K.H. SHEKARAPPA & OTHERS
v.
STATE OF KARNATAKA
(Criminal Appeal No. 382 of 2003)

DECEMBER 3, 2009*

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

Penal Code, 1860:

ss. 304(part II)/34 and 324/34 – Custodial death – Burden of proof – Five persons beaten up by police officials in police station – Two of them died and three sustained injuries – HELD: By ocular version and medical evidence, prosecution has proved its case against accused beyond reasonable doubt – When the deceased were brought alive to the police station but were produced dead before medical officer, it is for the accused-police officials to explain the circumstance in which the victims died – The accused pleaded a false defence which reinforces their guilt –Conviction and sentence upheld – Evidence Act, 1872 – s.106 – Evidence – Testimony of hostile witness.

Evidence:

Testimony of hostile witness – HELD: Normally should not be considered in support of prosecution case, however, such evidence, if corroborated by reliable independent witness, can be taken into consideration for determining whether prosecution case is proved or not.

The appellants (A-1 to A-7 and A-9) along with another Police Officer (A-8) were prosecuted for causing, in the police station, death of two persons and injuries to three others, who had been arrested in connection

* Judgment Received on 13.4.2010.

with a fight between them and some engineering students said to have taken place at a liquor bar. The trial court convicted the appellants for commission of offences punishable u/ss 143, 148, 326 r/w s.149, s.201/149, 218/149 and 302/149 IPC on two counts. A-8 was convicted u/ss 201/511 and 218/511 IPC. The accused filed appeals and the High Court ultimately convicted A-1 to A-7 and A-9 u/ss 304 (part II)/34 and 324/34 IPC. Aggrieved, A-1 to A-7 and A-9 filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. A fair reading of the testimony of PW-20, one of the injured witnesses, makes it abundantly clear that the appellants subjected the two deceased to severe beating because of which they died in the police station. [Para 16] [909-D-E]

1.2. The evidence of PW-5, the other injured witness, who was declared hostile, is also significant. Normally, the rule of appreciation of evidence of a hostile witness is that the same should not be considered in support of the prosecution case. However, it is a well settled principle that evidence of a hostile witness can be taken into consideration for the purpose of determining whether prosecution case is proved or not, if the same is corroborated by reliable independent witness. In the instant case, this Court finds that the admissions made by the witness in cross-examination by the prosecution are fully supported by medical evidence on record. Before the doctor, who had examined him, the witness had narrated history of assault on him, which was noted down by the doctor on his medical papers. The assertion made by the witness in his cross-examination that he was assaulted in Police Station gets ample corroboration from the medical evidence and, therefore, it would be safe to conclude that this witness received injuries while in

police custody. The evidence of this witness indicates that though initially he was hesitant in admitting the assault upon the two deceased and the two other injured in his presence, he admitted in his cross-examination that he was taken into lock-up and assaulted and the two deceased and the other two injured were with him in the same lock-up. From the evidence of this witness, it becomes evident that he and four other persons, namely, the two deceased and the other two injured, were assaulted with sticks resulting into injuries on all over their person. [Para 13 and 14] [903-E-H; 904-A-D; 905-A-C; H; 906-A]

1.3. According to the Medical Officers (PW 1 and PW-2), the cause of death of both the deceased was shock as a result of the multiple injuries sustained by them. The Medical Officers are completely corroborated by the contents of Post Mortem reports produced on the record of the case. It was explained by the doctor that individually the injuries were simple, but collectively they could cause the death of an individual. According to the doctor, it was a case of rapid death due to injuries sustained by the deceased. On reappraisal of the evidence of the Medical Officers this Court finds that the trial court and the High Court were justified in concluding that the deceased had died a homicidal death. Thus, by ocular version and the medical evidence the prosecution has proved its case against the appellants beyond reasonable doubt. [Para 9 and 16] [896-B-G; 909-E]

2.1. The fact that the two deceased and the three injured were arrested and brought to the Police Station on their two feet is not in dispute. The medical evidence would indicate that both the deceased were brought dead to the hospital. When the deceased were brought alive to the Police Station but were produced dead before the Medical officer, it is for the accused-police officials to

explain as to in which circumstances the deceased died. The deceased were in the custody of the appellants, who were police officials. During the time when the victims were in police custody they expired. Therefore, it was within the special knowledge of the appellants as to how the deceased had expired. In view of the salutary provisions of s. 106 of the Evidence Act, 1872, it was for the appellants to offer explanation regarding the death of the two deceased. [Para 17] [909-F-H; 910-A-B]

2.2. The defence pleaded by the appellants that both the deceased had sustained injuries when they attempted to flee at the time of their arrest, cannot be accepted. It is highly improbable that deceased 'R' would receive as many as 40 injuries and deceased 'G' would receive 24 injuries while attempting to avoid arrest. Further it could not be explained by the appellants at all as to how deceased 'G' had received burn injuries, when he, according to the appellants, had fallen into drainage and sustained injuries. Thus, the appellants pleaded a false defence which reinforces the circumstances showing the deceased had died due to cruel thrashing given by the appellants and they had injured three witnesses. On the facts and in the circumstances of the case, the appellants have not been even remotely able to probablise their defence and, therefore, the well recorded conviction of the appellants as well as sentences imposed upon them for commission of those offences are upheld. [Para 17 and 18] [909-F-H; 910-B-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 382 of 2003.

From the Judgment & Order dated 14.11.2002 of the High Court of Karnataka at Bangalore in Crl. A. No. 455 of 1995.

Shantha Kumar V. Mahale, Harish S.R. Hebbar, Rajesh Mahale for the Appellant.

Sanjay R. Hegde, A. Rohen Singh for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. The appellants, who were original accused Nos. 1 to 7 and 9, were members of police force of the Doddapet Police Station at Shimoga City, Karnataka. The challenge in this appeal by special leave is to judgment dated November 14, 2002, rendered by the Division Bench of High Court of Karnataka, Bangalore, in Criminal Appeal No. 455 of 1995, by which judgment dated July 28, 1995, passed by the learned Additional Sessions Judge, Shimoga, in Sessions Case No. 14 of 1998 convicting them under Sections 143, 148, 326, 201, 218 and 302 read with Section 149 of Indian Penal Code (IPC) and imposing different punishments for commission of those offences, is set aside and instead they are convicted for the offences punishable under Section 304 Part II IPC read with Section 34 IPC for having caused the death of two persons, i.e., Rajakumar and Gurumurthy and under Section 324 read with Section 34 IPC for causing hurt to injured Prakash and each one of them is imposed sentence of R.I. for one year and fine of Rs.5,000/- and in default to undergo R.I. for 2 years for commission of offence punishable under Section 304 Part II read with Section 34 IPC whereas no separate sentence is awarded for conviction under Section 324 read with Section 34 IPC.

2. Though several constitutional and statutory provisions have been enacted to safeguard the personal liberty and life of citizens, incidents of torture and death in the police custody are ever on the rise. In spite of condemnation of such acts by this Court and High Courts, certain police officials conduct themselves in a manner resulting into gruesome torture and death of suspects in the police custody. There is no manner of doubt that these are the most heinous crimes committed by persons, who claim to be the protectors of the citizens. What is distressing to note is that the incidents of torture and death

in the police custody take place under the shield of uniform and authority, in the four walls of a police station or in the lock-up, where the victims are totally helpless.

3. This is one such case which brings to light an incident in which two persons lost their lives and others were injured while in police custody. The facts emerging from the record of the case are as under:

On the night of December 31, 1987, a fight broke out between Gurumurthy, Rajakumar, Prakash, Nallakumar and Purushotham on one hand and some engineering students on the other, at a liquor bar, called Shilpa Bar, at Shimoga, where all were merrymaking to welcome the new year of 1988. The students lodged a complaint of assault on them. Therefore, criminal cases were registered against Gurumurthy, Rajakumar, Nallakumar, Prakash and Purushotham at Doddapet Police Station, Shimoga City. In wee hours of January 12, 1988 a reliable information was received at the said Police Station that Gurumurthy, Rajakumar, Nallakumar, Prakash and Purushotham were taking shelter in a room at Sujatha Building, Tilak Nagar, Shimoga. The appellants Nos. 1 to 7, who were Police Constables, rushed to the place. They apprehended and brought Gurumurthy and others to the Police Station. At the relevant time, the appellant No. 8 was the Head Constable and was present in the Police Station. The appellants gave Gurumurthy, Rajakumar, Nallakumar, Prakash and Purushotham severe beating. Unable to withstand the same Gurumurthy and Rajakumar lost their consciousness and collapsed in the Police Station. The appellants thereafter took both of them to the hospital at different times. But doctor on duty declared them “dead on arrival”. Prakash and Nallakumar were also severely beaten and they received serious injuries. Therefore, they were also taken to the hospital. When the news of death of Gurumurthy and Rajakumar at the hands of the police spread, a public disturbance near the hospital took place. On coming to know about this incident, Varadaraj, who was

another P.S.I. of the same Police Station, rushed to the hospital and recorded statement of injured Prakash. After recording the same, P.S.I. Varadaraj returned to the Police Station. On the basis of the contents of the statement of injured Prakash, Crime No. 14/88 was registered against the appellants Nos. 1 to 7 for commission of offences punishable under Sections 302, 324 read with Section 34 IPC. On the basis of said FIR, P.S.I. Varadaraj commenced the investigation. He recorded statements of those persons who were found to be conversant with the facts of the case. He prepared a spot mahazar and submitted the FIR to his superior officer Mr. Mahadev Naik, who was then Deputy Superintendent of Police. Mr. Mahadev Naik also took part in the investigation of the case and mobilized the police force for maintaining public peace, as there was an apprehension of disturbance of public order. On the next day, i.e., on January 14, 1988, the Deputy Superintendent of Police visited the hospital and recorded the statement of injured Purushotham, Prakash and Nallakumar. He also made necessary arrangements for sending the dead bodies of the deceased for Post Mortem examination. On the same day, the Deputy Superintendent of Police directed Mr. Patil, who was then P.S.I. of Kote Police Station, to register a case against the appellants. Accordingly Mr. Patil also registered a case as Crime No. 8/88 at Kote Police Station against the appellants Nos. 1 to 7 and arrested them. On January 16, 1988 the Investigating Officer visited the Police Station at Doddapet and conducted search in the presence of independent witnesses. At that time he noticed two cars parked in the compound of the Police Station and found three service lottis kept below the cars. The same were seized under a mahazar. Thereafter the sketch of the Police Station was got prepared through an engineer. Other incriminating articles were also seized. After obtaining necessary reports including the Post Mortem reports, the Forensic Science Laboratory report, etc. charge-sheet was filed initially against appellants Nos. 1 to 7.

4. On committal of the case, the learned Sessions Judge

framed charges against the appellants Nos. 1 to 7 for commission of offences punishable under Sections 143, 148, 341 read with Section 149 IPC, Section 326 read with Section 149 IPC and Section 302 read with Section 149 IPC. Later on it was revealed that original accused Nos. 8 and 9 had also played role in the incident and, therefore, they were arrayed as accused in the case and were charged along with the appellants Nos. 1 to 7. As all the accused denied the charges and claimed to be tried, they were tried in Sessions Case No. 14 of 1988.

5. In order to establish the guilt of the accused, the prosecution examined in all 45 witnesses and got marked 106 documents as well as produced MOs 1 to 6. The incriminating circumstances appearing against the appellants were explained to them by the learned Judge and their further statements were recorded as required by Section 313 of Code of Criminal Procedure, 1973.

6. In the further statements the appellants denied in general the prosecution case. However in answer to the last question, the appellants Nos. 1 to 7 stated that on January 13, 1988 at about 7.00 A.M. all of them had gone to apprehend the accused in Crime Nos. 2/88 and 3/88 and when an attempt to apprehend the deceased near a park was made, they had tried to escape and in the process Gurumurthy had fallen in a mori (a small open drainage) while Rajakumar had fallen on a barbed wire and as such both of them had sustained injuries. It was further mentioned by them that as the condition of Gurumurthy was not good, he was taken to the hospital, but had died on the way to the hospital. The original accused No. 9 in his further statement mentioned that while he was S.H.O. the appellants Nos. 1 to 7 produced Gurumurthy and Rajakumar, who were accused in Crime Nos. 2/88 and 3/88 and on inquiry by him he was informed that they had received injuries due to fall and they wanted medical treatment. According to the original accused No. 9, he tried to get medical help in the Police Station

but no private doctor was available and, therefore, he could not secure medical help for those injured accused. What was mentioned by him was that thereafter he was not knowing as to what happened in the incident.

On appreciation of evidence as also the defence theory, the trial court found that the appellants were guilty of the offences under Sections 143, 148, 326 read with Section 149 IPC, Section 201 read with Section 149 IPC, Section 218 read with Section 149 IPC and Section 302 read with Section 149 IPC on two counts. Insofar as original accused No. 8 was concerned, he was found guilty of the offences under Section 201 read with Section 511 IPC and Section 218 read with Section 511 IPC, but not guilty of other offences. After hearing the appellants on the question of sentence, the learned Judge imposed sentence of life imprisonment on the appellants for commission of offences under Section 302 read with Section 149 IPC and also other punishments for commission of other offences.

7. Feeling aggrieved, the appellants filed Criminal Appeal No. 455 of 1995 whereas the original accused No. 8 filed Criminal Appeal No. 456 of 1995 before the High Court of Karnataka, Bangalore. The matters were placed for hearing before the Division Bench comprising M.F. Saldanha and S.R. Bannurmath, JJ. Mr. Justice M.F. Saldanha was of the opinion that the prosecution had failed to prove its case against the appellants beyond reasonable doubt and, therefore, they were entitled to acquittal. Mr. Justice Bannurmath expressed the view that conviction of the appellants recorded by the learned Additional Sessions Judge was well founded and, therefore, the appeals deserved to be dismissed. In view of the fact that the learned Judges of Court of Appeal were equally divided in their opinion, the appeals with their opinions were laid before another learned Judge of that Court. The third learned Judge of the High Court of Karnataka, after hearing the parties and considering the record of the case, delivered his opinion mentioning that

the guilt of the appellants was proved, but they had not committed offences punishable under Sections 143, 148, 326, 218 and 302 read with Section 149 IPC but had committed offences punishable under Sections 304 Part II and 324 both read with Section 34 IPC for having caused death of two persons Rajakumar and Gurumurthy and causing hurt to injured Prakash respectively. The learned Judge further opined that the appellants should be sentenced to R.I. for one year each and fine of Rs.5,000/- in default R.I. for two years for commission of the offence punishable under Section 304 Part II read with Section 34 IPC. The learned Judge was of further opinion that no separate sentence was needed to be awarded for conviction of the appellants under Section 324 read with Section 34 IPC. The learned Judge was also of the opinion that on realization of the entire amount of fine from the appellants, the same should be paid to the heirs of the two deceased in equal proportion by way of compensation. The opinion rendered by the third learned Judge of the High Court was laid before the Division Bench of the High Court. The judgment delivered by the Division Bench of the High Court has followed the opinion expressed by the learned third Judge, giving rise to the instant appeal.

8. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the record summoned from the Trial Court.

9. The fact that the deceased Rajakumar died a homicidal death is not disputed before this Court. Dr. O.A. Mahipal (PW-1) has stated that on January 13, 1988 at about 4.40 P.M., he had received a requisition from the concerned Police Station to conduct the Post Mortem examination on the dead body of the deceased Rajakumar. According to him he had performed autopsy on the dead body of the deceased on January 14, 1988 between 8.20 and 10.00 A.M. and found following injuries: -

"1. A circular brownish contusion of 1 cm. diameter present over the right side of forehead.

2. 2 minute brownish contusions over the middle of the forehead.

3. Forehead is diffusely swollen.

4. A contusion of reddish brown colour 1" in diameter present over the right maxillary region, ½" below the right eye.

5. Multiple brownish black abrasions of various sizes and shapes present in different directions over the right mandible, right side of the chin, right angle of the jaw and right side of the anterior portion of neck and behind the right ear.

6. Fullness over both clavicular area present.

7. Fourth brownish black abrasion circular and linear present over the clavicular areas.

8. Multiple transverse blackish contusions with their margins half C.M. wide, centre being clear present over the front of chest and abdomen.

9. Multiple brownish contusions, some circular some other are transversely linear of various sizes and shapes eight in number present over left scapular area and middle of the left lumbar area.

10. An area of 5" x 2" blackish burnt area over the left buttock present. Surrounding this injury a smokey area of 3" diameter present.

11. An oblique brownish black contusion of 3½" x 3/4th of an inch over the left iliac crust present.

12. Multiple transverse brownish abrasions of 2½" x 1"

size present over the right buttock.

13. Four transverse blackish linear burnt out marks 3" x 1/8th of an inch each present over the right buttock.

14. Multiple brownish contusions, 10 in numbers present over the right lumbar area.

15. The whole of the right upper limb is diffusely swollen.

16. A reddish brown contusion of 9" x 3" size over the medical aspect of lower half of right arm extending upto upper third of the right fore arm.

17. A blackish brown burnt area of 2½" diameter, 1" below the right elbow joint present over the right fore arm.

18. 3 blackish oblique burnt out areas 2½" x 1½", 3" x 1" and 1" diameter respectively present over the posterior aspect of right arm, elbow and forearm.

19. Three distinct punched out blackish burnt marks of ½", ¼ of an inch and ¾" diameter present over dorsum of right hand.

20. Tips of all the fingers are smokey.

21. A contusion (brownish) contusion of 3" x 1½" size present over the lateral aspect of upper third of left arm.

22. Left elbow and shoulder joints are swollen.

23. Multiple deep abrasion and burnt out areas obliquely placed six in number measuring 1½", 1½", 2½", 2", 3", 3½" along and each being ½" wide present over the posterior aspect of left arm and left elbow.

24. A transversely placed 'U' shape burnt out mark over the back of left forearm present.

25. A brownish contusion of 3" x 1" size over the lateral aspect of left elbow joint present.

26. Multiple distinct brownish black contusion over the dorsum of left hand and wrist.

27. Multiple brownish black obliquely placed contusion 5" x 2" present over the posterior aspect of left thigh.

28. A transversely placed II Degree burnt out area of 3" x 2" present over the left knee joint.

29. Two burnt out areas, one transversely placed 2" x ¾" and another longitivenely placed 2" x ½" both present over the middle of the anterior aspect of left thigh.

30. A punctured wound of ½ cm. diameter and ¼ cm deep over the middle of front of left leg seen.

31. Multiple blackish burnt out marks of varying sizes from 1 cm to 7 cms long and each 1 cm. wide, distributed in various directions of various shapes, present over the whole of the anterior aspect of left leg."

The doctor further mentioned in his testimony that on dissection of the dead body, he had found the following internal injuries: -

"a. Left knee joint contains clotted blood about 300 cc blood, no fracture or dislocation found.

b. Right knee joint contains clotted about 100 cc of blood no fracture of dislocation found out.

c. Left ankle joint shows presence of sub cutaneous blood clots about 100 cc.

d. Left elbow joint shows no fracture of dislocation.

e. Right elbow joint contains blood clots about 100 cc. of blood, no fracture of dislocation observed."

According to the Medical Officer, the cause of death of the deceased was shock as a result of the multiple injuries sustained by him. The Medical Officer is completely corroborated by the contents of Post Mortem report produced on the record of the case as Exh. P-9. The doctor further opined that clotting of blood found in the joints as per (a) to (e) would be due to the assault by the sticks like MOs 1 to 3 whereas the burn injuries that were found on the dead body could be caused by any heated substance like metal or rubber tyre. The Medical Officer further explained that a single fall would not cause such injuries that were sustained by the deceased. It was explained by him that individually the injuries were simple, but collectively they could cause the death of an individual. In cross-examination also the Medical Officer maintained that the cause of death was shock as a result of multiple injuries. What is important to be noticed is that it was further stated by him in cross-examination that the said injuries could not have been caused simultaneously. After mentioning that the age of the injuries sustained by the deceased Rajakumar were ranging from 24 hours to four days, the Medical Officer stated that the age of injuries were mentioned by him on the basis of colour of the injuries. The doctor further stated that the death of the deceased might have been caused about 24 hours prior to the commencement of the Post Mortem examination. According to the doctor, it was a case of rapid death due to injuries sustained by the deceased Rajakumar. On reappraisal of the evidence of the Medical Officer this Court finds that the Sessions Court and the High Court were justified in concluding that the deceased Rajakumar had died a homicidal death.

10. Similarly, the testimony of Dr. Dodda Gowda (PW-2) shows that on January 13, 1988 he had received a requisition from the Sub-Divisional Magistrate, Shimoga to conduct the

Post Mortem on the dead body of deceased Gurumurthy and that on the same day he himself with Dr. Srinivasa had conducted Post Mortem on the said dead body between 4.15 P.M. and 5.45 P.M. According to the doctor the Post Mortem examination had revealed following injuries: -

"1. Dark brown contusion 1" below the right angle of the mouth measuring ¾" x ½".

2. Dark brown contusion on right to the traches 1" above the supra tranol notch irregular in shape.

3. Dark brown contusion in front of right shoulder ½" x 1".

4. Multiple irregular contusions four in number outer aspect of right arm.

5. Irregular contusion front of right elbow (Cubital Fossa).

6. Diffuse dark brown contusion outer part of right lower half of forearm.

7. Dark brown contusion back of right forearm 1½" x 1½".

8. Diffuse dark brown contusion front of right thigh and right knee outer aspect.

9. Contusion front and middle of right leg ½" x ¼".

10. Dark brown contusion outer and middle part of left arm.

11. Diffuse contusion front of left elbow and left forearm.

12. Diffuse contusion back of left elbow.

13. Contusion at the outer part of left thigh upper half

3" x 1" and another measuring 4" x 1" two inches apart from each other.

14. Dark brown contusion front of left knee and lower third of left thigh.

15. Lacerated wound appear third of left leg in front measuring ½" x ¼" with dark blood clots.

16. Dark brown contusion over the medial part of right thigh and knee.

17. Dark brown contusion back of left shoulder, and trepious region.

18. Dark brown irregular contusion at the left scapular region, outer part of left chest and outer part of left lumber region.

19. Multiple irregular dark brown contusion at the right shoulder and scapular region.

20. Diffuse dark brown contusion lower part of right chest right lumber region, at the outer and lower aspect.

21. Diffuse multiple dark brown contusion irregular right glutial region, upper part of the thigh.

22. Diffuse irregular dark brown contusion on back of right knee.

23. Diffuse dark brown contusion with an abrasion measuring ½" x ¼" at the left glutial region.

24. Irregular dark brown contusion back of left writst."

His evidence further shows that on dissection following internal injuries were noticed by him: -

"Skull and Vertebra and Membranes were intact.

Brain: Pale, Spinal Cord: not opened.

Chest Wall : Intact Pluscae: intact;

Larynx: Healthy, Right and left lungs: Pale,

Pericordium : Intact.

Heart: Pale and empty, large vessels: intact,

Abdomen walls: intact; Peritoneum: intact,

Mouth and Pharynx and Exophagus: Healthy,

Stomach and its contents: Pale and empty,

Small intestine and its contents: Pale and contains semi digested food;

Large Intestine: Pale distended with gas and fecol matter; Liver: Pale;

Spleen: Pale. Kidney: Pale, Bladder: contains 4 ounce of clear urine,

Organs of Generation: Healthy."

According to the Medical officer the death was due to shock as a result of multiple injuries and all the injuries were ante mortem. The Medical Officer further gave opinion that the injuries might have been caused by sticks like MOs 1 to 3 and death might have occurred 24 hours prior to the commencement of the Post Mortem examination. According to the doctor, the age of the injuries varied from 1 to 3 days. During cross-examination the witness explained that except injury No. 15, all other injuries were contusions and the injuries might have been caused about 48 hours prior to the commencement of Post Mortem examination. The defence

wanted to know from this witness as to whether the injuries found on the dead body of the deceased could have been caused simultaneously or at different intervals but the Medical officer replied that he was not in a position to say whether all the injuries were caused simultaneously. During his cross, the witness further stated that some of the external injuries were on the vital parts but had not damaged the vital parts. According to the doctor, the deceased had died because of irreversible shock. A fair reading of the testimony of this witness makes it evident that the deceased Gurumurthy had also died a homicidal death.

The testimony of the Medical Officer Dr. O.A. Mahipal, examined as PW-1, further shows that at 4.45 P.M. on January 13, 1988 he had examined one Nallakumar, who was referred to him for treatment. According to the Medical Officer the injured had mentioned history of assault by the police with rubber, rod and lottis on December 31, 1987 at 1.00 P.M. at Gopi Circle, Shimoga and that he had recorded the same on the medical papers. The doctor has further mentioned that on examination he had found following injuries on the body of Nallakumar: -

"1. A linier crusted laceration over the middle of the forehead 2" x ¼" size.

2. Multiple oblique brownish abrasions over the right forearm and right elbow present.

3. Vague tanderness all over the body present.

4. A transverse crusted laceration of 1" x ½" present over the front of the right leg."

The Medical Officer has further stated that the injured was advised X-ray but the X-ray revealed no fracture. The witness mentioned that injured Nallakumar was treated as an indoor patient till January 21, 1988. It was further mentioned by the doctor that injuries Nos. 1 to 4 were simple in nature caused due to external violence with hard and blunt objects and that

the injuries might have been caused by the sticks like MOs 1 to 3. The doctor explained that the age of injuries Nos. 1 and 4 was about one week whereas injury No. 2 was two days old and injury No. 3 might have been caused within 24 hours.

The testimony of this witness further shows that on the same day at 5.00 P.M., he had examined injured Prakash. According to the Medical Officer injured Prakash had narrated history of assault by eight police officials at Doddapet Police Station at 7.00 A.M. on January 13, 1988 and that he had recorded the same in the medical papers of the injured. The Medical Officer has further stated that on examination of the injured Prakash he had found following injuries on his person: -

"1. Multiple crusted abrasions of varying sizes and shapes present over the extremities.

2. Diffuse tender swelling of both upper extremities and both knee joints present."

The doctor has further mentioned that the injured was advised to go for X-ray examination and the report of the said examination did not reveal any fracture, but another X-ray was taken on January 16, 1988, report of which showed incomplete fracture of the head of left fibula. The Medical Officer explained that injury No. 1 was simple in nature whereas injury No. 2 was grievous. According to the doctor, the fracture found in injury No. 2 was separately marked as injury No. 3 in wound certificate and it was grievous.

The doctor further mentioned in his testimony that at 5.15 P.M. on the same day, he had examined injured Purushotham. According to the doctor the injured had narrated history as assault by ten police officials at Doddapet Police Station, Shimoga at 12.00 midnight on January 12, 1988 extending upto early hours of January 13, 1988 and that he had recorded the same in the medical papers of the injured.

What is to be noted is that this Medical Officer was not cross-examined by the defence on the question of injuries sustained by Nallakumar, Prakash and Purushotham or history of assault recorded by him on the medical papers of the injured. Thus there is no manner of doubt that the High Court was justified in concluding that Nallakumar, Prakash and Purushotham were injured at Doddapet Police Station during the midnight of January 12, 1988 extending upto early hours of January 13, 1988.

11. This brings the Court to consider the question whether the prosecution has been successful in proving that the death of the two deceased and injuries on the injured were caused by the appellants.

12. It is to be noted that the appellants were charged for causing custodial death of the two deceased and injuring the three injured. The evidence in this case can be divided into two parts – (1) direct evidence relating to the incident and (2) circumstantial evidence. To begin with, this Court proposes to consider the evidence relating to topography of the premises where Doddapet Police Station is located. In this regard the prosecution had examined D. Dharmappa Shetty (PW-3). His evidence discloses that on January 16, 1988 Assistant Executive Engineer had issued instructions to him to prepare a sketch of the place of occurrence, i.e., the verandah in front of the lock-up room of Doddapet Police Station. According to him on January 2, 1988 he had visited the spot shown to him by P.S.I. Varadaraj and prepared the sketch, which was produced by him at Exh. P-17. The witness explained that the sketch was prepared as a rough sketch showing the existing pillars, the verandah, etc. The witness mentioned that there was a verandah in the Police Station and it had a door which opened into a space situated in front of the two toilets. The witness mentioned that the stone pillars were supporting the room and the pillars on the south of the verandah were high and separated from each other by 3.20 meters. According to him

he had seen the pillars from within the lock-up room of the Police Station and it was possible for one to see only one central pillar from the lock-up room, but from the eastern door of the Sub Inspector's room all the four pillars were visible. In the cross-examination he admitted that on one extreme side of the verandah there was a room of the Sub Inspector and to the north of the entire premises there was a Taluk office. According to him the width of the verandah was 1.20 meters and from the door, the central pillar was almost at a distance of about 2 meters or 6 feet. In cross-examination the witness clearly mentioned that from the lock-up room one pillar was visible. From the testimony of this witness it becomes at once evident that the door was fixed on the dividing wall of the verandah and the lock-up room and therefore, there could have been difficulty for a person to see the stone pillar between the central pillar and the pillar next to it supporting the room on the eastern side.

13. The injured witness Purushotham (PW-5) did not support the prosecution and was contradicted by the prosecution with reference to his earlier statement recorded under Section 161 of the Code of Criminal Procedure. In the cross-examination by the prosecution, the witness admitted that on January 13, 1988 at about 4.30 or 5.00 P.M. he was examined by the doctor in Mc. Gann Hospital, Shimoga as he had received injuries due to police assault in Doddapet Police Station. He also admitted that in Doddapet Police Station policemen assaulted him in the early morning of January 13, 1988 and he sustained injuries. It was further stated by him that he was taken to Mc. Gann Hospital but hastened to add by making a voluntary statement that he was taken from Mahatma Gandhi Park to the Police Station and thereafter he was assaulted. The suggestion by the prosecution that on January 13, 1988 at about 1.00 P.M. he was picked up with another pickpocketer and taken from Doddapet Police Station to Kote Police Station and that he was beaten in Kote Police Station from 3.30 or 4.00 P.M. in that Police Station and then taken to

D.A.R. Unit, was denied by him. Normally, the rule of appreciation of evidence of a hostile witness is that the same should not be considered in support of the prosecution case. However, it is a well settled principle that evidence of a hostile witness can be taken into consideration for the purpose of determining whether prosecution case is proved or not, if the same is corroborated by reliable independent witness. Here in this case the Court finds that the admissions made by this witness in cross-examination by the prosecution are fully supported by medical evidence on record. Before the doctor, who had examined him, this witness had narrated history of assault on him, which was noted down by the doctor on his medical papers. The assertion made by the witness in his cross-examination that he was assaulted in Doddapet Police Station gets ample corroboration from the medical evidence and, therefore, it would be safe to conclude that this witness received injuries while in police custody.

14. At this stage it would be advantageous to reproduce what was stated by the witness in his cross-examination: -

> "There were about 30 Policemen when I was assaulted and some out of them assaulted me. I was not tied down. I was taken to the Lock-up and assaulted. Nallakumar, Prakash and Gurumurthy, Raja Kumar and myself were put in lock up and were assaulted. None of us was tied. It is false to say that I was taken by the Police on the night of 31.12.1987 itself from my house. The C.O.D. Inspector has recorded my statement. I have not stated before him as per Ex. P-19 now read over to me. It is false to say that since the night of 31.12.1987 I was in the Police lock-up Doddapet upto 13.01.1988. It is not true to say that 3-4 days after my arrest Nallakumar was brought and put in Doddapet Police Station lock-up. When Gurumurthy was in the lock-up, he was asking for water. Many Police people were there at that time. I cannot say whether the accused were also there. He was given water."

The evidence of this witness indicates that though initially he was hesitant in admitting the assault upon the deceased Gurumurthy and Rajakumar and injured Nallakumar and Prakash in his presence, he, in terms, admitted in his cross-examination that he was taken into lock-up and assaulted and Gurumurthy, Rajakumar, Nallakumar and Prakash were with him in the same lock-up. His evidence further shows that the police had not arrested and brought Prakash, Rajakumar and Gurumurthy on January 13, 1988 at about 4.20 A.M. along with three students to the Doddapet Police Station, Shimoga. Though this witness denied the suggestion of the prosecution that Prakash, Gurumurthy and Rajakumar were tied to the three pillars of the verandah whereas the three students were made to sit in the room of S.I. to watch, the witness made following statement: -

> "The Police assaulted myself and four others, i.e., Prakash, Rajakumar, Gurumurthy and Nallakumar. They assaulted us with the sticks. They caused injuries on all over our body. The Banian on the person of Prakasha, Gurumurthy and Rajakumara were torn. They sustained bleeding injury. Nallakumar wiped out the blood on the person of Prakash, Rajakumar and Gurumurthy. Gurumurthy was completely exhausted and tired and fell down. He was not given water after he fell down. It is not true to say that his feet were burnt. He was taken alone to the hospital. It is not true to say that Prakash, Nallakumar and Rajakumar were also taken out of the lock-up in Police-van, and that I was in Kote Police Lock-up and that the Police brought the dead body of Rajakumara, and Nallakumara and Prakash to the Kote P.S. As I was in the Hospital, I do not know whether there was galata in the City on the day when Gurumurthy and Rajakumar died."

From the above quoted extract, it becomes evident that this witness and four other persons, namely, Prakash, Rajakumar, Gurumurthy and Nallakumar were assaulted with sticks resulting

into injuries on all over their person. The statement also makes clear that the banians of Prakash, Gurumurthy and Rajakumar were torn. His evidence further proves that Nallakumar wiped out the blood on the body of Prakash, Rajakumar and Gurumurthy and that Gurumurthy was not given even water after he had fallen down.

15. Similarly, the prosecution had examined injured Purushotham to prove its case against the appellants. However, this witness did not support the prosecution case.

16. After discussing the evidence of witnesses (1) Renukeshwara (PW-6), (2) Shivaraja (PW-7), (3) Krishna Murthy (PW-9), (4) Shantha Veeranaika (PW-16), (5) Panchaksharai (PW-27), (6) Harish (PW-28) and (7) Chinnamma (PW-11) the High Court has come to the conclusion that deceased Rajakumar was not in the police custody prior to January 12, 1988 and he was apprehended only in the night of January 12, 1988 or early morning of January 13, 1988.

Nallakumar (PW-20) is one of the persons, who, according to the prosecution, was apprehended by police officials of Jayanagar Police Station on the night of December 31, 1987 from near Gopi Circle in relation to the incident, which had taken place at Shilpa Bar on the same night in the wee hours of the new year of 1988. A close scrutiny of his evidence establishes that he was first apprehended by the policemen, i.e., by Lokesh, Ameer Jain, Basavaraja and Mahadevappa of Jayanagar Police Station and was kept in illegal custody. His evidence proves that he was subjected to merciless beating by the above mentioned policemen at the instigation of Basavaraju and Deffedar Muddappa. It is further proved by his testimony that from that place he was shifted to Doddapet Police Station. His evidence would further show that though he was illegally detained in Jayanagar Police Station, Sub-Inspector of Police Gangadharappa, i.e., original accused No. 8, who was discharging duties at the Doddapet Police Station,

was visiting Jayanagar Police Station and beating him enquiring about Gurumurthy and Rajakumar, who were absconding. His evidence further shows that he was detained till January 13, 1988 and that at Doddapet Police Station also the appellants had subjected him to merciless beating. The scrutiny of the evidence of this witness would show that he had closed down his business and gone to Gopi Circle to bring milk at Prithvi Sagar Milk Booth and while he was bringing milk, policemen from Jayanagar Police Station had approached him and after questioning about whereabouts of Gurumurthy, Rajakumar and Prakash he was taken to Jayanagar Police Station where Sub-Inspector of Police, i.e., accused No. 8 was standing. This witness has mentioned in his testimony that he was kept in the lock-up of Doddapet Police Station roughly for six days and that one day when he had waken up early in the morning around 4.00 A.M. or 4.30 A.M., he had seen from the lock-up that Gurumurthy, Prakash and Rajakumar were brought to the Police Station and Rajakumar and Prakash were separately tied to the stone pillars supporting verandah in front of the lock-up room. He further stated that he had seen Prakash being tied to one pillar with his hands tied backward and Gurumurthy was also tied to another pillar with his hands stretched behind around the pillar. According to him Gurumurthy was handcuffed whereas Rajakumar was tied to third pillar in the similar way. What is stated by the witness is that the appellants were beating Prakash, Rajakumar and Gurumurthy with lotties and tyre pieces and that the injured were bleeding. The witness further stated that the injured were wearing only banian and knickers and he had continued to watch what was happening. In order to appreciate as to what was seen by this witness, it would be relevant to reproduce his testimony, which reads as under: -

> "One day early morning, at about 4 a.m. or 4.30 a.m. I saw near stone pillar in front of the lock up door, they brought Gurumurthy and he was tied to the said stone pillar with his hands stretched at the back and tied. He was handcuffed. To the next stone pillar, I saw they had tied Rajakumara also in the same way. On the next pillar I saw they had tied Prakash in the same way. I also saw that all the accused persons except Sub Inspector Gangadharappa, were beating Prakash, Rajakumara, Gurumurthy. They were beating those three persons with latties and tyre pieces. I also saw that from the injuries sustained by those three persons, blood was coming out. Those three persons were wearing only Banian, (west and kacha panties). I saw that after some time when the accused were beating, Gurumurthy slumped with his hand, handcuff behind to the floor. At that time I saw Sub Inspector of Police Gangadharappa came to that spot. He told the accused as follows: -
>
> TRANSLATED IN ENGLISH
>
> 'He could catch hold of these bastards, bring those latties'.
>
> So saying he took latti from Mohan Singh (A-4) and then once again bet Gurumurthy, Prakash and Rajakumar."

Though this witness claimed that he had seen actual act the deceased and the injured being beaten by the accused involved in the case, it was stated by him that Sub Inspector of Police, i.e., the appellant No. 8 was not at that place and had come to the spot later on. The evidence of this witness further shows that the appellants had asked him to wipe blood oozing out from the injuries of Prakash, Rajakumar and Gurumurthy and he had accordingly wiped blood trickling out from the wounds of Prakash, Rajakumar and Gurumurthy. According to him when he had gone to wipe blood seeping out from the wounds of Gurumurthy, he had felt that Gurumurthy was not breathing. According to him he had tried to hold the head of Gurumurthy but the head was slumping on either side. The witness has further stated that thereupon he had asked the accused No. 8 to see as to what had happened to Gurumurthy and accused No. 8 had told him that Gurumurthy was pretending and then

took lotti from other accused persons and started beating on the leg of Gurumurthy, but Gurumurthy did not show any sign of pain or movement. According to this witness thereafter accused No. 8 had checked as to whether Gurumurthy was dead and asked the appellants to remove his handcuff and untie from the stone pillar. The witness has mentioned that the appellants had put the dead body of Gurumurthy along side that place and untied Prakash and Rajakumar also. According to him, after untying Rajakumar and Prakash from the stone pillars, they were pushed into the lock-up room. According to him, the appellant No. 1 had pushed Rajakumar in the lock-up room but Rajakumar had fallen with face down and was bleeding from the injuries on his body. The witness further stated that the appellants had brought fire and tried to burn the armpit, legs and other parts of the body of Gurumurthy but Gurumurthy had not responded at all. The witness asserted that thereafter the appellants had collected themselves and lifted the body of Gurumurthy and taken him to Charandi. A fair reading of the testimony of this witness makes it abundantly clear that the appellants had subjected the two deceased to severe beating because of which they had died in the police station. Thus by ocular version the prosecution has proved its case against the appellants beyond reasonable doubt.

17. The fact that the deceased and injured were arrested and brought to the Police Station is not in dispute. It is not in dispute that the deceased and the injured were brought to the Police Station on their two feet. The testimony of the Medical Officers, who had performed autopsy on the dead bodies of the two deceased, would indicate that both the deceased were brought dead to the hospital. When the deceased, who were brought to the Police Station, were alive and were produced dead before the Medical officer, it is for the appellants to explain as to in which circumstances they had died. The deceased were in the custody of the appellants, who were police officials. During the time when they were in police custody they had expired. Therefore, it was within the special knowledge

of the appellants as to how they had expired. In view of the salutary provisions of Section 106 of the Evidence Act, 1872, it was for the appellants to offer explanation regarding the death of the two deceased. As noticed earlier, the appellants in their further statements stated that both the deceased had sustained injuries when they had made attempt to flee when their arrest was attempted to be effected. On preponderance of probabilities, it is difficult to agree with the defence pleaded by the appellants. It is highly improbable that the deceased Rajakumar would receive as many as 40 injuries while attempting to avoid arrest. So also it is not probable at all that the deceased Gurumurthy would receive as many as 24 injuries while trying to avoid his arrest. Further it could not be explained by the appellants at all as to how deceased Gurumurthy had received burn injuries, when the deceased, according to the appellants, had fallen into drainage and sustained injuries. Thus the appellants pleaded a false defence which reinforces the circumstances showing the deceased had died due to cruel thrashing given by the appellants and they had injured three witnesses.

18. On the facts and in the circumstances of the case this Court is of the opinion that the appellants have not been even remotely able to probablise their defence and, therefore, the well recorded conviction of the appellants as well as sentences imposed upon them for commission of those offences will have to be upheld.

19. For the foregoing reasons the appeal fails and is dismissed.

R.P. Appeal dismissed.

MD. SHAHABUDDIN

v.

STATE OF BIHAR & ORS.

(Criminal Appeal No. 591 of 2010)

MARCH 25, 2010

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

Code of Criminal Procedure, 1973:

ss. 9(6), 11, 407 and 465 – Notification by High Court shifting the venue of Court of Session inside the District Jail, and Notification by State Government establishing Court of Judicial Magisrate 1st class inside District Jail to try cases pending against accused – HELD: Are valid – High Court in exercise of its administrative power u/s 9(6) is empowered to shift the venue of the pending case/trial without hearing the accused and this would not violate his fundamental rights under Articles 14 and 21 or any other provision of the Constitution – The power of High Court u/s 9(6) is administrative in nature and as such, it is under no obligation to observe the rule of **audi alteram partem –** *By issuing the Notification, High Court cannot be said to have transfered the cases pending against the accused – There was a shift simpliciter in the venue of the trial without there being anything more – Delay in publishing the Notification and supplying a copy thereof to accused would not vitiate the trial as no prejudice is caused to him – Notification dated 7.6.2006 issued by State Government establishing the Court of Judicial Magistrate 1st Class inside the District Jail satisfies all the requirements of s. 11 – Constitution of India, 1950 – Articles 14 and 21 – Principle of natural justice – Rule of* **audi alteram partem** *– Interpretation of Statutes – Judicial Review – Practice and Procedure.*

s. 327 – Court to be open – Trial of accused inside the jail – HELD: Open trial is an important part of judicial system – Public access is essential to achieve the objective of maintaining public confidence in the administration of justice – Although the universal rule is that criminal trial should be an open trial, but in exceptional cases, there can be deviation from the rule in larger public interest – The instant case falls in the category of and exceptional cases where, in the interest of justice, it became imperative to shift the venue of the trials inside the jail – However, there is no presumption that a trial in prison is not an open trial – Apart from the large number of lawyers of the accused, press and those who want to watch the trial have free access to the venue during the court proceedings - Thus, no prejudice is caused to the appellant – Constitution of India, 1950 – Articles 14 and 21 – Administration of Justice – Open trial.

Constitution of India, 1950:

Article 14 – Equality before law – Reasonable classification – A classification may be reasonable even though a single individual is treated as a class by himself – Code of Criminal Procedure, 1973 – s.9(6).

Plea:

New pleas regarding constitutional validity of s.9(6) CrPC and delay in publication of notification in official gazette and in supply of copy thereof to accused raised at the time of hearing of appeal before Supreme Court – HELD: Not maintainable.

Evidence Act, 1872:

s.114, Illustration (e) – Presumption that official act has been regularly performed – In the Notification issued by the State Government stating that Court of Session would hold its sitting inside District Jail, apart from mentioning s.9(6) CrPC, s.14(1) of Bengal, Assam and Agra Civil Courts Act,

1887 also referred – HELD: If the notification refers to a wrong provision, the same cannot be held to be invalid when its validity could be upheld on the basis of some other provision – In the instant case, notification was valid in view of provisions of s.9(6) CrPC – Besides statutory presumption as envisaged by s.114 Illustration (e) would also be available – Code of Criminal Procedure, 1973 – s.9(6) – Practice and Procedure.

The appellant, a sitting M.P., was involved in a large number of criminal cases and, as such, was in custody in District Jail, Siwan in the State of Bihar. The Superintendent of Police reported that more than forty cases were pending against the appellant and there was serious danger to public peace during his presence in the court premises; that his supporters and other criminals could attack the witnesses; that since the appellant was accused in many cases, other criminal groups could also attack him. The matter was taken up by the Law Secretary of the State with the Registrar General of the High Court and ultimately, the High Court in exercise of its powers, under sub-section (6) of s.9 of the Code of Criminal Procedure, 1973, issued Notification dated 20.5.2006 stating that the premises of District Jail, Siwan would be the place of sitting of the Court of Session for the Sessions Division of Siwan for expeditious trial of the Sessions cases pending against the appellant. Thereafter, the State Government issued Notification dated 7.6.2006 to the effect that Court of Judicial Magistrate I Class, Siwan would hold its sitting inside the District Jail, Siwan for trial of cases pending against the appellant. Another Notification dated 7.6.2006, issued by the State Government, stated that the Additional District and Sessions Judge of Siwan Sessions Division would hold its sitting inside the District Jail, Siwan to try Sessions cases pending against the appellant. The appellant challenged all the three Notifications before the High Court in a writ petition, which was dismissed.

In the instant appeal it was primarily contended for the appellant that the power u/s 9(6) of the Code of Criminal Procedure, 1973 could not be exercised for a particular individual or accused, and if at all, the principle of 'audi alteram partem' had to be complied with; that the Notification dated 20.5.2006 was vitiated as copy thereof was not supplied to the appellant; that changing the venue of the Court inside the District Jail would violate the right of the appellant to be tried in an open court.

