, 2003 (No.57 of 2003) all provisions amended by it also came into force, hence, there is no requirement for a further notification under Section 1(3), particularly when Section 121 in its amended form has come into force w.e.f. 27.1.2004. In this connection, it may be seen that Section 121 of the original Act stood substituted by Amendment Act No.57 of 2003. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. Substitution is a combination of repeal and fresh enactment. [See: Principles of Statutory Interpretation by G.P. Singh, 11th Edn., p. 638]**.** Section 121 of the original Electricity Act, 2003 was never brought into force. It was

substituted by new Section 121 by Amendment Act No.57 of 2003 which was brought into force by a notification dated 27.1.2004. Substitution, as stated above, results in repeal of the old provision and replacement by a new provision. Applying these tests to the facts of the present case, we find that the Electricity (Amendment) Act, 2003 (No.57 of 2003) was brought into force by notification dated 27.1.2004. That, notification was issued under Section 1(2) of the Electricity (Amendment) Act, 2003 (No.57 of 2003). If one reads Section 1(2) of Electricity (Amendment) Act, 2003 (No.57 of 2003) with Notification dated 27.1.2004 issued under Section 1(2) of the amended Act, 2003, it becomes clear that on coming into force of the Electricity (Amendment) Act, 2003 (No.57 of 2003) all provisions amended by it also came into force. Hence, there was no requirement for a further notification under Section 1(3), consequently, Section 121 in its amended form came into force with effect from 27.1.2004.

59. Summary of Our Findings:

(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

(iii) A regulation under Section 178 is made under the

authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.

(vii) Section 121, as amended by Electricity

(Amendment) Act 57 of 2003, came into force with effect from 27.1.2004. Consequently, there is no merit in the contention advanced that the said section is not yet been brought into force.

Conclusion:

60. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.

Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, we make it clear that the decision may not be taken as expression of any view in regard to the powers of Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and Exchange Board of India Act, 1992 or with reference to the Telecom Disputes Settlements and Appellate Tribunal vis-à-vis Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997.

61. In view of our findings, we dismiss these appeals as having no merit with no order as to costs.

K.K.T. Appeals dismissed.

M/S. EMPIRE INDUSTRIES LTD.
v.
STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 3003 of 2005)

MARCH 17, 2010

[AFTAB ALAM AND DR. B.S. CHAUHAN, JJ.]

Industrial Disputes Act, 1947 – ss. 10(1) and (3) and 25N – Lock-out of Industry – On the basis of three demands i.e. agitational activities of workmen, ceiling on dearness allowance and retrenchment – Complaint made in respect of agitational activities under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act – Order of Government prohibiting lock-out – Order challenged on the ground that lock-out was prohibited without referring the disputes viz. agitational activities of workmen and retrenchment, for adjudication u/s. 10(1) – Held: Appropriate Government empowered and competent to issue the order prohibiting lock-out – On facts, there was no dispute on the basis of demand in respect of retrenchment – Retrenchment can be effected only after following statutory provisions provided therefor – A reference u/s. 10(1) cannot be used to bypass the Scheme u/s. 25N – Once having taken resort to Maharashtra Act with regard to agitational activities any proceeding under ID Act barred by s. 59 of Maharashtra Act – Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 – s. 59.

ss. 10(1) and 25N – Distinction between – Explained.

Respondent-State passed order in exercise of the power u/s. 10(3) of Industrial Disputes Act, 1947, prohibiting continuance of the lock-out in the factory of the appellant. The order was challenged in writ petition which was dismissed by Single Judge of High Court. The

order was further confirmed in writ appeal by Division Bench of High Court.

In appeal to this Court, appellant contended that the State Government derives the legal authority to prohibit a lock-out in terms of section 10(3) only after it had referred for adjudication all the disputes leading to the lock-out u/s. 10(1); that the closure of the factory being on three demands viz., agitational activities of the workmen (ii) imposition of ceiling on dearness allowance and (iii) reduction of the workforce and retrenchment, and out of the three demands, Government having referred only one, concerning the ceiling on dearness allowance, it was not permissible to prohibit the lock-out.

Respondent contended that in respect of agitational activities complaint already having been filed under Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 resort to proceedings under Industrial Disputes Act, 1947 was barred, by virtue of s. 59 of the Maharashtra Act.

Dismissing the appeal, the Court

HELD: 1. In regard to the alleged agitational activities of the workmen, the appellant had already filed a complaint u/s. 26 r/w. Item Nos. 5 and 6 of Schedule III of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. Once having taken resort to the provisions of this Act, any proceeding under the Industrial Dispute Act, 1947 was barred by Section 59 of the Maharashtra Act and, therefore, there was no question of any reference of this particular demand by the petitioner u/s. 10(1) of ID Act. [Para 13] [700-G-H; 701-A-C]

2.1. The subject of retrenchment is fully covered by the statute. It is not left open for the employer to make a

demand in that connection and to get the ensuing industrial dispute referred for adjudication in terms of Section 10(1) of ID Act. To say that even without following the provisions of Section 25N of ID Act, it is open to the employer to raise a demand for retrenchment of workmen and to ask the Government to refer the ensuing dispute to the Industrial Tribunal for adjudication, would tantamount to substituting a completely different mechanism in place of the one provided for in the Act to determine the validity and justification of the employer's request for retrenchment of workers. It is true that u/s. 25N, the authority to grant or refuse permission for retrenchment is vested in the appropriate Government which in this case would be the State Government or the authority specified by it. Under Section 10(1) too, it is the State Government that would make a reference of the industrial dispute. But the two provisions are not comparable. The nature of the power of the State Government and its functions under the two provisions are completely different. In making the reference (or declining to make the reference) u/s. 10(1) of the Act, the State Government acts in an administrative capacity whereas u/s. 25N(3) its power and authority are evidently *quasi* judicial in nature. [Paras 26 and 27] [709-G-H; 710-A-E]

2.2. Though Section 25N(6) has the provision to refer the matter to the tribunal for adjudication, that provision is completely different from Section 10(1). A reference u/s. 10(1) of the Act cannot be used to circumvent or bypass the statutory scheme provided u/s. 25N of the Act. This is, however, not to say that there cannot be any dispute on the subject of retrenchment that can be referred to the tribunal for adjudication. A dispute may always be raised by or on behalf of the retrenched workmen questioning the validity of their retrenchment. Similarly, the employer too can raise the dispute in case

denied permission for retrenchment by the Government. It is another matter that the chances of the disputes being referred for adjudication are quite remote. But the point to note is that the occasion to raise the demand/dispute comes after going through the statutory provisions of Section 25N of ID Act. [Para 27] [710-F-H; 711-A-B]

2.3. In the instance case, on the material date, there was no dispute on the basis of any demand raised by the appellant with regard to retrenchment of any workers in the factory. Secondly, and more importantly, any retrenchment of worker(s) can only be effected by following the provisions laid down under ID Act, and the Rules. It follows that it is not open to the management to make a demand/proposal for retrenchment of workmen and disregarding the provisions of the Act ask the Government to refer the demand/dispute under section 10(1) to the tribunal for adjudication. The only demand raised by the management regarding imposition of ceiling on dearness allowance was already referred to the Industrial Tribunal. Hence, the appropriate Government was fully competent and empowered to issue the impugned order prohibiting closure of the factory. There was no illegality or infirmity in the closure notice. [Para 29] [713-B-E]

Workmen of Meenakshi Mills Ltd. and Ors. vs. Meenakshi Mills Ltd. and Anr. **(1992) 3 SCC 336, followed.**

Oswal Agro Furane Ltd. and Anr. vs. Oswal Agro Furane Workers Union and Ors. **(2005) 3 SCC 224, relied on.**

State of Madras vs. C.P. Sarathy and Anr. **1953 (4) SCR 334, held inapplicable.**

Delhi Administration, Delhi vs. Workmen of Edward Keventers **(1978) 1 SCC 634;** *The Management of Express Newspapers Ltd. vs. Workers and Staff Employed Under It and Ors.* **1963 (3) SCR 540;** *Management of Kairbetta Estate,*

Kotagiri vs. Rajamanickam and Ors. **1960 (3) SCR 371;** *D.D. Gears Ltd. vs. Secretary (Labour) and Ors,* **2006 Lab. I. C. 1462;** *Meal Box India Ltd. vs. State of Tamil Nadu and Ors.* **1995 II L.L.N. 814, referred to.**

Case Law Reference:

(1978) 1 SCC 634	**referred to.**	**Para 4**
1963 (3) SCR 540	**referred to.**	**Para 5**
1960 (3) SCR 371	**referred to.**	**Para 5**
2006 Lab. I. C. 1462	**referred to.**	**Para 6**
1995 II L.L.N. 814	**referred to.**	**Para 6**
1953 (4) SCR 334	**held inapplicable.**	**Para 19**
(1992) 3 SCC 336	**followed.**	**Para 27**
(2005) 3 SCC 224	**relied on.**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3003 of 2005.

From the Judgment & Order dated 1.4.2005 of the High Court of Judicature at Bombay in Letters Patent Appeal No. 70 of 2001.

Shanti Bhushan, K.M. Naik, Arun R. Pedneker, V.N. Raghupathy for the Appellant.

Colin Gonsalves, Jayshree Satpute, Jyoti Mendiratta, Chinmoy Khaladkar, Sanjay Kharde (for Asha G. Nair) for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. The appellant, which is a public limited company incorporated under the Companies Act, 1956 seeks to challenge the order dated September 23, 1992 issued

by the Government of Maharashtra in exercise of the powers conferred by sub-section (3) of section 10 of the Industrial Disputes Act, 1947 (for short 'the Act') prohibiting continuance of the lock-out in its factory, Garlick Engineering at Ambernath, Thane.

2. The appellant first challenged this order before the Bombay High Court in Writ Petition No.6051/1995. The writ petition was dismissed by a learned single judge of the court by judgment and order dated February 9, 2001. Against the judgment of the single judge, the appellant preferred an internal court appeal (LPA No. 70 of 2001) which too was dismissed by a division bench of the court by judgment and order dated April 1, 2005. The appellant has now brought the matter in appeal before this Court.

3. It may be stated here that during the course of this protracted litigation the factory was closed down on April 26, 1999 and since then it remains closed. The validity of the factory's closure is not in issue. This means that the relevance of the present appeal is only for the period September 23, 1992 (the date on which the prohibition order was issued) to April 26, 1999 (when the factory was finally closed down). In case, the impugned prohibition order is held legal and valid and the appeal is dismissed the lock-out in the factory after September 26, 1992 would be illegal in terms of section 24(O) of the Act and the appellant would be liable to face the legal consequences. If, on the other hand the appeal succeeds and the prohibition order is struck down as illegal and invalid, that would be the end of the matter.

4. Mr. Shanti Bhushan, learned Senior Advocate, appearing for the appellant assailed the government order prohibiting the continuance of lock-out in its factory, Garlick Engineering by raising a simple point. With reference to the closure notice, he submitted that the closure of the factory was in connection with three demands, namely, (i) the workmen

should abjure agitational activities and desist from intimidation and acts of violence, (ii) the workmen should accept a ceiling on dearness allowance and (iii) the workmen should agree to reduction of the workforce and retrenchment of a number of workers. He further submitted that out of the three demands the government had referred only one concerning the ceiling on dearness allowance for adjudication to the Industrial Tribunal and yet issued the notice prohibiting closure of the factory. Mr. Shanti Bhushan contended that as long as all the demands leading to the strike or the lock-out were not referred to adjudication under section 10(1) of the Act, it was not open to the government to prohibit the strike or the lock-out, as the case may be. Learned counsel submitted that the government would derive the legal authority to prohibit a strike or a lock-out in terms of section 10(3) only after it had referred for adjudication all the disputes leading to the strike or the lock-out, as the case may be. He further submitted that it was not open to the government to refer selectively only a few out of several demands for reference and yet prohibit the lock-out or the strike in connection with those demands and, thus, close all doors for the concerned party for realization of the demands that were left out of reference. He submitted that this position would be clear from a plain reading of section 10(3) of the Act which is as follows:

> 10(3): Where an *industrial dispute has been referred* to a Board, Labour Court, Tribunal or National Tribunal under this section, the appropriate government may by order prohibit the continuance of any strike or lockout *in connection with such disputes* which may be in existence on the date of the reference."
>
> (Emphasis added)

Learned counsel submitted that the power and the authority to prohibit a strike or lock-out could be exercised only in respect of such dispute(s) that had been referred to a Board, Labour

Court, Tribunal or National Tribunal. It necessarily followed that in case some of the disputes that had led to the strike or lock-out, as the case may be, were left out of the reference made under section 10(1) of the Act, the precondition for invoking section 10(3) would not be satisfied and it would not be permissible for the government to issue the prohibition order under that provision. In support of the submission, he relied upon a decision of this Court in *Delhi Administration, Delhi 17/03/2010vs. Workmen of Edward Keventers,* (1978) 1 SCC 634. In paragraphs 2, 4 and 6 of the decision on which reliance was placed by Mr. Shanti Bhushan the Court observed as follows:

> "2. A plain reading of the sub-section leaves no room for doubt in our minds that the High Court has correctly interpreted it. Indeed, the learned Judges have gone into details, although we in this affirming judgment desire to express ourselves only briefly. Two conditions are necessary to make Section 10(3) applicable. There must be an industrial dispute existing and such existing dispute must have been referred to a Board, Labour Court, Tribunal or National Tribunal under this section, namely, Section 10(1). Section 10 stands as a self-contained code as it were so far as this subject-matter is concerned. The prohibitory power springs into existence only when such dispute has been made the subject of reference under Section 10(1). What then is *such* dispute? The suchness of the dispute is abundantly brought out in the preceding portion of the sub-section. Clearly, there must be an industrial dispute in existence. Secondly, such dispute must have been already referred for adjudication. Then, and then alone, the power to prohibit in respect of such referred dispute can be exercised.
>
> 4. Shri Aggarwal pressed before us a ruling reported in *Keventers Karmachari Sangh v. Lt. Governor of Delhi* (1971) 2 LLJ 375, decided by the Delhi High Court.

Although the ratio there is contrary to the same High Court's ruling which is the subject-matter of the present appeal, we are obviously inclined to adopt the reasoning of the judgment under appeal. Imagine twenty good grounds of dispute being raised in a charter of demands by the workmen and the appropriate Government unilaterally and subjectively deciding against the workmen on nineteen of them and referring only one for adjudication. How can this result in the anomalous situation of the workmen being deprived of their basic right to go on strike in support of those nineteen demands. This would be productive not of industrial peace, which is the objective of the Industrial Disputes Act, but counter-productive of such a purpose. If Government feels that it should prohibit a strike under Section 10(3) it must give scope for the merits of such a dispute or demand being gone into by some other adjudicatory body by making a reference of all those demands under Section 10(1) as disputes. In regard to such disputes as are not referred under Section 10(1), Section 10(3) cannot operate. This stands to reason and justice and a demand which is suppressed by a prohibitory order and is not allowed to be ventilated for adjudication before a Tribunal will explode into industrial unrest and run contrary to the policy of industrial jurisprudence.

6. While we appreciate the strenuous efforts made by Shri Aggarwal to support the judgment and perhaps sympathise with him on the particular facts of this case, we cannot agree that hard cases can be permitted to make bad law. The appeal is dismissed, but since the workmen for obvious reasons have not been able to represent themselves in this Court, the normal penalty of costs against the appellant who loses cannot follow. The appeal is dismissed, but for the reasons above stated, there will be no order as to costs. "

5. Mr. Shanti Bhushan submitted that though the decision

in *Workmen of Edward Keventers* was rendered in a case of strike by workmen, for the present case the court should read it by substituting the word "lock-out" for "strike". Learned counsel submitted that lock-out was the obverse of strike and in industrial law strike and lock-out were the two sides of the same coin. The decision in *Workmen of Edward Keventers* would, therefore, equally apply to a case of lock-out. In support of the submission he relied upon two decisions of the Supreme Court, one in *The Management of Express Newspapers Ltd. vs. Workers & Staff Employed Under It and Ors.*, 1963 (3) SCR 540 and the other in *Management of Kairbetta Estate, Kotagiri vs. Rajamanickam and Ors.,* 1960 (3) SCR 371.

In *Management of Express Newspapers Ltd.*, it was observed as follows:

> "… The theoretical distinction between a closure and a lockout is well settled. In the case of a closure, the employer does not merely close down the place of business, but he closes the business itself; and so, the closure indicates the final and irrevocable termination of the business itself. Lockout, on the other hand, indicates the closure of the business itself. Experience of Industrial Tribunals shows that the Lockout is often used by the employer as a weapon in his armoury to compel the employees to accept his proposals just as a strike is a weapon in the armoury of the employees to compel the employer to accept their demands…."

And in *Management of Kairbetta*, it was observed as follows:

> "… Even so, the essential character of a lock-out continues to be substantially the same. Lock-out can be described as the antithesis of a strike. Just as a strike is a weapon available to the employees for enforcing their industrial demands, a lock-out is a weapon available to the employer to persuade by a coercive process the employees to see

his point of view and to accept his demands. In the struggle between capital and labour the weapon of strike is available to labour and is often used by it, so is the weapon of lock-out available to the employer and can be used by him. The use of both the weapons by the respective parties must, however, be subject to the relevant provisions of the Act. Chapter V which deals with strikes and lock-outs clearly brings out the antithesis between the two weapons and the limitations subject to which both of them must be exercised…."

6. Apart from the decisions of the Supreme Court, Mr. Shanti Bhushan also relied upon a decision of the Delhi High Court in *D.D. Gears Ltd. vs. Secretary (Labour) and Ors.,* 2006 Lab. I. C. 1462 and another of the Madras High Court in *Metal Box India Ltd. vs. State of Tamil Nadu & Ors.*, 1995 II L.L.N. 814. In the two High Court decisions the notices issued by the respective governments under section 10(3) prohibiting the lock-out of the factory by the management were held to be bad and illegal under similar circumstances, by applying the same reasoning as advanced by Mr. Shanti Bhushan and relying upon the decisions of this Court in *Workmen of Edward Keventers* and *Management of Express Newspapers Ltd*.

7. On the basis of the submissions made above, it was submitted that the prohibition notice coming under challenge in the present appeal was equally liable to be struck down.

8. The point so carefully crafted by Mr. Shanti Bhushan appears to be quite unexceptionable and there may not be any quarrel with the proposition that in a case where the strike or the lock-out is in connection with a number of disputes, the appropriate government would derive the authority and the power to prohibit, the lock-out or the strike, as the case may be, only if all the disputes are referred for adjudication under section 10(1) of the Act.

9. But let us see, how far the proposition applies to the present case.

10. We must begin with a brief summary of the facts of the present case. The appellant company had a division called Garlick Engineering at Ambernath which was engaged in the manufacture and sale of E.O.T. cranes. The undertaking maintained its own profit and loss account separately. Before the present conflict started between the parties, the employer and the workmen of the undertaking were bound and governed by the last settlement arrived at between the two sides on December 24, 1986. This settlement expired in June 1989 and on its expiry the third respondent submitted a charter of demands to the appellant. At that time the undertaking was in dire straits, so much so that at the end of 1990 its overhead losses for the past twenty seven months roughly worked out to Rs.9.89 crores as against the paid up public capital of Rs.5,99,99,980/-. It was not in a position even to pay the electricity charges and the provident fund dues of the employees. The appellant responded to the workmen's charter of demands by letter dated September 15, 1990, stating that it would be impossible to agree to any increase in wages and further that the only way forward was to impose a ceiling on the dearness allowance. This letter was followed by a notice dated November 24, 1990 given under section 9A of the Act. In this notice, the appellant proposed to peg the amount of dearness allowance of monthly and daily rated workmen at the cost of living index number 4524 worked out for the month of October 1990. In the notice, the appellant declared its intention to "effect the change to the effect that irrespective of the rise in the level of CPI over the CPI No.4524 as worked out in the month of October 1990, no workman shall receive DA over and above the CPI No.4524.". The workmen rejected the proposal and refused to accept any ceiling on dearness allowance. The dispute which, thus, arose between the employer and the workmen was taken up for conciliation under sections 11 and 12 of the Act. The conciliation, however, ended in failure on

September 10, 1991 and the failure report submitted by the conciliation officer concluded by stating as follows:

> "During the conciliation proceeding the Management did not attend the hearings most of the time & also did not put up any documents to show its worsening financial position since there was no possibility of settlement the failure was recorded and the conciliation proceedings were concluded on 10.9.1991."

In this connection, Mr. Colin Gonsalves, learned Senior Advocate for respondent no. 3, also invited our attention to the affidavit-in-reply filed by the State in the LPA filed by the petitioner before the division bench of the High Court from which the present appeal arises. In paragraph 3 of its affidavit, the State stated as follows:

> "… During conciliation proceedings, the Management did not attend the hearing most of the time and also has not shown any documents to show its worsening financial position. Since there was no possibility of settlement, failure was recorded and the conciliation proceedings were concluded. Hereto annexed and marked as EXHIBIT- "3" is the copy of the failure report dt.27.3.1992 submitted to the Government and copy was given to the respective parties…"

11. On receipt of the failure report of the conciliation proceedings, the state government referred the dispute concerning the ceiling on dearness allowance to the Industrial Tribunal, Thane under section 10(1) of the Act vide order dated February 12, 1992 which gave rise to Reference (IT) 3 of 1992.

12. Even before its demand concerning imposition of ceiling on dearness allowance was referred by the state government for adjudication to the Industrial Tribunal, the appellant issued the lock-out notice on September 28, 1991. In the notice, the reason for the proposed lock-out was stated

as follows:

> "The Management endeavoured to impress upon the office bearers/members of the said Association that the Management is not at all in a position to concede any further demands and they should agree for ceiling on DA. In addition to this, the office bearers/members of the Association were during several meetings, advised by the representatives of the Management that they should also agree for reduction of surplus, labour as it is not economically viable to run the said factory with the existing manpower/labour force. The office bearers/members of the said Association were sought to be taken into confidence from time to time by the Management and explained to them that the very existence/survival of the Undertaking is at stake and that they should see the reasons and realities and give up their Charter of Demands and they should agree to the ceiling of reduction in DA and reduction of surplus labour as also give up unlawful/agitational activities. However, no wiser counsel prevailed upon them. On the contrary, they resorted to various agitations/illegal/unlawful activities from time to time."

Here, it needs to be made clear that it was on the basis of the above passage in the lock-out notice that Mr. Shanti Bhushan argued that the lock-out was in connection with three materially separate demands. One, relating to the agitational activities of the workmen and the alleged intimidations and acts of violence committed by them, the other in respect of the imposition of ceiling on dearness allowance and the third, with regard to the reduction in the workforce and the retrenchment of a number of workers.

13. In reply, Mr. Colin Gonsalves, submitted that in regard to the alleged agitational activities of the workmen, the appellant had already filed a complaint under section 26 read with Item Nos.5 and 6 of Schedule III of the Maharashtra

Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, which was registered as Complaint (ULP) No.368 of 1991 in the Industrial Court of Maharashtra, Thane, titled *M/s Garlick Engineering Ambernath vs. Association of Engineering Workers and Ors.* On July 24, 1991, the date of filing of the complaint, the appellant had also obtained an *ex parte* order of injunction against the workmen. The complaint was eventually dismissed because the appellant stopped taking any steps in the proceeding but once having taken resort to the provisions of Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, any proceeding under the Industrial Dispute Act was barred by section 59 of the former Act and, therefore, there was no question of any reference of this particular demand by the petitioner under section 10(1) of the Act.

14. Mr. Gonsalves is undoubtedly right insofar as the appellant's grievance/demand with regard to the workmen's alleged activities are concerned. But in fairness to Mr. Shanti Bhushan it must be said that he did not much refer to this particular demand. His grievance was mainly with regard to the demand concerning retrenchment of a number of workers for reduction of the workforce and the state government's omission to refer it for adjudication.

15. In so far as the demand concerning retrenchment of workers is concerned, Mr. Gonsalves countered that it was equally a false alibi. He pointed out that the section 9A notice given by the management was only about putting a ceiling on dearness allowance paid to the daily rated and the monthly rated workers and there was no mention in it of any proposal for retrenchment of workers. Further, in the conciliation proceeding that took place in pursuance of the section 9A notice it was perfectly open to the management to raise any additional demand concerning retrenchment of workers but the appellant did not even properly take part in the protracted proceedings that continued for about 10 months, much less raising any additional demand.

Coming then to the lock-out notice in which the matter of retrenchment of workers was mentioned for the first time, Mr. Colin Gonsalves pointed out the manner in which it was put:

> "… In addition to this, the office bearers/members of the Association were during several meetings, **advised** by the representatives of the Management that they should also agree for reduction of surplus, labour as it is not economically viable to run the said factory with the existing manpower/labour force."

16. Mr. Gonsalves submitted that the matter of reduction of surplus labour was, thus, at best an advice by the appellant. He contended that the retrenchment of workers was never presented to the workmen as a demand by the appellant, the non-acceptance or rejection of which could give rise to an industrial dispute. In other words, on facts there was no industrial dispute concerning the retrenchment of workers in the factory that could form the subject matter of any reference for adjudication under section 10(1) of the Act.

17. From the legal point of view, Mr. Gonsalves argued that in the matter of retrenchment, the initiative always lies in the hands of the employer and the employer can, at all times, take steps for retrenchment of workers subject of course to the provisions of the Act. Hence, the mere fact that the matter of retrenchment of workers was not referred for adjudication under section 10(1) cannot be taken as a plea to defy the prohibition order issued under section 10(3) of the Act.

18. In short, learned counsel submitted that so far as the issue of retrenchment of workers is concerned, as a matter of fact, no such dispute between the parties had crystallised and come into existence for reference; further a dispute of such nature was not required to be referred for adjudication under section 10(1) of the Act because the retrenchment of workmen was always within the power of the employer. Hence, its non

reference would not vitiate or invalidate the impugned closure notice.

19. In reply to the submission of Mr. Gonsalves that no dispute concerning retrenchment of workmen ever came into existence, Mr. Shanti Bhushan submitted that for reference for adjudication it was not necessary that a dispute should come into existence but an apprehended dispute could also be referred under section 10(1) of the Act. In support of his submission he relied upon a Constitution Bench decision of this Court in *State of Madras vs. C.P. Sarathy and Anr.*, 1953 (4) SCR 334. He cited the following passage from the decision:

> "Moreover, it may not always be possible for Government, on the material placed before it, to particularise the dispute in its order of reference, for situations might conceivably arise where public interest requires that a strike or a lockout, either existing or imminent, should be ended or averted without delay, which under the scheme of the Act, could be done only after the dispute giving rise to it has been referred to a Board or a Tribunal (*vide* sections 10(3) and 23). In such cases Government must have the power, in order to maintain industrial peace and production, to set in motion the machinery of settlement with its sanctions and prohibitions without stopping to enquire what specific points the contending parties are quarrelling about, and it would seriously detract from the usefulness of the statutory machinery to construe section 10(1) as denying such power to Government. We find nothing in the language of that provision to compel such construction. The Government must, of course, have sufficient knowledge of the nature of the dispute to be satisfied that it is an industrial dispute within the meaning of the Act, as, for instance, that it relates to retrenchment or reinstatement. But, beyond this no obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under section 10(1) or to specify them in the order."

The proposition that an apprehended dispute can also form the subject matter of a reference under section 10(1) of the Act is well established, but we do not see any application of the principle or of the Constitution Bench decision relied upon by Mr. Shanti Bhushan in the facts of the case.

20. In reply to Mr. Gonsalves' second submission that since in the matter of retrenchment the initiative always remained in the hands of the employer, there was no need to make any reference of the demand of retrenchment made by the employer, Mr. Shanti Bhushan submitted that the employer might be free to carry out retrenchment of workers on its own but that would not prevent it to have the legal confirmation of its action in advance by raising a demand for retrenchment and getting it referred for adjudication under section 10(1) of the Act.

The submission though apparently reasonable, is quite fallacious as it would nullify and render meaningless a whole lot of provisions of the Act.

21. Retrenchment is defined in the Act to mean termination of the service of a workman by the employer for any reason whatsoever, otherwise than as punishment for any misconduct and further subject to the four exceptions enumerated in clauses (a), (b), (bb) and (c) of section 2(oo) of the Act. Retrenchment being termination of service for no fault on the part of the workman is likely to visit the concerned worker(s) and his/their families with disastrous consequences. Retrenchment is an important and serious issue in industrial law since its wanton and improper use can become a major source of industrial unrest and disharmony. The issue of retrenchment is, therefore, not left uncontrolled but is regulated in great detail by the law. The Industrial Disputes Act lays down not only certain inflexible preconditions that must be satisfied before an employer can resort to retrenchment but also a detailed procedure following which retrenchment can be carried out. Section 9A provides

that no employer proposing to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule shall effect such change without giving twenty one days notice in the prescribed manner of the nature of change proposed to be effected. Item No.11 of the Fourth Schedule deals with any increases or reduction (other than casual) in the number of persons employed or to be employed in any occupation or process or department or shift (not occasioned by circumstances over which the employer has no control).

22. Then, we come to Chapters VA and VB of the Act which were inserted with effect from October 24, 1953 and March 5, 1976 respectively. Chapter VA contains sections 25A to 25H dealing with lay-off and retrenchment. Section 25A excludes the application of sections 25C to 25E to certain industrial establishments, including those covered by the provisions of Chapter VB. Section 25B gives the definition of continuous service. Section 25F lays down the conditions precedent to retrenchment of workmen and requires the employer to give notice to the appropriate government/ prescribed authority apart from giving one month's notice in writing or one month's wages in lieu of the notice and payment of retrenchment compensation to the concerned workman(en). Section 25FF provides for compensation to workmen in case of transfer of undertakings. Section 25FFF provides for compensation to workmen in case of closing down of undertakings. Section 25G lays down the procedure for retrenchment and provides that retrenchment should follow the principle of last come, first go. Section 25H deals with re-employment of retrenched workers. Section 25J has the non-obstante clause and lays down that the provisions of chapter VA would have effect notwithstanding anything inconsistent therewith contained in any other law, including standing orders made under the Industrial Employment (Standing Orders) Act, 1946.

23. Chapter VB has "Special Provisions" relating to lay-off, retrenchment and closure in certain establishments. The provisions of chapter VB (from section 25K to section 25S) apply to industrial establishments (not of a seasonal character or in which work is performed only intermittently) in which not less than one hundred workmen were employed on an average per working day in the past 12 months. It is not in dispute that the number of workers employed by Garlick Engineering was in excess of hundred and, therefore, the industrial establishment was covered by the provisions of Chapter VB]. Section 25L contains the definitions. Section 25M prohibits lay-off except under certain conditions. Section 25N lays down the conditions precedent for the retrenchment of workmen and it is as follows:

> *"25N. Conditions precedent to retrenchment of workmen.-* (1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,-
>
> (a) the workman has been given three months notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and
>
> (b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.
>
> (2) An application for permission under sub-section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served

simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the persons interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where an application for permission has been made under sub-section (1) and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(5) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(6) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (3) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

(8) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such establishment for such period as may be specified in the order.

(9) Where permission for retrenchment has been granted under sub-section (3) or where permission for retrenchment is deemed to be granted under sub-section (4), every workman who is employed in that establishment immediately before the date of application for permission under this section shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen days average pay for every completed year of continuous service or any part thereof in excess of six months."

Section 25Q lays down the penalty for lay-off and retrenchment without previous permission.

24. As may be seen from Section 25N, it has a complete scheme for retrenchment of workmen in industrial

establishments where the number of workers is in excess of hundred. Clauses (a) & (b) lay down the conditions precedent to retrenchment and provide for three months' notice or three months' wages in lieu of the notice to the concerned workmen *and* the *prior* permission of the appropriate government/ prescribed authority. Sub-section (2) & (3) plainly envisage the appropriate government/prescribed authority to take a quasi-judicial decision and to pass a reasoned order on the employer's application for permission for retrenchment after making a proper enquiry and affording an opportunity of hearing not only to the employer and the concerned workmen but also to the person interested in such retrenchment. Sub-section (4) has the provision of deemed permission. Sub-section (5) makes the decision of the government binding on all parties. Sub-section (6) gives the government the power of review and the power to refer the employer's application for permission to a tribunal for adjudication. Any retrenchment without obtaining prior permission of the government is made expressly illegal by sub-section (7) with the further stipulation that the termination of service in consequence thereof would be *void ab initio*. Sub-section (8) empowers the government to exempt the application of sub-section (1) under certain exceptional circumstances and sub-section (9) provides for payment of retrenchment compensation to the concerned workmen.

25. The procedural details for seeking prior permission of the appropriate government for carrying out retrenchment under section 25N are laid down in rule 76A of the Industrial Disputes Central Rules. The application for permission for retrenchment is to be made in Form PA and that requires the employer to furnish all the relevant materials in considerable detail.