Dismissing the appeal, the Court

HELD: Per Dalveer Bhandari, J

1.1The High Court, in view of the extraordinary facts and circumstances of a particular case, is empowered to change the venue of the pending case/trial without hearing the accused and this would not violate his fundamental rights guaranteed under Articles 14 and 21 or any other provision of the Constitution. This controversy is no longer res integra and is fully settled in view of the judgment of this Court in *Kehar Singh's* **case.* [para 153.IV] [998-C-D]**

******Kehar Singh vs. State (Delhi Administration)* **1988 (2) Suppl. SCR 24 = 1988 SCC (3) 609, relied on.**

1.2. In the instant case, the record indicates that by the criminal acts of the appellant reign of terror had spread. The appellant has also earned enemies who would like to seize upon an opportunity and endanger his life if the trial is conducted in general court. Simultaneously, other criminals owing allegiance to the appellant are likely to create law and order problem including communal tension and endanger the life of the common public during his trial in general court. After assessing the entire situation, the District Magistrate informed the State Government that trial of the appellant

was not possible in the District Court of Siwan. Pursuant to the report of the District Magistrate, the Law Secretary, Government of Bihar made a request to the High Court for designation of Court of Session and Court of Judicial Magistrate, 1st Class inside the Siwan Jail premises for expeditious trial of the cases pending against the appellant. After evaluating and assessing the entire situation, the notification was issued by the High Court as also by the State Government in consultation with the High Court for sitting and establishment of courts for expeditious trial of cases pending against the appellant. [Para 38 and 39] [953-G-H; 954-A-D]

2.1. This Court in *Kehar Singh's* case has held that the order of the High Court notifying the trial of a particular case in a place other than the court house is not a judicial order but an administrative order. It is clear from the wording of Section 9 of the Code of Criminal Procedure, 1973 that there is no need for the High Court to give a hearing while deciding the venue of the trial. It is, therefore, clear that there is no statutory right for the appellant to be heard. [Para 103-105] [979-G-H; 980-A-F-H]

2.2. The principles of natural justice are essential to the framework of our laws and protection against arbitrary actions. It is the bounden duty of the courts to judicially review administrative actions. However, this power has to be exercised judiciously. In the instant case, there is no violation of the principles of natural justice in shifting the trials of the cases of the appellant from a regular court to a special court. When there is no prima facie violation of the principles of natural justice then one must properly consider whether there is need for a judicial review of the orders of shifting the trials. [Para 105, 108, 110 and 111] [981-D-E; 982-C-D]

State Bank of Patiala & Others v. S.K. Sharma **(1996) 3 SCC 364, relied on.**

Wiseman & Another v. Borneman & Others **(1971) A.C. 297;** *Regina v. Gaming Board for Great Britain* **(1970) 2 Q.B. 417, referred to.**

3.1. The decision to hold the trials of cases of the appellant in jail was taken in pursuance of the notification dated 20.5.2006 issued by the High Court. The State Government issued two notifications on 7th June, 2006 in pursuance of the notification of the High Court dated 20.5.2006. It became imperative for the State to issue the said notifications because of the new Notification of High Court dated 20.5.2006 particularly when the venue of the trial, i.e., Siwan Jail was not within the control of the High Court. All the three notifications are valid and were issued in consonance with the relevant provisions of law. [para 153.II and III] [997-G-H; 998-A-B]

3.2. After the High Court took the decision to establish a Court of Additional District and Sessions Judge in the Siwan District Jail, necessary correspondence/instruments/requests were sent by the High Court for implementation of its decision, which ultimately culminated in the two Notifications issued by the State Government on 7th June, 2006 and also culminated in the Notification of the 20th May 2006 being gazetted on 16th August, 2006. There is, therefore, no scope for any person, leave alone the appellant, to contend that the decision was not of the High Court or High Court never applied its mind. [para 52] [959-B-D]

4. A notification empowering a Court of Session to sit and hold a trial inside the jail is not outside the purview of s.465 of the Code. It would come within the meaning of "other proceedings" "during a trial", because as per

the admission of the appellant the trial has already been started. [Para 57] [961-A]

5. It cannot be said that the entire trial would vitiate because of non-supply of a copy of the notification dated 20.5.2006 to the appellant in time. The High Court was correct in ordering that a copy of the notification be supplied to the appellant. Initially the copy of the notification was not given to the appellant but on the directions of this Court the same was made available to the appellant. So there is no surviving grievance of the appellant as far as this aspect of the matter is concerned. [para 141 and 153.I] [994-G-H; 997-E-F]

Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar etc. etc. **(1993) 4 SCC 727; and** *State Bank of Patiala & Others v. S.K. Sharma* **(1996) 3 SCC 364, relied on.**

6.1. Criminal trial is a public event. What transpires is a public property. Therefore, open trial is the universal rule and must be scrupulously adhered to. The right to public trial has also been recognized u/s 327 of the Code. Public trial is an important part of the judicial system. Every criminal act is an offence against the society. The people are, therefore, entitled to know whether the justice delivery system is adequate or inadequate; whether it responds appropriately to the situation or it presents a pathetic picture. The other aspect, which is still more fundamental, is that when the State representing the society seeks to prosecute a person, it must do so openly. In dispensation of justice, the people should be satisfied that the State is not misusing its machinery viz. the Police, the Prosecutors and other Public Servants. The people may see that the accused is fairly dealt with and not unjustly condemned. [para 102,131,132 and 145] [979-C; 989-C-D; 990-B-C; 995-D-E]

Kehar Singh vs. State (Delhi Administration) **1988 (2) Suppl. SCR 24 =1988 SCC (3) 609, relied on.**

Ajit Kumar Nag v. General Manager (P.J.), Indian Oil Corporation Ltd.; Haldia & Others **(2005) 7 SCC 764, referred to**

Scott & Another v. Scott: **1913 A.C. 417, referred to.**

Cooley's Constitutional Law, **Vol I, 8th edn., at page 647, referred to.**

6.2. There is yet another aspect. The courts like other institutions also belong to people. They are as much human institutions as any other, and could survive only by the strength of public confidence. The public confidence can be fostered by exposing courts more and more to public gaze. Public access is essential if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. Publicity is the authentic hallmark of judicial functioning distinct from administrative functioning. Open trial serves an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. It restores the balance in cases when shocking crime occurs in the society. [Para 132, and 142-144] [990-C-D; 995-A-C; 994-G-H]

Kehar Singh vs. State (Delhi Administration) **1988 (2) Suppl. SCR 24 =1988 SCC (3) 609; and** *Naresh Shridhar Mirajkar v. State of Maharashtra* **(1966) 3 SCR 744, relied on.**

"First Amendment Right of Access to Pretrial Proceeding in Criminal Cases" by Beth Hornbuckle Fleming Emory Law Journal, **V.32 (1983) P.619, referred to.**

Gannett Co. Inc. v. Danial A. DePasquale **(1979) 443 U.S. 368;** *Richmond Newspapers, Inc. et al v. Commonwealth*

of Virginia et al **65L Ed 2d 973 = (1980) 448 US 555;** *Globe Newspaper Co. v. Superior Court for the County of Norfolk* **(1982) 457 US 596 : 73 L.Ed. 2d 248, referred to.**

6.3. Although the universal rule as recognized in all civilized countries governed by rule of law is that the criminal trial should be a public trial or open trial, but in exceptional cases there can be deviation from the universal rule in the larger public interest. However, in order to ensure that the right of the appellant to a public trial is not vitiated by the court being set up inside the jail, the State must demonstrate that: (a) there is a clear and logical reason as to why the case was transferred from the court house to the Jail; and (b) nobody is being denied entry to the court room as long as they agree to the regular security checks. The case in hand would fall in the category of those extraordinary and exceptional cases where in the interest of justice it became imperative to shift the venue of the trial. The letters exchanged between the police authorities and the request made to High Court clearly show that there was serious danger in producing the appellant in open court. The police authorities had shown that the appellant being a sitting M.P., his supporters and the large crowds were making a fair trial impossible and creating delays in deciding the cases. Besides, since the appellant was wanted in many cases, other criminal groups could also attack him. It must be noted that a large number of supporters of the appellant may create unrest in front of the court room and much larger security would be required to protect the witnesses, the officers of the Court and the appellant. It is necessary to maintain the discipline of the court which is not only trying the case of the appellant but a large number of other cases which were getting delayed by the presence of a large number of the supporters of the appellant. [para 110, 127,138,139,146,149 and 154] [982-B; 987-D-E-H; 993-G-H; 994-A-B; 998-F-G]

Alfred Thangarajah Durayappah of Chundikuly v. W.J. Fernando & Others **(1967) 2 AC 337, referred to.**

6.4. There is no presumption that a trial in prison is not an open trial. The appellant has merely stated that the trial of his cases has been transferred from the Siwan Court to the Siwan Jail. This in itself does not prove that the trial has been closed to the public. In order to establish that the appellant's right to a open trial has been denied, the appellant has to prove more than mere shifting of the location of the trial. It has been shown by the respondents that no one had been prevented from attending or watching the trial. Apart from appellant's 38 lawyers, the public and the press used to attend to the court proceedings. The Siwan Jail is only one kilometer from the Siwan Court. The court proceedings were regularly reported in the press. So, in the instant case no real prejudice has been caused to the appellant. [Para 112,117, 119, 121 and 153V] [986-A-B; 984-; 985-B-C-F; 998-D-E]

K.L. Tripathi v. State Bank of India & Others **(1984) 1 SCC 43;** *R. Balakrishna Pillai v. State of Kerala* **(2000) 7 SCC 129;** *Jankinath Sarangi v. State of Orissa* **(1969) 3 SCC 392;** *A.K. Roy & Others v. Union of India & Others* **(1982) 1 SCC 271 and** *Sahai Singh v. Emperor* **AIR 1917 Lah. 311, referred to.**

Samuel H. Sheppard v. E.L. Maxwell **384 U.S. 333 (1966);** *Press-Enterprise Co. v. Superior Court* **478 U.S. 1 (1986);** *State of Oregon v. James Donald Jackson* **178 Or App 233, 36 P3d 500 (2001);** *Stephen Gary Howard v Commonwealth of Virginia* **6 Va. App. 132 (1988);** *Adolph Dammerau v. Commonwealth of Virginia* **3 Va. App. 285 (1986);** *The People v. Robert England the Court* **83 Cal. App. 4th 772 (2000);** *Malloch v. Aberdeen Corporation* **(1971) 1 W.L.R. 1578; and** *George v Secretary of the State for the*

Environment **(1979) 77 L.G.R. 689 (1979), referred to.**

Union of India & Another v. Tulsiram Patel & Others **1985 (2) Suppl. SCR 131 = (1985) 3 SCC 398 ;** *E. P. Royappa v. State of Tamil Nadu* **1974 (2) SCR 348 = (1974) 4 SCC 3;** *Maneka Gandhi v. Union of India* **1978 (2) SCR 621 =(1978) 1 SCC 248;** *Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Others* **1990 (1) Suppl. SCR 142 =1991 (Supp) 1 SCC 600;** *D.K. Yadav v. J.M.A. Industries Ltd.* **1993 (3) SCR 930 = (1993) 3 SCC 259;** *State of W.B. v. Anwar Ali Sarkar* **AIR 1952 SC 75;** *Krishan Lal v. State of J&K* **1994 (2) SCR 149 = (1994) 4 SCC 422;** *State of Karnataka v. Kuppuswamy Gownder & Others* **1987 (2) SCR 295 = (1987) 2 SCC 74;** *Ranbir Singh v. State of Bihar* **(1995) 4 SCC 392;** *Zahira Habibullah H. Shaikh & Another v. State of Gujarat & Others* **(2004) 4 SCC 158;** *Ranjit Singh v. Hon'ble the Chief Justice & Others* **ILR 1985 Delhi 388;** *Kailash Nath Agarwal & Another v. Emperor* **AIR (34) 1947 Allahabad 436;** *re M. R. Venkataraman* **AIR (37) 1950 Madras 441;** *re T. R. Ganeshan* **AIR (37) 1950 Madras 696;** *Prasanta Kumar Mukerjee v. The State* **AIR (39) 1952 Calcutta 91** *Narwarsingh & Another v. State* **AIR 1952 Madhya Bharat 193, cited.**

Per Dr. Mukundakam Sharma, J (Concurring)

1.1. A bare reading of the provisions of s.9(6) of the Code of Criminal Procedure, 1973 explicitly indicates that the power conferred on the High Court is the power to determine the place or places where the Court of Session shall ordinarily hold its sittings. The second part which immediately follows the first part opens with the word "but", thereby carving out an exception to the general rule that the venue of the Court of Session shall be the place notified by the High Court. However, being an exception, the Code specifically mandates in the second part for observance of a special procedure contemplating compliance of the rule of *audi alteram partem* **and also for**

obtaining the consent of the parties before the Court of Session may hold its sittings at a place other than the place or places notified by the High Court. [Para 14] [1007-A-E]

1.2. In the instant case, the essential conditions ingrained in the second part of s. 9(6), are not applicable inasmuch as the power to change the venue of the trial of cases pending against the appellant, was exercised by the High Court and not by the Court of Session. The power of the High Court u/s 9(6) to notify a particular place or places where the Court of Session shall ordinarily hold its sitting is an administrative power unlike the power of the Court of Session under second part of s.9(6) which is a purely judicial power in nature. Being so, the High Court was under no obligation to observe the rule of audi alteram partem. It has been the consistent view of this Court that an administrative order when passed by a competent authority may not necessarily be required to be issued only after due compliance with the principles of natural justice. [Para 15, 17, 21 and 25] [1008-B-D; 1009-D-E; 1012-B-C; 1013-D-E]

Kehar Singh vs. State (Delhi Administration) **1988 (2) Suppl. SCR 24 =1988 SCC (3) 609;** *Union of India v. Col. J.N. Sinha,* **(1970) 2 SCC 458;** *Haradhan Saha v. State of W.B.* **1975 (1) SCR 778 = (1975) 3 SCC 198 ;** *Olga Tellis v. Bombay Municipal Corporation* **1985 (2) Suppl. SCR 51 =(1985) 3 SCC 545;** *Carborundum Universal Ltd. v. Central Board of Direct Taxes,* **(1989) Supp. 2 SCC 462; and** *Ajit Kumar Nag v. G. M. (PJ), Indian Oil Corp. Ltd.* **(2005) 7 SCC 764, relied on.**

1.3. The second part of s.9(6) of the CrPC expressly requires the Court of Session to afford the prosecution and the accused an opportunity of hearing and to obtain their consent beforehand whereas there is no such stipulation under first part of s.9(6). The omission of such a requirement in case of the High Court pertaining to first

part of sub-section (6) of s.9 is to be construed as a conscious decision on the part of the legislature for, it intended to exclude such a requirement when such power is to be exercised by the High Court. [Para 22] [1012-D-F]

1.4. Even otherwise, 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. [Para 23] [1012-F-G]

Ansal Properties & Industries Ltd. v. State of Haryana **2009 (1) SCR 553 = (2009) 3 SCC 553, relied on.**

1.5. As regards the constitutional validity of s.9(6), significantly, no such plea was ever raised at any stage and even such ground was not raised in the memo of appeal. An important question of constitutional validity of a provision in a Central Act cannot be permitted to be raised for the first time at the stage of final hearing. The Union of India is also not a party in the proceedings and in its absence no such issue could be allowed to be raised, argued and decided. [Para 26] [1013-F-G]

2.1. Section 407 of the Code deals with the power of the High Court to "transfer" cases and appeals. The key word in this section is the word 'transfer', which essentially consists of two steps: (a) removing a case or class of cases from the jurisdiction of the court where it/they is/are pending trial, and (b) putting it/them under the jurisdiction of another court (whether of equal or superior jurisdiction) for adjudication. Thus, every transfer involves two different courts. [Para 16] [1008-G-H; 1009-A]

2.2. By issuing the notification dated 20.5.2006, the High Court cannot be said to have transferred the cases

pending against the appellant, for the said notification simply notified the premises of District Jail, Siwan, to be the place of sitting for holding the trial of cases pending against the appellant. The notification did not, in any manner, affect or abridge the jurisdiction of the Court of Session, Siwan, to try those cases. Thus, there was a shift simpliciter in the venue of the trial, without there being anything more. In such circumstances, the instant case cannot be said to be a case of "transfer" to which the provisions of s. 407 are attracted. [Para 16] [1009-A-C]

3.1. Section 11 CrPC makes it explicitly clear that a Court of Judicial Magistrate could be established by the State Government after consultation with the High Court. The State Government is vested with the power, after due consultation with the High Court, to create or to establish for any local area one or more courts of Judicial Magistrate First Class so as to try any particular case or class of cases. [Para 27] [1014-A-C]

3.2. By issuing one of the two impugned notifications dated 7.6.2006 the State of Bihar, in exercise of its powers conferred u/s 11 of the CrPC and in consultation with the High Court, established a Court of Judicial Magistrate, First Class inside the District Jail, Siwan to hold its sitting for the trial of cases pending against the appellant in the Court of Judicial Magistrate, First Class. The impugned notification satisfies all the requirements and all the four corners as envisaged u/s 11 of the Code and, therefore, the said notification is legal and valid inasmuch as, the same was issued by the competent authority and also in full compliance with the requirements and the safeguards provided in the said provisions. [Para 43] [1020-G-H; 1021-A-B]

3.3. So far the other notification issued by the Government of Bihar on 07.06.2006 directing that the Court of Additional District and Sessions Judge of Siwan

Sessions Division would hold its sitting inside the District Jail, Siwan to try sessions cases pending against the appellant is concerned, it appears to be a surplusage, which was issued for making available the jail premises for the purpose of holding the Court of Session. The power u/s 9(6) is vested in the High Court and in exercise of the said power the High Court had issued a notification on 20.05.2006 which was also published in the official Gazette. Any further notification by the State Government making the jail premises available for the said purposes cannot be said to be illegal and void. [Para 44] [1021-C-F]

3.4. There is thus no infirmity in establishing both the Special Courts i.e. the Court of Additional District and Sessions Judge to try sessions cases and the Court of Judicial Magistrate, First Class to try the other cases, pending against the appellant, inside the premises of the District Jail, Siwan as the notification u/s 9(6) was issued in accordance with the provisions of law by the High Court and subsequent notification was also issued by the State Government in consultation with the High Court. [Para 45] [1021-G-H; 1022-A-B]

4.1. The issue whether the notification dated 20.5.2006 was published in the official Gazette or not or whether a copy thereof was supplied to the appellant or not, is a mixed question of law and fact and, therefore, the same should have been raised specifically in the writ petition and at least in the appeal petition. It also does not appear from the material available on record that such an issue was ever raised by the appellant before the High Court. Therefore, the issue being raised for the first time at the time of hearing of the appeal before this Court cannot be permitted to be raised. [Para 32] [1015-B-D]

Shakti Tubes Ltd. v. State of Bihar, **2009 (10) SCR 739 = (2009) 7 SCC 673, relied on**

4.2. However, from the records, it is conclusively established that the High Court took all necessary steps to get the notification issued and published in the official gazette. If the Government Press took some time to get the notification published in the official gazette, the High Court cannot be blamed for it nor could the notification be declared to be void, particularly, when it was so published in the official gazette, as it is established from the records placed before the Court, although after some delay. [Para 42] [1020-B-D]

5.1. It cannot be said that reference of the provisions of s.14 (1) of the Bengal, Assam and Agra Civil Courts Act, 1887 apart from referring to the provisions of s.9(6) CrPC in the notification dated 07.06.2006 issued by the State Government indicates non-application of mind by the competent authority and on that ground the notification was illegal and void. If the notification quotes a wrong section and refers to a wrong provision, the same cannot be held to be invalid if the validity of the same could be upheld on the basis of some other provision. In the instant case, for making available the jail premises to hold the Court of Session, provisions of s.9(6) CrPC would be applicable. [Para 46,47 and 49] [1022-B-E; 1023-E]

N. Mani v. Sangeetha Theatre, **(2004) 12 SCC 278, relied on.**

5.2. It is a well-established law that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other provision or rule, and the validity of such impugned order must be judged on a consideration of its substance and not its form. The principle is that the act of a public servant must be ascribed to an actual existing

authority under which it would have validity rather than to one under which it would be void. In such cases, this Court will always rely upon s.114 Ill. (e) of the Evidence Act, 1872 to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the courts will uphold such State action. [para 48] [1022-G-H; 1023-A-B]

P. Balakotaiah v. Union of India, **1958 SCR 1052 =AIR 1958 SC 232;** *Lekhraj Sathramdas Lalvani v. N.M. Shah, Deputy Custodian-cum-Managing Officer,* **(1966) 1 SCR 120;** *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India,* **1992 (1) SCR 406 = (1992) 2 SCC 343;** *B.S.E. Brokers' Forum, Bombay v. Securities And Exchange Board of India,* **(2001) 3 SCC 482, relied on.**

6. As regards the plea that the power and jurisdiction u/s 9(6), CrPC could not be exercised by the High Court in respect of the trials relating to one particular individual pending in one Sessions Division, it is well settled law that a classification may be reasonable even though a single individual is treated as a class by himself, if there are some special circumstances or reasons applicable to him alone and not applicable to others. There were about 40 cases pending against the appellant and they were being tried in different courts. Difficulties were being created for conducting the said cases at various courts both for the prosecution as also to the appellant. Therefore, disposal of all the cases pending against the appellant most expeditiously at one place without being in any manner disturbed by the factors mentioned in the letter of the Superintendent of Police, could be said to be a reasonable ground. Expeditious disposal of cases is also a factor and a necessary concomitant to administration of justice and the hallmark of fair administration of justice. Since the venue of the trial of a group or a class of cases was shifted by establishing and

constituting a Court within the District Jail, Siwan, the same cannot be said to be void or invalid in any manner. [Para 50-51 and 57] [1023-F-H; 1024-A-C-D; 1028-E-F]

7.1. So far as the plea that a trial must be conducted in an open court and the constitution of a special Court of Session in the jail premises of District Jail, Siwan amounts to violation of Articles 14 and 21 of the Constitution of India as also of the provision contained in s.327 CrPC is concerned, although the general rule is that a trial must be conducted in an open court, it may sometimes become necessary or rather indispensable to hold a trial inside a jail. Considerations of public peace and tranquility, maintenance of law and order situation, safety and security of the accused and the witnesses may make the holding of a trial inside the jail premises imperative as is the situation in the instant case. A trial does not stand vitiated solely because it is conducted inside the jail premises. What is significant is that there must be compliance of the provisions contained in s.327 CrPC which guarantees certain safeguards to ensure that a trial is an open trial. [Para 53-55] [1025-B-C; 1026-B-C-F-H]

Kehar Singh vs. State (Delhi Administration) **1988 SCC (3) 609, relied on.**

R. v. Denbigh Justices, **(1974) 2 All ER 1052, 1056 (QBD), relied on.**

Black's Law Dictionary **(6th Edition, 1990, p. 1091),, referred to.**

7.2. In the instant case, a general notice inviting the public to witness the trial of the appellant was affixed on the jail gate; the appellant was represented by 38 advocates who regularly attended the court in jail premises; the day-to-day proceedings of the court were reported in the newspapers daily; and entry was allowed

to all persons after recording their personal details into a register maintained by the jail authorities. It has also not been shown that any permission sought for by any intending person to witness the proceedings was refused by the authority. In this view of the matter, there was sufficient compliance with s.327 CrPC. [Para 56] [1027-G-H; 1028-A-B]

West Bengal v. Anwar Ali Sarkar, **1952 SCR 284 =AIR 1952 SC 75 held in applicable.**

7.3. It must be noted that in the instant case, no special procedure was prescribed and the cases were to be conducted and disposed of in accordance with the ordinary criminal procedure as prescribed under the Code of Criminal Procedure. Thus, no prejudice was caused to the appellant while shifting the cases to the Special Courts situated inside the premises of District Jail, Siwan. Therefore, there is no violation either of s.327 CrPC or of Articles 14 and 21 of the Constitution. The legality and the validity of all the three notifications is upheld. Consequently, the trial can proceed as against the appellant in all the pending cases and it would continue to be held in terms of the notifications in accordance with law. The order passed by the High Court is upheld. [Para 57, 60 and 61] [1028-G-H; 1029-A-E-G]

Case Law Reference:

Judgment by Dalveer Bhandari, J

1952 SCR 284	**not applicable**	**para 11**
AIR 1936 Privy Council 246	**referred to**	**para 14**
(1913) A C 417	**referred to**	**para 14**
65L Ed 2d 973	**referred to**	**para 15**
1988 (2) Suppl. SCR 24	**relied on**	**para 27**

(1966) 3 SCR 744	**relied on**	**para 27**
1985 (2) Suppl. SCR 131	**cited**	**para 28**
1974 (2) SCR 348	**cited**	**para 28**
1978 (2) SCR 621	**cited**	**para 28**
1990 (1) Suppl. SCR 142	**cited**	**para 31**
1993 (3) SCR 930	**cited**	**para 32**
1994 (2) SCR 149	**cited**	**para 33**
1987 (2) SCR 295	**cited**	**para 54**
(1982) 1 SCC 271	**referred to**	**para 72**
AIR 1917 Lah. 311	**referred to**	**para 73**
AIR (34) 1947 Allahabad 436	**referred to**	**para 74**
AIR (37) 1950 Madras 441	**referred to**	**para 75**
AIR (37) 1950 Madras 696	**referred to**	**para 76**
AIR (39) 1952 Calcutta 91	**referred to**	**para 77**
AIR 1952 Madhya Bharat 193	**referred to**	**para 77**
(1996) 3 SCC 364	**relied on**	**Para 105**
(1971) A.C. 297	**referred to**	**para 107**
(1970) 2 Q.B. 417	**referred to**	**para 108**
(1967) 2 AC 337	**referred to**	**para 111**
384 U.S. 333 (1966)	**referred to**	**para 114**
478 U.S. 1 (1986)	**referred to**	**para 114**
178 Or App 233, 36 P3d 500 (2001)	**referred to**	**para 115**
6 Va. App. 132 (1988)	**referred to**	**para 115**

3 Va. App. 285 (1986)	**referred to**	**para 116**
83 Cal. App. 4th 772 (2000)	**referred to**	**para 118**
(1971) 1 W.L.R. 1578	**referred to**	**para 120**
(1984) 1 SCC 43	**referred to**	**para 122**
(1979) 77 L.G.R. 689 (1979)	**referred to**	**para 123**
AIR 1917 Lah. 311	**referred to**	**para 118**
(2000) 7 SCC 129	**referred to**	**para 124**
(1969) 3 SCC 392	**referred to**	**para 125**
(2005) 7 SCC 764	**relied on**	**para 134**
(1982) 457 US 596 : 73 L.Ed. 2d 248	**referred to**	**para 135**
(1993) 4 SCC 727	**relied on**	**para 140**

Judgment by Dr. Mukundakam Sharma, J.

1988 (2) Suppl. SCR 24	**relied on**	**para 12**
(1970) 2 SCC 458	**relied on**	**para 19**
1975 (1) SCR 778	**relied on**	**para 20**
1985 (2) Suppl. SCR 51	**relied on**	**para 21**
(1989) Supp. 2 SCC 462	**relied on**	**para 21**
(2005) 7 SCC 764	**relied on**	**para 21**
2009 (1) SCR 553	**relied on**	**para 23**
2009 (10) SCR 739	**relied on**	**para 32**
(2004) 12 SCC 278	**relied on**	**para 47**
1958 SCR 1052	**relied on**	**para 48**
(1966) 1 SCR 120	**relied on**	**para 48**

1992 (1) SCR 406	**relied on**	**para 48**
(2001) 3 SCC 482	**relied on**	**para 48**
(1974) 2 All ER 10521056 (QBD)	**relied on**	**para 54**
1952 SCR 284	**held in applicable**	**para 57**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 591 of 2010.

From the Judgment & Order dated 14.8.2007 of the High Court of Judicature at Patna in Criminal Writ Jurisdiction Case No. 553 of 2006.

Ram Jethmalani, Pranay Ranjan, Lata Krishnamurthy, P.R. Mala, Sourab Ajay Gupta, Praneet Ranjan for the Appellant.

Ranjeet Kumar, P.H. Parekh, Gopal Singh, Manish Kumar, Ajay Kumar Jha, Divya Sinha, Vishal Prasad (for Parekh & Co.) for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment of the High Court of Judicature at Patna passed in Criminal Writ Jurisdiction Case No.553 of 2006 dated 14.08.2007.

3. The appellant is aggrieved by the notification No.184A dated 20th May, 2006 whereby the Patna High Court in exercise of administrative powers conferred under sub-section (6) of section 9 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") has been pleased to decide that the premises of the District Jail, Siwan will be the place of sitting of the Court of Session for the Sessions Division of Siwan for the expeditious trial of Sessions cases pending against Md.

Shahabuddin.

4. The appellant is also aggrieved by the two notifications bearing No.A/Act-01/2006 Part-1452/J corresponding to S.O. No. 80 dated 7.6.2006 and No.A/Act-01/2006 Part-1453/J corresponding to S.O. No.82 dt. 7.6.2006 issued by the State of Bihar at the behest of the High Court of Patna. The State of Bihar has established a Court of Judicial Magistrate 1st Class inside the District Jail, Siwan and directed that:

(a) the Court of Judicial Magistrate 1st Class, Siwan shall now hold its sitting inside the District Jail Siwan for trial of cases pending against the appellant Md. Shahabuddin in the Court of Judicial Magistrate 1st Class; and

(b) This notification shall come into force with effect from the 7th June, 2006.

5. The appellant is further aggrieved by another notification issued on the same day by which the court of the Additional District & Sessions Judge of Siwan Sessions Division was directed to now hold its sitting inside the District Jail, Siwan to try Sessions cases pending against the appellant Md. Shahabuddin.

6. Mr. Ram Jethmalani, learned senior counsel appearing for the appellant canvassed the following propositions of law;

(a) That in pending criminal cases of which cognizance had been taken and even evidence had been recorded can only be shifted to another venue by the trial court after satisfying the conditions laid down in Section 9(6) of the Code.

(b) That the High Court's administrative power of creating a court is not applicable for transferring a case from one court to another. A new court with its own defined jurisdiction can be created for the public generally, or for specified class of cases generally but not for cases in which a particular citizen is involved. The High Court missed the significance of the word

'ordinarily' in Section 9(6) of the Code.

(c) That the administrative power of the High Court can only be exercised where the principle of *audi alteram partem* does not apply. In all situations where an order affects the interests of a party in a pending case, this power is not available. That power can only be exercised under section 408 of the Code after hearing the affected parties. It is settled law that even administrative orders are subject to the rule of *audi alteram partem* and by not hearing the appellant before transferring of the venue of cases had led to infringement of the fundamental rights of the appellant under Articles 14 and 21 of the Constitution.

(d) That the administrative power is not available merely to expedite the trial of a particular case. Expedition is necessary for all cases. The High Court did not act in the interest of expedition but really for terrorizing witnesses into giving evidence which suited the prosecution.

(e) That the three notifications read together show that the action was taken by the State Government and the High Court has merely concurred with it. All the three notifications are thus without jurisdiction and void.

7. Mr. Jethmalani has drawn our attention to the relevant part of Section 9(6) of the Code which reads as under:

"9. Court of Session.—

x x x

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the

disposal of the case or the examination of any witness or witnesses therein."

8. Mr. Jethmalani submitted that the power of changing the venue is vested exclusively with the High Court and the State Government has no say in the matter.

9. The power under Section 9(6) of the Code cannot be exercised for a particular individual or accused and if it has to be exercised for one individual, then according to the principle of *audi alteram partem*, he has to be given hearing. Admittedly, no such hearing was given to the accused in this case.

10. Mr. Jethmalani referred to Section 407 of the Code which reads as under:

"407. Power of High Court to transfer cases and appeals.— (1) Whenever it is made to appear to the High Court—

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

it may order—

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court

subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least-twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case of appeal from any subordinate Court, the High Court may,

if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197."

11. Mr. Jethmalani further submitted that power under Section 407 of the Code can be exercised after hearing all the concerned parties. He heavily relied on the judgment of this court in *State of West Bengal v. Anwar Ali Sarkar & Another* AIR 1952 SC 75 and particularly placed reliance on para 37 which reads as under:

"37. Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a classification of offences or of cases. As pointed out by Chakravarti J. the necessity of a speedy trial is too vague and uncertain a criterion to form the basis of a valid and reasonable classification. In the words of Das Gupta J., it

is too indefinite as there can hardly be any definite objective test to determine it. In my opinion, it is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of Article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Persons concerned in offences or cases needing so-called speedier trial are entitled to inquire "Why are they being made the subject of a law which has short-circuited the normal procedure of trial; why has it grouped them in that category and why has the law deprived them of the protection and safeguards which are allowed in the case of accused tried under the procedure mentioned in the Criminal Procedure Code; what makes the legislature or the executive to think that their cases need speedier trial than those of others like them?"

12. He further contended that the west Bengal Special Act of 1950 (Special Act) gives special treatment because they need it in the opinion of the provincial government; in other words, because such is the choice of their prosecutors. This answer is neither rational nor reasonable. The only answer for withholding from such person the protection of Article 14 of the Constitution that could reasonably be given to these inquiries would be that "Of all other accused persons they are a class by themselves and there is a reasonable difference between them and those other persons who may have committed similar offences." They could be told that the law regards persons guilty of offences against the security of the State as a class in themselves. The Code of Criminal Procedure has by the process of classification prescribed different modes of

procedure for trial of different offences. Minor offences can be summarily tried, while for grave and heinous offences an elaborate mode of procedure has been laid down.

13. The said Special Act suggests no reasonable basis or classification, either in respect of offences or in respect of cases. It has not laid down any yardstick or measure for the grouping either of persons or of cases or of offences by which measuring these groups could be distinguished from those who are outside the purview of the Special Act. The Act has left this matter entirely to the unregulated discretion of the provincial government. It has the power to pick out a case of a person similarly situate and hand it over to the special tribunal and leave the case of the other person in the same circumstance to be tried by the procedure laid down in the Code. The State Government is authorized, if it so chooses, to hand over an ordinary case of simple hurt to the special tribunal, leaving the case of dacoity with murder to be tried in the ordinary way. It is open under this Act for the provincial government to direct that a case of dacoity with firearms and accompanied by murder, where the persons killed are Europeans, be tried by the Special Court, while exactly similar cases where the persons killed are Indians may be tried under the procedure of the Code.

14. According to the learned senior counsel, the appellant cannot be denied the trial in an open court where there is presence of free media. He has also placed reliance on *Cora Lillian McPherson v. Oran Leo McPherson* AIR 1936 Privy Council 246 wherein it is held that "Every Court of Justice is open to every subject of the King." (Ref.: *Scott & Anr. v. Scott* (1913) A C 417). Publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.

15. Mr. Jethmalani placed strong reliance on the observation of the US Supreme Court in *Richmond*

Newspapers, Inc. et al v. Commonwealth of Virginia et al 65L Ed 2d 973 = (1980) 448 US 555. One of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial. This was mentioned by F. Pollock, The Expansion of the Common Law 31-32 (1904). [See also: E. Jenks, The Book of English Law 73-74 (6th ed 1967)].

16. The learned senior counsel for the appellant further relied upon the following passages of the *Richmond's* case *(supra)*:

17. (Page 983) In some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided:

> "That in all public courts of justice for trials of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such trials as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." [Reprinted in Sources of Our Liberties 188 (R. Perry ed.1959). *See also* 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971).]

18. (Page 985) Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

> "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." J.

Bentham Rationale of Judicial Evidence 524 (1827).

19. (Page 985) The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value.

20. (Pages 985-986) When a shocking crime occurs, a community reaction of outrage and public protest often follows. [*See* H. Weihofen, The Urge to Punish 130-131 (1956)]. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated, and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. "The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operate to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'" Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U Pa L Rev 1, 6 (1961)."

21. (Page 987) From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years.

22. (Page 999) This Court too has persistently defended the public character of the trial process. *In re Oliver* established that the Due Process Clause of the Fourteenth Amendment forbids closed criminal trials. Noting the "universal rule against secret trials," 333 U.S. at 266, 92 L Ed 682, 68 S Ct 499, the

Court held that

> "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means, at least, that an accused cannot be thus sentenced to prison." Id., at 273, 92 L Ed 682, 68 S Ct 499.

23. (Page 1000) Tradition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that "[a] trial is a public event. What transpires in the court room is public property." *Craig v. Harney,* 331 US 367, 374, 91 L Ed 1546, 67 S Ct 1249 (1947).

24. (Page 1000-1001) Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. [*See, e.g., Estes v. Texas,* 381 U.S., at 538-539, 14 L Ed 2nd 543, 85 S Ct 1628]. But, as a feature of our governing system of justice, the trial process serves other, broadly political, interests, and public access advances these objectives as well. To that extent, trial access possesses specific structural significance.

25. (Page 1001) Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. [*See Gannett,* supra at 428-429, 61 L Ed 2d 608, 99 S Ct 2898 (Blackmum, J., concurring and

dissenting).

26. (Page 1003) Shrewd legal observers have averred that:

> "open examination of witnesses *viva voce,* in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination . . . where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal." 3 Blackstone (supra) at *373.

27. Mr. Jethmalani also submitted that *Kehar Singh & Others v. State (Delhi Administration)* (1988) 3 SCC 609 has no relevance in the present case. In the said case, the shifting of the trial in jail was caused because of extraordinary situation which happened after assassination of Mrs. Indira Gandhi and that cannot be compared with the present situation. He placed reliance on the following paragraph:

> *'204.* In *Naresh Shridhar Mirajkar v. State of Maharashtra* (1966) 3 SCR 744 this Court had an occasion to consider the validity of a judicial verdict of the High Court of Bombay made under the inherent powers. There the learned Judge made an oral order directing the press not to publish the evidence of a witness given in the course of proceedings. That order was challenged by a journalist and others before this Court on the ground that their fundamental rights guaranteed under Article 19(1)(*a*) and (*g*) have been violated. Repelling the contention, Gajendragadkar, C.J., speaking for the majority view, said: (SCR pp. 760-61)
>
> > "The argument that the impugned order affects the fundamental rights of the appellants under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decision. . . . But it is singularly inappropriate to assume that a judicial decision pronounced by a judge of competent jurisdiction in

> > or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decisions cannot be said to affect the fundamental rights of citizens under Article 19(1)."

28. Mr. Jethmalani also placed reliance on *Union of India & Another v. Tulsiram Patel & Others* (1985) 3 SCC 398 para 92 in which this Court relied on *E. P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3. Para 85 of the said judgment reads as under:

> "... Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. *The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination.* Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. *Equality is a dynamic concept with many aspects and dimensions* and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, *equality is antithetic to arbitrariness.* In fact *equality and arbitrariness are sworn enemies*; *one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that*

it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. A*rticles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.* Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Articles 14 and 16." (emphasis supplied)

29. Mr. Jethmalani further placed reliance on the following paragraph:

"93. Bhagwati, J., reaffirmed in *Maneka Gandhi* case (1978) 1 SCC 248 what he had said in *Royappa* case (supra) in these words (at pp. 673-74): (SCC p. 283, para 7):

"Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a

dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa* v. *State of T.N*. namely, that from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14. A*rticle 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence* ...(emphasis supplied)

30. In the said judgment, Bhagwati, J., further observed (at pp. 676-77): (SCC p. 286, para 10)

"Now, if this be the test of applicability of the doctrine of natural justice, *there can be no distinction between a quasi-judicial function and an administrative function for this purpose.* The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of 'fair-play in actions' is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence *the rules of natural justice must apply equally in an administrative inquiry*

which entails civil consequences." (emphasis supplied)

31. Mr. Jethmalani placed reliance on *Delhi Transport Corporation v. D.T.C. Mazdoor Congress & Others* 1991 (Supp) 1 SCC 600 wherein vide paras 166, 167 and 168, this Court observed thus:

> *"166.* It is well settled that even if there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action.
>
> *167.* An order impounding a passport must be made quasi-judicially. This was not done in the present case. It cannot be said that a good enough reason has been shown to exist for impounding the passport of the appellant. The appellant had no opportunity of showing that the ground for impounding it given in this Court either does not exist or has no bearing on public interest or that the public interest can be better served in some other manner. The order should be quashed and the respondent should be directed to give an opportunity to the appellant to show cause against any proposed action on such grounds as may be available.
>
> *168.* Even executive authorities when taking administrative action which involves any deprivation of or restriction on inherent fundamental rights of citizens must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the

> requirements of natural justice."

32. Reliance was also placed on *D.K. Yadav v. J.M.A. Industries Ltd.* (1993) 3 SCC 259, wherein vide para 10, the court observed thus:

> *"10.* In *State of W.B.* v. *Anwar Ali Sarkar* AIR 1952 SC 75 per majority, a seven-Judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. In *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248 another Bench of seven Judges held that the substantive and procedural laws and action taken under them will have to pass the test under Article 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice."

33. Learned counsel for the appellant referred to the case of *Krishan Lal v. State of J&K* (1994) 4 SCC 422, wherein vide

para 28 the court observed thus:

> *"28.* The aforesaid, however, is not sufficient to demand setting aside of the dismissal order in this proceeding itself because what has been stated in *ECIL* case (1993) 4 SCC 727 in this context would nonetheless apply. This is for the reason that violation of natural justice which was dealt with in that case, also renders an order invalid despite which the Constitution Bench did not concede that the order of dismissal passed without furnishing copy of the inquiry officer's report would be enough to set aside the order. ……"

34. Mr. Ranjit Kumar, learned senior counsel appearing for the State submitted that the appellant is involved in a large number of criminal cases, the details of which are as under:

"(i) Session Trial No. 287/2007

(ii) Session Trial No. 441/2006

(iii) Session Trial No. 419/2006

(iv) Siwan Town P.W. Case No. 11/2001

(v) Ander P.S. case – 41/1999

(vi) Ander P.S. case – 10/1998

(vii) Siwan Muffassil case no. 61/1990

(viii) Session Trial No. 99/1997; and

(ix) Session Trial No. 63/2004"

35. Mr. Kumar also submitted that even by transferring the trial, no prejudice whatsoever has been caused to the appellant. He submitted that the venue is just one kilometer away from the Sessions Court, therefore, no inconvenience or prejudice is caused to any one. No one has been denied entry. On the

contrary, a large number of advocates and press people have attended the hearings and they have been regularly reporting this matter. He also referred to the notification dated 20th May, 2006 issued by the Patna High Court by which trial pending against the appellant has been expedited. The notification reads as under:

> "No.184A:- In exercise of powers conferred under sub-section (6) of Section 9 of the Criminal Procedure Code, 1973, the High Court has been pleased to decide that the premises of the District Jail, Siwan will be the place of sitting of Court of Session for the Sessions Division of Siwan for expeditious trial of sessions cases pending against Md. Sahabuddin.
>
> By Order of the High Court
>
> Sd/-
>
> Registrar General
>
> *Memo No.5146-49 dated, Patna the 20th May, 2006.*
>
> Copy forwarded to the District and Sessions Judge, Siwan/The Chief Judicial Magistrate, Siwan/ The Secretary to the Government of Bihar, Law (Judicial) Department, Patna/The Secretary to the Government of Bihar, Department of Personnel and Administrative Reforms, Patna for information and necessary action.
>
> By Order of the High Court
> Sd/-
> Registrar General"

36. Mr. Kumar, learned senior counsel further submitted that the two notifications were subsequently issued by the Government of Bihar because the premises were not under the control of the High Court. Where the premises are not under the control of the High Court, the notification has also to be issued by the State Government. The establishment of the court

can be done by the State Government in consultation with the High Court. He referred to the notification dated 20.5.2006 and notifications corresponding to S.O. Nos.80 and 82 both dated 7.6.2006. The notifications establishing the court were issued in consonance with the scheme of the Act.

37. Mr. Ranjit Kumar has drawn our attention to the counter affidavit filed by the State *in extenso*. In the said counter affidavit filed by the State it is mentioned that the reign of terror created by the appellant and his 'private army' in the last two decades is beyond imagination. Some of the notorious crimes committed by the appellant and his gang of criminals and the extent to which he has been interfering with the administration of justice, has been enumerated in the counter affidavit. It would be pertinent to recapitulate the same as under:

"xxx xxx xxx

(a) That on 03.5.1996 the petitioner along with his associates fired upon the then Superintendent of Police, Shri S. K. Singhal, IPS with sophisticated arms. In this case, bearing S.T. No. 320/2001, the petitioner and his two associates have been found guilty and sentenced to undergo rigorous imprisonment for 10 years.

(b) That during a raid conducted on 16.03.2001 in the house of the petitioner, the accused-petitioner and his private army fired upon the raiding party and burnt the vehicles of the Deputy Inspector General of Police, Saran Range, District Magistrate Siwan and Superintendent of Police Siwan. These criminals fired more than 100 rounds of ammunition from arms including AK 47 and AK 56 etc. In that firing, one constable was killed and several constables were injured. In this raid, huge quantity of ammunitions were recovered from the house of the accused. An FIR bearing Case No. 32 of 2001 was registered in the Hussainganj Police Station."

(c) That in another raid conducted in 2005 on the order of the Bihar Military Force-I, a large number of arms and ammunition and other articles were recovered from the house of the accused. Pursuant to this raid, an FIR bearing Case Nos. 41 to 44/2005 was registered in the Hussainganj Police Station.

(d) That when the petitioner was being shifted from Siwan Jail to Beur Jail Patna pursuant to his arrest on 10.02.2005, the petitioner did not sit in the vehicle of the Jail Administration and forcibly sat in a private vehicle. He first visited his village home at Pratapur in flagrant violation of the directions of the jail administration and the police escort party. All along the way he did as he chose and before finally arriving at the Beur Jail Patna, he even visited his relative and minister Sh. Izazul Haq at the government quarter. Resistance of the escorting police party were brushed aside by threatening them with dire consequences and use of brute force to carryout the above illegal acts.

(e) That in Sessions Trial No. 63 of 2002 accused and his gang fired upon Munna Choudhary. He was kidnapped in injured conditions and was thereafter killed and his body was disposed off. Such was the terror of the accused person that when the case was tried in the general court, 21 prosecution witnesses including the parents and sisters of the deceased as well as the investigating officers turned hostile due to fear created by the petitioner. Presently, this case is being tried in the Court at Siwan Jail, where the father and mother of the deceased have filed their affidavits stating that they were coerced and threatened by the petitioner and his gang, therefore, they could not depose against him.

(f) That the distance between the District Court Siwan and the Court at Siwan Jail is about one kilometer. From the jail gate to District Court there is one way which passes through narrow bridge over a river. This area is densely

populated and is a market area of the town. Whenever, the accused was produced in the District Court in the past, there used to be large gathering of criminals. It was always very difficult for the District Administration to control the situation. During the trial, thousands of criminals and armed men used to enter District Court premises and also inside the Court Room in support of the accused and created an atmosphere of terror in the minds of the prosecution witnesses. Consequently, no one dared to depose truthfully against the accused which led to his acquittal in more than 16 cases, one after the other.

(g) That prior to the constitution of the Court in the jail premises, when the petitioner was remanded to Siwan Jail in various criminal cases from time to time, he never co-operated and got himself produced in the concerned court, situated about one kilometer away from Siwan Jail, on the dates fixed for his appearance. Perusal of the order sheet of 9 cases which are undergoing trial in the Court shows that on only 24% occasions, the petitioner co-operated and got himself produced in the trial courts situated in court campus Siwan. On 76% occasions, he did not cooperate and consequently could not be produced from the Jail before the various trial courts. It is apparent that in most of them, the petitioner appeared before the Trial Court only once, at the time of remand or when he surrendered before the Court for getting himself remanded in the case. On several subsequent occasions, on one pretext or the other, he did not appear before the concerned court despite being in Siwan Jail."

38. It is also incorporated in the counter affidavit filed by the State that by the criminal acts of the appellant reign of terror had spread. The appellant has also earned enemies who would like to seize upon an opportunity and endanger his life if the trial is conducted in general court. Simultaneously, criminals owing allegiance to the appellant are likely to create law and

order problem including communal tension and endanger the life of the common public during his trial in general court.

39. It is further incorporated in the counter affidavit that in view of the aforementioned background and after assessing the entire situation, the then District Magistrate, Siwan informed the State Government that trial is not possible in the District Court of Siwan against the accused person. Pursuant to the report of the District Magistrate, the Law Secretary, Government of Bihar made a request to the Patna High Court for designation of Court of Session and Court of Judicial Magistrate, 1st Class inside the Siwan Jail Premises for expeditious trial of the cases pending against the appellant. After evaluating and assessing the entire situation, the notification was issued by the Patna High Court as also by the State Government with the consultation of Patna High Court for sitting and establishment of courts for expeditious trial of cases pending against the appellant.

40. Mr. Ranjit Kumar next submitted that Notification No. 184A dated 20.5.2006 was issued by the Patna High Court in exercise of its power conferred under section 9(6) of the Code. Mr. Kumar further submitted that Section 9(6) is in two parts. First part pertains to the statutory power of the High Court and the Second part pertains to the judicial power of the Sessions Court. Notification No.184A dt.20.05.2006 pertains to the first part.

41. According to the learned counsel for the State, the *audi alteram partem* rule would not be applicable to the first part but the second part. Therefore, the challenge by the appellant on the ground of breach of the *audi alteram partem* rule is unsustainable.

42. Mr. Kumar further submitted that immediately after the notification on 20.5.2006, on the same day, the High Court through its Registrar General wrote a letter asking for the State of Bihar to publish the notification in the official gazette. Delay

in the publication was not at the instance of the High Court. The appellant could not assail the notification of the High Court on this ground as no such plea or ground was raised either in the High Court or in this appeal.

43. Mr. Kumar also contended that the court inside the Jail was created by the High Court through its Notification dated 20.05.2006. Since the jail premises did not belong to the High Court, the State of Bihar issued two Notifications dated 7.6.2006 to facilitate the smooth functioning of the said court which had been created by the High Court. In any case, the administrative/statutory orders made by the High Court are given effect to by the State Government (e.g. appointments, terminations, dismissals, retirements etc.)

44. Mr. Kumar further contended that the Sessions Court was created by the State and not by the High Court is contrary to the record. The notification dt.7.6.2006 makes it clear that it was issued in pursuance to Notification No.184A dated 20.5.2006 of the Patna High Court.

45. Mr. Kumar also brought to the attention of the court that the appellant has faced trials in 43 cases before the Magistrates and the Sessions' Courts. Out of the 30 cases before the Magistrates, he has been convicted in 3 and acquitted in 1 and 26 remaining cases are pending. Out of the 13 cases before the Sessions Court, he has been convicted in 3, acquitted in 3 and 7 cases are still pending.

46. Mr. Kumar also contended that the Court premises inside the Jail are open to all. The appellant is being represented through 38 lawyers. Apart from all his lawyers and every other person wanting to attend has been allowed to do so. The press and the public have also been allowed entry. In fact, the appellant and his supporters had objected to the presence of the reporters. Therefore, the allegation of denial of a fair and open trial is devoid of any substance.

47. Mr. Kumar further submitted that the appellant is a notorious criminal and it is virtually impossible to hold his trials in the normal court premises. The atmosphere of terror let loose by the appellant and his supporters had jeopardized the functioning of the court warranting trials of his cases inside the jail. The Superintendent of Police formed an opinion and forwarded it to the District Magistrate. The State drew the attention of the High Court and the High Court decided to act on it. There is nothing sinister or clandestine in this. The opening and the closing lines of the opinion forwarded by the Superintendent of Police of the District to the District Magistrate speak of the desire of the High Court qua trial of the appellant.

48. He further submitted that during the course of the hearing, the appellant was permitted inspection of the High Court records. Based on it, the appellant has set out a new case during the course of arguments in rejoinder.

49. According to the learned counsel for the State, the submission of the appellant that there was variance between the Notification No. 184A in English and the Notification No.184 Ni in Hindi is wholly untenable. (This has been explained both by the State and the High Court to mean 'appointment' in English and 'niyukti' in Hindi.)

50. Learned counsel for the State further submitted that the contention of the appellant that absence of a serial order in the publication of 16.8.2006 makes it suspicious is also unsustainable.

51. Mr. Kumar also contended that the State Government issued notifications for establishing courts in jail only after issuance of the Notification No. 184A dated 20.5.2006 by the High Court is fully proved from the following correspondence:

a. Letter No.5137 dated 20th May 2006 from the Registrar General to the Secretary, Department of

Personnel and Administrative Reforms, State of Bihar, requesting that the State Government be moved to issue the necessary notification to give effect to the transfer to Siwan of one Shri Gyaneshar Singh as Additional and District Sessions Judge in the Court being constituted inside the District Jail, Siwan for expediting the trial for sessions case pending for trail against the appellant.

b. Letter No.5138 dated 20th May, 2006 was sent to the Law Secretary as a copy of the letter at Sl.No.1.

c. Letter No.5139 was addressed to the Secretary, Law Department by the Registrar General dated 20th May, 2006 informing that the High Court had considered the matter regarding establishment of a Special Court of Judicial Magistrate, First Class inside the District Jail, Siwan and expedite the proposal of the State Government for such establishment for trial of cases pending against the appellant.

d. Letter No.5140 dated 20th May, 2006 was a copy of the aforesaid letter at Sl.No.3 forwarded to the Secretary, Department of Personnel and Administrative Reforms for information and necessary action.

e. Letter No.5141 of 20th May, 2006 was written to the Secretary, Government of Bihar, Department of Personnel and Administrative Reforms requesting that Shri Vishwa Vibhuti Gupta, Judicial Magistrate First Class, Siwan designated as presiding officer of the Judicial Magistrate First Class being constituted inside the District Jail, Siwan for expeditious trial of pending cases of the appellant.

f. The Letter No.5142 of 20th May, 2006 being the

copy of the letter at Sl.No.5 was sent to the Secretary (Law), Judicial Department for information and necessary action.

g. Letter No.5143 dated 20th May 2006 was addressed by the High Court to the Secretary (Law), Judicial Department informing that the High Court having considered the matter was pleased to accept the proposal of the State Government for establishment of a special court of Additional District and Sessions Judge inside the District Jail, Siwan for expeditious trial of cases against the appellant.

h. Letter No.5144 dated 20th May 2006 being the copy of letter at Sl.No.7 was sent by the High Court to the Secretary, Department of Personnel and Administrative Reforms for information and necessary action.

i. Letter No.5145 dated 20th May, 2006 was sent by the Registrar General of the High Court to Superintendent, Government Printing Press, Gulzarbagh for publication of the notification No.184A dated 20th May, 2006 in the next issue of Bihar gazette (copy of this letter was also submitted by the Counsel for appellant in the High Court during the course of hearing on the last day).

j. The Patna High Court notification dated 20th May, 2006 issued under Section 9(6) of the Code was forwarded by the Registrar General of the High Court vide letter Nos.5146-49 of even date to the District and Sessions Judge/The Chief Judicial Magistrate, Siwan/Secretary to the Government of Bihar (Law), Judicial Department, the Secretary, Department of Personnel and Administrative Reforms for information and necessary action.

52. It will, thus, be seen from the above chronology that after the High Court took the decision to establish a Court of Additional District and Sessions Judge and of the Judicial Magistrate First Class in the Siwan District Jail, necessary correspondence/instruments/requests were sent by the High Court for implementation of the decision of the High Court in seriatim from letter Sl.Nos.5137-5138, 5139-5140, 5141-5142, 5143-5144, 5145 and 5146-5149. This full series of correspondence to give effect to the decision of the High Court was brought into operation which ultimately culminated in the two Notifications issued by the State Government on 7th June, 2006 respectively and also culminated in the Notification of the 20th May 2006 being gazetted on 16th August, 2006. There is, therefore, no scope for any person, leave alone the appellant, to contend that the decision was not of the High Court or High Court never applied its mind.

53. Learned counsel for the State further submitted that the argument that Section 462 of the Code only deals with a wrong court and not a wrong place is untenable. A reading of Section 462 categorically shows that the title of the section speaks of proceedings in wrong place but the substantive portion of the Section speaks of the wrong Sessions Division, District, Sub-Division or other local area, unless it appears that such an error in fact occasioned a failure of justice.

54. The decision rendered in *State of Karnataka v. Kuppuswamy Gownder & Others* (1987) 2 SCC 74 placed before the Court fully demolishes the contention of the appellant. Further, in any case the court of the Sessions Division within the compound of the Siwan Jail is not a wrong place for the purpose of holding the trial. The same has been duly notified.

55. The argument qua Section 465 Cr.P.C. that the notification dated 20th May, 2006 saying "other proceedings before and during the trial" and therefore, section 465 would not apply is totally devoid of any merit. Firstly, as per the

admission of the appellant himself, judicial proceedings against him had started in several cases and trials were going on, and therefore, it would come within the purview of words 'before or during the trial'. The emphasis of the State is on 'during trial'. Secondly, the words 'other proceedings before and during trial" would include the notification issued by the High Court and given effect to by the State Government by virtue of the constitutional provisions in Chapter-VI of the Constitution relating to Subordinate Courts and the notification is in the nature of a sanction to prosecute the appellant within the Siwan Jail premises in the courts of Sessions Division and the Judicial Magistrate. The notification issued, therefore, in other proceedings during the trial would clearly come within the purview of Section 465 of the Code. It would also come within the words 'irregularities in any sanction for the prosecution'. If the arguments of the appellant were to be upheld that the notification is bad because of non-gazetting thereof, prior to the State gazette notification inasmuch as the notification of the High Court having been issued on 16th August, 2006, it is stated that the delay, if any, would only amount to an irregularity and nothing more. Even for the said irregularity the appellant would have to lay foundation in the pleadings and prove to the court that there has been a failure of justice in his case.

56. In fact the appellant himself admitted in the summary of submissions in rejoinder that new points could be raised 'so long as they did not cause surprise to the other side' or at another place 'new point must be capable of being disposed off on the existing record or additional record, the aforesaid is not open to any challenge'. The learned counsel for the State-respondent submitted that the argument definitely raised surprise to the State Government because had such an argument been raised, both the State and High Court would have filed counter-affidavits. It is for the appellant to prove his allegations. He, having not even pleaded, cannot be allowed to raise new point at this stage.

57. A notification empowering a Sessions Court to sit and hold a trial inside the jail is not outside the purview of Section 465 of the Code. It would come within the meaning of other proceedings as explained above during a trial, because as per the admission of the appellant the trial has already been started.

58. The argument qua exercise of power for transfer of proceedings could only be done under Section 407 of the Code after giving adequate opportunity of hearing to the appellant has been answered against the appellant by this court in *Ranbir Singh v. State of Bihar* (1995) 4 SCC page 392. In para 13 it has been specifically said -

> "We are unable to share the above view of Mr. Jethmalani. So long as power can be and is exercised purely for administrative exigency without impinging upon an prejudicially affecting the rights or interests of the parties to any judicial proceeding we do not find any reason to hold that administrative powers must yield place to judicial powers simply because in a given circumstance they co-exist. On the contrary, the present case illustrates how exercise of administrative powers were more expedient, effective and efficacious. If the High Court had intended to exercise its judicial power of transfer invoking Section 407 of the Code it would have necessitated compliance with all the procedural formalities thereof, besides providing adequate opportunity to the parties of a proper hearing which, resultantly, would have not only delayed the trial but further incarceration of some of the accused, it is obvious, therefore, that by invoking its power of superintendence, instead of judicial powers, the High Court not only redressed the grievances of the accused and other connected with the trial but did it with utmost dispatch."

59. Mr. Kumar placed reliance on the case of *Zahira Habibullah H. Shaikh & Another v. State of Gujarat & Others* (2004) 4 SCC 158, particularly on Para 36 of the judgment. The relevant portion of Para 36 of the judgment reads as under:

> "36. ……..Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

60. Mr. Kumar further submitted that when the notification of 20th May, 2006 was issued by the High Court, it is expected that the judges of the High Court would take care of all aspects including the interest of the accused. According to him, section 9(6) of the Code is in two parts. The first part is when the notification is issued by the High Court, then it is presumed that they would take into consideration the interests of the parties including the accused before issuing the notification. In the second part, the Court of Session may decide to hold its sitting at any place in the session. They can do so only after hearing the parties and that order of the Court of Session is a judicial order and order issued by the High Court is an administrative order.

61. He submitted that the Jail is an open court as long as there are no restrictions and right of the accused to fair trial is not compromised. The concept of open court is where there is access of every one.

62. He placed reliance on a Division Bench judgment of the Delhi High Court in *Ranjit Singh v. Hon'ble the Chief Justice & Others* ILR 1985 Delhi 388. In this case, the court held that when the notification is issued by the High Court, then there is no necessity of issuing notice to the accused before passing an order to fix a place of holding the trial. The relevant observation made by the Division Bench reads as under:

"7. …….Surely, it is a reasonable presumption to hold that when the Full Court exercised its power, like in the present case, directing that the Court of Session may hold its sitting at a place other than its ordinary place of sitting considerations of the interest of justice, expeditious hearing of the trial and the requirement of a fair and open trial are the considerations which have weighed with the High Court in issuing the impugned notification. It should be borne in mind that very rarely does the High Court exercise its power to direct any particular case to be tried in jail. When it does so it is done only because of overwhelming consideration of public order, internal security and a realization that holding of trial outside jail may be held in such a surcharged atmosphere as to completely spoil and vitiate the Court atmosphere where it will not be possible to have a calm, detached and fair trial. It is these considerations which necessitated the High Court to issue the impugned notification. Decision is taken on these policy considerations and the question of giving a hearing to the accused before issuing a notification is totally out of place in such matters. These are matters which evidently have to be left to the good sense and to the impartiality of the Full Court in taking a decision in a particular case……."

63. Mr. Kumar also placed reliance on the case of *Naresh Shridhar Mirajkar* (supra). In this case, the court emphasized the importance of public trial, but at the same time noted that they cannot overlook the fact that the primary function of judiciary is to do justice between the parties and that it was difficult to accede to the proposition that there can be no exception to the rule that all cases must be tried in open court.

64. Mr. Kumar contended that all the questions which have been raised by Mr. Ram Jethmalani were raised before this Court in the case of *Kehar Singh's* case (supra). This Court has answered to all those questions in the said case against

the appellant herein. In this case, a three Judge Bench of this Court has given three separate judgments. Reliance has been particularly placed on paragraphs 21 to 24. On interpretation of section 9(6) of the Code, Oza, J. in paras 21 and 22 at pages 635 to 636 observed as under:

"21. ……

On the basis of this language one thing is clear that so far as the High Court is concerned it has the jurisdiction to specify the place or places where ordinarily a Court of Session may sit within the division. So far as any particular case is to be taken at a place other than the normal place of sitting it is only permissible under the second part of sub-clause with the consent of parties and that decision has to be taken by the trial court itself. It appears that seeing the difficulty the Uttar Pradesh amended the provision further by adding a proviso which reads:

> Provided that the court of Session may hold, or the High Court may, direct the Court of Session to hold, its sitting in any particular case at any place in the sessions division, where it appears expedient to do so for considerations of internal security or public order, and in such cases, the consent of the prosecution and accused shall not be necessary.

22. But it is certain that if this proviso is not on the statute book applicable to Delhi, it can not be used as the High Court has used to interpret it. That apart, if we look at the notification from a different angle the contention advanced by the learned Counsel for the appellants ceases to have any force. Whatever be the terms of the notification, it is not disputed that it is a notification issued by the Delhi High Court under Section 9 Sub-clause (6) Cr.P.C. and thereunder the High Court could do nothing more or less than what it has the authority to do. Therefore, the said notification of the High Court could be taken to have

notified that Tihar Jail is also one of the places of sitting of the Sessions Court in the Sessions division ordinarily. That means apart from the two places Tis Hazari and the New Delhi, the High Court by notification also notified Tihar Jail as one of the places where ordinarily a Sessions Court could hold its sittings. In this view of the matter, there is no error if the Sessions trial is held in Tihar Jail after such a notification has been issued by the High Court."

65. The question regarding Article 21 of the Constitution was also dealt with by this Court. The relevant para 23 of the judgment reads as under:

"23. The next main contention advanced by the counsel for the appellants is about the nature of the trial. It was contended that under Article 21 of the Constitution a citizen has a right to an open public trial and as by changing the venue the trial was shifted to Tihar Jail, it could not be said to be an open public trial. Learned counsel also referred to certain orders passed by the trial court wherein it has been provided that representatives of the Press may be permitted to attend and while passing those orders the learned trial Judge had indicated that for security and other regulations it will be open to Jail authorities to regulate the entry or issue passes necessary for coming to the Court and on the basis of these circumstances and the situation as it was in Tihar Jail it was contended that the trial was not public and open and therefore on this ground the trial vitiates. It was also contended that provisions contained in Section 327 Cr.P.C. clearly provides that a trial in a criminal case has to be public and open except if any part of the proceedings for some special reasons to be recorded by the trial court, could be in camera. It was contended that the High Court while exercising jurisdiction. under Section 9(6) notified the place of trial as Tihar Jail, it indirectly did what the trial court could have done in respect of particular, part of the

proceedings and the, High. Court has no jurisdiction under Section 327 to order trial to be held in camera or private and in fact as the trial was shifted to Tihar Jail it ceased to be open and public trial. Learned counsel on this part of the contention referred to decisions from American Supreme Court and also from House of Lords. In fact, the argument advanced has been on the basis of the American decisions where the concept of open trial has developed in due course of time whereas so far as India is concerned here even before the Constitution our criminal practice always contemplated a trial which is open to public."

66. In this case, the Court dealt with Section 327 Cr.P.C. which reads as under:

"327. Court to be open-(1) The place in which any. Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the Presiding Judge or Magistrate, may, if he thinks fit, of order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

(2) Notwithstanding anything contained in Sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code shall be conducted in camera:

Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular per: son to have access to, or be or remains in, the room or building used by the court.

(3) Where any proceedings are held under Sub-section (2) it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court."

67. On analysis of Section 327 Cr.P.C., this Court observed as under:

"…….So far as this country is concerned the law be very clear that as soon as a trial of a criminal case is held whatever may be the place it will be an open trial. The only thing that it is necessary for the appellant is to point out that in fact that it was not an open trial. It is not disputed that there is no material at all to suggest that any one who wanted to attend the trial was prevented from so doing or one who wanted to go into the Court room was not allowed to do so and in absence of any such material on actual facts all these legal arguments loses its significance. The authorities on which reliance were placed are being dealt with elsewhere in the judgment."

68. In the concurring judgment, Ray, J. has specifically dealt with this aspect of the case. On interpretation of Section 327 Cr.P.C., the Court observed as under:

"…….It is pertinent of mention that Section 327 of the Cr.P.C. provides that any place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court, to which the public generally may have access, so far as the same can conveniently contain them. The place of trial in Tihar Jail according to this provision is to be deemed to be an open court as the access of the public to it was not prohibited. Moreover, it has been submitted on behalf of the prosecution that there is nothing to show that the friends and relations of the accused or any other member of the public was prevented from having access to the place

where trial was held. On the other hand, it has been stated that permission was granted to the friends and relations of the accused as well as to outsiders who wanted to have access to the court to see the proceedings subject, of course, to jail regulations. Section 2(p) Criminal Procedure Code defines places as including a house, building, tent, vehicle and vessel. So court can be held in a tent, vehicle, a vessel other than in court. Furthermore, the proviso to Section 327 Criminal Procedure Code provides that the presiding Judge or Magistrate may also at any stage of trial by order restrict access of the public in general, or any particular person in particular in the room or building where the trial is held. In some cases trial of criminal case is held in court and some restrictions are imposed for security reason regarding entry into the court. Such restrictions do not detract from trial in open court. Section 327 proviso empowers the Presiding Judge or Magistrate to make order denying entry of public in court. No such order had been made in this case denying access of members of public to court."

69. Ray, J. has also dealt with Indian, English and American cases. He placed reliance on a judgment of this Court in *Naresh Shridhar Mirajkar* (supra). The relevant passage of the said judgment which was relied on by Ray, J. is set out as under:

"While emphasizing the importance of public trial, we cannot overlook the fact that the primary function of the judiciary is to do justice between the parties who bring their causes before it. If a judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to pubic gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the trial is to do justice in causes brought before it, then on

principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise whereby following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the high Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course…..... In this connection it is essential to remember that public trial of causes is a means, though important and valuable, to ensure fair administration of justice, it is a means, not an end. It is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict, arises between fair administration of justice itself on the one hand, and public trial on the other, inevitably, public trial may have to be regulated or controlled in the interest of administration of justice."

70. In this case, Shetty, J. in his concurring judgment also elaborately dealt with this aspect of the matter and observed as under:

"The right of an accused to have a public trial in our country has been expressly provided in the code, and I will have an occasion to consider that question a little later. The Sixth Amendment to the United States Constitution provides "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial by an impartial jury..." No such right has been guaranteed to the accused under our Constitution."

71. The Court observed that "the trial in jail is not an innovation. It has been there before we were born". The validity of the trial with reference to Section 352 of the Code of 1898 since re-enacted as Section 327(1) has been the subject matter of several decisions of different High Courts.

72. The Court also dealt with the judgment of this Court in *A.K. Roy & Others v. Union of India & Others* (1982) 1 SCC 271 and observed (at page 342, para 106) as under:

"….. The right to a public trial is not one of the guaranteed rights under our Constitution as it is under the 6th Amendment of the American Constitution which secures to persons charged with crimes a public, as well as a speedy, trial. Even under the American Constitution, the right guaranteed by the 6th Amendment is held to be personal to the accused, which the public in general cannot share. Considering the nature of the inquiry which the Advisory Board has to undertake, we do not think that the interest of justice will be served better by giving access to the public to the proceedings of the Advisory Board."

73. Reliance was placed on the case of *Sahai Singh v. Emperor* AIR 1917 Lah. 311. In this case, the conviction of the accused was challenged on the ground that the whole trial is vitiated because it was held in the jail. In this case, the Court held that, "there is nothing to show that admittance was refused to anyone who desired it, or that the prisoners were unable to communicate with their friends or counsel. No doubt, it is difficult to get counsel to appear in the jail and for that reason, if for no other, such trials are usually undesirable, but in this case the Executive Authorities were of the opinion that it would be unsafe to hold the trial elsewhere."

74. In *Kailash Nath Agarwal & Another v. Emperor* AIR (34) 1947 Allahabad 436, the Allahabad High Court has taken the view that there is no inherent illegality in jail trials if the Magistrate follows the rules of Section 352 which is equivalent to Section 327(1) of the new Code.

75. *In re M. R. Venkataraman* AIR (37) 1950 Madras 441, the Court came to the conclusion that the trial is not vitiated because it was held in jail.

76. *In re T. R. Ganeshan* AIR (37) 1950 Madras 696, the High Court upheld the validity of the jail trial.

77. In *Prasanta Kumar Mukerjee v. The State* AIR (39) 1952 Calcutta 91 and *Narwarsingh & Another v. State* AIR 1952 Madhya Bharat 193, the High Court recognized the right of the Magistrate to hold court in jail for reasons of security for accused, for witnesses or for the Magistrate himself or for other valid reasons.

78. Mr. Pravin Parekh, the learned senior counsel appearing for the High Court submitted that the Law Secretary, Government of Bihar vide letter No. 1-C(R) dated 7.5.2006 wrote to the Registrar General of the Patna High Court that the Patna High Court may kindly be moved for trial of cases pending against Md. Shahabuddin in Siwan Jail by constituting two special courts, one each of Additional Sessions Judge and another of Judicial Magistrate 1st Class.

79. Mr. Parekh pointed out that the Superintendent of Police, Siwan vide his letter No. 1493 dated 8.5.2006 wrote to the District Magistrate that more than forty cases were pending against Mohd. Shahabuddin and directions had been received from the Patna High Court to dispose of those cases expeditiously. It is stated that there was a serious danger to public peace during the presence of the appellant in the court premises. His supporters and other co-criminals could attack the witnesses. Even the possibility of threat and attack on the public prosecutor/district prosecuting officer could not be ruled out. Besides this, since he was wanted in many cases, therefore, other criminal groups could also attack him. Since he was a sitting Member of Parliament (hereinafter referred to as 'M.P.') and looking to the number of his supporters, it would impair the working of other courts in the Civil Court, Siwan. His supporters could create disturbance during hearing or realizing that his defence became weak and there was a possibility that his supporters might disturb public peace in the court premises and nearby areas and could commit murder and/or create other

serious law and order problems. The people of Siwan got frightened on the mere mention of name of Mohd. Shahabuddin. In view of orders passed by the High Court, competent Court may be moved for constituting Special Court in Siwan Jail.

80. Mr. Parekh submitted that the District Magistrate concurred with the report of the Superintendent of Police, Siwan and wrote to the Home Secretary, Bihar. While referring to the Superintendent of Police's letter dated 8.5.2006, the District Magistrate requested that necessary action may kindly be taken for construction of Court rooms in District Jail for quick trial of cases relating to the appellant.

81. Mr. Parekh also brought to our attention that the Law Secretary, Government of Bihar vide letter No. 361/C/2006 dated 9th May, 2006 wrote to the Registrar General of Patna High Court by enclosing a photocopy of letters of Superintendent of Police, Siwan and District Magistrate, Siwan both dated 8.5.2006. He stated that Md. Shahabuddin is a high profile M.P. from Siwan having criminal antecedents, since reportedly facing prosecution in more than forty cases. His physical production in the court during trial may be a source of menace to the public peace and tranquility, besides posing a great threat to the internal security extending other prosecution witnesses and prosecutors too. That apart, it may have adverse impact on inside Court working condition making the situation surcharged during trial. It was likely to impair inside court room working culture which in the ultimate analysis may have fallout on the administration of criminal justice. To promote efficient conducting of trial as also to strengthen its efficacy, therefore, the trial of Md. Shahabuddin inside District Jail, Siwan by proposed especially constituted courts seems to be an imperative need of the time. Accordingly, he requested that the Patna High Court may be moved to constitute Special Courts for the trial of the appellant Md. Shahabuddin inside the District Jail, Siwan.

82. Accordingly, a note requesting for placing the aforesaid

matter for consideration of the Standing Committee was put up by the Registrar General on 9.5.2006 to the Chief Justice of Patna High Court by enclosing both the letters of Superintendent of Police, Siwan and the District Magistrate dated 8.5.06 along with the Law Secretary's letter dated 9.5.06 by enclosing three precedents in respect of designation of the Special Courts for the trial of:

(a) Accused person relating to the cases of Lakshmanpur (Bathe), Jerhanabad carnage;

(b) Cases relating to Narainpur (Jehanabad) massacre;

(c) Sessions trial No. 115 of 2006 (*State vs. Anandmohan & Ors*.) relating to murder of G. Krishnaiyyah, the then District Magistrate, Gopalganj and for earmarking court of the Additional District & Sessions Judge.

83. Mr. Parekh further submitted that the Chief Justice of Patna High Court directed that the matter be put up before the Standing Committee. A list of the Additional Sessions Judges for trial of sessions' cases and list of the Special Magistrates was also placed for kind consideration of the Standing Committee.

84. Accordingly, the matter was placed before the Standing Committee in its meeting held on 11.5.2006. The Agenda for the said meeting was: "Letters received from the Law Secretary, Government of Bihar regarding designation of the Special Court of Session and Court of Judicial Magistrate, 1st Class for expeditious trial of the cases pending against Mohd. Shahabuddin and for notifying Siwan Jail a place for shifting of Sessions Court and Magisterial Court inside the jail for trial of such cases". Accordingly, a decision was taken by the Standing Committee, which is as under:

"Upon due deliberation and consideration of the letters

received from the Law Secretary, regarding designation of Special Court of Session and Court of Judicial Magistrate, 1st Class for expeditious trial of cases pending against Md. Shahbuddin and for notifying the Siwan Jail for sitting of Sessions and Magisterial Courts inside the Siwan Jail for trial of such cases. It is resolved to designate one court of Additional District and Sessions Judge as Special Court for trying the cases triable by the Courts of Sessions and one Court of Judicial Magistrate for trying the cases triable by the Court of Maigistrate, 1st Class. The matter of posting of the Officers i.e. ADJ and Judicial Magistrate, 1st Class, the matter be placed before the Sub committee which has been entrusted the transfer and posting under the Annual General Transfer. It is also resolved that the Siwan Jail premises be notified as a place of sitting of Sessions Court and Magisterial Court under provisions of Section 9(6) of the Criminal Procedure Code."

85. Mr. Parekh further pointed out that another note was put up by the Joint Registrar (Estt) on 17.5.2006 to the Registrar General pointing out Section 9(6) of the Code related only to Court of Session and not to Judicial Magistrate. A request was made to place the matter before the Hon'ble Court for necessary orders.

86. The Standing Committee in its meeting dated 18.5.2006 decided as under:

"*It is resolved* that the minutes of the proceeding of the last meeting of the Standing Committee held on 11th May, 2006, be approved, with the only modification that in the last line of agenda item No. (4) after section 9 sub-section (6) "and section 11 Sub-section (1) of the Code of Criminal Procedure, 1973, respectively" be added."

87. Accordingly, Notification No. 184A dated 20.5.2006 was issued by the Patna High Court by which the premises of

the District Jail, Siwan will be place of sitting of the Court of Sessions.

88. Mr. Parekh also pointed out that vide letter No. 5137/ Admn (Appointment) dated 20.5.2006, Mr. Gyaneshwar Srivastava, Additional District and Sessions Judge, Darbhanga was designated as the Presiding Officer (Special Judge) of the Special Court of the Additional District and Sessions Judge being constituted inside the District Jail, Siwan for the expeditious trial of Sessions Cases pending against Mohd. Shahabuddin.

89. Similarly, vide letter No. 5139, the Registrar General informed the Law Secretary that the Patna High Court had been pleased to accept the proposal of the State Government for establishment of a Special Court of Judicial Magistrate, 1st Class inside the District Jail, Siwan for the expeditious trial of cases pending against Mohd. Shahabuddin. The Registrar General vide letter No. 5141 dated 20.5.2006 informed the Secretary Department (Personnel) that Patna High Court has been pleased to recommend the name of Shri Vishwa Vibhuti Gupta, Judicial Magistrate, 1st Class, Siwan for his designation as the Presiding Officer (Special Magistrate) of the Special Court of Judicial Magistrate, 1st Class being constituted inside the District Jail, Siwan for expeditious trials of cases pending against Md. Shahabuddin.

90. The Registrar General vide his letter No. 5145 dated 20.5.2006 wrote to the Superintendent, Secretariat Press, Bihar, Gulzarbagh, Patna with a request to publish the enclosed notification in the next issue of Bihar Gazette. The issuing section was instructed to issue it at once on the very same day under a sealed cover as per the directions of the Registrar General.

91. Accordingly, notification No. 184A dated 20.5.06 was published in Part-1 of the Bihar Gazette dated 16.8.2006 along with other notifications of various dates.

92. Thereafter, the Law (Judicial) Department, Government of Bihar, Patna published the two Notifications bearing Nos. Part-1452/J and Part-1453/J both dated 7.6.2006 corresponding to S.Os. 80 and 82 respectively in the Bihar Gazette (Extraordinary Edition) which were impugned by the appellant. The Personnel Department also issued the Notification Nos. 5556 and 5557 dated 12.6.2006 regarding appointment of the Presiding Officers for the said two Special Courts.

93. The impugned Notifications provide that the State of Bihar in exercise of its power conferred by Section 11 of Cr.P.C. and in consultation with Patna High Court had been pleased to establish a Court of Judicial Magistrate of 1st Class, inside the District Jail, Siwan, shall hold its sitting inside the District Jail, Siwan for trial of cases pending against Md. Shahabuddin in the Court of Judicial Magistrate, 1st Class.

94. Similarly, another Notification dated 7.6.2006 was issued by the Governor of Bihar, in exercise of the powers conferred by sub-section (1) of Section 13 and sub-section (1) of Section 14 of the Bengal, Agra and Assam Civil Courts Act, 1887 (Act 12 of 1887) and sub-section (6) of Section 9 of the Code and in the light of Notification No. 184A dated 20th May, 2006 issued by the High Court of Judicature at Patna directing that the Court of Additional District and Sessions Judge of Siwan Sessions Division shall now hold its sitting inside the District Jail, Siwan to try Sessions cases pending against Md. Shahabudin. Both these notifications came into force with effect from 7.6.2006.

95. Mr. Parekh submitted that there is no infirmity in establishing two Special Courts inside the Siwan Jail for trying the cases of Md. Shahabuddin, M.P. from Siwan constituency, as the impugned notifications were issued in pursuance to the direction of the Patna High Court vide its notification dated 20.5.2006.

96. According to Mr. Parekh, the contentions raised by the appellant in the present appeal have been rejected by a three-Judge Bench of this court in *Kehar Singh's* case. It has been held that:

> "The High Court need not afford hearing to accused before fixing place of sitting of Sessions Court. Under Section 9(6) Cr.P.C. the High Court has the jurisdiction to specify the place or places where ordinarily a Court of Session may sit within the division. There is no error if the Sessions trial is held in Tihar Jail after such a notification has been issued by the High court. As soon as a Court holds trial in a venue fixed for such trial, it is deemed to be an open Court under Section 327, irrespective of the place of trial – whether it is a private house or a jail and everyone has a right to go and attend the trial. The High Court can fix a place other than the Court where the sittings are ordinarily held if the High Court so notifies for the ends of justice. The argument that jail can never be regarded as a proper place for a public trial is too general. Jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be regarded as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons."

97. *Kehar Singh's* judgment (supra) laid down that the public trial is a means, though important and valuable to ensure fair administration of justice, it is a means, not an end. It is the fair administration of justice which is the end of judicial process, and so, if ever a real conflict arises between fair administration of justice itself on the one hand, and public trials on the other, inevitably, public trials may have to be regulated or controlled in the interest of administration of justice. Moreover, it is laid down that order of the High Court is an Administrative Order and not Judicial Order.

98. Mr. Parekh has referred to a separate counter affidavit filed in the High Court. He has also mentioned that the

expeditious trial should not be read out of context. The cases of the appellant cannot be decided in normal course in the court premises because of the background of the appellant. The appellant is keeping a private army and if trial is conducted in court there is serious apprehension to the lives of the witnesses, public prosecutor, Presiding Officer and the accused. Therefore, after taking into consideration all facts and circumstances, a decision has been taken to hold the trials in jail. He referred to para 22 of the *Kehar Singh's judgment (supra)* delivered by Oza, J. in which it is mentioned that the High Court by notification has notified that Tihar Jail along with Tis Hazari and the New Delhi will be the places of sittings of the sessions court. He also referred to the para 157 of the judgment delivered by Shetty, J. who gave a concurring judgment in the *Kehar Singh's* case *(supra)*.

99. He has further submitted that the High Court is empowered under section 9(6) of the Code to specify a place or places for hearing of individual case. He referred to para 171 in which Shetty, J. has observed that under Section 9(6), the High Court exercises administrative power intended to further the administration of justice. The second part deals with the power of the Court of Session. The judicial power of the court intended to avoid hardship to the parties and witnesses in particular. One is independent of and unconnected with the other, the exercise of which is conditioned by mutual consent of the parties. The court further observed that the exercise of that power has to be narrowly tailored to the convenience of all concerned. It cannot be made use for any other purpose. The limited judicial power of the Court of Session should not be put across to curtail the vast administrative power of the High Court.

100. In response thereto, Mr. Jethmalani, the learned senior counsel for the appellant pointed out in the rejoinder that there is no law that a bad character person should be tried by a Special Court. He submitted that Notification dated 20th May,

2006 was not gazetted before the consequential notification dated 7th June, 2006 was issued. He has referred to the definitions of "notification", "official Gazette" and "Gazette" in the Criminal Procedure Code. According to the definition given in the Code, the word "notification" means a notification published in the Official Gazette. "Official Gazette" or "Gazette" shall mean the Gazette of India or the Official Gazette of a State.

101. He submitted that the copy of the notification was not made available to the appellant and he was driven to file a writ petition before this court and only because of the direction of this court, a copy of the notification was made available to him.

102. Public trial is an important part of the judicial system and this court in *Kehar Singh's* case has ruled:

> "In open dispensation of justice, the people may see that the State is not misusing the State machinery like the Police, the Prosecutors and other public servants. The people may see that the accused is fairly dealt with and not unjustly condemned. There is yet another aspect. The courts like other institutions also belong to people. They are as much human institutions as any other. The other instruments and institutions of the State may survive by the power of the purse or might of the sword. But not the Courts. The Courts have no such means or power. The Courts could survive only by the strength of public confidence. The public confidence can be fostered by exposing Courts more and more to public gaze."

103. The first question that one asks, before setting aside any order, is the nature of the action, judicial, legislative or administrative. This is because the grounds under which each type of action may be set aside are different. It was held in *Kehar Singh's* case that the order of the High Court notifying the trial is not a judicial order but an administrative order. The court held as under:-

> "The order of the High Court notifying the trial of a particular case in a place other than the Court is not a judicial order but an administrative order."

104. Since this is an administrative function, therefore, the test for this court should be whether the decision of the High Court stands up to the test of judicial review of administrative decisions. The first question, therefore, is whether the appellant had a statutory right to a hearing. If this is answered in the positive, then there is no need to go to further issues, as this would mean that the State has violated a statutory right to hearing. It is clear from the wording of Section 9 of the Code that there is no need for the High Court to give a hearing while deciding the venue of the trial. It is only if the Sessions Court is moving the place of trial that the parties have a right to a hearing. It must be added that one of the exceptions to the rule of *audi alteram partem* is the denial of hearing by implication. D. D. Basu in his celebrated book mentions:

> "(a) Where the statute classifies different situations and while, in some cases, it makes it obligatory to give a hearing to the party to be affected by the proposed order, in some other specified circumstances, such as an emergency or the avoidance of public injury, no such hearing is required because of the nature of the exceptional situation." [Basu, Durga Das, Administrataive Law, Sixth Edition, 2004 at pg. 288]

105. It is therefore, clear that there is no statutory right for the appellant to be heard. However, common law and the principles laid down in the Constitution lay down that even in administrative action there must be minimum standards that are to be maintained. In *State Bank of Patiala & Others v. S.K. Sharma* (1996) 3 SCC 364 this court ruled:

> "The objects of the principles of natural justice - which are now understood as synonymous with the obligation to provide a fair hearing is to ensure that justice is done, that

there is no failure of justice and that every person whose rights are going to be affected by the proposed action gets a fair hearing."

106. In *Wiseman & Another v. Borneman & Others* (1971) A.C. 297 Lord Reid held:

"For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

107. Therefore, this court must look into the issue whether the right to a fair hearing was denied to the appellant or not even if there is no statutory provision for it.

108. The principles of natural justice are essential to the framework of our laws and a protection against arbitrary actions. There is every duty of the courts to judicially review administrative actions. However, this is usually not to be applied blindly. *In Regina v. Gaming Board for Great Britain* (1970) 2 Q.B. 417, the court emphasized:

"it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter."

109. However, there are situations where the action of the State is prima facie void and therefore has to be set aside. If the denial of a public trial was a prima facie case of vitiation of natural justice, the court would be justified in exercising judicial review. This Court in *Naresh Shridhar Mirajkar's* case (supra) held that:

"If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exception whatever, cases may arise where by following the principle, justice itself may be defeated."

110. In the present case, it must be noted that a large number of supporters of the appellant may create unrest in front of the court room and much larger security would be required to protect the witnesses, the officers of the Court and the appellant. Therefore, it is clear from the letter of the Superintendent of Police of Siwan that it is not possible to hold the trials of the appellant in the open court. Holding of the trials of the appellant in open court may affect the trials of other civil and criminal cases that are going on in the same court building. Therefore, there is no violation of the principles of natural justice in shifting the trials of the cases of the appellant from a regular court to a special court.

111. When there is no prima facie violation of the principles of natural justice then one must test whether there is need for a judicial review of the orders of shifting the trials. The Privy Council in *Alfred Thangarajah Durayappah of Chundikuly v. W.J. Fernando & Others* (1967) 2 AC 337 laid down that it was neither possible nor desirable to classify exhaustively the cases in which a hearing is required but three factors must be borne in mind—

(1) The nature of the property or office held or status enjoyed by the complainant.

(2) The circumstances in which the other deciding party is entitled to intervene.

(3) When the latter's right to intervene is proved, the sanctions he can impose on the complainant.

112. The subject matter in the present case is the open trials for the appellant. There is a claim that it is being vitiated

by holding the trial in the jail. Here again there is doubt as to whether the first requirement has been vitiated by the decision of the High Court. The appellant has merely stated that the trial of his case has been transferred from the Siwan Court to the Siwan Jail. This in itself does not prove that the trial has been closed to the public. In *Kehar Singh's* case, this court observed that for reasons of security, the public access to trial can be regulated. The relevant observations are reproduced as under:-

> "10. For security reasons, the public access to trial was regulated. Those who desired to witness the trial were required to intimate the court in advance. The trial Judge used to accord permission to such persons subject to usual security checks"

113. This was considered a valid trial in open court.

114. Even in the United States in *Samuel H. Sheppard v. E.L. Maxwell* 384 U.S. 333 (1966), the Supreme Court ruled that the right to a public trial is not absolute. Sometimes excess publicity can be harmful to the case and therefore public access may be restricted. In *Press-Enterprise Co. v. Superior Court* 478 U.S. 1 (1986), the court held that trials can be closed on account of there being:

> "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."

115. While the Oregon Court of Appeals overruled the trial held in prison in *State of Oregon v. James Donald Jackson* 178 Or App 233, 36 P3d 500 (2001) on the specific ground that the public did not have access to watch the trial; there is no ruling that all trials inside jails are void. In the case of *Stephen Gary Howard v Commonwealth of Virginia* 6 Va. App. 132 (1988) the appellant claimed that the trial inside prison was inherently prejudicial to his case. The Court of Appeals of Virginia held that there is no presumption of

prejudice if a trial is held in prison. The court noted:

> "We find that the trial location did not erode Howard's right to a presumption of innocence."

116. In *Adolph Dammerau v. Commonwealth of Virginia* 3 Va. App. 285 (1986), the Court of Appeal ruled:

> "Rather, the surroundings and circumstances of each situation must be examined to determine if the public was inhibited from attending the trial so that "freedom of access" was effectively denied."

117. This clearly shows that the approach of the court that there is no presumption that a trial in prison is not an open trial.

118. In *The People v. Robert England the Court* 83 Cal. App. 4th 772 (2000) of Appeals of California held that reasonable restrictions, like security checks should be allowed. The court found:

> "In this case, the court did not close the trial to the public. Defendant argues only that it was more difficult for the public to attend because some people would be dissuaded from attending a proceeding held on prison grounds and some would resent having to identify themselves to prison officials to gain access to the grounds. Neither concern impacts defendant's right to a public trial.
>
> As noted previously, because the courtroom was located outside the actual prison wires, there was little possibility that the public might come into contact with inmates or otherwise be exposed to prison activities. That some people might not want to go to a courtroom located on prison grounds is irrelevant to determining whether a trial was public. *Other individuals might not want to go downtown to an urban courtroom, while others might not want to drive long distances in rural areas to attend a*

courtroom located in another town. These individual predilections do not make what is otherwise a public trial any less public.

Nor does the fact that individuals have to identify themselves before entering prison grounds unlawfully curtail defendant's right to a public trial. Far more stringent security procedures have been permitted in other cases."

119. Therefore, to hold that the appellant's right to a public trial has been denied the appellant has to prove more than mere shifting of the location of the trial.

120. Lord Wilberforce in *Malloch v. Aberdeen Corporation* (1971) 1 W.L.R. 1578 laid down a test for courts before it interfered in the decisions of administrative authorities on the ground of violation of *audi alteram partem*. He stated:

"The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. *A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain*"

121. In the present case, it has been shown by the respondents that no one had been denied from attending or watching the trial. The appellant is being represented by 38 lawyers. Apart from his lawyers, the press and those who want to attend the trial or case had free access to remain present during the court proceedings.

122. In *K.L. Tripathi v. State Bank of India & Others* (1984) 1 SCC 43 this Court held:

"When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly…."

In the same case this Court stated:

"it is true that all actions against a party which involve penal or adverse consequences must be in accordance with the principles of natural justice…"

123. In *George v Secretary of the State for the Environment* (1979) 77 L.G.R. 689 (1979), the court held that there must be some real prejudice to the complainant:

"there is no such thing as a merely *technical infringement of natural justice*."

The court noted:

"The question is whether, as a result of any failure in procedure or the like, there was a breach of natural justice.

On this approach, the position under the first limb is almost indistinguishable from that under the second limb. One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error that has been made."

124. In *R. Balakrishna Pillai v. State of Kerala* (2000) 7 SCC 129, this Court observed regarding adherence to the Principles of Natural Justice. Relevant para is reproduced as under:

"It is true that one of the principles of the administration of justice is that justice should not only be done but it should be seen to have been done. However, a mere allegation that there is apprehension that justice will not be done in

a given case is not sufficient."

125. In *Jankinath Sarangi v. State of Orissa* (1969) 3 SCC 392, this court pointed out that there is no carte blanche rule of setting aside orders. Hidayatullah CJ, ruled:

> "There is no doubt that if the principles of natural Justice are violated and there is a gross case, this Court would interfere by striking down the order of dismissal; but there are cases and cases. We have to look to *what actual prejudice* has been caused to a person by the supposed denial to him of a particular right."

126. In *Sahai Singh* (supra), the court noted that if the Executive Authorities were of the opinion that it would be unsafe to hold the trial elsewhere it could be held in jail.

127. In the present case, the letters exchanged between the police authorities and the request made to High Court clearly show that there was serious danger in producing the appellant in open court. The police authorities had shown that the large crowds were making a fair trial impossible and creating delays in deciding the cases. The relevant part of the letter dated 8.5.2006 written by the Superintendent of Police, Siwan reads:

> "With reference to the above, I have to respectfully inform you that more than forty cases are pending against Hon'ble Member of Parliament Mohd. Shahabuddin. Directions have been received from Hon'ble Patna High Court to dispose of cases as soon as possible. There is serious danger to public peace during the presence of Hon'ble Member of Parliament Mohd. Shahabuddin, in the court premises. His supporters and other co-criminals can attack the witnesses. Even the possibility of threat and attack on the public prosecutor/district prosecuting officer cannot be ruled out. Besides this, since he is wanted in many cases, therefore, other criminal groups can also attack him. Since he is a sitting M.P. and looking to the number of his supporters, it will impair the working of other courts in Civil Court Siwan. His supporters can create disturbance during hearing after seeing that his defence gets weak and there is possibility that his supporters may disturb public peace in the court premises and nearby areas and can commit murder and other serious law and order problems……."

128. In *Ajit Kumar Nag v. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia & Others* (2005) 7 SCC 764, there was clear record that the employee had assaulted a doctor and it was not possible to run a hospital safely and as an emergency the employee was dismissed. The court held that the dismissal was valid in view of maintaining discipline of the hospital.

129. I have heard the learned counsel for the parties at length and carefully examined the provisions of law and the relevant Indian, English and American judgments. The judgments and other literature available on record favour public trial or open trial as a rule.

130. Cooley, J. in his well known book *Cooley's Constitutional Law, Vol I, 8th edn., at page 647* observed as under:

> "It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are may cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard for public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and

that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility into the importance of their functions; and the requirement is fairly observed if, without partiality of favouritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

131. Every criminal act is an offence against the society. The crime is a wrong done more to the society than to an individual. It involves a serious invasion of rights and liberties of some other person or persons. The people are, therefore, entitled to know whether the justice delivery system is adequate or inadequate. Whether it responds appropriately to the situation or it presents a pathetic picture. This is one aspect. The other aspect is still more fundamental. When the State representing the society seeks to prosecute a person, the State must do it openly. As Lord Shaw said with most outspoken words [*Scott & Another v. Scott:* 1913 A.C. 417]:

"It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hal-lam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the

open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise...."

132. In dispensation of justice, the people should be satisfied that the State is not misusing the State machinery like the Police, the Prosecutors and other Public Servants. The people may see that the accused is fairly dealt with and not unjustly condemned. There is yet another aspect. The courts like other institutions also belong to people. They are as much human institutions as any other. The other instruments and institutions of the State may survive by the power of the purse or might of the sword. But not the Courts. The Courts have no such means or power. The Courts could survive only by the strength of public confidence. The public confidence can be fostered by exposing Courts more and more to public gaze.

133. Beth Hornbuckle Fleming in his article "*First Amendment Right of Access to Pretrial Proceeding in Criminal Cases*" (Emory Law Journal, V.32 (1983) P.619) neatly recounts the benefits identified by the Supreme Court of the United States in some of the leading decisions. He categorizes the benefits as the "fairness" and "testimonial improvement" effects on the trial itself, and the "educative" and "sunshine" effects beyond the trial. He then proceeds to state;

"Public access to a criminal trial helps to ensure the fairness of the proceeding. The presence of public and press encourages all participants to perform their duties conscientiously and discourages misconduct and abuse of power by judges, prosecutors and other participants. Decisions based on partiality and bias are discouraged, thus protecting the integrity of the trial process. Public

access helps to ensure that procedural rights are respected and that justice is applied equally.

Closely related to the fairness function is the role of public access in assuring accurate fact- finding through the improvement of witness testimony. This occurs in three ways. First, witnesses are discouraged from committing perjury by the presence of members of the public who may be aware of the truth. Second, witnesses like other participants, may be encouraged to perform more conscientiously by the presence of the public, thus improving the overall quality of testimony. Third, unknown witnesses may be inducted to come forward and testify if they learn of the proceedings through publicity.

Public access to trials also plays a significant role in educating the public about the criminal justice process. Public awareness of the functioning of judicial proceedings is essential to informed citizen debate and decision-making about issues with significant effects beyond the outcome of the particular proceeding. Public debate about controversial topics, such as, exclusionary evidentiary rules, is enhanced by public observation of the effect of such rules on actual trials. Attendance at criminal trials is a key means by which the public can learn about the activities of police, prosecutors, attorneys and other public servants, and thus make educated decisions about how to remedy abuses within the criminal justice system.

Finally, public access to trials serves an important "sunshine" function. Closed proceedings, especially when they are the only judicial proceedings in a particular case or when they determine the outcome of subsequent proceedings, may foster distrust of the judicial system. Open proceedings, enhance the appearance of justice and thus help to maintain public confidence in the judicial system."

134. In *Gannett Co. Inc. v. Danial A. DePasquale* (1979) 443 U.S. 368, the defendants were charged with murder and requested closure of the hearing of their motion to suppress allegedly involuntary confessions and physical evidence. The prosecution and the trial Judge agreed and said that closure was necessary. The public and the press were denied access to avoid adverse publicity. The closure was also to ensure that the defendants' right to a fair trial was not jeopardized. The Supreme Court addressed to the question whether the public has an independent constitutional right of access to a pretrial judicial proceedings, even though the defendant, the prosecution, and the trial Judge had agreed that closure was necessary. Explaining that the right to a public trial is personal to the defendant, the Court held that the public and press do not have an independent right of access to pretrial proceedings under the Sixth Amendment.

135. Although the Court in *Gannett* held that no right of public access emanated from the sixth Amendment it did not decide whether a constitutional right of public access is guaranteed by the first amendment. This issue was discussed in great detail in *Richmond Newspaper* (supra). This case involved the closure of the court-room during the fourth attempt to try the accused for murder. The United States Supreme Court considered whether the public and press have a constitutional right of access to criminal trials under the first amendment. The Court held that the first and fourteenth amendments guarantee the public and press the right to attend criminal trials. But the *Richmond Newspapers* case (supra) still left the question as to whether the press and public could be excluded from trial when it may be in the best interest of fairness to make such an exclusion. That question was considered in the *Globe Newspaper Co. v. Superior Court for the County of Norfolk* (1982) 457 US 596 : 73 L.Ed. 2d 248. There the trial Judge excluded the press and public from the court room pursuant to a Massachusetts statute making closure mandatory in cases involving minor victims of sex crimes. The Court considered the

constitutionality of the Massachusetts statute and held that the statute violated the first amendment because of its mandatory nature. But it was held that it would be open to the Court in any given case to deny public access to criminal trials on the ground of state's interest. Brennan, J., who delivered the opinion of the Court said (at 258-59):

> "We agree with appellee that the first interest - safeguarding the physical and psychological well-being of a minor - is a compelling one. But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case by case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victims, and the interests of parents and relatives. …. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

136. It will be clear from these decisions that the mandatory exclusion of the press and public to criminal trials in all cases violates the First Amendment to the United States Constitution. But if such exclusion is made by the trial Judge in the best interest of fairness to make that exclusion, it would not violate that constitutional right.

137. It is interesting to note that the view taken by the American Supreme Court in the last case, runs parallel to the principles laid down by this Court in *Naresh Shridhar Mirajkar* case (supra).

138. In the present case, it is necessary to maintain the discipline of the court which is not only trying the case of the appellant but a large number of other cases which were getting

delayed by the presence of a large number of supporters.

139. The appellant is claiming that his right to a public trial has been vitiated by the court being set up inside the jail. The State must demonstrate that: (a) nobody is being denied entry to the court room as long as they agree to the regular security checks and (b) there is a clear and logical reason as to why the case was transferred from the Siwan courthouse to the Siwan Jail.

140. The second argument of the appellant is that the notification was not made available to him on time and therefore the proceedings are void. In *Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar etc. etc.* (1993) 4 SCC 727 a Constitution Bench took the view that before an employee is punished in a disciplinary enquiry, a copy of the enquiry report should be furnished to him (i.e., wherever an enquiry officer is appointed and he submits a report to the Disciplinary Authority). It was held that not furnishing the report amounts to denial of natural justice. At the same time, it was held that just because it is shown that a copy of the enquiry officer's report is not furnished, the punishment ought not be set aside as a matter of course. It was directed that in such cases, a copy of the report should be furnished to the delinquent officer and his comments obtained in that behalf and that the court should interfere with the punishment order only if it is satisfied that there has been a failure of justice. (see para 25 of *State Bank of Patiala* (supra).

141. Therefore, to vitiate the entire trial on the ground that the notification was not sent to the appellant in time would not be in the interest of justice, and the High Court was correct in ordering that a copy of the notification be supplied to the appellant.

142. On analysis of the provisions of law and the leading judgments which all in one voice say that in all civilized countries governed by the rule of law, all criminal trials have to be public

trials where public and press have complete access.

143. Public access is essential if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.

144. Publicity is the authentic hallmark of judicial functioning distinct from administrative functioning. Open trial serves an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Public trial restores the balance in cases when shocking crime occurs in the society.

145. People have inherent distrust for the secret trials. One of the demands of the democratic society is that public should know what goes on in court while being told by the press or what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. Criminal trial is a public event. What transpires is a public property. Therefore, I have no difficulty in concluding that open trial is the universal rule and must be scrupulously adhered to. The right to public trial has also been recognized under section 327 of the Code.

146. The importance of public trial in a democratic country governed by rule of law can hardly be over emphasized, but at the same time I cannot overlook the fact that primary function of the judiciary is to do justice between the parties which bring their causes before it. Therefore, it is difficult to accede to the proposition that there cannot be any exception to the universal rule that all cases must be tried in open court. In a case of extraordinary nature, the universal rule of open trial may not be adhered to. This is the settled legal position crystallized by a three-Judge Bench of this court in *Kehar Singh* case (supra). The High Court looking to the exceptional and extraordinary circumstances can take such a decision and no personal hearing is warranted before taking such a decision.

147. The test as laid down by this Court in *Kehar Singh's* case (supra) is whether public could have reasonable access to the court room. The court noted:

> "It may now be stated without contradiction that jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be regarded as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons. The enquiry or trial, however, must be conducted in open Court. There should not be any veil of secrecy in the proceedings. There should not even be an impression that it is a secret trial. The dynamics of judicial process should be thrown open to the public at every stage. The public must have reasonable access to the place of trial. The Presiding Judge must have full control of the Court house. The accused must have all facilities to have a fair trial and all safeguards to avoid prejudice."

148. The question arises – whether the present case would fall in the category of those extraordinary or exceptional cases where universal rule of open trial can be given a go-bye.

149. It is alleged by the learned counsel appearing for the State that the appellant is involved in more than forty criminal cases. In the counter affidavit filed by the State it is mentioned that a reign of terror has been created by the appellant and his 'private army' in the last two decades is beyond imagination. Some of the notorious crimes committed by the appellant and his gang of criminals and the extent to which he has been interfering with the administration of justice, has been enumerated in detail in the counter affidavit.

150. During the raid conducted on 16.03.2001 in the house of the appellant, the appellant and his private army fired upon the raiding party and burnt the vehicles of the Deputy Inspector General of Police, Saran Range, District Magistrate Siwan and Superintendent of Police Siwan. These criminals fired more

than 100 rounds of ammunition from arms including AK 47 and AK 56 etc. In that firing, one constable was killed and several constables were injured. There are innumerable cases of the same kind in which the appellant is directly involved.

151. It is also stated in the counter affidavit that prior to the constitution of the Court in the jail premises, when the appellant was remanded to Siwan Jail in various criminal cases from time to time, he never co-operated and got himself produced in the concerned court, situated only about one kilometer away from Siwan Jail, on the dates fixed for his appearance. A large number of advocates and press people have attended the hearings and they have been regularly reporting this matter in the press.

152. In this case though the trials are taking place in jail but in fact no real prejudice has been caused to the appellant. All 38 counsel of the appellant, public and press people are permitted to remain present during the court proceedings. The court proceedings were regularly reported in the Press.

153. I would like to reiterate my main findings on following issues as under:-

I. Initially the copy of the notification was not given to the appellant but on the directions of this court the same was made available to the appellant. So there is no surviving grievance of the appellant as far as this aspect of the matter is concerned.

II. The decision to hold the trials of cases of the appellant in jail was taken in pursuance to the notification dated 20.5.2006 issued by the High Court of Patna. The State Government issued two notifications on 7th June, 2006 in pursuance to the notification of the High Court dated 20.5.2006. It became imperative for the State to issue the said notification because the new venue of the trial, i.e.,

Siwan Jail was not within the control of the High Court.

III. I hold that these three notifications, one issued by the High Court dated 20.5.2006 and two issued by the State Government on 7.6.2006 are valid and were issued in consonance with the provisions of law.

IV. The High Court in view of the extraordinary facts and circumstances of a particular case is empowered to change the venue of the pending case/trial without hearing the appellant and this would not violate appellant's fundamental rights under Articles 14 and 21 or any other provision of the Constitution. This controversy is no longer *res integra* and is fully settled in view of the judgment of this court in *Kehar Singh's* case (supra).

V. In the instant case apart from appellant's 38 lawyers, the public and the press had access to the court proceedings. The Siwan Jail is only one kilometer from the Siwan Court. The court proceedings were regularly reported in the press. So in the instant case no real prejudice has been caused to the appellant.

154. I accept the main argument of the learned counsel of the appellant and reiterate that universal rule as recognized in all civilized countries governed by rule of law is that the criminal trial should be a public trial or open trial but in exceptional cases there can be deviation from the universal rule in the larger public interest. The case in hand would fall in the category of those extraordinary and exceptional cases where in the interest of justice it became imperative to shift the venue of the trials for the reasons stated in the preceding paragraphs.

155. On consideration of the totality of the facts and

circumstances, this appeal lacks merit and is accordingly dismissed.