26. It is, thus, seen that the subject of retrenchment is fully covered by the statute. It is not left open for the employer to make a demand in that connection and to get the ensuing industrial dispute referred for adjudication in terms of section 10(1) of the Act

27. In face of such detailed regulatory mechanism provided for in the Act and the Rules, we find the submission of Mr. Shanti Bhushan completely unacceptable. To say, that even without following the provisions of section 25N of the Act, it is open to the employer to raise a demand for retrenchment of workmen and to ask the government to refer the ensuing dispute to the Industrial Tribunal for adjudication, would tantamount to substituting a completely different mechanism in place of the one provided for in the Act to determine the validity and justification of the employer's request for retrenchment of workers. It is true that under section 25N the authority to grant or refuse permission for retrenchment is vested in the appropriate government which in this case would be the state government or the authority specified by it. Under section 10(1) too it is the state government that would make a reference of the industrial dispute. But the two provisions are not comparable. The nature of the power of the state government and its functions under the two provisions are completely different. In making the reference (or declining to make the reference) under section 10(1) of the Act the state government acts in an administrative capacity whereas under section 25N(3) its power and authority are evidently quasi judicial in nature (see the Constitution Bench decision of this court in *Workmen of Meenakshi Mills Ltd. and Ors. vs. Meenakshi Mills Ltd. and Anr.*, (1992) 3 SCC 336, paragraphs 28 to 30). Further, though section 25N(6) has the provision to refer the matter to the tribunal for adjudication, that provision is completely different from section 10(1). A reference under section 10(1) of the Act cannot be used to circumvent or bypass the statutory scheme provided under section 25N of the Act. This is, however, not to say that there cannot be any dispute on the subject of retrenchment that can be referred to the tribunal for adjudication. A dispute may always be raised by or on behalf of the retrenched workmen questioning the validity of their retrenchment. Similarly, the employer too can raise the dispute in case denied permission for retrenchment by the government. [It is another matter that the chances of the disputes

being referred for adjudication are quite remote: see *Workmen of Meenakshi Mills Ltd.*, (s*upra)* paragraphs 56 & 57]. But the point to note is that the occasion to raise the demand/dispute comes after going through the statutory provisions of section 25N on the Act.

28. The view taken by us is fully supported by a Constitution Bench decision of this Court in *Workmen of Meenakshi Mills Ltd.*. In a more recent decision of this Court in *Oswal Agro Furane Ltd. and Anr. vs. Oswal Agro Furane Workers Union and Ors.*, (2005) 3 SCC 224, this Court even went to the extent of holding that there cannot be any settlement between the parties, superseding the provisions of sections 25N and 25O of the Act. In paragraphs 14, 15 and 16, of the decision, the Court observed as follows:

> "14. A bare perusal of the provisions contained in Sections 25-N and 25-O of the Act leaves no manner of doubt that the employer who intends to close down the undertaking and/or effect retrenchment of workmen working in such industrial establishment, is bound to apply for prior permission at least ninety days before the date on which the intended closure is to take place. They constitute conditions precedent for effecting a valid closure, whereas the provisions of Section 25-N of the Act provides for conditions precedent to retrenchment; Section 25-O speaks of procedure for closing down an undertaking. Obtaining a prior permission from the appropriate Government, thus, must be held to be imperative in character.
>
> 15. A settlement within the meaning of Section 2(p) read with sub-section (3) of Section 18 of the Act undoubtedly binds the workmen but the question which would arise is, would it mean that thereby the provisions contained in Sections 25-N and 25-O are not required to be complied with? The answer to the said question must be rendered in the negative. A settlement can be arrived at between

> the employer and workmen in case of an industrial dispute. An industrial dispute may arise as regard the validity of a retrenchment or a closure or otherwise. Such a settlement, however, as regard retrenchment or closure can be arrived at provided such retrenchment or closure has been effected in accordance with law. Requirements of issuance of a notice in terms of Sections 25-N and 25-O, as the case may, and/or a decision thereupon by the appropriate Government are clearly suggestive of the fact that thereby a public policy has been laid down. The State Government before granting or refusing such permission is not only required to comply with the principles of natural justice by giving an opportunity of hearing both to the employer and the workmen but also is required to assign reasons in support thereof and is also required to pass an order having regard to the several factors laid down therein. One of the factors besides others which is required to be taken into consideration by the appropriate Government before grant or refusal of such permission is the interest of the workmen. The aforementioned provisions being imperative in character would prevail over the right of the parties to arrive at a settlement. Such a settlement must conform to the statutory conditions laying down a public policy. A contract which may otherwise be valid, however, must satisfy the tests of public policy not only in terms of the aforementioned provisions but also in terms of Section 23 of the Indian Contract Act.
>
> 16. It is trite that having regard to the maxim "*ex turpi causa non oritur actio*", an agreement which opposes public policy as laid down in terms of Sections 25-N and 25-O of the Act would be void and of no effect. The Parliament has acknowledged the governing factors of such public policy. Furthermore, the imperative character of the statutory requirements would also be borne out from the fact that in terms of sub-section (7) of Section 25-N and sub-section (6) of Section 25-O, a legal fiction has been

created. The effect of such a legal fiction is now well-known. [See *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, (1951) 2 All ER 587, *Om Hemrajani v. State of U.P.*, (2005) 1 SCC 617 and *Maruti Udyog Ltd. v. Ram Lal* (2005) 2 SCC 638."

29. In light of the discussions made above, we arrive at the conclusion that on the material date there was no dispute on the basis of any demand raised by the appellant in regard to retrenchment of any workers in the factory, Garlick Engineering. Secondly, and more importantly, any retrenchment of worker(s) can only be effected by following the provisions laid down under the Act and the Rules. It follows that it is not open to the management to make a demand/proposal for retrenchment of workmen and disregarding the provisions of the Act ask the government to refer the demand/dispute under section 10(1) to the tribunal for adjudication. The only demand raised by the management regarding imposition of ceiling on dearness allowance was already referred to the Industrial Tribunal. Hence, the appropriate government was fully competent and empowered to issue the impugned order prohibiting closure of the factory. There was no illegality or infirmity in the closure notice.

30. We find no merit in the appeal. It is, accordingly, dismissed with costs.

K.K.T. Appeal dismissed.

JAFARIA

v.

UNION OF INDIA & ORS.

(Writ Petition (Criminal) No. 49 of 2009)

MARCH 22, 2010

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

Constitution of India, 1950:

Articles 32 and 21 – Writ of habeas Corpus – Pakistani national, convicted by Court of Session in India – Continued to be in prison in India, after serving the full sentence – HELD: In view of specific information that the Government of India has taken a decision to repatriate the petitioner, no further direction is required – International Law – Repatriation.

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 49 of 2009.

Under Article 32 of the Constitution of India.

B.S. Billoria, Dinesh Kumar Garg for the Petitioner.

Gopal Subramanium, SG, Dr. Manish Singhvi, AAG, Aman Ahluwalia, S.N. Terdal, Devanshu Kumar Devesh, Vinay Kumar Sharma, Milind Kumar for the Respondents.

The following Order of the Court was delivered

O R D E R

1. According to the petitioner, he is a permanent resident of Chorewala, District Rahimiarkhan, Pakistan and has been illegally detained for the last three and a half years in Central Jail, Jaipur though he has undergone actual sentence of nine years awarded by Sessions Court in Sessions Case No. 228 of 1997 by judgement dated 16.01.2006. The present confinement, according to him, is contrary to Article 21 of the Constitution of India. In the writ petition he has also highlighted

various details and finally prayed for issuance of a writ of Habeas Corpus to release him from Central Jail, Jaipur forthwith.

2. Pursuant to the notice issued by this Court, State of Rajasthan has filed a counter affidavit stating that they have no objection in releasing the petitioner from Central Jail, Jaipur.

3. On behalf of the Government of India, Deputy Secretary (Foreigners) in the Ministry of Home Affairs, filed an affidavit highlighting its stand. Mr. Gopal Subramanium, learned Solicitor General appearing for the Union of India, by drawing our attention to paragraph 10 of the said affidavit submitted that in view of the decision taken by the Union of India, no direction is required from this Court. It is useful to refer paragraph 10 of the said affidavit which reads as under:

> 'Most respectfully, it is further submitted that for the repatriation of all Pak nationals including Mr. Jafaria, who have completed their sentence and who have been confirmed by the Pakistani authorities as Pakistani nationals, this Ministry had sought 'No Objection' from the State Governments concerned (including Government of Rajasthan in respect of Mr. Jafaria). No objection from the Government of Rajasthan in respect of Mr. Jafaria has since been received. It has accordingly been decided to repatriate Mr. Jafaria to Pakistan on 25th March, 2010 through the Attari-Wagha border'.

4. In view of the specific information that the Government of India has taken a decision to repatriate the petitioner namely, Jafaria, to Pakistan on 25th March, 2010 through Attari-Wagha Border, no further direction is required except recording the above information. This Court appreciates the efforts made by the learned Solicitor General and the ultimate decision by the Government of India.

5. With the above observation, the writ petition is disposed of.

R.P. Writ Petition disposed of.

STATE OF HARYANA AND ORS.
v.
JAGDISH
(Criminal Appeal No. 566 of 2010)

MARCH 22, 2010

[K.G. BALAKRISHNAN, CJI., J.M. PANCHAL AND DR. B.S. CHAUHAN, JJ.]

Constitution of India, 1950 – Articles 161 and 72 – Life convict – Pre-mature release – Powers of clemency – Respondent convicted and sentenced to life imprisonment as a Class 3 prisoner – He sought pre-mature release after serving more than 10 years of imprisonment – Case for pre-mature release of respondent – To be considered as per policy prevailing on date of his conviction, i.e. policy dated 4-2-1993 or as per short sentencing policy subsequently introduced on 13-8-2008 – Policy dated 04-02-1993 referred to exercise of powers under Article 161 of the Constitution whereas policy dated 13-8-2008 was in exercise of powers under s.432 r/w ss.433 and 433-A CrPC – Held: The power exercised under Article 161 of the Constitution is a mandate of the Constitution while the policy dated 13-8-2008 is under a rule of procedure which is subordinate to the Constitution – Policy dated 13-8-2008 therefore cannot override the policy dated 4-2-1993 – Also, the State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for pre-mature release would be considered after serving the sentence, as prescribed in the short sentencing policy existing on that date – Thus, on facts, the case of respondent was to be considered on the strength of policy dated 4-2-1993 and not in terms of policy dated 13-8-2008 – Code of Criminal Procedure, 1973 – ss.432, 433 and 433-A – Prisons Act, 1894 – s.59(5).

Doctrines – Doctrine of "legitimate expectation" – Applicability of.

Constitution of India, 1950 – Articles 161 and 72 – Clemency power of the Executive – Held: Is absolute and unfettered – The provisions contained under Article 72 or 161 of the Constitution cannot be restricted by ss.432, 433 and 433-A CrPC – Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency under Article 72/161 of the Constitution – Code of Criminal Procedure, 1973 – ss. 432, 433 and 433A.

Administration of Justice – Criminal Justice – Exercise of clemency powers – Held: Considerations of public policy and humanitarian impulses support the concept of executive power of clemency.

Maxims –"Vana est illa potentia quae nunquam venit in actum" and "Veniae facilitas incentivum est delinquendi" – Discussed.

Sentencing – Object and relevancy of – Discussed.

Respondent was convicted under ss.302, 148 and 149 IPC and sentenced to life imprisonment in 1999.

After having served more than 10 years imprisonment, respondent filed application before the High Court praying for consideration of his case for grant of clemency as per the policy prevailing on the date of his conviction, i.e. policy dated 4-2-1993. Respondent contended that his case for pre-mature release was not being considered in view of the policy of short sentencing introduced on 13-8-2008 under s.432 r/w ss.433 and 433-A, CrPC.

The High Court held in favour of the respondent

holding that his case for pre-mature release was required to be considered in the light of the policy existing on the date of his conviction and thus, issued direction to the State Authorities to consider his case for pre-mature release in terms of the policy dated 4-2-1993.

In appeal to this Court, the appellant-State contended that it has unfettered power to lay down a policy in regard to remission of sentence; that short sentencing policies are merely executive instructions having no statutory force, therefore, do not create any legal/vested right in favour of the convict; that having regard to the provisions of ss.54, 55 IPC and s.433A CrPC, no interference was required by the High Court and the case of respondent for pre-mature release had to be considered in view of the policy dated 13-8-2008.

Respondent, on the other hand, contended that all remission schemes are issued making reference to Article 161 of the Constitution; that the clemency power of the executive cannot be subjected to any law whatsoever and thus, a legal right stood crystallised in favour of the convict, to be considered for pre-mature release in view of the scheme prevailing on the date of his conviction; that such scheme envisaged at least a promise; that the provisions of the Prisons Act, 1894 and rules framed under it create legal right in favour of the convict and that such rights cannot be taken away by the policy dated 13-8-2008.

The Amicus Curiae submitted that even if there is no vested right of the convict to be considered for pre-mature release, in view of the policy prevailing on the date of his conviction, at least a human element of expectation that the convict would have remission as per the guidelines prevailing on the date of his conviction cannot be ruled out; that even if the convict does not satisfy the requirement of the remission policy dated 13-8-2008, his

case can always be considered for remission under the provisions of Article 72 or 161 of the Constitution and it will be for the President or the Governor, as the case may be, to take a view in the matter.

Dismissing the appeal, the Court

HELD: 1.1. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, whoever the sovereignty might be. Every civilised society recognises and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in appropriate cases. This power is also an act of justice, supported by a wise public policy. It cannot, however, be treated as a privilege. It is as much an official duty as any other act. It is vested in the Authority not for the benefit of the convict only, but for the welfare of the people; who may properly insist upon the performance of that duty by him if a pardon or parole is to be granted. [Paras 32, 40] [745-E; 750-G-H; 751-A]

1.2. The legal maxim, "Veniae facilitas incentivum est delinquendi", is a caveat to the exercise of clemency powers, as it means -"Facility of pardon is an incentive to crime." It may also prove to be a "grand farce", if granted arbitrarily, without any justification, to "privileged class deviants". Thus, no convict should be a "favoured recipient" of clemency. [Para 36] [749-B-C]

1.3. The State has to achieve the goal of protecting the society from convict and also to rehabilitate the offender. The Remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activity and is required to be rehabilitated. Objectives of the punishment are wholly or predominantly reformative and preventive. The basic principle of punishment that "guilty must pay for his

crime" should not be extended to the extent that punishment becomes brutal. The matter is required to be examined keeping in view modern reformative concept of punishment. The concept of "Savage Justice" is not to be applied at all. The sentence softening schemes have to be viewed from a more human and social science oriented approach. Punishment should not be regarded as the end but as only the means to an end. The object of punishment must not be to wreak vengeance but to reform and rehabilitate the criminal. More so, relevancy of the circumstances of the offence and the state of mind of the convict, when the offence was committed, are the factors, to be taken note of. [Para 37] [749-D-H; 750-A]

1.4. At the time of considering the case of pre-mature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances. [Para 38] [750-A-C]

1.5. Considerations of public policy and humanitarian impulses – supports the concept of executive power of clemency. If clemency power is exercised and sentence is remitted, it does not erase the fact that an individual was convicted of a crime. It merely gives an opportunity to the convict to reintegrate into the society. The modern penology with its correctional and rehabilitative basis emphasise that exercise of such power be made as a means of infusing mercy into the justice system. Power of clemency is required to be

pressed in service in an appropriate case. Exceptional circumstances, e.g. suffering of a convict from an incurable disease at last stage, may warrant his release even at much early stage. '*Vana Est Illa Potentia Quae Nunquam Venit In Actum*' means-vain is that power which never comes into play. [Para 39] [750-C-F]

K.M. Nanavati v. State of Bombay **AIR 1961 SC 112, referred to.**

Salmond on Jurisprudence by P.J. Fitzgerald (12th Edition) and *Jurisprudence by R.M.V.Dias* **(5th Edition, 1985), referred to.**

2.1. The power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the Constitution. This power was never intended to be used or utilised by the Executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. However, the exercise of such power under Article 161 of the Constitution or under Section 433A Cr PC may have a different flavour in the statutory provisions, as short sentencing policy brings about a mere reduction in the period of imprisonment whereas an act of clemency under Article 161 of the Constitution commutes the sentence itself. Since this matter relates to the State of Haryana, the Governor of Haryana may exercise the clemency power. [Paras 27, 30] [742-G-H; 743-A-D; 744-G]

2.2. Articles 72 and 161 of the Constitution provide for a residuary sovereign power, thus, there can be nothing to debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances so warrant. [Para 33] [746-A-B]

2.3. The clemency power of the Executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A Cr. P.C. though the Authority has to meet the certain requirements while exercising the clemency power. To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short-sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered. [Para 35] [746-G-H; 747-A]

2.4. Not only the provisions of Section 433-A Cr. P.C. would apply prospectively but any scheme for short sentencing framed by the State would also apply prospectively. This is in conformity with the provisions of Articles 20(1) and 21 of the Constitution. The expectancy of period of incarceration is determined soon after the conviction on the basis of the applicable laws and the established practices of the State. When a short sentencing scheme is referable to Article 161 of the Constitution, it cannot be held that the said scheme cannot be pressed in service. Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency under the provisions of Article 72 and 161 of the Constitution. Right

of the convict is limited to the extent that his case be considered in accordance with the relevant rules etc., he cannot claim pre-mature release as a matter of right. [Para 35] [747-C-F]

Maru Ram v. Union of India **(1981) 1 SCC 107, followed.**

State of Haryana v. Mahender Singh & Ors. **(2007) 13 SCC 606 and** *State of Haryana v. Bhup Singh* **AIR 2009 SC 1252, affirmed.**

State of Haryana & Ors. v. Balwan **AIR 1999 SC 3333;** *Gopal Vinayak Godse v. State of Maharashtra & Ors.* **AIR 1961 SC 600;** *Pt. Kishorilal v. Emperor* **AIR 1946 P.C. 64;** *Dalbir Singh & Ors. v. State of Punjab* **AIR 1979 SC 1384;** *State of Haryana v. Nauratta Singh & Ors.* **AIR 2000 SC 1179;** *Swamy Shraddananda @Murali Manohar Mishra v. State of Karnataka* **AIR 2008 SC 3040;** *Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh* **AIR 2010 SC 420;** *Mohd. Munna v. Union of India* **(2005) 7 SCC 417;** *State of Punjab v. Joginder Singh*, **AIR 1990 SC 1396;** *Laxman Naskar v. Union of India & Ors.* **(2000) 2 SCC 595;** *Ashok Kumar @ Golu v. Union of India & Ors.* **AIR 1991 SC 1792;** *Bhagirath v. Delhi Administration* **AIR 1985 SC 1050;** *Kehar Singh & Anr. v. Union of India & Anr.* **AIR 1989 SC 653;** *Epuru Sudhakar & Another v. Govt. of A.P. & Ors.* **AIR 2006 SC 3385;** *Swaran Singh v. State of U.P.* **AIR 1998 SC 2026;** *Satpal & Anr. v. State of Haryana & Ors.* **AIR 2000 SC 1702;** *Bikas Chatterjee v. Union of India* **(2004) 7 SCC 634;** ***G.*** *Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors.* **(1976) 1 SCC 157 and** *Regina v. The Secretary of State for the Home Department* **(1996) EWCA Civ 555, referred to.**

3.1. Section 59 (5) of the Prisons Act, 1894 enables the Government to frame rules for "award of marks and shortening of sentence". The Rules framed thereunder provide for classification of prisoners according to the intensity and gravity of the offence. According to the

classification of prisoners, Class 1 prisoners are those who had committed heinous organized crimes or specially dangerous criminals. Class 2 prisoners include dacoits or persons who commit heinous organized crimes. Class 3 prisoners are those who do not fall within Class 1 or Class 2. The instant case falls in Class 3, not being a case of organized crime or by professionals or hereditary or specially dangerous criminals. The aforesaid rules are statutory rules, not merely executive instructions. Therefore, a "lifer" has a right to get his case considered within the parameters laid down therein. More so, consistent past practice adopted by the State can furnish grounds for legitimate expectation [Para 41] [751-B-G; 752-A]

3.2. As per the information furnished by the appellant-State, the respondent has served more than 14 years (actual) prior to the date of judgment impugned herein. By now, the respondent has served (actual) for more than 15 years. Respondent falls in category 3 of the prisoners as he did not indulge in any organised crime. [Para 44] [753-B-C]

Official Liquidator v. Dayanand & Ors. **(2008) 10 SCC 1, relied on.**

Sadhu Singh v. State of Punjab **AIR 1984 SC 739, referred to.**

4.1. In the present case, the earlier policies including the policy dated 04-02-1993 refers to the exercise of powers under Article 161 of the Constitution whereas the policy dated 13-08-2008 is in exercise of the powers under Section 432 read with Sections 433 and 433-A of CrPC. The restriction under Section 433-A is only to the extent of the powers to be exercised in respect of offences as referred to under Section 432 Cr.P.C. The

notification dated 13-08-2008 is, therefore, under a rule of procedure, which is subordinate to the Constitution. The power exercised under Article 161 of the Constitution is obviously a mandate of the Constitution and, therefore, the policy dated 13-08-2008 cannot override the policy dated 04-02-1993. [Para 42] [752-B-D]

4.2. The right of the respondent prisoner, therefore, to get his case considered at par with such of his inmates, who were entitled to the benefit of the said policy, cannot be taken away by the policy dated 13.08.2008. This is evident from a bare perusal of the recitals contained in the policies prior to the year 2008, which are referable to Article 161 of the Constitution. The High Court, therefore, was absolutely justified in arriving at the conclusion that the case of the respondent was to be considered on the strength of the policy that was existing on the date of his conviction. The State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for pre-mature release would be considered after serving the sentence, prescribed in the short sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose it should relate to a policy which, in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a "lifer" for pre-mature release, he should be given benefit thereof. [Para 43] [752-E-H; 753-A]

4.3. The appellant-State Government is directed to proceed to calculate the sentence for the purpose of consideration of remission in the case of respondent as per the policy dated 4-2-1993. [Para 45] [753-D]

Case Law Reference:

AIR 1999 SC 3333	referred to	Para 2
(2007) 13 SCC 606	affirmed	Para 2
AIR 2009 SC 1252	affirmed	Para 2
(1981) 1 SCC 107	followed	Para 11
AIR 1961 SC 600	referred to	Para 13
AIR 1946 P.C. 64	referred to	Para 13
AIR 1979 SC 1384	referred to	Para 14
AIR 2000 SC 1179	referred to	Para 15
AIR 2008 SC 3040	referred to	Para 16
AIR 2010 SC 420	referred to	Para 17
(2005) 7 SCC 417	referred to	Para 18
AIR 1990 SC 1396	referred to	Para 22
AIR 1984 SC 739	referred to	Para 23
(2000) 2 SCC 595	referred to	Para 24
AIR 1991 SC 1792	referred to	Para 25
AIR 1985 SC 1050	referred to	Para 25
AIR 1989 SC 653	referred to	Para 25
AIR 2006 SC 3385	referred to	Para 28
AIR 1998 SC 2026	referred to	Para 29
AIR 2000 SC 1702	referred to	Para 29
(2004) 7 SCC 634	referred to	Para 29
AIR 1961 SC 112	referred to	Para 32
(1976) 1 SCC 157	referred to	Para 33

(1996) EWCA Civ 555 referred to Para 34

(2008) 10 SCC 1 relied on Para 41

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 566 of 2010.

From the Judgment & Order dated 17.2.2009 of the High Court of Punjab & Harayana at Chandigarh in Crl. Misc. No. M-641 of 2009.

Gopal Subramanium, Sol. Genl. of India (A.C.), P.N. Mishra Manjit Singh, AAG, Kamal Mohan Gupta for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Delay condoned. Leave granted.

2. This matter has come up before us upon reference having been made by a Two-Judge Bench vide order dated 04.11.2009 upon noticing an inconsistency in the views expressed by this Court in the case of *State of Haryana & Ors. v. Balwan* AIR 1999 SC 3333 on one hand and in the cases of *State of Haryana v. Mahender Singh & Ors.* (2007) 13 SCC 606; and *State of Haryana v. Bhup Singh* AIR 2009 SC 1252, on the other hand. The inconsistency, which was pointed out in the said order was noticed by taking into account the para 5 of the judgment in *Balwan* (supra) which is as follows :-

> ".....However, in order to see that a life convict does not lose any benefit available under the remission scheme which has to be regarded as the guideline, it would be just and proper to direct the State Government to treat the date on which his case is/was required to be put up before the Governor under Article 161 of the Constitution as the relevant date with reference to which their cases are to be considered ....."

3. The views expressed in *Mahender Singh* (supra) and *Bhup Singh* (supra) were as follows :-

Mahender Singh (supra)

> "40. Whenever, thus, a policy decision is made, persons must be treated equally in terms thereof. A' fortiori the policy decision applicable in such cases would be which was prevailing at the time of his conviction."

Bhup Singh (supra)

> "10..... The right to ask for remission of sentence by a life convict would be under the law as was prevailing on the date on which the judgment of conviction and sentence was passed .....
>
> 11. .....It is, therefore, directed that if the respondents have not already been released, the State shall consider their cases in terms of the judgment of this Court in Mahender Singh case having regard to the policy decision as was applicable on the date on which they were convicted and not on the basis of the subsequent policy decision of the year 2002...."

4. The question that has been posed before us is as to whether the policy which makes a provision for remission of sentence, should be that which was existing on the date of the conviction of the accused or it should be the policy ˇthat exists on the date of consideration of his case for pre-mature release by the appropriate authority?

5. In the instant case, we find that the respondent, herein, has been granted the relief by the Punjab and Haryana High Court for consideration of his case for grant of clemency as per the policy prevailing on the date of his conviction. The respondent was convicted and sentenced for life imprisonment vide judgment and order dated 20.05.1999 and the policy which was in existence at that point of time was dated 04.02.1993.

The respondent, having served more than 10 years imprisonment, approached the High Court that in spite of having undergone the sentence as per the aforesaid policy dated 04.02.1993, his case for pre-mature release was not being considered in view of the new policy of short sentencing, introduced on 13.08.2008. The policy dated 13.8.2008 has been brought on record, which expressly recites that the same was being issued in exercise of the powers conferred by Sub-Section (1) of Section 432 read with Section 433 of Criminal Procedure Code (hereinafter called Cr.P.C.), 1973. The same further recites that it is in supersession of the Government Memorandum dated 12.04.2002 *and all other earlier policies.*

6. The respondent was involved in a case, the FIR whereof was registered ˇon 16.01.1995 and he was convicted vide judgment and order dated 20.5.1999 under Sections 302, 148 and 149 Indian Penal Code (hereinafter called IPC), 1860. In the above background, the respondent filed a Criminal Misc. Application before the High Court. The Court placing reliance on the judgments of this Court in *Mahender Singh* (supra) and *Bhup Singh* (supra) came to the conclusion that the case of the respondent for pre-mature release was to be considered in the light of the short sentencing policy existing on the date of his conviction and thus, a direction was issued to the State Authorities to consider his case for pre-mature release in view of the policy dated 4.2.1993 existing on the date of his conviction i.e. 20th May, 1999 within a period of one month from the date of receipt of the certified copy of the judgment. Hence, this appeal. In view of the conflicting views in various judgments of this Court, reference has been made to the larger Bench.

7. Heard Shri Gopal Subramanium, learned Solicitor General, Amicus Curiae, Shri P.N. Mishra, learned senior counsel appearing for the State of Haryana, Shri B.S. Malik, Senior Advocate, Shri Manoj Swarup, Shri D.P. Singh and Shri Sanjay Jain, Advocates for respondents.

8. Shri P.N. Mishra, learned senior counsel appearing for

the State of Haryana has submitted that State has unfettered power to lay down a policy in regard to remission of sentence. The short sentencing policies are merely executive instructions having no statutory force, therefore, do not create any legal/ vested right in favour of the convict. Having regard to the provisions of Sections 54, 55 IPC and Section 433-A Cr.P.C., no interference was required by the High Court. Case of the respondent for pre-mature release would be considered in view of the policy dated 13.8.2008. Thus, the judgment and order of the High Court impugned herein, is liable to be set aside.

9. On the contrary, learned counsel appearing for the respondent in this appeal and other connected cases, which are being disposed of by separate order, have contended that all remission schemes were issued making reference to Article 161 of the Constitution of India (hereinafter called the Constitution). The clemency power of the executive cannot be subjected to any law whatsoever and thus, a legal right stood crystallised in favour of the convict, to be considered for pre-mature release in view of the scheme prevailing on the date of his conviction. They have emphasised that such scheme envisaged at least a promise and in view of the provisions of Articles 20(1) and 21 of the Constitution, the conditions contained in subsequent policies being more stringent cannot be enforced against the “lifer”. Provisions of the Prisons Act, 1894 (hereinafter called as ‘Act 1894’) and rules framed under it create legal right in favour of the convict. Such rights cannot be taken away by presently prevailing policy dated 13.8.2008. No policy can be framed in derogation of the statutory rules. However, in case a lenient policy is enforced at subsequent stage, the same can be made applicable and thus, the judgment and order of the High Court does not require any interference. The appeal is liable to be dismissed.

10. Shri Gopal Subramanium, learned Solicitor General who appeared as Amicus Curiae, has submitted that even if there is no vested right of the convict to be considered for pre-

mature release, in view of the policy prevailing on the date of his conviction, at least a human element of expectation that the convict would have remission as per the guidelines prevailing on the date of his conviction cannot be ruled out. Even if the convict does not satisfy the requirement of presently existing remission policy dated 13.8.2008, his case can always be considered for remission under the provisions of Article 72 or 161 of the Constitution and it will be for the President or the Governor, as the case may be, to take a view in the matter in conformity with the decision in *Maru Ram v. Union of India* (1981) 1 SCC 107.

11. We have considered the rival submissions made by learned counsel for the parties and perused the record.

12. In the instant case, the respondent was convicted on 20th May, 1999 and sentenced for life imprisonment. Remission policy has been changed from time to time and provided mainly as under:

Date of Policy	**Minimum required sentence for pre-mature release**
4th February, 1993 (a) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life for having and after earning at least 6 years committed a **heinous crime** such as:- murder with wrongful confinement, for extortion/ robbery; murder with rape;	Their cases may be considered **after completion of 14 years actual sentence** including under trial period and **after earning at least 6 years remission.**

murder while undergoing life imprisonment; murder with dacoity .... ; murder of a child under the age of 14 years; and murder on professional/hired basis.... (b) Adult life convicts who have been imprisoned for life but whose cases are not covered under (a) above and who have committed crime which are not considered heinous as mentioned in clause (a) above, or other life convicts imprisoned for life for offence for which death penalty is not a punishment.	Their cases may be considered after **completion of 10 years** of actual sentence including under trial period, provided that the **total period of such sentence including remission is not less than 14 years.**
8th August, 2000 (a) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life having committed a **heinous crime** such as:- (i) murder with wrongful confinement, for extortion/ robbery; (ii) murder with rape; (iii) murder while undergoing life imprisonment; (iv) murder with dacoity .... ; (viii) murder of a child under the age of 14	Their cases may be considered **after completion of 14 years actual sentence** including under trial period provided that the **total period of such sentence including remission is not less than 20 years.**

years; (ix) murder of woman; and (xi) murder on professional/hired basis.... (xvi) convicts who have been awarded life imprisonment a second time under any offence....	
(b) Adult life convicts who have been imprisoned for life but whose cases are not covered under (a) above and who have committed crime which are not considered heinous as mentioned in clause (a)	Their cases may be considered **after completion of 10 years actual sentence** including under trial period provided that the **total period of such including remissions is not less than 14 years.**
29th October, 2001	
(aa) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life having committed a heinous crime such as:-	Their cases may be considered after **completion of 20 years** actual sentence and **25 years total sentence with remissions.**
(i) murder after rape repeated chained rape/unnatural offences; (ii) murder with intention for the ransom; (iii) murder of more than two persons; (iv) persons convicted for second time for murder; and (v) sedition with murder.	

(a) Convicts who have been imprisoned for life having committed a heinous crime such as:-	Their cases may be considered **after completion of 14 years actual sentence** including under trial period provided that **the total period of such including remissions is not less than 20 years.**
(i) murder with wrongful is not less than 20 years. confinement for extortion/ robbery; (ii) murder while undergoing life sentence; murder with dacoity..... and (vii) murder of a child under the age of 14 years.....	
(b) Adult life convicts who have been imprisoned for life but whose cases are not covered under (aa) and sentence including under trial period (a) above and who have committed crime which are not considered heinous as mentioned in clause (aa) & (a) above.	Their cases may be considered **after completion of 10 years actual sentence** including under trial period provided that the **total period of such sentence including remissions is not less than 14 years.**
13th August, 2008	
(a) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life having committed a heinous crime such as:-	Their cases for pre-mature release may be considered **after completion of 20 years actual sentence and 25 years total sentence with remissions.**

(i) murder with rape/unnatural offences; (ii) murder with intention to collect ransom/ robbery/ kidnapping/ abduction; (iii) murder of more than two persons; (iv) persons convicted for second time for murder; (v) sedition; (vi) sedition with murder; and (vii) murder while undergoing life sentence.....	
(b) Convicts who have been imprisoned for life having committed any crime which is defined in IPC and/or NDPS Act as punishable with death sentence.	Their cases for pre-mature release may be considered **after completion of 14 years actual sentence** including under trial period; provided that the **total period of such sentence including remissions is not less than 20 years.**
(c)	.....

It may also be pertinent to mention here that all the aforesaid policies made a clear-cut distinction and categorised the offence of murder in two separate categories. Heinous crime means murder, i.e., (i) murder with wrongful confinement, for extortion/robbery; (ii) murder with rape; (iii) murder undergoing life imprisonment; (iv) murder with dacoity .... ; (v) murder of a child under 14 years; and (vi) murder on professional/hired basis etc. Murders not mentioned in either of these above categories have been treated differently for the purpose of grant of pre-mature release. In all the policies issued by the Government except policy dated 13th August, 2008, the provisions of Article 161 of the Constitution have been referred

to. All the said policies provided that the cases of life convicts would be put to the Governor through the Minister for Jails and the Chief Minister, Haryana with full background of the prisoners and recommendations of the Committee alongwith the copy of the judgment etc. for orders under Article 161 of the Constitution.

13. This Court in *Gopal Vinayak Godse v. State of Maharashtra & Ors.* AIR 1961 SC 600 considered the provisions of Section 53-A IPC, Cr.P.C. and also considered the Code of Criminal Procedure Amendment Act, 1955 which provided that a person sentenced to transportation for life before the Amendment Act would be considered as sentenced to rigorous imprisonment for life. The life convict was bound to serve the remainder of sentence imprisoned. Unless the sentence was commuted or remitted by the Competent Authority, such sentence would not be equated with any fixed term. The benefit of remission or any short sentencing policy in accordance with the rules framed under the Act 1894, if any, would be considered towards the end of the term and the said question was within the exclusive domain of the appropriate Government. In the said case, in spite of the fact that certain remissions had been made, the competent authority did not remit the entire sentence. While deciding the said case, this court placed reliance on the judgment of the Privy Council in *Pt. Kishorilal v. Emperor* AIR 1946 P.C. 64.