156. Before parting with the case, I would like to place on record my deep sense of appreciation for the able assistance provided by the learned counsel for the parties.

DR. MUKUNDAKAM SHARMA, J. 1. I have had the privilege of perusing the considered judgment of my esteemed brother Justice Dalveer Bhandari. However, in view of the fact that the present appeal involves several important and wide-ranging questions of law, I wish to record my own reasons for the same, while, in essence, concurring with the conclusions arrived at by my learned brother. I may, however, add that since in the main judgment detailed facts have been delineated, I refrain myself from repeating the same, but refer only to those basic facts as would help in appreciating the issues discussed hereinafter.

2. Main challenge in this appeal as it appears from the arguments advanced is to the legality and the validity of the three notifications one of which was issued by the Patna High Court on 20.05.2006 and the other two notifications dated 07.06.2006 were issued by the Government of Bihar.

3. The appellant, who was a Member of Parliament from Siwan Lok Sabha Constituency, being aggrieved by the issuance of the aforesaid notifications filed a writ petition in the High Court of Patna wherein he challenged the legality and validity of the aforesaid three notifications.

4. The appellant was arrested in connection with the Siwan P.S. Case No. 8 of 2001 and was remanded to judicial custody on 13.8.2003 and he continued to remain in custody till 18.02.2005 till he was granted bail by the Patna High Court on 10.02.2005. A number of other cases came to be lodged against him and he was re-arrested and detained in Beur Jail, Patna under the provisions of the Bihar Control of Crimes Act,

1981. Though the aforesaid order of detention was set aside, still the appellant continued to remain in custody in connection with other cases that had been lodged against the appellant.

5. The notification dated 20.05.2006 notified the decision of the Patna High Court that the premises of the District Jail, Siwan would be the place of sitting of the Court of Session for the Sessions Division of Siwan for expeditious trial of sessions cases pending against the appellant namely Md. Shahabuddin. By issuing the other two notifications dated 07.06.2006, the Government of Bihar directed that the Court of Additional District and Sessions Judge of Siwan, Sessions Division would hold its sitting inside the jail premises of District Jail, Siwan for trying the cases relating to the appellant herein. By issuing the third notification dated 07.06.2006, the Government of Bihar in exercise of power conferred under Section 11 of the Code of Criminal Procedure (for short 'the CrPC') and in consultation with the Patna High Court ordered the establishment of a Court of Judicial Magistrate of First Class inside the District Jail, Siwan for holding its sitting for the trial of cases pending against the appellant. On issuance of the aforesaid notifications dated 07.06.2006, the venue for holding the trial of the cases pending against the appellant was shifted to the premises of the District Jail, Siwan.

6. The appellant had earlier challenged and assailed the legality and validity of the aforesaid notifications in the High Court of Patna by filing a Writ Petition. It was submitted on behalf of the present appellant before the High Court that the provisions of Section 9(6) of the CrPC do not empower the High Court to transfer the pending cases although such power might or could be exercised with regard to the newly instituted cases. It was also submitted that since the State Government has no power and jurisdiction to exercise powers under Section 9(6), therefore, the notification issued by the State Government exercising powers under Section 9(6) by way of establishing a Sessions Court in District Jail, Siwan is without jurisdiction and

violative of Articles 14 and 21 of the Constitution of India. It was next submitted that the rule of 'audi alteram partem' is applicable to transfer of any case to any court to which provisions of Section 407 of CrPC would apply. It was further submitted that since the power of transfer of a case is a judicial power, an opportunity of hearing should have been afforded to the appellant before exercising such powers and as the aforesaid notifications were issued without doing so, the said notifications were illegal, without jurisdiction and in violation of the principles of natural justice. It was further submitted that the expeditious hearing of cases is a concomitant of the principles of administration of justice and, therefore, the same could not be a valid criteria for transfer of cases and that also cannot be done in relation to one particular individual. It was also submitted that the trial held in the District Jail, Siwan cannot be said to be an open court and, therefore, there was violation of Section 327 of the CrPC as also violation of the right to have a fair and open trial.

7. All the aforesaid submissions made by the appellant before the High Court were considered by the High Court and by its impugned judgment and order dated 14.08.2007, the same were held to be without merit and consequently, the writ petition was dismissed.

8. Being aggrieved by the aforesaid judgment and order passed by the High Court, the present appeal was preferred by the appellant in which notice was issued. The learned counsel appearing for the parties argued the case in extenso and in conclusion of the same the judgment was reserved.

9. Mr. Ram Jethmalani, learned senior counsel appearing for the appellant made extensive arguments during the course of which he even travelled beyond the pleadings filed in the writ petition to which reference shall be made during the course of present discussions on the various arguments raised before this Court. On the basis of the pleadings and the arguments advanced and on consideration thereof, the following legal

issues arise for consideration which have been dealt with hereinafter: -

(a) The scope and ambit of the power under Section 9(6) and Section 11 of CrPC.

(b) While issuing the notification dated 20.05.2006, the High Court had no intention of creating a jail sessions court in exercise of its administrative power under Section 9(6) of CrPC because it left the same to be done by the State Government. Further, the notification dated 07.06.2006 was void as the Governor of Bihar could not have exercised power under Section 9(6) of CrPC as such power lies exclusively with the High Court.

(c) The notification dated 20.05.2006 was not supplied to the appellant and the same was not published in the Gazette and, therefore, the said notification is invalid.

(d) If issues of the aforesaid nature were neither raised earlier in the writ petition nor argued in the writ petition nor decided in the writ petition and not also taken in the SLP, whether the same could be argued as a question of law on the ground that such legal issues could be amended at any time.

(e) Before issuing a notification was it necessary to provide an opportunity of being heard to the accused in compliance of the rule of 'audi alteram partem' which is an embodied rule under Section 9(6).

(f) Section 9(6) of CrPC does not empower the High Court to transfer any pending case but it covers only new cases.

(g) Reason for issuance of notification being only for

expeditious disposal which is even otherwise a necessary concomitant of administration of justice, the notification is void as no special reason to exercise power under Section 9(6) was spelt out and also particularly when the said power is exercised in the cases of only one individual.

(h) A trial conducted inside the jail premises, not being an open court, violates Section 327 of CrPC as well as Articles 14 and 21 of the Constitution.

(i) Whether mention of the words 'Civil Code' and 'Civil Court' in the notifications issued by the State vitiates the notifications.

10. First of all, let me deal with the scope and ambit of the power under Section 9(6) and Section 11 of CrPC. Since reference was also made by the counsel appearing for the appellant to Section 407 of CrPC, it would be appropriate to extract the aforesaid provisions in order to appreciate the issues raised before us. Section 9 (6) of the CrPC reads as follows: -

"9. Court of Session.

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(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein."

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Section 11 of the CrPC reads as follows:

"11. Courts of Judicial Magistrates.

(1) In every district (not being a metropolitan area), there shall be established as many, Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification, specify:

[Provided that the State Government may, after consultation with the High Court, establish, for any, local area, one or more Special Courts of Judicial Magistrate of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.]

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court."

Section 407 of the CrPC reads as follows:

"407. Power of High Court to transfer cases and appeals.

(1) Whenever it is made to appear to the High Court-

(a) That a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) That some question of law of unusual difficulty is likely to arise; or

(c) That an order under this section is required by any provision of this Code, or will tend be the general convenience of the parties or witnesses, or is expedient for the ends of, justice,it may order-

(i) That any offence be inquired into or tried by any court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) That any particular case, or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) That any particular case be committed for trial of to a Court of Session; or

(iv) That any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative:

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(8) When the High Court orders under sub-section (1) that a case be transferred from any court for trial before itself, it shall observe in such trial the same procedure which that court would have observed if the case had not been so transferred."

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11. Mr. Jethmalani, after referring to the aforesaid provisions, submitted that the power to transfer cases from one sessions division to other sessions division could be made only in respect of the pending cases of which cognizance has been

taken and evidence recorded only after resorting to the principles of audi alteram partem, that is, upon opportunity of hearing having been given to the party as the interest of the party to have a fair and open trial is involved in the case and consequently such a power could be exercised only under the provisions of Section 9(6) of CrPC which could only be done after hearing the parties. Mr. Jethmalani also submitted that if the administrative power of the High Court is construed as applicable to a pending case and without any duty of affording an opportunity of hearing, Section 9(6) should be considered as constitutionally invalid being opposed to Articles 14 and 21 of the Constitution of India. He also submitted that the power under Section 9(6) could not have been exercised either by the High Court or by the State Government and also that even if it is held that the High Court has such a power vested in it under Section 9(6), the same could be exercised only in consonance with the intention of the legislature gathered from the provisions. Another connected issue which was raised was whether before issuing a notification under Section 9(6), was it necessary to provide an opportunity of hearing to the appellant in compliance with the rule of audi alteram partem which is embodied in Section 9(6) of CrPC. Since both the aforesaid issues are interconnected and interrelated, both the issues are taken up together for consideration.

12. The aforesaid submissions of Mr. Jethmalani were vehemently refuted by Mr. Ranjit Kumar, learned senior counsel appearing for the State of Bihar and also by Mr. P.H. Parekh, learned senior counsel appearing for the Patna High Court. They extensively relied upon the judgment rendered by this Court in the case of *Kehar Singh v. State (Delhi Administration)* reported in 1988 SCC (3) 609, wherein the issue of change of venue of the trial from the Patiala House Court, Delhi to the Special Court established in the Tihar Jail, Delhi had come up for consideration.

13. This Court in the aforesaid case was also called upon

to interpret Section 9 of the CrPC and after referring to the various provisions of the CrPC and the provisions of Section 9, it was held that Section 9(6) is divided into two parts – the first part thereof confers power on the High Court whereas the second part thereof endows power on the Court of Sessions.

14. A bare reading of the aforesaid provisions of Section 9(6) explicitly indicates that the power conferred on the High Court is the power to determine the place or places where the Court of Session shall ordinarily hold its sittings. The second part which immediately follows the first part opens with the word "but", thereby carving out an exception to the general rule that the venue of the Court of Session shall be the place notified by the High Court. That the power of the Court of Session to fix the venue is an exception to the aforesaid general rule is also indicated by the use of the word "ordinarily" in the first part of Section 9(6) of CrPC. Thus, by virtue of the provision contained in the second part of Section 9(6), the Court of Session is endowed with the power to hold its sittings at any place in the sessions division other than that notified by the High Court. However, being an exception, the CrPC specifically mandates in the second part for observance of a special procedure contemplating compliance of the rule of audi alteram partem and also for obtaining the consent of the parties before the Court of Session may hold its sittings at a place other than the place or places notified by the High Court. Being an exception to the general rule, the power of the Court of Session to change the venue of a trial is circumscribed and could be exercised by the Court of Session only on the fulfillment of the aforesaid condition and only on the ground that such change in the venue of trial will tend to the general convenience of the parties and witnesses and cannot be exercised for any other purpose or on any other ground. Moreover, the said power can be exercised only with reference to a particular case. The expression "particular case" as used in the second part of Section 9(6) connotes a single or specific case as opposed to a bunch or class of cases. Being an exception to the general

rule, the conditions, subject to the fulfilment of which the power to shift the venue of the trial may be exercised by the Court of Session, have to be strictly construed. Thus, where the conditions specified under the second part of Section 9(6) of the Code are not complied with, the Court of Session has no power to shift the venue. In such a case, the power of shifting the venue continues to lie with the High Court.

15. In the present case, the essential conditions ingrained in the second part of Section 9(6), as set out above, are not applicable inasmuch as neither inconvenience to the parties or witnesses was ever perceived or recorded by the Court of Additional Sessions Judge nor was the venue of trial shifted for a particular case. On the contrary, it was shifted for the entire class of cases that were pending against the appellant. In light of the aforesaid, it may be said that the power to change the venue of the trial of cases pending against the appellant, was exercisable by the High Court and not by the Court of Session. Furthermore, a careful reading of Section 9(6) reveals that the second part expressly requires the Court of Session to afford the prosecution and the accused an opportunity of hearing and to obtain their consent beforehand. It is, therefore, not a case falling under second part of Section 9(6) but is a case falling under first part of Section 9(6) of CrPC.

16. Learned Senior Counsel appearing for the appellant also contended that there was a "transfer" of cases pending against the appellant from the Sessions Court, Siwan to Jail Sessions Court, Siwan and as such there was a case of exercise of power under Section 407 of CrPC by the High Court which is a judicial power and thus compliance with the rule of audi alteram partem was necessary. In my considered view, the argument is entirely misplaced as Section 407 of the Code deals with the power of the High Court to "transfer" cases and appeals. The key word in this section is the word 'transfer', which essentially consists of two steps: (a) removing a case or class of cases from the jurisdiction of the court where it/they

is/are pending trial, and (b) putting it/them under the jurisdiction of another court (whether of equal or superior jurisdiction) for adjudication. Thus, every transfer involves two different courts. By issuing the said notification, the High Court cannot be said to have transferred the cases pending against the appellant, for the said notification simply notified the premises of District Jail, Siwan, to be the place of sitting for holding the trial of cases pending against the appellant. The notifications did not, in any manner, affect or abridge the jurisdiction of the Court of Session, Siwan, to try those cases. Thus, there was a shift simpliciter in the venue of the trial, without there being anything more. In such circumstances, the present case cannot be said to be a case of "transfer" to which the provisions of Section 407 are attracted.

17. Now what remains to be examined is whether the rule of audi alteram partem should have been complied with when the High Court notified a shift in the venue of the trial. The power of the High Court under section 9(6) to notify a particular place or places where the Court of Session shall ordinarily hold its sitting is an administrative power unlike the power of the Court of Session under second part of section 9(6) which is judicial in nature. Being so, the High Court was under no obligation to observe the rule of audi alteram partem. The said power undoubtedly is an administrative power exercisable by the High Court. This position was also made clear by the decision of this Court in *Kehar Singh* (supra) wherein it was observed as follows:

> *"171.* The argument that the first part of Section 9(6) should be read along with the second part thereof has, in the context, no place. The first part provides power to the High Court. It is an administrative power, intended to further the administration of justice. The second part deals with the power of the Court of Session. It is a judicial power of the court intended to avoid hardship to the parties and witnesses in a particular case. One is independent of and

> unconnected with the other. So, one should not be confused with the other. The judicial power of the Court of Session is of limited operation, the exercise of which is conditioned by mutual consent of the parties in the first place. Secondly, the exercise of that power has to be narrowly tailored to the convenience of all concerned. It cannot be made use of for any other purpose. This limited judicial power of the Court of Session should not be put across to curtail the vast administrative power of the High Court."

18. The intention of the legislature for providing an opportunity of hearing in the matters of transfer of criminal cases could be gathered from the language used in the provision wherein the legislature desired that there should be an opportunity of hearing that is so specifically stated in the language itself and where the legislature desired that there should be a power of the High Court to fix the place or places of sittings of a Sessions Court for holding its trial, it has so mentioned explicitly by excluding the rules of natural justice from its ambit thereby excluding the principles of *audi alteram partem.*

19. In *Union of India v. Col. J.N. Sinha,* (1970) 2 SCC 458, at page 460, this Court observed as follows:

> "8**.** Fundamental Rule 56(i) in terms does not require that any opportunity should be given to the concerned government servant to show cause against his compulsory retirement. A government servant serving under the Union of India holds his office at the pleasure of the President as provided in Article 310 of the Constitution. But this "pleasure" doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Article 311. Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this_Court in *A.K. Kraipak v. Union of India* "the aim of rules of natural justice

is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it". *It is true that if a statutory provision can be read consistently with the principles of natural justice, the courts should do so because it must be presumed that the Legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But if on the other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power."*

(emphasis supplied)

20. In *Haradhan Saha v. State of W.B.* (1975) 3 SCC 198, at page 208, a five judge Bench of this Court reiterated the aforesaid view as follows:

"30. Elaborate rules of natural justice are excluded either expressly or by necessary implication where procedural provisions are made in the statute or where disclosure of relevant information to an interested party would be contrary to the public interest. *If a statutory provision excludes the application of any or all the principles of natural justice then the court does not completely ignore the mandate of the legislature.* The court notices the distinction between the duty to act fairly and a duty to act judicially in accordance with natural justice. The detaining authority is under a duty to give fair consideration to the

representation made by the detenu but it is not under a duty to disclose to the detenu any evidence or information. The duty to act fairly is discharged even if there is not an oral hearing. Fairness denotes abstention from abuse of discretion."

(emphasis supplied)

21. It has been the consistent view of this Court that an administrative order when passed by a competent authority may not necessarily be required to be issued only after due compliance with the principles of natural justice. Reference in this regard may be made to the decisions of this Court in *Olga Tellis v. Bombay Municipal Corporation,* (1985) 3 SCC 545; *Carborundum Universal Ltd. v. Central Board of Direct Taxes,* (1989) Supp. 2 SCC 462; and *Ajit Kumar Nag v. G. M. (PJ), Indian Oil Corp. Ltd.,* (2005) 7 SCC 764.

22. The second part of Section 9(6) of the CrPC expressly requires the Court of Session to afford the prosecution and the accused an opportunity of hearing and to obtain their consent beforehand whereas there is no such stipulation under first part of Section 9(6). The omission of such a requirement in case of the High Court pertaining to first part of sub-section (6) of Section 9 is to be construed as a conscious decision on the part of the legislature for, it intended to exclude such a requirement when such power is to be exercised by the High Court.

23. Even otherwise, 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 a 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 a recent decision of this Court in *Ansal*

Properties & Industries Ltd. v. State of Haryana (2009) 3 SCC 553.

24. 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, which prescribes a condition at one place but not at some other place in the same provision, 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. In such cases, it will be wrong to presume that such omission was inadvertent or that by incorporating the condition at one place in the provision the legislature also intended the condition to be applied at some other place in that provision.

25. On a detailed and proper interpretation of Section 9(6) of CrPC there can be only one opinion that it was not necessary for the High Court to observe or comply with the rule of audi alteram partem before notifying a shift in the venue of the trial, for such power of the High Court under Section 9(6) of the CrPC to notify a particular place or places where the Court of Session shall ordinarily hold its sitting, is an administrative power unlike the power of the Court of Session under second part of Section 9(6) which is a purely a judicial power in nature. Consequently, the High Court was under no requirement to follow and to comply with the rule of audi alteram partem before issuing the notification dated 20.05.2006.

26. As stated hereinbefore, a feeble attempt was made to argue the constitutional validity of Section 9(6). Significantly, no such plea was ever raised at any stage and even such ground was not raised in the memo of appeal. An important question of constitutional validity of a provision in a Central Act cannot be permitted to be raised for the first time at the stage of final hearing. The Union of India is also not a party in the present proceeding and in its absence no such issue could be allowed to be raised, argued and decided.

27. Now, I come to Section 11 of the CrPC which makes it explicitly clear that a Court of Judicial Magistrate could be established by the State Government after consultation with the High Court. The State Government is vested with the power, after due consultation with the High Court, to create or to establish for any local area one or more Judicial Magistrate Court of the First Class so as to try any particular case or particular class of cases and that where such special court is established, no other court be created or established for such a case or any class of cases for the trial of which such a Court of Judicial Magistrate has been established.

28. In terms of Section 9(6) and Section 11 of the CrPC, the venue of Court of Session for holding of trial of the cases pending against the appellant was shifted to, and Court of Judicial Magistrate First Class was established in, the District Jail, Siwan.

29. It is the case of the appellant that while issuing the notification dated 20.05.2006, the High Court had no intention of creating a jail Sessions Court in exercise of its administrative power because it left the same to be done by the State Government and further that the notification dated 07.06.2006 was void as the Governor of Bihar could not have exercised power under Section 9(6) of the CrPC. He further submitted that the notification dated 20.05.2006 was not supplied to the appellant and the same was not published in the Gazette and, therefore, the said notification was invalid.

30. The aforesaid submission of the learned senior counsel appearing for the appellant was strongly refuted by Mr. Ranjit Kumar, learned senior counsel appearing for the State of Bihar and also by Mr. P.H. Parekh, learned senior counsel appearing for the High Court of Patna.

31. Mr. Ranjit Kumar specifically submitted that neither such plea was raised in the writ petition nor argued before the High Court nor any such issue was raised before this Court and,

therefore, such an issue cannot be raised for the first time at the time of hearing of the present appeal. Mr. Jethmalani, however, tried to repel the aforesaid objection taken by Mr. Ranjit Kumar contending, inter alia, that the aforesaid issue being a legal one, the same could be amended and could be raised by him at any point of time.

32. I find force in the submissions of Mr. Ranjit Kumar, the learned senior counsel appearing for the State of Bihar that the issue which was sought to be raised about the non-publication of the notification in the official Gazette is a mixed question of law and fact and, therefore, the same should have been raised specifically in the writ petition and at least in this appeal petition. It also does not appear to us from the material available on record that such an issue was ever raised by the appellant before the High Court. Therefore, the issue being raised, for the first time, at the time of hearing of the case before us which, according to us, cannot be permitted to be raised for the first time for the simple reason that the issue being whether the notification dated 20.05.2006 was supplied to the appellant and the same was published in the Gazette or not, is not a pure question of law but a mixed question of law and fact. The said facts were required to be urged evidentially before the courts below. Unless such a factual foundation is available it is not possible to decide such a mixed question of law and fact. Therefore, such a mixed question of law and fact should not be allowed to be raised at the time of final hearing of appeal before this Court. [Reference in this regard may be made to a recent decision of this Court in *Shakti Tubes Ltd. v. State of Bihar,* (2009) 7 SCC 673]. However, in order to do complete justice to the parties the parties were called upon to place their additional documents, relevant to the issues involved, if any, which were accepted during the course of arguments.

33. On going through the records, it is clear that before issuance of the notification dated 20.05.2006, a bunch of correspondences had taken place among the different

authorities. The Superintendent of Police, Siwan under his letter No. 1493 dated 08.05.2006 wrote to the District Magistrate, Siwan that more than 40 cases were pending against the appellant. In the said letter, it was also indicated that there were directions issued by the Patna High Court to dispose of the cases expeditiously. It was further indicated that there was a serious danger to public peace during the presence of the appellant in the court premises due to the fact that his supporters and other co-criminals could attack the witnesses and that even the possibility of threat and attack on the Public Prosecutor and the District Prosecuting Officer could not be ruled out. It was mentioned in the letter that besides that, since the appellant was wanted in many criminal cases, other criminal groups could attack him. It was also mentioned in the letter that since the appellant was a sitting MP and had a large number of supporters, there was every possibility of the working of the other courts in District Court, Siwan being impaired for, his supporters could create disturbance during hearing and that there could be murder and other serious law and order problems during the hearing of the cases of the appellant.

34. The District Magistrate after receipt of the aforesaid communication concurred with the report of the Superintendent of Police, Siwan and wrote to the Home Secretary, Bihar requesting for necessary action for construction of court rooms in District Jail for trial of cases relating to the appellant. The Law Secretary, Government of Bihar thereafter by his letter No. 361/C/2006 dated 09.05.2006 wrote to the Registrar General of the Patna High Court by enclosing a photocopy of the letters of the Superintendent of Police, Siwan and the District Magistrate, Siwan. He alleged that Md. Shahabuddin, the appellant was a high profile MP of Siwan having criminal antecedents, reportedly facing prosecution in more than 40 cases. He also mentioned in his report that his physical production in the court during the trial may be a source of menace to the public peace and tranquility, besides posing a great threat to the internal security extending to other

prosecution witnesses and other prosecutors. It was also indicated in the report that it may also have adverse impact on inside court working condition making the situation surcharged during the trial. He suggested that to promote efficient conducting of trial as also to strengthen its efficacy, the trial of the appellant be conducted by constituting a special court inside the District Jail, Siwan which, according to him, was an imperative need of the time. He therefore, suggested that the Patna High Court may be requested to constitute special courts for the trial of the appellant inside the District Jail, Siwan.

35. The aforesaid records were placed before the Registrar General of the Patna High Court who put up a note upon which the Chief Justice of the Patna High Court directed the matter to be put up before the Standing Committee. A list of Additional Sessions Judges for the trial of sessions cases and a list of Special Magistrates were also placed for consideration before the Standing Committee. Consequently, the matter was placed before the Standing Committee in its meeting held on 11.05.2006. The Agenda for the said meeting is reproduced hereunder:

> "Letters received from the Law Secretary, Government of Bihar regarding designation of Special Court of Session and Court of Judicial Magistrate First Class for expeditious trial of the cases pending against Md. Shahbuddin and for notifying Siwan Jail a place for shifting of Sessions Court and Magisterial Court inside the jail for trial of such cases."

36. In the aforesaid meeting of the Standing Committee, a decision was taken to the following effect:

> "Upon due deliberation and consideration of the letters received from the Law Secretary, regarding designation of Special Court of Session and Court of Judicial Magistrate, 1st Class for expeditious trial of cases pending against Md. Shahbuddin and for notifying the Siwan Jail for sitting of Sessions and Magisterial Courts inside the

> Siwan Jail for trial of such cases. It is resolved to designate one Court of Additional District and Sessions Judge as Special Court for trying the cases triable by the Court of Session and one Court of Judicial Magistrate for trying the cases triable by the Court of Magistrate, First Class. The matter of posting of the Officers i.e. ADJ and Judicial Magistrate, First Class, the matter is placed before the Sub Committee which has been entrusted the transfer and posting under the Annual General Transfer. It is also resolved that the Siwan Jail premises be notified as a place of sitting of Sessions Court and Magisterial Court under provisions of Section 9(6) of Criminal Procedure Code".

37. Subsequent thereto, another note was prepared by the Joint Registrar (Establishment) on 17.05.2006 which was placed before the Registrar General in which it was pointed out that Section 9(6) of the CrPC related only to the Court of Session and not to the Judicial Magistrate and, therefore, a request was made to place the matter before the court for necessary orders. After obtaining the order of the Registrar General and the Chief Justice of the Patna High Court to the aforesaid extent the matter was placed before the Standing Committee which in its meeting dated 18.05.2006 decided as under:

> "It is resolved that the minutes of the proceeding of the last meeting of the Standing Committee held on 11th May, 2006, be approved, with the only modification that in the last line of agenda item No. (4) after section 9 sub-section (6) "and Section 11 sub-section (1) of the Code of Criminal Procedure, 1973, respectively" be added".

38. Pursuant to the aforesaid decision of the Standing Committee of the Patna High Court, the notification dated 20.05.2006 was issued by the Patna High Court which reads as follows :

"In exercise of powers conferred under Sub section (6) of Section 9 of the Criminal Procedure Code, 1973, the High Court have been pleased to decide that the premises of the District Jail, Siwan will be the place of sitting the Court of Session for the Sessions Divisions of Siwan for the expeditious trial of Sessions cases pending against Md. Shahabuddin."

39. By letter No. 5137/Admn. (Appointment) dated 20.05.2006, Mr. Gyaneshwar Shrivastav, Additional District and Sessions Judge was designated as the Presiding Officer (Special Judge) constituted inside the District Jail, Siwan for the expeditious trial of sessions cases pending against the appellant. Similarly, by letter No. 5139, the Registrar General informed the Law Secretary that Patna High Court had been pleased to accept the proposal of the State Government for the establishment of a Special Court of Judicial Magistrate First Class inside the District Jail, Siwan for the expeditious trial of cases pending against the appellant.

40. The Registrar General under letter No. 5141 dated 20.05.2006 informed the Secretary, Department (Personnel) that the Patna High Court has been pleased to recommend the name of Sri Vishwa Vibhuti Gupta, Judicial Magistrate, First Class, Siwan, for his designation as Presiding Officer (Special Magistrate) of the Special Court of Judicial Magistrate, First Class being constituted to function inside the District Jail, Siwan for expeditious trial of cases pending against the appellant.

41. The Registrar General under his letter No. 5145 dated 20.05.2006 wrote to the Superintendent, Secretariat Press, Bihar, Gulzarbagh, Patna with a request to publish the notification issued under Section 9(6) of the CrPC in the next issue of the Bihar Gazette. The issuing section was instructed to issue the same at once on the very same day under a sealed cover as per the direction of the Registrar General. However, the said notification which was directed to be published in the next issue of the Bihar Gazette came to be

published in Part – I of the Bihar Gazette dated 16.08.2006 along with other notifications of various dates. Thereafter, the Law (Judicial) Department, Government of Bihar, Patna published the two Notifications bearing No. 1452 dated 07.06.2006 with S.O. 80 and 82 in the Bihar Gazette (Extra Ordinary Edition) which were assailed by the appellant. The Personnel Department also issued the Notification Nos. 5556 and 5557 dated 12.06.2006 regarding appointment of Presiding Officer for the said two Special Courts.

42. It is therefore conclusively established that the High Court took all necessary steps to get the notification issued and published in the official gazette. If however the Government Press took some time to get the notification published in the official gazette, the High Court cannot be blamed for it nor could the notification be declared to be void particularly when it was so published in the official gazette, as it is established from the records placed before us, although after some delay. The appellant also failed to prove before us and had also failed to plead before the writ Court that the said notification issued by the High Court is void on the ground of non-publication of the same in the official gazette. The appellant has not even pleaded such ground in the writ petition or in the Memorandum of Appeal nor placed any evidence before us to show that any effective order which was prejudicial to him was passed in any of the criminal cases during the aforesaid period. Instead, he took part in all the proceedings without any protest and now at the time of argument is making an effort to take up such issues, which again involve questions of fact, and therefore, cannot be allowed to be raised only at this stage.

43. By issuing one of the aforesaid two impugned notifications the State of Bihar, in exercise of its powers conferred under Section 11 of the CrPC and in consultation with the Patna High Court, was pleased to establish a Court of Judicial Magistrate, First Class inside the District Jail, Siwan to hold its sitting inside the jail premises for the trial of cases

pending against the appellant in the Court of Judicial Magistrate, First Class. The said notification was challenged by the appellant on various grounds. But on consideration of the records of the case, I am satisfied that the impugned notification satisfies all the requirements and all the four corners as envisaged under Section 11 of the CrPC and, therefore, the said notification appears to us to be legal and valid inasmuch as, according to us, the same was issued by the competent authority and also in full compliance with the requirements and the safeguards provided in the said provisions.

44. So far the other notifications which were issued by the Government of Bihar are concerned, the same were issued on 07.06.2006 directing that the Court of Additional District and Sessions Judge of Siwan Sessions Division would now hold its sitting inside the District Jail, Siwan to try sessions cases pending against the appellant. The legality and validity of the same was challenged on the ground that the State Government has no power to issue such a direction under Section 9(6) and Section 11 of the CrPC. As already discussed hereinbefore that the power under Section 9(6) is vested in the High Court and in exercise of the said power the High Court had issued a notification on 20.05.2006 which was also published in the official Gazette. The subsequent notification issued by the State of Bihar appears to be a surplusage, which was issued for making available the jail premises for the purpose of holding the Sessions Court. The competent authority as envisaged under law having issued a notification for constituting and establishing a Sessions Court within the District Jail, Siwan, any further notification by the State Government making the jail premises available for the said purposes cannot be said to be illegal and void.

45. I am, therefore, of the considered view that there is no infirmity in establishing both the Special Courts i.e. the Court of Additional District and Sessions Judge to try sessions cases pending against the appellant and the Court of Judicial

Magistrate, First Class to try the cases pending against the appellant in the Court of Judicial Magistrate, First Class, inside the premises of the District Jail, Siwan as the notification under Section 9(6) was issued in accordance with the provisions of law by the High Court of Patna and subsequent notification was also issued by the Government of Bihar in consultation with the Patna High Court.

46. Another issue which was raised by the learned senior counsel appearing for the appellant was that the notification dated 07.06.2006 issued by the State Government apart from referring to the provisions of Section 9 of the CrPC also refers and relies upon the provisions of Section 14 (1) of the Bengal, Assam and Agra Civil Courts Act, 1887. It was submitted that since the aforesaid reference was made in the notification, the same pinpoints to the fact of non-application of mind by the competent authority and on that ground the notification was illegal and void.

47. I am unable to accept the aforesaid submission for the simple reason that if the notification quotes a wrong section and refers to a wrong provision, the same cannot be held to be invalid if the validity of the same could be upheld on the basis of some other provision. In *N. Mani v. Sangeetha Theatre,* (2004) 12 SCC 278, at page 279, a three judge Bench of this Court succinctly observed as follows:

> *"9.* It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."

48. It is a well-established law that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other

provision or rule, and the validity of such impugned order must be judged on a consideration of its substance and not its form. The principle is that we must ascribe the act of a public servant to an actual existing authority under which it would have validity rather than to one under which it would be void. In such cases, this Court will always rely upon Section 114 Ill. (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the courts will uphold such State action. [Reference in this regard may be made to the decisions of this Court in *P. Balakotaiah v. Union of India,* AIR 1958 SC 232; *Lekhraj Sathramdas Lalvani v. N.M. Shah, Deputy Custodian-cum-Managing Officer,* (1966) 1 SCR 120; *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India,* (1992) 2 SCC 343; *B.S.E. Brokers' Forum, Bombay v. Securities And Exchange Board of India,* (2001) 3 SCC 482]

49. Although the State Government could not have exercised powers under the provisions of Sections 13 and 14 (1) of the Bengal, Assam and Agra Civil Courts Act, 1887 for making available the jail premises for the purpose of holding the Sessions Court, the provisions of the CrPC would be applicable under sub-section (6) of Section 9 of the CrPC. The aforesaid contention, therefore, is also without merit and is rejected.

50. The next contention which was raised by the learned senior counsel appearing for the appellant was that the aforesaid power and jurisdiction could not be exercised by the High Court in respect of the trials relating to one particular individual pending in one Sessions Division. It was further contended that if at all such power was exercisable, it could be exercised only with regard to new cases. If the power could be exercised by the High Court for establishing a new court, the same could be created for a group of cases or a class of cases. There were about 40 cases pending against the

appellant and they were being tried in different courts creating difficulties for conducting the cases at various courts both for the prosecution as also to the appellant. That also created a number of problems as mentioned in the letter dated 08.05.2006 of the Superintendent of Police, Siwan which was affirmed by the District Magistrate. The Law Secretary, Government of Bihar had also affirmed the said reasons. Therefore, in order to dispose of all the cases pending against the appellant most expeditiously at one place without being in any manner disturbed by the factors mentioned in the letter of the Superintendent of Police could be said to be a reasonable ground.

51. Expeditious disposal of cases is also a factor and a necessary concomitant to administration of justice and the hallmark of fair administration of justice. Since the venue of the trial of a group or a class of cases was shifted by establishing and constituting a Court within the District Jail, Siwan, the same cannot be said to be void or invalid in any manner. The aforesaid issue, therefore, stands answered accordingly along with the issue which was argued by the learned senior counsel appearing for the appellant that reason for issuance of notification being only the expeditious disposal of the cases pending against the appellant which is even otherwise a necessary concomitant of the administration of justice, the notification was void as no special reason to exercise such power under Section 9(6) of the CrPC is spelt out and also particularly when the said power is exercised in the cases of only one individual. I have dealt with the aforesaid issue as well and have given my reasons for rejecting the aforesaid submission for, according to me, the said submission is devoid of any merit.

52. The correspondences spell out as to why the trial of all the cases of the appellant should be held at one place. The reasons given in the aforesaid communications were sufficient to arrive at a conclusion which was rightly done by the High

Court to have the trial of all the cases of the appellant pending against him. So far the contention as to whether or not such power as envisaged under Section 9(6) of the CrPC could be exercised in a pending case, there is no reason as to why the said power should not be applicable even to pending cases and, therefore, the said contention is also without any valid substance.

53. The next issue which arises for consideration is based on the submissions of the learned senior counsel appearing for the appellant is that a trial must be conducted in an open court and the constitution of a special Sessions Court in the jail premises of District Jail, Siwan amounts to violation of Articles 14 and 21 of the Constitution of India as also of the provision contained in Section 327 of CrPC. This issue was extensively argued by the learned senior counsel appearing for the appellant. However, learned senior counsel appearing for the respondent vehemently repelled the aforesaid submission and submitted that the grievance of the appellant with regard to a fair trial not being meted out to him in the jail is unfounded. It was further submitted that only because the trial is being conducted against the appellant in the jail premises, it cannot be said that the same was not open and public.

54. According to Black's Law Dictionary (6th Edition, 1990, p. 1091), an "open court" means a court to which the public have a right to be admitted. This term may mean either a court which has been formally convened and declared open for the transaction of its proper judicial business, or a court which is freely open to spectators. In *R. v. Denbigh Justices,* (1974) 2 All ER 1052, 1056 (QBD), it was held that the presence or absence of the press is a vital factor in deciding whether a particular hearing was or was not in the open Courts. It was further held that if the press has been actively excluded, the hearing is not in the open Courts. On the other hand, even if the press is present, if individual members of the public are refused admission, the proceedings cannot be considered to go on in open Courts. In my considered view an 'open court' is

a court to which general public has a right to be admitted and access to the court is granted to all the persons desirous of entering the court to observe the conduct of the judicial proceedings. Although the general rule still remains that a trial must be conducted in an open court, it may sometimes become necessary or rather indispensable to hold a trial inside a jail. Considerations of public peace and tranquility, maintenance of law and order situation, safety and security of the accused and the witnesses may make the holding of a trial inside the jail premises imperative as is the situation in the present case. The legal position as regards the validity of a trial inside the jail premises is well settled. In *Kehar Singh* case (supra) Shetty J. in his concurring judgment, after going through a number of authorities, on this issue observed thus:

> "45. It may now be stated without contradiction that jail is not a prohibited place for trial of criminal cases. Nor the jail trial can be regarded as an illegitimate trial. There can be trial in jail premises for reasons of security to the parties, witnesses and for other valid reasons. The enquiry or trial, however, must be conducted in open Court. There should not be any veil of secrecy in the proceedings. There should not even be an impression that it is a secret trial. The dynamics of judicial process should be thrown open to the public at every stage. The public must have reasonable access to the place of trial. The Presiding Judge must have full control of the Courthouse. The accused must have all facilities to have a fair trial and all safeguards to avoid prejudice."

55. It is evidently clear from the aforesaid decision that a trial inside a jail does not stand vitiated solely because it is conducted inside the jail premises. However, at the same time, there must be compliance of the provisions contained in Section 327 of the CrPC which guarantees certain safeguards to ensure that a trial is an open trial. Section 327 of CrPC is reproduced as hereunder:

"327. Court to be open.

(1) The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the court.

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera:

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court."

56. Learned counsel appearing for the respondent brought to our notice that on the direction of the Presiding Judge, a general notice inviting the public to witness the trial of the appellant was affixed on the jail gate, the appellant was represented by 38 advocates who regularly attended the court in jail premises, the day-to-day proceedings of the court were reported in the newspapers daily and that the entry was allowed to all persons after entering their personal details into a register

maintained by the jail authorities. Furthermore, a retired judicial officer who was a relative of the appellant had attended all the proceedings of the court. All the aforesaid facts have not been controverted by the appellant. We have also not been shown or made aware of any fact that any permission sought for by any intending person to witness the proceedings was refused by the authority. As a matter of fact, presence of a press person in the audience present on one occasion at least was vehemently objected to by the appellant himself. In view of the aforesaid, I find that there was sufficient compliance with Section 327 of the CrPC.

57. After referring to the decision of this Court in the case of *West Bengal v. Anwar Ali Sarkar,* AIR 1952 SC 75, the learned senior counsel appearing for the appellant assailed the impugned notifications on the ground that the object of expeditious trial of cases does not amount to a valid criterion for shifting the venue of the trial. In my considered opinion, the aforesaid decision has no application to the present case as in *Anwar Ali* case (supra) the West Bengal Special Courts Act, 1950 was enacted which provided for differential treatment for the trial of criminals in certain cases and for certain offences. On the contrary, in the present case, the notifications issued by the Patna High Court and the Government of Bihar simply shifted the venue of the trial of cases pending against the appellant in the different courts to the premises of the District Jail, Siwan. I wish to point out that it is well settled law that a classification may be reasonable even though a single individual is treated as a class by himself, if there are some special circumstances or reasons applicable to him alone and not applicable to others. The reasons which necessitated the shifting of the venue of the trial of cases pending against the appellant only have already been discussed hereinbefore. It must be noted that no special procedure was prescribed and the cases were to be conducted and disposed of in accordance with the ordinary criminal procedure as prescribed under the CrPC. I am, therefore, of the considered opinion that no

prejudice was caused to the appellant while shifting the cases to the Special Courts situated inside the premises of District Jail, Siwan. Therefore, I am of the considered view that there is no violation either of Section 327 or of Articles 14 and 21 of the Constitution.

58. In light of the aforesaid discussion, although aforesaid issues were raised before us for challenging the legality and the validity of the three notifications which were issued by the respondents for holding the trial of cases pending against the appellant in one Sessions Division and for constituting and establishing two Special Courts i.e. the Court of Additional District and Sessions Judge to try sessions cases pending against the appellant and the Court of Judicial Magistrate, First Class to try the cases pending against the appellant in the Court of Judicial Magistrate, First Class, within the premises of the District Jail, Siwan, I find no merit and force in the submissions of the learned senior counsel appearing for the appellant.

59. Having held, thus, in the foregoing paragraphs of this judgment, all the issues that were framed in paragraph 9 above, on the basis of the arguments of the parties stand discussed and answered.

60. That being the position, I uphold the legality and the validity of all the three notifications. Consequently, the trial can proceed as against the appellant in all the pending cases and it would continue to be held in terms of the notifications in accordance with law.

61. In view of the foregoing, the order passed by the High Court is upheld and consequently the appeal filed by the appellant stands dismissed. The parties are left to bear their own costs.

R.P. Appeal dismissed.

KAMAL KUMAR AGARWAL

v.

COMMISSIONER OF COMMERCIAL TAXES, WEST BENGAL & ORS.

(Civil Appeal No. 2757 of 2010)

MARCH 26, 2010

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

Sales Tax – West Bengal Sales Tax Act, 1994 – s.68(3) – West Bengal Sales Tax Rules, 1995 – r.211A(6) – Transport from port, airport etc., of consignment of goods despatched from any place outside West Bengal and bound for any place outside West Bengal – Regulatory measures to avoid tax evasion – Consignment of imported goods to be transported through State of West Bengal to Mumbai – Appellant was the Customs House Agent (CHA) of the importer – Declaration made by appellant in prescribed format as per r.211A before taking delivery of the goods – Penalty imposed on appellant for failure to produce the endorsed counter-signed copy of the declaration before the Assessing Authority – Justification of – Held: Justified – With the making of the Declaration, the appellant undertook the obligation to transit the consignment to a destination outside the State, for which the proof was the countersigned copy of the Declaration – Non-production thereof, raised a legal presumption of tax evasion, which the appellant failed to rebut.

The scope and effect of Section 68(3) of the West Bengal Sales Tax Act, 1994 read with sub-Rule (6) of Rule 211A of the West Bengal Sales Tax Rules, 1995 came up for consideration in the present appeal.

Appellant was appointed by an importer as its Customs House Agent [CHA]. The consignment of imported goods was to be thereafter transported to

Mumbai through the State of West Bengal. Appellant made declaration in prescribed format as per r.211A before taking delivery of the goods. The goods passed through the sales tax barrier at Haldia (the first checkpost) and, ultimately, through the exit checkpost at Chichira, and were finally received by the consignee (importer).

The Assistant Commissioner of Commercial Taxes issued show-cause notice to the appellant alleging contravention of Section 68 of the Act in respect of transportation of the goods from *Haldia* to *Chichira*. It was alleged that the appellant failed to produce the endorsed copy of the prescribed Declaration in terms of Rule 211A.

Appellant disputed the maintainability of the notice stating that the subject goods could be moved only by the owner or the importer, directly by itself or through its transporter, and that appellant being a CHA, he had no role to play in the movement of the goods. He submitted that he was appointed by the importer only to get the documents cleared from the Customs and Port authorities and not for movement of the goods and that he was not required to keep an endorsed copy of the said Declaration. The appellant contended that under Rule 211A, the endorsed copy was returned to the person transporting the goods for onward movement to its final destination.

The Assistant Commissioner of Commercial Taxes imposed penalty on the appellant for failure to produce the endorsed copy of the prescribed Declaration in terms of Rule 211A. The order was upheld by the West Bengal Taxation Tribunal as well as the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. The West Bengal Sales Tax Act, 1994 has been enacted to consolidate and amend the laws relating to the levy of tax on sale or purchase of goods in the State of West Bengal. [Para 9] [1050-E-F]

1.2. To ensure that there is no evasion of tax, Section 68 of the Act (which occurs in Chapter VIII of the Act), inter alia, states that no person shall transport from any Port or any checkpost or from any other place any consignment of goods, except in accordance with such restrictions and conditions, as may be prescribed. The important words which occur in Section 68(1) of the Act are "no person". It does not refer to the word "transporter". This aspect is of some significance because Section 68(1) of the Act puts a restriction on the movement of goods. The checkposts are designed and meant to prevent the evasion of sales tax and other dues. This restriction stands lifted subject to the compliance of certain provisions of the Act. Under Section 68(3) of the Act, any consignment of goods may be transported by any person after he furnishes in the prescribed manner such particulars in such Form as may be prescribed. The expression "any person" in sub-section (3) of Section 68 of the Act would include, a clearing and forwarding agent, a transporter or any person who makes a Declaration in the prescribed manner. Therefore, sub-section (3) is not confined to a transporter, as is sought to be argued on behalf of the appellant. Secondly, sub-section (3) indicates that any consignment of goods may be transported by any person after he furnishes particulars in the prescribed Form. [Para 9] [1050-H; 1051-A-E]

1.3. Rule 211A of the West Bengal Sales Tax Rules, 1995 occurs in Chapter XV of the Rules, which deals with restrictions on transport of any consignment of goods, regulatory measures for movement of such goods in transit through West Bengal, interception, search, seizure

and penalty for contravention, and certain measures to prevent evasion of tax on sales within West Bengal. Both Chapter VIII of the Act and Chapter XV of the Rules deal with regulatory measures to avoid tax evasion. Therefore, the machinery provisions under the Act constitute an integral part of the charging provisions. These regulatory measures are intended to ensure that there is no evasion of tax. Therefore, one cannot read the Act by segregating the machinery provisions from the charging provisions. [Para 9] [1051-E-G]

1.4. Rule 211A of the Rules deal with procedure for transport from Port, checkposts, etc., of any consignment of goods despatched from any place outside West Bengal and bound for any place outside West Bengal. In the present case, the subject-goods have come from Hamburg, a place outside West Bengal. They passed through the customs barrier, the port barrier and the sales tax barrier at Haldia [which is the first checkpost] and, ultimately, were bound for Mumbai through the exit checkpost at Chichira. In short, the goods were meant to be in transit through the State of West Bengal and they were bound for Mumbai, which is a place outside West Bengal. In such a situation, Rule 211A of the Rules was applicable. [Para 9] [1051-H; 1052-A-C]

State of West Bengal vs. O.P. Lodha & Anr. **(1997) 105 STC 561 (SC), referred to.**

2.1. If one reads Section 68(3) of the Act along with Rule 211A(1) of the Rules, one finds that 'any person', before taking delivery of the consignment from any port, etc., is required to make a Declaration in the prescribed Form and only on making the requisite Declaration, such 'any person' is allowed to transport the consignment of goods through West Bengal to a place outside the State. In other words, no person will be able to transit the

consignment of goods through the State of West Bengal without making a Declaration in the prescribed Form. Before taking delivery of such goods, such a person shall make a Declaration in the Form appended to Rule 211A(1) of the Rules. Such a Declaration, therefore, is a condition precedent for taking delivery of the goods from Port, Airport, etc., to any place outside the State of West Bengal. In Rule 211A(1) of the Rules, the words used are "any person". These words include, a clearing and forwarding agent, a transporter and Customs House Agent or any other person, who makes a Declaration in the Form prescribed. In this connection, clause (4) of the Declaration is equally important. It mandates a statutory obligation on the declarant, who takes delivery of the consignment to transport such consignment to its destination outside West Bengal [which, in the present case, is Mumbai]. The declarant could be an importer or a clearing and forwarding agent or any person taking delivery of the consignment. This obligation is imposed on the declarant so that, in the event of detection of tax evasion, it would not be open to the declarant to deny his liability which under the Scheme of the Act is an absolute liability in the sense that if the declarant commits breach of his obligation under the Act read with the Rules, then a legal presumption is drawn against him, of course, subject to rebuttal. [Para 10] [1052-D-H; 1053-A-C]

2.2. In the present case, the appellant was the declarant. He had appended his signature on the Declaration prescribed under Rule 211A(1) of the Rules. Under the procedure prescribed in the Rules, the declarant, before taking delivery of the goods from the port, has to make a Declaration in the prescribed Form in which he undertakes unequivocally to transport such consignment to its destination outside the State of West Bengal. With such Declaration, the appellant becomes liable for a breach if he fails to produce the counter-

signed copy of the Declaration before the Assessing Authority. The Declaration is in triplicate. One copy duly endorsed remains with the Sales Tax Authority at the first checkpost which, in the present case, is at Haldia. The remaining two counter-signed copies of the Declaration in the prescribed Form are carried by the declarant to the exit checkpost where one copy is retained by the Authority and the other is given to the declarant. In the present case, the endorsed counter-signed copy of the Declaration was not produced by the appellant in the impugned proceedings before the Assessing Authority. Non-production thereof raises a legal presumption of tax evasion. The reason is that when countersigned copy of the Declaration is not produced, law presumes, unless otherwise proved, that goods in question have been consumed, used or otherwise disposed of within the State. In the present case, there is no evidence whatsoever to rebut that presumption. There is no material to indicate that the goods had crossed the border at Chichira, except a confirmation from the consignee that it has received the goods in question. This Court cannot accept such confirmation from the consignee primarily because, under the Act, the importer/ consignee is not liable for the breach. The consignee is not the declarant. In the present case, the consignee [importer] has not undertaken any obligation to take the goods in transit through the State of West Bengal to its destination outside the State. If one reads carefully Section 68 of the Act, one finds that the provisions of said section contemplate a regulatory measure to ensure that there is no evasion of tax. Even if Section 68 of the Act is treated as a machinery section, even then the said Section has been enacted to ensure that there is no evasion of tax. In that sense, if one examines the Scheme of the Act, it becomes clear that non-production of the endorsed counter-signed copy of the Declaration before the Competent Authority would give rise to a legal

presumption of tax evasion, subject to such presumption being rebutted. [Para 10] [1053-C-H; 1054-A-D]

3.1. On behalf of the appellant, it was urged that, under the Scheme of the Act, the word "transporter" has been defined by way of an *Explanation* to Section 72 of the Act. This argument was advanced to demonstrate that Sections 68, 71B and *Explanation* (a) to Section 72 of the Act are applicable only to a transporter, i.e., the owner or any person having possession or control of a goods vehicle or the driver or any other person in charge of such vehicle, who transports the goods on account of any other person or on his own account and, therefore, the said provisions do not apply to CHA. There is no merit in this argument. The appellant, as a declarant, could be an importer, a clearing and forwarding agent, etc., who undertakes the delivery of the consignment for the purpose of transporting such consignment of goods to its destination outside West Bengal. Once such a Declaration is made by the appellant, he is a transporter, even assuming that the said provisions, namely, Sections 68, 71B and *Explanation* (a) to Section 72, are applicable only to a transporter. [Para 11] [1054-E-H]

3.2. Section 68 imposes a restriction when it says that no person shall transport any consignment of goods from any Railway Station, Airport, Port, etc., except in accordance with such conditions and restrictions, as may be prescribed. In other words, the restriction on movement of goods under sub-section (1) of Section 68 of the Act can only be lifted in a situation falling under sub-sections (3) and (4) of Section 68 of the Act. Under sub-section (3), any person, who seeks delivery of the consignment, is required to undertake an obligation that he is undertaking that delivery for transporting such consignment to its destination outside West Bengal. Section 71B of the Act is consequential upon

contravention of provisions of Section 68 when goods transported are not available. It says that where the goods are transported by a person in contravention of restrictions or conditions prescribed under Section 68 of the Act read with Rule 211A of the Rules, including the Declaration therein, and if such goods are not available for seizure, the Prescribed Authority shall, after giving reasonable opportunity of being heard, impose a penalty. That penalty is an amount not exceeding twenty five per cent of the value of such goods. [Para 11] [1055-A-D]

3.3. Section 71B read with Section 68 of the Act indicates that if the declarant undertakes delivery of the consignment with an obligation to transport such consignment of goods to its destination outside West Bengal and if he contravenes any restrictions or conditions prescribed under Rule 211A of the Rules read with the Declaration, then such person becomes liable to pay penalty on *ad valorem* basis. In the present case, the appellant has not produced before the Assessing Authority any evidence to show that the consignment, whose delivery has been taken from the Customs Port, has gone out of West Bengal. He has not produced the endorsed countersigned copy of the Declaration before the Assessing Authority. In such a case, law presumes that the subject-goods have been sold unauthorisedly within the State of West Bengal and that is the sole reason why penalty has been imposed on *ad valorem* basis, i.e., on certain percentage of the value of the goods. [Para 11] [1055-E-H]

3.4. It was open to the assessee to prove to the contrary and rebut the above legal presumption. However, he has failed to do so. Further, when the appellant signs the Declaration in terms of Rule 211A(1) of the Rules, he, inter alia, undertakes an obligation to act as a transporter. [Para 11] [1056-A-B]

4. There is no merit in the submission of the appellant that sub-rule (6) of Rule 211A applies to a transporter and not to a CHA. If one reads sub-rule (6), it becomes clear that the said sub-rule refers to copies of the Declaration duly countersigned under sub-rule (4) to be produced before the Prescribed Authority at the exit checkpost. Sub-rule (4), in turn, refers to a Declaration being made under sub-rule (2) which, in turn, refers to the Declaration made under sub-rule (1) of Rule 211A of the Rules. Therefore, under sub-rule (4), such a Declaration is required to be countersigned by the Prescribed Authority and two copies thereof are returned to the declarant under sub-rule (1). In other words, sub-rule (6) applies to a declarant who could be a transporter, CHA, clearing and forwarding agent or any person taking delivery of the consignment of goods from the Port for despatch of the same outside West Bengal. Further, clause (4) of the Declaration refers to an obligation being undertaken by the declarant that the delivery is required to be taken by him for transporting such consignment to its destination outside West Bengal. Hence, with the making of the Declaration, the appellant undertook the obligation to transit the consignment to the destination outside the State for which the proof was the countersigned copy of the Declaration. [Para 12] [1058-A-E]

Case Law Reference:

(1997) 105 STC 561 (SC) referred to Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2757 of 2010.

From the Judgment & Order dated 17.12.2007 of the High Court of Judicature at Calcutta in W.P.T.T. No. 633 of 2007.

P.N. Mishra, M. Chandrasekharan, Sunil Gupta, Ritesh Agrawal, Siddharth Sengar, Tara Chandra Sharma, Neelam

Sharma, Rupesh Kumar, Amarjeet Singh, Jatin Zaveri, Vibha Narang for the appearing parties.

The Judgment of the Court was delivered by

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

2. Heard learned counsel on both sides.

3. In this civil appeal arising out of special leave petition, we are required to consider the scope and effect of Section 68(3) of the West Bengal Sales Tax Act, 1994 [`Act', for short] read with sub-rule (6) of Rule 211A of the West Bengal Sales Tax Rules, 1995 [`Rules', for short].

4. On 8th September, 2001, M/s. Sanman Trade Impex Private Limited, Mumbai, appointed the appellant as it's Customs House Agent [CHA] to clear the consignment of goods imported from Hamburg. To enable the appellant to clear the consignment, M/s. Sanman Trade Impex Private Limited sent all the relevant documents required for getting the goods cleared from Kolkata to Mumbai. M/s. Sanman Trade Impex Private Limited also forwarded copy of the Declaration in Form 44A, duly endorsed, to the appellant to be produced before the Sales Tax Authority posted at Haldia [for short, `first checkpost']. M/s. Sanman Trade Impex Private Limited appointed M/s. Brahmaputra Roadways, Kolkata, as it's transporter for onward transportation of imported goods from Kolkata to Mumbai. According to the appellant, the imported goods were to be handed over by him to the transporter, M/s. Brahmaputra Roadways, along with all the necessary documents for onward transportation of goods to it's final destination after getting the goods duly cleared from the Customs and Port Authorities. According to the appellant, the goods were duly received by M/s. Sanman Trade Impex Private Limited on 30th October, 2001, which fact is duly certified by the letter from M/s. Sanman Trade Impex Private Limited informing him that the subject-goods have been received by it intact and in good condition.

5. On 24th August, 2001, M/s. Paluck Trade Links, New Delhi, appointed the appellant as it's CHA to clear the consignment imported by it from London. At this stage, we may state that, in this civil appeal, we are concerned with two items, namely, Soda ash imported from Hamburg and Aluminium Scrap imported from London. To continue the chronology of facts, M/s. Paluck Trade Links, New Delhi, also appointed M/s. Brahmaputra Roadways as it's transporter for onward transportation of the imported goods from Kolkata to Delhi. On July 30, 2002, a show-cause notice was issued to the appellant by the Assistant Commissioner of Commercial Taxes alleging contravention of Section 68 of the Act. The appellant was asked to explain as to why penalty should not be levied for such contravention. In reply, the appellant contended that he had no obligation or liability under Section 68 of the Act in respect of transportation of goods from Haldia to Chichira [exit checkpost]. According to him, the goods could be moved only by the owner or the importer directly by itself or through it's transporter. According to the appellant, a CHA has no role to play in the movement of goods. He submitted that he was appointed by the importer only to get the documents cleared from the Customs and Port Authorities and not for movement of goods for which it is the importer who appoints a transporter. Therefore, according to him, the notice was not maintainable in terms of Section 68 of the Act. The appellant further submitted that he was not required to keep an endorsed copy of the said Declaration. In this connection, reliance was placed on Rule 211A(6) of the Rules. According to the appellant, under Rule 211A(6) of the Rules, the endorsed copy had to be returned to the person transporting the goods for onward movement to it's final destination. Hence, according to him, the show-cause notice was not maintainable.

6. By order dated 27th December, 2002, the Assistant Commissioner of Commercial Taxes imposed a penalty on the appellant for failure to produce the endorsed copy of the Declaration in terms of Rule 211A(6) of the Rules. Being

aggrieved by the order, the appellant preferred a revision before the West Bengal Taxation Tribunal, which application stood rejected. The decision of the West Bengal Taxation Tribunal has been upheld by the High Court vide judgement dated 17th December, 2007, hence, this civil appeal is filed by the appellant.

7. For the sake of convenience, we quote hereinbelow the relevant provisions of the Act:

"68. Restriction on movement of goods.-- [1] To ensure that there is no evasion of tax, no person shall transport from any railway station, steamer station, airport, port, post office or any checkpost set up under section 75 or from any other place any consignment of goods except in accordance with such restrictions and conditions as may be prescribed.

[2] xxx xxx xxx xxx

[3] Subject to the restrictions and conditions prescribed under sub-section (1) or sub-section (2), any consignment of goods may be transported by any person after he furnishes in the prescribed manner such particulars in such form obtainable from such authority or in such other form as may be prescribed.

69. Interception, detention and search of road vehicles and search of warehouse, etc.-- For the purpose of verifying whether any consignment of goods are being or have been transported in contravention of the provisions of section 68 or section 73, the Commissioner, an Additional Commissioner, or any person appointed under sub-section (1) of section 3 to assist the Commissioner, may, subject to such restrictions as may be prescribed,--

[a] intercept, detain and search at any place, referred to in sub-section (1) of section 68, a road vehicle or river craft or any load carried by a person, or

[b] search any warehouse or at any other place in which, according to his information, such goods so transported in contravention of the provisions of section 68 have been stored, or

[c] intercept, detain and search at any checkpost or any other place referred to in sub-section (2) of section 73, any goods vehicle.

71. Penalty for transporting goods in contravention of section 68 or section 73.-- [1] If any goods are seized under section 70, the Commissioner or the Additional Commissioner may, by an order in writing, impose upon the person from whom such goods are seized or the owner of such goods, where particulars of the owner of such goods are available, or where there is no claimant for such goods at the time of such seizure, any person who subsequently establishes his claim of ownership or possession of such goods, after giving such person or owner, as the case may be, a reasonable opportunity of being heard, a penalty of a sum not exceeding fifty per centum of the value of such goods as may be determined by him in accordance with the rules made under this Act:

Provided that the sum of penalty that may be imposed under this sub-section shall not exceed--

[a] thirty per centum of the value of goods if the rate of tax leviable under sub-section (1) of section 17, or sub-section (1) of section 18, or sub-section (1) of section 20, in respect of such goods does not exceed ten per centum;

[b] fifty per centum of the value of goods if the rate of tax leviable under sub-section (1) of section 17, or sub-section (1) of section 18, in respect of such goods exceeds ten per centum.

[2] A penalty imposed under sub-section (1) shall be paid

by the person or the owner of goods, as the case may be, into a Government Treasury or the Reserve Bank of India by such date as may be specified by the Commissioner or the Additional Commissioner in a notice to be issued for this purpose, and the date so specified shall not be earlier than fifteen days from the date of the notice:

Provided that the Commissioner or the Additional Commissioner may, for reasons to be recorded in writing, extend the date of payment of the penalty for such period as he may think fit.

71B. Penalty for contravention of the provisions of section 68 when goods transported are not available.-- [1] Where the goods are, or have been, transported by a person, dealer or casual trader in contravention of restrictions or conditions prescribed under section 68 and such goods are not available for seizure under sub-section (1) of section 70, the Commissioner, or the Additional Commissioner, shall, after giving such person, dealer or casual trader a reasonable opportunity of being heard, impose a penalty of a sum not exceeding twenty-five per centum of the value of such goods.

[2] The procedure for imposition of penalty as prescribed under section 71A shall apply mutatis mutandis in the matter of imposition of penalty under this section.

72. Regulatory measures for transport of goods through West Bengal.

[1] When a goods vehicle, transporting any goods [other than goods sales of which are tax-free under section 24], enters into West Bengal, and such vehicle transporting such goods is bound for any place outside West Bengal, the transporter of such goods shall have to make, in the prescribed manner, a declaration on the body of the consignment note or on a document of like nature that the

goods being so transported in his vehicle shall not be unloaded, delivered or sold in West Bengal and he shall also specify in such declaration the name of the last checkpost through which the vehicle transporting such goods shall move outside West Bengal.

[2] xxx xxx xxx xxx

[3] xxx xxx xxx xxx

[4] The transporter shall carry with him the consignment note or the document of like nature containing the declaration duly countersigned under sub-section (3) while transporting the goods through West Bengal and produce such consignment note or document of like nature before the Commissioner at the last checkpost that he reaches before the exit of the vehicle with such goods from West Bengal, and the Commissioner shall, in the prescribed manner, endorse such consignment note or document of like nature evidencing exit from West Bengal of the vehicle transporting the same goods as are specified in such consignment note and return the same to the transporter.

xxx xxx xxx xxx

[5] The Commissioner may, subject to such conditions and restrictions as may be prescribed, intercept at any place, other than those referred to in sub-section (2) and sub-section (4), within West Bengal any goods vehicle and require the transporter to produce before him the declaration and other documents referred to in sub-section (2) and search such goods vehicle for verification of the goods with the declaration and other documents produced, if any, by the transporter.

[6] Where the Commissioner or the other authority referred to in sub-section (5) is satisfied, for reasons to be recorded in writing, that the transporter has contravened the provisions of this section, he may, after giving the

transporter a reasonable opportunity of being heard, impose, by an order to be passed in the prescribed manner, such penalty, not exceeding twenty-five per centum of the value of the goods so transported, as may be determined by him in accordance with the rules made under this Act.

73. Measures to prevent evasion of tax on sales within West Bengal.

[1] Where a transporter carries from any place in West Bengal in a goods vehicle any consignment of goods and such vehicle is bound for any place outside West Bengal, he shall, in addition to a document of title to the goods, carry with him, in respect of such goods,--

[a] where carriage is caused by a sale of such goods, two copies of the bill or cash memorandum issued by the seller of such goods, and a way bill in the prescribed form, or such document, containing description, quantity or weight and value of the goods and such other particulars as may be prescribed, or

[b] where carriage is caused otherwise than by a sale of such goods, two copies of the forwarding note, delivery challan or document of like nature, by whatever name called, issued by the owner or consignor of such goods, and a way bill in the prescribed form containing such particulars as may be prescribed.

8. We may also quote hereinbelow Rule 211A of the Rules along with the Declaration Form appended to the said Rule:

"211A. Procedure for transport from railway station, port, airport etc. of any consignment of goods despatched from any place outside West Bengal and bound for any place outside West Bengal.-- (1) Where any consignment of

goods other than those referred to in the Explanation to sub-rule (1), or in sub-rule (2), of rule 210 despatched from any place outside West Bengal reaches a railway station, port, airport or post office in West Bengal and such consignment of goods is bound for any destination outside West Bengal, any person shall, before taking delivery of such goods from any such place, make a declaration in the format appended to this sub-rule.

DECLARATION

[See sub-rule (1) of rule 211A]

To

The .....

.....Checkpost/Charge/Section/Division

I, ..., do hereby declare that --

[1] I am a person who is importing or bringing into West Bengal/I am a person who is authorised by the importer mentioned in the invoice/bill of lading/ bill of entry/air consignment note/railway receipt/ postal receipt to take delivery of the consignment of goods despatched from ....., a place situated outside West Bengal;

[2] the said consignment of goods has reached a railway station, port, airport or post office in West Bengal, namely,.....;

[3] the said consignment of goods is bound for a destination outside West Bengal, namely, ...;

[4] the delivery of the said consignment is required to be taken by me for the purpose of transporting such consignment of goods to its destination outside West Bengal;

[5] the said goods shall not be, either wholly or partly, unloaded, delivered or sold in West Bengal;

[6] the statements in this declaration are true to the best of my knowledge and belief;

I am furnishing hereunder the particulars/ information relating to the said consignment:-

[a] name, address and sales tax registration No., if any, of the consignor outside West Bengal: .....

[b] railway receipt/bill of lading/air-consignment note/ postal receipt No. and date thereof: .....

[c] invoice No. and date : .....

[d] description of each commodity of the consignment: .....

[e] quantity/weight of each commodity in the consignment: .....

[f] value of the consignment with custom duty, freight etc.: .....

[g] name, address and sales tax registration No. of the consignee outside West Bengal:.....

[h] name, address, licence No. and telephone No. of the clearing and forwarding agent, if any, in West Bengal who is handling the consignment on behalf of the consignee:.....

[i] mode of transportation of the consignment to the destination outside West Bengal after taking delivery: .....

[j] registration No. of the road vehicle if such goods are transported to such destination by a road vehicle: .....

[k] railway receipt/bill of lading/air-consignment note/ postal receipt No. and date:.....

[l] name of the exit checkpost: .....

[m] approximate date by which the vehicle shall move outside West Bengal: .....

[n] where the goods are being transported by a road vehicle,--

[i] whether there is any possibility of transhipment in West Bengal [please tick whichever is applicable] yes/no;

[ii] if yes,--

[A] place of such transhipment :.....

[B] vehicle No. after the transhipment is effected: .....

[C] name and address of the transporter: .....

[D] consignment note No. and date:.....

Signature of the importer/clearing and forwarding agent/the person taking delivery of the consignment of goods from port, airport, railway station, post office for despatch of the same outside West Bengal

Date: .....

Full name of the signatory
Address of the signatory

Note:- Please strike out whatever is not applicable.

[2] The declaration made under sub-rule (1) shall be produced in triplicate along with a copy of invoice, railway receipt, bill of lading, air-consignment note, postal receipt or a document of like nature before the Assistant Commissioner, Commercial Tax Officer or Assistant Commercial Tax Officer posted at the checkpost situated in or around the railway station, port, airport or post office from which the delivery of the consignment of goods as referred to in sub-rule (1) is to be taken.

[3] If no checkpost has been set up in or around the railway station, port, airport or post office from which the delivery of the consignment of goods as referred to in sub-rule (1) is to be taken, the declaration under the said sub-rule (1) shall be produced in triplicate by the person taking delivery of such goods along with a copy of invoice, railway receipt, bill of lading, air-consignment note, postal receipt or a document of like nature before the Assistant Commissioner or Commercial Tax Officer having jurisdiction over the area in which such railway station, port, airport, or post office is situated.

[4] The declaration along with a copy of documents as referred to in sub-rule (2) or sub-rule (3) produced before any of the authorities mentioned in such sub-rules shall be countersigned with his office seal by such authority and the two countersigned copies of such declaration shall be returned to the person referred to in sub-rule (1).

[5] For the purpose of section 69, the person referred to in sub-rule (1) shall, while transporting any consignment of goods on its way to destination outside West Bengal, stop his vehicles on being asked by such Assistant Commissioner or Commercial Tax Officer as the Commissioner may authorise in this behalf, at any place and present before him, on demand, the countersigned copies of the declaration referred to in the said sub-rule along with invoice, consignment note, road challan or any other document of like nature.

[6] The two copies of the declaration duly countersigned under sub-rule (4) shall be produced before the Assistant Commissioner, Commercial Tax Officer or Assistant Commercial Tax Officer posted at the exit checkpost and such authority shall, on being satisfied upon verification of the goods being transported with those specified in such declaration, endorse such declaration, retain one copy of such endorsed declaration and return the other copy of it to the person transporting such goods for onward movement to the place of destination outside West Bengal after recording in a register the particulars given in the endorsed declaration and other connected documents and also the particulars of transhipment of the goods, if any, in West Bengal.

[7] For the purposes of interception, detention, search and seizure by any authority under this rule, the procedure in such matters contained in the provision of rule 212 shall apply mutatis mutandis.

[8] Any infringement of any provision of this rule by the person referred to in sub-rule (1) shall be deemed to be a contravention of the provisions of section 68 by the person referred to in the said sub-rule."

9. The Act has been enacted to consolidate and amend the laws relating to the levy of tax on sale or purchase of goods in the State of West Bengal. Under Explanation (2) to Section 2(10) of the Act, an agent for handling or transporting of goods or handling of document of title to goods is a "dealer". Agents of all types have been included in the definition of the word "dealer" under Section 2(10) of the Act. [See *State of West Bengal vs. O.P. Lodha & Anr.* (1997) 105 STC 561 (SC)]. Section 68 occurs in Chapter VIII of the Act, which deals with maintenance of accounts; search and seizure of accounts; measures to regulate transport of goods; checkposts; seizure of goods; imposition of penalty, etc. To ensure that there is no evasion of tax, Section 68 of the Act, inter alia, states that no

person shall transport from any Port or any checkpost or from any other place any consignment of goods, except in accordance with such restrictions and conditions, as may be prescribed. [See Section 68(1) of the Act] The important words which occur in Section 68(1) of the Act are "no person". It does not refer to the word "transporter". This aspect is of some significance because Section 68(1) of the Act puts a restriction on the movement of goods. The checkposts are designed and meant to prevent the evasion of sales tax and other dues. This restriction stands lifted subject to the compliance of certain provisions of the Act. Under Section 68(3) of the Act, any consignment of goods may be transported by any person after he furnishes in the prescribed manner such particulars in such Form as may be prescribed. The expression "any person" in sub-section (3) of Section 68 of the Act would include, a clearing and forwarding agent, a transporter or any person who makes a Declaration in the prescribed manner. Therefore, sub-section (3) is not confined to a transporter, as is sought to be argued on behalf of the appellant. Secondly, sub-section (3) indicates that any consignment of goods may be transported by any person after he furnishes particulars in the prescribed Form. In this connection, we may refer to Rule 211A of the Rules. The said Rule occurs in Chapter XV of the Rules, which deals with restrictions on transport of any consignment of goods, regulatory measures for movement of such goods in transit through West Bengal, interception, search, seizure and penalty for contravention, and certain measures to prevent evasion of tax on sales within West Bengal. If one reads Chapter VIII of the Act with Chapter XV of the Rules, one finds that both Chapters deal with regulatory measures to avoid tax evasion. Therefore, in our view, the machinery provisions under the Act constitute an integral part of the charging provisions. These regulatory measures are intended to ensure that there is no evasion of tax. Therefore, one cannot read the Act by segregating the machinery provisions from the charging provisions. Rule 211A of the Rules deal with procedure for

transport from Port, checkposts, etc., of any consignment of goods despatched from any place outside West Bengal and bound for any place outside West Bengal. In the present case, the subject-goods have come from Hamburg, which is a place outside West Bengal. They passed through the customs barrier, the port barrier and the sales tax barrier at Haldia [which is the first checkpost] and, ultimately, were bound for Mumbai through the exit checkpost at Chichira. In short, the goods were meant to be in transit through the State of West Bengal and they were bound for Mumbai, which is a place outside West Bengal. In such a situation, Rule 211A of the Rules was applicable.

10. In this case, we are required to ascertain whether the appellant, who has signed the Declaration in the prescribed Form, has complied with the said Rule? If not, the consequence of non-compliance? If one reads Section 68(3) of the Act along with Rule 211A(1) of the Rules, one finds that `any person', before taking delivery of the consignment from any port, etc., is required to make a Declaration in the prescribed Form and only on making the requisite Declaration, such `any person' is allowed to transport the consignment of goods through West Bengal to a place outside the State. In other words, no person will be able to transit the consignment of goods through the State of West Bengal without making a Declaration in the prescribed Form. Before taking delivery of such goods, such a person shall make a Declaration in the Form appended to Rule 211A(1) of the Rules. Such a Declaration, therefore, is a condition precedent for taking delivery of the goods from Port, Airport, etc., to any place outside the State of West Bengal. In this connection, once again, we may emphasise that in Rule 211A(1) of the Rules, the words used are "any person". These words include, a clearing and forwarding agent, a transporter and Customs House Agent or any other person, who makes a Declaration in the Form prescribed. In this connection, clause (4) of the Declaration is equally important. It mandates a statutory obligation on the declarant, who takes delivery of the

consignment to transport such consignment to its destination outside West Bengal [which, in the present case, is Mumbai]. The declarant could be an importer or a clearing and forwarding agent or any person taking delivery of the consignment. This obligation is imposed on the declarant so that, in the event of detection of tax evasion, it would not be open to the declarant to deny his liability which, in our opinion, under the Scheme of the Act is an absolute liability in the sense that if the declarant commits breach of his obligation under the Act read with the Rules, then a legal presumption is drawn against him, of course, subject to rebuttal. It is important to note, in this connection, that the appellant in this case was the declarant. He had appended his signature on the Declaration prescribed under Rule 211A(1) of the Rules. At this stage, we may point out that, under the procedure prescribed in the Rules, the declarant, before taking delivery of the goods from the port, has to make a Declaration in the prescribed Form in which he undertakes unequivocally to transport such consignment to its destination outside the State of West Bengal. With such Declaration, the appellant becomes liable for a breach if he fails to produce the counter-signed copy of the Declaration before the Assessing Authority. The Declaration is in triplicate. One copy duly endorsed remains with the Sales Tax Authority at the first checkpost which, in the present case, is at Haldia. The remaining two counter-signed copies of the Declaration in the prescribed Form are carried by the declarant to the exit checkpost where one copy is retained by the Authority and the other is given to the declarant. In the present case, the endorsed counter-signed copy of the Declaration has not been produced by the appellant in the impugned proceedings before the Assessing Authority. Non-production thereof raises a legal presumption of tax evasion. The reason is that when countersigned copy of the Declaration is not produced, law presumes, unless otherwise proved, that goods in question have been consumed, used or otherwise disposed of within the State. In the present case, there is no evidence whatsoever to rebut that presumption. There is no material to indicate that the goods had crossed the

border at Chichira, except a confirmation from the consignee that it has received the goods in question. We cannot accept such confirmation from the consignee primarily because, under the Act, the importer/consignee is not liable for the breach. The consignee is not the declarant. In the present case, the consignee [importer] has not undertaken any obligation to take the goods in transit through the State of West Bengal to its destination outside the State. If one reads carefully Section 68 of the Act, one finds that the provisions of said section contemplate a regulatory measure to ensure that there is no evasion of tax. Even if Section 68 of the Act is treated as a machinery section, even then the said Section has been enacted to ensure that there is no evasion of tax. In that sense, if one examines the Scheme of the Act, it becomes clear that non-production of the endorsed counter-signed copy of the Declaration before the Competent Authority would give rise to a legal presumption of tax evasion, subject to such presumption being rebutted.

11. On behalf of the appellant, it was urged that, under the Scheme of the Act, the word "transporter" has been defined by way of an Explanation to Section 72 of the Act. This argument was advanced to demonstrate that Sections 68, 71B and Explanation (a) to Section 72 of the Act are applicable only to a transporter, i.e., the owner or any person having possession or control of a goods vehicle or the driver or any other person in charge of such vehicle, who transports the goods on account of any other person or on his own account and, therefore, the said provisions do not apply to CHA. We find no merit in this argument. As stated above, the appellant, as a declarant, could be an importer, a clearing and forwarding agent, etc., who undertakes the delivery of the consignment for the purpose of transporting such consignment of goods to its destination outside West Bengal. Once such a Declaration is made by the appellant, he is a transporter, even assuming that the said provisions, namely, Sections 68, 71B and Explanation (a) to Section 72, are applicable only to a transporter. The matter can

be looked at from another angle. Section 68 imposes a restriction when it says that no person shall transport any consignment of goods from any Railway Station, Airport, Port, etc., except in accordance with such conditions and restrictions, as may be prescribed. In other words, the restriction on movement of goods under sub-section (1) of Section 68 of the Act can only be lifted in a situation falling under sub-sections (3) and (4) of Section 68 of the Act. Under sub-section (3), any person, who seeks delivery of the consignment, is required to undertake an obligation that he is undertaking that delivery for transporting such consignment to its destination outside West Bengal. Section 71B of the Act is consequential upon contravention of provisions of Section 68 when goods transported are not available. It says that where the goods are transported by a person in contravention of restrictions or conditions prescribed under Section 68 of the Act read with Rule 211A of the Rules, including the Declaration therein, and if such goods are not available for seizure, the Prescribed Authority shall, after giving reasonable opportunity of being heard, impose a penalty. That penalty is an amount not exceeding twenty five per cent of the value of such goods. Section 71B read with Section 68 of the Act indicates that if the declarant undertakes delivery of the consignment with an obligation to transport such consignment of goods to its destination outside West Bengal and if he contravenes any restrictions or conditions prescribed under Rule 211A of the Rules read with the Declaration, then such person becomes liable to pay penalty on ad valorem basis. In the present case, the appellant has not produced before the Assessing Authority any evidence to show that the consignment, whose delivery has been taken from the Customs Port, has gone out of West Bengal. He has not produced the endorsed countersigned copy of the Declaration before the Assessing Authority. In such a case, law presumes that the subject-goods have been sold unauthorisedly within the State of West Bengal and that is the sole reason why penalty has been imposed on ad valorem basis, i.e., on certain percentage of the value of the goods. It

was open to the assessee to prove to the contrary and rebut the above legal presumption. However, he has failed to do so. Further, when the appellant signs the Declaration in terms of Rule 211A(1) of the Rules, he, inter alia, undertakes an obligation to act as a transporter. Under Section 72 of the Act, if any person transports a consignment from any place outside the State and, in order to go to its destination at a place outside the State, seeks to pass through the State of West Bengal, he is required to make a Declaration, as prescribed in Rule 223(1) of the Rules on the body of the consignment note before the appropriate Authority of the first checkpost for his verification and counter-signature. Further, the transporter is required to carry such a Declaration and other documents and produce them before the Prescribed Authority of the last checkpost for his verification. In our view, Section 72 of the Act read with Rule 223(1) of the Rules has no application to the facts of the present case. Section 72, no doubt, deals with goods being transported through the State of West Bengal; however, the said section specifically refers to entry of a "goods vehicle" into West Bengal and such vehicle transporting the goods is bound for a place outside West Bengal. In the present case, we are concerned with goods coming from Hamburg in Germany into the Port in West Bengal, hence, Section 72 of the Act has no application. Moreover, the word "transporter" has been defined specifically for the purpose of only Sections 72 and 73 of the Act and has not been defined for the entire Act. In the circumstances, it is not open to the appellant to say that there is a clear dichotomy between a transporter and a CHA/clearing and forwarding agent. In the present case, we are concerned with the contravention of the provisions of Section 68 of the Act by a person who makes a Declaration in the prescribed Form in terms of Rule 211A(1) of the Rules.

12. One of the key arguments advanced on behalf of the appellant herein was that Rule 211A(6) of the Rules applies to the transporter/carrier, who is in possession of two countersigned copies of the Declaration when the goods are

being transported across the exit checkpost of West Bengal, because it is the transporter who gets back the endorsed Declaration as "a person transporting the goods for onward movement". According to the appellant, Rule 211A(8) of the Rules has no application as the said sub-rule is consequential to the applicability of sub-rule (6) of Rule 211A, which sub-rule is applicable only in the case of a transporter. In other words, according to him, sub-rule (6) casts an obligation on the transporter and not upon the CHA, whose assignment is confined to the precincts of the Customs Port. We find no merit in this submission. Under sub-rule (2) of Rule 211A of the Rules, the Declaration, in triplicate, is required to be produced along with the copy of invoice, railway receipt, bill of lading or document of like nature before the Prescribed Authority posted at the checkpost situated in or around the Railway Station, Port, Airport or Post Office from which the delivery of the consignment of goods is to be taken. Sub-rule (3) of Rule 211A of the Act deals with a situation where there is no checkpost set up in or around the Railway Station, Port, etc. We are not concerned with that situation in this case. Under sub-rule (5), it is, inter alia, provided that, in cases of interception, detention and search of vehicles falling under Section 69 of the Act, the declarant under sub-rule (1) shall, while transporting any consignment on it's way to the destination outside West Bengal, shall stop his vehicle on being asked by the Prescribed Authority to produce the countersigned copies of the Declaration referred to in sub-rule (1) of Rule 211A along with the invoice, consignment note, road challan or any other document of like nature. Therefore, sub-rule (5) squarely applies to a declarant under sub-rule (1). Under sub-rule (6), two copies of the Declaration duly countersigned shall be produced before the Prescribed Authority posted at the exit checkpost and such Authority shall, on being satisfied upon verification of the goods being transported with those specified in the Declaration, endorse such Declaration, retain one copy of such endorsed Declaration with it and return the other copy to the person transporting such goods for onward movement to the place of

destination outside West Bengal after recording in his register the particulars given in the Declaration. As stated above, it is the case of the appellant that sub-rule (6) of Rule 211A applies to a transporter and not to a CHA. We find no merit in this submission. If one reads sub-rule (6), it becomes clear that the said sub-rule refers to copies of the Declaration duly countersigned under sub-rule (4) to be produced before the Prescribed Authority at the exit checkpost. Sub-rule (4), in turn, refers to a Declaration being made under sub-rule (2) which, in turn, refers to the Declaration made under sub-rule (1) of Rule 211A of the Rules. Therefore, under sub-rule (4), such a Declaration is required to be countersigned by the Prescribed Authority and two copies thereof are returned to the declarant under sub-rule (1). In other words, sub-rule (6) applies to a declarant who could be a transporter, CHA, clearing and forwarding agent or any person taking delivery of the consignment of goods from the Port for despatch of the same outside West Bengal. Further, as stated above, clause (4) of the Declaration refers to an obligation being undertaken by the declarant that the delivery is required to be taken by him for transporting such consignment to its destination outside West Bengal. Hence, with the making of the Declaration, the appellant undertook the obligation to transit the consignment to the destination outside the State for which the proof was the countersigned copy of the Declaration.

13. Before concluding, we may state that a request was made by the learned senior counsel appearing on behalf of the appellant that, in the event of this Court rejecting this civil appeal, the Department may give the benefit of instalments to the appellant to make payment towards impugned penalty. We do not wish to express any opinion thereon.

14. Accordingly, we find no merit in this civil appeal, which is, accordingly, dismissed with no order as to costs.

B.B.B. Appeal dismissed.

RAMDAS ATHAWALE
v.
UNION OF INDIA AND ORS.
(Writ Petition (Civil) No. 86 of 2004)

MARCH 29, 2010

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

Constitution of India, 1950:

Articles 87, 118, 122 – President's special address at the commencement of session – Requirement of, when the House resumed after it was adjourned sine die – Held: Resumption of House for the purpose of continuing its business would not amount to commencement of new session – No special address by President required – Rules of Procedure and Conduct of Business in Lok Sabha – Rule 15.

Articles 122, 32 – Speaker's decision directing resumption of House which was adjourned sine die – Writ petition questioning the propriety of Speaker's decision – Maintainability of – Held: Courts are precluded from making inquiry into proceedings of Parliament on the ground of any irregularity of procedure – Question whether the resumed sitting was to be treated as the second part of the session was essentially a matter relating purely to the procedure of Parliament and cannot be tested and gone into in a proceeding under Article 32 – Judicial review – Scope of.

Article 122 – Speaker – Powers and duties – Held: Speaker is the guardian of the privileges of the House and its spokesman and representative upon all occasions – He is the interpreter of its rules and procedure, and is invested with the power to control and regulate the course of debate

and to maintain order – Under Article 122 (2), the decision of the Speaker in whom powers are vested to regulate the procedure and the Conduct of Business is final and binding on every Member of the House.

Article 32 – Scope of – Held: Petition under Article 32 not entertainable unless it is shown that the petitioner had some fundamental right.

Article 85 – Prorogation and adjournment – Distinction between.

The Fourteenth Session of the Thirteenth Lok Sabha commenced on 2nd December, 2003 and was adjourned *sine die* on 23rd December, 2003. Thereafter on 20th January, 2004, the Secretary General of the Lok Sabha, by way of a Notice informed all the Members of the Thirteenth Lok Sabha, duly stating that under Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha, the Speaker has directed that the Lok Sabha, which was adjourned *sine die* on 23rd December, 2003 would resume its sittings on 29th January, 2004.

In a writ petition filed under Article 32 of the Constitution of India, a member of Lok Sabha challenged the constitutional validity of the proceedings in the Lok Sabha commencing from 29th January, 2004 on the ground that the Session commenced on 29th January, 2004 was the first Session of the Lok Sabha in the year 2004, and there was no address by the President informing the Parliament, the cause of its summons as provided for and required under Article 87 (1) of the Constitution of India.

Dismissing the writ petition, the Court

HELD: 1.1. The scheme of the Constitution, from the compendium of Articles 79, 83, 85 and 86 reveals that

Union Parliament consists of the President and the Council of States and the House of the People unless dissolved earlier, the House of the People continues for five years from the date of its first meeting, and the expiration of five years operates as a dissolution of the House except that during proclamation of Emergency, the period of five years may be extended at a time not exceeding one year and not extending in any case beyond six months after such proclamation has ceased to operate. The President is under constitutional mandate to summon each House of the Parliament from time to time to meet at such time and place as he thinks fit. The President alone is vested with the power to summon the House from time to time and prorogue the House or either House; and to dissolve the House of the People. The President has a right to address either House or both the Houses together and for that purpose require the attendance of Members. He may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and the House to which message is sent is required to take the same into consideration. [Para 10] [1071-A-E]

1.2. A plain reading of Article 87 clearly suggests that (a) the President shall address at the commencement of the first session after each general election to the House of the People; and (b) at the commencement of the first session of each year. In the present case, the Winter session of the House of the People commenced on 2nd December, 2003 and was adjourned *sine die* on 23rd December, 2003. The resumption of its sittings on 29th January, 2004, by no stretch of imagination, could be characterized as commencement of a new session. The House merely resumed its sittings and continued the Session which actually commenced on 2nd December, 2003. As the House was adjourned *sine die* on 23rd

December, 2003, the resumption of its sittings is nothing but reconvening of the same Session after its adjournment *sine die*. It is the second part of the same session. [Paras 12 and 14] [1071-H; 1072-A, C, D]

1.3. The words "first session of the year" employed in Article 87 (1) has no reference to resumption of the adjourned session. The session commences with the President's summoning the House to meet. It is Article 85 which deals with the summoning of Sessions of Parliament, prorogation and dissolution of the House of People. The constitutional provision does not require summoning of every Session of Parliament which was adjourned for its own reasons after commencement of its Session pursuant to the summons of the President. It is only when a House is prorogued and a new Session thereafter summoned under Article 85(2) of the Constitution, the special address by the President as provided for under Article 87(1) is required with reference to the new Session so as to inform the Parliament of the cause of its summons. No such special address is needed, if a Sessions is adjourned *sine die* in the previous year and the sittings of the same Session is resumed in the next year. [Para 15] [1072-E-H]

1.4. Articles 85 and 87 were amended so as to do away with the summoning of Parliament twice a year and the constitutional requirement of the President's special address at the commencement of each Session. The present constitutional position is that not more than six months are to elapse between the last Session and the first day of the following Session. The House is now prorogued only once a year and the President addresses both Houses of Parliament only at the commencement of the first Session of each year. Article 87, as it originally stood, provided for the President's address in 'every Session of the year'. The first amendment in 1951

substituted the words "every Session" by "first Session of each year". By the first amendment, Articles 85 and 174 were also amended. [Paras 16 and 17] [1073-A-D]

Special Reference No. 1 of 2002 **(2002) 8 SCC 237, relied on.**

Kaul & Shakdher's Practice and Procedure of Parliament **Fifth Edition; *May's Parliamentary Practice,* referred to.**

1.5. An adjournment is an interruption in the course of one and the same session, whereas a prorogation terminates a Session. The effect of prorogation is to put an end with certain exceptions to all proceedings in Parliament then current. A Session commenced in terms of the order of the President summoning the House can come to an end only with the day on which the President prorogue the House or dissolves Lok Sabha. It is thus clear that whenever the House resumes after it is adjourned *sine die*, its resumption for the purpose of continuing its business does not amount to commencement of the session. The resumed sitting of the House, in this case, on 29th January, 2004, does not amount to commencement of the first Session in the year 2004. [Paras 20, 22, 23] [1073-B, G; 1076-D]

2. Under Article 122 of the Constitution, the Courts are precluded from making inquiry into proceedings of Parliament. A plain reading of Article 122 makes it abundantly clear that the validity of any proceeding in the Parliament shall not be called in question on the ground of any irregularity of procedure. The prayer in the writ petition was to declare the proceedings in the Lok Sabha pursuant to the Notice dated 20th January, 2004 issued under the directions of the Speaker as unconstitutional. The petitioner essentially raised a dispute as to the regularity and legality of the proceedings in the House of the People and propriety of the Speaker's direction to

resume sittings of the Lok Sabha which was adjourned *sine die* on 23rd December, 2003. The Speaker is the guardian of the privileges of the House and its spokesman and representative upon all occasions. He is the interpreter of its rules and procedure, and is invested with the power to control and regulate the course of debate and to maintain order. The powers to regulate Procedure and Conduct of Business of the House of the People vests in the Speaker of the House. By virtue of the powers vested in him, the Speaker, in purported exercise of his power under Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha got issued notice dated 20th January, 2004 through the Secretary General of the Lok Sabha directing resumption of sittings of the Lok Sabha which was adjourned *sine die* on 23rd December, 2003. Whether the resumed sittings on 29th January, 2004 was to be treated as the second part of the 14th session as directed by the Speaker is essentially a matter relating purely to the procedure of Parliament. The validity of the proceedings and business transacted in the House after resumption of its sittings cannot be tested and gone into by this Court in a proceeding under Article 32 of the Constitution of India. [Paras 25, 26] [1079-D; G-H; 1080-A-F]

3. Article 118(1) provides that each House of Parliament may make rules for regulating, subject to the provisions of the Constitution, its procedure and conduct of its business. The rules, in fact, are made and known as Rules of Procedure and Conduct of Business in Lok Sabha. Article 118(1) makes it perfectly clear that when the House is to make any rules as prescribed by it, those rules are subject to the provisions of the Constitution which obviously include Fundamental Rights guaranteed by Part III of the Constitution. Article 122(2) confers immunity on the officers and members of Parliament in whom powers are vested by or under the Constitution for

regulating procedure or conduct of the business or for maintaining order in Parliament from being subject to the jurisdiction of any Court in respect of the exercise by him of those powers. [Paras 27-29] [1080-G; 1081-C-H]

4. The Notice dated January 20, 2004 is self-explanatory and reveals that the House was adjourned *sine die* on 23rd December, 2003 by the Speaker. It is the Speaker's direction to resume its sittings from 29th January, 2004 onwards. The Notice clearly says that it was the second part of the fourteenth session and was likely to conclude on 5th February, 2004. The Speaker's decision adjourning the House *sine die* on 23rd December, 2003 and direction to resume its sittings relates to proceedings in Parliament and is of procedural in nature. The Business transacted and the validity of proceedings after the resumption of its sittings pursuant to the directions of the Speaker cannot be inquired into by the Courts. [Para 30] [1082-B-D]

5. Under Article 122 (2), the decision of the Speaker in whom powers are vested to regulate the procedure and the Conduct of Business is final and binding on every Member of the House. The validity of the Speaker's decision adjourning the House *sine die* on 23rd December, 2003 and latter direction to resume its sittings cannot be inquired into on the ground of any irregularity of procedure. The business transacted and the validity of proceedings after the resumption of sittings of the House pursuant to the directions of the Speaker cannot be inquired into by the Courts. No decision of the Speaker can be challenged by a member of the House complaining of mere irregularity in procedure in the conduct of the business. Such decisions are not subject to the jurisdiction of any Court and they are immune from challenge. [Para 31] [1082-E-G]

In re, Under Article 143, Constitution of India **(1965) 1 SCR 413;** *Indira Nehru Gandhi v. Raj Narain & Anr.* **1975 (Supp.) SCC 1, explained.**

6. It is a right of each House of Parliament to be the sole judge of the lawfulness of its own proceedings. The Courts cannot go into the lawfulness of the proceedings of the Houses of Parliament. The Constitution aims at maintaining a fine balance between the Legislature, Executive and Judiciary. The object of the constitutional scheme is to ensure that each of the constitutional organs function within their respective assigned sphere. Precisely, that is the constitutional philosophy inbuilt into Article 122 of the Constitution of India. [Para 31] [1082-H; 1083-A-B]

M.S.M Sharma v. Dr. Shree Krishna Sinha **AIR 1960 SC 1186, referred to.**

7. One more aspect of the matter is that the petition has become infructuous, since the Lok Sabha was dissolved and thereafter two elections have been held. The issue raised in the petition was purely a hypothetical question. There is no existing *lis* between the parties. It is settled practice that this Court does not decide matters which are only of academic interest on the facts of a particular case. [Para 34] [1084-E-F]

R.S. Nayak v. A.R. Antulay **(1984) 2 SCC 183, referred to.**

8. It is equally well settled that Article 32 of the Constitution guarantees the right to a Constitutional remedy and relates only to the enforcement of the right conferred by Part III of the Constitution and unless a question of enforcement of a fundamental right arises, Article 32 does not apply. It is well settled that no petition under Article 32 is maintainable, unless it is shown that the petitioner has some fundamental right. There is not

even a whisper of any infringement of any fundamental right guaranteed by Part III of the Constitution in the writ petition. Whenever a person complains and claims that there is a violation of any provision of law or a Constitutional provision, it does not automatically involve breach of fundamental right for the enforcement of which alone Article 32 of the Constitution is attracted. It is not possible to accept that an allegation of breach of law or a Constitutional provision is an action in breach of fundamental right. The writ petition deserves dismissal only on this ground. [Paras 37 and 38] [1085-B-F]

Northern Corporation v. Union of India **(1990) 4 SCC 239, relied on.**

Case Law Reference:

(2002) 8 SCC 237	**relied on**	**Para 19**
(1965) 1 SCR 413	**explained**	**Para 29**
1975 (Supp.) SCC 1	**explained**	**Para 31**
AIR 1960 SC 1186	**referred to**	**Para 32**
(1984) 2 SCC 183	**referred to**	**Para 35**
(1990) 4 SCC 239	**relied on**	**Para 37**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 86 of 2004.

Under Article 32 of the Constitution of India

H.K. Puri for the Appellant.

G.E. Vahanvati, Indira Jaisingh, ASG, A. Mariaputham, Devdatt Kamat, T.A. Vimal Dubey, Chinmoy Pradip Sharma Anil Katiyar, P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This writ application under Article 32 of the Constitution of India has been filed by a Member of Lok Sabha, challenging the validity of the proceedings in the Lok Sakha commencing from 29th January, 2004 on the ground that the President has not addressed both Houses of Parliament as envisaged under Article 87 of the Constitution. The prayer in the writ petition is to issue appropriate Writ or direction or order declaring that the Session of the Lok Sabha called by the Notice dated January 20, 2004 is the first Session in the year 2004; and the proceedings of the Lok Sabha pursuant to the Notice dated 20th January, 2004 are unconstitutional, illegal, null and void.

2. The case set up by the petitioner is that the Session commenced on 29th January, 2004 was the first Session of the Lok Sabha in the year 2004, and there was no address by the President informing the Parliament, the cause of its summons as provided for and required under Article 87 (1) of the Constitution of India. The contention of the petitioner was that the "first Session" means, the Session, which is held first in point of time in a given year. According to him, the Session, which commenced on 29th January, 2004 was the first Session of the House of the year 2004. The sittings thereafter continued up to 5th February, 2004.

3. There is no dispute before us that the Fourteenth Session of the Thirteenth Lok Sabha commenced on 2nd December, 2003 and was adjourned *sine die* on 23rd December, 2003. Thereafter on 20th January, 2004, the Secretary General of the Lok Sabha, by way of a Notice informed all the Members of the Thirteenth Lok Sabha, duly stating that under Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha, the Speaker has directed that the Lok Sabha, which was adjourned *sine die* on 23rd December, 2003 will resume its sittings on 29th January, 2004.

4. Learned counsel for the petitioner submitted that in terms of mandatory requirement as provided for in Article 87

(1) of the Constitution of India, the President has to address both Houses of Parliament at the commencement of the Session every year and inform the Parliament of the causes of its summons. It was submitted that the commencement of the first Session of each year has to be with reference to the first Session of each year and year shall mean a year reckoned according to British calendar. The contention was that the sittings of the Lok Sabha from 29th January, 2004 were unconstitutional or it could not have been assembled at all in the absence of special address of both the Houses of Parliament by the President. The House of People could have assembled only after the special address by the President.

5. The learned Attorney General submitted that in the instant case the Winter Session of Parliament had commenced on 2nd December, 2003 and was adjourned *sine die* on 23rd December, 2003. The House resumed sitting of that adjourned Session in pursuance of the Notice of the Secretary General dated 20th January, 2004 under Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha. It was submitted that the sitting commenced on 29th January, 2004 was not the commencement of a new Session, but was a continuation of Winter Session, which was adjourned on 23rd December, 2003. The learned Attorney General further submitted that the word "first Session" of the year in Article 87 cannot refer to the resumption of the adjourned Session. It must refer to a new Session. It was submitted that the distinction in procedure between the resumption of an adjourned Session and summoning of a new Session may have to be borne in mind for the purpose of interpretation of Article 87 (1) of the Constitution of India. The submission was that, for the resumption of an adjourned Session, the Speaker, under Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha, directs issuance of a notice informing the Members of the next sitting of the Session. But if the House is prorogued, it is only the President who can summon the next Session of the Parliament. It was submitted that in the present case, Article

87 (1) has no application, as the Winter Session was only resumed on 29th January, 2004 and no new Session was summoned.

6. In dealing with these contentions, we shall follow the sequence of events and examine the constitutionality of each happening that would clearly demonstrate that the matter lies in a narrow compass than what has been made to appear.

7. In the United Kingdom the Queen and two Houses of Parliament constitutes the Legislature so that the Queen is an integral part of the Legislature.

8. In India the same model has been adopted. Article 79 of the Constitution provides that there shall be a Parliament for the Union, which consists of the President and the two Houses to be known respectively as the Council of the State and the House of the People. Article 83 (2) provides that the House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House, except during a proclamation of Emergency, the period of five years may be extended for a period not extending one year at a time, and not extending in any case beyond six months after such proclamation cease to operate. Under Article 85 (1), the President has to summon each House of the Legislature at such time and place as he thinks fit, so that six months do not intervene between its last sitting in one Session and its first sitting in the next. Article 85 (2) provides as follows:

"The President may from time to time—

(a) prorogue the Houses or either House; and

(b) dissolve the House of the People."

9. Article 86 speaks about Right of the President to address and send messages to Houses.

10. The scheme of the Constitution, as is evident from the compendium of Articles referred to hereinabove, reveals that Union Parliament consists of the President and the Council of States and the House of the People unless dissolved earlier, the House of the People continues for five years from the date of its first meeting, and the expiration of five years operates as a dissolution of the House except that during proclamation of Emergency, the period of five years may be extended at a time not exceeding one year and not extending in any case beyond six months after such proclamation has ceased to operate. The President is under constitutional mandate to summon each House of the Parliament from time to time to meet at such time and place as he thinks fit. The President alone is vested with the power to summon the House from time to time and prorogue the House or either House; and to dissolve the House of the People. The President has a right to address either House or both the Houses together and for that purpose require the attendance of Members. He may send messages to either House of Parliament, whether with respect to a Bill then pending in Parliament or otherwise, and the House to which message is sent is required to take the same into consideration.

11. Article 87 is an important Article for our present purpose and it reads as follows:

> *"87. Special address by the President:-* (1) At the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year the President shall address both Houses of Parliament assembled together and inform Parliament of the causes of its summons.
>
> (2) Provision shall be made by the rules regulating the procedure of either House for the allotment of time for discussion of the matters referred to in such address."

12. A plain reading of Article 87 clearly suggests that (a) the President shall address at the commencement of the first session after each general election to the House of the People; and (b) at the commencement of the first session of each year.

13. The question is whether in this case was there any failure in complying with the requirement as provided for under Article 87 (1) of the Constitution?

14. In the present case, the Winter session of the House of the People commenced on 2nd December, 2003 and was adjourned *sine die* on 23rd December, 2003. The resumption of its sittings on 29th January, 2004, by no stretch of imagination, could be characterized as commencement of a new session. The House merely resumed its sittings and continued the Session which actually commenced on 2nd December, 2003. As it is evident from the record, the House was adjourned *sine die* on 23rd December, 2003, the resumption of its sittings is nothing but reconvening of the same Session after its adjournment *sine die*. It is the second part of the same session.