14. In *Dalbir Singh & Ors. v. State of Punjab* AIR 1979 SC 1384, this court came to the conclusion that 'life imprisonment' means imprisonment for the whole of the man's life. But in practice it amounts to incarceration for a period between 10 to 14 years.

15. In *State of Haryana v. Nauratta Singh & Ors.* AIR 2000 SC 1179, this Court clearly held that 14 years mentioned in Section 433-A Cr. P.C. is the actual period of imprisonment undergone without including any period of remission.

16. In *Swamy Shraddananda@Murali Manohar Mishra v. State of Karnataka* AIR 2008 SC 3040, this Court had passed the order that the appellant therein would not be released from prison till the rest of his life. Such a punishment was considered necessary because this Court substituted the death sentence given to the appellant by the Trial Court and confirmed by the High Court, with imprisonment for life with a direction that the said appellant would not be released from prison for the rest of his life. Thus, the Court came to the conclusion, on the facts of that case, that in such an eventuality the pre-mature release after a minimum incarceration for a period of 14 years as envisaged under Section 433-A Cr.P.C. would not be acceded to, since the sentence of death had been stepped down to that of life imprisonment which was definitely a lenient punishment.

17. In *Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh* AIR 2010 SC 420, this Court held as under:

> "In the various decisions rendered after the decision in Godse case, "imprisonment for life" has been repeatedly held to mean imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the powers vested in the Governor under Article 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the authorities concerned to determine the actual length of imprisonment having regard to the gravity and intensity of the offence."

18. In *Mohd. Munna v. Union of India* (2005) 7 SCC 417, this Court came to the conclusion that life imprisonment was not equivalent to imprisonment for 14 years or 20 years. Life imprisonment means imprisonment for the whole of the remaining period of the convicted person's natural life. There was no provision either in the IPC or Cr.P.C. whereby life

imprisonment could be treated as either 14 years or 20 years incarceration without there being a formal remission by the Appropriate Government. The contention that having regard to the provisions of Section 57 IPC, a prisoner was entitled to be released on completing 20 years of imprisonment under the West Bengal Correctional Services Act, 1992 and the West Bengal Jail Code, was rejected.

19. Before we proceed to consider the exercise of powers with regard to remission, as provided for either under the Constitution, the IPC or the Cr.P.C., it would be worth reiterating what has already been traversed and laid down by this Court right from the case of *Maru Ram* (supra) to the decision in the case of *Ram Raj* (supra).

20. In *Maru Ram* (supra), this Court elaborately dealt with the issue of validity of Section 433-A Cr.P.C. and the remission/ short sentencing policies and held as under:

> "54. The major submissions which deserve high consideration may now be taken up. They are three and important in their outcome in the prisoners' freedom from behind bars. The first turns on the 'prospectivity' (loosely so called) or otherwise of Section 433-A. We have already held that Article 20(1) is not violated but the present point is whether, on a correct construction, those who have been convicted prior to the coming into force of Section 433-A are bound by the mandatory limit. If such convicts are out of its coils their cases must be considered under the remission schemes and 'short-sentencing' laws. The second plea, revolves round 'pardon jurisprudence', if we may coarsely call it that way, enshrined impregnably in Articles 72 and 161 and the effect of Section 433-A thereon. The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. Thirdly, the exercise of this plenary power cannot be left to the fancy, frolic or frown of Government, State or Central, but must embrace reason,

relevance and reformation, as all public power in a republic must. On this basis, we will have to scrutinize and screen the survival value of the various remission schemes and short-sentencing projects, not to test their supremacy over Section 433-A, but to train the wide and beneficent power to remit life sentences without the hardship of fourteen fettered years.

xx xx xx

67. All these go to prove that the length of imprisonment is not regenerative of the goodness within and may be proof of the reverse — a calamity which may be averted by exercise of power under Article 161..... In short, the rules of remission may be effective guidelines of a recommendatory nature, helpful to Government to release the prisoner by remitting the remaining term.

xx xx xx

72(7) We declare that Section 433-A, in both its limbs (i.e. both types of life imprisonment specified in it), is prospective in effect..... It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433-A was brought into effect.

xx xx xx

72(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433-A, they will override Section 433-A if the Government, Central or State, guides itself by the selfsame rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking—a desirable step, in our view—the present remission and release schemes may

usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, Section 433-A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme."

21. Thus, the Court held that the amendment would apply prospectively. The life convicts who had been sentenced prior to 18.12.1978 i.e. date of enforcement of amendment would not come within the purview of the provisions of Section 433-A Cr.P.C. and short sentencing policy would also apply prospectively. Remission rules/short sentencing policies could be taken as guidelines for exercise of power under Articles 72 or 161 of the Constitution and in such eventuality, remission rules will override Section 433-A Cr.P.C.

22. In *State of Punjab v. Joginder Singh* AIR 1990 SC 1396 this Court held that remission cannot detract from the quantum and quality of judicial sentence except to the extent permitted by Section 433 Cr.P.C. subject of course, to Section 433-A or where the clemency power under the Constitution is invoked. But while exercising the constitutional power under Articles 72/161 of the Constitution, the President or the Governor, as the case may be, can exercise an absolute power which cannot be fettered by any statutory provision such as Sections 432, 433 and 433-A Cr.P.C. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules.

23. In *Sadhu Singh v. State of Punjab* AIR 1984 SC 739, this Court examined the nature of the provisions contained in para 516-B of the Punjab Jail Manual which provided for remissions etc. and executive instructions issued by the Punjab Government from time to time and came to the conclusion that

the Jail Manual contained merely executive instructions having no statutory force. Thus, it was always open to the State Government to alter, amend or withdraw the executive instructions or supersede the same by issuing fresh instructions. But the Court observed as under:

> "Any existing executive instruction could be substituted by issuing fresh executive instructions for processing the cases of lifers for pre-mature release but once issued these must be uniformly and invariably apply to all cases of lifers"

24. A similar view has been re-iterated by this Court in *Balwan* (supra); and *Laxman Naskar v. Union of India & Ors.* (2000) 2 SCC 595.

25. In *Ashok Kumar @ Golu v. Union of India & Ors.* AIR 1991 SC 1792 this Court considered the scope and relevancy of Rajasthan Prisons (Shortening of Sentences) Rules, 1958 qua the provisions of Section 433-A Cr.P.C. The said Rajasthan Rules 1958 provided that a "lifer" who had serve dactual sentence of about nine years and three months was entitled to be considered for pre-mature release if the total sentence including remissions worked out to 14 years and he was reported to be of good behaviour. The grievance of the petitioner therein had been that his case for pre-mature release had not been considered by the Concerned Authorities in view of the provisions of Section 433-A Cr.P.C. This Court considered the matter elaborately taking into consideration large number of its earlier judgments including *Maru Ram* (supra), *Bhagirath v. Delhi Administration* AIR 1985 SC 1050; *Kehar Singh & Anr. v. Union of India & Anr.* AIR 1989 SC 653, and came to the following conclusions:

(i) Section 433-A Cr.P.C. denied pre-mature release before completion of actual 14 years of incarceration to only those limited convicts convicted of a capital offence i.e. exceptionally heinous crime;

(ii) Section 433-A Cr.P.C. cannot and does not in any way affect the constitutional power conferred on the President/Governor under Article 72/161 of the Constitution;

(iii) Remission Rules have a limited scope and in case of a convict undergoing sentence for life imprisonment, it acquires significance only if the sentence is commuted or remitted subject to Section 433-A Cr.P.C. or in exercise of constitutional power under Article 72/161 of the Constitution; and

(iv) Case of a convict can be considered under Articles 72 and 161 of the Constitution treating the 1958 Rules as guidelines. The aforesaid case was disposed of by this Court observing that in case the clemency petition of the petitioner therein was pending despite of the directive of the High Court, it would be open to the said petitioner to approach the High Court for compliance of its order.

26. In *Mahender Singh* (supra), this Court as referred to hereinabove held that the policy decision applicable in such cases would be which was prevailing at the time of his conviction. This conclusion was arrived on the following ground:

> "38. A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder."

27. Nevertheless, we may point out that the power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the

Constitution of India. This responsibility was cast upon the Executive through a Constitutional mandate to ensure that some public purpose may require fulfillment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the Executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. However, the exercise of such power under Article 161 of the Constitution or under Section 433-A Cr. P.C. may have a different flavour in the statutory provisions, as short sentencing policy brings about a mere reduction in the period of imprisonment whereas an act of clemency under Article 161 of the Constitution commutes the sentence itself.

28. In *Epuru Sudhakar & Another v. Govt. of A.P. & Ors.* AIR 2006 SC 3385 this Court held that reasons had to be indicated while exercising power under Articles 72/161. It was further observed (per Kapadia, J) in his concurring opinion:

> "Pardons, reprieves and remissions are manifestation of the exercise of prerogative power. These are not acts of grace. They are a part of Constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.....
>
> Exercise of Executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the

> duty.....
>
> Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or sets aside the punishment for a crime.....
>
> The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case."

29. There is no dispute to the settled legal proposition that the power exercised under Articles 72/161 could be the subject matter of limited judicial review. (vide *Kehar Singh* (supra); *Ashok Kumar* (supra); *Swaran Singh* v. State of U.P. AIR 1998 SC 2026; *Satpal & Anr. v. State of Haryana & Ors.* AIR 2000 SC 1702; and *Bikas Chatterjee v. Union of India* (2004) 7 SCC 634). In *Epuru Sudhakar* (supra) this Court held that the orders under Articles 72/161 could be challenged on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness.

30. The power of clemency that has been extended is contained in Articles 72 and 161 of the Constitution. This matter relates to the State of Haryana. The Governor of Haryana may exercise the clemency power. Article 161 of the Constitution enables the Governor of a State "to grant pardons, reprieves,

respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends"

31. Sections 54 and 55 IPC provide for punishment. However, the provisions of Sections 432 and 433-A Cr.P.C., relate to the present controversy. Section 432(1) Cr.P.C. empowers the State Government to suspend or remit sentences of any person sentenced to punishment for an offence, at any time, without conditions or upon any conditions that the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. Section 433-A Cr.P.C. imposes restriction on powers of remission or commutation where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment.

32. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, whoever the sovereignty might be. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, Sovereignty has always been associated with the source of power — the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes etc. The rule of law, in contradiction to the rule of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and the equal protection of the laws. As a result of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government, (Vide *K.M. Nanavati v. State of Bombay* AIR 1961 SC 112).

33. Articles 72 and 161 of the Constitution provide for a residuary sovereign power, thus, there can be nothing to debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances so warrant. (Vide *G. Krishta Goud & J. Bhoomaiah v. State of Andhra Pradesh & Ors.* (1976) 1 SCC 157)

34. In *Regina v. The Secretary of State for the Home Department* (1996) EWCA Civ 555, the question came for consideration, before the Court that if the short-sentencing policy is totally inflexible, whether it amounts to transgression on the clemency power of the State which is understood as unfettered? The court considered the issue at length and came to the conclusion as under:

> *"..... the policy must not be so rigid that it does not allow for the exceptional case which requires a departure from the policy, otherwise it could result in fettering of the discretion which would be unlawful....*It is inconsistent with the very flexibility which must have been intended by the Parliament in giving such a wide and untrammeled discretion to the Home Secretary..... Approximately 90 years ago an enlightened Parliament recognised that a flexible sentence of detention is what is required in these cases with a very wide discretion being given to the person Parliament thought best suited to oversee that discretion so that the most appropriate decision as to release could be taken in the public interest. The subsequent statutes have not altered the nature of the discretion." (Emphasis added).

Thus, it was held therein that the clemency power remains unfettered and in exceptional circumstances, variation from the policy is permissible.

35. In view of the above, it is evident that the clemency power of the Executive is absolute and remains unfettered for

the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A Cr. P.C. though the Authority has to meet the requirements referred to hereinabove while exercising the clemency power.

To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short- sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered.

The Constitution Bench of this Court in *Maru Ram* (supra) clarified that not only the provisions of Section 433-A Cr. P.C. would apply prospectively but any scheme for short sentencing framed by the State would also apply prospectively. Such a view is in conformity with the provisions of Articles 20 (1) and 21 of the Constitution. The expectancy of period of incarceration is determined soon after the conviction on the basis of the applicable laws and the established practices of the State. When a short sentencing scheme is referable to Article 161 of the Constitution, it cannot be held that the said scheme cannot be pressed in service. Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency under the provisions of Article 72 and 161 of the Constitution. Right of the convict is limited to the extent that his case be considered in accordance with the relevant rules etc., he cannot claim pre-mature release as a matter of right.

36. Two contrary views have always prevailed on the issue of purpose of criminal justice and punishment. The punishment, if taken to be remedial and for the benefit of the convict, remission should be granted. If sentence is taken purely punitive in public interest to vindicate the authority of law and to deter

others, it should not be granted.

In Salmond on Jurisprudence, 12th Edition by P.J. Fitzgerald, the author in Chapter 15 dealt with the purpose of criminal justice/punishment as under :-

> "Deterrence acts on the motives of the offender, actual or potential; disablement consists primarily in physical restraint. Reformation, by contrast, seeks to bring about a change in the offender's character itself so as to reclaim him as a useful member of society. Whereas deterrence looks primarily at the potential criminal outside the dock, reformation aims at the actual offender before the bench. In this century increasing weight has been attached to this aspect. Less frequent use of imprisonment, the abandonment of short sentences, the attempt to use prison as a training rather than a pure punishment, and the greater employment of probation, parole and suspended sentences are evidence of this general trend. At the same time, there has been growing concern to investigate the causes of crime and the effects of penal treatment..... The reformative element must not be overlooked but it must not be allowed to assume undue prominence. How much prominence it may be allowed, is a question of time, place and circumstance."

R.M.V.Dias, in his book Jurisprudence (Fifth Edition- 1985) observed as under :-

> "The easing of laws and penalties on anti-social conduct may conceivably result in less freedom and safety for the law-abiding. As Dietze puts it: 'Just as the despotio variant of democracy all too often has jeopardized human rights, its permissive variant threatens these rights by exposing citizens to the crimes of their fellowmen.....
>
> ..... The more law-abiding people lose confidence in the law and those in authority to protect them, the more will

they be driven to the alternative of taking matters into their own hands, the perils of which unthinkable and are nearer than some liberty-minded philanthropists seem inclined to allow....."

Legal maxim, *"Veniae facilitas incentivum est delinquendi",* is a caveat to the exercise of clemency powers, as it means - "Facility of pardon is an incentive to crime." It may also prove to be a "grand farce", if granted arbitrarily, without any justification, to "privileged class deviants". Thus, no convict should be a "favoured recipient" of clemency.

37. Liberty is one of the most precious and cherished possessions of a human being and he would resist forcefully any attempt to diminish it. Similarly, rehabilitation and social reconstruction of life convict, as objective of punishment become of paramount importance in a welfare state. "Society without crime is a utopian theory". The State has to achieve the goal of protecting the society from convict and also to rehabilitate the offender. There is a very real risk of revenge attack upon the convict from others. Punishment enables the convict to expiate his crime and assist his rehabilitation. The Remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activity and is required to be rehabilitated. Objectives of the punishment are wholly or predominantly reformative and preventive. The basic principle of punishment that "guilty must pay for his crime" should not be extended to the extent that punishment becomes brutal. The matter is required to be examined keeping in view modern reformative concept of punishment. The concept of "Savage Justice" is not to be applied at all. The sentence softening schemes have to be viewed from a more human and social science oriented approach. Punishment should not be regarded as the end but as only the means to an end. The object of punishment must not be to wreak vengeance but to reform and rehabilitate the criminal. More so, relevancy of the circumstances of the offence

and the state of mind of the convict, when the offence was committed, are the factors, to be taken note of.

38. At the time of considering the case of pre-mature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances.

39. Considerations of public policy and humanitarian impulses - supports the concept of executive power of clemency. If clemency power exercised and sentence is remitted, it does not erase the fact that an individual was convicted of a crime. It merely gives an opportunity to the convict to reintegrate into the society. The modern penology with its correctional and rehabilitative basis emphasis that exercise of such power be made as a means of infusing mercy into the justice system. Power of clemency is required to be pressed in service in an appropriate case. Exceptional circumstances, e.g. suffering of a convict from an incurable disease at last stage, may warrant his release even at much early stage. 'Vana Est Illa Potentia Quae Nunquam Venit In Actum' means-vain is that power which never comes into play.

40. Pardon is an act of grace, proceedings from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which law inflicts for a crime he has committed. Every civilised society recognises and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in appropriate cases. This power has been exercised in most of the States from time immemorial, and has always been regarded as a necessary attribute of sovereignty. It is also an act of justice, supported by a wise public policy. It cannot, however, be

treated as a privilege. It is as much an official duty as any other act. It is vested in the Authority not for the benefit of the convict only, but for the welfare of the people; who may properly insist upon the performance of that duty by him if a pardon or parole is to be granted.

41. This Court in *Mahender Singh* (supra) has taken note of the provisions of Act 1894 and rules framed thereunder as well as the relevant paragraphs of Punjab Jail Manual. Section 59 (5) of Act 1894 enables the Government to frame rules for "award of marks and shortening of sentence". Rules define prisoner including a person committed to prison in default of furnishing security to keep peace or be of good behaviour. Rules further provide for classification of prisoners according to the intensity and gravity of the offence. According to the classification of prisoners, Class 1 prisoners are those who had committed heinous organized crimes or specially dangerous criminals. Class 2 prisoners include dacoits or persons who commit heinous organized crimes. Class 3 prisoners are those who do not fall within Class 1 or Class 2. Rule 20 thereof provides that life convict being a Class 1 prisoner if earned such remission as entitles him to release, the Superintendent shall report accordingly to the Local Government with a view to the passing of orders under Section 401 Cr.P.C. Rule 21 provides that save as provided by Rule 20, when a prisoner has earned such remission as entitles him to release, the Superintendent shall release him. Instant case falls in Class 3, not being a case of organized crime or by professionals or hereditary or specially dangerous criminals.

Undoubtedly, the aforesaid rules are applicable in Haryana in view of the State Re-organisation Act. These are statutory rules, not merely executive instructions. Therefore, a "lifer" has a right to get his case considered within the parameters laid down therein.

It may not be out of place to mention here that while deciding the case in *Sadhu Singh* (supra), provisions of the

aforesaid Act 1894 and Rules referred to hereinabove, had not been brought to the notice of this Court.

More so, consistent past practice adopted by the State can furnish grounds for legitimate expectation (vide *Official Liquidator v. Dayanand & Ors.* (2008) 10 SCC 1).

42. We have already noticed that the earlier policies including the policy dated 04.02.1993 refers to the exercise of powers under Article 161 of the Constitution whereas the policy dated 13.08.2008 is in exercise of the powers under Section 432 read with Sections 433 and 433-A of Cr. P.C. The restriction under Section 433-A is only to the extent of the powers to be exercised in respect of offences as referred to under Section 432 Cr.P.C. The notification dated 13.08.2008 is, therefore, under a rule of procedure, which is subordinate to the Constitution. The power exercised under Article 161 of the Constitution is obviously a mandate of the Constitution and, therefore, the policy dated 13.08.2008 cannot override the policy dated 04.02.1993.

43. The right of the respondent prisoner, therefore, to get his case considered at par with such of his inmates, who were entitled to the benefit of the said policy, cannot be taken away by the policy dated 13.08.2008. This is evident from a bare perusal of the recitals contained in the policies prior to the year 2008, which are referable to Article 161 of the Constitution. The High Court, therefore, in our opinion, was absolutely justified in arriving at the conclusion that the case of the respondent was to be considered on the strength of the policy that was existing on the date of his conviction. State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for pre-mature release would be considered after serving the sentence, prescribed in the short sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may

depend upon case to case and for that purpose, in our opinion, it should relate to a policy which, in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a "lifer" for pre-mature release, he should be given benefit thereof.

44. As per the information furnished by the appellant-State of Haryana, the respondent Jagdish has served more than 14 years (actual) on 12.2.2009 i.e. prior to the date of judgment impugned herein dated 17.2.2009. By now, the respondent has served (actual) for more than 15 years. Respondent falls in category 3 of the prisoners as he did not indulge in any organised crime.

45. Accordingly, for the reasons given hereinabove, we find no reason to interfere with the judgment of the High Court, which is hereby affirmed. The appeal is dismissed accordingly, subject to the direction that the appellant- State Government shall proceed to calculate the sentence for the purpose of consideration of remission in the case of the respondent as per the policy dated 04.02.1993.

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No. 5842 of 2009.

From the Judgment & Order dated 16.3.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. No. M-465 of 2009.

WITH

SLP (Crl.) No.6385, 6442, 6441, 6444, 5768, 7629, 7579, 7580, 7581, 7582, 8140, 7631, 7630, 7628, 7622, 7623, 7625, 7619, 7621, 7659, 7654, 7656, 7657, 7652, 7655, 7661, 7653, 7651, 7660, 7649, 7658/2009, SLP (Crl.) No..... /2009 @Crl.M.P. No.13253, 7974, 9330, 9234, 9268, SLP (Crl.) No. ..... /2009 @Crl.M.P. No.12754, SLP (Crl.) No. ..... /2009 Crl.M.P. No.13045, SLP (Crl.) No.6914, 6913, 8288,

8290, 8291, 8292, 8293, 8294, 8297, 8298, 8300, 8301, 8302/2009, SLP (Crl.) No..... /2009 @Crl.M.P. No.18221, SLP (Crl.) No...../2009 @Crl.M.P. No.18264, SLP (Crl.) No..... /2009 @Crl.M.P. No. 18402, SLP (Crl.) No. 831, 832, 1026, 1097, 1615, 2101, 1861, 2216, 3475, 3035, 3042, 3032, 3044, 3040, 3123, 4125, 4076, 4077, 4815, 4882, 5117, 5173, 6787, 6272, 6783, 6310, 6784, 6467, 6468, 6985, 6637, 6986, 6647, 6766, 6767, 6776, 6777, 7147, 8392, 4789, 6485, 4802, 4803, 4909, 6487, 4933, 4934, 4943, 4956, 6488, 5115, 5118, 5166, 5170, 5174, 8800, 8802, 8801, 8806, 8804, 8807, 4883, 9364, 9373, 9392, 9379, 9376, 9382, 9384, 9387, 9389, 9372, 9366, 9371, 9368, 9388, 9383, 9385, 9378, 9377, 9381, 9374, 9358, 9367, 9369, 9370, 9380, 10237, 9393, 9390 , 9355, 9351, 9359, 9354, 9386, 10119, 10122 10121, 10123, 10120 of 2009, 200, 211, 210, 206, 207, 196, 193, 194, 199, 205, 197, 198, 204, 208, 203, 192, 437 of 2010 & 3118 of 2009

Gopal Subramanium, Sol. Genl. of India (A.C.), B.S. Malik, P.V. Dinesh, Athouba Khaidem, Harivansh Manab, Chander Shekhar Ashri, A. Dasharatha, D.P. Singh, Sanjay Jain, Sanjay Sharawat, Satyendra Kumar, Gagan Gupta, Manoj Swarup, Vijay K. Jindal, Devesh Kr. Tripathi, Ashok Anand, Rohit Kr. Singh, Ajay Pal, Rupender Singh, Prashant Shukla, S.K. Shrivastava, Rishi Malhotra, S.K. Shrivastava (for Ajay Pal) for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.

In view of our judgment pronounced today in Criminal Appeal No.566 of 2010 @ SLP(Crl.) No. 6638 of 2009 (*State of Haryana & Ors. v. Jagdish*), these Special Leave Petitions are dismissed.

B.B.B. Matters dismissed.

UNION OF INDIA & ANOTHER
v.
HEMRAJ SINGH CHAUHAN & OTHERS
(Civil Appeal No. 2651-2652 of 2010)

MARCH 23, 2010

[R.V. RAVEENDRAN AND ASOK KUMAR GANGULY, JJ.]

Service law:

Indian Administrative Service (Cadre) Rules, 1954 – Rule 4(2) – Cadre review – Compliance of Rule 4(2) – Members of U.P. State Civil Service seeking promotion – Issuance of Notification in 2000, fixing the cadre strength of U.P. – Another Notification in 2005, re-fixing the cadre strength – Challenge to, on the ground that since last cadre review of I.A.S. in UP cadre conducted in 1998, next cadre review was due in 2003, thus, cadre review conducted in 2005 to be given retrospective effect – Application set aside by tribunal – High Court setting aside the judgment of tribunal – On appeal, held: Statutory duty cast on State and Central Government to undertake cadre review exercise every 5 years is ordinarily mandatory subject to exceptions – Lethargy, in-action not just exceptions – On facts, both Central and State Government under Rule 4(2) accepted on principle that cadre review in U.P. was due in 2003 – Reason for delay in review was total in-action on the part of State and lackadaisical attitude in discharging its statutory responsibility – Delayed exercise cannot be justified within the meaning of 'ordinarily'– Thus, members not responsible for the delay – Rule 4(2) will operate prospectively and not retrospectively – Directions issued by High Court reasonable – Indian Administrative Service (Appointment by Promotion) Regulations, 1955 – Indian Administrative Service (Recruitment) Rules, 1954 – Rule 4(1)(b).

Words and Phrases: Word 'ordinarily' – Meaning of – In the context of Rule 4(2) of the Indian Administrative Service (Cadre) Rules, 1954.

The respondents are members of the State Civil Service (S.C.S.) of the State of Uttar Pradesh. They completed eight years of service on 23.07.85 and 04.06.86 respectively. As a result of the bifurcation of the State of Uttar Pradesh, notification was issued on 21.10.2000, fixing the cadre strength of State of Uttar Pradesh. On 25.08.2005, another notification was issued re-fixing the cadre strength in the State of Uttar Pradesh. The respondents challenged the said notification on the ground that since the last cadre review of the I.A.S. of Uttar Pradesh cadre was conducted in 1998, the next cadre review was due in 2003; and that the cadre review conducted in August 2005 should be given retrospective effect from April 2003. The respondents also sought quashing of the notification dated 01.02.2006 whereby vacancies were increased. The tribunal held that the cadre review carried out in 2005 cannot be given retrospective effect. The High Court set aside the order of the tribunal and also the notifications dated 25.08.2005 and 01.02.2006. It directed the State Government and the Central Government that cadre review exercise should be undertaken as if it was taking place on 30-04-2003 with reference to the vacancy position as on 01.01.2004. Hence, the present appeals.

Disposing of the appeals with certain modifications/ directions, the Court

HELD: 1.1 The authorities who are under a statutory mandate to re-examine the strength and composition of cadre are the Central Government and the concerned State Government. On facts, it is clear that both the authorities under Rule 4(2) of the Indian Administrative Service (Cadre) Rules, 1954 accepted on principle that

cadre review in Uttar Pradesh was due in 2003. [Paras 27 and 34] [767-F-G; 770-C]

T.N. Administrative Service Officers Association and another v. Union of India and others **(2000) 5 SCC 728, relied on.**

1.2. The Court must keep in mind the Constitutional obligation of both the appellants/Central Government as also the State Government. Both the Central Government and the State Government are to act as model employers, which is consistent with their role in a Welfare State. [Para 37] [771-C]

1.3. The right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution. Therefore, it is clear that legitimate expectations of the respondents of being considered for promotion has been defeated by the acts of the government and if not of the Central Government, certainly the unreasonable in-action on the part of the Government of State of U.P. stood in the way of the respondents' chances of promotion from being fairly considered when it is due for such consideration and delay has made them ineligible for such consideration. [Paras 38 and 40] [771-D-E; G-H]

The Manager, Government Branch Press and Anr. vs. D.B. Belliappa, **(1979) 1 SCC 477, referred to.**

1.4. The submission that the statutory mandate of a cadre review exercise every five years is qualified by the expression 'ordinarily' and so if it has not been done within five years that does not amount to a failure of exercise of a statutory duty on the part of the authority

contemplated under the Rule cannot be accepted. The word 'ordinarily' must be given its ordinary meaning. While construing the word the Court must not be oblivious of the context in which it has been used. In the case in hand, the word 'ordinarily' has been used in the context of promotional opportunities of the officers concerned. In such a situation the word 'ordinarily' has to be construed in order to fulfill the statutory intent for which it has been used. The word 'ordinarily', of course, means that is does not promote a cast iron rule, it is flexible. It excludes something which is extraordinary or special. The word 'ordinarily' would convey the idea of something which is done 'normally' and 'generally' subject to special provision. [Paras 41, 42 and 43] [772-B-E]

Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed and Others **(1976) 1 SCC 671;** *Eicher Tractors Limited, Haryana vs. Commissioner of Customs, Mumbai* **(2001) 1 SCC 315;** *Krishan Gopal vs. Shri Prakashchandra and others* **(1974) 1 SCC 128;** *Mohan Baitha and others vs. State of Bihar and another* **(2001) 4 SCC 350 354, relied on.**

1.5. The statutory duty which is cast on the State Government and the Central Government to undertake the cadre review exercise every five years is ordinarily mandatory subject to exceptions which may be justified in the facts of a given case. Lethargy, in-action, an absence of a sense of responsibility cannot fall within category of just exception. [Para 44] [772-G-H; 773-A]

1.6. In the facts of the case, neither the appellants nor the State of U.P. justified its action of not undertaking the exercise within the statutory time frame on any acceptable ground. From the materials on record, it is clear that the appellant as the Cadre Controlling authority repeatedly urged the State Government to initiate the review by several letters. The only reason for the delay

in review, was total in-action on the part of the U.P. Government and lackadaisical attitude in discharging its statutory responsibility. The delayed exercise cannot be justified within the meaning of 'ordinarily' in the facts of this case. Therefore, there was failure on the part of the authorities in carrying out the timely exercise of cadre review. [Paras 36 and 45] [770-F-H; 773-B]

1.7. The word 'ordinarily' does not alter the underlying intendment of the provision. Unless there is a very good reason for not doing so, the Selection Committee shall meet every year for making the selection. [Para 47] [773-F]

Union of India and Ors. vs. Vipinchandra Hiralal Shah **(1996) 6 SCC 721;** *Syed Khalid Rizvi vs. Union of India* **1993 Supp. (3) SCC 575, referred to.**

1.8. Rule 4(2) cannot be construed to have any retrospective operation and it will operate prospectively. But in the facts and circumstances of the case, the court can, especially having regard to its power under Article 142 of the Constitution, give suitable directions in order to mitigate the hardship and denial of legitimate rights of the employees. In the instant case, for the delayed exercise of statutory function the Government has not offered any plausible explanation. The respondents cannot be made in any way responsible for delay. In such a situation, the directions given by the High Court to the State Government and the Central Government that the cadre review exercise should be undertaken as if it was taking place on 30.04.2003 with reference to the vacancy position as on 01.01.2004, cannot be said to be unreasonable. In any event, the said directions are reiterated in exercise of the power under Article 142 subject to the only rider that in normal cases the provision of rule 4(2) of the Cadre Rules cannot be construed retrospectively. [Paras 18 and 49] [774-D-F; 764-G]

Case Law Reference:

(2000) 5 SCC 728	**Relied on.**	**Para 29**
(1979) 1 SCC 477	**Referred to.**	**Para 39**
(1976) 1 SCC 671	**Relied on.**	**Para 43**
(2001) 1 SCC 315	**Relied on.**	**Para 43**
(1974) 1 SCC 128	**Relied on.**	**Para 43**
(2001) 4 SCC 350	**Relied on.**	**Para 43**
(1996) 6 SCC 721	**Referred to.**	**Para 46**
1993 Supp. (3) SCC 575	**Referred to.**	**Para 47**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2651-2652 of 2010.

From the Judgment & Order dated 14.11.2008 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 19103-04 of 2006.

V.N. Shetty, 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. In SLP (C) Nos.6758-6759/2009, Union of India and the Secretary, Union Public Service Commission are in appeal impugning the judgment and order dated 14.11.2008 delivered by the Delhi High Court on the writ petition filed by Hemraj Singh Chauhan and Ramnawal Singh, the respondents herein.

3. The respondents are members of the State Civil Service (S.C.S.) of the State of Uttar Pradesh and according to them completed eight years of service on 23.07.85 and 4.6.86 respectively. The contention of the respondents is that in terms of Regulation 5(3) of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955, a member of the S.C.S., who has attained the age of 54 years on the 1st day of January of the year in which the Committee meets, shall be considered by the Committee, provided he was eligible for such consideration on the 1st day of the year or of any of the years immediately preceding the year in which such meeting is held, but could not be considered as no meeting of the Committee was held during such preceding year or years.

4. Those regulations have been framed in exercise of power under Sub-Rule 1 of Rule 8 of Indian Administrative Service Recruitment Rules, 1954 and in consultation with the State Government and the Union Public Service Commission.

5. Regulation 5 (1) of the said Regulation provides that such Committee shall ordinarily meet every year and prepare a list of such members of the S.C.S. as are held to be suitable for promotion to the service. The number of members of the said civil services to be included in this list shall be determined by the Central Government in consultation with the State Government concerned but shall not exceed the number of substantive vacancies in the year in which such meeting is held.

6. It may be mentioned in this connection that as a result of bifurcation of the State of Uttar Pradesh as a result of creation of the State of Uttaranchal in terms of the State Reorganization Act, namely Uttar Pradesh State Reorganization Act 2000, two notifications were issued on 21.10.2000. The first was issued under Section 3(1) of the All India Services Act, 1951 read with Section 72 (2) and (3) of the Reorganization Act and Rule 4 (2) of the Indian Administrative Service (Fixation of Cadre Strength) Regulations, 1956 (hereinafter referred to as the "Cadre Rule").

7. Thus, the Central Government constituted for the State of Uttaranchal an Indian Administrative Service Cadre with effect from 1.11.2000. On 21.10.2000 another notification was issued fixing the cadre strength of State of Uttar Pradesh thereby determining the number of senior posts in the State of Uttar Pradesh as 253.

8. The case of the appellants is that the next cadre review for the State of Uttar Pradesh fell due on 30th April, 2003. To that effect a letter dated 23.1.2003 was written by the Additional Secretary in the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, Government of India to the Chief Secretary, Government of Uttar Pradesh.

9. The further case of the appellants is that several reminders were sent on 5th March, 3rd September, 17th September and 8th December, 2003 but unfortunately the Government of Uttar Pradesh did not respond. Then a further reminder was sent by the Government of India stating therein that four requests were made for the cadre review of the I.A.S. cadre of Uttar Pradesh but no response was received from the Government of Uttar Pradesh. In the said letter the Government of India wanted suitable direction from the concerned officials so that they can furnish the cadre review proposal by 28.2.04. Unfortunately, there was no response and thereafter subsequent reminders were also sent by the Government of India on 14th/17th June, 2004 and 8th October, 2004.

10. Ultimately, a proposal was received from the Government of Uttar Pradesh only in the month of January 2005 and immediately preliminary meeting was fixed on 21st February, 2005. Thereafter, a cadre review meeting was held under the Chairmanship of the Cabinet Secretary on 20th April, 2005 and the Minutes duly signed by the Chief Secretary, Government of Uttar Pradesh were received by the appellants on 27th June, 2005. After approval was given to the said Minutes, notification was issued on 25th August, 2005 re-fixing the cadre strength in the State of Uttar Pradesh.

11. Challenging the said notification, the respondents herein approached Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as C.A.T.) by filing two O.As, namely, O.A. No.1097/2006 and O.A. No.1137/2006 praying for quashing of the said notification. The respondents also prayed for setting aside the order dated 1.2.2006 whereby vacancies were increased as a result of the said cadre review adding to the then existing vacancies for the year 2006.

12. In those O.As the substance of the contention of the respondents was that the last cadre review of the I.A.S. in Uttar Pradesh cadre was conducted in 1998 and the next cadre review was therefore due in April 2003. As such it was contended that the cadre review which was conducted in August 2005 should have been given effect from April 2003 so that the respondents could be considered for promotion against the promotion quota.

13. The stand of the State of Uttar Pradesh before C.A.T. was that with the issuance of notification issued by the Department of Personnel and Training on 21.10.2000 bifurcating cadre of undivided Uttar Pradesh to I.A.S. Uttar Pradesh and I.A.S. Uttaranchal upon the Uttar Pradesh Reorganization Act, cadre review has already taken place and as such the next review was due in 2005 only.

14. The stand of the appellants both before the C.A.T. and before the High Court was that the cadre review was due in 2003. However, the C.A.T. after hearing the parties upheld the contention of the State of Uttar Pradesh and held that the cadre review carried out in 2005 cannot be given retrospective effect. The Tribunal dismissed O.A. No.1097/06 and partially allowed O.A. No.1137/06, inter alia, directing the respondents to convene the meeting of D.P.C. Selection Committee to fill-up the posts which were not filled up in the year 2001, 2002 and 2004 and to consider all eligible S.C.S. Officers in the zone of consideration including the officers who were put in the select list of those years but could not be appointed in the absence

of integrity certificate.

15. However, the respondents being aggrieved by the judgment of the C.A.T. filed a writ petition before the Hon'ble High Court on 18.12.2006 contending therein that the cadre review of the I.A.S. of Uttar Pradesh cadre was due in 2003 and was delayed by the State of Uttar Pradesh as a result of which some of the S.C.S. Officers were deprived of their promotion to the I.A.S. Their specific stand in the writ petition was if the increased vacancies were available in 2004 as a result of the cadre review in 2003, they could have been promoted to I.A.S.

16. However, before the High Court the stand of the Central Government was that the cadre review of the I.A.S. of Uttar Pradesh was due in 2003 but unfortunately it was held in 2005 when State of Uttar Pradesh had sent its proposal. Such review was made effective from 25.8.2005 when the revised cadre strength of the I.A.S. cadre of Uttar Pradesh was notified in the official Gazette in terms of the statutory provisions. The further stand of the appellants was that the cadre review undertaken in 2005 cannot be given retrospective effect.

17. However, before the High Court the stand of the Uttar Pradesh Government was slightly changed and it filed a 'better affidavit' and took the stand that they have no objection to any direction for exercise of cadre review to be undertaken with reference of the vacancy position as on 1.1.2004

18. The High Court after hearing the parties was pleased to set aside the judgment of C.A.T. dated 15.12.2006 and the notifications dated 1.2.2006 and 25.8.2005 were set aside. The State Government and the Central Government were directed that the cadre review exercise should be undertaken as if it was taking place on 30th April, 2003 with reference to the vacancy position as on 1st January, 2004.

19. In order to resolve the controversy in this case, the

relevant statutory provisions may be noted. The respondents being S.C.S. Officers, are seeking promotion to I.A.S. in terms of Rule 4(1)(b) of the relevant recruitment rules. Rule 4(1)(b) of the Indian Administrative Service (Recruitment) Rules, 1954 is set out:-

"4. Method of recruitment of the Service

(1) xxx xxxx

Xxx xxx

(b) By promotion of a substantive member of a State Civil Service;"

20. In tune with the said method of recruitment, substantive provisions have been made under Rule 8 for recruitment by promotion. Rule 8(1) of the Recruitment Rules in this connection is set out below:-

"8. Recruitment by promotion or selection for appointment to State and Joint Cadre:-

(1) The Central Government may, on the recommendations of the State Government concerned and in consultation with the Commission and in accordance with such regulations as the Central Government may, after consultation with the State Governments and the Commission, from time to time, make, recruit to the Service persons by promotion from amongst the substantive members of a State Civil Service."

21. Under Rule 9, the number of persons to be recruited under Rule 8 has been specified, but in this case we are not concerned with that controversy.

22. The other regulation which is relevant in this case is Rule 5 of Indian Administrative Service (Appointment by Promotion) Regulations, 1955 (hereinafter referred to as, 'the

said regulation'). These regulations have been referred to in the earlier part of the judgment. Rule 5(3) of the said regulation, relevant for the purpose of this case, is set out below:-

"5 (3) The Committee shall not consider the cases of the members of the State Civil Service who have attained the age of 54 years on the first day of January of the year in which it meets:

Provided that a member of the State Civil Service whose name appears in the Select List prepared for the earlier year before the date of the meeting of the Committee and who has not been appointed to the Service only because he was included provisionally in that Select List shall be considered for inclusion in the fresh list to be prepared by the Committee, even if he has in the meanwhile attained the age of fifty four years:

Provided further that a member of the State Civil Service who has attained the age of fifty-four years on the first day of January of the year in which the Committee meets shall be considered by the Committee, if he was eligible for consideration on the first day of January of the year or of any of the years immediately preceding the year in which such meeting is held but could not be considered as no meeting of the Committee was held during such preceding year or years."

23. Another regulation relevant in this connection is Indian Administrative Service (Cadre) Rules, 1954 (hereinafter referred to as, 'the Cadre Rules')

24. Under Rule 4 of the said Cadre Rules, the strength and composition of the Cadres constituted under Rule 3 shall be determined by regulation made by the Central Government in consultation with the State Government and until such regulations are made, shall be as in force immediately before the commencement of those rules.

25. Rule 4(2) has come up for interpretation in this case and to appreciate its true contents, the said Rule 4(2) is set out below:-

> "(2) The Central Government shall ordinarily at the interval of every five years, re-examine the strength and composition of each such cadre in consultation with the State Government or the State Governments concerned and may make such alterations therein as it deems fit.
>
> Provided that nothing in this sub-rule shall be deemed to affect the power of the Central Government to alter the strength and composition of any cadre at any other time:
>
> Provided further that State Government concerned may add for a period not exceeding two years and with the approval of the Central Government for a further period not exceeding three years, to a Sate or Joint Cadre one or more posts carrying duties or responsibilities of a like nature to cadre posts."

26. The main controversy in this case is, whether re-examination on the strength and composition of cadre in the State of Uttar Pradesh had taken place in accordance with the mandate of Rule 4 sub-rule (2).

27. It appears clearly that the authorities who are under a statutory mandate to re-examine the strength and composition of cadre are the Central Government and the concerned State Government. It can be noted in this connection that word 'ordinarily' in Rule 4(2) has come by way of amendment with effect from 1.3.1995 along with said amendment has also come the amendment of 5 years, previously it was 3 years.

28. From the admitted facts of this case, it is clear that Central Government had always thought that cadre review in terms of Rule 4(2) of the cadre Rules was due in 2003. In several letters written by the Central Government, it has been repeatedly urged that the cadre review of I.A.S. cadre of Uttar

Pradesh is due on 30th April, 2003. The letter dated 23/24 January, 2003 written to that effect on behalf of the appellant to the Chief Secretary, Government of Uttar Pradesh, Lucknow is set out below:-

> "Dear Shri Bagga,
>
> The cadre review of IAS cadre of Uttar Pradesh is due on 30.04.2003. The Supreme Court in 613/1994 (TANSOA vs. Union of India) has stated that the Central Government has the primary responsibility of making cadre reviews and to consider whether it is necessary or not to encadre long existing ex-cadre posts. Delay in conducting the cadre review results in avoidable litigation as officers of the State Civil Service approach the Courts that the delay has stalled their promotional avenues. It is important that the cadre reviews are held on time.
>
> 2. I shall, therefore, be grateful if you could look into the matter personally and instruct the concerned officials to sponsor the review proposals in the prescribed proforma, after taking into consideration the requirement of the State Government by 28th February, 2003 to this Department for processing the case further.
>
> With regards"

29. In various subsequent letters, namely dated 5th March, 2003, 3rd September, 2003, 17th September, 2003, 8th December, 2003, the Central Government reiterated its stand that cadre review has to be done by 2003. Admittedly, the Central Government took the aforesaid stand in view of the law laid down by this Court in the case of *T.N. Administrative Service Officers Association and another v. Union of India and others,* reported in (2000) 5 SCC 728.

30. It cannot be disputed that the Central Government took the aforesaid stand in view of its statutory responsibility of initiating cadre review as a cadre controlling authority. In fact

in the letter dated 29th August, 2005 by Neera Yadav, on behalf of the State of Uttar Pradesh, it has been categorically admitted in paragraph 3 of the said letter that the previous cadre review was done in 1998. The stand is as follows:-

> "Thus, the cadre review for alteration was to be done under Rule 4(2) of the Indian Administrative Service Cadre Rules, 1954 as on 30.04.2003. The Department of Personal & Training, through D.O. letter No.11031/5/2003-AIS-II dated 23.01.2003 requested that State Government to sponsor the review proposal on the prescribed proforma as cadre review as cadre review of Indian Administrative Service, Uttar Pradesh cadre was due on 30.04.2003."

31. In the affidavit of the appellant, filed before Central Administrative Tribunal, the following stand has been categorically taken:-

> "It is submitted that the last cadre strength of the IAS cadre of unified cadre of Uttar Pradesh was notified on 30.04.1998. Therefore, as per Rule 4(2) of the IAS (Cadre) Rules, 1954, the next review was due on 30.4.2003."

32. It was also stated that the reference by the State Government to order dated 23.9.2000 was not one of cadre review. It was a reference of the State Government in connection with the bifurcation of Uttar Pradesh and Uttaranchal, pursuant to Uttar Pradesh Reorganization Act, 2000. It was admitted that the I.A.S cadre of Uttaranchal was constituted later i.e. on 21.10.2000.

33. In so far as the State of U.P. was concerned, the State filed an application for a 'better affidavit' before the High Court and in paragraphs 4 and 5 of the said application the State Government reiterated the reasons for filing a 'better affidavit'. In those paragraphs, the stand of the Central Government was reiterated, namely, that the last cadre review was done in 1998 and the subsequent cadre review under Rule 4(2) of the Cadre

Rules was due on 30.04.2003. In the 'better affidavit', which was filed on behalf of the State of Uttar Pradesh before the High Court, in paragraph 8, the stand taken is as follows:-

> "..In this view of the matter, since the last "Quinquenial Cadre Review" of the IAS Cadre was held on 30.4.1998, the next "Quinquenial Cadre Review" of the IAS cadre became due on 30.4.2003 as stated by the Cadre Controlling Authority in para 9 of its counter affidavit."

34. It is thus clear that both the authorities under Rule 4(2) of the Cadre Rules accepted on principle that cadre review in Uttar Pradesh was due in 2003.

35. Appearing for the appellants the learned counsel urged that the judgment of the High Court in so far as it seeks to give a retrospective effect to the cadre review is bad inasmuch as the stand of the appellants is that the Notification dated 25.8.2005 makes it explicitly clear that the same comes into force on the date of its publication in the Official Gazette. Relying on the said Notification, it has been urged that since the same has been made explicitly prospective and especially when the Rule in question, namely, Rule 4(2) of the Cadre Rules is expressly prospective in nature, the cadre review exercise cannot be made retrospective. This seems to be the only bone of contention on the part of the appellants.

36. However, from the discussion made hereinbefore, the following things are clear:

(a) Both the appellants and the State Government in accordance with their stand in the subsequent affidavit accepted that Cadre Review in the State of U.P. was made in 1998 and the next Cadre Review in that State was due in 2003;

(b) Neither the appellants nor the State Government has given any plausible explanation justifying the delay in Cadre review;

(c) From the materials on record it is clear that the appellant as the Cadre Controlling authority repeatedly urged the State Government to initiate the review by several letters referred to hereinabove;

(d) The only reason for the delay in review, in our opinion, is that there was total in-action on the part of the U.P. Government and lackadaisical attitude in discharging its statutory responsibility.

37. The Court must keep in mind the Constitutional obligation of both the appellants/Central Government as also the State Government. Both the Central Government and the State Government are to act as model employers, which is consistent with their role in a Welfare State.

38. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution.

39. In *The Manager, Government Branch Press and Anr. vs. D.B. Belliappa* – (1979) 1 SCC 477, a three judge Bench of this Court in relation to service dispute, may be in a different context, held that the essence of guarantee epitomized under Articles 14 and 16 is "fairness founded on reason" (See para 24 page 486).

40. It is, therefore, clear that legitimate expectations of the respondents of being considered for promotion has been defeated by the acts of the government and if not of the Central Government, certainly the unreasonable in-action on the part of the Government of State of U.P. stood in the way of the respondents' chances of promotion from being fairly considered when it is due for such consideration and delay has made them ineligible for such consideration. Now the question which is

weighing on the conscience of this Court is how to fairly resolve this controversy.

41. Learned counsel for the appellants has also urged that the statutory mandate of a cadre review exercise every five years is qualified by the expression 'ordinarily'. So if it has not been done within five years that does not amount to a failure of exercise of a statutory duty on the part of the authority contemplated under the Rule.

42. This Court is not very much impressed with the aforesaid contention. The word 'ordinarily' must be given its ordinary meaning. While construing the word the Court must not be oblivious of the context in which it has been used. In the case in hand the word 'ordinarily' has been used in the context of promotional opportunities of the Officers concerned. In such a situation the word 'ordinarily' has to be construed in order to fulfill the statutory intent for which it has been used.

43. The word 'ordinarily', of course, means that it does not promote a cast iron rule, it is flexible (See *Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed and Others* - (1976) 1 SCC 671, at page 682 (para 35). It excludes something which is extraordinary or special [*Eicher Tractors Limited, Haryana vs. Commissioner of Customs, Mumbai* - (2001) 1 SCC 315, at page 319 (para 6)]. The word 'ordinarily' would convey the idea of something which is done 'normally' *[Krishan Gopal vs. Shri Prakashchandra and others* - (1974) 1 SCC 128, at page 134 (para 12)] and 'generally' subject to special provision *[Mohan Baitha and others vs. State of Bihar and another* - (2001) 4 SCC 350 at page 354].

44. Concurring with the aforesaid interpretative exercise, we hold that the statutory duty which is cast on the State Government and the Central Government to undertake the cadre review exercise every five years is ordinarily mandatory subject to exceptions which may be justified in the facts of a given case. Surely, lethargy, in-action, an absence of a sense

of responsibility cannot fall within category of just exceptions.

45. In the facts of this case neither the appellants nor the State of U.P. has justified its action of not undertaking the exercise within the statutory time frame on any acceptable ground. Therefore, the delayed exercise cannot be justified within the meaning of 'ordinarily' in the facts of this case. In the facts of the case, therefore, the Court holds that there was failure on the part of the authorities in carrying out the timely exercise of cadre review.

46. In a somewhat similar situation, this Court in *Union of India and Ors. vs. Vipinchandra Hiralal Shah* – (1996) 6 SCC 721, while construing Regulation 5 of the I.A.S. (Appointment by Promotion) Regulations, 1955 held that the insertion of the word 'ordinarily' does not alter the intendment underlying the provision. This Court in that case was considering the provision of Clause (1) of Regulation 5 of the IPS (Appointment by Promotion) Regulations along with other provisions of Regulation 5. The interpretation which this Court gave to the aforesaid two Regulations was that the Selection Committee shall meet at an interval not exceeding one year and prepare a list of members who are eligible for promotion under the list. The Court held that this was mandatory in nature.

47. It was urged before this Court that the insertion of the word 'ordinarily' will make a difference. Repelling the said contention, this Court held that the word 'ordinarily' does not alter the underlying intendment of the provision. This Court made it clear that unless there is a very good reason for not doing so, the Selection Committee shall meet every year for making the selection. In doing so, the Court relied on its previous decision in *Syed Khalid Rizvi vs. Union of India* – 1993 Supp. (3) SCC 575. In that case the Court was considering Regulation 5 of the Indian Police Service (Appointment by Promotion) Regulations, 1955 which also contained the word 'ordinarily'. In that context the word 'ordinarily' has been construed as:

> "…….since preparation of the select list is the foundation for promotion and its omission impinges upon the legitimate expectation of promotee officers for consideration of their claim for promotion as IPS officers, the preparation of the select list must be construed to be mandatory. The Committee should, therefore, meet every year and prepare the select list and be reviewed and revised from time to time as exigencies demand."

48. The same logic applies in the case of cadre review exercise also.

49. Therefore, this Court accepts the arguments of the learned counsel for the appellants that Rule 4(2) cannot be construed to have any retrospective operation and it will operate prospectively. But in the facts and circumstances of the case, the Court can, especially having regard to its power under Article 142 of the Constitution, give suitable directions in order to mitigate the hardship and denial of legitimate rights of the employees. The Court is satisfied that in this case for the delayed exercise of statutory function the Government has not offered any plausible explanation. The respondents cannot be made in any way responsible for the delay. In such a situation, as in the instant case, the directions given by the High Court cannot be said to be unreasonable. In any event this Court reiterates those very directions in exercise of its power under Article 142 of the Constitution of India subject to the only rider that in normal cases the provision of Rule 4(2) of the said Cadre Rules cannot be construed retrospectively.

50. With the aforesaid modification/direction, the appeals filed by the Union of India are disposed of. There shall be no order as to costs.

N.J. Appeals disposed of.

VIKRAM VIR VOHRA
v.
SHALINI BHALLA
(Civil Appeal No. 2704 of 2010)

MARCH 25, 2010

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

Hindu Marriage Act, 1955 – s. 26 – Custody of minor child – Divorce by mutual consent – Settlement between parties as regards custody of minor child – Visitation rights granted to father – Application u/s. 26 seeking modification of terms and custody of minor – Courts below allowing wife to take child to Australia where she was employed for gain with a direction to bring child back to India twice in year for allowing visitation rights of father – Interference with – Held: Not called for – Welfare of child is of paramount importance in matters of custody – Custody orders are interlocutory orders and are capable of being altered and moulded keeping in mind the needs of child – Judicial discretion has been properly balanced between the rights of husband and those of wife – Visitation rights of father have been so structured as to be compatible with the educational career of the child.

The parties filed petition for divorce and decree of divorce on mutual consent was passed. The parties arrived at a settlement that the custody of the child shall remain with the mother and father shall have only visiting rights. Thereafter, the respondent-wife as also appellant-husband filed applications u/s. 26 of the Hindu Marriage Act seeking modification of the terms and conditions about the custody of the child. Respondent wanted to take the child with her to Australia where she was employed for gain with a request to revoke the visitation rights granted to the appellant for meeting the child whereas the appellant sought permanent custody of the

child. The trial court allowed the respondent to take the child with her to Australia but also directed her to bring the child back to India for allowing the father visitation rights twice in a year. High Court upheld the order. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1 The welfare of the child is of paramount importance in matters relating to child custody and the welfare of the child may have a primacy even over statutory provisions. [Para 14] [783-C]

Mausami Moitra Ganguli vs. Jayant Ganguli **(2008) 7 SCC 673, referred to.**

1.2. The child was found to be quite intelligent and discerning. The child is in school and from the behaviour of the child, it could be made out that he is well behaved and that he is receiving proper education. The child categorically stated that he wanted to stay with his mother. It appears that the child is about 8-10 years of age and is in a very formative and impressionable stage in his life. [Paras 13 and 14] [783-A-C]

1.3. The submission that in view of the provisions of section 26 of the Hindu Marriage Act, the order of custody of the child and the visitation rights of the appellant cannot be changed as they are not reflected in the decree of mutual divorce, is far too hyper technical an objection to be considered seriously in a custody proceeding. A child is not a chattel nor is he/she an article of personal property to be shared in equal halves. [Para 15] [783-D-E]

1.4. In a matter relating to custody of a child, the Court must remember that it is dealing with a very sensitive issue in considering the nature of care and

affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child. Even if orders are based on consent, those orders can also be varied if the welfare of the child so demands. Even though the principles have been laid down in proceedings under the Guardians and Wards Act, 1890, these principles are equally applicable in dealing with the custody of a child under section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a strait jacket. Therefore, each case has to be dealt with on the basis of its peculiar facts. [Paras 16, 17 and 19] [783-F-H; 784-A, C]

Rosy Jacob vs. Jacob A Chakramakkal **(1973) 1 SCC 840;** *Dhanwanti Joshi vs. Madhav Unde* **(1998) 1 SCC 112;** *Gaurav Nagpal vs. Sumedha Nagpal* **(2009) 1 SCC 42;** *Thrity Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka* **AIR 1982 SC 1276, referred to.**

1.5. Regarding the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, it is found that the respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent-mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare

no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both. [Para 23] [785-C-E]

1.6. The father is already established in India and he is also financially solvent. His visitation rights have been ensured in the impugned orders of the High Court. His rights have been varied but have not been totally ignored. The appellant-father, for all these years, lived without the child and got used to it. [Para 24] [785-F]

1.7. In the application filed before the Additional District Judge, the mother made it clear that she is ready to furnish any undertaking or bond in order to ensure her return to India and to make available to the father, his visitation rights subject to the education of the child. So far as the order which had been passed by the High Court, affirming the order of the trial court, the visitation rights of the appellant-father have been so structured as to be compatible with the educational career of the child. In this matter judicial discretion has been properly balanced between the rights of the appellant and those of the respondent. In that view of the matter, interference with the order passed by the High Court is not called for. The respondent is directed that before taking the child to Australia, she must file an undertaking to the satisfaction of the Court of Additional District Judge within the stipulated period. [Paras 25 and 26] [785-G-H; 786-A-C]

Case Law Reference:

(2008) 7 SCC 673	**Referred to.**	**Para 14**
(1973) 1 SCC 840	**Referred to.**	**Para 17**

(1998) 1 SCC 112	**Referred to.**	**Para 18**
(2009) 1 SCC 42	**Referred to.**	**Para 20**
AIR 1982 SC 1276	**Referred to.**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2704 of 2010.

From the Judgment & Order dated 27.7.2009 of the High Court of Delhi at New Delhi in MAT APP No. 38 of 2009.

Jaspal Singh, Neelam Kalsi, Vimal Chandra S. Dave for the Appellant.

P.H. Parekh, J.K. Chawla, P.K. Sharma, Amit Tripathi, Rohit Pandey for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal by the husband, impugns the judgment and order dated 27.07.09 of Delhi High Court which upheld the judgment and order of the Additional District Judge passed in relation to applications filed by both the parties under Section 26 of the Hindu Marriage Act (hereinafter "the Act"). The impugned judgment permitted the respondent-wife to take the child with her to Australia.

3. The material facts of the case are that the parties to the present appeal were married as per the Hindu rites on 10.12.2000. A child, Master Shivam, was born to them on 05.08.02. In view of irreconcilable differences between the parties they had agreed for a divorce by mutual consent under Section 13-B of the Act and filed a petition to that effect and on 05.09.06 a decree of divorce on mutual consent was passed by the Additional District Judge, Delhi.

4. As regards the custody of the child there was some

settlement between the parties and according to the appellant the same was incorporated in paras 7 and 9 of the petition filed under Section 13-B (2) of the Act. Those paragraphs are as under:

> "The parties have agreed that the custody of the minor son Master Shivam shall remain with the mother, petitioner No.1 who being the natural mother is also the guardian of the son Master Shivam as per law laid down by the Supreme Court of India. It is, however, agreed that the father petitioner shall have right of visitation only to the extent that the child Master Shivam shall be with the father, petitioner No.2, once in a fortnight from 10 AM to 6.30 PM on a Saturday. Petitioner No.2 shall collect the child Master Shivam from WZ-64, 2nd Floor Shiv Nagar Lane No.4, New Delhi-58 at 10 AM on a Saturday where the child is with his mother. And on the same day at by 6.30 PM, the petitioner No.2 would leave the child back at the same place with the mother i.e. petitioner No.1 and in case he does not do so petitioner No.1 the mother shall collect the child from petitioner No.2 on the same day. Both parties undertake before this Hon'ble Court that they would not create any obstruction in implementation of this arrangement.
>
> The petitioner No.1 shall take adequate care of the child in respect of health, education etc., at her own cost. In case the petitioner No.1 changes her address or takes the child outside Delhi, she shall keep petitioner No.2 informed one week in advance about the address and telephone nos. and the place where the child would be staying with the mother, to enable the petitioner No.2 to remain in touch with the child.
>
> The petitioner No.1 has received all her Stridhan and other valuables, articles and other possessions, and nothing remains due to her from the petitioner No.2. The petitioner

No.1 and the child Shivam has no claim to any property or financial commitment from petitioner No.2 and all her claims are settled fully and finally".

5. Thereafter the respondent-wife filed applications dated 07.11.06 and 9.05.08 and the appellant-husband also filed applications dated 17.11.07 and 16.02.09 under Section 26 of the Act seeking modification of those terms and conditions about the custody of the child.

6. The respondent was basing her claim on the fact that she wanted to take the child with her to Australia where she was employed for gain with a request to revoke the visitation rights granted to the appellant for meeting the child. This she felt will be conducive to the paramount interest and welfare of the child. The appellant on the other hand sought permanent custody of the child under the changed circumstances alleging that it is not in the interest of the child to leave India permanently.

7. The Trial Court vide its order dated 06.04.09 took notice of the fact that in the joint petition of divorce, parties voluntarily agreed that the custody of the child shall remain with the mother and father shall have only visiting rights, in the manner indicated in the mutual divorce decree. The Court modified the terms and conditions of the custody and visitation rights of the appellant about the minor child. By its order the Trial Court had allowed the respondent to take the child with her to Australia but also directed her to bring the child back to India for allowing the father visitation rights twice in a year i.e. for two terms – between 18th of December to 26th of January and then from 26th of June to 11th of July.

8. Being aggrieved by that order of the Trial Court, the appellant appealed to the High Court. It was argued by the appellant since no decree was passed by the Court while granting mutual divorce, an application under Section 26 of the Act does not lie and in the absence of specific provision in the decree regarding the custody and visitation rights of the child,

the Trial Court has no jurisdiction to entertain the petition afresh after passing of the decree.

9. The High Court took into consideration the provisions of Section 26 of the Act and was of the view that the aforesaid provision is intended to enable the Court to pass suitable orders from time to time to protect the interest of minor children. However, the High Court held that after the final order is passed in original petition of divorce for the custody of the minor child, the other party cannot file any number of fresh petitions ignoring the earlier order passed by the Court.

10. The Court took into consideration that even if the terms and conditions regarding the custody and visitation rights of the child are not specifically contained in the decree, they do form part of the petition seeking divorce by mutual consent. It was of the view that absence of the terms and conditions in the decree does not disentitle the respondent to file an application under Section 26 of the Act seeking revocation of the visitation rights of the appellant.

11. It is important to mention here that the learned Judge of the High Court had personally interviewed the child who was about 7 years old to ascertain his wishes. The child in categorical terms expressed his desire to be in the custody and guardianship of his mother, the respondent. The child appeared to be quite intelligent. The child was specifically asked if he wanted to live with his father in India but he unequivocally refused to go with or stay with him. He made it clear in his expression that he was happy with his mother and maternal grandmother and desired only to live with his mother. The aforesaid procedure was also followed by the learned Trial Court and it was also of the same view after talking with the child.

12. Being aggrieved with the judgment of the High Court the appellant has approached this Court and hence this appeal by way of Special Leave Petition.

13. We have also talked with the child in our chambers in the absence of his parents. We found him to be quite intelligent and discerning. The child is in school and from the behaviour of the child, we could make out that he is well behaved and that he is receiving proper education.

14. The child categorically stated that he wants to stay with his mother. It appears to us that the child is about 8-10 years of age and is in a very formative and impressionable stage in his life. The welfare of the child is of paramount importance in matters relating to child custody and this Court has held that welfare of the child may have a primacy even over statutory provisions [See *Mausami Moitra Ganguli vs. Jayant Ganguli* – (2008) 7 SCC 673, para 19, page 678]. We have considered this matter in all its aspects.

15. The argument of the learned counsel for the appellant, that in view of the provisions of Section 26 of the Act, the order of custody of the child and the visitation rights of the appellant cannot be changed as they are not reflected in the decree of mutual divorce, is far too hyper technical an objection to be considered seriously in a custody proceeding. A child is not a chattel nor is he/she an article of personal property to be shared in equal halves.

16. In a matter relating to custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child.

17. In *Rosy Jacob vs. Jacob A Chakramakkal* -[(1973) 1 SCC 840]**,** a three judge Bench of this Court held that all orders relating to custody of minors were considered to be temporary orders. The learned judges made it clear that with the passage

of time, the Court is entitled to modify the order in the interest of the minor child. The Court went to the extent of saying that even if orders are based on consent, those orders can also be varied if the welfare of the child so demands.

18. The aforesaid principle has again been followed in *Dhanwanti Joshi vs. Madhav Unde* - [(1998) 1 SCC 112].

19. Even though the aforesaid principles have been laid down in proceedings under the Guardians and Wards Act, 1890, these principles are equally applicable in dealing with the custody of a child under Section 26 of the Act since in both the situations two things are common; the first, being orders relating to custody of a growing child and secondly, the paramount consideration of the welfare of the child. Such considerations are never static nor can they be squeezed in a strait jacket. Therefore, each case has to be dealt with on the basis of its peculiar facts.

20. In this connection, the principles laid down by this Court in *Gaurav Nagpal vs. Sumedha Nagpal* reported in (2009) 1 SCC 42 are very pertinent. Those principles in paragraphs 42 and 43 are set out below:

> **"**42. Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible.
>
> 43. The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force".

21. That is why this Court has all along insisted on focussing the welfare of the child and accepted it to be the

paramount consideration guiding the Court's discretion in custody order. See *Thrity Hoshie Dolikuka vs. Hoshiam Shavaksha Dolikuka* - [AIR 1982 SC 1276], para 17**.**

22. In the factual and legal background considered above, the objections raised by the appellant do not hold much water.

23. Now coming to the question of the child being taken to Australia and the consequent variations in the visitation rights of the father, this Court finds that the Respondent mother is getting a better job opportunity in Australia. Her autonomy on her personhood cannot be curtailed by Court on the ground of a prior order of custody of the child. Every person has a right to develop his or her potential. In fact a right to development is a basic human right. The respondent-mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.

24. Insofar as the father is concerned, he is already established in India and he is also financially solvent. His visitation rights have been ensured in the impugned orders of the High Court. His rights have been varied but have not been totally ignored. The appellant-father, for all these years, lived without the child and got used to it.

25. In the application dated 9.5.2008 filed before the Additional District Judge, Delhi, the mother made it clear in paragraph 12 that she is ready to furnish any undertaking or bond in order to ensure her return to India and to make available to the father, his visitation rights subject to the education of the child. This Court finds that so far as the order

which had been passed by the High Court, affirming the order of the Trial Court, the visitation rights of the appellant-father have been so structured as to be compatible with the educational career of the child. This Court finds that in this matter judicial discretion has been properly balanced between the rights of the appellant and those of the respondent.

26. In that view of the matter, this Court refuses to interfere with the order passed by the High Court. The appeal is dismissed with the direction that the respondent-mother, before taking the child to Australia, must file an undertaking to the satisfaction of the Court of Additional District Judge-01, (West), Delhi within a period of four weeks from date. No order as to costs.

N.J. Appeal dismissed.

KUNGA NIMA LEPCHA & ORS.

v.

STATE OF SIKKIM & ORS.