15. The words "first session of the year" employed in Article 87 (1) has no reference to resumption of the adjourned session. The session commences with the President's summoning the House to meet. It is Article 85 which deals with the summoning of Sessions of Parliament, prorogation and dissolution of the House of People. The constitutional provision does not require summoning of every Session of Parliament which was adjourned for its own reasons after commencement of its Session pursuant to the summons of the President. It is only when a House is prorogued and a new Session thereafter summoned under Article 85 (2) of the Constitution, the special address by the President as provided for under Article 87 (1) is required with reference to the new Session so as to inform the Parliament of the cause of its summons. No such special address is needed, if a Sessions is adjourned *sine die* in the previous year and the sittings of the same Session is resumed in the next year.

16. Articles 85 and 87 were amended so as to do away with the summoning of Parliament twice a year and the constitutional requirement of the President's special address at the commencement of each Session. The present constitutional position is that not more than six months are to elapse between the last Session and the first day of the following Session. The House is now prorogued only once a year and the President addresses both Houses of Parliament only at the commencement of the first Session of each year.

17. Article 87, as it originally stood, provided for the President's address in 'every Session of the year'. The first amendment in 1951 substituted the words "every Session" by "first Session of each year". By the first amendment, Articles 85 and 174 were also amended. While intervening in the debate Dr. B.R. Ambedkar, with reference to amendment to Article 85, stated:

> "…due to the word summon, the result is that although Parliament may sit for the whole year adjourning from time to time, it is still capable of being said that Parliament has been summoned only once and not twice. *There must be prorogation in order that there may be a new session.* It is felt that this difficulty should be removed and consequently the first part of it has been deleted. The provision that whenever there is a prorogation of Parliament, the new session shall be called within six months is retained."
>
> (emphasis supplied)

18. Kaul & Shakdher's Practice and Procedure of Parliament (Fifth Edition, at page 180) gives the background to the aforesaid amendment and observed:

> "Before article 87(1) was amended in its present form by the Constitution (First Amendment Act, 1951, the article required the President to address both the Houses

> assembled together at the commencement of each session. Accordingly, the President addressed each of the three sessions held in 1950 of the Provisional Parliament.
>
> During the Third Session, a question arose whether the next session might commence with the President's Address or would the session be merely adjourned to meet again on 5 February, 1951, which would obviate the necessity of the President's Address. Speaker Mavalankar, in this connection, suggested that instead of the President addressing each session, it might be provided that he would give his Address at the commencement of the first session (First Amendment) Bill, 1951, as reported by the Select Committee, observed: "The real difficulty of course is that this (Address) involves a certain preparation outside this House which is often troublesome. Members are aware that when a coach and six horses come, all kinds of things have to be done for that purpose. Anyhow, that trouble does not fall on the House or members thereof, but on the administration of Delhi"."

Distinction between Prorogation and Adjournment:

19. In the matter of *Special Reference No. 1 of 2002*[1], a Constitution Bench of this Court while interpreting Article 85 (2) of the Constitution observed:

> "When the House is prorogued, all the pending proceedings of the House are not quashed and pending Bills do not lapse. The prorogation of the House may take place at any time either after the adjournment of the House or even while the House is sitting. An adjournment of the House contemplates *postponement of the sitting or proceedings of either House to reassemble on another specified date.* During currency of a session the House may be adjourned for a day or more than a day.

1. (2002) 8 SCC 237.

Adjournment of the House is also *sine die*. When a House is adjourned, pending proceedings or Bills do not lapse."

(emphasis supplied)

20. An adjournment is an interruption in the course of one and the same Session, whereas a prorogation terminates a Session. The effect of prorogation is to put an end with certain exceptions to all proceedings in Parliament then current.

21. In May's Parliamentary Practice, which has assumed the status of a classic on the subject and is usually regarded as an authoritative exposition of Parliamentary practice; it is stated:

"A session is the period of time between the meeting of a Parliament, whether after the prorogation or dissolution, and its prorogation…..During the course of a session, either House may adjourn itself of its own motion to such as it pleases. The period between the prorogation of Parliament and its reassembly in a new session is termed as 'recess'; while the period between the adjournment of either House and the resumption of its sitting is generally called an 'adjournment'."

22. Kaul & Shakdher's Practice and Procedure of Parliament further explains the constitutional position succinctly stating "the session of Lok Sabha comprises the period commencing from the date and time mentioned in the order of the President summoning Lok Sabha and ending with the day on which the President prorogue or dissolves the Lok Sabha. It is thus clear that a Session commenced in terms of the order of the President summoning the House can come to an end only with the day on which the President prorogue the House or dissolves Lok Sabha. The Parliamentary Practice prevalent till then has been noticed in the same treatise which is to the following effect:

"The Eighth Session of the Eighth Lok Sabha commenced

on 23 February, 1987 and was adjourned *sine die* on 12 May, 1987. The Lok Sabha, however, was not prorogued. On a proposal from the Minister of Parliamentary Affairs, the Speaker, exercising his powers under proviso to Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha, agreed to reconvene the sittings of Lok Sabha from 27 July to 28 August, 1987. The two parts, preceding and following the period of adjournment of Lok Sabha *sine die* on 12 May, 1987, were treated as constituting one session divided into two parts namely, Part I and Part II. On conclusion of the second part of the Eighth Session, Lok Sabha adjourned *sine die* on 28 August, 1987 and was prorogued on 3 September, 1987."

23. It is thus clear that whenever the House resumes after it is adjourned *sine die*, its resumption for the purpose of continuing its business does not amount to commencement of the session. The resumed sitting of the House, in this case, on 29th January, 2004, does not amount to commencement of the first Session in the year 2004.

Speaker's Ruling:

24. The very issue regarding propriety of convening of the first session of the House on 29th January, 2004 without the Presidential address was raised in the House. The Speaker gave a ruling declaring that as per the provisions of the Constitution, a session of the House comes to an end when the House is prorogued. As the House was not prorogued after its adjournment sine die on 23rd December, 2003, the session can, at best be treated as a second part of the 14th session of the 13th Lok Sabha "notwithstanding the fact that the calendar year has since changed". The session convened from 29th January, 2004 was held to be second part of the winter session. The ruling of the Speaker is reproduced hereunder:

"Tuesday, February 3, 2004/Magha 14, 1925 (Saka)

Ruling by the Speaker – Regarding propriety of (i) terming 'Vote on Account' as the 'Interim Budget' in the Order Paper of the day; and (ii) convening of the first session of the year on 29 January, 2004 without the Presidential Address.

The Speaker, after hearing ……. gave the following ruling:-

Let me at the outset make it clear that the rulings of the Speaker are generally in accordance with the rules, the rule book and also the Constitution of India. At times, it so happens that the issue requires ruling of Chair and in such circumstances the precedents are seen. If the precedents are not available, then the presiding officer has to make up his own mind and give a ruling on the issues which are raised. In this particular case, fortunately, there are rules of procedure as well as definitions to guide us. I have gone through Erskine May's Parliamentary Practice. I would like the House to listen carefully to the ruling which I am now going to give.

Firstly, let me refer to Erskine May who has given, fortunately, a definition of the term 'prorogation'. He has said:

'A prorogation terminates a session; an adjournment is an interruption in the course of one and the same session'.

Therefore, the point which was raised here about prorogation has been made clear by this definition.

……

But that was not the main point which was raised today. The main point which was raised by Shri Somnath Chatterjee was about the very holding of this Session and this point was also raised in the House by Shri Varkala Radhakrishnan and some other Members on 30th January,

2004 and the Hon'ble Minister of Parliamentary Affairs had responded to the points raised by the Members on that day. Shri Somnath Chatterjee has contended that was commenced on 29th January, 2004 was the first Session of the year. I would like to clarify that there is no mention of adjournment *sine die* of the House in the Constitution. As per the provisions of the Constitution, a Session of the House comes to an end when the House is prorogued. As the House was not prorogued after its adjournment *sine die* on 23rd December, 2003 this Session can, at best, be treated as the second part of the Fourteenth Session of the Thirteenth Lok Sabha notwithstanding the fact that the calendar year has since changed.

I am giving an illustration; I am giving a precedent regarding the Third Lok Sabha. On 11th December, 1962 the House adjourned to meet on 21st January, 1963.

This was treated as Part-II of the same Session. I may inform the House that in the past also there have been occasions when after adjournment *sine die* of the House, the Lok Sabha was re-convened before prorogation.

….For example, the Eighth Session of the Eighth Lok Sabha was adjourned *sine die* on 12th May, 1987, but the House was not prorogued…and was reconvened after a gap of 75 days on 27th July, 1987 as the second part of the Session. Similarly, the 14th Session of the Eighth Lok Sabha was adjourned *sine die* on 18th August, 1989, but the House was not prorogued and was reconvened on 11th October, 1989 after a gap of 53 days as second part of the 14th Session.

….There are several other similar instances also. I have already made a reference to the case when the House was adjourned and thereafter, though it was reconvened in the next year, it was not treated as the fresh Session. Therefore I must make it clear that in this

particular case also, this Session can be treated as the second part of the Winter Session.

……*After listening to the arguments, I have treated this as the second part of the Winter Session. Since under the provisions of the sub-clause (a) of clause (2) of article 85 of the Constitution, the power to prorogue the House vests in the Hon'ble President – please remember that this power is with the Hon'ble President* – I am not inclined to allow any more discussion on the issue and I hold both the points of order out of order."

25. The question that arises for consideration in this writ petition is whether the decision of the Speaker directing resumption of sitting of the Lok Sabha which was adjourned sine die on 23rd December, 2003 is susceptible to judicial review in a proceeding under Article 32 of the Constitution of India? Under Article 122 of the Constitution, the Courts are precluded from making inquiry into proceedings of Parliament. Article 122 reads as under:

"122. Courts not to inquire into proceedings of Parliament:- (1): The validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.

(2) No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

26. A plain reading of Article 122 makes it abundantly clear that the validity of any proceeding in the Parliament shall not be called in question on the ground of any irregularity of procedure. The prayer in the writ petition is to declare the proceedings in the Lok Sabha pursuant to the Notice dated

20th January, 2004 issued under the directions of the Speaker as unconstitutional. The petitioner is essentially raising a dispute as to the regularity and legality of the proceedings in the House of the People. The dispute raised essentially centers around the question as to whether the Speaker's direction to resume sittings of the Lok Sabha which was adjourned *sine die* on 23rd December, 2003 is proper? The Speaker is the guardian of the privileges of the House and its spokesman and representative upon all occasions. He is the interpreter of its rules and procedure, and is invested with the power to control and regulate the course of debate and to maintain order. The powers to regulate Procedure and Conduct of Business of the House of the People vests in the Speaker of the House. By virtue of the powers vested in him, the Speaker, in purported exercise of his power under Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha got issued notice dated 20th January, 2004 through the Secretary General of the Lok Sabha directing resumption of sittings of the Lok Sabha which was adjourned *sine die* on 23rd December, 2003. Whether the resumed sittings on 29th January, 2004 was to be treated as the second part of the 14th session as directed by the Speaker is essentially a matter relating purely to the procedure of Parliament. The validity of the proceedings and business transacted in the House after resumption of its sittings cannot be tested and gone into by this Court in a proceeding under Article 32 of the Constitution of India.

27. There are two Articles to which reference must be made. Article 118(1) provides that each House of Parliament may make rules for regulating, subject to the provisions of the Constitution, its procedure and conduct of its business. The rules, in fact, are made and known as Rules of Procedure and Conduct of Business in Lok Sabha. Rule 15 of the Rules of Procedure and Conduct of Business in Lok Sabha provides that:

"(1) The Speaker shall determine the time when a sitting

of the House shall be adjourned *sine die* or to a particular day, or to an hour or part of the same day:

Provided that the Speaker may, if he thinks fit, call a sitting of the House before the date or time to which it has been adjourned or at any time after the House has been adjourned *sine die*.

(2) In case the House, after being adjourned is reconvened under the proviso to sub-rule (1), the Secretary General shall communicate to each member the date, time, place and duration of the next part of the session."

28. Article 118(1) makes it perfectly clear that when the House is to make any rules as prescribed by it, those rules are subject to the provisions of the Constitution which obviously include Fundamental Rights guaranteed by Part III of the Constitution.

29. Similarly, Article 122(1) makes a provision which is relevant. It lays down that the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure. Article 122(2) confers immunity on the officers and members of Parliament in whom powers are vested by or under the Constitution for regulating procedure or conduct of the business or for maintaining order in Parliament from being subject to the jurisdiction of any Court in respect of the exercise by him of those powers. This Court *In re, Under Article 143, Constitution of India*[2] (also known as *Keshav Singh's* case) while construing Article 212(1) observed that it may be possible for a citizen to call in question in the appropriate Court of law, the validity of any proceedings inside the Legislature if his case is that the said proceedings suffer not from mere irregularity of procedure, but from an illegality. If the impugned procedure is illegal and unconstitutional, it would be open to be scrutinized in a Court of law, though such scrutiny is prohibited if the complaint against the procedure is no more

2. 1965 (1) SCR 413.

than this that the procedure was irregular. The same principle would equally be applicable in the matter of interpretation of Article 122 of the Constitution.

30. The Notice dated January 20, 2004 is self-explanatory and reveals that the House was adjourned *sine die* on 23rd December, 2003 by the Speaker. It is the Speaker's direction to resume its sittings from 29th January, 2004 onwards. The Notice clearly says that it was the second part of the fourteenth session and was likely to conclude on 5th February, 2004. The Speaker's decision adjourning the House *sine die* on 23rd December, 2003 and direction to resume its sittings e in part two ssentially relates to proceedings in Parliament and is of procedural in nature. The Business transacted and the validity of proceedings after the resumption of its sittings pursuant to the directions of the Speaker cannot be inquired into by the Courts.

31. Under Article 122 (2), the decision of the Speaker in whom powers are vested to regulate the procedure and the Conduct of Business is final and binding on every Member of the House. The validity of the Speaker's decision adjourning the House sine die on 23rd December, 2003 and latter direction to resume its sittings cannot be inquired into on the ground of any irregularity of procedure. The business transacted and the validity of proceedings after the resumption of sittings of the House pursuant to the directions of the Speaker cannot be inquired into by the Courts. No decision of the Speaker can be challenged by a member of the House complaining of mere irregularity in procedure in the conduct of the business. Such decisions are not subject to the jurisdiction of any Court and they are immune from challenge as understood and explained in *Keshav Singh's* case and further explained in *Indira Nehru Gandhi Vs. Raj Narain & Anr.*[3] wherein it was observed that "the House is not subject to the control of the courts in the administration of the internal proceedings of the House." It is a

3. 1975 (Supp.) SCC 1.

right of each House of Parliament to be the sole judge of the lawfulness of its own proceedings. The Courts cannot go into the lawfulness of the proceedings of the Houses of Parliament. The Constitution aims at maintaining a fine balance between the Legislature, Executive and Judiciary. The object of the constitutional scheme is to ensure that each of the constitutional organs function within their respective assigned sphere. Precisely, that is the constitutional philosophy inbuilt into Article 122 of the Constitution of India.

32. In *M.S.M Sharma Vs. Dr. Shree Krishna Sinha*[4], a Constitution Bench of this Court held that the validity of the proceedings inside the Legislature of the State cannot be called in question on the allegation that the procedure laid down by the law had not been strictly followed. Sinha, C.J. speaking for the Court observed:

> "It was contended that the procedure adopted inside the House of the Legislature was not regular and not strictly in accordance with law. There are two answers to this contention, firstly, that according to the previous decision of this Court, the petitioner has not the fundamental right claimed by him. He is, therefore, out of Court. Secondly, the validity of the proceedings inside the Legislature of a State cannot be called in question on the allegation that the procedure laid down by the law had not been strictly followed. Article 212 of the Constitution is a complete answer to this part of the contention raised on behalf of the petitioner. No Court can go into those questions which are within the special jurisdiction of the Legislature itself, which has the power to conduct its own business. Possibly, a third answer to this part of the contention raised on behalf of the petitioner is that it is yet premature to consider the question of procedure as the Committee is yet to conclude its proceedings. It must also be observed that once it has been held that the Legislature has the

4. air 1960 sc 1186.

> jurisdiction to control the publication of its proceedings and to go into the question whether there has been any breach of its privileges, the Legislature is vested with complete jurisdiction to carry on its proceedings in accordance with its rules of business. Even though it may not have strictly complied with the requirements of the procedural law laid down for conducting its business, that cannot be a ground for interference by this Court under Article 32 of the Constitution."

33. In the present case, there is no complaint of infringement of any guaranteed fundamental rights and therefore it may not be necessary to dilate on the question as to parameters and extent of judicial review that may be available in case of infringement of any guaranteed fundamental rights of a member of the House.

34. One more aspect of the matter. The petitioner in this writ petition under Article 32 of the Constitution has challenged the validity of proceedings in the Lok Sabha commencing from 29th January, 2004 on the grounds stated hereinabove, with which we have dealt with in the preceding paragraphs. The petition has become infructuous, since the Lok Sabha was dissolved and thereafter two elections have been held. The issue raised in the petition is purely a hypothetical question. There is no existing *lis* between the parties. It is settled practice that this Court does not decide matters which are only of academic interest on the facts of a particular case.

35. In *R.S. Nayak Vs. A.R. Antulay*[5], a Constitution Bench of this Court observed:

> "We propose to adhere to the accumulated wisdom which has reopened into a settled practice of this Court not to decide academic questions."

36. Though the writ petition has become infructuous, having

5. (1984) 2 SCC 183.

regard to the constitutional issues raised, we have considered the question as to the interpretation of Articles 85 and 87 of the Constitution of India.

37. It is equally well settled that Article 32 of the Constitution guarantees the right to a Constitutional remedy and relates only to the enforcement of the right conferred by Part III of the Constitution and unless a question of enforcement of a fundamental right arises, Article 32 does not apply. It is well settled that no petition under Article 32 is maintainable, unless it is shown that the petitioner has some fundamental right. In *Northern Corporation Vs. Union of India*[6], this Court has made a pertinent observation that when a person complains and claims that there is a violation of law, it does not automatically involves breach of fundamental right, for the enforcement of which alone, Article 32 is attracted.

38. We have carefully scanned through the averments and allegations made in the writ petition and found that there is not even a whisper of any infringement of any fundamental right guaranteed by Part III of the Constitution. We reiterate the principle that whenever a person complains and claims that there is a violation of any provision of law or a Constitutional provision, it does not automatically involve breach of fundamental right for the enforcement of which alone Article 32 of the Constitution is attracted. It is not possible to accept that an allegation of breach of law or a Constitutional provision is an action in breach of fundamental right. The writ petition deserves dismissal only on this ground.

39. We accordingly find no merit in this writ petition and is accordingly dismissed without any order as to costs.

D.G. Writ Petition dismissed.

6. (1990) 4 SCC 239.

M. JAGDISH VYAS AND ORS.
v.
UNION OF INDIA AND ORS.
(Civil Appeal Nos.4345-4346 of 2007)

MARCH 29, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Service law:

Deputation – Post of JAO in DoT – Filling up of vacant post of JAO by deputation and by appointment/promotion of departmental candidates – Deputationists to appear in two papers of JAO Part II examination – The letter dated 24.6.2002 issued by DoT prescribing minimum marks to be obtained by deputationists in the two papers – In the letter dated 23.7.2002, the minimum prescribed percentage of marks relaxed – The letter stated that the result of deputationists would be declared separately – Claim of parity by deputationists with the departmental candidates, for relaxation of minimum qualifying marks in the examination – Held: The letter dated 23.7.2002 related only to declaration of result of departmental candidates – Deputationists to be absorbed on the posts of JAOs and the departmental employees seeking appointment by way of promotion on the posts of JAOs who were required to take the JAO Examination, constituted two separate and distinct class – The classification had a clear nexus with the objects sought to be achieved, i.e., to fill in as many vacant posts from the departmental candidates working on the lower ranks provided they reached bare minimum qualifying standards in the JAO, Part-II Examination – Moreover, result of deputationists was declared separately which also indicated that the departmental candidates were segregated from the deputationists – Hence, the criteria for declaration of results for the departmental

candidates was different from the deputationists – DoT was entitled to insist on recruiting the best from among the deputationists – Hence, the higher criteria for deputationists cannot be said to be arbitrary or discriminatory – Such classification is permissible under Articles 14 and 16 – Constitution of India, 1950 – Articles 14 and 16.

The Department of Telecommunication (DoT) was following a practice of filling the vacant post of Junior Accounts Officer (JAOs) by deputing employees of the Department of posts who were qualified for the posts of JAOs after conducting an examination. The departmental candidates were also eligible for appointment/promotion to the post of JAO provided they were prepared to pass Part I and Part II examination held for the post of JAOs. As per the Scheme, the examination was to be conducted simultaneously with the JAO telecom Part II examination and would be only for paper VII and Paper VIII for deputationists.

Appellants were permanent employees of the Postal Department. They had already qualified the Part-I and Part II examination of JAO in the Postal Department. They appeared in the examination in two papers on 18.10.2000. On the same day, the examination was held for the departmental candidates for the post of JAOs. The communication dated 24.6.2002 was issued by DoT wherein the minimum marks to be obtained in Paper VII and VIII of JAO part II examination were 45% in aggregate and 40% in each paper.

The result of the JAO, Part-II Examination held in December 2000 was declared through letter dated 23.7.2002. In that letter, the minimum prescribed percentage of marks was relaxed. The letter also mentioned that the General candidates were required to secure 33% in each subject and 35% in aggregate, 6 grace marks were provided in any one subject. The letter

also mentioned that the names of the candidates were not arranged in the order of merit. The letter stated that the result of deputationist candidates would be declared separately. Thereafter, the results of deputationist candidates were declared on 29.08.2002. The appellants who would have been declared successful under the criteria contained in the Letter dated 23.07.2002 were not included in the list of successful candidates.

Aggrieved appellants filed application before CAT which was allowed with directions to employer to include the names of appellants in the list of successful candidates as per their merit positions and consider their candidature for absorption on the posts of JAO. Union of India filed writ petitions before High Court. High Court allowed the writ petitions holding that deputationists who were to be absorbed on the posts of JAOs and the departmental employees seeking appointment by way of promotion on the posts of JAOs who were required to take the JAO Examination, constituted two separate and distinct classes. While the employees of DoT were offered an opportunity for being qualified to become JAO in the regular line of promotion, deputationists who had not passed one of the requisite essential papers of JAO, Part-II Examination were permitted to make up the deficiency by passing the necessary paper in the examination held by the DoT. The classification was, therefore, on a rational basis. The High Court concluded that the letter dated 23.07.2002 was not applicable to the deputationists. They were governed by the conditions laid down in the letter dated 24.06.2002. Hence these appeals.

Dismissing the appeals, the Court

HELD: 1. A bare perusal of the letter dated 24.06.02 made it clear that the qualifying marks were separately provided for the deputationists who were to appear in the

JAO Part-II Examination. The letter specifically referred to qualifying marks of JAO, Part-II Examination in respect of the examination appeared by deputationists. It was then stated that the qualifying marks in respect of the papers in JAO, Part-II examination taken by deputationists would continue to be same as that of the departmental candidates. It further clarified that deputationists have to secure 40% in each subject and 45% in the aggregate. From this, it became clear that the deputationists were being treated as a class apart from the departmental candidates. It also becomes apparent that the conditions enumerated in the said letter did not apply to the departmental candidates. No material was placed on record either before the Tribunal or before the High Court to show that there was any relaxation in the standard or the minimum marks required to be obtained by the deputationists. The qualifying marks prescribed in the letter dated 24.06.02 were not in any manner affected by the letter dated 23.07.02 so far as the deputationists were concerned. It related only to the declaration of result of the departmental candidates. The letter dated 24.6.2002 provided the lower standard of 33% for each subject and 35% in aggregate exclusively for the examination held in December, 2000. If the standard had been lowered for the deputationists also, the letter would have made a specific provision in that regard. The fact that the names of the successful candidates were not arranged in order of merit also indicated that the letter related only to the departmental candidates. The intention was clearly to induct as many candidates from the lower ranks of Clerks, Accountants and Telephone Operators working in DoT to the higher posts of JAO provided they had reached the bare minimum standard. On the other hand, it was clearly stated in the letter dated 29.8.2002 that the list of deputationists, who have qualified in Paper VII and Paper VIII, have been arranged in order of merit. Therefore, undoubtedly the intention was to absorb only

the best from the deputationist candidates. [Paras 14-17] [1100-G-H; 1102-C-H; 1103-A-D]

2. The expression that the qualifying marks for the deputationists would continue to be the same as that of the departmental candidates in the letter dated 24.06.2002 would not mean that the deputationists would *ipso facto* become entitled for any relaxation in the standard which may have been given to the departmental candidates in the future. Condition No.6 which provided that the result of deputationists would be declared separately would also indicate that the departmental candidates had been segregated from the deputationists. Hence, the criteria for declaration of results for the departmental candidates was different from the deputationists. The result of the departmental candidates was declared irrespective of the merit of the candidate. On the other hand, the result of deputationists was declared in the order of merit. The respondents have also given a clear justification for issuing the letter dated 23.7.2002. The relaxation related to the entire JAO Part-II Examination in five papers. All the departmental candidates were to appear in five papers of JAO Part-II Examination. On the other hand, the deputationists appeared only in one subject, i.e., Paper VII and VIII combined. The deputationists had already passed JAO Part-II Examination in their parent Postal Department. Therefore, the requirement of passing Part-I of the departmental examination had been relaxed in favour of the deputationists. They were required only to appear in Paper VII and VIII. Therefore, they could not claim to be equated with the departmental candidates. The rationale for providing the minimum qualifying marks of 40% in each subject and 45% in the aggregate for the deputationists is set out in the letter dated 24.6.2002. There was no scope for any confusion. This criteria was not relaxed in the case of deputationists in the letter dated 23.7.2002. [Paras 18 and 19] [1103-E-H; 1104-A-C]

3. The final decision was taken by Government of India for relaxing the minimum qualifying marks for the departmental candidates as a one time measure in order to facilitate the departmental candidates to get promotion to the posts of JAO. Deputationists, on the other hand, were provisionally allowed to sit in the examination subject to the final decision of the competent authority whether to absorb them or not. These conditions were made known to the deputationists in the policy decision dated 30.9.2000. The categorization of deputationists and the departmental candidates into the two categories was rightly upheld by the High Court. The law is well settled for many years that members of one homogenous group have to be treated equally. At the same time, Articles 14 and 16 do not mandate that un-equals are to be treated as equals. In this case, the classification cannot be said to be either irrational or arbitrary. It had a clear nexus with the objects sought to be achieved, i.e., to fill in as many vacant posts from the departmental candidates working on the lower ranks provided they reached bare minimum qualifying standards in the JAO, Part-II Examination. So far as the deputationists were concerned, the respondents were entitled to insist on recruiting the best from among the deputationists. Hence, the higher criteria for deputationists cannot be said to be arbitrary or discriminatory. Such classification is permissible under Articles 14 and 16 of the Constitution of India. [Para 20] [1104-D-H; 1105-A-B]

S.G. Jaisinghani v. Union of India **AIR 1967 SC 1427, relied on.**

Case Law Reference:

AIR 1967 SC 1427 relied on Para 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4345-4346 of 2007.

From the Judgment & Order dated 3.5.2005 of the High Court of Judicature for Rajasthan at Jodhpur, in D.B. Civil writ Petition Nos. 5193 and 5638 of 2004.

WITH

C.A. No. 4349-4350, 4351 of 2007.

Sushil Kumar Jain, Puneet Jain, Eshita Baruah, Pratibha Jain for the Appellants.

Amita Arora, Sumit Kaul, Meera Bhatia, Rishi Kesh for Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These appeals have been filed against the judgment of the High Court of Judicature for Rajasthan at Jodhpur rendered in DB Civil Writ Petition No.5193/04 and DB Civil Writ Petition No.5638/04 dated 3.5.2005. By the aforesaid common judgment the High Court had held that the instructions dated 23.07.2002 had not superseded the qualifications laid down by Central Government in its letter dated 24.6.2002. By virtue of the aforesaid decision of the High Court the appellants have lost the opportunity for being absorbed in the service of Bharat Sanchar Nigam Limited (BSNL). Civil Appeal No.4351/2007 has been filed against the order of Central Administrative Tribunal (CAT) dated 17.11.2005 in O.A. No.116/2005 whereby the CAT has dismissed the O.A. following the decision of the Rajasthan High Court which is the subject matter of the two above noted appeals. We propose to dispose of all the aforesaid appeals by this common judgment.

2. The appellants had challenged the declaration of results of deputationists who had appeared in the Examination for Junior Accounts Officer (JAO), Part-II dated 29.08.2002 in the Central Administrative Tribunal (CAT) Jodhpur Bench, Jodhpur. It was claimed by the appellants that their names had been wrongly omitted from the list of successful candidates in the

result dated 29.08.2002 as they had qualified the examination on the basis of the criteria laid down in the letter dated 23.07.2002. By the aforesaid letter BSNL had declared the result of candidates who had qualified in JAO, Part-II Examination held in December 2000. In that letter, the qualifying standards and the grace marks required to be obtained by the successful candidates were as follows:

"General candidates: (1) 33% in each subject and 35% in aggregate.

(2) 6 grace marks in any one subject.

SC/ST candidates: (1) 25% in each subject and 27% in aggregate.

(2) 6 grace marks in any one subject."

3. The appellants were permanent employees of the Postal Department. They had already qualified the Part-I and Part-II Examination of Junior Accounts Officer (JAO) in the Postal Department. Since the Department of Telecommunications (DoT) was having shortage of qualified JAO, the usual practice was to fill the vacant posts by taking JAOs on deputation from other departments in Union of India. Large number of employees from the postal department used to be taken on deputation in DoT batch-wise depending on the particular need of the borrowing department, i.e., DoT. It seems a policy decision was taken to absorb the employees of the Department of Posts who were qualified for the posts of JAOs and have passed both Part-I and Part-II examinations. The Department of Telecommunications (DoT) also wanted to appoint/promote its own employees who were working on the lower ranks of Clerks, Accountants, and Telephone Operators provided they were prepared to pass Part-I and Part-II Examinations for the post of JAO. Keeping in view the aforesaid

objectives, DoT framed a scheme dated 30.9.2000 which *inter alia* provided as under:

"Due to acute shortage in the grade of Junior Accounts Officers in Department of Telecommunications, this Department had taken certain officials from other Departments, including the Department of Posts, on deputation to work as Junior Accounts Officers and posted them to various Telecom Circles/Units. In order to have the services of these officials on long term basis, in view of large number of vacancies existing in the Department of Telecom in the grade of JAO as on date, it has now been decided, with the approval of competent authority, to absorb these deputationists as Junior Accounts Officers in DoT/DTS/DTO, as one time measure, after conducting an examination. The examination will be conducted on certain terms and conditions set out separately in respect of those officials who will be working on deputation in DOT/ proposed BSNL as on 18.10.2000 and for all those who have earlier worked in DoT on deputation basis but have since been repatriated to their parent cadre. Any official holding any post higher than JAO in his parent Department as on 30.9.2000 will not be eligible to appear in the said examination.

2. The said examination will be conducted simultaneously with JAO Telecom Part-II examination and will be only for Paper-VII and Paper-VIII for these deputationists, as contained in 'syllabus for JAO, Telecom Part-II Examination. The details of eligibility conditions and also terms and conditions (ANNEXURE I) for regulating their pay and seniority etc., for the said examination, alongwith proforma of declaration undertaking (ANNEXURE-II) required to be given by all the applicants at the time of applying for the examination are enclosed herewith. The application form is also enclosed. Photo copy of the same can be used by the officials for submitting the application."

4. The policy further stated that all the present deputationists who were willing to be absorbed in DoT/DTS/DTO as JAOs are requested to go through the terms and conditions and submit their applications in the prescribed proforma latest by 27.10.2000. Under the aforesaid policy, deputationists who had already been repatriated to their parent departments would also be eligible. They were also to submit their applications by the same day. It was also made clear that the appearance in the examination is purely provisional and subject to approval of absorption by the Department of Personnel and Training. The DoT also shall have the right to cancel the examination or withhold the results. This policy was accompanied by the detailed terms and conditions subject to which the deputationists were to take the Examination of JAO Part-II for Paper-VII and Paper-VIII. All the deputationists were required to appear in the examination in T.R. paper. The relevant provision of the annexure setting out the terms and conditions for absorption of personnel taken on deputation is as under:

"(B) Examination in T.R. Paper:

(1) The DoT/DTS/DTO will have to appear in Part-VII and VIII of JAO (Telecom) Part-II syllabus, which, inter-alia, consists of theory and practical portion relating to Telecom Revenue Accounts. These papers will be conducted simultaneously with other papers of JAO Part-II exam which will be held for those DOT officials who have already qualified DOT JAO Part-I examination. The examination schedule will be announced by DE Branch of DOT. It is, however, expected that the said exam will be conducted during 2nd fortnight of December 2000 subject to convenience of DE Branch.

(2) The syllabus for TR paper set for deputationists will be same as that for JAO (Part-II) examinees of Department of Telecommunications."

5. It was further provided that even upon qualification in

both the examinations the absorption will be the sole discretion of DoT both in terms of time and number of persons. It was further provided that the deputationists who qualify in the Part-II Examination will be repatriated to their parent department before their absorption. It was further made clear that the DoT is on the verge of corporatisation and that the service conditions as well as the pay attached to the posts of JAOs and above are likely to undergo changes.

6. Knowing the aforesaid conditions, the appellants appeared in the examination in the two papers on 18.10.2000. It appears that on the very same date the examination was also held for the departmental candidates to be appointed on the posts of JAOs.

7. The result of the JAO, Part-II Examination held in December 2000 was declared through Letter dated 23.7.2002. It was stated that the candidates mentioned in Annexure-I had qualified the JAO, Part-II Examination. It further mentioned the approved qualifying standards. General candidates were required to secure 33% in each subject and 35% in aggregate, 6 grace marks were provided in any one subject. For Scheduled Caste/Scheduled Tribe candidate an even lower standard was prescribed. Significantly, the letter also mentioned that the names of the candidates are not arranged in order of merit. Clause 6 of the letter stated that the result in the case of candidates on deputation from other departments, who were allowed to appear in this examination, will be declared separately.

8. Thereafter, the results of deputationist candidates were declared on 29.08.2002. The appellants who would have been declared successful under the criteria contained in the Letter dated 23.07.2002 were not included in the list of successful candidates. Hence, the appellants had moved the CAT as noticed above. The CAT allowed the application with the following observations:

"We have anxiously considered the submissions of

both the parties. In nut-shell, the dispute is whether or not the relaxation letter dated 23.7.2002 (Annexure A-5) is applicable to the deputationists, or it is meant only for non-deputationists i.e. officials of the DoT etc. As per the respondents, the letter dated 24.6.2002 (Annexure R/1) is applicable to the deputationists and since the applicant could not obtain marks at 45% in aggregate (i.e. a total of 90% marks in both the papers VII and VIII put together) he was not included in the impugned result. We observe while going through the various communications/letters/letters issued by the competent authority from time to time that the basic bible for absorption of the deputationists in DoT is letter dated 30.9.2000 (Annexure A/3). We find that nowhere it has been mentioned that for the purpose of eligibility for absorption in DoT, the deputationists are required to clear JAO part-I examination. We also find that the relaxation given in the letter dated 23.7.2002 (Annexure A/5) does not prohibit the deputationists to avail the above relaxations as is available to the officials of the DoT etc. We also observe that the communication dated 24.6.2002 (Annexure R/1) had been issued by the DoT wherein the minimum marks obtained in paper VII and VIII of JAO part II examination should be 45% in aggregate and 40% in each paper. This minimum prescribed percentage of marks were relaxed by issuing of another communication/ Letter dated 23.7.2002 (Annexure A/5) which is also applicable in the case of deputationists. We also anxiously noticed that the deputationists were required to pass only in JAO Part-II examination in paper VII and VIII only. As per the letter dated 30.9.2000 (Annexure A/3) wherein the terms and conditions have been laid down in the main body of the letter as well as in Annexure I to IV thereof, stand satisfied and fulfilled. Since the applicant had already cleared the JAO Part-II examination before deputation in DoT therefore only requirement for both the deputationists in DoT for absorption was to pass in paper VII and VIII only."

9. With these observations, BSNL was directed to include the names of the appellants in the list of successful candidates as per their merit positions and consider their candidature for absorption on the posts of JAOs.

10. The aforesaid decision of the CAT was challenged before the High Court of Judicature at Jodhpur by Union of India/ BSNL in two writ petitions. Considering the factual situation as narrated above, the Division Bench considered the two letters dated 23.07.2002 and 24.06.2002 and held that the CAT had not construed the same in the proper perspective. The Division Bench concluded that deputationists who were to be absorbed on the posts of JAOs and the departmental employees seeking appointment by way of promotion on the posts of JAOs who were required to take the JAO Examination, constituted two separate and distinct classes. While the employees of DoT have been offered an opportunity for being qualified to become JAO in the regular line of promotion, deputationists who had not passed one of the requisite essential papers of JAO, Part-II Examination were permitted to make up the deficiency by passing the necessary paper in the examination held by the DoT. The classification was, therefore, on a rational basis. It had a nexus with the object sought to be achieved. Therefore the appellants could not have complained of any violation of their rights under Articles 14 and 16 of the Constitution of India. The Division Bench concluded that the letter dated 23.07.2002 was not applicable to the deputationists. They were governed by the conditions laid down in the letter dated 24.06.2002 which had been placed before the CAT as Annexure R1. It has been held that the appellants failed to place on record any material to show that the aforesaid letter dated 24.06.2002 which was applicable in the case of deputationists, had been superseded by the letter dated 23.07.2002. Consequently, the writ petitions filed by the Union of India/BSNL were allowed and the order passed by the CAT was set aside. The applications filed by the appellants were dismissed. Hence the appellants who were the applicants before the CAT have challenged the

aforesaid judgment of the Rajasthan High Court in these appeals.

11. We have heard the learned counsel for the parties. It is vehemently argued by Mr. Sushil Kumar Jain, appearing for the appellants, that the letter dated 23.07.2002 is fully applicable in the case of the deputationists who had appeared in the T.R. paper of the JAO Part-II Examination. The letter dated 24.06.2002 stood modified by the letter dated 23.07.2002. According to the learned counsel, the Division Bench has misread the relevant provisions in various documents. He submitted that the appellants had appeared in the examination pursuant to the scheme dated 30.09.2000. In this letter, it was clearly provided that the syllabus for T.R. paper set for deputationists will be same as that for JAO Part-II examinees of the DoT. A combined examination was held in which candidates of DoT as also deputationists appeared. The conditions of eligibility were prescribed for all the candidates. He emphasised on the use of the expression "this examination" in the letter dated 23.07.2002. According to the learned counsel the eligibility criteria had been lowered for all the candidates. Learned counsel submitted that in view of Clause 6, BSNL was entitled to declare the results of the deputationists separately. It was so declared on 29.08.2002. This declaration of the result on 29.08.2002 was a mere continuation of the declaration of result as contained in the letter dated 23.07.2002. This mere declaration of the result on 29.08.2002 would not permit BSNL to change the qualifying marks for deputationists from 33% in individual papers and 35% in aggregate to 40% in each paper and 45% in aggregate. Had it been the intention of the authorities to provide separate qualifying marks for deputationists, it would have been mentioned in the letter dated 23.07.2002. Therefore, according to the learned counsel a harmonious reading of the letter dated 23.07.2002 and the letter dated 29.08.2002 would lead to the inevitable conclusion that the decision communicated in letter dated 24.06.2002 stood superseded and modified for the petitioners also. Learned

counsel further submitted that all the candidates whether departmental or deputationists appeared in the same examination for the purposes of being qualified to hold the post of JAO in DoT. All the candidates appearing in the examinations formed one class. Therefore deputationists cannot be discriminated by providing higher qualifying marks in comparison to the marks required by departmental candidates.

12. In the other hand, learned counsel for the respondents submitted that the deputationists cannot claim to be equated with the departmental candidates. The departmental candidates were being given an opportunity to get promotion in the normal line. The qualifying criteria for the departmental candidates was relaxed as a one-time measure in view of the peculiar situation that was being faced by the DoT employees at that time. The qualifications for deputationists were specifically laid down in the Letter dated 24.06.2002. The aforesaid criteria was not applicable to the departmental candidates. It is submitted that there is no discrimination and the Division Bench had rightly rejected the claim of the appellants.

13. We have considered the submissions made by the learned counsel for the parties. The only issue that needs determination is whether the deputationist candidates could be distinguished from the departmental candidates in the matter of providing minimum qualifying marks in the examination in question. In order to claim parity with the departmental candidates, the deputationists have relied upon the language contained in the letter dated 23.7.2002. The question that arises for consideration, therefore, is whether the deputationists are justified in claiming the parity with the departmental candidates on the basis of the above letter.

14. In our opinion, a bare perusal of the Letter dated 24.06.02 would make it abundantly clear that the qualifying marks have been separately provided for the deputationists who were to appear in the JAO Part-II Examination. The Letter dated

24.06.02 is as under:

"No.21-31/2001-SEA Government of India,

Department of Telecommunications, Sanchar Bhawan, 20, Ashoka Road, New Delhi – 110001.

Dated: 24.6.2002

To

The ADG(DE),BSNL, Dak Bhawan, New Delhi-110001

Subject: Qualifying marks of JAO Part-II exam in respect of the exam appeared by deputationists.

Reference: Your U.O. No.10-1/2001-DE, dated 07.05.2002.

I am directed to refer to your letter under reference and convey that the qualifying marks in respect of the papers in the JAO Part-II exam taken by the deputationists will continue to be the same as that of the departmental candidates i.e. the deputationists have to secure 40% in each subject and 45% in the aggregate provided a minimum of 40% also secured separately in the practical paper with books. 45% in the aggregate for this purpose would mean 90 marks out of 200 marks (200 marks are the maximum marks of paper VII and VIII).

To be precise, as (i) both papers VII and VIII appeared in by the deputationists fall under one subject, (ii) Paper VII and VIII constitute the aggregate papers in the Exam for the deputationists and (iii) Paper VIII is practical paper with the aid of books, the following marks should be secured by the deputationists to declare him as qualified.

(i) 45% aggregate marks i.e. total of 90 marks in both papers VII and VIII put together.

(ii) A minimum marks of 40% in paper VIII (Practical paper with aid of books).

(iii) No minimum marks is required in paper VII.

SD/-

(D. SELVARAJ)

ADG (SEA)"

15. A perusal of the aforesaid letter clearly shows that it provided qualifying marks of JAO, Part-II Examination for deputationists. The information has been given on a request made by BSNL for clarification.

16. The letter specifically refers to "qualifying marks of JAO, Part-II Examination in respect of the exam appeared by deputationists". It is then stated that the qualifying marks in respect of the papers in JAO, Part-II exam taken by deputationists will continue to be same as that of the departmental candidates. It is further clarified that deputationists have to secure 40% in each subject and 45% in the aggregate.

17. From the above it becomes clear that the deputationists were being treated as a class apart from the departmental candidates. It also becomes apparent that the conditions enumerated in the aforesaid letter did not apply to the departmental candidates. In our opinion there is no merit in the submission of Mr. Sushil Kumar Jain that since the letter stated that the marks would be the same as that of the departmental candidates, the conditions laid therein also apply to departmental candidates. The aforesaid expression was clearly only indicative of the general standard that was expected of all the examinees. No material was placed on the record either before the Tribunal or before the High Court to show that there has been any relaxation in the standard or the minimum marks required to be obtained by the deputationists. The qualifying marks prescribed in the letter dated 24.06.02 were not in any manner affected by the Letter dated 23.07.02 so far as the deputationists were concerned. It related only to the

declaration of result of the departmental candidates. The letter dated 24.6.2002 issued with the approval of Member –F of BSNL had provided the lower standard of 33% for each subject and 35% in aggregate exclusively for the examination held in December, 2000. It appears that a one time concession had been given to the departmental candidates in special circumstances. If the standard had been lowered for the deputationists also, the letter would have made a specific provision in that regard. The fact that the names of the successful candidates were not arranged in order of merit also indicates that the letter related only to the departmental candidates. The intention was clearly to induct as many candidates from the lower ranks of Clerks, Accountants and Telephone Operators working in DoT to the higher posts of JAO provided they had reached the bare minimum standard. On the other hand, it is clearly stated in the letter dated 29.8.2002 that the list of deputationists, who have qualified in Paper VII and Paper VIII, have been arranged in order of merit. Therefore, undoubtedly the intention was to absorb only the best from the deputationist candidates.

18. The expression that the qualifying marks for the deputationists will continue to be the same as that of the departmental candidates in the letter dated 24.06.2002 would not mean that the deputationists would *ipso facto* become entitled for any relaxation in the standard which may have been given to the departmental candidates in the future. Condition No.6 which provides that the result of deputationists will be declared separately would also indicate that the departmental candidates had been segregated from the deputationists. Hence, the criteria for declaration of results for the departmental candidates is different from the deputationists. The results of the departmental candidates have been declared irrespective of the merit of the candidate. On the other hand, the result of deputationists has been declared in the order of merit.

19. The respondents have also given a clear justification for issuing the letter dated 23.7.2002. The relaxation related to

the entire JAO Part-II Examination in five papers. All the departmental candidates had to appear in five papers of JAO Part-II Examination. On the other hand, the deputationists appeared only in one subject, i.e., Paper VII and VIII combined. The deputationists had already passed JAO Part-II Examination in their parent Postal Department. Therefore, the requirement of passing Part-I of the departmental examination had been relaxed in favour of the deputationists. They were required only to appear in Paper VII and VIII. Therefore, they could not claim to be equated with the departmental candidates. The rationale for providing the minimum qualifying marks of 40% in each subject and 45% in the aggregate for the deputationists is set out in the letter dated 24.6.2002. There was no scope for any confusion. This criteria has not been relaxed in the case of deputationists in the letter dated 23.7.2002.

20. In our opinion, the final decision has been taken by Government of India for relaxing the minimum qualifying marks for the departmental candidates as a one time measure in order to facilitate the departmental candidates to get promotion to the posts of JAO. Deputationists, on the other hand, had been provisionally allowed to sit in the examination subject to the final decision of the competent authority whether to absorb them or not. These conditions were made known to the deputationists in the policy decision dated 30.9.2000. The categorization of deputationists and the departmental candidates into the two categories, in our opinion, has been rightly upheld by the High Court. The law has been well settled for many years that members of one homogenous group have to be treated equally. At the same time Articles 14 and 16 do not mandate that un-equals are to be treated as equals. In this case, the classification cannot be said to be either irrational or arbitrary. It had a clear nexus with the objects sought to be achieved, i.e., to fill in as many vacant posts from the departmental candidates working on the lower ranks provided they reached bare minimum qualifying standards in the JAO, Part-II Examination. So far as the deputationists are concerned, the respondents

were entitled to insist on recruiting the best from among the deputationists. Hence, the higher criteria for deputationists cannot be said to be arbitrary or discriminatory. Such classification is permissible under Articles 14 and 16 of the Constitution of India. The law that Articles 14 and 16 permit reasonable classification of employees has been settled for many decades and reiterated in a catena of judgments by this Court. We may notice here only the observations made by the Constitution Bench in the case of *S.G. Jaisinghani Vs. Union of India* [AIR 1967 SC 1427] wherein this Court has held as follows:

> "The relevant law on the subject is well-settled. Under Article 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Article 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Article 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment can legitimately be sustained on the basis of a valid classification."

21. In view of the above, we find no merit in the appeals. We accordingly dismiss the appeals. There will be no order as to costs.

D.G. Appeals dismissed.

M.D., M/S. T. NADU MAGNESITE LTD.

v.

S. MANICKAM & ORS.

(Civil Appeal No. 2808 of 2010)

MARCH 29, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Service law – Re-absorption/re-transfer – Selection/ appointment of employees by Government Company – State Government implementing a project in joint venture with K company – Government Company transferred its permanent employees to joint venture company without any monetary loss and alteration of service conditions – Subsequent closure of JVC – Employees seeking reversion back to Government Company – Dismissal of writ petition – Direction by Division Bench of High Court to Government Company to absorb the employees with continuity of service on basis of promissory estoppel – Correctness of – Held: Division Bench erred in issuing such direction – Claim of employees not covered by the principle of promissory/equitable estoppel – No finding recorded by Division Bench as to infringement of legal or fundamental right of employees – After permanent transfer, fresh letter of appointment was served upon the employees – Services of employees having been terminated, their lien in Government Company also stood terminated – Hence, order of Division Bench set aside – Service Rules of the Tamil Nadu Magnesite Limited.

Doctrines – Doctrine of promissory equitable estoppel – Applicability of.

The appellant-company 'TANMAG' fully owned by the State Government, selected and appointed the respondents to various posts. The State Government

implemented a Project in joint venture with K Company. The appellant transferred the respondents to the Joint Venture Company-JVC, without any monetary loss and alteration of service conditions with seniority and other benefits. After 7 years, the Government decided to close JVC. The respondents sought reversion back to the appellant-Company but the same was rejected. Aggrieved, respondents filed writ petition. The Single Judge of High Court dismissed the same. The Division Bench of High Court on basis of the doctrine of promissory estoppel, directed the appellant to absorb the respondents with continuity of service and other benefits without back wages. Hence, the present appeals.