(Writ Petition (Civil) No. 353 of 2006)

MARCH 25, 2010

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

Constitution of India, 1950: Article 32 – Public Interest Litigation – Against Chief Minister – By persons belonging to political parties – Alleging possession of assets disproportionate to known source of income and criminal misconduct – Seeking initiation of investigation by CBI – Held: The writ petition in the nature of PIL not maintainable – The status of petitioners as belonging to political party leads to apprehension that the petition is not the result of public-spirited concern – Writ jurisdiction can be exercised only when there is violation of fundamental rights and not where statutory remedies are available – Allegation of infringement of fundamental rights in the instant case is vague – Alleged acts cannot be automatically equated with violation of Article 14 – The alleged acts can come within the ambit of statutory offences under Prevention of Corruption Act – Proceedings can be brought before writ court only on exhaustion of ordinary remedies – Court cannot in exercise of jurisdiction under Article 32 direct initiation of investigation – The scope of intervention by court of first instance is controlled by statutory provisions i.e. Cr.P.C. – Direction for initiation of investigation by the Highest Court would also prejudice the accused –Even otherwise, High Court is the more appropriate forum for examining the allegations in the instant case – Public Interest Litigation – Investigation – Prevention of Corruption Act, 1988 – Constitution of India, 1950 – Article 14 – Code of Criminal Procedure, 1973 – Locus Standi.

The present writ petition was filed as a Public Interest Litigation under Article 32 of the Constitution of India, alleging that respondent No. 2 (Chief Minister of the State) has misused public office to amass assets disproportionate to his known sources of income; and also misappropriated public money. The writ petitioner sought writ in the nature of Mandamus directing CBI to investigate the awarding of Government contracts and/ or work orders by respondent-State during the tenure of respondent No. 2 as the Chief Minister. The petitioner also sought CBI Investigation against respondent No. 2, his relatives and other guilty officials.

Petitioner No. 3 sought permission to withdraw from the proceedings stating that he filed the writ petition at the instance of former Chief Minister of the State.

Dismissing the petition, the Court

HELD: 1. The fact that this petition was instituted at the initiative of four individuals belonging to a political party raises the apprehension that they were motivated by a sense of political rivalry rather than a public-spirited concern about the misuse of office by the incumbent Chief Minister. The writ jurisdiction exercised by Supreme Court cannot be turned into an instrument of such partisan considerations. However, even if the *locus standi* of the petitioners is accepted, keeping in mind that allegations of corruption on the part of the incumbent Chief Minister do touch on public interest, Supreme Court is not the appropriate forum for seeking the initiation of investigation. [Para 7] [794-F-G]

2. It is true that this Court has copious powers under Article 32 of the Constitution for the purpose of enforcing the rights enshrined in Part III of the Constitution. However, the remedies evolved by way of writ jurisdiction are of an extraordinary nature. They cannot be granted

as a matter of due course to provide redressal in situations where statutory remedies are available. It is quite evident that the *onus* is on the petitioners to demonstrate a specific violation of any of the fundamental rights in order to seek relief under writ jurisdiction. In the present petition, the petitioners have made a rather vague argument that the alleged acts of corruption amount to an infringement of Article 14 of the Constitution of India. The guarantee of 'equal protection before the law' or 'equality before the law' is violated if there is an unreasonable discrimination between two or more individuals or between two or more classes of persons. The alleged acts of misappropriation from the public exchequer cannot be automatically equated with a violation of the guarantee of 'equal protection before the law'. The alleged acts can easily come within the ambit of statutory offences such as those of 'possession of assets disproportionate to known sources of income' as well as 'criminal misconduct' under the Prevention of Corruption Act, 1988. [Paras 9 and 10] [795-E-H; 796-A-B]

Vineet Narain v. Union of India **(1998) 1 SCC 226, referred to.**

3.1. The onus of launching an investigation into such matters is clearly on the investigating agencies such as the State Police, Central Bureau of Investigation (CBI) or the Central Vigilance Commission (CVC) among others. It is not proper for this Court to give directions for initiating such an investigation under its writ jurisdiction. In the past, writ jurisdiction has been used to monitor the progress of ongoing investigations or to transfer ongoing investigations from one investigating agency to another. Such directions have been given when a specific violation of fundamental rights is shown, which could be the consequence of apathy or partiality on part of

investigating agencies among other reasons. The writ court can only play a corrective role to ensure that the integrity of the investigation is not compromised. However, it is not viable for a writ court to order the initiation of an investigation. That function clearly lies in the domain of the executive and it is upto the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation. It must also be borne in mind that there are provisions in Cr.P.C. which empower the courts of first instance to exercise a certain degree of control over ongoing investigations. The scope for intervention by the trial court is hence controlled by statutory provisions and it is not advisable for writ courts to interfere with criminal investigations in the absence of specific standards for the same. [Para 10] [796-B-H]

3.2. Supreme Court cannot sit in judgment over a question whether investigations should be launched against politicians for alleged acts of corruption. The Supreme Court of India functions as a Constitutional Court as well as the highest appellate court in the country. If the Supreme Court gives direction for prosecution, it would cause serious prejudice to the accused, as the direction of this Court may have far reaching persuasive effect on the Court which may ultimately try the accused. It is always open to the petitioners to approach the investigative agencies directly with the incriminating materials and it is for the investigative agencies to decide on the further course of action. [Para 11] [797-A-C]

4. While it could be appreciated that the efforts to uncover the alleged acts of corruption may be obstructed by entrenched interests, in this particular case the petitioners would be well advised to rely on the statutory remedies. It is only on the exhaustion of ordinary remedies that perhaps a proceeding can be brought

before a writ court and in any case the High Court of Sikkim would be a far more appropriate forum for examining the allegations made in the present petition. [Para 11] [797-C-E]

Case Law Reference

(1998) 1 SCC 226	**Referred to.**	**Para 8**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 353 of 2006.

Vinod Bobde, Annam D.N. Rao, Arunabh Chowdhury, Anupam Lal Das for the Appellants.

Mohan, Parasaran, ASG, K.K. Venugopal, Alaf Ahmad, Ram Jethmalani, Sonam P. Wangdi, A.G., Mariarputham, Anukur Talwar (for Arputham, Aruna & Co.), Tufail A. Khan, B.K. Prasad (for P. Parmeswaran), P.R. Mala, Joyeta, Banerjee, Saurabh Gupta, Rajdeep Banerjee, V. Mohana for the Respondents.

The Judgment of the Court was delivered by

K. G. BALAKRISHNAN, CJI. 1. The present writ petition was instituted in this Court by way of public interest litigation under Article 32 of the Constitution of India. The petitioners have levelled some allegations against the incumbent Chief Minister of the State of Sikkim who was impleaded as Respondent No.2 herein. The crux of these allegations is that he has misused his public office to amass assets disproportionate to his known sources of income. The petitioners have also alleged that he has misappropriated a large volume of public money at the cost of the Government of India and the Government of Sikkim. The relief sought by the petitioners is the issuance of a writ of mandamus directing the Central Bureau of Investigation (CBI) to investigate the allegations that have been levelled against him.

2. It may be recalled that the State of Sikkim had become a full fledged state of the Union of India, following the enactment of the Thirty-sixth Amendment to the Constitution which was given effect in 1975. The said amendment had inserted Article 371F into the constitutional text which lays down special provisions with respect to the governance of the State of Sikkim. We must also take note of the fact that even though the Income Tax Act, 1961 had been extended to the State of Sikkim in 1989, it has not been enforced till date on account of the constitutionally mandated special treatment. The non-enforcement of the Income Tax Act is a relevant consideration since it entails that the income details of individuals who belong to and reside in Sikkim are not recorded by the Income Tax Department. Furthermore, the finances of the government of Sikkim are enhanced by the various developmental and welfare schemes of Government of India. Respondent No. 2 is the founder President of the Sikkim Democratic Front and he has been serving as the Chief Minister of the State of Sikkim since 12th December, 1994. Under his leadership, the Sikkim Democratic Front has been successful in the periodic elections held to constitute the State Legislative Assembly.

3. However, the petitioners have levelled some serious allegations of wrongdoing on part of the second respondent. In Annexure P-1 of the writ petition submitted before this Court, a list of his family members has been provided. This list refers to 21 members which includes 2 wives, 4 sons, 1 daughter, 4 brothers, 6 sisters-in-law, 1 father-in- law, and 3 brothers-in-law. It has been pointed out that in order to contest the elections to the State Legislative Assembly from the 13-Damthang Constituency in the year 2004, he had declared his family's assets taken together to be Rs. 4,76,54,238/-. This declaration was made as per the requirements of the Representation of People Act, 1951. However, the petitioners have alleged that the total assets actually amount to more than Rs. 25 crores.

4. In Paragraph 29 of the writ petition, the petitioners have

incorporated a detailed description of the movable and immovable assets that allegedly belong to Respondent No. 2 and his relatives. Furthermore, the petitioners have also alleged that Respondent No. 2 has acquired several immovable properties either in his own name or in the name of his relatives or in the name of his nominees by way of misappropriating funds from the public exchequer. In Annexure P-20, the petitioners have alleged that the Government of Sikkim acting through the Sikkim Power Development Corporation has misappropriated an amount of Rs. 15.38 crores from the public exchequer. The petitioners have supported these allegations by submitting that the relevant information was procured in response to applications filed under the Right to Information Act, 2005. It will also be useful to reproduce the prayer sought by the petitioners in the following words:

> "(a) issuance of an appropriate writ in the nature of Mandamus commanding the Director, Central Bureau of Investigation to investigate the awarding of government contracts and/or work orders by the Respondent No. 1 State of Sikkim during the tenure of the Respondent No.2 as the Chief Minister of the State of Sikkim viz a viz amassing of huge assets and/or wealth by the Respondent No. 2 and his relatives with a direction upon it to submit its report before this Hon'ble Court within a time frame fixed by this Hon'ble Court;
>
> (b) issuance of an appropriate writ in the nature of mandamus commanding the Director, Central Bureau of Investigation to investigate the matter against the Respondent No. 2, his relatives and other guilty officials and take appropriate legal action by way of registration of FIR under the general provisions of law and the provisions of Prevention of Corruption Act, 1988;
>
> (c) order for rule nisi in terms of the prayers above;

> (d) pass such further order(s) and/or direction(s) as this Hon'ble Court may deem fit and proper."

5. In the course of the proceedings before this Court, Sh. Vinod Bobde, Sr. Adv. argued on behalf of the petitioners. Thereafter, Sh. Ram Jethmalani, Sr. Adv. made oral submissions on behalf of the respondents, followed by Sh. K.K. Venugopal. Sr. Adv. Thereafter, Sh. Vinod Bobde, Sr. Adv. made his submissions in rejoinder.

6. Before addressing the substance of the petitioners' submissions, it must be mentioned that there are four petitioners in this case who are serving as office-bearers of a political party in Sikkim. Petitioner No. 3 has affirmed through an affidavit dated 31st August, 2007, that they were advised to file a writ petition before this court by former Chief Minister of the State of Sikkim and currently serving as President of a political party. In fact, Petitioner No. 3 has sworn on affidavit that he had joined these proceedings as a petitioner at the instance of him. He has also cast aspersions on the motives of Sh. Kunga Nima Lepcha (Petitioner No. 1) for filing the present writ petition. In view of this position, Petitioner No. 3 had sought permission to withdraw from the proceedings.

7. The fact that this petition was instituted at the initiative of four individuals belonging to a political party raises the apprehension that they were motivated by a sense of political rivalry rather than a public-spirited concern about the misuse of office by the incumbent Chief Minister. We must of course emphasise that the writ jurisdiction exercised by this Court cannot be turned into an instrument of such partisan considerations. However, even if we were to accept the *locus standi* of the petitioners keeping in mind that allegations of corruption on part of the incumbent Chief Minister do touch on public interest, this Court is not the appropriate forum for seeking the initiation of investigation.

8. It is of course true that this Court has copious powers

under Article 32 of the Constitution for the purpose of enforcing the rights enshrined in Part III of the Constitution. Over the years, this Court has creatively expanded its writ jurisdiction to provide redress against the infringement of fundamental rights and concurrently relied on Article 142 to do complete justice in the matters before it. As explained by J.S. Verma, C.J., in *Vineet Narain v. Union of India* (1998) 1 SCC 226 (Para. 49):

> "*49.* There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognized and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role…"

9. However, the remedies evolved by way of writ jurisdiction are of an extraordinary nature. They cannot be granted as a matter of due course to provide redressal in situations where statutory remedies are available. It is quite evident that the onus is on the petitioners to demonstrate a specific violation of any of the fundamental rights in order to seek relief under writ jurisdiction. In the present petition, the petitioners have made a rather vague argument that the alleged acts of corruption on part of Shri Pawan Chamling amount to an infringement of Article 14 of the Constitution of India. We do not find any merit in this assertion because the guarantee of 'equal protection before the law' or 'equality before the law' is violated if there is an unreasonable discrimination between two or more individuals or between two or more classes of persons. Clearly the alleged acts of misappropriation from the public exchequer cannot be automatically equated with a violation of the guarantee of 'equal protection before the law'.

10. Furthermore, we must emphasise the fact that the alleged acts can easily come within the ambit of statutory

offences such as those of 'possession of assets disproportionate to known sources of income' as well as 'criminal misconduct' under the Prevention of Corruption Act, 1988. The onus of launching an investigation into such matters is clearly on the investigating agencies such as the State Police, Central Bureau of Investigation (CBI) or the Central Vigilance Commission (CVC) among others. It is not proper for this court to give directions for initiating such an investigation under its writ jurisdiction. While it is true that in the past, the Supreme Court of India as well as the various High Courts have indeed granted remedies relating to investigations in criminal cases, we must make a careful note of the petitioners' prayer in the present case. In the past, writ jurisdiction has been used to monitor the progress of ongoing investigations or to transfer ongoing investigations from one investigating agency to another. Such directions have been given when a specific violation of fundamental rights is shown, which could be the consequence of apathy or partiality on part of investigating agencies among other reasons. In some cases, judicial intervention by way of writ jurisdiction is warranted on account of obstructions to the investigation process such as material threats to witnesses, the destruction of evidence or undue pressure from powerful interests. In all of these circumstances, the writ court can only play a corrective role to ensure that the integrity of the investigation is not compromised. However, it is not viable for a writ court to order the initiation of an investigation. That function clearly lies in the domain of the executive and it is upto the investigating agencies themselves to decide whether the material produced before them provides a sufficient basis to launch an investigation. It must also be borne in mind that there are provisions in the Code of Criminal Procedure which empower the courts of first instance to exercise a certain degree of control over ongoing investigations. The scope for intervention by the trial court is hence controlled by statutory provisions and it is not advisable for writ courts to interfere with criminal investigations in the absence of specific standards for the same.

11. Hence it is our conclusion that the petitioners' prayer cannot be granted. This court cannot sit in judgment over whether investigations should be launched against politicians for alleged acts of corruption. The Supreme Court of India functions as a Constitutional Court as well as the highest appellate court in the country. If the Supreme Court gives direction for prosecution, it would cause serious prejudice to the accused, as the direction of this Court may have far reaching persuasive effect on the Court which may ultimately try the accused. It is always open to the petitioners to approach the investigative agencies directly with the incriminating materials and it is for the investigative agencies to decide on the further course of action. While we can appreciate the general claim that the efforts to uncover the alleged acts of corruption may be obstructed by entrenched interests, in this particular case the petitioners would be well advised to rely on the statutory remedies. It is only on the exhaustion of ordinary remedies that perhaps a proceeding can be brought before a writ court and in any case the High Court of Sikkim would be a far more appropriate forum for examining the allegations made in the present petition.

12. Hence, the writ petition is dismissed, however with no order as to costs.

K.K.T. Writ Petition dismissed.

SUPREME PAPER MILLS LTD.

v.

ASSTT. COMMNR. COMMERCIAL TAXES CALCUTTA & ORS.

(Civil Appeal No. 1410 of 2003)

MARCH 25, 2010

[D.K. JAIN, DR. MUKUNDAKAM SHARMA AND R.M. LODHA, JJ.]

Bengal Finance (Sales Tax) Act, 1941 – s. 11 E(2) – Show-cause notice – Issuance of – Furnishing of incorrect statement of turnover/incorrect particulars of sales by assessee – Show cause notice issued proposing to re-open deemed assessment for the period – Challenge to, by assessee on the ground that time period of 15 days not given and reasons justifying the issuance of notice not given – On appeal, held: Show cause notice is issued to the dealer when Commissioner is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show cause notice – Assessee would not in any manner be prejudiced due to issuance of the notice – Assessee can file an effective reply – Time given by the authority for filing the reply can be further extended – Non-mentioning of reasons justifying issuance of notice does not invalidate the notice.

Interpretation of Statutes – Legislative intent – Held: Language employed in a statute itself determines and indicates the legislative intent – If the language is clear and unambiguous, it is not proper for the court to add any words thereto and evolve some legislative intent not found in the statute.

The question which arose for consideration in the

instant appeal is whether the show cause notice issued by the respondent-Revenue proposing to re-open the deemed assessment for the period, is illegal and defective as the same did not provide for a time period of 15 days as prescribed in the statute and did not disclose the materials leading to the satisfaction of the concerned authorities justifying the issuance of such a show cause notice.

Dismissing the appeal, the Court

HELD: 1.1. The expression used in section 11 E(2) of the Bengal Finance (Sales Tax) Act, 1941 is that the Commissioner must be satisfied on information or otherwise that the registered dealer has furnished incorrect statement of his turnover or furnished incorrect particulars of his sale in the return. A show cause notice is issued to the dealer with the purpose of informing him that the department proposes to re-open the assessment because the Commissioner himself is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show cause notice as to why the said power vested on the Commissioner should not be exercised. [Para 14] [806-G-H; 807-A]

1.2. There is nothing in the language of s. 11 E(2) which either expressly or impliedly mandates the recording of any reasons. Section 11 E (2) nowhere specifically mentions that factual basis of the ground of Deputy Commissioner's satisfaction on either or both the points mentioned in sub-section 2(a) or 2(b) of section 11 of the Act are required to be incorporated in the notice for re-opening of the deemed assessment and supplied to the dealer and that in case of failure to do so, the same would invalidate the notice. [Paras 15 and 18] [807-B-C; 808-B-C]

1.3. Section 11 (E) is clear and explicit and there is no ambiguity in it. If the legislature had intended to give any other meaning as suggested by the counsel appearing for the appellant it would have made specific provision laying down such conditions explicitly and in clear words. The court cannot add anything into a statutory provision, which is plain and unambiguous. Language employed in a statute itself determines and indicates the legislative intent. If the language is clear and unambiguous it would not be proper for the court to add any words thereto and evolve some legislative intent not found in the statute. [Para 16] [807-C-E]

2.1. In the instant case, notice was issued in order to provide an opportunity of natural justice to the dealer. The notice issued giving the dealer an opportunity to show cause within a stipulated period does not in any manner prejudice the right of the appellant to file an effective reply. It was always possible for the appellant to seek for further time, if according to him the time given by the authority for filing the reply was required to be extended in order to enable him to collect some record. It cannot therefore be said that if detailed reasons for issuance of notice being absent in the show cause notice, the same was invalid and void. [Paras 17 and 18] [807-G-H; 808-A]

2.2. The appellant at this stage is simply called upon to file his objection or show cause as to why the re-opening of the assessment should not be done. Once he submits his reply to the show cause, he would also be heard and would also be allowed to produce his records namely books of accounts, only after which a decision would be taken whether the assessment already done should be re-opened or not. Even after that, the appellant would definitely get an opportunity of hearing in the fresh assessment proceeding. Thus, the appellant would not in any manner be prejudiced due to issuance of the said

show cause notice. The judgment and order passed by the tribunal and upheld by the High Court, is maintained. [Para 19] [808-C-F]

Sales Tax Officer, Ganjam vs. M/s. Uttareswari Rice Mills **(1973) 3 SCC 171, held applicable.**

Apollo Tyres Ltd. vs. Deputy Commissioner (Commercial Taxes) and Ors. **2001 38 Sales Tax Advices 4;** *Hindustan Lever Ltd. vs. Director General (Investigation and Registration) and Anr.* **(2001) 2 SCC 474, referred to.**

Case Law Reference:

(2001) 38 Sales Tax Advices 4	**Referred to.**	**Para 7**
(2001) 2 SCC 474	**Referred to.**	**Para 7**
(1973) 3 SCC 171	**held applicable.**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1410 of 2003.

From the Judgment & Order dated 19.7.2002 of the High Court at Calcutta in W.P.T.T. No. 18 of 2001.

Rana Mukherjee, M. Indrani, Abhijit Sengupta for the Appellant.

M. Chandrasekharan, Tara Chandra Sharma, Neelam Sharma, Rupesh Kumar for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The issue that falls for consideration in the present appeal is whether the show cause notice issued by the respondent is illegal and defective as the same did not provide for a time period of 15 days as prescribed in the statute and also because it did not disclose materials leading to the satisfaction of the concerned authorities justifying the issuance of such a show cause notice.

2. The appellant Company was carrying on the business of manufacturing various types of papers at its paper mill situated at Village Raninagar Chakdah, District Nadia, Kolkata. In the course of its carrying on business it filed necessary returns as required under the Bengal Finance (Sales Tax) Act, 1941 (for short the "1941 Act") and also paid the taxes on the basis of the said return. The Revenue also completed the assessment proceeding which was deemed to have been made under Section 11 E (1) of the 1941 Act by operation of law. Subsequently, however, the appellant received a show cause notice from the Deputy Commissioner, Commercial Taxes, Corporate Division whereby the appellant was directed to show cause why deemed assessment case for the period mentioned in the said impugned notices would not be re-opened. Since the validity of the aforesaid notices has been challenged by the appellant herein, we would extract the relevant contents of one of the notices which reads as follows:-

> "Whereas I am satisfied that the returns filed by you which formed the basis of the above mentioned deemed assessment case exhibit incorrect statement of your turnover/incorrect particulars of sales whereas it appears to me that the assessment is required to be re-opened, you are hereby directed to show cause on 29.6.99 at 11.00 a.m. why the assessment will not be re-opened."

3. The other notices which are also impugned herein have similar contents. In terms of the aforesaid notices, the appellants were directed to submit their reply to the show cause notice on 29.6.1999.

4. Being aggrieved by the issuance of the aforesaid notices, the appellant filed an application under Section 8 of the West Bengal Taxation Tribunal Act, 1987 challenging the validity of the aforesaid notices issued by the respondent proposing to re-open the deemed assessment for the four periods. The West Bengal Taxation Tribunal heard all the four

cases analogously and by judgment dated 27.7.2001, dismissed the same.

5. Being aggrieved and dissatisfied by the aforesaid judgment and order passed by the Tribunal, the appellant preferred a Writ Petition in the High Court of Calcutta which was entertained. However, the High Court of Calcutta dismissed the writ petition by the impugned judgment and order dated 19.7.2002 which is under challenge in this appeal.

6. Counsel appearing for the appellant submitted before us that the aforesaid show cause notice is illegal and without jurisdiction as a time period of 15 days which is required to be given was not extended to the appellant to submit its reply to the show cause notice. It was also submitted that the said notices were invalid due to non-mentioning of materials leading to the satisfaction of the authority for issuance of such a notice.

7. In support of the aforesaid contentions, counsel appearing for the appellant relied upon the provisions of section 11E (2) of the Act as also on the decision of the Calcutta High Court in *Apollo Tyres Ltd. Vs. Deputy Commissioner (Commercial Taxes) and Others* reported in 2001 38 Sales Tax Advices 4 and the decision in *Hindustan Lever Ltd. Vs. Director General (Investigation and Registration) and Anr.* reported in (2001) 2 SCC 474.

8. Counsel appearing for the respondent, however, refuted the aforesaid submission contending inter alia that what is challenged in the present case is only a show cause notice and that no final order is yet passed. It was also submitted that the pre-condition as mentioned in the statutory provision is the satisfaction of the concerned Authority that the assessee had furnished incorrect statements of his turnover or incorrect particulars of the sale submitted under Section 10 or otherwise, and that such a satisfaction can be derived on the basis of the information received by that Authority or otherwise.

9. It was submitted that on fulfilling all the pre-conditions mentioned in the statute itself and if the Commissioner is satisfied of the aforesaid situation, it is possible for him to issue such a show cause notice. He also submitted that the aforesaid show cause notice cannot be said to be invalid because of paucity of time granted to the appellant. We have considered the aforesaid submissions of the counsel appearing for the parties in the light of the records placed before us.

10. Section 11 E (2) in terms of which the aforesaid show cause notice is issued reads as follows:-

> "Sec. 11E (2) - Where the Commissioner is satisfied on information or otherwise that a registered dealer –
>
> (a) has concealed any sales or particulars thereof, or
>
> (b) has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted under section 10 or otherwise.
>
> *relating to an assessment made under sub-section (1) which has resulted in reduction of the amount of tax payable by him under this Act in respect of any of the periods, the Commissioner shall, subject to such conditions as may be prescribed, within six years from the date of such assessment, reopen in the prescribed manner the assessment for such period and, after giving such dealer a reasonable opportunity of being heard, make fresh assessment under sub-section (1) of section 11 for such period to the best of his judgement."*

11. The aforesaid provision makes it crystal clear that if on information received by the Commissioner or even otherwise, if he is satisfied that the assessee namely the registered dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted or even otherwise, he may issue a show cause notice to show cause as to why the assessment made should not be

re-opened. It is crystal clear that the show cause notice is issued with the purpose of giving the dealer a reasonable opportunity of being heard before an order is passed for re-opening of the assessment for the reason that he has furnished incorrect statement of his turnover or incorrect particulars of his sales in his return.

12. In *Sales Tax Officer, Ganjam Vs. M/s. Uttareswari Rice Mills* [(1973) 3 SCC 171], a similar issue as sought to be raised herein was urged before the Supreme Court. In the said case, a similar notice was issued by the Sales Tax Officer to the dealer contending inter alia that he had a reason to believe that his turnover for the quarter ending 1963-64 on which sales tax was payable under the Orissa Sales Tax Act, 1947 had escaped assessment/had been under-assessed. In that view of the matter, the dealer was called upon to submit his reply. The aforesaid notice was challenged by filing a writ petition in the High Court of Orissa whereas the High Court allowed the writ petition on the ground that the Sales Tax officer did not indicate any reason for issuing notice under Section 12(8) of the Act. On appeal being filed, this Court in that context considered sub-sections (5) and sub-sections (8) of Section 12. After considering the aforesaid provisions, the Supreme Court in paragraph 8 held as follows:-

> "8**.** Although the opening words used in Section 12(8) are "if for any reason" and not "if the sales tax authority has reason to believe", the difference in phraseology, in our opinion, should not make such material difference. A reason cannot exist in vacuum. Somebody must form the belief that reason exists and looking to the context in which the words are used, we are of the view that it should be the sales tax authority issuing the notice who should have reason to believe that the turnover of a dealer has escaped assessment or has been under-assessed. The approach in this matter has to be practical and not pedantic. Any view which would make the opening words

> of Section 12(8) unworkable has to be avoided. It may be noted in this context that in Form VI appended to the rules, which has been prepared in pursuance of Rule 23, the words used are "whereas I have reason to believe that your turnover . . . . . has escaped assessment . . . . . ."

13. Then again in paragraph 14, this Court further held in the following manner:-

> "14**.** There is nothing in the language of Section 12(8) of the Act which either expressly or by necessary implication postulates the recording of reasons in the notice which is issued to the dealer under the above provision of law. To hold that reasons which led to the issue of the said notice should be incorporated in the notice and that failure to do so would invalidate the notice, would be tantamount to reading something in the statute which, in fact, is not there. We are consequently unable to accede to the contention that the notice under the above provision of law should be quashed if the reasons which led to the issue of the notice are not mentioned in the notice. At the same time, we would like to make it clear that if the Sales Tax Officer is in possession of material which he proposes to use against the dealer in proceedings for reassessment, the said officer must before using that material bring it to the notice of the dealer and give him adequate opportunity to explain and answer the case on the basis of that material."

14. In our considered opinion, the ratio of the aforesaid decision of this Court is squarely applicable to the facts of the present case. The expression used in Section 11 E of the Act is that the Commissioner must be satisfied on information or otherwise that the registered dealer has furnished incorrect statement of his turnover or furnished incorrect particulars of his sale in the return. A show cause notice is issued to the dealer with the purpose of informing him that the department proposes to re-open the assessment because the Commissioner himself

is satisfied that the dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted, so as to enable the dealer to reply to the show cause notice as to why the said power vested on the Commissioner should not be exercised.

15. A notice was issued in order to provide an opportunity of natural justice to the dealer. There is nothing in the language of the aforesaid provision which either expressly or impliedly mandates the recording of any reasons. The provision of the Act nowhere postulates that the reasons which led to the issue of the said notice should be incorporated in the notice itself, and that in case of failure to do so, the same would invalidate the notice.

16. The aforesaid provision is clear and explicit and there is no ambiguity in it. If the legislature had intended to give any other meaning as suggested by the counsel appearing for the appellant it would have made specific provision laying down such conditions explicitly and in clear words. It is a well-settled principle in law that the court cannot add anything into a statutory provision, which is plain and unambiguous. Language employed in a statute itself determines and indicates the legislative intent. If the language is clear and unambiguous it would not be proper for the court to add any words thereto and evolve some legislative intent not found in the statute.

17. Here is a case where the section provides that if the Commissioner is satisfied that the assessee namely the registered dealer has furnished incorrect statement of his turnover or incorrect particulars of his sales in the return submitted or even otherwise and in that event a notice would be issued as envisaged therein to the dealer to show cause as to why the assessment made should not be re-opened. Therefore, notice issued in the present case giving the dealer an opportunity to show cause within a stipulated period does not in any manner prejudice the right of the appellant to file an effective reply. It was always possible for the appellant to seek

for further time, if according to him the time given by the authority for filing the reply was required to be extended in order to enable him to collect some record. It cannot therefore be said that if detailed reasons for issuance of notice being absent in the show cause notice, the same was invalid and void.

18. The aforesaid Section 11 E (2) nowhere specifically mentions that factual basis of the ground of Deputy Commissioner's satisfaction on either or both the points mentioned in sub-Section 2(a) or 2(b) of Section 11 of the Act are required to be incorporated in the notice for re-opening of the deemed assessment and supplied to the dealer.

19. The appellant at this stage is simply called upon to file his objection or show cause as to why the re-opening of the assessment should not be done. Once he submits his reply to the show cause, he would also be heard and would also be allowed to produce his records namely books of accounts, only after which a decision would be taken whether the assessment already done should be re-opened or not. Even after that, the appellant would definitely get an opportunity of hearing in the fresh assessment proceeding. In that view of the matter, we are of the considered opinion that the appellant would not in any manner be prejudiced due to issuance of the aforesaid show cause notice. We therefore, dismiss the appeal filed by the appellant, maintain the judgment and order passed by the Tribunal and upheld by the High Court.

20. The appeal has no merit and is dismissed.

N.J. Appeal dismissed.

SIEL FOODS & FERTILIZERS INDUSTRIES
v.
UNION OF INDIA & ORS.

Review Petition (C) Nos. 1200 of 2002

IN
IA NO. 22, 36 AND 129
IN
W. P. (C) NO. 4677 OF 1985 Etc.

MARCH 25, 2010

[K.G. BALAKRISHNAN, CJI., R.V. RAVEENDRAN AND J.M. PANCHAL, JJ.]

Delhi Development Authority Act, 1957 – s. 15 – Shifting/relocation of polluting industries from Delhi – Land available as a result of shifting – Direction of Court by various orders to use the land partly by land-owner and a part of it to be surrendered to Development Authority (DDA) for development of green belt – Land-owners time and again taking plea that the authorities should acquire the land under DDA Act and pay compensation – Court in lieu of monetary compensation giving additional FAR to the land-owners – Petition for review of the previous orders of the Court taking plea that DDA could not take the land without resorting to compulsory acquisition – Held: Review not maintainable – Plea regarding acquisition repeatedly rejected by Court – The land surrendered by land-owners need not be acquired and additional FAR was the only compensation – The Land is surrendered by the land-owners to DDA in Trust for the purpose of development of green belt and for the benefit of the community – If DDA in deviation to the Trust, uses the land for any other purpose, the land-owner entitled to compensation – Since the land-owner already received some consideration in the form of additional FAR, DDA and land-

owner to share the compensation at 50% each – Any change in use of the surrendered land to be only after prior permission of Delhi High Court – Transfer of the land, surrendered by one of the applicants, by DDA to Delhi Metro Rail Corporation is not permissible – Urban Development – Environmental Law – Trust.

In a Public Interest Litigation (*M.C. Mehta Vs. Union of India & Ors.*), series of orders were passed regarding shifting and relocating several hazardous, noxious, large and heavy industries, causing extensive pollution, from Delhi. Supreme Court monitored the matter and directed the authorities concerned to examine the question regarding utilization of land, made available as a relocation/shifting of industries.

Supreme Court passed order dated 10.05.1996 taking the view that land surrendered should be used for the development of green belts and open spaces. The land owner would develop part of the land for his own use and surrender the remaining land for the use of community at large to Delhi Development Authority (DDA). The extent of land for community use and for personal benefit of land-owners was also specified.

By another order dated 08.07.1996, the Court directed that the use of the land would be permitted in terms of the order dated 10.05.1996. By further order dated 04.12.1996, it was clarified that the order dated 10.05.1996 regarding the land-use was to be applicable for relocating industries as well as to those who decide to close down and not to relocate.

Some of the industries filed IAs praying for direction to DDA to acquire the land under Delhi Development Authority Act, 1957 (DDA Act) or Land Acquisition Act, 1894, which was required to be surrendered. The IAs were dismissed as withdrawn.

The Court by order dated 28.04.2000 directed that as a compensation, FAR would stand increased to 'one and a half times of the permissible FAR under the Master Plan' and held that DDA was not bound to acquire the land u/s. 15 of DDA Act.

Another attempt was made by the industries by raising the issue regarding compensation in an IA filed by DDA, wherein the plea was rejected.

The petitioners have filed the present petition seeking review of the orders dated 10.05.1996, 08.07.1996, 04.12.1996 and 28.04.2000, primarily taking the plea that DDA should resort to compulsory acquisition u/s. 15 of DDA Act.

The applicant in IA No. 1914 of 2006 and IA No. 2205 of 2007 contended that the land surrendered by it to DDA was further transferred to Delhi Metro Rail Corporation on payment of a premium and other amount and that such transfer was impermissible and that the monetary gain was required to be paid over to the land-owner.

Dismissing the petitions, the Court

HELD: 1. The orders dated 10.5.1996, 8.7.1996, 4.12.1996 and 28.4.2000 clearly demonstrate that the owners of land/industries were given a fair hearing before passing the order on 10.5.1996. The petitioners had now raised these very contentions that their lands will have to be acquired and that they are entitled to get reasonable compensation when their land was taken over. All these pleas had been repeatedly rejected by this Court. [Para 13] [831-E-G]

2. Some of the review petitions have been filed after dismissal or withdrawal of the earlier petition by the very same petitioners seeking almost the very same reliefs.

Therefore, such petitions are *prima facie* not maintainable and the pleas raised by these petitioners to review the earlier order passed by this Court cannot be considered. [Para 15] [833-F-G]

3. The order dated 10.5.1996 was passed to give effect to the Master Plan, to save the city and in public interest. Therefore, by surrendering a part of the land, the owners were not only benefitting the community, but themselves. The records clearly show that before the order dated 10.5.1996 was passed, the question what should be the compensation for the surrendered lands was specifically raised and considered. It was made clear that additional FAR will be in lieu of any monetary compensation for the land to be surrendered and dedicated to DDA for community use, for development of green belts and lung spaces. Therefore, it is evident that the order dated 10.5.1996 clearly intended that the land to be surrendered would vest in trust in DDA for the benefit of the community and the additional FAR was the only compensation for such surrendered land for community benefit and there would be no further compensation. Contentions similar to the contentions now raised were rejected by this Court by order dated 28.4.2000. Therefore, it is not possible for this Court to again review all these orders or take a different view. [Para 14] [833-B-E]

4. The land dedicated by private owners to the community, if acquired for any other purpose, or is diverted to any other use by DDA (as for example for putting up constructions or for sale or lease for development or construction), the land-owner will be entitled to compensation. But so long as the land remained as lung space/green area, there is no question of any payment to the owner, as compensation or otherwise. [Para 13] [832-G-H; 833-A]

5. It is clarified that wherever such open lung space is created in the land surrendered, it shall be shown in the Municipal/DDA records as 'DDA land – dedicated by xxxxxxxx'. The DDA shall maintain a Trust Account of such surrendered lands. This would mean that the DDA which holds the surrendered and dedicated land in Trust cannot use it for any purpose other than as green belt or other spaces for the benefit of the community. This will be necessary to identify, if the land held by DDA in trust for the community is not lost and is not treated as DDA owned lands which can be dealt with by DDA as absolute owner. In the event of any acquisition or development of such surrendered land, the owner-dedicator will have the benefit of compensation on account of land ceasing to be 'land dedicated to the community purpose of lung/ open space'. As the owner has already received some consideration in the form of 50% additional FAR, when such acquisition/alienation takes place, DDA and the land owner will be entitled to share the compensation at 50% each. Where the land surrendered is very small or being of an irregular shape, and DDA finds that it is not feasible or practical to maintain any small areas as independent green belt or park or playground or lung space or to safeguard any such area from encroachers, DDA can take steps to consolidate several smaller areas into larger blocks in the same locality so that they can be used effectively. For that purpose, DDA may also enter into suitable arrangements by way of exchange or otherwise. But any such consolidation or exchange shall be only with the sanction of the District Court, Delhi, after notice to the landowners-dedicators. Any change in use of such surrendered land held in Trust by DDA or any transfer by DDA shall be only after securing prior permission from the High Court of Delhi. [Para 16] [833-H; 834-A-H]

6. The land surrendered by the applicant in IA No.

1914 of 2006 and IA No. 2208 of 2007, which was transferred by DDA to Delhi Metro Rail Corporation on payment of a premium and other amounts, was not permissible. The land surrendered to DDA could be used only for community purposes and cannot be used for any private purpose. In circumstances where the land is acquired or used (other than as green belt and open lung space) for any other purpose under extreme necessity the land owner would be entitled to get 50% of the compensation or consideration for the use of such land. It is clarified that the owner of such land would be entitled to get 50% of the amount received by DDA as consideration/compensation. If DDA fails to pay the same, such persons would be entitled to take appropriate legal action. Any such diversion of use by DDA shall henceforth be only with the permission of the District Court, Delhi, after notice to the landowners concerned. [Para 18] [835-C-E]

CIVIL ORIGINAL JURISDICTION

Review Petition (C) Nos. 1200 of 2002

IN

IA NO. 36

IN

I.A. No. 129

IN

W. P. (C) No. 4677 of 1985

WITH

R.P. (C) No. 1256/2003 in I.A. No. 22 in I.A. No. 129 in W.P. (C) No. 4677/1995;

R.P. (C) No. 1295 of 2003 in I.A. No. 22 in W.P. (C) No. 4677/1985; R.P. (C) No. 1296 of 2003 in I.A. No. 22 in W.P. (C) No. 4677/1985;

I.A. No. 1328 in W.P. (C) No. 4677/1985;

I.A. No. 1329 in W.P. (C) No. 4677/1985;

I.A. No. 1782 in W.P. (C) No. 4677/1985;

I.A. No. 1805 in W.P. (C) No. 4677/1985;

I.A. No. 1850 in W.P. (C) No. 4677/1985;

I.A. No. 1 in I.A. No. …. IN W.P. (C) No. 4677/1985;

Contempt Petition (C) No. 22 of 2005 in I.A. No. 22 in W.P. (C) No. 4677/1985;

I.A. No. 1876 in CONMT. Petition (C) No. 22 of 2005 in W.P. (C) No. 4677/1985;

I.A. No. 1877 in CONMT. PET. (C) No. 22 of 2005 in W.P. (C) No. 4677/1985;

I.A. No. 1883 in R.P. (C) No. 1296/2003 in R.P. (C) No. 1200/2002 in R.P. (C) No. 1256/2002 in W.P. (C) No. 4677/1985;

I.A. No. 1913-1914 in W.P. (C) No. 4677/1985;

I.A. No. 2205 in I.A. 1914/06 in W.P. (C) No. 4677/1985;

I.A. 2222 in I.A. 1172 in W.P. (C) No. 4677/1985;

I.A. No. 2238 in I.A. 1914/06 in W.P. (C) No. 4677/1985;

I.A. No. 2266 in W.P. (C) No. 4677/1985

R. Mohan, ASG, Ranjit Kumar, (A.C.), Dr. A.M. Singhvi, Jaideep Gupta, Kamal Gupta (A.C.) M.C. Mehta (petitioner-in-person), O.P. Khaitan, Ankur Chawla, Jayant Mohan, Rahul

Pratap (for O.P. Khaitan & Co.), Vijayalakshmi Menon, Shruti Verma, Bimal Roy Jad, Sunita Pandit, Bharti, Dinesh Kumar Garg, K.L. Mehta & Co., M.L. Lahoty, Paban K. Sharma, Himanshu Shekhar, K. Rajeev, Shiv Sagar Tiwari, Ritu Menon, Anupam Lal Das, Dheeraj Garg, Sukumaran, Meera Mathur, Ashok Bhan, Kiran Bhardwaj, M.P.S. Tomar, S.W.A. Qadri, D.S. Mahra (for Anil Katiyar), Sandhya Goswami (for B.K. Prasad), V.B. Saharya (for Saharya & Co.), P. Parmeshwaran, D.N. Goburdhan, Geeta Luthra, Sheil Sethi, Avijit Bhattacharjee, Praveen Swarup (NP), L.P. Mangla (applicant-in-person) for the appearing parties.

The Judgment of the Court was delivered by

K.G. BALAKRISHNAN, CJI: 1. In the city of Delhi, there were several hazardous and noxious industries, as also several large and heavy industries, causing extensive pollution. The Master Plan for Delhi – Perspective 2001, which was published in the Gazette of India on 01.08.1990, did not permit any of these industries to operate in Delhi. In a Public Interest Litigation i.e. *M.C. Mehta v. Union of India & Others,* [IA No.22 in W.P. (C) No. 4677/1985] the question of shifting these polluting industries from Delhi and relocating them outside the city of Delhi and other related issues were considered and a series of orders were passed regarding shifting and relocating the industries. The polluting industries were notified through individual notices, public notices in newspapers and electronic media. This Court monitored the matter from January, 1995 and all stake holders, including Union of India, Delhi Administration, Central Pollution Control Board, National Capital Region Planning Board, Delhi Development Authority, and the polluting industries were heard/consulted during several hearings. The Delhi Development Authority [for short "DDA"] was also directed to frame suitable schemes regarding the utilization of land which would become available after the relocation of the hazardous/noxious/heavy/large industries from Delhi. DDA constituted a Committee with Mr. K.J. Alphons,

Commissioner, Land Management, DDA, as Chairman for this purpose. The said Committee examined the question regarding the utilization of land made available as a result of the re-location/ shifting of the industries and submitted detailed proposals. Views of other experts were also considered.

2. After hearing the parties including the affected industries, ultimately an order was passed on 10.05.1996 (reported in 1996 (4) SCC 351) relevant portions of which are extracted below:

"6. We have given our thoughtful consideration to the point at issue before us. We have had elaborate discussion with the learned counsel representing various industries which are to be relocated/shifted. The basic charter for the land use in the city of Delhi is the Master Plan. The provisions of the Master Plan are statutory and binding. The relevant provisions regarding hazardous/noxious/heavy/large industries under the Master Plan are as under:

"HAZARDOUS AND NOXIOUS INDUSTRIES

Refer Annexure III H(a).

(a) The hazardous and noxious industrial units are not permitted in Delhi.

(b) The existing industrial units of this type shall be shifted on priority within a maximum time-period of three years. Project report to effectuate shifting shall be prepared by the units concerned and submitted to the authority within a maximum period of one year.

(c) The land which would become available on account of shifting as administered in (b) above, would be used for making up the deficiency, as per the needs of the community; based on norms given in Master Plan; if any land or part of land, so vacated is not needed for the deficiency of the community services, it will be used as per

prescribed land use; however the land shall be used for light and service industries, even if the land use according to the Master Plan/Zonal Development Plan is extensive industry.

(d) * * *

HEAVY AND LARGE INDUSTRIES

Refer Annexure III H(b)

(a) No new heavy and large industrial units shall be permitted in Delhi.

(b) The existing heavy and large-scale industrial units shall shift to Delhi Metropolitan Area and the National Capital region keeping in view the National Capital Region Plan and National Industrial Policy of the Government of India.

(c) The land which would become available on account of shifting as administered in (b) above, would be used for making up the deficiency, as per the needs of the community; based on norms given in the Master Plan; if any land or part of land so vacated is not needed for the deficiency of the community services, it will be used as per prescribed land use; however the land shall be used for light and service industries, even if the land use according to the Master Plan/Zonal Development Plan is extensive industry.

(d) * * *

It is thus obvious that the land which would become available on account of shifting/relocation of the industries can only be used for making up the deficiency, as per the needs of the community, based on the norms given in the Master Plan. If any land or part of the land, so vacated is not needed for community services it can be used as per the prescribed land use. To appreciate the concept "need

of the community" under the Master Plan, it would be useful to have a look at the following provisions of the Master Plan :-

"In general it would be desirable to take up all the existing developed residential areas one by one for environmental improvements through (i) plantation and landscaping (ii) provision of infrastructure – physical and social and proper access where lacking (iii) possibility of infrastructure management of the last tier through the local residents.

Conservation and revitalization is required in case of traditional areas and environmental upgradation and improvement is needed in other old built-up areas.

LUNG SPACES

x x x x xxxx xxxx

Further conversion of recreational areas to other uses should be permitted only under extraordinary circumstances. Areas in lieu of such conversion may be provided elsewhere in order to maintain the overall average for the city. xxxx xxxx"

7. Delhi is one of the most polluted cities in the world. The quality of ambient air is so hazardous that lung and respiratory diseases are on the increase. The city has become a vast and unmanageable conglomeration of commercial, industrial, unauthorized colonies, resettlement colonies and unplanned housing. There is total lack of open spaces and green areas. Once a beautiful city Delhi now presents a chaotic picture. The most vital "community need" as at present is the conservation of the environment and reversal of the environmental degradation. There are virtually no "lung spaces" in the city. The Master Plan indicates the "approximately 34 per cent of recreational areas have been lost to other uses". We are aware that

the housing, the sports activity and the recreational areas are also part of the "community need" but the most important community need which is wholly deficient and needed urgently is to provide for the "lung spaces" in the city of Delhi in the shape of green belts and open spaces. *We are, therefore, of the view that totality of the land which is surrendered and dedicated to the community by the owners/occupiers of the relocated/shifted industries should be used for the development of green belts and open spaces.*

8. The core question for consideration, however, is how much of the total land which would become available from each of the industrialists is to be taken away by the community for its use and how much is to be left in the hands of the industrialists for the community use. The suggestions given by Alphons Committee in this respect have been noted by us in the earlier part of the order. Mr. Omesh Sehgal, Mr. P.C. Jain and Justice Khanna by and large agree with the suggestions of the Alphons Committee. We are of the view that no useful purpose would be served by maintaining two categories as suggested by Alphons Committee in columns 3 and 4. After leaving a part of the land with the owner for developing the same in accordance with the surrender to the Delhi Development Authority [DDA] for developing the same to meet the community needs, it obviously means that the land has to be surrendered and dedicated to the community. While meeting the community needs it is necessary to make a suitable provision for the owner to enable him to meet the expenses of relocating/shifting the industry. *It would, therefore, be in conformity with the broader concept of "community need" under the Master Plan, to permit the owner to develop part of the land for his own benefit and surrender the remaining land for the use of the community at large.*

9. *We, therefore, order and direct that the land which would become available on account of shifting/relocation of hazardous/noxious/heavy and large industries from the city of Delhi shall be used in the following manner:*

S.No.	Extent	Percentage to be surrendered **and dedicated to the DDA for development of green belts and other spaces**	Percentage to be development by **the owner for his own benefit in** accordance with the **user permitted** under the Master Plan
(1)	(2)	(3)	(4)
1	Up to 2000 sq. mts. (including the first 2000 sq. the Master Plan larger plot)	-	100% to be developed by the owner in accordance with the zoning regulation of mts. of the
2	0.2 ha to 5 ha	57	43
3	5 h to 10 ha	65	35
4	Over 10 ha	68	32

10. We do not agree with the learned counsel for the industrialists that Floor Area Ratio [FAR] be permitted to them on the total area of the plot. *We, however, direct that on the percentage of land as shown in column 4 the owners at Serial Nos. 2, 3 and 4 shall be entitled to one and a half times of the permissible FAR under the Master Plan*

11. *The DDA has suggested that it may be necessary*

to amend the Master Plan for regularizing the land use as directed by us. The totality of the land made available as a result of the relocating/ shifting of the industries is to be used for the community needs. The land surrendered by the owner has to be used for the development of green belt and open spaces. The land left with the owner is to be developed in accordance with the user permitted under the Master Plan. In either way the development is to meet the community needs which is in conformity with the provisions of the Master Plan."

(emphasis supplied)

3. This was followed by another order dated 8.7.1996 (reported in 1996 (4) SCC 750) wherein this Court observed :

"…. The allotment of the plots shall be made on priority basis. We have no doubt that reasonable incentives, which are normally provided to new industries in new industrial estates, shall be extended to the shifting industries. This Court by the order dated 10.5.1996 in *M.C. Mehta v. Union of India* [1996 (4) SCC 351] has already directed and laid down the manner in which the land which would become available on account of shifting of H(a) and H(b) industries is to be used. *In view of the huge increase of prices of land in Delhi, the reuse of the vacant land is bound to bring lots of money which can meet the cost of relocation."*

"The use of the land which would become available on account of shifting/relocation of the industries shall be permitted in terms of the orders of this Court dated 10.5.1996 in *M.C. Mehta*."

(emphasis supplied)

4. By order dated 4.12.1996 (reported in 1997 (11) SCC

237) several clarifications were issued. One of the clarifications was that the order dated 10.5.1996 regarding land use – that is utilization of land available as a result of shifting/relocation/ closure of hazardous/noxious/heavy/large industries from Delhi - are applicable both for relocating industries as well as those which decide to close down and not to relocate.

5. While most of the industries, shifted or relocated, there were delay and obstacles in surrendering the land for community purposes as per the order dated 10.5.1996. The District court, Delhi was authorized to implement the directions issued by this Court. The High Court has been monitoring the progress of the surrender of the lands as a consequence of such re-locations.

6. Some of the industries including Swatantra Bharat Mills and DCM Silk Mills filed interlocutory applications praying for a direction to DDA to acquire the land required to be surrendered under the DDA Act or Land Acquisition Act and to restrain DDA from trying to expropriate their lands. The request was turned down and IAs were dismissed as withdrawn.

7. Thereafter, M.C. Mehta, the petitioner in the public interest litigation moved an application (IA No.129 in IA No.22) making a grievance that though the industries were closed, they had not surrendered the excess land to DDA, in pursuance of the orders dated 10.5.1996 and 8.7.1996. Notices were issued to the defaulting industries. A large number of industries appeared through counsel and the matter was heard at length. Mr. K.K. Venugopal, learned senior counsel appearing on behalf of a group of industries contended that this Court had never contemplated that the land should be surrendered free of cost. He further contended that when this Court directed that their land should be surrendered, it was clearly implied that the DDA would have to acquire the land under Section 15 of the Delhi Development Act, 1957 and pay compensation for the land. After considering the contentions, this Court by order

dated 28.4.2000 (reported in 2000 (5) SCC 525), categorically rejected the said contention by holding as follows:

> "When this Court first passed the order on 10.05.1996, it had before it the report of Mr. Justice D.R. Khanna and had the advantage of hearing several counsels over a period of six months as is evident from the order itself. It will be difficult to believe or accept that the Court was not aware of the provisions of the Delhi Development Authority Act which, inter alia, provides in Section 15 that the Authority could acquire the land for the purposes of the Act. The Court nevertheless directed the surplus land not to be acquired by DDA but to be surrendered by the owners. With regard to the balance of land, it was to be retained by the owner. *The Court directed that FAR would stand increased to "one-and-a-half times of the permissible FAR under the Master Plan". It is true that the Court did not direct any compensation, but this element of compensation was clearly present in the mind of the Court when it increased FAR and permitted the owner to build more than what was permissible under the Master Plan. It is not possible, therefore, to accept the contention that DDA is bound to acquire the land under Section 15 after paying compensation.*
>
> Be that as it may, there is nothing to indicate in the order nor has our attention been drawn to any affidavit that there was, at any point of time, a contention raised or a demand made that cash payment should be made for the land required to be surrendered or that DDA should be asked to acquire the land under Section 15. Mr. G.L. Sanghi, learned Senior Counsel submits that in a matter like this where a public interest litigation is filed, the principle of res judicata does not strictly apply. *Even if this be so, we would have expected the owners to have raised this contention if they had genuinely felt that there was a need for compensation to be awarded for the land which was to be*

surrendered. Perhaps they were happy to have an increased FAR which would have enabled them to construct more and would have offset the loss of land without payment of money. In fact, by the order dated 08.07.1996 reported as *M.C. Mehta Vs. Union of India* [see : 1996 (4) SCC 750 at page 762, para 15], it was observed as follows:

'In view of the huge increase of prices of land in Delhi, the reuse of the vacant land is bound to bring lots of money which can meet the cost of relocation'

Be that as it may, we do not think that it is appropriate at this juncture to permit the erstwhile owners of the land to raise the contention that they should be paid compensation.

It has to be borne in mind that the Master Plan of 1990 made it obligatory on the hazardous industries to shift within three years. No time limit was stipulated with regard to the existing heavy and large industries, but the spirit clearly was that they should shift within a reasonable period of time. If the industries continued to use the land in violation of and in disregard of the Master Plan and then have had to lose some parcels of land, they have to blame themselves for it. It was contended before us by Mr. K.K. Venugopal that if the industry had shut before 1996, it would have been entitled to retain all the land, but because the closure has been effected as a result of the order of this Court, the owners have had to surrender part of the land free of cost. This is undoubtedly, true but as we have observed above if the owners had cared to obey the law then, as is always the case, would have been more profitable."

(emphasis supplied)

8. Another attempt was made by a group of industries by

raising this issue regarding compensation for land surrendered, when DDA filed an interlocutory application for various directions. The industries also filed several applications. All those interlocutory applications came up before a three Judge Bench of this Court and this Court disposed of the matter by judgment dated 01.03.2001 [reported in (2001) 4 SCC 577]. It was contended by the industries that their industrial units which had been ordered to re-locate were not bound to surrender their freehold land free of cost and that the DDA had to acquire the land under Section 15 of the Act. The matter was elaborately argued by eminent counsel and their arguments were discussed in detail, and all their pleas were rejected. This Court also noticed that the Master Plan came into existence in 1962 and that 'H' category industries ought to have shifted out of the area in 1962 itself; that the subsequent Master Plan in 1990 directed shifting the industries within a specified period of within three years; that there was an obligation on the 'H' category industries to shift and relocate in terms of the Master Plan by the year 1993; and that all possible opportunities were given to the industries and upon assessment of the situation through the appointments of commissions and obtaining the consent of various parties on these aspects, the Court passed the order on 10.05.1996. This Court issued specific directions on several issues raised by DDA. This Court directed that even industries which closed prior to the order dated 10.5.1996 (whose names appeared in the list of 'H' category industries to be closed) are liable to surrender land as per order dated 10.5.1996. The relevant portions of the order are extracted below :-

"Be it noted that the learned Amicus Curiae with his usual eloquence contended that review applications against the order passed on 10.5.1996 numbered 36 in the year 1966, 55 in the year 1997, 3 in the year 1999 and 2 petitions in the year 2000, as the records depict, were all dismissed and in the wake of the same, Mr. Ranjit Kumar addressed us in detail that the present petition said to be for clarification cannot but be attributed to be a further

attempt to review the order dated 10.5.1996 which, in fact, does not call for any review nor does it call for any further order substituting the earlier order dated 10.5.1996.

Be it noted that the order dated 10.5.1996 specifically directed that 'H' category industries are required to surrender the land to DDA. We may note here that this order of surrender was passed by reason of the fact that the pollution level has reached its optimum in the city of Delhi affecting the entire society – *'H' category industries were directed to close and to surrender the land so as to make available some green belt and open space popularly ascribed to be lung space for the city*. Industries might have closed in terms of the order of this Court and the compliance with the order was to this limited extent only. Structures are still lying there and no surrender has yet taken place. *The majesty of law demanded compliance in observance rather than in its breach – it is for the society only that this Court thought it fit to pass order to the extent as indicated above ……*

……. We make it clear that the order dated 7.12.1999, in the case of vegetable oil was in the peculiar facts of that case and is not of universal application, nor does it in any way dilute the mandate of the order of this Court directing surrender of entire land subject to the extent of availability to the owner as per order dated 10.5.1996.

….. On the question as to the land to be surrendered should be free from encumbrance, we are of the view, if the land is already encumbered, then a direction to release it from encumbrance and surrender will be a great burden. At the same time, such land will be of no use to the society unless released from encumbrance. In the circumstances we direct that the owner cannot utilize the land available to him by virtue of order of this Court dated 10.5.1996, until he releases the surrendered land from encumbrance. Further, if it is not made free from encumbrance within five

years, then he will not get the benefit of the order dated 10.5.19996 and after five years even the land which the owner was otherwise entitled to retain would stand vested with DDA for the use and the need of the society. "

9. The petitioners in these Review Petitions and Interlocutory Applications seek a review of the orders dated 10.5.1996 8.7.1996, 4.12.1996 and 28.4.2000 passed by this Court. We have heard Sri Harish Salve, Sri Mukul Rohatgi, Dr. A.M. Singhvi, Sri Dushyant Dave, Mr. Jaideep Gupta, Mr. M.L. Lahoti, and others for the land-owners (erstwhile industries in Delhi) as also the learned Additional Solicitor General on behalf of the Union Government, and Mr. D.N. Goburdhan, on behalf of the Delhi Development Authority. Mr. Ranjit Kumar rendered able assistance as *amicus curiae*.

10. The petitioners/ applicants contended that the findings of this Court in the earlier judgments and orders dated 10.5.1996, 8.7.1996 and 28.4.2000 regarding the element of compensation are ex *facie* incorrect and the judgment and order dated 10.05.1996 is liable to be reviewed. It was urged that the increased FAR mentioned in the Order is illusory and that there were restrictions on the permitted height of construction and many of the owners of freehold land had not been able to use the increased FAR. They contended that if any land is required for the purpose of development or for any other purpose, DDA should resort to compulsory acquisition under section 15 of the Delhi Development Act, 1957. It was contended that no land can be taken over or required to be surrendered without compulsory acquisition under Section 15 of the Delhi Development Act, 1957 and payment of market value as compensation. It was contended that transfer of ownership of freehold land otherwise than by acquisition or by conveyance or by inheritance was not known to law; and Article 300A of the Constitution barred any person being deprived of his property save by authority of law. It was further contended that the mere fact that this court did not want the Government

to undertake the time consuming process of acquisition under Section 15 of the Delhi Development Act would not in any way detract from the rule of law which requires the land owners of Delhi Industries to be treated on par with owners of land in other parts of the country which are acquired for the purposes of urban development. It was submitted while Section 15 deals with compulsory acquisition of land where the land is required for the purpose of development or any other purpose under the DD Act, Section 55 of the said Act dealt with modification of the Master Plan or zonal development plan in certain cases. The said section provided that where any land is required by the Master Plan or a zonal Development Plan to be kept as an open space or un-built upon or is designated in any such plan as subject to compulsory acquisition, then if at the expiration of 10 years from the date of operation of the plan under section 11 or where such land has been so required or designated by any amendment of such plan, from the date of operation of such amendment, the land is not compulsorily acquired, the owner of the land may serve notice on the Government requiring his interest in the land to be so acquired; and if the Government fails to acquire the land within a period of six months from the date of the said notice, the Master Plan or the Zonal Development Plan, shall have effect, as if the land were not required to be kept as an open space or un-built upon or were not designated as subject to compulsory acquisition. It is submitted this provision was completely ignored by this Court, while passing the order dated 10.5.1996. It was argued that as relevant constitutional and statutory provisions had not been taken note of by this Court, and as there is an apparent error on the face of the record, the impugned order dated 10.05.1996 should be reviewed. Another argument put forth by some of the owners is the word 'surrender' used in the order dated 10.5.1996 would apply only to leasehold land and not to freehold land.

It was further submitted that physical surrender of land to DDA in pursuance of the order dated 10.5.1996 being for the

limited purpose of maintaining green belt and lung spaces, DDA cannot claim any ownership right nor commercially exploit the same. It was lastly contended that the rule of '*res judicata'* would not apply in this case to prevent the Court from entertaining the grievance and giving appropriate directions.

11. The learned Amicus Curiae pointed out that despite the fact that the Master Plan for Delhi was published as early as in 1990, these hazardous, noxious, large and heavy industries did not take steps to shift their premises out of Delhi and these industries had been causing severe pollution for a long period thereby violating the Master Plan as well as damaging the environment and it was at this juncture that this Court had passed the order and directed all these industries to be re-located outside Delhi and issued categorical directions regarding surrender of portions of the land cleared by shifting of industries for community use; and that the landowners were not entitled to any compensation in regard to such surrender except the additional FAR granted under the decision. The learned Additional Solicitor General and the learned counsel for DDA also took the same stand. They further pointed out that all the above-mentioned pleas had been raised before this Court and had been considered in detail on more than one occasion and that they had been rejected and many of these petitioners have repeatedly filed review petitions, curative petitions and writ petitions and some of these petitions have been filed much after the original order that was passed on 10.05.1996. Therefore, it was urged that there is no merit in the contentions advanced by the petitioners.

12. There is no question of acquisition and/or compensation in regard to the lands to be surrendered, is also evident from the categorical directions given in the order dated 10.5.1996. The surrender of lands by the industries was under a broad scheme framed by the court after assessment and consideration of the then existing situation, the reports of various committees, the grievances and contentions of various

industries and the consensus arrived at on certain issues, and the findings on several other issues. This Court categorically stated :

> "*After leaving a part of the land with the owner for developing the same in accordance with the permissible land use under the Master Plan, the remaining land should be surrendered to Delhi Development Authority for developing the same to meet the community needs.*"

In para 10 of the order dated 10.5.1996, this Court held that in respect of the land which was to be retained by the owner for its own benefit and to be developed in accordance with the permitted use, the owner will be entitled to one and half times the permissible FAR under the Master Plan. The scheme contemplated not merely surrender of a part of the land but "dedication" of such surrendered land to the DDA for development of green belts and open spaces. The land that was to be surrendered had to be retained as green belt and open spaces and not to be sold, constructed or developed by DDA.

13. We have carefully considered the various review petitions and other applications filed in this regard. We have extracted the relevant portions of the orders dated 10.5.1996, 8.7.1996, 4.12.1996 and 28.4.2000 which clearly demonstrate that the owners of land/industries were given a fair hearing before passing the order on 10.5.1996. The petitioners had now raised these very contentions that their lands will have to be acquired and that they are entitled to get reasonable compensation when their land was taken over. All these pleas had been repeatedly rejected by this Court. The Scheme evolved by this Court in its order dated 10.5.1996 is clear :

> (i) The land which becomes available on account of an industry being shifted out of Delhi would be divided equitably into two portions. The one portion to be retained by the land owner for development for his own benefit and

> the other portion to be surrendered to DDA for community use for development of green belts, open/lung spaces. The land to be surrendered and dedicated for community use was 57% (where the size of the plot was 0.2H to 5H), 65% (where the size of the plot was 5H to 10H) and 68% (where the plot was over 10H). The balance was to be retained by the landowner. The percentage was to be calculated after deducting first 2000 sq.m. for development by the owner.
>
> (ii) In consideration of the land owners surrendering and dedicating a part of the land for community use, they (land owners) will be entitled to an additional 50% FAR in regard to the land permitted to be retained by them for their benefit. That is, the FAR would stand increased to one and a half times of the admissible FAR under the Master Plan. The landowners will not be entitled to any other consideration/compensation for the land surrendered and dedicated to the community.
>
> (iii) The portions of land surrendered to DDA and dedicated for community purposes, that is only for being used as green belt or open 'lung spaces' for the city. Such dedicated land will be used only for such dedicated purpose and not any other purpose.
>
> (iv) The land will be at the disposal of the community at large and the DDA shall not exploit it for either commercial use or construction of residential flats. As DDA is not going to derive any benefit by exploitation thereof, and was to only hold it in trust for and on behalf of the community, there was no question of DDA paying any compensation therefore to the land owners.

It therefore, follows that such land dedicated by private owners to the community, is acquired for any other purpose, or is diverted to any other use by DDA (as for example for putting up constructions or for sale or lease for development or

construction), the land owner will be entitled to compensation. But so long as the land remained as lung space/green area, there is no question of any payment to the owner, as compensation or otherwise.

14. The order dated 10.5.1996 was passed to give effect to the Master Plan, to save the city and in public interest. Therefore by surrendering a part of the land, the owners were not only benefiting the community but themselves. The records clearly show that before the order dated 10.5.1996 was passed, the question what should be the compensation for the surrendered lands was specifically raised and considered. It was made clear that additional FAR will be in lieu of any monetary compensation for the land to be surrendered and dedicated to DDA for community use, for development green belts and lung spaces. Therefore, it is evident that the order dated 10.5.1996 clearly intended that the land to be surrendered would vest in trust in DDA for the benefit of the community and the additional FAR was the only compensation for such surrender land for community benefit and there would be no further compensation. Contentions similar to the contentions now raised were rejected by this Court by order dated 28.4.2000. Therefore, it is not possible for this Court to again review all these orders or take a different view. Therefore, all these review petitions, applications for directions and clarifications are without any merit.

15. We may note that some of these review petitions have been filed after dismissal or withdrawal of the earlier petition by the very same petitioners seeking almost the very same reliefs. Therefore, such petitions are *prima facie* not maintainable and the pleas raised by these petitioners to review the earlier order passed by this Court cannot be considered. Be that as it may. As the contentions raised by others have been considered, this issue loses relevance.

16. One aspect requires clarification, particularly in view of some of the surrendered land being acquired or taken

perpetual lease by Delhi Metro Rail Corporation from DDA. The landowners surrendered and dedicated portions of the land as shown in Column III of the Table contained in Para 9 of the Order dated 10.5.1996 exclusively for the purpose of development of green belt and open spaces. Therefore wherever such open lung space is created, it shall be shown in the Municipal/DDA records as 'DDA land – dedicated by xxxxxxxx'. The DDA shall maintain a Trust Account of such surrendered lands. This would mean that the DDA which holds the surrendered and dedicated land in Trust cannot use it for any purpose other than as green belt or other spaces for the benefit of the community. This will be necessary to identify if the land held by DDA in trust for the community is not lost and is not treated as DDA owned lands which can be dealt with by DDA as absolute owner. In the event of any acquisition or development of such surrendered land, the owner- dedicator will have the benefit of compensation on account of land ceasing to be 'land dedicated to the community purpose of lung/open space". As the owner has already received some consideration in the form of 50% additional FAR, we are of the view that when such acquisition/alienation takes place, DDA and the land owner will be entitled to share the compensation at 50% each. The second aspect is where the land surrendered is very small (say on account of 57% of 0.2 Hectare that is 1140 sqm being surrendered) or being of an irregular shape, and DDA finds that it is not feasible or practical to maintain any small areas as independent green belt or park or playground or lung space or to safeguard any such area from encroachers, DDA can take steps to consolidate several smaller areas into larger blocks in the same locality so that they can be used effectively. For that purpose, DDA may also enter into suitable arrangements by way of exchange or otherwise. But any such consolidation or exchange shall be only with the sanction of the District Court, Delhi, after notice to the Landowners – Dedicators. Any change in use of such surrendered land held in trust by DDA or any transfer by DDA shall be only after securing prior permission from the High Court of Delhi.