Allowing the appeals, the Court

HELD: 1.1. The request of the respondents to be sent on deputation was not accepted by the appellants. By letter dated 11.5.1991, the respondents were informed that it is not possible to depute them to JVC as per Clause 2.17 of the Service Rules of the Tamil Nadu Magnesite Limited. The respondents were permanently transferred to the JVC by letter dated 20.6.1991. They were also informed that the date of joining in service in TANMAG shall be deemed to be the date of joining at the JVC for reckoning the length of service for all purposes including the payment of gratuity. Therefore, it becomes quite evident that the appellant as well as the respondents were well aware about the nature of terms and conditions which were protected. After the permanent transfer fresh letter of appointment dated 25.7.1991 was served upon the respondents. Therefore, it is clear that the services of the respondents having been terminated, their lien in TANMAG, also stood terminated. [Para 16] [1115-E-H; 1116-A-C]

1.2. There was no representation made to respondent no. 1 that he would be ensured employment till the age of superannuation with the JVC. The other two

respondents have also not referred to any document which would indicate that any promise of future continuous employment was held out to them by TANMAG. In fact they had been earlier categorically informed that their services were liable to be terminated as they had become surplus. They were offered an alternative to be transferred to the JVC. Therefore, with their eyes open, the respondents had accepted the job in JVC. Their request for deputation, as provided under Clause 2.17 of the Service Rules, had been specifically rejected. They were in danger of losing their jobs under Clause 2.14 which enables the company to terminate services of the employees by giving three months' notice or salary in lieu thereof. They, therefore, accepted the alternative of a job with JVC. A job in JVC was better than no job at all. The Division Bench noticed that the respondents had accepted the loss of their lien in TANMAG. They were seeking re-absorption on the closure of the JVC. There was no assurance that there will be no closure of the JVC under any circumstances. The Division Bench in its anxiety to help the respondents, who were in danger of losing their jobs at the age of 50 years and above, seems to have stretched the principle of promissory estoppel beyond the tolerable limits. Undoubtedly, while exercising the extraordinary original jurisdiction under Article 226/227 of the Constitution of India, the High Court ought to come to the rescue of those who are victims of injustice, but not at the cost of well established legal principles. [Para 18] [1117-B-G]

State of Orissa vs. Ram Chandra Dev **AIR 1964 SC 685;** *State of W.B. vs. Calcutta Hardware Stores* **(1986) 2 SCC 203, referred to.**

1.3. There is no finding recorded by the Division Bench as to which legal or fundamental right of the respondents has been infringed. The relief is granted only on the basis of the doctrine of promissory estoppel. In

these circumstances, it was the duty of the High Court to analyze the facts to ensure that the principles of estoppel could appropriately be invoked in the instant case to help the respondents. The High Court erred in not performing this cautionary exercise. In view of the factual situation, it cannot be accepted that the respondents were put to disadvantage acting upon any unequivocal promise made by the appellants. On the basis of facts on record in the instant case, the claim of the respondents would not be covered by the said principles. In view of the facts, the Division Bench clearly committed an error of law in concluding that there has been a breach of principles of promissory/equitable estoppel. Therefore, the High Court erred in issuing the direction/writ in the nature of mandamus directing the appellants to re-absorb the respondents in the service of TANMAG. [Para 18, 19] [1118-G-H; 1119-A-H]

Kaniska Trading vs. Union of India **(1995) 1 SCC 274, referred to.**

Case Law Reference:

AIR 1964 SC 685	**Referred to.**	**Para 18**
(1986) 2 SCC 203	**Referred to.**	**Para 18**
(1995) 1 SCC 274	**Referred to.**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2808 of 2010.

From the Judgment & Order dated 13.3.2007 of the High Court of Madras in W.A. No. 3943 of 2004.

WITH

C.A. Nos. 2809 and 2810 of 2010.

T. Harish Kumar, Prasanth P. and V. Vasudevan for the Appellant.

K.K. Mani and Ankit Swarup for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. By this judgment, we shall dispose of the above three appeals as the facts and the legal issues involved in all the appeals are common. The writ petitioners before the High Court have been impleaded as respondent No.1 before this Court.

3. The appellant herein, TANMAG, is a company fully owned by the Government of Tamil Nadu. By G.O.Ms.No.41 Industries Department, dated 10.1.1979, it was decided to implement the policy decision taken by the Government of Tamil Nadu to reserve the mineral prone areas of magnesite for State exploitation. TANMAG was accordingly formed for implementing the policy. It is the common case of the parties that the respondents were duly selected and appointed, on the respective posts, in the aforesaid company. They were appointed as Assistant Project Engineer (Mechanical), Junior Foreman (Mechanical) and Deputy Manager (Mechanical) respectively by orders dated 12.9.1983, 23.11.1988 and 18.8.1989. At the time of joining, the respondents executed bonds to serve in TANMAG for a minimum period of three years. The TANMAG confirmed the services of the respondents through its proceedings dated 25.10.1985, 30.4.1991 and 24.8.1989 respectively. The respondents were paid the revised pay by the TANMAG as per the Pay Commission's recommendations made by the Government of Tamil Nadu.

4. In the year 1990, through G.O.Ms.No.855 Industries (MME.II) Department, dated 16.8.1990 the Government of Tamil Nadu decided to implement the Chemical Beneficiation Project

in joint venture with M/s. Kaitan Supermag Limited. The share holding pattern of the joint venture was as follows:

TANMAG:	26%
M/s. Kaitan Supermag Ltd.:	25%
General public:	49%

Therefore, TANMAG had control over JVC.

5. The appellant through letter dated 18.3.1991 conveyed to the respondents that they are in excess of the cadre strength in TANMAG and called upon them to express their willingness to work in the Joint Venture Company with the then existing pay and other facilities without any disadvantage. It was also mentioned in the said communication that if no option is given, the appellant will have no option but to terminate their services under Clause 2.14 of the Service Rules of the Tamil Nadu Magnesite Limited (hereinafter referred to as the Service Rules). The respondents were reluctant to leave the service of TANMAG. However, after prolonged correspondence, the appellant transferred the respondents to the JVC, without any monetary loss and alteration of service conditions with seniority and other benefits; by orders dated 20.06.1991 and 31.07.1991 respectively.

6. On 21.6.1996 respondent No.1 S. Manickam, petitioner in Writ Petition No.3707/2001, represented that since his transfer to JVC he had been working in the same cadre. Had he continued in TANMAG he would have become eligible for promotion. Even though under the transfer order it was provided that there would be no change in terms and conditions of employment, apart from other facilities he was monetarily losing more than Rs.2,000/- a month. It was also pointed that since JVC had not been able to take up any work on chemical beneficiation project, he was apprehensive about his future employment prospects. Since there was uncertainty in the

implementation of the project and originally his employment was for Rotary Kiln Plant, he be reverted back to TANMAG. It appears that no decision was taken on the representation.

7. By G.O.Ms No 140 dated 11.5.98 it was decided to close the JVC. A joint request was made by six employees in the letter dated 31.10.1998 including the three respondents herein seeking reversion back to TANMAG. By letter dated 26.11.98 the respondents and the other employees were informed that they were permanently transferred to the JVC, namely, M/s. India Magnesia Products Limited (hereinafter referred to as IMPL). Accordingly, they were relieved from the service of the company from the afternoon of 31.7.1991. As such they have no lien in TANMAG and no right to claim a reversion of their services from M/s. IMPL to TANMAG. Thus their request was rejected.

8. The order dated 26.11.1998 was challenged by the respondents in the respective writ petitions contending that the respondents were recruited by TANMAG and were transferred with all service benefits, pay protection, etc., to M/s. IMPL (the JVC) when it was formed. When it was closed all its assets were transferred back to TANMAG. The employees transferred from TANMAG to the JVC should also be automatically reverted back to TANMAG. The action of TANMAG in not re-transferring the respondents to its service is erroneous. They, therefore, prayed for quashing the said order dated 26.11.1998 with a consequential direction to TANMAG to re-transfer/absorb the respondents in the service of TANMAG with all benefits such as seniority on par with their immediate juniors, arrears of pay and allowances with service benefits that would have been accrued in favour of the respondents if they had continued in the service of TANMAG.

9. The TANMAG resisted the writ petitions by filing counter affidavit by contending that TANMAG is a separate entity and no writ is maintainable against it. It was pleaded that even though the Board of Directors are named by the Government,

the Company is managed by the Managing Director under the control and superintendence of the Board of Directors. It is also stated in the counter affidavit that the respondents were recruited for the project as per the advertisement. Thereafter the respondents were transferred to the JVC on the basis of the advance notice dated 18.3.1991. It was made clear that their services were permanently transferred and they were relieved from TANMAG from 31.7.1991. It is accepted that their service conditions were protected at the time of transfer to the JVC. After the transfer the respondents have lost their lien. They became the employees of the JVC. Therefore they have no right to demand reversion to TANMAG merely because the JVC had been closed. It is also stated in the counter affidavit that the respondents having opted and given their willingness to be absorbed in the JVC, it was not open to them to claim that they should be re-transferred to TANMAG on the closure of the JVC.

10. The learned single Judge after considering the rival submissions held that the respondents have lost the lien in TANMAG due to their transfer to the JVC. On transfer, they became the staff of the JVC. The claim of the respondents for being sent on deputation, under Clause 2.17 of the Service Rules having been rejected they cannot claim that they should be reverted back to TANMAG. Consequently the writ petitions were dismissed.

11. Being aggrieved by the aforesaid judgment of the learned single judge respondents filed the three writ appeals. On behalf of the respondents it was submitted before the Division Bench that TANMAG was a shareholder of JVC. It had transferred the land and machinery to the aforesaid company. The services of the respondents had been transferred to the JVC as the appellant had an interest in JVC. In such circumstances the company was not justified in claiming that the respondents had lost their lien in TANMAG on being transferred to JVC. They are, therefore, entitled to be reverted back to TANMAG. It was emphasised that none of the

respondents was willing to join the joint venture company. They were literally compelled to join in view of the agreement that had been signed by them at the time when they initially joined the services of TANMAG.

12. On the other hand, it was submitted by the appellant that on the permanent absorption of the respondents in the JVC, they had lost their lien. The closure of the JVC cannot revive the lien in TANMAG.

13. The Division Bench upon consideration of the submissions of the parties concluded that the respondents are entitled to be taken back by TANMAG in terms of the earlier transfer order, which protects the service conditions of the respondents. It was further held that TANMAG is not justified in contending that appellants having lost their lien in TANMAG cannot be retransferred. The assurance given in the letter dated 11.5.1991 clearly states that the transfer of service is without any disadvantage. It was, therefore, held that the stand taken by TANMAG is contrary to the assurance given to the respondents when they were compulsorily transferred to the JVC. It is noticed that all the assets of JVC on its closure have been taken over by TANMAG. There is no justification in denying absorption of the respondents who are unable to seek any other employment at this age of above 50 years. It is held that TANMAG is bound by the assurance given to the respondents while seeking their consent for transfer to JVC. This is particularly so, as it was stated that the terms and conditions of employment enjoyed by them in TANMAG are protected. It is further held that since JVC was closed at the instance of TANMAG, the appellant has put the respondents in a disadvantageous position. Therefore, TANMAG is estopped from contending that the respondents will not be absorbed. With these observations the judgment of the learned Single judge has been set aside. The appellant has been directed to absorb the respondents with continuity of service and other attendant benefits without back wages.

14. We have heard the learned counsel for the parties. Mr. P.P. Rao, learned Senior Advocate, appearing for the appellant submitted that the Division Bench has erred in applying the principle of estoppel. The only promise made to the respondents was that during their services with the JVC their terms and conditions and employment will be protected. No assurance was given that JVC will not be closed down in the future at any time. There was also no promise held out that in case the company is closed down they would be reabsorbed in the appellant. In any event learned senior counsel submitted that the writ petition did not even claim the relief on the basis of the promissory estoppel. There are no pleadings to lay the foundation to claim any relief on the basis of the doctrine of promissory estoppel.

15. Learned counsel for the respondents, however, submitted that initially 16 persons had been transferred to the JVC. Subsequently most of these persons joined some other concerns. They are, therefore, not claiming re-absorption. At present, there are only three respondents who need to be accommodated by the appellant.

16. We have considered the submissions made by the learned counsel for the parties. A perusal of the correspondence would show that initially the respondents were reluctant to leave the services of the appellant. However, they were aware that their services were liable to be terminated due to non-availability of work for which they were qualified. On 2.5.91 respondents addressed a letter to the appellants that they would like to continue the services in TANMAG, otherwise as per Clause 2.17 of the Service Rules they were wiling to work in the JVC. Rule 2.17 of the Service Rules provides as under:

> "The Management reserves the Right to depute any staff member/officer of the company to any other organization, on terms not inferior to those enjoyed by him in the company."

The request of the respondents to be sent on deputation was not accepted by the appellants. By letter dated 11.5.1991 the respondents were informed that it is not possible to depute them to JVC as per Clause 2.17. The respondents were permanently transferred to the JVC by letter dated 20.6.1991. They were also informed that the date of joining in service in TANMAG shall be deemed to be the date of joining at the JVC for reckoning the length of service for all purposes including the payment of gratuity. Therefore, it becomes quite evident that the appellant as well as the respondents were well aware about the nature of terms and conditions which were protected. After the permanent transfer fresh letter of appointment dated 25.7.1991 was served upon the respondents. Therefore, it is clear that the services of the Respondents having been terminated, their lien in TANMAG, also stood terminated.

17. It was only when the respondent No.1 S. Manickam, petitioner in Writ Petition No.3707/2001 became apprehensive about the closure of the unit, he submitted a representation on 21.6.1996 to the respondents seeking re-absorption in TANMAG. In this letter, the respondent narrated the entire history of his services with TANMAG. It is emphasized that his services were transferred to the JVC under compelling circumstances. At that time, he had been assured that there will not be any change in the terms and conditions of employment as stipulated in TANMAG. It is stated that he had accepted the transfer under compelling circumstances and joined JVC on the clear understanding that all privileges, perquisites and other facilities enjoyed by him in TANMAG shall be protected. His grievance was that since his transfer to JVC, he has been working in the same cadre in which he had joined TANMAG in 1983. Had he remained in TANMAG, he would have become eligible for promotion. He also emphasized that there was a loss of more than Rs.2000/- per month in his remuneration. Finally, he stated that it has not been possible for the JVC to take up the work on Chemical Beneficiation Project. Many of the officers whose services had been transferred to JVC along

with him have left the service. He was therefore apprehensive of his future employment career. Hence, he sought his reversion back to the respondents.

18. A perusal of the aforesaid letter makes it abundantly clear that there was no representation made to this respondent that he would be ensured employment till the age of superannuation with the JVC. The other two respondents have also not referred to any document which would indicate that any promise of future continuous employment was held out to them by TANMAG. In fact they had been earlier categorically informed that their services were liable to be terminated as they had become surplus. They were offered an alternative to be transferred to the JVC. Therefore, with their eyes open, the respondents had accepted the job in JVC. Their request for deputation, as provided under Clause 2.17 of the Service Rules, had been specifically rejected. They were in danger of losing their jobs under Clause 2.14 which enables the company to terminate services of the employees by giving three months' notice or salary in lieu thereof. They, therefore, accepted the alternative of a job with JVC. This was clearly, so to speak, "lesser of the two evils". A job in JVC was better than no job at all. The Division Bench noticed that the respondents had accepted the loss of their lien in TANMAG. They were seeking re-absorption on the closure of the JVC. There was no assurance that there will be no closure of the JVC under any circumstances. The Division Bench in its anxiety to help the respondents, who were in danger of losing their jobs at the age of 50 years and above, seems to have stretched the principle of promissory estoppel beyond the tolerable limits. Undoubtedly, while exercising the extraordinary original jurisdiction under Article 226/227 of The Constitution of India the High Court ought to come to the rescue of those who are victims of injustice, but not at the cost of well established legal principles. The circumstances in which a High Court could issue an appropriate writ under these articles was delineated by a constitution bench of this Court in the case of *State of Orissa*

Vs. Ram Chandra Dev, AIR 1964 SC 685 wherein Gajendragadkar, J. speaking for the court observed as follows:

> "Under Article 226 of the Constitution, the jurisdiction of the High Court is undoubtedly very wide. Appropriate writs can be issued by the High Court under the said article even for purposes other than the enforcement of the fundamental rights and in that sense, a party who invokes the special jurisdiction of the High Court under Article 226 is not confined to cases of illegal invasion of his fundamental rights alone. But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226."

The aforesaid settled position was reiterated in the case of *State of W.B. Vs. Calcutta Hardware Stores,* (1986) 2 SCC 203 in the following words:

> "Although the powers of the High Court under Article 226 of the Constitution are far and wide and the Judges must ever be vigilant to protect the citizens against arbitrary executive action, nonetheless, the Judges have a constructive role and therefore there is always the need to use such extensive powers with due circumspection. There has to be in the larger public interest an element of self-ordained restraint."

In this case, there is no finding recorded by the Division Bench as to which legal or fundamental right of the respondents has been infringed. The relief in this case is granted only on the basis of the doctrine of promissory estoppel. In these circumstances it was the duty of the High Court to analyze the facts to ensure that the principles of estoppels could appropriately be invoked in this case to help the respondents.

In our opinion, the High Court erred in not performing this cautionary exercise. In view of the factual situation, as noted above, we are unable to accept that the respondents were put to disadvantage acting upon any unequivocal promise made by the appellants.

19. The doctrine of promissory estoppel as developed in the administrative law of this country has been eloquently explained in *Kaniska Trading Vs. Union of India* (1995) 1 SCC 274 by Dr. A.S. Anand, J, in the following words :

> *"11.* The doctrine of promissory estoppel or equitable estoppel is well established in the administrative law of the country. To put it simply, the doctrine represents a principle evolved by equity to avoid injustice. The basis of the doctrine is that where any party has by his word or conduct made to the other party an unequivocal promise or representation by word or conduct, which is intended to create legal relations or effect a legal relationship to arise in the future, knowing as well as intending that the representation, assurance or the promise would be acted upon by the other party to whom it has been made and has in fact been so acted upon by the other party, the promise, assurance or representation should be binding on the party making it and that party should not be permitted to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings, which have taken place or are intended to take place between the parties."

In our opinion, on the basis of facts on record in this case, the claim of the respondents would not be covered by the principles enunciated above. In view of the facts narrated above, the Division Bench clearly committed an error of law in concluding that there has been a breach of principles of promissory/ equitable estoppel. Therefore, the High Court erred in issuing the direction/writ in the nature of mandamus directing the appellants to reabsorb the appellants in the service of TANMAG.

20. Before we part with the judgment, it would be appropriate to notice that during the hearing of these appeals, the respondents had been permitted to make the representation to the appellants for reconsideration of their request. The respondents had, therefore, submitted a representation on 15.2.2010. Learned counsel for the appellant, however, stated that it was not possible for the appellant to accommodate the respondents, however, in case in future any vacancy arises, the request of the respondents may be considered.

21. In view of the above, the appeals are allowed. The impugned judgment of the Division Bench under appeal is set aside. There will be no order as to costs.

N.J. Appeals allowed.

SUHRID SINGH @ SARDOOL SINGH
v.
RANDHIR SINGH & ORS.
(Civil Appeal Nos. 2811-2813 of 2010)

MARCH 29, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Court Fees Act, 1870 – s. 7(iv)(c) and (v) – Court fee – Computation of – In suits for a declaratory decree and consequential benefits – Filing of civil suit – Prayer for declaration that sale deed not binding on co-parcenary and for joint possession and court fee paid u/s. 7(iv)(c) – Courts below holding that the prayer was to seek cancellation of sale deeds and thus, court fee to be paid on the sale consideration mentioned in sale deeds – On appeal, held: Prayer was not for cancellation of sale deed but for a declaration that sale deed not binding on co-parcenary and for joint possession – Plaintiff was non-executant of sale deed – Thus, court fee was computable u/s. 7(iv)(c) – Orders of courts below set aside.

The question which arose for consideration in these appeals is as to what is the court fee payable in regard to the prayer for a declaration that the sale deeds were void and not 'binding on the co-parcenary', and for the consequential relief of joint possession and injunction.

Allowing the appeals, the Court

HELD: 1.1 Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. There is a difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance. In essence in

both the cases parties may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If the executant of the deed seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If the non-executant is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Court Fees Act, 1870. But if the non-executant is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under section 7(iv)(c) of the Act. Section 7(iv)(c) of the Act provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of section 7. [Para 6] [1126-C-H; 1127-A-B]

1.2. In the instant case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parcenery" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial court and the High Court were not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds and therefore, court fee had to be paid on the sale consideration mentioned in the sale deeds. Thus, the orders of the trial court and the High Court directing payment of court fee on the sale consideration under the sale deeds are set aside and trial court is directed to

calculate the court fee in accordance with section 7(iv)(c) read with section 7(v) of the Act. [Paras 7 and 8] [1127-B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2811-2813 of 2010.

From the Judgment & Order dated 19.3.2007 order dated 11.2.2008 and 16.5.2008 passed by the High Court of Punjab and Haryana at Chandigarh in CR No. 1482/2007 and RA No. 35 CII/2007 in Civil Revision No. 1482/2007 and C.M. No. 9445-C-II/2008 in C.M. 7001-C-II/2008 in R.A. 35-C-II/2007 in Civil Reivision 1482/2007.

Suhrid Singh appellant in person.

Labh Singh Bhangu and Madhu Moolchandani for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted.

The appellant filed a suit (Case No.381/2007) on the file of the Civil Judge, Senior Division, Chandigarh for several reliefs. The plaint contains several elaborate prayers, summarizes below :

(i) for a declaration that two houses and certain agricultural lands purchased by his father S. Rajinder Singh were co-parcenary properties as they were purchased from the sale proceeds of ancestral properties, and that he was entitled to joint possession thereof;

(ii) for a declaration that the will dated 14.7.1985 with the codicil dated 17.8.1988 made in favour of the third defendant, and gift deed dated 10.9.2003 made in favour of fourth defendant were void and non-est "qua the co-parcenary";

(iii) for a declaration that the sale deeds dated 20.4.2001,

24.4.2001 and 6.7.2001 executed by his father S. Rajinder Singh in favour of the first defendant and sale deed dated 27.9.2003 executed by the alleged power of attorney holder of S. Rajender Singh in favour of second defendant, in regard to certain agricultural lands (described in the prayer), are null and void qua the rights of the "co-parcenary", as they were not for legal necessity or for benefit of the family; and

(iv) for consequential injunctions restraining defendants 1 to 4 from alienating the suit properties.

2. The appellant claims to have paid a court fee of Rs.19.50 for the relief of declaration, Rs.117/- for the relief of joint possession, and Rs.42/- for the relief of permanent injunction, in all Rs.179/-. The learned Civil Judge heard the appellant-plaintiff on the question of court fee and made an order dated 27.2.2007 holding that the prayers relating to the sale deeds amounted to seeking cancellation of the sale deeds and therefore ad valorem court fee was payable on the sale consideration in respect of the sale deeds.

3. Feeling aggrieved the appellant filed a revision contending that he had paid the court fee under section 7(iv)(c) of the Court-fees Act, 1870; and that the suit was not for cancellation of any sale deed and therefore the court fee paid by him was adequate and proper. The High Court by the impugned order dated 19.3.2007 dismissed the revision petition holding that if a decree is granted as sought by the plaintiff, it would amount to cancellation of the sale deeds and therefore, the order of the trial court did not call for interference. The application filed by the appellant for review was dismissed on 11.2.2008. The application for recalling the order dated 19.3.2007 was dismissed on 24.4.2008 and further application for recalling the order dated 24.4.2008 was dismissed on 16.5.2008. Feeling aggrieved, the appellant has filed these appeals by special leave.

4. The limited question that arises for consideration is what is the court fee payable in regard to the prayer for a declaration that the sale deeds were void and not 'binding on the co-parcenary', and for the consequential relief of joint possession and injunction.

5. Court fee in the State of Punjab is governed by the Court Fees Act, 1870 as amended in Punjab ('Act' for short). Section 6 requires that no document of the kind specified as chargeable in the First and Second Schedules to the Act shall be filed in any court, unless the fee indicated therein is paid. Entry 17(iii) of Second Schedule requires payment of a court fee of Rs.19/50 on plaints in suits to obtain a declaratory decree where no consequential relief is prayed for. But where the suit is for a declaration and consequential relief of possession and injunction, court fee thereon is governed by section 7(iv)(c) of the Act which provides :

> *"7. Computation of fees payable in certain suits :* The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :
>
> (iv) in suits – x x x x (c) *for a declaratory decree and consequential relief.-* to obtain a declaratory decree or order, where consequential relief is prayed, x x x x x according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.
>
> In all such suits the plaintiff shall state the amount at which he values the relief sought:
>
> Provided that minimum court-fee in each shall be thirteen rupees.
>
> Provided further that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of this section."

The second proviso to section 7(iv) of the Act will apply in this case and the valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of the said section. Clause (v) provides that where the relief is in regard to agricultural lands, court fee should be reckoned with reference to the revenue payable under clauses (a) to (d) thereof; and where the relief is in regard to the houses, court fee shall be on the market value of the houses, under clause (e) thereof.

6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to 'A' and 'B' — two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. 'A' has to sue for cancellation of the deed. On the other hand, if 'B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A' is invalid/void and non-est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If 'B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if 'B', a non-executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed

according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7.

7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parcenery" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that therefore court fee had to be paid on the sale consideration mentioned in the sale deeds.

8. We accordingly allow these appeals, set aside the orders of the trial court and the High Court directing payment of court fee on the sale consideration under the sale deeds dated 20.4.2001, 24.4.2001, 6.7.2001 and 27.9.2003 and direct the trial court to calculate the court fee in accordance with Section 7(iv)(c) read with Section 7(v) of the Act, as indicated above, with reference to the plaint averments.

N.J. Appeals allowed.

PREM CHAND & ORS.

v.

UNION OF INDIA

(Civil Appeal No. 2856 of 2010)

MARCH 30, 2010

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Land Acquisition Act, 1894 – ss. 4 and 23(1A) r/w. s. 30(1)(b) – Land acquired – Claim for compensation – High Court relying on its previous judgment, awarded compensation @ Rs. 39,300/- per bigha and denied benefit u/s. 23(1A) –In another case in respect of identical land, High Court had awarded compensation @ Rs. 3.45 lacks per bigha, which was scaled down to Rs. 76,550/- per bigha by Supreme Court – Held: Claimants are entitled to the compensation u/s. 23(1A) r/w. s. 30(1)(b), since the award had not been made on or before 30.04.1982 – In view of the judgment in the case of identical land, compensation @ Rs.39,300/- not justified – However, the compensation is scaled down by deducting 10% of the rate of Rs.76,550/- considering the fact that the lands have been already developed into plots.

The High Court in the impugned order, relying on its previous judgment, awarded compensation @ Rs. 39,300/- per *bigha* for the land acquired under Land Acquisition Act, 1894. However, it specifically denied the claimants' entitlement to the benefit u/s. 23(1A).

In appeal to this Court, claimants contended that High Court was wrong in denying benefit u/s. 23(1A); and that High Court had wrongly fixed the compensation at Rs. 39,300/- per bigha, as in *Bali Ram Sharma's* **case wherein the land acquired was also from the same village as in the present case, High Court had awarded**

compensation @ 3.45 lacks, which was scaled down to Rs. 76,550/- per bigha by Supreme Court in appeal and that the claimants were at least entitled to the compensation @ 76,550/- per *bigha*.

Partly allowing the appeal, the Court

HELD: 1. The claimants would be entitled to the compensation u/s. 23(1A) r/w. Section 30(1)(b) of Land Acquisition Act, 1894, since the award had not been made on or before 30.04.1982. The claimants would, therefore, be entitled to that benefit, though the benefit seems to have been rejected by the High Court without giving any reasons. [Para 5] [1132-B-C]

K.S. Paripoornan v. State of Kerala and *Ors.* **1994 (5) SCC 593, followed.**

2. On the question of parity, the lands at the villages in **Bali Ram Sharma's* **case are identically circumstanced. It would, therefore, not be proper to grant the compensation at much lesser rate of Rs.39,300/- per *bigha*. However, it is correct that the rate of Rs.76,550/- is in respect of the Notification dated 17.11.1980 and the Notification in the present case was published only on 22.03.1978 and, therefore, some allowance would have to be given for that. Therefore, the compensation is scaled down by deducting 10 per cent of the rate of Rs.76,550/- considering the fact that the lands in this case have been found to be already developed into plots. The compensation shall be paid @ Rs.69,550/- plus the benefit u/s. 23(1-A) r/w. Section 30(1)(b) of the Act. [Para 8, 9] [1133-D-G-H; 1134-A-B]**

Delhi Development Authority v. Bali Ram Sharma and Ors.* **2004 (6) SCC 533; *Union of India v. Harpat Singh and Ors*. **2009 (8) SCALE 201, relied on.**

Karan Singh and Ors. v. Union of India **1997 (8) SCC 186, referred to.**

Case Law Reference:

1994 (5) SCC 593	**followed.**	**Para 4**
2004 (6) SCC 533	**relied on.**	**Para 6**
1997 (8) SCC 186	**referred to.**	**Para 6**
2009 (8) SCALE 201	**relied on.**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2856 of 2010.

From the Judgment & Order dated 11.12.2003 of the High Court of Delhi at New Delhi in R.F.A. No. 149 of 1997.

P.H. Parekh, Mohit Choudhary, Puja Sharma, P.K. Mohapatra, Ramesh Gopinathan for the Appellant.

P.P. Malhotra, ASG, Shailender Sharma, Sadhana Sandhu (for Anil Katiyar) for the Respondent.

The Judgment of the Court was delivered

V.S. SIRPURKAR, J. 1. Leave granted.

2. This is an appeal against the judgment of the High Court wherein the High Court has awarded the land acquisition compensation @ Rs.39,300/- per bigha. The High Court relied on its earlier judgment without citing the same wherein it had fixed the land acquisition compensation @ Rs.34,150/- per bigha in respect of the Notification under Section 4 of the Land Acquisition Act dated 19.08.1976. On that basis, the High Court, considering the difference of 1-1/2 years, enhanced the amount at the rate of 10 per cent per year and thus granted compensation @ Rs.39,300/- per bigha.

3. The concerned lands are from village Dallupura which have been acquired by the Notification under Section 4 of the Land Acquisition Act dated 22.03.1978 which ripened into the

Notification under Section 6 dated 27.09.1978. The High Court, however, specifically ordered that the appellants would not be entitled to the benefit under Section 23 (1-A) of the Land Acquisition Act (hereafter 'the Act').

4. Shri P.H. Parekh, learned Senior Counsel pointed out firstly that the claimants in this case could not have been deprived of the benefit under Section 23 (1-A) of the Act since the award was passed on 25.02.1983 and it was pending on 24.09.1984. He invited our attention to the Constitution Bench decision of this Court in *K.S. Paripoornan v. State of Kerala & Ors.* [1994 (5) SCC 593] wherein this Court had culled out the ratio in paragraph 110 as follows:

"110. For all these reasons the questions raised in these petitions are answered as below:

(1) Section 23(1-A) providing for additional compensation is attracted in every case where reference was pending under Section 18 before the Court [Section 23(1-A)].

(2) No additional compensation is payable in appeals pending on or after 24-9-1984 either in High Court or this Court.

(3) Additionalcompensation under Section 23(1-A) is also payable in all those cases where the proceedings were pending and the award had not been made by the Collector on or before 30-4-1982 [Section 30(1)(a)].

(4) Similarly every landowner is entitled to additional compensation where the land acquiring proceedings started after 30-4-1982 whether the award by the Collector was made before 24-9-1984 or not [Section 30(1)(b)].

(5) XXX"

5. Accordingly as per the sub-para (3) of paragraph 110, it is clear that the claimants would be entitled to the compensation under Section 23 (1-A) read with Section 30 (1) (b) since the award had not been made on or before 30.04.1982. The claimants would, therefore, be entitled to that benefit though the benefit seems to have been rejected by the High Court without giving any reasons. That direction of the High court is, therefore, set aside and it is held that the claimants would be entitled to the benefit under Section 23 (1-A) of the Act.

6. However, Shri P.H. Parekh argued that the High Court had erred in fixing the compensation @ Rs.39,300/- per bigha. He further pointed out that the claimants herein had moved an application under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, enhancing their claim before the High Court to Rs.350 per sq. yds. He pointed out that in the case reported as *Delhi Development Authority v. Bali Ram Sharma & Others* [2004 (6) SCC 533] in respect of the villages Kondli, Gharoli and Dallupura, this Court had awarded compensation @ Rs.76,550/- per bigha. In that case, this Court, relying on *Karan Singh & Ors. v. Union of India* [1997 (8) SCC 186] had scaled down the compensation to Rs.76,550/- per bigha from the one awarded by the High Court @ Rs.3.45 lakh per bigha. Shri Parekh, therefore, suggests that even the claimants in this case whose lands have been acquired in Dallupura would be entitled at least to the compensation @ Rs.76,550/- per bigha. The lands at Dallupra, Kondli and Gharoli have been held to be identically circumstanced. In fact, in *Bali Ram Sharma's* case (cited supra), the Court was dealing with the lands at Gharoli, Kondli and Dallupura where the High Court had awarded the compensation @ Rs.3.45 lakhs. This Court did not agree with that and scaled it down to Rs.76,550/-. It is, therefore, the learned Senior Counsel claims the compensation at least at that rate. It is to be noted that even

in this case, the claimants had claimed the compensation @ Rs.350/- per bigha by way of an amendment. Shri Parekh pointed out that the Notification in *Bali Ram Sharma's* case (cited supra) was dated 17.11.1980 which is comparable to the Notification in the present case which is dated 22.03.1978. He further pointed out that there is evidence that the lands at Dallupura, compensation of which is in question in the present appeal, were actually converted into the plots. He, therefore, claims compensation @ Rs.76,550/-.

7. On the other hand, Shri P.P. Malhotra, learned Counsel appearing for the Union of India disputes this and claims that the High Court was right in fixing the compensation @ 39,300/- per bigha.

8. On the question of parity, there can be no dispute that the lands at Kondli, Dallupura and Gharoli are identically circumstanced, as held by this Court in *Bali Ram Sharma's* case (cited supra). It would, therefore, be not proper to grant the compensation at much lesser rate of Rs.39,300/- per bigha. The learned Counsel also pointed out a decision of this Court to which one of us, (Cyriac Joseph, J.) was a party reported as *Union Of India v. Harpat Singh & Ors*. [2009 (8) SCALE 201]. This Court followed the judgments in *Karan Singh's* case (cited supra) and *Bali Ram Sharma's* case (cited supra) and approved them. These judgments were in respect of Gharoli, Kondli and Dallupura, where the compensation was paid @ Rs.76,550/-. He, therefore, urged to maintain the parity in this case also.

9. However, it is pointed out by Shri Malhotra that the rate of Rs.76,550/- is in respect of the Notification dated 17.11.1980 and the Notification in the present case was published only on 22.03.1978 and, therefore, some allowance would have to be given for that. Shri Malhotra is undoubtedly right. We, therefore, scale down the compensation by deducting 10 per cent of the rate of Rs.76,550/-. Ordinarily, we would have scaled down by

20 per cent but considering the fact that the lands in this case have been found to be already developed into plots, we would choose to scale down the compensation by 10 per cent to the round figure of Rs.69,550/- The compensation shall be paid @ Rs.69,550 plus the benefit under Section 23 (1-A) read with Section 30 (1) (b) of the Act.

10. With these directions, the appeal is allowed in part.

K.K.T. Appeal partly allowed.

PATAI @ KRISHNA KUMAR
v.
STATE OF U.P.
(Criminal Appeal No. 1718 of 2007)

MARCH 30, 2010

[DR. MUKUNDAKAM SHARMA AND A.K. PATNAIK, JJ.]

Penal Code, 1860: s.302 r.w. s.34 – Common intention – Appellants-accused committed act of accosting the deceased with pistols and dragging him away to the place of incident – The other two accused persons armed with pistols fired at the deceased which resulted in his death on the spot – Conviction under s.302 r.w. s.34 – Challenged by appellants on the ground that they were only holding the deceased and consequently, there was no pre-conceived or pre-concerted meeting of minds – Held: Appellants actively participated in the commission of the offence by doing acts in furtherance of the common intention of killing the deceased – Conviction upheld.

FIR: Cryptic message – Not containing details regarding the manner in which incident took place or name of the deceased or accused – Held: Cannot be termed as FIR – A message or communication to be qualified to be an FIR must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law into motion – An FIR must at least contain some information about the crime committed as also some information about the manner in which the cognizable offence was committed – Penal Code, 1860 – s.302 r.w. s.34.

Prosecution case was that on the fateful day, deceased, his son-PW-1 and PW-3 were returning from the court where litigation was pending between the deceased and 'G' alongwith others. When they got down

from the train, the accused-appellants and the accused 'SK' armed with pistols accosted the deceased. 'G' who was travelling in the same train after alighting from the train exhorted to the other accused persons to avail the opportunity to eliminate the deceased, whereafter the appellants dragged the deceased to the place of incident. 'SK' and 'G' fired at the deceased which resulted in his death on the spot. On hue and cry, some villagers assembled there and saw the appellants, 'SK' and 'G' running away from that place. The informant wrote an FIR on the spot itself and submitted it to the Police Station. Trial Court convicted the accused persons under Section 302 r.w. Section 34 IPC. High Court upheld the order of conviction.

In these appeals, it was contended for the appellants that they were only holding the deceased and consequently, it could not be held that there was any pre-conceived or pre-concerted meeting of minds and therefore their conviction under Section 302 read with Section 34 IPC was illegal; that there were two separate First Information Reports lodged with the police – the first one was lodged at about 4.30 p.m. by the Assistant Station Master whereas the First Information Report second in point of time was lodged by P.W. 1 at about 5.15 p.m.; and that since the First Information Report lodged by Assistant Station Master indicated that there was no eye-witness to the occurrence therefore framing and calling of the three eye-witnesses by the prosecution could not have been believed and the prosecution story should fail.

Dismissing the appeals, the Court

HELD: 1.1. The report given by the Assistant Station Master appeared to be a telephonic message which was sent by the Cabin man at the Rooma Halt Station to GRP. This also found corroboration in the deposition of DW-1

who stated in his evidence that he registered a case in GD and sent a message at 4.40 p.m. to the control room on telephone and also gave a wireless message to the Maharajpur Police Station. There was however nothing on record to indicate that the aforesaid report was sent to the Maharajpur Police Station immediately and the same was received at the Police Station Maharajpur prior to the lodging of the report given by P.W. 1. Besides, the alleged report given by the Assistant Station Master appeared to be very cryptic and without any details regarding the manner in which the incident had taken place or mentioning the name of the deceased. Considering the contents of the said message, it cannot be said that there was any possibility of recording a First Information Report on the basis of the message sent to the GRP by the Assistant Station Master. There was no concrete evidence to indicate that any such information was in fact sent and received at the police station. In order for a message or communication to be qualified to be a First Information Report, there must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law into motion. It is true that a First Information Report need not contain the minutest details as to how the offence had taken place nor it is required to contain the names of the offenders or the witnesses. But it must at least contain some information about the crime committed as also some information about the manner in which the cognizable offence has been committed. A cryptic message recording an occurrence cannot be termed as a First Information Report. [Paras 11 and 15] [1143-G-H; 1144-C-H; 1145-A]

1.2. The object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. In the present

case, however, there was no proof regarding the fact that the said information was sent to the Police at Maharajpur and that it was received and therefore, the said information cannot be said to be earliest first information report submitted to the police. The actual first information report was the report which was submitted by P.W. 1, the informant at 5.15 p.m. [Paras 16 and 17] [1145-D, E, H; 1146-A-B]

Bavaji Jadeja v. State **(1994) 2 SCC, relied on.**

2.1. The Investigating Officer clearly stated in his deposition that he had recovered three tickets from the possession of the deceased. From the said deposition, it was thus clearly established that on the fateful day not only the deceased was travelling by the said train but the two other persons namely, P.W. 1, the informant and P.W. 3 also travelled with him in the same train and all the three got down at the Rooma Halt Railway Station where the incident took place. Therefore, there was no reasonable ground to doubt that P.W. 1, the informant and P.W. 3 were not the natural witnesses. They had in fact accompanied the deceased and also observed and saw the manner in which the entire incident happened and took place. P.W. 4 was also a fellow traveller in the same train who had also got down at the Rooma Halt Station. He clearly stated that he saw the occurrence. There was nothing on record to cast a doubt as to the presence of P.W. 4 also at the time and at the place of occurrence. The evidence adduced by P.W. 1 and P.W. 3 clearly corroborated each other with respect to the fact that both the appellants accosted the deceased with pistols in their hands and both of them dragged the deceased from the platform to the place near the *Peepal* tree where he was shot dead by the other two accused persons. The evidence adduced thus clearly established that all the four accused persons carried weapons with them and at the exhortation of 'G' that it was the opportune time to

eliminate the deceased, appellants dragged the deceased from the platform to the *Peepal* tree, where the deceased was shot dead by the other two accused persons. A pre-concerted mind and a common intention to commit the offence were apparent on the face of the record. [Paras 18 and 19] [1146-C-H; 1147-A-B]

2.2. Section 34 IPC lays down that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The appellants committed the act of accosting the deceased with pistols and dragging him away from the platform to a place near the *Peepal* tree at the exhortation given by 'G'. Therefore, it could be said that not only the two appellants were present at the scene of offence but they actively participated in the commission of the offence by doing acts in furtherance of the common intention of killing the deceased. [Paras 19-20] [1147-C-E]

2.3. P.W. 1 clearly stated in his statement that he had drawn up the said first information report at the place of occurrence in his own handwriting. The fact that the said first information report was in a neat and clean handwriting cannot always lead to the conclusion that the said report was prepared by the police officer or at his dictation. If the hand writing of the writer of the information is neat and clean and he could express himself clearly, no fault could be found against such writing. In the present case, there was a clear deposition of PW-1 that it was drawn by himself and in his own hand writing and there is no evidence to impeach or doubt the said statement of the witness. [Para 22] [1147-H; 1148-A-C]

2.4. In the entire facts and circumstances of the case, the prosecution was able to establish by leading cogent

and reliable evidence, the guilt of both the appellants and therefore their conviction and sentence under Section 302 read with Section 34 IPC cannot be said to be in any manner illegal or unjustified. [Para 23] [1148-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1718 of 2007.

From the Judgment & Order dated 8.11.2006 of the High Court of Judicature at Allahabad in Criminal Appeal No. 687 of 1980.

WITH

Crl.A.No. 1719 of 2007.

Ratnakar Dash, Anilendra Pandey, Priya Kashyap, Dr. Kailash Chand, P.K. Jain, Shekhar Raj Sharma, Chandra Prakash Pandey for the appearing parties.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA 1. These two appeals arise out of a common judgment and order dated 08.11.2006 passed by the High Court of Allahabad dismissing the appeals filed by the appellants herein against their conviction and sentence under Section 302 read with Section 34 of the Indian Penal Code (for short the "IPC").

2. Shri Prithvi Pal Singh alias Chandra Prakash Singh, son of the deceased had lodged a report at the Police Station Maharajpur, District Kanpur contending, inter alia, that on 29.07.1977 while he alongwith his father, Vikramaditya Singh and one Sri Jagannath Dubey were coming back to their village by Kanpur Allahabad Passenger Train from the Court of Munsif Hawali, Kanpur where a litigation was pending between his father Vikramaditya Singh and Sri Ganesh Singh and others, they alighted at the Rooma Halt Station for the purpose of going to their house. Further allegation was that the accused Sri Shrawan Kumar, Sri Patai @ Krishna Kumar and Brij Kishore,

who were armed with country made pistols, accosted the deceased.

3. It was alleged that the accused Ganesh Singh, who was travelling in the same train but in a different compartment, after alighting from the train exhorted that it is the opportune time to eliminate Sri Vikramaditya Singh, the deceased, whereupon the present appellants Brij Kishore and Patai @ Krishna Kumar dragged his father from the platform of the station to a place under a Peepal tree whereupon Sri Shrawan Kumar and Ganesh Singh put their country made pistols at the deceased and fired shots consequent to which Vikramaditya Singh died instantaneously. On hue and cry having been made by Prithvi Pal Singh @ Chandra Prakash Singh - the informant and Sri Jagannath Dubey, Sri Iqbal, Sri Mahendra Singh, Sri Ram Prasad Sharma and some other persons of village Gangaganj came to the place of occurrence and saw the appellants running away from that place. It is further alleged that Prithvi Pal Singh had written the First Information Report at the spot itself and had submitted the same to the Police Station wherein an entry was made.

4. After registering a case, investigation was conducted during the course of which all the accused persons were arrested. On completion of the investigation, a chargesheet was filed against all the accused persons under Section 302 read with Section 34 IPC. As many as 8 prosecution witnesses were examined which included, among others, Prithvi Pal Singh, P.W. 1, Jagannath Dubey, P.W. 3, Sri Iqbal Singh, P.W. 4. Sri Girja Shanker Yadav, the Sub-Inspector who had started the investigation was examined as P.W. 6. Dr. R.S. Pundrik who had conducted the post mortem examination on the dead body was examined as PW-7. The accused persons were examined under Section 313 of the CrPC and on completion of the trial, the arguments of the counsel appearing for the parties were heard.

5. The learned trial Court, after appreciating the evidence on record passed a judgment and order dated 12.03.1980 finding all the accused persons guilty of the charge under Section 302 read with Section 34 of the IPC and convicted all of them under the aforesaid sections. By a separate order, they were sentenced to undergo imprisonment for life.

6. Being aggrieved by the aforesaid judgment and order passed by the trial Court, three separate appeals were filed by the accused persons – one by Shrawan Kumar and Brij Kishore and the others by Ganesh Singh & Patai @ Krishna Kumar respectively. The High Court after considering the entire record upheld the order of conviction and sentence and dismissed all the appeals.

7. Being aggrieved by the aforesaid judgment and order passed by the High Court, the accused Ganesh Singh and Sri Patai filed an appeal in this Court which was registered as Criminal Appeal No. 1718 of 2007 whereas the accused Brij Kishore filed a separate appeal which was registered in this Court as Criminal Appeal No. 1719 of 2007. As the facts and legal issues urged in both these appeals are similar in nature, we propose to dispose of both the said appeals by this common judgment and order. Before adverting to the other issues, we may record that during the pendency of the present appeal, one of the appellants namely Ganesh Singh died and therefore his appeal stands abated. Thus, in the present appeals we are concerned with only the two accused persons namely, Sri Patai and Brij Kishore.

8. Both the counsel appearing for the said two accused persons namely Patai and Brij Kishore very forcefully submitted before us that none of the aforesaid two appellants had fired any shot at the deceased and the allegations that have been made against them are that they were only holding the deceased and consequently, it could not have been held that there was any pre-conceived or pre-concerted meeting of minds and therefore their conviction under Section 302 read

with Section 34 IPC is illegal.

9. It was also submitted that the prosecution has failed to prove that the present appellants had shared an intention common with that of the other two accused persons namely Ganesh and Shrawan Kumar who had in fact fired shots from their country made pistols at the deceased resulting in his death. The next submission of the counsel appearing for the appellants was that this is a case where there were two separate First Information Reports lodged with the police – the first one was lodged at about 4.30 p.m. by the Assistant Station Master whereas the First Information Report second in point of time was lodged by P.W. 1 at about 5.15 p.m. The counsel for the appellant forcefully contended before us that since the said First Information Report indicates that there was no eye-witness to the occurrence, framing and calling of the three eye-witnesses by the prosecution could not and should not have been believed and hence the prosecution story should fail.

10. It was also submitted that under any circumstance it could not be said that the present appellants are guilty of charge under Section 302 and at the most they could be charged under Section 304 of the Indian Penal Code.

11. We have considered the aforesaid submission in the light of which we have carefully scrutinized the records. Since there was a specific submission that there were two separate First Information Reports lodged with the police on the same date as aforesaid, we have analyzed the entire records. The alleged First Information Report stated to have been lodged by the Assistant Station Master is placed on record as Annexure P-1.

12. The aforesaid report given by the Assistant Station Master appears to be a telephonic message which was sent by the Cabin man at the Rooma Halt Station to GRP. The text of the message reads as follows: -

"Message at 16.20 hrs. One passenger was shot dead at Roome cabin got down by 2 KA passenger p1 proved and arranged disposal of dead body."

13. It therefore appears that the aforesaid message was sent by the Cabin man through the Assistant Station Master to the GRP which was received at the GRP and on the basis of which a chik report Ext. Kha-5 was prepared. This also finds corroboration in the deposition of Shri O.N. Pandey, DW-1.

14. He has also stated in his evidence that he registered a case in GD No. 72, the true copy of which is Ext. Kha-8. He further stated that at 4.40 p.m., he sent a message to the control room on telephone and also gave a wireless message to the Maharajpur Police Station, but he has admitted that he had sent the wireless message through the control room. There is however nothing on record to indicate that the aforesaid report was sent to the Maharajpur Police Station immediately and the same was received at the Police Station Maharajpur prior to the lodging of the report given by P.W. 1. Besides, the aforesaid alleged report given by the Assistant Station Master appears to be very cryptic and without any details regarding the manner in which the incident had taken place or mentioning the name of the deceased.

15. Considering the contents of the said message, it cannot be said that there was any possibility of recording a First Information Report on the basis of the message sent to the GRP by the Assistant Station Master. There is no concrete evidence to indicate that any such information was in fact sent and received at the police station. In order for a message or communication to be qualified to be a First Information Report, there must be something in the nature of a complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law into motion. It is true that a First Information Report need not contain the minutest details as to how the offence had taken place nor it is required to contain the names of the offenders or the witnesses. But it

must at least contain some information about the crime committed as also some information about the manner in which the cognizable offence has been committed. A cryptic message recording an occurrence cannot be termed as a First Information Report.

16. In *Ramsinh Bavaji Jadeja v. State* (1994) 2 SCC 685, this Court, while dealing with the issue as to when investigation commences, observed with regard to the cryptic nature of a message as follows in para 7 of that judgment:

> "**7.** ..... If the telephonic message is cryptic in nature and the officer in charge, proceeds to the place of occurrence on basis of that information to find out the details of the nature of the offence itself, then it cannot be said that the information, which had been received by him on telephone, shall be deemed to be first information report. The object and purpose of giving such telephonic message is not to lodge the first information report, but to request the officer in charge of the police station to reach the place of occurrence. On the other hand, if the information given on telephone is not cryptic and on basis of that information, the officer in charge, is prima facie satisfied about the commission of a cognizable offence and he proceeds from the police station after recording such information, to investigate such offence then any statement made by any person in respect of the said offence including about the participants, shall be deemed to be a statement made by a person to the police officer "in the course of investigation", covered by Section 162 of the Code. That statement cannot be treated as first information report. But any telephonic information about commission of a cognizable offence irrespective of the nature and details of such information cannot be treated as first information report.....".

17. In the present case, however, there is no proof regarding the fact that the said information was sent to the

Police at Maharajpur and that it was received and therefore, the said information cannot be said to be earliest first information report submitted to the police. The actual first information report as appears to us from the record is the report which was submitted by P.W. 1, Prithvi Pal Singh, the informant at 5.15 p.m. Therefore, the contention urged by the counsel of the appellants that there were two separate First Information Reports lodged with the police on the day of the occurrence is without any merit.

18. The Investigating Officer has clearly stated in his deposition that he had recovered three tickets from the possession of the deceased. From the said deposition, it is thus clearly established that on the fateful day i.e. 29.07.1977 not only the deceased was travelling by the aforesaid train but the two other persons namely, P.W. 1, Prithvi Pal Singh, the informant and P.W. 3 Sri Jagannath Dubey, also travelled with him in the same train and all the three got down at the Rooma Halt Railway Station where the incident had taken place. Therefore, there is no reasonable ground to doubt that P.W. 1, the informant and P.W. 3 are not the natural witnesses. They had in fact accompanied the deceased and also observed and saw the manner in which the entire incident had happened and taken place. P.W. 4, Iqbal Singh was also a fellow traveller in the same train who had also got down at the Rooma Halt Station. He has clearly stated that he had seen the occurrence. There is nothing on record to cast a doubt as to the presence of P.W. 4 also at the time and at the place of occurrence. The evidence adduced by P.W. 1 and P.W. 3 clearly corroborate each other with respect to the fact that both the present appellants had accosted the deceased with pistols in their hands and both of them had dragged the deceased from the platform to the place near the Peepal tree where he was shot dead by the other two accused persons.

19. The evidence adduced thus clearly establishes that all the four accused persons carried weapons with them and at

the exhortation of Sri Ganesh Singh that it is the opportune time to eliminate the deceased, accused persons namely Brij Kishore and Patai dragged the deceased from the platform to the Peepal tree, where the deceased was shot dead by the other two accused persons namely, Sri Shrawan Kumar and Sri Ganesh Singh. A pre-concerted mind and a common intention to commit the offence are apparent on the face of the record. Section 33, IPC defines the expression "act" in the following words:

> "The word "act" denotes as well a series of acts as a single act."