17. M/s SIEL Ltd., the applicant in IA No. 1914/2006 and IA No. 2205/2007 (SIEL Ltd.) submitted that DDA, out of 18.854 Hec. surrendered by it though it did not have either ownership or right of commercial exploitation had transferred 7.5 Hec. plus 1.21 Hec. to DMRC on payment of a premium of 1,55,33,213/- plus others amounts. It is contended that such transfer was impermissible and the monetary gain should be paid over to the owner of the land. It is also contended that the land should be used only in accordance with the order dated 10.5.1996.

18. The land surrendered by SIEL Ltd. as per the order dated 10.5.1996 to DDA could be used only for community purposes and cannot be used for any private purpose. In circumstances where the land is acquired or used (other than as green belt and open lung space) for any other purpose under extreme necessity the land owner would be entitled to get 50% of the compensation or consideration for the use of such land. We make it clear that the owner of such land would be entitled to get 50% of the amount received by DDA as consideration/ compensation. If DDA fails to pay the same, such persons would be entitled to take appropriate legal action. We again reiterate that any such diversion of use by DDA shall henceforth be only with the permission of the District Court, Delhi, after notice to the landowners concerned. I.A. 1850/2003 and IA 1914/2006 with IA No.2205/2007 are disposed of accordingly.

19. All review petitions, interlocutory applications and other petitions are dismissed, subject to the clarification contained in paras 13, 16, 17 and 18 above.

K.K.T. Petitions and Interlocutry Applications dismissed.

THE CHAIRMAN-CUM-MANAGING DIRECTOR, RAJASTHAN FINANCIAL CORPORATION AND ANR.

v.

COMMANDER S.C. JAIN (RETD.) & ANR.

(Civil Appeal No. 2774 of 2010)

MARCH 26, 2010

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

CONSUMER PROTECTION ACT, 1986:

ss. 2(1)(c), (g) and 14 – 'Complaint' – 'Deficiency' in service – 'Finding of District Forum' – Complaint filed alleging deficiency in service of providing loan – Rejected by District Forum holding that the bills produced by complainant, as required in terms of agreement, were fraudulent – State Commission declining to entertain the appeal of complainant – National Commission in revision, holding that there was no deficiency in rendering service to the complainant, but directing the Corporation to pay the complainant compensation amounting to Rs.1,50,000/- along with 12% interest – HELD: National Commission failed to appreciate that the respondent had repeatedly acted fraudulently in providing the bills and receipts to the appellant-Corporation – The Act has provided provision for correcting the shortcomings in the service or goods provided by way of awarding compensation or other means specified only when the Consumer Forum comes to the conclusion that there is `deficiency' in service provided or goods sold – The loss suffered by the complainant for the reason of not being able to start the unit cannot be the basis for awarding the compensation specifically when the complainant was at fault for the non-release of the balance loan amount – Therefore, when there is no deficiency found on the part of the Corporation, it cannot be asked to pay compensation – National Commission, though has held that there is no

deficiency in service as regards the disbursement of the balance loan amount, has erred in going ahead to award compensation with interest @ 12 per cent – The impugned order cannot be sustained and is accordingly set aside. [para 13, 14, 18 and 19]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2774 of 2010.

From the Judgment & Order dated 25.7.2006 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 2372 of 2004.

S.K. Bhattacharya for the Appellant.

Commander, S.C. Jain (Retd.) Respondent-in-person.

The Order of the Court was delivered by

ORDER

H.L. DATTU, J. 1. The petitioner has sought leave to appeal against the order passed by the National Consumer Disputes Rederessal Commission, New Delhi (for short 'National Commission') wherein and whereunder it has directed the appellant to pay compensation to the tune of Rs.1,50,000/- along with interest at the rate of 12 per cent from the date of filing of petition in favour of the respondent. Leave granted.

Facts:

2. The Respondent had applied for loan on 03.03.1990 to the Rajasthan Financial Corporation (in short 'Corporation') for setting up a manufacturing unit of plastic doors, windows etc. The Corporation after considering the request made, had sanctioned term loan of Rs.18,000/- for machinery and also Rs.1,26,000/- as the working capital limit for the said business. As per the sanction letter, the Corporation was to provide only 75 per cent of the purchase price to the respondent and the

remaining share, i.e., 25 per cent was to be contributed by the respondent. The sanction letter also provided that if the concern has purchased machinery in accordance with the scheme and full payment has been made, 90 per cent of the admissible amount of loan will be released on the basis of the statement of account prescribed for the purpose, duly supported by bills and receipts and balance after valuation of machines. The period of repayment of the loan was eight years in quarterly installments. The first installment was to be due on the first day of 18th month reckoned from the date of first disbursement of loan against fixed assets. Further as per the terms of the sanction letter one of the important terms was that the machinery should be purchased from authorized dealer and of Wolf make or from M/s Rally India Ltd.

3. On 29.06.1990, the respondent requested the appellant -Corporation for more time to complete the formalities of submitting the loan documents in order to enable the appellant to disburse the loan amount. The loan document was, however, executed in favour of the appellant on 05.07.1990. The appellant -Corporation requested the respondent to submit bills and receipts of plant and machinery as well as raw material so that the parties could proceed with the loan agreement. Thereafter, in a short period, the bills were submitted and it was apparent from the bills submitted that the name of the firm in whose favour the bills were originally issued was struck off and the respondent firm's name was inserted in its place. Thus the appellant - Corporation asked the respondent to submit correct bills.

4. Thereafter on 26.07.1990, the respondent again submitted the bills in the name of Kailash Udhyog and not in the name of his own business, i.e., Fauji Kutir Udhyog. The appellant - Corporation was forced to dishonor the bills as the name indicated in them were not as per the requirement and new bills were asked to be submitted. Later, on 04.05.1991 the respondent submitted a bill of Nita Udyogic Vastu Bhandar

Private Limited dated 21.08.1989 for a sum of Rs.10,200/- representing the purchase price of drill machine etc., prior to the date of sanction of the loan and its disbursement. Another bill of Rs.17,800/- dated 29.12.1989 which represented saw machines with two HP motors with accessories etc. was also submitted. Due to repeated submission of wrong bills by the respondent, the appellant addressed a letter to the respondent stating that the bills were unacceptable for two reasons, firstly, Nita Udyogic Vastu Bhandar Private Limited is a family concern and the respondent is in gainful employment in the concern. Secondly, Nita Udyogic Vastu Bhandar Private Limited is not an authorized dealer for Wolf make machine or M/s rally India Ltd. The appellant also informed that the machines were old as per the internal checkup done by the appellant - Corporation. The respondent was given another chance as the appellant informed the respondent that though the loan agreement was time barred, his case could be considered favourably only if he submits the bills from authorized dealer or manufacturer. The correct and accurate bills were to be submitted within one month from 31.05.1991. The respondent submitted bills from the authorized dealer of Wolf portable machine, i.e., Heerex Corporation amounting to Rs.19,797.75/- against which a sum of Rs.2000/-, as advance was paid to the respondent. The respondent was, therefore, asked to submit a receipt for Rs.3172.75 denoting his contribution of 25 per cent, in order to avail the sum of Rs.14,625/-. In spite of such a request the respondent never submitted the receipt. The appellant - Corporation sent a cheque of Rs.14,625/- favouring the authorized dealer Heerex Corporation, to Fauji Kutir Udyog along with a request to send the receipt to the Corporation for the amount so paid. An additional request was also made as regards the receipts showing the respondent's share of Rs.3172.75/-. Another correspondence was addressed to the respondent requesting him to fulfill all other terms and conditions of the loan agreement, including a condition to create assets in the ratio of 1:1.10 as stipulated in Clause 5 of the Special Terms and Conditions annexed with the loan

agreement. The respondent thereafter made a representation whereby he claimed that the Corporation was under liability to pay a sum of Rs.3,375/- as the balance amount of sanctioned loan by considering his earlier bill of Nita Udyog Vastu Bhandar Private Limited which was rejected by the appellant stating it to be untenable as the Nita Udyog Vastu Bhandar was not an authorized dealer.

5. On 19.12.1991, the respondent requested the appellant -Corporation for disbursement of the loan against the raw materials without submitting any supporting documents showing the details of the expenditure. The appellant - Corporation addressed two separate letters dated 26.12.1991 and 02.11.1992 asking the respondent to submit the details of the consumption of quantity of raw materials and the stock position update along with sales made.

Proceedings before the Consumer Forum:

6. The respondent moved the District Consumer Commission with a complaint of deficiency of service and also prayed for the disbursement of Rs.3,375/-. The plea of the respondent was dismissed by the District Consumer Commission on the principle that his application is not maintainable as the dispute in a loan agreement between the debtor and creditor does fall within the jurisdiction of the Consumer forum.

7. Due to the repeated failure on part of the respondent to submit the details of the material purchased and consumed, the appellant finally cancelled the unavailed loan, on 08.09.1992 and informed the same to respondent. The respondent replied to the said communication stating that he had already initiated the proceedings before the State Consumer Commission, Jaipur on 15.07.1992.

8. The State Commission allowed the appeal vide order dated 12.12.1994 and remanded the matter back to the District

Forum. The District forum dismissed the complaint on 02.12.1995 holding that the respondent was unable to show the details of the purchased goods from authorized dealer and that M/s Nita Udyog Vastu Bhadar Private Limited is their own concern which was closed much before the issuance of the bill, thus failing to show that he was entitled to the sum of Rs.3,375/-. Further, the appeal was entertained by the State Commission as the respondent sought to file certain documents. The matter was remanded back to the District Forum vide order dated 21.03.2003. The District Consumer Forum dismissed the complaint along with costs vide order date 31.01.2004 stating that there was no deficiency in service as the bills presented by the respondent were of a firm which was non-existent.

9. The respondent being aggrieved by the order of the District forum, preferred appeal before the State Consumer Commission. The State Commission refused to entertain the appeal vide order date 02.09.2004. Thereafter, the review petition filed by the respondent was also rejected by the State Commission vide order dated 09.09.2004.

Revision Petition before the National Consumer Disputes Redressal Commission:

10. The respondent being aggrieved by the decision of the State Consumer Commission preferred a Revision Petition before the National Consumer Disputes Redressal Commission. The National Commission considered revision on two counts. Firstly, as regards the non-release of the balance amount of Rs.3,375/- as against the machinery and secondly, the non-release of the balance amount of Rs.81,000/- from the sanctioned amount of Rs.1,26,000/- for working capital limit. As regards the first point, the National Commission considered the contention of the appellant - Corporation whereby it was stated that the amount of Rs.3,375/- was not released as the respondent did not comply with the terms spelled out in the letter of sanction. However, the National Commission concluded on this point that there was no specific obligation pointed out by

the appellant -Corporation which is said to be left unfulfilled by the respondent. As regards the second point, the National Commission cited a para from the letter dated May 04, 1991 addressed by the appellant - Corporation to the respondent whereby it is pointed out that the bills submitted were not the correct one as they were issued in name of firm Kailash Udyog and the respondent had fraudulently replaced there name in the bills. Therefore, the National Commission observed that the appellant -Corporation "cannot be held to be deficient in rendering services" in the said loan agreement. Further, it is important to note that the National Commission has specifically pointed out that the prayer in the original complaint was only for release of Rs. 3,375/- and only at a later stage, i.e., when the matter was remanded back to the District Forum by the State Commission vide order dated 21.03.2003, that the respondent filed another complaint with regard to the amount for working capital thereby seeking direction to release the sum of Rs.81,000/-. Further, the peculiar observation made by the National Commission is that the respondent have claimed compensation "without any corresponding profit and loss statement or any affidavit in support of such a demand".

11. However, the National Commission has directed the appellant - Corporation to pay compensation of Rs.1,50,000/- with interest at the rate of 12 per cent from the date of filling of complaint. The cost is also awarded to the tune of Rs 10,000/-.

Appeal from the decision of the National Consumer Disputes Redressal Commission:

12. The appellant - Corporation has sought appeal on the ground that the National Commission has erred in awarding the compensation with interest, inspite of holding that there was no deficiency in rendering the service to the respondent. It is also contended by the appellant - Corporation that they have fully discharged obligation under the loan agreement and there was nothing outstanding for which it could be held responsible and,

in fact, it is the respondent who had failed to carry out its obligation as they had repeatedly submitted incorrect and fraudulent receipts.

13. It is pertinent to mention that the appellant - Corporation had repeatedly requested the respondent to submit the bills of the purchase of the machinery of Wolf make, or from M/s Rally India Ltd. in order to disburse the amount sanctioned for the machinery which in the 'Sanction Letter' dated 3.3.1990 appears to be "Rs.18,000/- against fixed assets" (Annexure P-1). However, it is on record and is observed by the District Commission and State Commission that the respondent has constantly submitted wrong receipts. The District Consumer Forum has observed in the order dated 31.01.2004 that the Nita Udyogic Vastu Bhandar (P) Ltd. from whom the respondent claim to have purchased the machinery and the bills so produced dated 29.12.1989 are clearly fraudulent as this concern stood closed since March 1989. This fact was reiterated by the State Commission in its order dated 02.09.2004. Therefore, we find no hesitation to conclude that National Commission failed to appreciate that the respondent had repeatedly acted fraudulently in providing the bills and receipts to the appellant - Corporation.

14. Secondly, the National Commission though has held that there is no deficiency in service as regards the disbursement of the balance loan amount of Rs.81,000/-, have gone ahead to award compensation to the tune of Rs.1,50,000/- with interest of 12 per cent.

15. For deciding whether the respondent ought to be awarded compensation, it is important to consider the meaning of deficiency as provided under section 1(g) of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act'):

> (g) "Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;

16. Further, the Consumer Protection Act also provides that the important component of the complaint by the 'consumer' on the basis of which the compensation is decided, is that there should be 'deficiency' in the service provided or goods sold to the concerned consumer. The definition of 'complaint' is provided under section 1(c) of the Act :

> (c) "Complaint'' means any allegation in writing made by a complainant that-
>
> (i) An unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
>
> (ii) The goods bought by him or agreed to be bought by him suffer from one or more defects;
>
> (iii) *Service hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;*
>
> (iv) a trader or the service provider, as the case may be, has charged for the goods or for the service mentioned in the complaint, a price in excess of the price in excess of the price-
>
> (a) fixed by or under any law for the time being in force;
>
> (b) displayed on the goods or any package containing such goods;
>
> (c) displayed on the price list exhibited by him by or under any law for the time being in force;
> (d) agreed between the parties;
>
> (v) goods which will be hazardous to life and safety when used are being offered for sale to the public;-

(A) in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;

(B) if the trader could have known with due diligence that the goods so offered are unsafe to the public;

(vi) service which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety.

17. It is also important to note the following provision of the Act:

Section 14. FINDING OF THE DISTRICT FORUM.

(1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely :-

(a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
(b) to replace the goods with new goods of similar description which shall be free from any defect;

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;

(e) to remove the defects or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

(i) to provide for adequate costs to parties.

18. Thus, it is clear that the Act has provided provision for correcting the shortcomings in the service or goods provided by way of awarding compensation or other means specified in the provision above mentioned only when the Consumer Forum comes to the conclusion that there is 'deficiency' in service provided or goods sold. The loss suffered by the respondent for the reason of not being able to start the unit cannot be the basis for awarding the compensation specifically when the respondent was at fault for the non release of the balance loan amount. Therefore, when there is no deficiency found on the part of the appellant - Corporation, it cannot be asked to pay compensation.

19. In the light of the above discussion, the impugned order cannot be sustained. Accordingly, it is set aside. Appeal is allowed. No order as to costs.

R.P. Appeal allowed.

PALLAWI RESOURCES LTD.
v.
PROTOS ENGINEERING COMPANY PVT. LTD.
(Civil Appeal No. 2763 of 2010)

MARCH 26, 2010

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

West Bengal Premises Tenancy Act, 1997 – ss. 17 (4A) and 20 – Revision of – 'Fair rent' – Determination of – Where a tenancy subsists for twenty years or more in respect of premises constructed in or before the year 1984 and used for commercial purpose – Whether automatic or to be determined by Rent Controller – Held: Under s. 17(4A) there is no automatic fixation of fair rent – An order in this regard is required to be passed by Rent Controller on the basis of an application filed –West Bengal Premises Tenancy Rules, 1999 – r. 8– Rent Control and Tenancy.

Interpretation of Statutes – Interpretation of a statutory provision – Legislative intent – Determination of – Held: A statutory provision to be read as a whole keeping in view other relevant provisions, to correctly arrive at the legislative intent – Court cannot read anything into a statutory provision which is plain and unambiguous – It is not proper for courts to add words to a provision and evolve some legislative intent, not found in the statute.

The question for consideration before this Court was whether the fair rent in respect of a tenancy which subsists for 20 years or more in respect of the premises constructed in or before the year 1984 and used for commercial purpose is required to be determined by the Rent Controller or whether the same would stand automatically determined under sub-section 4A of Section 17 r/w Section 20 of the West Bengal Premises

Tenancy Act, 1997.

Dismissing the appeal, the Court

HELD: 1.1. A cardinal principle of statutory interpretation is that a provision in a statute must be read as a whole and not in isolation, ignoring the other provisions of that statute. While dealing with a statutory instrument, one cannot be allowed to pick and choose. It will be grossly unjust if the court allows a person to single out and avail the benefit of a provision from a chain of provisions which is favourable to him. A provision in a statute ought not to be read in isolation. On the contrary, a statute must be read as an integral whole keeping in view the other provisions which may be relevant to the provision in question in order to correctly arrive at the legislative intent behind the provision in question. [Paras 13 and 15] [857-E-F; 858-E-F]

Prakash Kumar v. State of Gujarat **(2005) 2 SCC 409, followed.**

SAIL v. S.U.T.N.I. Sangam and Ors. **2009 (10) SCALE 416, relied on.**

1.2. If a statutory provision is enacted by the legislature in a certain manner, the only reasonable interpretation which can be resorted to by the courts is that such was the intention of the legislature and that the provision was consciously enacted in that manner. The court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. [Para18] [859-G-H; 860-A-B]

Ansal Properties Industries Ltd. v. State of Haryana **(2009) 3 SCC 553, relied on.**

2.1. The present case involves an interpretation of Section 17 (4A) of West Bengal Premises Tenancy Act, 1997. It will not be appropriate to read sub-section 4A of Section 17 ignoring the other relevant provisions. Section 18 of the Act which speaks about revision of the fair rent employs the words "automatically increased" in contradistinction to the word "determined" used in Section 17(4A). The use of different terminology in the two Sections thus indicates that the legislative intent was to lay down different modes for fixation of the rent under the two Sections. [Para 15] [858-F-G]

2.2. A plain reading of Section 20 of the Act would show that Section 20 allows the landlord to only give a notice of his intention to increase the rent, which becomes due and recoverable from the month or period of tenancy next after the expiry of thirty days from the date on which the notice is given. The requirement of giving by the landlord a notice of intention to increase the rent instead of a notice of increase of rent and the period of one month which has been allowed before the increased rent becomes due and recoverable from the tenant by the landlord sufficiently indicate that the legislature did not intend to make the rent fixed by the landlord automatically applicable without any reference to the Rent Controller. [Para 16] [858-H; 859-A-C]

2.3. It is not correct to say that under sub-section 4A of Section 17, there is automatic fixation of the fair rent without any reference to the Rent Controller. Section 17 as it stands today, consists of a number of sub-sections. Sub-sections 4A and 4B were both inserted in Section 17 by the West Bengal Premises Tenancy (Amendment) Act, 2002 with retrospective effect from 10.07.2001. Sub-section (1) of Section 17 clearly states that the Controller

shall be the authority to fix the rent in respect of any premises in accordance with the provisions of that Act. Sub-section 4A of Section 17 lays down the mode for the determination of fair rent where a tenancy subsists for twenty years or more in respect of the premises constructed in or before the year 1984 and used for commercial purpose. [Para 17] [859-C-F]

2.4. Sub-section 4A of Section 17 employs the word 'determine'. All the sub-sections included in Section 17 are independent provisions laying down different criteria on the fulfillment of which an application could be filed before the Rent Controller praying for increasing the fair rent. Section 17 lays down different types of causes of action as to when such an increase could be sought for. Sub-section (1) of Section 17 makes it crystal clear that on the happening and fulfillment of the criteria laid down in each of the cause of action, an application would be required to be filed before the Rent Controller who would then determine as to what would be the fair rent. Although, it could only be a case of mathematical calculation, yet an order in that regard is to be passed by the Rent Controller on the basis of an application filed before it by determining the quantum of such fair rent. [Paras 19 and 20] [860-C; 861-A-C]

Divisional Personnel Officer, Southern Rly. v. T.R. Chellappan **(1976) 3 SCC 190, relied on.**

2.5. In case there is a case of deemed increase of fair rent or an automatic increase, still somebody would have to determine that it has so increased and that authority is definitely the Rent Controller who could exercise the jurisdiction only when he receives an application. Unless an application is received in that regard, nobody would know that in fact a case for increase of fair rent has accrued or is sought for by the concerned party. [Para 21] [861-D-E]

2.6. It cannot be said that sub-section 4A of Section 17 was sought to be brought in by way of an exception to the general rule of Section 17. Had the legislature intended otherwise, it would have specifically, in its wisdom, made sub-section 4A an exception to sub-section (1) by adding a proviso or by making a specific provision thereto u/s. 3, where the Act itself provides some exemptions and provides for specific cases where the Act is not applicable. The fact that the West Bengal State legislature did not, even after insertion of sub-section 4A, amend or modify Rule 8 of the West Bengal Premises Tenancy Rules, 1999 which prescribes the manner of making applications u/s. 17 for fixation of fair rent also fortifies the fact that the State legislature did not intend to incorporate sub-section 4A as an exception to sub-section (1) of Section 17. On the contrary, the non-amendment of Rule 8 goes on to show that the legislature intended the same procedure to be followed with regard to making an application under any provision of Section 17 for the fixation of fair rent. [Para 22] [861-F-H; 862-A-B]

Case Law Reference:

(2005) 2 SCC 409	**followed.**	**Para 13**
2009 (10) SCALE 416	**relied on.**	**Para 14**
(2009) 3 SCC 553	**relied on.**	**Para 18**
(1976) 3 SCC 190	**relied on.**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2763 of 2010.

From the Judgment & Order dated 26.3.2008 of the High Court at Calcutta in G.A. No. 800 of 2008 in C.S. No. 14 of 2008.

Dr. A.M. Singhvi, Ranjit Kumar, Rahul Roy, Kumar Mihit

Amit Bhandari (for Khaitan & Co.) for the Appellant.

Bhaskar P. Gupta, Narin, S.K. Das, Sandeep Narain, Arti Tiwari (for S. Narain & Co.) for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal by special leave is directed against the judgment and order dated 26.03.2008 passed by the Calcutta High Court under its ordinary original civil jurisdiction whereby the High Court dismissed the application G.A. No. 800 of 2008 in C.S. No. 14 of 2008 moved by the appellant herein under Chapter XIIIA of the Rules on the Original Side Rules of the Calcutta High Court for a summary judgment.

3. The issue and the controversy that falls for consideration in the present appeal deals with the interpretation of the provisions of sub-section 4A of Section 17 of the West Bengal Premises Tenancy Act, 1997. The question that arises for our consideration is whether the fair rent in respect of a tenancy which subsists for 20 years or more in respect of the premises constructed in or before the year 1984 and used for commercial purpose is required to be determined by the Rent Controller or whether the same would stand automatically determined under sub-section 4A of Section 17 read with Section 20 of the West Bengal Premises Tenancy Act, 1997.

4. At this juncture, it will be pertinent to set out a brief statement of facts in the backdrop of which the present controversy has arisen before us. A lease deed dated 15.02.1969 was executed between the appellant and the respondent herein for grant of lease, for office purposes, of the entire first floor of premises no. 20, Rajendra Nath Mukherjee Road, Calcutta for a period of twenty years from 01.02.1969 to 31.01.1989 and the rent mutually settled and agreed upon

by the parties was Rs. 2,250/- per month as the basic component of the rent (the service charges and other additional payments excluded).

5. Upon the expiry of the term of twenty years, the appellant herein instituted a suit being C.S. No. 778 of 1989 before the Calcutta High Court. The appellant herein, however, had withdrawn the said suit by way of an order dated 18.04.2006. In the meanwhile, the West Bengal Premises Tenancy Act, 1997 came into force which repealed the earlier Act of 1956. Section 17(4A) was inserted by the West Bengal Premises Tenancy (Amendment) Act, 2002 with retrospective effect from 10.07.2001.

6. The appellant therefore issued to the respondent a notice dated 12.03.2007 under Section 20 of the West Bengal Premises Tenancy Act, 1997 intending to increase the rent of the said premises to Rs. 13,500/- per month, it being five times the rent earlier agreed upon by the parties due and recoverable from the month of May 2007. A notice under Section 106 of the Transfer of Property Act, 1882 dated 09.06.2007 terminating the tenancy and calling upon the respondent to hand over vacant, peaceful and khas possession of the said premises was served upon the respondent by the appellant.

7. Since the respondent continued to occupy the said premises, the appellants instituted a suit C.S. No. 14 of 2008 in the High Court of Calcutta under its ordinary original civil jurisdiction, praying, *inter alia*, for a decree of peaceful, vacant and khas possession of the said premises. Subsequently, an application G.A. No. 800 of 2008 for a summary judgment was moved by the appellant wherein it was contended by the appellant that under sub-section 4A of Section 17 there is a mandate for increase of rent which automatically comes in operation upon a notice in that regard being issued under Section 20 without the landlord requiring to perfect the demand before any other authority. It was also urged that if there is no

dispute as to the quantum, the increased rent becomes payable from the month or period of tenancy next after the expiry of 30 days from the date of the notice and the refusal without any dispute as to the quantum would not make the landlord liable to apply before the Rent Controller for fixation of rent. It was further contended that only where a tenant refused to accept the increase as suggested by a landlord, the landlord has perforce to seek the increase before the Rent Controller. However, the Court relying on an earlier judgment of the Division Bench of that Court reported as 2006 (2) CHN 386 dismissed the said application. Hence, the parties are in appeal before us.

8. Before proceeding further, we wish to refer to the rival contentions made by the learned counsel appearing for the parties. Dr. A.M. Singhvi and Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the appellant, contended before us that Section 17(4A) of the West Bengal Premises Tenancy Act, 1997 as inserted by the 2002 Amendment Act, envisages that the determination of the fair rent would be automatic under Section 17(4A) read with Section 20 of the West Bengal Premises Tenancy Act, 1997 without reference to the Rent Controller once the three pre-conditions which govern the applicability of Section 17(4A) spelt out in that Section are fulfilled. According to the counsel for the appellant, fixation of the rent is automatic because Section 17(4A) prescribes a formal method of fixing the rent requiring only minimal calculation. The counsel further forcefully submitted before us that since the job of fixing the rent does not involve any adjudicatory process, it is a ministerial task, and hence reference to the Rent Controller is not required.

9. Mr. Bhaskar P. Gupta, learned senior counsel appearing on behalf of the respondent, on the other hand, contended that sub-section 4A of Section 17 has to be read in conjunction with the other sub-sections of that Section and that application of Section 17(1) which requires the Rent Controller

to fix the fair rent cannot be dispensed with. Mr. Gupta also laid emphasis on the fact that Rule 8 of the West Bengal Premises Tenancy Rules, 1999 which prescribes the manner of making applications under Section 17 for fixation of the fair rent remains unamended even after the amendment of the 1997 Act, thereby keeping the manner of fixation of the fair rent intact even for cases falling under sub-section 4A of Section 17.

10. We have carefully considered the aforesaid submission of the counsel appearing for the parties. In order to appreciate the said contentions we have also perused not only the statutory provisions of the West Bengal Premises Tenancy Act, 1997 but also the Statement of Objects and Reasons leading to framing of the aforesaid legislation as also the Statement of Objects and Reasons for bringing in an amendment of the said Act in 2002 giving retrospective effect to the said provisions from 2001. Before the enactment of the West Bengal Premises Tenancy Act, 1997, the field was covered by the West Bengal Premises Tenancy Act, 1956. However, the aforesaid Act of 1997 was legislated after repealing the West Bengal Premises Tenancy Act, 1956. We may now have a look at the definition of the term "fair rent" under the Act of 1997. The definition of "fair rent" is given in Section 2(b), where it is stated that fair rent means rent fixed under Section 17 of the Act. At this stage, reference is also to be made to the relevant text of Section 17 which is reproduced below for the purpose of convenience but restricted only to the relevant portion: -

> "*Section 17 - Fixation of fair rent - (1) The Controller shall, on application made to him either by the landlord or by the tenant in the prescribed manner, fix the fair rent in respect of any premises in accordance with the provisions of this Act.*
>
> .....
>
> *(4A) Where a tenancy subsist for twenty years or more in respect of the premises constructed in or before the year 1984 and used for commercial purpose, the fair rent shall be determined by adding to the rent as on 1.7.1976 five times or by accepting the existing rent if such rent is more than the increased rent determined under this sub-section*."

The text of Section 20 which deals with the issuance of a notice required to be mandatorily given to the tenant by the landlord if he wants to increase the rent is also reproduced hereunder: -

> "*Section 20 – Notice of increase of rent – Where a landlord intends to increase the rent of any premises, he shall give to the tenant the notice of his intention so to do in so far as such increase is permissible under this Act; the increase of rent shall be due and recoverable from the month or period of tenancy next after the expiry of thirty days from the date on which the notice is given.*
> "

11. It may be mentioned herein that in the original Act of 1997 there did not exist the provisions of sub-section 4A of Section 17 and the same was brought in by the Amendment Act of 2002, operating retrospectively with effect from 10.07.2001. In the Statement of Objects and Reasons of the Bill of 2002 it was stated that one of the purposes for bringing in the Amendment Bill is to extend the application of the said Act to the premises let out for residential purpose and non-residential purpose having monthly rent upto Rs. 6,000/- and Rs. 10,000/- respectively situated within the limits of Kolkata Municipal Corporation or the Howrah Municipal Corporation as well as to extend the application of the said Act to the premises let out for residential purpose and non-residential purpose having monthly rent upto Rs. 3,000/- and Rs. 5,000/- respectively situated in other areas to which the said Act extends. Another reason stated for bringing in the Amendment Bill was to amend Section 17 of the said Act for fixation of fair rent in such a manner so as to provide benefit to both the

landlord and the tenant concerned.

12. A plain reading of Section 17(4A) would suggest that the three conditions which must co-exist for the applicability of that sub-section in a given case are:

i. There must be a subsisting tenancy for twenty years or more; and

ii. The tenancy must be in respect of a premises constructed in or before the year 1984; and

iii. The premises must be used for a commercial purpose.

The counsel for the parties have, before us, not disputed the fulfillment of these three pre-conditions in the present case. Therefore, we intend to directly move to the point which is in issue before us in the present appeal. At the outset, we wish to point out that for a number of reasons set out in the following paragraphs, we cannot accept the view propounded by the learned senior counsel appearing for the appellant.

13. A cardinal principle of statutory interpretation is that a provision in a statute must be read as a whole and not in isolation ignoring the other provisions of that statute. While dealing with a statutory instrument, one cannot be allowed to pick and choose. It will be grossly unjust if the Court allows a person to single out and avail the benefit of a provision from a chain of provisions which is favourable to him. Reference may be made to a constitutional bench decision of this Court in the case of *Prakash Kumar v. State of Gujarat* (2005) 2 SCC 409. The Court, in para 30, of that judgment observed as follows:

> "*30. By now it is well settled principle of law that no part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is also trite that the statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved."*

14. We wish to also refer to a latest judgment of this Court reported as *SAIL v. S.U.T.N.I. Sangam and Ors.* 2009 (10) SCALE 416, wherein this Court, very succinctly reiterated the aforesaid position in, para 79, as follows:

> "79. The learned counsel, however, invited our attention to take recourse to the purposive interpretation doctrine in preference to the literal interpretation. It is a well settled principle of law that a statute must be read as a whole and then chapter by chapter, section by section, and then word by word. For the said purpose, the Scheme of the Act must be noticed. If the principle of interpretation of statutes resorted to by the Court leads to a fair reading of the provision, the same would fulfill the conditions of applying the principles of purposive construction."

15. From these authorities, it is amply clear that a provision in a statute ought not to be read in isolation. On the contrary, a statute must be read as an integral whole keeping in view the other provisions which may be relevant to the provision in question in order to correctly arrive at the legislative intent behind the provision in question. Applying this principle to the case at hand which involves an interpretation of Section 17 (4A), it will not be appropriate for us to read sub-section 4A of Section 17 ignoring the other relevant provisions. It will also be pertinent to note that Section 18 of the Act which speaks about revision of the fair rent employs the words "automatically increased" in contradistinction to the word "determined" used in Section 17 (4A). The use of different terminology in the two sections thus indicates that the legislative intent was to lay down different modes for fixation of the rent under the two sections.

16. Furthermore, a plain reading of Section 20 of the Act

would show that Section 20 allows the landlord to only give a notice of his intention to increase the rent, which becomes due and recoverable from the month or period of tenancy next after the expiry of thirty days from the date on which the notice is given. We are of the considered view that the requirement of giving by the landlord a notice of intention to increase the rent instead of a notice of increase of rent and the period of one month which has been allowed before the increased rent becomes due and recoverable from the tenant by the landlord sufficiently indicate that the legislature did not intend to make the rent fixed by the landlord automatically applicable without any reference to the Rent Controller.