Section 34, on the other hand, lays down that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

20. In our considered opinion, here is a case where the appellants have committed the act of accosting the deceased with pistols and dragging him away from the platform to a place near the Peepal tree at the exhortation given by Sri Ganesh Singh. Therefore, it could be said that not only the two appellants were present at the scene of offence but they actively participated in the commission of the offence by doing acts in furtherance of the common intention of killing the deceased. Therefore, the contention of the counsel appearing for the appellants stands rejected.

21. It was also submitted by one of the counsel that the First Information Report submitted by P.W.-1 was actually written by the Police Officer or at least at his dictation and the same could not have been drawn up at the place of occurrence as alleged. The aforesaid submission is not supported by any evidence on record.

22. On the other hand P.W. 1 has clearly stated in his statement that he had drawn up the said first information report

at the place of occurrence in his own handwriting. The fact that the said first information report is in a neat and clean handwriting cannot always lead to the conclusion that the said report was prepared by the police officer or at his dictation. If the hand writing of the writer of the information is neat and clean and he could express himself clearly, no fault could be found against such writing. In the present case, there is a clear deposition of PW-1 that it was drawn by himself and in his own hand writing and there is no evidence to impeach or doubt the said statement of the witness. Consequently, the aforesaid submission is also found to be without any merit.

23. Considering the entire facts and circumstances of the case, we are of the considered opinion that the prosecution has been able to establish by leading cogent and reliable evidence, the guilt of both the accused persons who are appellants before this Court, and therefore their conviction and sentence under Section 302 read with Section 34 IPC cannot be said to be in any manner illegal or unjustified.

24. The appeals, therefore, have no merit and are dismissed. The records may be transmitted immediately.

D.G. Appeals dismissed.

SUNDERLAL KANAIYALAL BHATIJA
v.
STATE OF MAHARASHTRA AND ORS.
(Criminal Appeal No. 1222 of 2006)

MARCH 31, 2010

[DR. MUKUNDAKAM SHARMA AND H.L. DATTU, JJ.]

Evidence Act, 1872: s.25 – Confessional statement recorded in case relating to offences under the TADA Act would not be admissible in evidence against the accused in prosecution for offence under any other law if the offences under any other law and those under the TADA Act are being tried separately – On facts, accused convicted in TADA case on the basis of his confessional statement – In a separate complaint accused charged under ss302, 307, 353 and 402 IPC – Some offences under TADA Act were also incorporated initially but later same were dropped – Confession made by accused under TADA Act cannot be used by prosecution for offences committed under IPC – Terrorist and Destructive Activities Act, 1987 – ss.12 and 15 – Penal Code, 1860 – ss.302, 307, 353 – Arms Act, 1959 – s.35(c).

The Private respondent No.4 was convicted in TADA case on the basis of his confessional statement. A separate complaint was filed wherein he was charged under Sections 302, 307, 353 and 402 of the Indian Penal Code, r.w. Section 35(c) of the Arms Act, 1959. The provisions of the Terrorist and Disruptive Activities Act, 1987 (TADA Act) were also applied in the said case. However, the said provisions of the TADA Act were dropped since the TADA Review/Screening Committee came to the conclusion that offences under the TADA Act were not attracted in the said case.

The question which arose for consideration in the present appeal was whether the confessional statements

recorded in a case relating to offences under the TADA Act would be admissible in evidence against the accused in prosecution for offences other than those under the TADA Act.

Dismissing the appeal, the Court

HELD: 1.1. Section 25 of the Indian Evidence Act deals with the general provision regarding a confession made by an accused to a police officer. In terms of the Section 25 of the Indian Evidence Act, a confession made by an accused to a police officer is not admissible. However, an exception has been carved out under the provision of Section 15 of the TADA Act which provides that certain confessions made to police officers by an accused involved in a case charged for an offence under the TADA Act or rules made thereunder would be admissible in evidence in the trial of such person. [Para 12] [1156-G-H; 1157-A-B]

Prakash Kumar @ Prakash Bhutto v. State of Gujarat **(2005) 2 SCC 409;** *State of Gujarat v. Mohammed Atik & Others* **(1998) 4 SCC 351, referred to.**

1.2. It is now a settled law that a confessional statement duly recorded by a police officer in a case related to TADA Act and the rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Section 12 read with Section 15 of the Act notwithstanding that the accused was acquitted of offences under the TADA Act in the same trial. But, in the instant case the allegation was mainly for the offences under the IPC. Some offences under the TADA Act were also incorporated initially but later on the same were dropped. Consequently, charges in the said case were framed only for offences under the IPC and not under the TADA Act and the trial was also only for offences under the IPC and not under the TADA Act. Therefore, such

confessional statement as made by the respondent no. 4 under the TADA Act, in a different case, cannot be used or utilised by the prosecution in the present case as the charges were framed only for the offences under the Indian Penal Code. [Para 16] [1159-D-G]

Case Law Reference:

(2005) 2 SCC 409	**referred to**	**Para 11**
(1998) 4 SCC 351	**referred to**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1222 of 2006.

From the Judgment & Order dated 29.9.2006 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 354 of 2006 with Criminal Revision Application 36 of 2006.

R. Sundervardhan, Hari, Sanjeev Tyagi, Rekha Pandey, Bhupender Yadav, S.S. Shamsherry, Debaleena Kilikdar, Ram Lal Roy, Chinmany Khaladkar, Sanjay Kharde, Nitin S. Tambwekar, B.S. Sai, Asha Gopalan Nair, R.C. Kohli, R.N. Keshwani, Atishi Dipankar, K. Rajeev for the appearing parties.

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 confessional statements recorded in a case relating to offences under the Terrorist and Disruptive Activities Act, 1987 [for short `TADA Act"] would be admissible in evidence against the accused in prosecution for offences other than those under the TADA Act. In order to answer the aforesaid issue arising for our consideration, some background facts are required to be stated so as to make it easier to appreciate the issues urged.

2. The private respondent No. 4 was arrested in TADA Case No. 114 of 1991 and 114-A of 1991. In the said case, there was a confessional statement made by the private respondent no. 4 which was recorded on 17.03.1991 along with another co- accused. The said confessional statements so

recorded by the police were used by the prosecution as substantive evidence in the aforesaid TADA case. The aforesaid TADA case resulted in the conviction of the private respondent No. 4, which was finally confirmed even by this Court.

3. Apart from the aforesaid TADA case, a separate complaint was filed by Sh. Ghansyam Vijay Kumar Bendre, pursuant to which a criminal case came to be registered at the Vithalwadi Police Station, Ulhasnagar against the private respondent No. 4 and some others for the offences punishable under Sections 302, 307, 353 and 402 of the Indian Penal Code [for short "IPC"] read with Section 35(c) of the Arms Act, 1959. The provisions of the TADA Act were also applied in the said case. However, the said provisions of the TADA Act were dropped since the TADA Review / Screening Committee came to the conclusion that offences under the TADA Act were not attracted in the said case. Faced with the aforesaid situation, the prosecution filed an application before the Sessions Judge-Kalyan, praying that the original confessional statement of the private respondent No. 4 made in the aforesaid TADA case(s) be called for. The said application was rejected by the trial Court by its order dated 22.11.2005. The aforesaid order passed by the trial Court was challenged by the prosecution as well as the relative of the deceased by filing a Criminal Revision Application and a Criminal Writ Petition respectively in the High Court of Bombay. The High Court, after hearing the parties, however, dismissed both the aforesaid revision application and the writ petition by an order dated 29.09.2006. Being aggrieved by the aforesaid order, the present Special Leave Petition was filed in which leave was granted and consequently the present appeal.

4. During the pendency of the present appeal, the appellant died and therefore an application seeking for substitution of the appellant was filed.

5. We have heard the learned counsel appearing for the

parties on the said application and have also gone through the records. After hearing the counsel appearing for the parties and for the reasons stated in the application, we allow the application for substitution of the appellant in terms of this order and the name of Kamal Sunderdas Bathija be substituted in place of Sunderlal Kanaiyalal Bhatija.

6. Having allowed the application seeking the substitution, we are now required to deal with the main appeal. At this stage, we would like to indicate that being aggrieved by the impugned order dated 29.09.2006 passed by the Bombay High Court, the State of Maharashtra, filed a Special Leave Petition in this Court, challenging the legality of the same, which was registered as CRLMP Nos. 8215-16 of 2008. Since, there was a delay in filing, an application for condonation of the delay was also filed by the State of Maharashtra. Both, the aforesaid ˇ appeals, as also the application, were listed for consideration before a bench of this Court and by a judgment and order dated 13.05.2008, the Special Leave Petition was dismissed on the ground of delay as also on merits.

7. Subsequently, an application was filed by the State of Maharashtra which was registered as CRLMP No. 8133 of 2008 seeking their transposition as appellant. However, no order was passed on the application seeking transposition. Considering the facts and circumstances of the case and particularly, in view of the fact that, the substantive appeal of the State has been dismissed on merits, the application seeking transposition of the State of Mahrashtra as appellant cannot be allowed. The said application accordingly stands dismissed.

8. The fact which is therefore apparent on the face of the record is that one of the appeals, which was filed by the State of Maharashtra as against the impugned order stood dismissed on merits by this Court by its order dated 13.05.2008, but, since in the present appeal, we had issued notice, therefore, we are required to consider the points urged

and issues raised by the appellant in the present appeal.

9. There is no denial of the fact that there was a confessional statement made by respondent no. 4 in the said TADA case which was recorded on 17.03.1991 on the basis of which respondent no. 4 was convicted in the criminal case under the TADA Act which was registered as Case Nos. 114 of 1991 and 114-A of 1991. But, the said confessional statement made by the respondent no. 4 in the TADA case sought to be used and utilised and placed as evidence in the complaint filed by Sh. Ghansyam Vijay Kumar Bendre and now registered as a case for the offences under the Indian Penal Code and not under the TADA Act, for the TADA Review / Screening Committee had opined that no offence under the TADA Act was attracted in the said case and consequently the charges under the TADA Act were dropped. As noted earlier, the said prayer calling for the confessional statement made in the said TADA case for use as evidence in the criminal case under the IPC was rejected by the trial Court as well as by the High Court. Both the orders have been challenged by the legal representative of the deceased-complainant.

10. We have heard the learned counsel appearing for the parties. Counsel appearing for the appellant submitted before us that the confessional statement made before the police by respondent no. 4 in the TADA case could be used in the criminal case pending against respondent no. 4 under the IPC. In support of the said contention counsel appearing for the appellant relied upon the provisions of Sections 12 and 15 of the TADA Act and Section 25 of the Indian Evidence Act, 1872. Since reference has been made to the said provisions, the same are extracted hereinbelow:-

Terrorist and Disruptive Activities Act, 1987: -

"12. Power of Designated Courts with respect to other offences:-

(1) When trying any offence, a Designated Court may also

try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence.

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or any rule made thereunder or under any other law, a the Designated Court may convict such person of such other offence and pass any sentence authorised by this Act or such rule or, as the case may be, such other law, for the punishment thereof."

"Section 15 - Certain confessions made to Police Officers to be taken into consideration:-

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police office not lower in rank than a Superintendent of Police and recorded by such police officer in writing or on any mechanical device like cassettes, tapes or soundtracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person [or co-accused, abettor or conspirator] for an offence under this Act or rules made thereunder:

[Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.]

(2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

Indian Evidence Act, 1872: -

"Section 25 - Confession to police officer not to be proved:-

No confession made to a police officer, shall be proved as against a person accused of any offence."

11.It was contented on behalf of the counsel for the appellant that a bare look at Section 12 and Section 15 of the TADA Act would make it clear that certain confessions made to police officers could be taken into consideration and that the same would be admissible in trial of a person or his co-accused, abettor or conspirator for an offence under the TADA Act or rules made thereunder. This is, however, subject to a rider and that is the co-accused, abettor or conspirator must be charged and tried in the same case together with the accused. Reliance was placed by the counsel appearing for the appellant on the case of *Prakash Kumar @ Prakash Bhutto v. State of Gujarat* reported in (2005) 2 SCC 409 on the basis of which it was submitted that confessional statement duly recorded under Section 15 of the TADA Act and rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Section 12 of the Act notwithstanding the fact that the accused were acquitted of the provisions of the TADA Act in the same trial. The aforesaid submission of the counsel appearing for the appellant was refuted by the counsel appearing for the respondent by placing reliance on the same decisions as relied upon by the counsel appearing for the appellant and also on the same provisions of the TADA Act and the Indian Evidence Act.

12. Section 25 of the Indian Evidence Act deals with the general provision regarding a confession made by an accused to a police officer. In terms of the Section 25 of the Indian Evidence Act, a confession made by an accused to a police officer is not admissible. However, an exception has been carved out under the provision of Section 15 of the TADA Act which provides that certain confessions made to police officers

by an accused involved in a case charged for an offence under the TADA Act or rules made thereunder would be admissible in evidence in the trial of such person. A careful perusal of the said provision would also make it explicitly clear that such confessional statement made by an accused to a police officer would be admissible in evidence in the trial of such person where he is charged for an offence under the TADA Act or rules made thereunder. This is an exception to the general rule contained in Section 25 of the Indian Evidence Act or Section 162 of the Code of Criminal Procedure but one of the pre-conditions to make it admissible in evidence is that such trial must be for an offence under the TADA Act or the rules framed thereunder. If the aforesaid requirement which operates as a pre-condition is not satisfied, the confession does not become admissible in evidence.

13. A similar issue had come up for consideration before this Court in *State of Gujarat v. Mohammed Atik & Others* reported in (1998) 4 SCC 351. In the said case also, the provisions of Section 15 of the TADA Act were analysed by this Court and on such analytical study it was held that the requirements stipulated in Section 15(1) of the TADA Act for admissibility of confession made to a police officer are: (1) that the confession should have been made to a police officer not lower in rank than a Superintendent of Police, (2) it should have been recorded by the said police officer, (3) the trial should be against the maker of the confession and (4) such trial must be for an offence under TADA or the Rules framed thereunder. In the said decision, it was further held that if all the above requirements are satisfied, the confession would become admissible in evidence and it is immaterial whether the confession was recorded in one particular or in a different case.

14. Subsequently, a Constitutional Bench of this Court came to consider almost the same issue as now before us in the case of *Prakash Kumar* case (supra). The issue that had arisen for consideration in the said Constitutional Bench case was whether the confessional statement made in a TADA case

would continue to hold good even if the accused is acquitted under TADA offences and there is a clear finding that TADA Act has been wrongly taken recourse to or the confession loses its legal efficacy under the Act and thus rendering itself to an ordinary confessional statement before the Police under the general law of the land. The Constitutional Bench considered the question that once the Court comes to a definite finding that invocation of the TADA Act is wholly unjustified or there is utter frivolity to implicate the accused under the TADA Act, would it be justified that Section 15 would be made applicable with equal force as in TADA cases to book the offenders even under the general law of the land.

15. In the said decision, the Constitutional Bench had held that in a case where the accused is charged both under the TADA Act as also under other sections under the IPC and tried together, in that event, a confessional statement made by him under TADA could be utilised against him although he is acquitted of the provisions of the TADA Act. It was held in paragraph 37 of the said Constitutional Bench judgment as follows: -

> "37. The legislative intendment underlying Sections 12(1) and (2) is clearly discernible, to empower the Designated Court to try and convict the accused for offences committed under any other law along with offences committed under the Act, if the offence is connected with such other offence. The language "if the offence is connected with such other offence" employed in Section 12(1) of the Act has great significance. The necessary corollary is that once the other offence is connected with the offence under TADA and if the accused is charged under the Code and tried together in the same trial, the Designated Court is empowered to convict the accused for the offence under any other law, notwithstanding the fact that no offence under TADA is made out. This could be the only intendment of the legislature. To hold otherwise, would amount to rewrite or recast legislation and read something into it which is not

there."

Finally in paragraph 40 this Court answered the issues framed by them in the following manner: -

"40. For the reasons aforestated, we are of the view that the decision in Nalini case has laid down correct law and we hold that the confessional statement duly recorded under Section 15 of TADA and the Rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Section 12 of the Act, notwithstanding that the accused was acquitted of offences under TADA in the same trial."

16. That being the position, it is now a settled law that a confessional statement duly recorded by a police officer in a case related to TADA Act and the rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Sections 12 read with Section 15 of the Act notwithstanding that the accused was acquitted of offences under the TADA Act in the same trial. But, here is a case where the allegation was mainly for the offences under the IPC and some offences under the TADA Act were also incorporated initially but later on the same were dropped. Consequently, charges in the said case were framed only for offences under the IPC and not under the TADA Act and the trial is also only for offences under the IPC and not under the TADA Act. Therefore, such confessional statement as made by the respondent no. 4 under the TADA Act, in a different case, cannot be used or utilised by the prosecution in the present case as the charges were framed only for the offences under the Indian Penal Code.

17.We, therefore, uphold the orders passed by the trial Court as also by the High Court and dismiss the appeal filed by the appellant herein. The bail bonds, if any, shall stand cancelled.

D.G. Appeal dismissed.

GOAN REAL ESTATE & CONSTRUCTION LTD. & ANR.

v.

UNION OF INDIA THROUGH SECRETARY, MINISTRY OF ENVIRONMENT & ORS.

(Writ Petition (C) No. 329 of 2008)

MARCH 31, 2010

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

Environmental law – Construction on coastal area – Coastal Regulation Zone Notification declaring area upto 100 meters from High Tide Line as 'No Development Zone' – Amendment to the Notification in 1994, relaxing 'No Development Zone' to 50 meters from 100 meters – In 1996, Supreme Court declaring part of the amending Notification as illegal – Effect on constructions made and on-going constructions by real estate owners pursuant to the plans sanctioned on the basis of amended CRZ Notification – Held: Judgment of 1996 declaring part of the amended Notification to be illegal, will not affect the completed or the on-going constructions being undertaken pursuant to the said Notification – Operation of 1994 amendment neither stayed by this Court nor by Government – Thus, citizen entitled to act as per the said notification – Amendment was quashed because it would permit new constructions to take place which was contrary to the provisions of Environment Act, 1986, thus, judgment is to be given prospective effect – Constitution of India, 1950 – Article 32.

Judgment/Order – Construction of – Held: Judgment is to be read in its entirety – It cannot be read as a statute – It is to be construed having regard to the text and context in which the same was passed.

Judgment – Retrospective or prospective – Determination of – Held: Court is to decide on a balance of

all relevant considerations – It would look into the justifiable reliance on the previous position by administration; ability to effectuate the new rule adopted in the overruling case without doing injustice, whether its operation is likely to burden the administration of justice substantially or would retard the purpose.

The Central Government issued the Coastal Regulation Zone Notification dated February 19, 1991 and the area upto 100 meters from the High Tide Line was earmarked as 'No Development Zone' and no construction was permitted within this zone. The said Notification was amended by the Notification dated August 16, 1994 and the 'No Development Zone' was relaxed to 50 meters from 100 meters.

In the year 1993, the petitioner no.1-owner of land situated near river Zuari at Goa, obtained permission to construct a hotel and residential complex beyond 100 meters. In view of the Notification dated August 16, 1994, the petitioners sought permission and commenced construction in accordance with newly approved plans. In 1996, this Court in ****Indian Council for Enviro-Legal Action's* **case declared the two amendments out of the six amendments introduced by the amending Notification, as illegal. Thereafter, the respondent no. 4 filed a complaint before the Goa Coastal Zone Management Authority regarding constructions made by the petitioners between 50 meters and 100 meters. The Additional Collector, Goa issued a stop work order. Subsequently, the Additional Director of the MOEF, issued a clarification that any developmental activity which had been initiated between August 16, 1994 and April 18, 1996 after obtaining all the requisite clearances should be construed as an on-going project. Even thereafter, stop work order was not lifted. The National Coastal Zone Management Authority concluded that the stand taken by the MOEF was correct

and was in accordance with the CRZ notification of 1991, thus, all the properties and assets constructed or under construction in the period between August 16, 1994 and April 18, 1996 during which the set back line was changed from 100 meters to 50 meters was valid. The Public Interest Litigation was filed and the same was disposed of. The petitioners were directed to maintain status quo. Hence the present writ petition.

The question which arose for consideration in the instant writ petition is whether the constructions made and on-going constructions pursuant to the plans sanctioned on basis of the amended Coastal Regulation Zone Notification dated August 16, 1994 would be affected or not.

Partly allowing the writ petition, the Court

HELD: 1.1. It is declared that the judgment in *Indian Council for Enviro-Legal Action's* **case declaring part of the amending Notification dated August 16, 1994 to be illegal, will not affect the completed or the on-going constructions being undertaken pursuant to the plan sanctioned under the amending Notification of 1994. The rule is made absolute to the extent indicated. [Para 18] [1182-C-D]**

1.2. A critical study of the judgment in *Indian Council For Enviro-Legal Action's* case makes it clear that this Court found the two out of the six amendments made by Notification dated August 16, 1994 in the Notification dated February 19, 1991, to be arbitrary and illegal and, therefore, they were struck down. When one part of the Notification was found to be legal and another part of the said Notification to be bad in law, it would not be proper to construe the judgment affecting past transactions. [Para 13] [1177-D-E]

1.3. This Court in its judgment dated April 18, 1996 in the case of *Indian Council for Enviro-Legal Action* had not specifically directed demolition of existing structures. It had not stated as to what will be the fate of ongoing constructions which were coming up or on-going as per sanctions during the period when the said amending Notification dated August 16, 1994 was valid and in force. In view of the circumstances, it has become essential to understand the real intention of this Court ingrained in the judgment dated April 18, 1996. An order of Court must be construed having regard to the text and context in which the same was passed. For the said purpose, the judgment of this Court is required to be read in its entirety. A judgment cannot be read as a statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved therein and the context wherein the observations were made. Observation made in a judgment should be read in isolation and out of context. On perusal of the judgment, it is abundantly clear that even under 1991 Notification which is the main Notification, it was stipulated that all development and activities within CRZ will be valid and will not violate the provisions of the 1991 Notification till the Management Plans are approved. Thus, the intention of legislature while issuing Notification of 1991 was to protect the past actions/transactions which came into existence before the approval of 1991 Notification. [Para 13] [1177-G-H; 1178-A-D]

1.4. With regard to the submission in *Indian Council for Enviro-Legal Action* case that construction has already taken place along such rivers, creeks etc. at a distance of 50 meters and more, it was observed, that even if this be so, such reduction would permit new constructions to take place and this reduction could not be regarded as a protection only to the existing structures. Thus, on

perusal of the said statement, it is clear that this Court had quashed the amendment because the amendment would permit new constructions to take place which was contrary to the provisions of the Environment Act, 1986 and not because of the reason that there was evidence before the Court that constructions already made or on-going pursuant to the plans sanctioned on the basis of Notification of 1994 had, in fact, frustrated the object of the Act. Thus, paragraph 39 clearly reflects intention of this Court that Court wanted to give the judgment prospective effect. On perusal of the judgment in entirety, it is abundantly clear that the judgment is in form of directions to the Central Government and other authorities formed within the purview of Environment Act, 1986 and those directions are to be followed in future. [Para 13] [1177-F; 1178-E-H; 1179-A-B]

1.5. By communication dated January 24, 2007, February 13, 2007 and May 16, 2007 issued by Additional Director of Ministry of Environment and Forests and decision of National Coastal Zone Management Authority dated October 30, 2007, it is brought on record that all the authorities unanimously opined that judgment of this Court dated April 18, 1996 will operate prospectively and further clarified that any developmental activity which has been initiated between August 16, 1994 and April 18, 1996 after obtaining all requisite clearances from the concerned agencies including the Town and Country Planning should be construed as on-going projects and are not hit by the judgment of this Court dated April 18, 1996. [Para 13] [1179-C-F]

1.6. While interpreting the judgment, public interest should be taken into consideration. When judicial discretion has been exercised to establish a new norm, the question emerges whether it would be applied retrospectively to the past transactions or prospectively

to the transactions in future only. This process is limited not only to common law traditions, but exists in all jurisdictions. It is, therefore, for the Court to decide, on a balance of all relevant considerations, whether a decision which unsettles the previous position of law should be applied retrospectively or not. The Court would look into the justifiable reliance on the previous position by the Administration; ability to effectuate the new rule adopted in the overruling case without doing injustice, whether its operation is likely to burden the administration of justice substantially or would retard the purpose. All these factors are to be taken into account while determining whether a judgment is prospective or otherwise. The Court would adopt either the retroactive or non-retroactive effect of a decision after evaluating the merits and demerits of a particular case by looking to the prior history of the rule in question, its purpose and effect and whether retroactive operation will accelerate or retard the object of the judgment. The purpose of the old rule, the mischief sought to be prevented by the judgment and the public interest are equally germane and should be taken into account in deciding whether the judgment has prospective or retrospective operation. The courts do make the law to prevent administrative chaos and to meet ends of justice. Taking into consideration all these factors, this Court refuses to interpret the 1996 judgment in a manner which would give it a retrospective effect. It is clear from the tenor of judgment and from other background circumstances, more importantly in view of decisions of NCZMA which is a statutory body that Three Judge Bench decision in 1996 case intended to give it prospective effect. [Para 13] [1179-E-H; 1180-A-E]

Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar and Ors. **(1993) 4 SCC 727, referred to.**

1.7. The submission that decision should not have been taken by the NCZMA on October 30, 2007 stating that

all the properties and assets constructed or under construction during the period between August 16, 1994 and April 18, 1996 when the set back line stood changed from 100 meters to 50 meters, is valid and the said authority should have directed the parties to approach the High Court for appropriate orders, cannot be accepted. The whole matter was reconsidered by the NCZMA pursuant to the order passed by the Division Bench of the High Court. The said order was never challenged by the respondents before higher forum and by their conduct, the respondents had permitted the said order to attain finality. [Para 14] [1180-F-H; 1181-A]

1.8. The submission that the construction already completed would not be affected in any manner by decision of this Court in *Indian Council for Enviro-Legal Action's* **case but incomplete construction cannot be permitted to be completed is devoid of merits. Two amendments made in the year 1994 were declared to be illegal by judgment dated April 18, 1996. Till then, its operation was neither stayed by this Court nor by the Government. Therefore, a citizen was entitled to act as per the said notification. The rights of the parties were crystallized by the amending notification till part of the same was declared to be illegal by this Court. Therefore, notwithstanding the fact that part of the amending notification was declared illegal by this Court, all orders passed under the said notification and actions taken pursuant to the said notification would not be affected in any manner whatsoever. [Para 15] [1181-B-D]**

1.9. The plea that the petitioner would get benefit of interpretation placed by statutory bodies and others would not get any benefit and, therefore, the petition should be dismissed cannot be accepted. A bare glance at the minutes of the 16th meeting of the NCZMA held on October 30, 2007 makes it more than clear that it was concluded by the authority that the stand taken by the

Ministry vide letters dated January 24, 2007, February 13, 2007 and May 16, 2007 was correct and was in accordance with Coastal Regulation Zone Notification of 1991. The said authority has in terms held that the clarification given by the MOEF is applicable to all such cases in the coastal areas of the country. [Para 16] [1181-E-G]

******Indian Council for Enviro-Legal Action vs. Union of* India **(1996) 5 SCC 281, Clarified.**

Case Law Reference:

(1993) 4 SCC 727	**Referred to.**	**Para 13**
(1996) 5 SCC 281	**Clarified.**	**Para 13, 17 and 18**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 329 of 2008.

Petition Under Article 32 of the Constitution of India.

G.E. Vahanvati, A.G. of India, Mukul Rohtagi and K.K. Vengopal, Mahesh Agarwal, Rishi Agrawala, Mohammed Himayatullah, Saurabh Kirpal, Rohma Hameed (for E.C. Agrawala), Anitha Shenoy, Noma Alvares, Mamta Saxena, Gopal Shankar Narayanan, Sanjay Parikh, Anish R. Shah, Manjula Gupta, Mihir Chatterjee and Devdatt Kamat for the appearing parties.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. By filing this petition under Article 32 of the Constitution, the petitioners have prayed to declare that the building plans sanctioned and constructions made and on-going constructions pursuant to the Coastal Regulation Zone Notification dated February 19, 1991 as amended by the Notification dated August 16, 1994 issued by the Central Government are valid.

2. The relevant facts emerging from the records of the case are as under :

The Petitioner No.1 is owner of the land situated near river Zuari at Goa. It submitted plans in the year 1993 for construction of a hotel and residential complex. The Central Government, through Ministry of Environment and Forests ('MOEF', for short), issued Coastal Regulation Zone Notification dated February 19, 1991 in exercise of powers under Rule 5(d) of the Environment (Protection) Rules, 1986. As per the said notification, the area upto 100 meters from the High Tide Line was earmarked as 'No Development Zone' and no construction was permitted within this zone except for repairs etc. However, the Central Government issued another notification on August 16, 1994 amending notification dated February 19, 1991 and relaxing the 'No Development Zone' to 50 meters from 100 meters. In view of the said relaxation, the petitioners who had earlier obtained construction permissions in respect of a project beyond 100 meters, submitted an additional proposal to the Panchayat of Village Curca, Bambolim & Taloulim, Taluka Tiswadi, Goa for construction of 18 blocks between 50 meters and 100 meters. The Village Panchayat referred the matter to the Town and Country Planning Authority, as required under the Rules for technical evaluation. The Town and Country Planning Authority approved the abovementioned additional construction to be made between 50 meters and 100 meters vide order dated July 31, 1995. Based on this approval, vide its order dated July 31, 1995, the Village Panchayat sanctioned the plans and granted permission to construct. It is the case of the petitioners that they had commenced construction in accordance with newly approved plans which were revalidated from time to time and are valid till this date.

3. An NGO by the name of Indian Council for Enviro-Legal Action filed a public interest litigation in this Court under Article 32 of the Constitution against the Union of India making prayer to direct the Central Government to implement notification dated

February 19, 1991 by which CRZs were formed and restrictions on development were placed. The grievance made was that the non-implementation of the said notification had led to continued degradation of ecology. In the said petition, Goa Foundation, a society registered under the Societies Registration Act, 1960 filed an application challenging the vires of notification dated August 16, 1994 by which main notification dated February 19, 1991 was amended. This Court took into consideration the salient features of the main notification dated February 19, 1991 and noticed that the said notification was issued to ensure that the development activities were consistent with the environmental guidelines for beaches and coastal areas and, therefore, by the said Notification, restrictions on the setting up of industries which had detrimental effect on the coastal environment were imposed. The Court thereafter proceeded to examine validity of notification dated August 16, 1994. After noticing that six amendments were made in the main notification, this Court found that reduction of the ban on construction from 100 meters to 50 meters was illegal and power given to the Central Government for relaxation of developmental activities in the entire 6,000 kilometers long coast line was unbridled and capable of being abused. Thus, by judgment dated April 18, 1996 which is reported as *Indian Council for Enviro-Legal Action vs. Union of India,* (1996) 5 SCC 281, the abovementioned two amendments were held to be bad in law by this Court. From the final directions given by this Court in paragraph 47 of the judgment, it is evident that this Court partly accepted the petition by striking down two amendments which were introduced by notification dated August 16, 1994. From paragraph 39 of the judgment, it transpires that during the course of arguments, the learned Additional Solicitor General of India brought to the notice of this Court, the fact that construction had already taken place along such rivers, creeks etc. at a distance of 50 meters and more. This Court observed that there could not have been uniform basis for demarcating 'No Development Zone' and it would depend upon the requirements by each State Authority

concerned in their own management plan, but no reason had been given as to why in relation to tidal rivers, there was a reduction of the ban on construction from 100 meters to 50 meters. This Court also took into consideration the fact that no explanation had been given in the affidavit filed on behalf of the Union of India as to why the construction was permitted at a distance of 50 meters and more along rivers, creeks etc. This Court found that reduction of the ban on construction from 100 meters to 50 meters would permit new constructions to take place and, therefore, the reduction could not be regarded as a protection only to the existing structures. Further, this Court noticed that there was absence of a categorical statement in the affidavit to the effect that such reduction would not be harmful or result in serious ecological imbalance. The Court expressed its inability to conclude that the amendment was made in the larger public interest and was valid. The said amendment was held to be contrary to the object of the Environment Act and found not to have been made for any valid reason. Thus, the two amendments out of six amendments introduced by the amending Notification were declared to be illegal.

4. From the record, it becomes clear that the petitioners had made an application to the Panchayat to inspect the construction made on Survey No.12/1 and 99/2 which were stretches of lands lying between 50 meters and 100 meters. In view of the contents of the said letter, a Panchayat official had inspected the site on September 25, 1996 and prepared a site inspection report. The said report indicated that the petitioners had completed foundation work up to the plinth level and in some of the areas of the property, the construction work of the building was complete and ready for occupation.

5. However, People's Movement for Civic Action, i.e., Respondent No.4 herein made a complaint to the local Goa Coastal Zone Management Authority, i.e., the respondent No.3 regarding constructions made by the petitioners between 50

meters and 100 meters. Pursuant to the said complaint, the Goa Coastal Zone Management Authority on October 22, 2006 issued communication through its Secretary, to the Additional Collector stating that on a joint inspection of the site at Survey Nos.99/2, 12/1 and 96, it was found that the construction work was going on in violation of CRZ Guidelines inasmuch as construction was made between 50 meters to 100 meters of 'High Tide Line'. By the said letter, the respondent No.3 requested the Additional Collector to ascertain whether clearance under CRZ had been obtained. On October 22, 2006, an order was passed by the Collector, North Goa District directing the petitioner to stop the construction at the site. Based on a complaint by Goa Bachao Abhiyan to the Chief Secretary regarding alleged violation of CRZ norms, the Additional Collector, North Goa issued a stop work order dated December 22, 2006 and directed the Police and Town Planning Authority to maintain the status quo at the site. On December 28, 2006, petitioner No.1 made a representation to the MOEF to issue clarification that the project of the petitioner No.1 was an on-going project and as the same was sanctioned according to the rules and regulations then applicable, the stop work notice by the Additional Collector was illegal. The Central Government, through the Ministry of Environment and Forests ('MOEF' for short) vide letter dated January 24, 2007 addressed to the petitioner with copy to the Director and Joint Secretary, Department of Science, Technology and Environment, Government of Goa, clarified that new developmental activities to be carried out in the zone between 50 meters and 100 meters in the High Tide Line along with inland tidal water bodies would attract the provisions of CRZ notification of 1991 from the date of the order of the Supreme Court, i.e., from April 18, 1996. In spite of the receipt of abovementioned communication, the Goa Coastal Zone Management Authority did not act upon the directions issued by the MOEF. Therefore, the Petitioner No.1 made another representation to the Central Government with a request to issue necessary clarifications to the

authorities. A further clarification dated February 13, 2007 was issued by the Additional Director of the MOEF. In the said clarification, earlier communication dated January 24, 2007 was referred to and it was clarified that any developmental activity which had been initiated between August 16, 1994 and April 18, 1996 after obtaining all the requisite clearances from concerned agencies including the Town and Country Planning Authority should be construed as an on-going project. Even after this clarification, the stop work order was not lifted. The Goa Coastal Zone Management Authority ('GCZMA', for short) addressed a communication dated March 28, 2007 to the Additional Collector stating that it was decided that on the property of the petitioner No.l, 'No Development Zone' should be marked at 100 meters and the stop work order, if any, in operation beyond such 'No Development Zone' should be vacated. On receipt of communication dated March 28, 2007 from Goa Coastal Zone Management Authority, the Additional Collector, Goa, passed an order dated May 23, 2007 purporting to vacate the stop work order dated December 12, 2006 but, in fact, permitting the construction beyond 100 meters and not 50 meters. The petitioners, therefore, made third representation to MOEF and requested to issue fresh clarifications. The petitioners had also annexed copy of the letter dated March 28, 2007 addressed by the G.C.Z.M. Authority to the Additional Collector. On receipt of the said representation, the MOEF, Government of India, issued clarification dated May 16, 2007. A reference was made to its earlier letter dated February 13, 2007, it was mentioned therein that it was not clear as to why GCZMA had not taken into consideration the clarification dated February 13, 2007 of MOEF before addressing letter dated March 28, 2007 to the Additional Collector, Goa in relation to the development made in property bearing Survey No.12/1 (pt.) 12/2 and 99/2 of Village Bambolim Taluka Tiswadi, Goa. By the said communication, the Member-Secretary, Department of Science, Technology and Environment of Government of Goa was requested to get the matter examined by the Goa Coastal Zone Management

Authority keeping in view the clarifications issued by the Ministry vide letter dated February 13, 2007.

6. In spite of the receipt of the communication from MOEF, the stop work orders were not lifted and allowed to operate. Therefore, the petitioners filed writ petition No.365 of 2007 in the High Court of Bombay at Goa challenging the stop work orders dated December 22, 2006 and May 23, 2007 passed by the Additional Collector, Goa. During the course of hearing of the writ petition on July 24, 2007, the learned Additional Solicitor General appearing for the MOEF made a statement before the Court that from the records it was clear that the project of the petitioners had been treated by the Central Government acting through the MOEF as an on-going project. In view of this statement made on behalf of the Central Government, the learned Advocate-General appearing for the Goa Coastal Zone Management Authority and for the State of Goa stated at the Bar that the State of Goa would withdraw the stop work orders dated December 22, 2006 and May 23, 2007 to the extent, they imposed an embargo on construction between 50 meters and 100 meters and that the withdrawal letter would be issued to the petitioners within a period of one week from the date of the order. The record shows that the statements made at the Bar by the learned Additional Solicitor General and learned Advocate-General were accepted by the Court and, therefore, the petitioners had not pressed the said writ petition. The writ petition was accordingly disposed of by order dated July 24, 2007.

7. The record further shows that thereafter writ petition No.403 of 2007 was filed by People's Movement for Civic Action and Goa Foundation, a society registered under the Societies Registration Act challenging the order dated October 8, 1998 passed by the Panchayat of Curca, bambolim and Talaulim, Goa by which permission to construct was renewed in favour of the petitioners. Initially, the Court had directed the parties to maintain status quo. The Court had also directed the

Secretary, MOEF to place the stand of the Environment Ministry of the Central Government on the record by filing an affidavit. The record shows that in compliance of the said direction, an affidavit affirmed on September 12, 2007 by Mr. K. Uppily, Additional Director in the MOEF, Government of India was filed expressing the view of the Ministry that any developmental activity which had been initiated between August 16, 1994 and April 18, 1996 after obtaining all the requisite clearances from the concerned agencies including the Town and Country Planning Development should be construed as an on-going project. In the said affidavit, it was also mentioned that the Ministry had decided to place the matter before the National Coastal Zone Management Authority in its meeting which was scheduled to be held in October 2007 and the contentions of the People's Movement for Civic Action etc. as also the communications dated July 17, 2007 of Goa Coastal Zone Management Authority and the contentions of the petitioners would be examined by the said Authority.

In the light of the facts mentioned in the affidavit filed on behalf of the Ministry, the High Court directed the National Coastal Zone Management Authority to consider the matter referred to it by the Ministry and submit a report to the Court after giving a personal hearing to all the concerned parties. The High Court clarified that the National Coastal Zone Management Authority should decide the matter on merits without being influenced in any way by the filing of writ petition or the observations made by the Court. It was also clarified that if the order was adverse to the petitioners, they would be at liberty to challenge the same. Further, the Goa Coastal Management was directed to take action in accordance with law subject to the rights of the petitioners to challenge the said report. The Court further stated in its order that the Peoples Movement for Civic Action and Goa Foundation would also be at liberty to move the court for appropriate relief in case the report of National Coastal Zone Management Authority was adverse to it.

8. The record shows that the National Coastal Zone Management Authority considered the matter in detail in its meeting held on October 30, 2007. The Authority, after detailed discussions, was of the view that there would be several cases all over the coast wherein there would be some instances indicating that constructions work had been completed or was in progress pursuant to the Notification dated August 16, 1994. Therefore, the Authority concluded that the stand taken by the MOEF vide letters dated January 24, 2007, February 13, 2007 and May 16, 2007 was correct one and was in accordance with the CRZ notification of 1991. The Authority also noticed that the clarification given by the MOEF was applicable to all cases in the coastal areas of the country. What was reported by the said Authority was that this Court while setting aside two out of six amendments dated August 16, 1994 in Writ Petition No.664 of 1993 had not passed any orders with regard to cases in which the construction had been completed or was in progress and, therefore, all the properties and assets constructed or under construction in the period between August 16, 1994 and April 18, 1996 during which the set back line was changed from 100 meters to 50 meters was valid. The Authority noted that if it would have been otherwise, this Court would have passed specific orders. The Authority ultimately expressed the view that the interpretation of phrase 'on-going' by the Goa Coastal Zone Management Authority was incorrect and all the properties and assets constructed or under construction during the period between August 16, 1994 and April 18, 1996 should be maintained and should not be destroyed.

Thereafter, the public interest Litigation was placed for final hearing before the High Court. The Court was of the opinion that as the Supreme Court had struck down the notification amending the earlier notification, ordinarily all activities between 50 meters and 100 meters from the high tide line must cease. Having expressed this view, the Court considered the report of the National Coastal Zone

Management Authority ('NCZMA' for short) and noticed that the said report/order was not challenged by the petitioners who had instituted the public interest litigation. On the request of the petitioners, the Court permitted them to amend the petition so as to enable them to challenge the order of the NCZMA. The said order permitting the original petitioners to amend the petition was challenged by the present petitioners by filing SLP (C) No.16728 of 2008 before this Court.

9. The petitioners were also directed to maintain status quo and, therefore, feeling aggrieved by the said order, they have preferred SLP (C) No.19767 of 2008 which is also heard along with this writ petition.

10. The case of the petitioners is that this Court in its judgment dated April 18, 1996 had not specifically directed demolition of the existing structures nor the directions of the Court had affected the on-going constructions which were coming up as per plans sanctioned during the period when the said amending notification dated August 16, 1994 was valid and in force. It is mentioned by the petitioners that the Central Government and thereafter NCZMA after considering the facts and circumstances of the case and in the larger public interest had concluded that the stand taken by the MOEF vide its letters dated January 24, 2007, February 13, 2007 and May 16, 2007 was correct and, therefore, a case is made out for issuance of a clarification that the judgment of this Court rendered in *Indian Council for Inviro-Legal Action* (supra) on April 18, 1996 does not prejudice or affect either the completed construction or on-going construction. Under the circumstances, the petitioners have filed the instant petition and claimed the relief to which reference is made earlier.

11. On service of notice, Dr. A Senthil Vel, Additional Director, Ministry of Environment and Forest has filed reply affidavit and supported the case of the petitioners. After filing of Additional Affidavit by the petitioners, Mr. Claude Alvares,

has filed affidavit in opposition on behalf of the respondent No.5 whereas affidavit in rejoinder is filed by Mr. Vijender Kumar Sharma, on behalf of the petitioners.

12. This Court has heard the learned counsel for the parties at great length and in detail. This Court has also considered the documents forming part of the petition and other proceedings.

13. The question which falls for consideration is whether the constructions made or on-going pursuant to the plans sanctioned on the basis of Notification dated August 16, 1994 would be affected or not. For this purpose, it will be necessary to construe the judgment rendered in *Indian Council for Enviro-Legal Action* (supra). A critical study of the judgment in *Indian Council For Enviro-Legal Action* (supra) makes it clear that this Court had examined validity of six amendments made by Notification dated August 16, 1994 in the Notification dated February 19, 1991. Two out of the six amendments were found by this Court to be arbitrary and illegal and, therefore, they were struck down. When one part of the Notification was found to be legal and another part of the said Notification to be bad in law, it would not be proper to construe the judgment affecting past transactions.

Tenor of the judgment indicates that this Court intended to give prospective effect to the judgment dated April 18, 1996 rendered in the case of *Indian Council for Enviro-Legal Action* (supra). It is to be noted that this Court in its judgment dated April 18, 1996 had not specifically directed demolition of existing structures. It is also pertinent to note that this Court had not stated as to what will be the fate of ongoing constructions which were coming up or on-going as per sanctions during the period when the said amending Notification dated August 16, 1994 was valid and in force. In view of the circumstances, now it has become essential to understand the real intention of this Court ingrained in the judgment dated April 18, 1996. It is well

settled that an order of Court must be construed having regard to the text and context in which the same was passed. For the said purpose, the judgment of this Court is required to be read in its entirety. A judgment, it is well settled, cannot be read as a statute. Construction of a judgment should be made in the light of the factual matrix involved therein. What is more important is to see the issues involved therein and the context wherein the observations were made. Observation made in a judgment, it is trite, should be read in isolation and out of context. On perusal of paragraph 10 of the judgment, it is abundantly clear that even under 1991 Notification which is the main Notification, it was stipulated that all development and activities within CRZ will be valid and will not violate the provisions of the 1991 Notification till the Management Plans are approved. Thus, the intention of legislature while issuing Notification of 1991 was to protect the past actions/ transactions which came into existence before the approval of 1991 Notification.

In paragraph 39 of the judgment, this Court considered the argument proposed by the learned Additional Solicitor General that construction has already taken place along such rivers, creeks etc. at a distance of 50 meters and more. This plea was specifically answered by observing that even if this be so, such reduction would permit new constructions to take place and this reduction could not be regarded as a protection only to the existing structures. Thus, on perusal of the above statement, it is clear that this Court had quashed the amendment because the amendment would permit new constructions to take place which was contrary to the provisions of the Environment Act, 1986 and not because of the reason that there was evidence before the Court that constructions already made or on-going pursuant to the plans sanctioned on the basis of Notification of 1994 had, in fact, frustrated the object of the Act. Thus, paragraph 39 clearly reflects intention of this Court that Court wanted to give the judgment prospective effect.

On perusal of the judgment in entirety, it is abundantly clear that the judgment is in form of directions to the Central Government and other authorities formed within the purview of Environment Act, 1986 and those directions are to be followed in future.

While interpreting the judgment, it is important to take into consideration the view expressed over the matter in controversy by various Governmental Authorities formed under the purview of Environment Act, 1986 to implement the provisions of Environment Act, 1986 although such view or opinion is not binding on the Court. By communication dated January 24, 2007, February 13, 2007 and May 16, 2007 issued by Additional Director of Ministry of Environment and Forests and decision of National Coastal Zone Management Authority dated October 30, 2007, it is brought on record that all the authorities unanimously opined that judgment of this Court dated April 18, 1996 will operate prospectively and further clarified that any developmental activity which has been initiated between August 16, 1994 and April 18, 1996 after obtaining all requisite clearances from the concerned agencies including the Town and Country Planning should be construed as on-going projects and are not hit by the judgment of this Court dated April 18, 1996.

It is pertinent to note that while interpreting the judgment, public interest should be taken into consideration. In *Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors.* (1993) 4 SCC 727, this Court considered the factors which are to be taken into consideration while giving prospective operation to a judgment. When judicial discretion has been exercised to establish a new norm, the question emerges whether it would be applied retrospectively to the past transactions or prospectively to the transactions in future only. This process is limited not only to common law traditions, but exists in all jurisdictions. It is, therefore, for the Court to decide, on a balance of all relevant considerations, whether a decision

which unsettles the previous position of law should be applied retrospectively or not. The Court would look into the justifiable reliance on the previous position by the Administration; ability to effectuate the new rule adopted in the overruling case without doing injustice, whether its operation is likely to burden the administration of justice substantially or would retard the purpose. All these factors are to be taken into account while determining whether a judgment is prospective or otherwise. The Court would adopt either the retroactive or non-retroactive effect of a decision after evaluating the merits and demerits of a particular case by looking to the prior history of the rule in question, its purpose and effect and whether retroactive operation will accelerate or retard the object of the judgment. The purpose of the old rule, the mischief sought to be prevented by the judgment and the public interest are equally germane and should be taken into account in deciding whether the judgment has prospective or retrospective operation. It is well known that the courts do make the law to prevent administrative chaos and to meet ends of justice. Taking into consideration all these factors, this Court refuses to interpret the 1996 judgment in a manner which would give it a retrospective effect. It is clear from the tenor of judgment and from other background circumstances, more importantly in view of decisions of NCZMA which is a statutory body that Three Judge Bench decision in 1996 case intended to give it prospective effect.

14. The contention of Mr. K.K. Venugopal, learned senior counsel for the respondents that decision should not have been taken by the NCZMA on October 30, 2007 stating that all the properties and assets constructed or under construction during the period between August 16, 1994 and April 18, 1996 when the set back line stood changed from 100 meters to 50 meters, is valid and the said authority should have directed the parties to approach the High Court for appropriate orders, cannot be accepted. As observed earlier, the whole matter was reconsidered by the NCZMA pursuant to the order passed by the Division Bench of the Bombay High Court. It is well to

remember that the said order was never challenged by the respondents before higher forum and by their conduct, the respondents had permitted the said order to attain finality.

15. The contention raised on behalf of the respondents that the construction already completed would not be affected in any manner by decision of this Court in *Indian Council for Enviro-Legal Action* (supra) but incomplete construction cannot be permitted to be completed is devoid of merits. Two amendments made in the year 1994 were declared to be illegal vide judgment dated April 18, 1996. Till then, its operation was neither stayed by this Court nor by the Government. Therefore, a citizen was entitled to act as per the said notification. This Court finds that the rights of the parties were crystallized by the amending notification till part of the same was declared to be illegal by this Court. Therefore, notwithstanding the fact that part of the amending notification was declared illegal by this Court, all orders passed under the said notification and actions taken pursuant to the said notification would not be affected in any manner whatsoever.

16. The plea that the petitioner would get benefit of interpretation placed by statutory bodies and others would not get any benefit and, therefore, the petition should be dismissed has no substance. A bare glance at the minutes of the 16th meeting of the NCZMA held on October 30, 2007 makes it more than clear that it was concluded by the authority that the stand taken by the Ministry vide letters dated January 24, 2007, February 13, 2007 and May 16, 2007 was correct and was in accordance with Coastal Regulation Zone Notification of 1991. What is relevant to notice is that the said authority has in terms held that the clarification given by the MOEF is applicable to all such cases in the coastal areas of the country. Therefore, the plea that only petitioners have been favoured by the authority and, therefore, the petition should be dismissed cannot be accepted.

17. On the facts and in the circumstances of the case, this Court is of the opinion that a good case has been made out by the petitioners for issuance of a declaration that the judgment dated April 18, 1996 rendered in the case of *Indian Council for Enviro-Legal Action* (supra) will not affect the on-going constructions or completed constructions pursuant to the plans sanctioned under the amending Notification of 1994 till two clauses of the same were set aside by this Court.

18. For the foregoing reasons, the petition partly succeeds. It is declared that the judgment dated April 18, 1996 in *Indian Council for Enviro-Legal Action vs. Union of India,* (1996) 5 SCC 281, declaring part of the amending Notification dated August 16, 1994 to be illegal, will not affect the completed or the on-going constructions being undertaken pursuant to the said Notification The rule is made absolute to the extent indicated hereinabove. There shall be no order as to costs.

N.J. Writ Petition Partly allowed.