17. The stand of the learned senior counsel appearing on behalf of the appellant that under sub-section 4A of Section 17 there is automatic fixation of the fair rent without any reference to the Rent Controller is untenable as it is not in conformity with the cardinal rule referred to above by us. Section 17 of the West Bengal Premises Tenancy Act, 1997, as it stands today, consists of a number of sub-sections. Sub-sections 4A and 4B were both inserted in Section 17 by the West Bengal Premises Tenancy (Amendment) Act, 2002 with retrospective effect from 10.07.2001. Sub-section (1) of Section 17 clearly states that the Controller shall be the authority to fix the rent in respect of any premises in accordance with the provisions of that Act. Sub-section 4A of Section 17 lays down the mode for the determination of fair rent where a tenancy subsists for twenty years or more in respect of the premises constructed in or before the year 1984 and used for commercial purpose.

18. Further, it is a well established principle of statutory interpretation that the legislature is specially precise and careful in its choice of language. Thus, if a statutory provision is enacted by the legislature in a certain manner, the only reasonable interpretation which can be resorted to by the courts is that such was the intention of the legislature and that

the provision was consciously enacted in that manner. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to the recent decision of this Court in *Ansal Properties & Industries Ltd. v. State of Haryana* (2009) 3 SCC 553.

19. We must also take note of the submission made by the learned senior counsel appearing for the respondent that sub-section 4A of Section 17 employs the word 'determine'. The learned senior counsel has placed reliance on the judgment of a three Judge bench of this Court, which is binding on us, reported as *Divisional Personnel Officer, Southern Rly. v. T.R. Chellappan* (1976) 3 SCC 190, the relevant portion of para 21 is reproduced herein below:

> "21……..The word "consider" has been used in contradistinction to the word "determine". The rule-making authority deliberately used the word "consider" and not "determine" because the word "determine" has a much wider scope. The word "consider" merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term "consider" postulates consideration of all the aspects, the pros and cons of the matter after hearing the aggrieved person……."

20. We may also add herein that all the sub-sections included in Section 17 are independent provisions laying down different criteria on the fulfillment of which an application could be filed before the Rent Controller praying for increasing the fair rent. In other words, Section 17 lays down different types of causes of action as to when such an increase could be sought for. Sub-section (1) of Section 17 makes it crystal clear that on the happening and fulfillment of the criteria laid down in each of the cause of action, an application would be required to be filed before the Rent Controller who would then determine as to what would be the fair rent. Although, it could only be a case of mathematical calculation yet an order in that regard is to be passed by the Rent Controller on the basis of an application filed before it by determining the quantum of such fair rent.

21. In case there is a case of deemed increase of fair rent or an automatic increase, as suggested by the counsel appearing for the appellant, still somebody would have to determine that it has so increased and that authority is definitely the Rent Controller who could exercise the jurisdiction only when he receives an application. Unless an application is received in that regard, nobody would know that in fact a case for increase of fair rent has accrued or is sought for by the concerned party.

22. Thus, it cannot be said that sub-section 4A of Section 17 was sought to be brought in by way of an exception to the general rule of Section 17. Had the legislature intended otherwise, it would have specifically, in its wisdom, made sub-section 4A an exception to sub-section (1) by adding a proviso or by making a specific provision thereto under Section 3, where the Act itself provides some exemptions and provides for specific cases where the Act is not applicable. The fact that the West Bengal State legislature did not, even after insertion of sub-section 4A, amend or modify Rule 8 of the West Bengal Premises Tenancy Rules, 1999 which prescribes the manner

of making applications under Section 17 for fixation of fair rent also fortifies the fact that the State legislature did not intend to incorporate sub-section 4A as an exception to sub-section (1) of Section 17. On the contrary, the non-amendment of Rule 8 goes on to show that the legislature intended the same procedure to be followed with regard to making an application under any provision of Section 17 for the fixation of fair rent.

23. Thus, in light of the discussion made above, we are of the considered opinion that this appeal is liable to be dismissed, which we hereby do. The parties are left to bear their own costs.

K.K.T. Appeal dismissed.

TEHRI HYDRO DEVELOPMENT CORPORATION
v.
ALSTOM HYDRO FRANCE & ANR.
(Civil Appeal No. 2761 of 2010)

MARCH 26, 2010

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

Tenders:

Tehri Hydro Development Corporation – Inviting tenders – Acceptance of bid challenged in writ petition before High Court – Direction by High Court for inviting fresh bids – Challenged before Supreme Court – Corporation directed to invite fresh bids and process the matter accordingly – Objections filed – Panel of Experts appointed to examine objections – Objections raised to report submitted by Panel of Experts – HELD: A very important project like the instant one is being held up in a legal battle between two multinational companies – Contractual rights of these companies are not more important than national interest – In the interest of the project, the Panel of Experts shall give a fresh report after giving one more final opportunity of hearing to the parties – The Corporation would then, without loss of time take the decision regarding the award of contract, considering the report of the Panel of Experts – Once the fresh bids were allowed to be given, the old controversies before the High Court would naturally become extinct and nothing survives in the appeals arising out of its decision – The exercise of bidding before the Supreme Court was ordered with the sole objective of saving time and to give the transparency to the whole exercise – It is not for this Court to award the contracts by accepting or rejecting the tender bids – It is exclusively for the Corporation to do that – Hydro-Electric Projects.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2761 of 2010.

From the Judgment & Order dated 29.6.2009 of the High Court of Uttarakhand at Nainital in W.P. No. 167 of 2009.

WITH

SLP(C) No.19890 of 2009

T.C. (C) No. 33 of 2009.

G.E. Vahanvati, AG, F.S. Nariman, A. Sharan, Harish Salve, Dr. A.M. Singhvi, Pratap, Venugopal, Surekha Raman, Dileep Poolakkot, Purushottam Kumar Jha (for K.J. John & Co.) Jai Munim, Gursharan, Anuradha Bindra, J.N. Patel, Amit Anand Tiwari, Abhinav Mukerji, Shiv Prakash Pandey for the appearing parties.

The Order of the Court was delivered by

ORDER

V.S. SIRPURKAR, J. 1. Leave granted in SLP (C) Nos.15779 and 19890 of 2009.

2. These appeals emanate out of the order passed by the learned Single Judge of Uttaranchal High Court. On 31st August, 2007, the appellant herein invited bids for turn-key execution of the Tehri Pump Storage Plant, Phase-II. After the pre-bid conference and amendments four pre-qualification bids were submitted on 29th December, 2007 by respondent no.1 – Alstom Hydro France, Patel Engineering, Sumitomo Corporation, Japan and Voith Seimens as leaders of their respective consortia. Initially respondents 1 and 2 along with Sumitomo Corporation, Japan were qualified, however, subsequently the bid of Sumitomo Corporation was declined as non-responsive. Thus there were two parties in the fray, they being respondents 1 and 2 herein. These two gave two price options. However, respondent no.1 filed a Writ Petition being

W.P. No.167 of 2009 in the Uttarakhand High Court on two grounds, namely, (a) that respondent no.2 was not technically qualified; (b) that respondent no.2 had submitted two price bids which was in contravention of the terms and conditions of the ITB. The High Court by its final judgment came to the conclusion that the respondent no.2 was qualified. It was further held that there was no violation of terms and conditions of ITB. However, the learned Single Judge passed the following order by way of final directions:

> "Consequently this Court holds as follows:
>
> The qualifications of respondent no.2 for having done the work of 'erection' at Ghangzhou II seems to be in order as this court holds 'supervision of erection' as equivalent to that of 'erection' and rejects the arguments of petitioner on the eligibility of respondent no.2. Further, under the facts of this case, if two price bids had been invited by the employer – one as an assignee and the other as a partner, then again there is nothing wrong in such an approach and if consequent to it two price bids have been given by respondent no.2- one as an assignee and the other as a partner, it is in order and will not be called as a non-responsive bid. However, since the process of calling two bids is flawed for lack of clarity, the benefit has to be given to the petitioner, for the reasons already stated above. Hence, it is directed that respondent no.1 must ask for fresh bids from the petitioner as well as respondent no.2."

Being aggrieved the appellant herein filed the present appeals.

3. As it appears from the appeal filed by Tehri Hydro Development Corporation, the appellant assails the direction of the learned Single Judge to issue fresh bids as it was bound to further delay the project which was already delayed for six months only because of the pending proceedings. A contention was also raised that the fresh bidding was directed without

offering any protection to the appellant herein against cartelization. It was, therefore, apprehended that the two multinational corporations, they being respondents 1 and 2 in the appeal filed by Tehri Hydro, as leaders of the Consortia could possibly get together and submit revised reduced bids which would not be in the public interest. The criticism by the learned Single Judge in the impugned judgment to the effect that there was no clarity on the issue whether two price bids could be submitted was also assailed on various grounds. It was pointed out that the price options of the respondent no.1 were at Rs.2520.60 crores while after discount it was at Rs.2483.80 crores. The price options of the respondent no.2 was at Rs.2327.50 crores as assignee and under Clause 9.4.4(v)(e) as a partner it was Rs.2261.60 crores and thus the respondent no.2 was the lowest bidder. According to the appellant this fact was completely lost sight of by the High Court.

4. Notice was ordered to be issued on 11.9.2009. At that stage itself all the interested parties were being represented through counsel. It was, however, expressed by the learned Attorney General for India that in the national interest of completing the project early, the appellant was not averse to inviting the fresh bids in light of the judgment of the High Court. Accepting that plea, the following order came to be passed:

> "Issue Notice.
>
> The affidavits shall be exchanged within three weeks from today. Tehri Hydro Development Corporation shall invite fresh bids in the light of the judgment of the High Court. Both Alstom Hydro France and Voith Siemens Hydro Germany shall be entitled to put in their bids. These bids shall be examined by the Tehri Hydro Development Corporation and report shall be submitted to this Court in a sealed cover. Needless to mention, all this shall be done without prejudice to their rights and contentions. All contentions shall be open. We are passing this order deliberately as we are told that a very important project is

held up.

Put up after six weeks."

Accordingly fresh bids were invited and the respondents 1 and 2 submitted the same. As ordered in the earlier order two bids were submitted to the Registry of this Court in the sealed covers. Learned Attorney General also offered that the sealed covers could be opened in the office of the Registrar. Accordingly, the bids were directed to be opened on 26.10.2009 at 4.30 p.m. in the office of Registrar (Judicial-I) and copies thereof were directed to be given to the representatives of the respective parties. A Report was submitted thereafter in the sealed covers and vide order dated 4.12.2009, the appellant was directed to process the matter further on the basis of the fresh bids. The appellant, at this stage, also offered to give hearing, if any, to the parties in respect of their objections to the fresh bids.

5. Before that since it was found that respondent no.2 had impugned the order of the learned Single Judge dated 29.12.2009 by way of an appeal before the Division Bench of the Uttaranchal High Court being Special Appeal No.131 of 2009. That appeal got transferred to this Court.

6. On 3.12.2009 the respondent no.1 submitted a representation against the exercise of scrutiny by the appellant. It was suggested that the respondent no.1 had no opportunity to review the contents of the Report. Some other objections were also raised insisting that ultimately the Tender should be awarded in favour of the respondent no.1 alone. It seems that all these objections raised by the respondent no.1 were referred to a Panel of Experts on 29.1.2010. A letter to that effect was written to both the respondents by the appellant. It was stated in this letter that the examination report on fresh bids was opened in the Court on 4.12.2009 and since the court had directed the appellant herein to give hearing to the objections raised by the parties, if any, before the final decision and since

the copies of the examination report were already supplied and the appellant had received a representation raising objections, in order to maintain the transparency the appellant had constituted a Panel of three experts of national repute and impeccable integrity to examine the objections raised by the Consortium of respondents. This panel of experts comprises of following experts:

(i) Shri Ramesh Chandra (Ex-Chairman, CWC)

(ii) Shri D.V. Khera (Ex-Chairman, CEA)

(iii) Shri A.K. Shangle (Ex-Member, CWC)

The objections raised by the first respondent were inquired into by the Panel of Experts. The Panel of Experts framed the following question:

"Whether the examination report of THDC declaring the bid of the Consortium of M/s.Alstom as non-responsive is OK or the objections raised by the Consortium of M/s.Alstom are justified with reference to the Terms & Conditions of the Tender, Techno-commercial bid submitted in October 2008 and fresh price bid submitted in October, 2009 and their bid can be considered as responsive."

The Panel of experts have drawn a conclusion in their report to the following effect:

"Based upon the views outlined above, POE is of the opinion that fresh price bid of consortium of M/s.Alstom is non-responsive. Their quoted price on partnership basis even though non-responsive is however lower by Rs.84.5 crores (M/s.Voith Rs.21,551,245,304.00 – M/s.Alstom Rs.20,705,840,090.00). Similarly, the quoted price on assignee basis though non-responsive is lower by Rs.108.7 cores (M/s.Voith Rs.22,343,174,985.00 – M/s.Alstom Rs.21,256,007,413.00). The unconditional offer of consortium of M/s.Alstom to take care of THDC

observation without any extra cost so that bid becomes responsive and in accordance with employers' requirement is not acceptable as this is not permissible under Bidding Document of this Tender."

7. Ultimately when the matter was heard on 15.2.2010, a copy of the report of the Panel of Experts was handed over to the parties.

8. When the matter came up on 19.3.2010 Shri Harish Salve, Senior Advocate and Dr.A.M. Singhvi, Senior Advocate appearing for the respondent no.1 urged that the Panel of Experts had not given a fair opportunity to it and that it had merely reiterated what was already done by the appellant. The respondent no.1, however, in order to give quietus to the matter urged as under:-

"it is agreeable if the Government of India sends for the files and considers all the objections raised by it and Voith and issues appropriate directions to the appellant. Such a power is available with the Government in relation to PSUs in any event. If such an 'administrative review', is conducted, the petitioner (respondent no.1 in the appeal filed by Tehri Hydro) states that it shall not challenge any decision that may be taken in the matter by the Government of India and the matter shall, as far as the petitioner (respondent no.1 in the appeal filed by Tehri Hydro) is concerned, be given a quietus".

In short the respondent no.1 whose bid has been found to be non-responsive by the appellant as well as Panel of Experts was prepared to have a final decision from the Government of India.

9. Learned Attorney General as well as Shri F.S. Nariman, Senior Advocate appearing on behalf of the respondent no.2, however, opposed this plea. It was pointed out by the learned Attorney General that at no point of time the integrity, competence or capability of the members of the Panel of

Experts was ever challenged by anybody including the respondent no.1. The nature of objections raised to the report is of technical character. Even in its objections the respondent no.1 has not challenged the bonafides of the Panel of Expert though during the arguments the possibility of bias was expressed though haltingly. Learned Attorney General pointed out that in case the respondent no.1 has any grievance of not being heard by the Panel of Experts, the respondent no.1 could still address the Panel of Experts which could be requested to give a hearing to the respondent no.1. The Attorney General Pointed out that all the grievances, technical or otherwise could well be raised before the Panel of Experts and for that purpose a hearing could be given to all the concerned parties on the basis of the objections raised by them which would atleast put an end to the controversy.

10. The offer given by the Attorney General is undoubtedly a fair offer. The respondent no.1 has no problem about the matter being referred to the Government of India. We do not think that in absence of any allegations/ charges made and substantiated against the Panel of Experts, it would be proper to change the Panel of Experts and to appoint a new Panel of Experts through the Government of India or some other panel. There has to a finality somewhere. We are pained to note that a very important project like the present one is being held up in a legal battle between the two multinational companies. Till today, even the contract has not been finalized. All this would invariably cause loss to the nation. After all, contractual rights of these companies are not more important than the national interest.

11. Under the circumstances we order that the Panel of Experts shall give one more final opportunity to the parties to be heard and more particularly the respondent no.1 on the objections that it has raised on the earlier report of Panel of Experts and give a fresh report in the nature of recommendations. This exercise should be completed by the end of April, 2010. The appellant herein would then, without loss

of time, take the decision, considering the report of the Panel of Experts regarding the award of contract.

12. This course would leave nothing to be decided in the pending appeals. Firstly, when the Attorney General for India agreed to invite fresh bids as per the directions of the High Court, there remained nothing in that appeal as the invitation for new bids would straightaway put the clock back and the parties would be back to square one. Secondly, when all the parties agreed to give their fresh bids in pursuance of the offer made by Attorney General for India, there remained nothing in the original controversies. The challenge to the judgment by respondent no.1 in the appeal arising out of SLP 19890 of 2009 would also not survive once both the contesting respondents accepted the proposal to put bids again. Therefore, at this juncture, it is futile to go into the earlier controversies. Even the challenge by respondent no.2 would be of no consequence once the respondent no.2 was given a fresh opportunity for bidding. The exercise of bidding before this Court was ordered with the sole objective of saving time and to give the transparency to the whole exercise. Once the fresh bids were allowed to be given the old controversies before the High Court would naturally become extinct. In our opinion it would be in the interest of the project which has already been dragged by more than a year that the Panel of Experts should be allowed to consider the objections and express their opinion. That opinion shall then be considered by the appellant which would take the final decision on that basis. We must reiterate here that it is not for this Court to award the contracts by accepting or rejecting the tender bids. It is exclusively for the appellant herein to do that. Once all this exercise is over, nothing would remain for us to decide in these appeals.

13. In view of the directions passed above both the appeals as well as the Transfer Case No.33/2009 are disposed of.

R.P. Matters disposed of.

MANAM SARASWATHI SAMPOORNA KALAVATHI & ORS.

v.

MANAGER, APSRTC, TADEPALLIGUDEM A.P. & ANR.

(Civil Appeal No. 2325 of 2010)

MARCH 26, 2010

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

Motor Vehicles Act, 1988 – s.166 and Schedule II – Fatal accident – Rash and negligent driving of offending vehicle alleged –FIR also lodged – PW-2, Pillion rider of the scooter driven by the deceased, deposing that deceased was driving the scooter cautiously and driver of the offending vehicle was driving in a rash and negligent manner – Claim for compensation –Tribunal holding that accident was caused due to rash and negligent driving and awarded Rs. four lakhs applying multiplier of 16 – High Court disbelieving the evidence of PW-2 held that accident was not due to rash and negligent driving –It also held that application of multiplier from Schedule II was not correct, as the Schedule did not exist on the day of accident – However, the Court awarded compensation for Rs. 75,000/- – On appeal, held: High Court order was contradictory and unsustainable – There is no basis, logic and rationality in arriving at the conclusions – High Court was unjustified in weaving out a new case which is not borne out from the evidence on record – Application of multiplier from Schedule II is permissible in the facts of the case –Award passed by Tribunal restored.

After a fatal motor accident, mother, father and sisters of the deceased filed the claim petition under Motor Vehicles Act, 1988. FIR in respect of the incident was also lodged immediately after the accident. PW-2 (Pillion rider of the scooter which was driven by the deceased) stated

that deceased was driving the scooter slowly and cautiously on left side of the road and respondent No. 2 (the bus driver) was driving the bus in a rash and negligent manner and without blowing horn dashed the scooter from behind. Tribunal, relying on the testimony of PW-2, held that the deceased died because of rash and negligent act of respondent No. 2 (the driver of APSRTC). The Tribunal applying the multiplier of 16, determined the compensation amount at Rs. 4,80,000/-. Since the claimants had claimed only Rs. 4,00,000/-, the Tribunal restricted the compensation amount to Rs. 4,00,000/-.

In appeal, High Court disbelieved the testimony of PW-2, doubting his presence at the spot. It observed that there were possibilities of deceased driving the scooter at a high speed and sustaining injuries, or deceased not possessing a driving licence and falling down due to lack of experience; and that there was possibility of the claimants influencing the police and getting the FIR registered with time and date of their choice. High Court further held that the Tribunal was in error in taking the multiplier from Schedule II of the Act, as the Schedule did not exist on the day of accident. The court awarded compensation for Rs. 75,000/-. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1.The High Court erroneously observed that there is no evidence that the deceased died because of serious injuries received due to rash and negligent driving of the driver of the APSRTC. [Para 19] [881-D]

1.2. The approach of the High Court in evaluating the evidence of PW-2 is entirely erroneous. The evidence of PW-2 could not have been discarded on the ground that after sustaining minor injuries, he did not file a claim petition. This cannot be an appropriate manner of appreciating the evidence. When no question was asked

in the cross-examination, then PW-2 could not be expected to give reply to the question. The High Court by adopting erroneous method of scrutinizing the evidence, has discarded the evidence of PW-2. The High Court has wrongly observed that the possibility of PW-2 not being with the deceased at the time of accident and his implicating the bus belonging to the respondents, is also without any basis or foundation. [Paras 13 and 18] [879-F-H; 880-A; 881-B-C]

1.3. The finding of the High Court that it was possible that the deceased, while driving the scooter at a high speed, falling down and sustaining head injury is totally contrary to the record of this case. PW-2 has categorically stated in his evidence that the deceased was driving slowly and cautiously on the left side of the road and the driver of the bus was driving the bus in a rash and negligent manner without blowing horn. [Para 14] [880-A-B]

1.4. There is no basis, logic and rationality in arriving at the conclusion that there was possibility of the deceased not possessing a driving licence, and his falling down due to lack of experience and sustaining the head injury. [Para 15] [880-C-D]

1.5. The High Court was unjustified in weaving out a new case which is not borne out from the evidence on record. Similarly, the High Court erroneously observed that there was possibility of appellants-claimants influencing the police and getting an FIR registered with time and date of their choice. The appeal by special leave filed by the appellants is delayed by 654 days and this delay, according to the affidavit filed by the appellants, occurred due to extreme poverty. In this background, the above observation of the High Court is wholly erroneous and without any basis. [Paras 16 and 17] [880-D-E; 881-A]

1.6. The High Court, on the one hand, came to the clear conclusion that the deceased did not die because of the rash and negligent act of the respondents and on the other hand, it awarded compensation of Rs.75,000/-. If the High Court was clearly of the view that the deceased did not die because of the serious injuries sustained on account of rash and negligent act of the driver, then no compensation ought to have been awarded. The findings of the High Court are totally contradictory and unsustainable. [Para 22] [882-C-D]

2. The High Court's observation that the Tribunal was in error in taking the multiplier from Schedule II of the Act because on the date of the accident, Schedule II of the Act was not there in the Act and it was incorporated only by virtue of Act 54 of 1994 with effect from 14.11.1994, is not correct. [Para 19] [881-D-E]

Lata Wadhwa and Ors. vs. State of Bihar and Ors. **(2001) 8 SCC 197, relied on.**

3. The amount of compensation which has already been given to the appellants would be adjusted and the remaining amount, with interest as directed by the Tribunal, would be handed over to the appellants within two months from the date of this judgment. In case, the amount is not paid within a period of two months, the amount shall carry interest at the rate of 15% per annum. [Para 24] [882-F-G]

Case Law Reference:

(2001) 8 SCC 197 Relied on. Para 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2325 of 2010.

From the Judgment & Order dated 4.12.2006 of the High Court Judicature Andhra Pradesh at Hyderabad in Civil Misc. Appeal No. 2365 of 1997.

Shally Bhasin Maheshwari for the Appellants.

G.N. Reddy for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Delay condoned. Leave granted.

2. The brief facts which are necessary for disposal of this appeal are recapitulated as under:

The deceased was an engineering graduate working as a Branch Manager in Fancy Traders Company at Bangalore. He had gone to Velpucharla from Bangalore on the eve of Sankranti festival. On 11.1.1993 at about 11.00 a.m., the deceased, namely, Manam Yasovardhana, along with one Tummala Nageswara Rao had gone to Gannavaram Village on the scooter bearing No. AP-16-D-699. In the evening, they were returning to Velpucharla and when they reached the District Electrical Stores, Vatluru, N.H.5 road at about 6.30 p.m. while the deceased was driving the scooter on the left side of the road slowly and cautiously, the driver of the APSRTC bus bearing No. AP-Z-1247 drove in a rash and negligent manner without blowing horn and while proceeding towards Eluru hit the scooter from behind, as a result of which the deceased who was driving the scooter died on the spot and the pillion rider Tummala Nageswara Rao fell down and sustained injuries. The accident took place because of rash and negligent driving of the driver – Respondent No.2, P. Chittirama Raju of the APRRTC bus bearing No.AP-Z-1247.

3. The mother, father and sisters of the deceased filed a joint claim petition, being Original Petition No.451/1993 under Section 166 of the Motor Vehicles Act, 1988 before the Motor Accidents Claims Tribunal, West Godavari District, Erulu, A.P. The Tribunal, after taking into consideration the pleadings of the parties, framed the following issues:

(i) Whether the accident occurred due to rash and negligent

driving of the bus driver - 1st Respondent (respondent no.2 herein) and dashed against the scooter bearing No. AP-16-D-699 being driven by the deceased.

(ii) Whether the petitioners (appellants herein) are entitled to claim any compensation? If so, to what amount and against which of the respondents?

4. While dealing with Issue No.(i), the Tribunal stated that it is the specific evidence of PW-2, pillion rider of the scooter driven by the deceased Yasovardhana that on 11.1.1993 while returning to Eluru when they reached the District Electrical Stores, Vatluru, at about 6.30 p.m., the APSRTC bus bearing No. AP-Z-1247 which was being driven by P. Chittirama Raju, respondent No.2 herein, dashed the scooter from behind and the deceased and the scooter fell down, resulting into the death of the deceased on the spot.

5. It may be pertinent to mention herein that PW-2 clearly stated that the deceased was driving the scooter slowly and cautiously on the left side of the road and the bus driver was driving the bus in a rash and negligent manner without blowing horn and while proceeding towards Eluru, dashed the scooter from behind.

6. The incident took place on 11.1.1993 at 6.30 p.m. and the first information report was lodged at 8.00 p.m. on the same day. The post-mortem certificate revealed that the deceased died because of the multiple injuries and the injury on the vital part of the brain led to multiple fracture of vault and base of skull and due to haemorrhage and shock.

7. The Tribunal accepted the testimony of PW-2 – pillion rider and clearly found that the deceased died because of the rash and negligent act of the driver of the APSRTC bus.

8. Regarding issue No. (ii) which is about the claim of compensation, the appellants had claimed a compensation of Rs. 4 lakhs on the ground that the age of the deceased was

24 years on the date of accident and was getting Rs.5,000 per month. The Tribunal, relying on the certificate issued by the Chartered Accountant, Pondicherry, stated that the deceased got Rs.60,000/- towards salary and commission during the financial year 1991-92 and Rs.50,000/- from 1.4.1992 to 31.1.1993. The accident took place on 11.1.1993. This certificate shows that the total salary and commission for the ten months i.e. from 1.4.1992 to 31.1.1993 was Rs.50,000/-. Therefore, the gross earnings of the deceased was around Rs.5,000/- per month from salary and commission. Out of this sum, if 1/3rd is deducted then the net contribution will be Rs.3,334/- per month which would work out to be Rs.40,008/- per annum. The Tribunal took a round figure of Rs.40,000/- and applied the multiplier of 16. According to the Tribunal, the total amount would work out to Rs.6,40,000/-. Since the amount was to be paid in lump sum, a further deduction of 25% was made and after deduction the remaining payable amount was Rs.4,80,000/-. Since the appellants had claimed only Rs. 4 lakhs, the Tribunal restricted the total compensation at Rs.4 lakhs.

9. The Tribunal also took into consideration the age of the mother of the deceased, which was 47 years at that time and applying the multiplier of 13, the amount of compensation worked out to be Rs.3,90,000/- which is short by Rs.10,000/- of the total amount claimed. Even assuming that the multiplier of 16 was wrongly applied by the Tribunal, the Tribunal also calculated the amount of compensation by taking into consideration the age of the mother of the deceased, which was 47 years at that time, and applying the multiplier of 13, which worked out to be almost the same amount. Therefore, the Tribunal awarded the compensation of Rs.4 lakhs towards loss of future earnings or loss of dependency plus Rs.2,000/- towards the funeral expenses in this case. The Tribunal further directed that the appellants would be entitled to interest at the rate of 12% per annum on the amount of compensation from the date of application till the date of realization.

10. The Manager of the APSRTC – the 1st respondent herein, preferred an appeal before the High Court of Judicature, Andhra Pradesh at Hyderabad, under Section 173 of the Motor Vehicles Act, 1988, against the judgment of the Tribunal. The High Court relied on the first information report and, in paragraph 8 of the impugned order, mentioned that the first information report was lodged at 8.00 p.m. on 11.1.1993 and that the deceased died due to the rash and negligent driving of the APSRTC bus.

11. The High Court strangely observed that the motor vehicle inspector inspected the bus of the APSRTC at Taluq Police Station on 12.1.1993 at about 3.30 p.m. and did not find any damage or blood stains on the tyres of the bus and that the efficiency of foot brake of the bus was good and its action was even.

12. The High Court while evaluating the evidence of PW-2 has observed that when according to PW-2, he was thrown away into the bushes then how could he see the number of the bus? This is not explained by PW-2. It is further mentioned that it is not even the case of PW-2 that he had filed any claim petition seeking compensation for the injuries received by him in the accident. So the evidence of PW-2 that he could note the number of the bus that sped away, is difficult to be believed or accepted. The High Court further observed that if the bus was being driven at a high speed and on dashing against the scooter from behind, there should be a dent at least on the front or side portion of the body of the bus, but there was no damage to the bus.

13. The approach of the High Court in evaluating the evidence of PW-2 is entirely erroneous. How could the evidence of PW-2 be discarded on the ground that after sustaining minor injuries he did not file a claim petition? This cannot be an appropriate manner of appreciating the evidence. When no question was asked in the cross-examination, then how PW-2 could be expected to give reply to the question? The High Court

by adopting erroneous method of scrutinizing the evidence has discarded the evidence of PW-2.

14. The High Court further observed in the impugned judgment that the possibility of the deceased, while driving the scooter at a high speed, falling down and sustaining head injury cannot be ruled out. This finding is totally contrary to the record of this case. PW-2 has categorically stated in his evidence that the deceased was driving slowly and cautiously on the left side of the road and the driver of the bus was driving the bus in a rash and negligent manner without blowing horn.

15. The High Court further observed that significantly the driving license of the deceased was not produced. So the possibility of the deceased not possessing a driving licence, and his falling down due to lack of experience and sustaining the head injury cannot be ruled out. There is no basis, logic and rationality in arriving at this conclusion.

16. The High Court was totally unjustified in weaving out a new case which is not borne out from the evidence on record. Similarly, the High Court erroneously observed that the possibility of respondent Nos.1 to 5 (appellants herein) influencing the police and getting an FIR registered with time and date of their choice cannot be ruled out and the possibility of PW-2 not being with the deceased at the time of accident and his implicating a bus belonging to the appellant (respondent no.1 herein) as having caused the accident also cannot be ruled out, because if really PW-2 was thrown away into the bushes due to the impact, as stated by him, he would have sustained at least some scratches and would have been referred to government hospital. The entire analysis of evidence by the High Court is erroneous and faulty. There was no basis for the High Court to come to the conclusion that the possibility of the respondents (appellants herein), influencing the police and getting the FIR registered with time and date of their choice cannot be ruled out.

17. This appeal by special leave filed by the appellants is delayed by 654 days and this delay, according to the affidavit filed by the appellants, occurred due to extreme poverty. The appellants could not collect necessary funds to file the special leave petition before this Court. In the background of the facts of this case, the observation of the High Court that the possibility of the appellants influencing the police and getting an FIR registered with time and date of their choice cannot be ruled out, is wholly erroneous and without any basis.

18. The High Court has wrongly observed that the possibility of PW-2 not being with the deceased at the time of accident and his implicating the bus belonging to the respondents herein cannot be ruled out, is also without any basis or foundation whatsoever.

19. The High Court erroneously observed that there is no evidence that the deceased died because of serious injuries received due to rash and negligent driving of the driver of the APSRTC. The High Court further observed that the Tribunal was in error in taking the multiplier from the Schedule II of the Act because on the date of the accident, Schedule II of the Act was not there in the Act and it was incorporated only by virtue of Act 54 of 1994 with effect from 14.11.1994.

20. Ms. Shally Bhasin Maheshwari, learned counsel for the appellants has drawn our attention to the judgment of this Court in *Lata Wadhwa and Ors. vs. State of Bihar and Ors.,* (2001) 8 SCC 197. This case pertains to an accident which had taken place on 3.3.1989 in Jamshedpur. She has particularly drawn our attention to paragraph 4 of the said judgment, the relevant portion of which reads as under:

> "……It has been held that the multiplier method having been consistently applied by the Supreme Court to decide the question of compensation in the cases arising out of the Motor Vehicles Act, the said multiplier method has been adopted in the present case."

21. She has further drawn our attention to paragraph 8 of the judgment, the relevant portion of which reads as under:

> "The multiplier method is logically sound and legally well-established method of ensuring a 'just' compensation which will make for uniformity and certainty of the awards. A departure from this method can only be justified in rare and extraordinary circumstances and very exceptional cases."

22. The aforesaid judgment was available when the judgment of the High Court was delivered. The High Court, on the one hand, came to the clear conclusion that the deceased did not die because of the rash and negligent act of the respondents and on the other hand, it awarded compensation of Rs.75,000/-. If the High Court was clearly of the view that the deceased did not die because of the serious injuries sustained on account of rash and negligent act of the driver, then no compensation ought to have been awarded. The findings of the High Court are totally contradictory and unsustainable.

23. In the facts and circumstances of this case, we are left with no choice but to set aside the impugned judgment of the High Court and we do so. Consequently, the judgment passed by the Motor Accident Claims Tribunal, West Godawari District, is restored.

24. The amount of compensation which has already been given to the appellants would be adjusted and the remaining amount, with interest as directed by the Tribunal, would be handed over to the appellants within two months from today. In case, the amount is not paid within a period of two months, the amount shall carry interest at the rate of 15% per annum.

25. This appeal is accordingly allowed and disposed of leaving the parties to bear their own costs.

K.K.T. Appeal allowed.