NEW INDIA ASSURANCE CO. LTD.
v.
RAGHUVIR SINGH NARANG & ANR.
(Civil Appeal No. 3295 of 2009)

FEBRUARY 25, 2010*

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

Service Law:

General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme 2003:

Special Voluntary Retirement Package – Para 5, Clauses (3), (4) and (5) – Employees opting for the Scheme – Later withdrawing the option – Employer, accepting the offer, relieved the employees – HELD: Where the voluntary retirement is governed by a contractual scheme, as contrasted from a statutory scheme, the principle of contract relating to offer and acceptance will apply and consequently the letter of voluntary retirement will be considered as an offer by the employee and therefore any time before its acceptance, the employee could withdraw the offer – But where the voluntary retirement is under a statutory scheme which categorically bars the employee from withdrawing the option once exercised, the terms of the statutory scheme will prevail over the general principles of contract – In the instant case, the Special Voluntary Retirement Package being a part of the Amendment Scheme 2003 framed by the Central Government in exercise of the powers u/s.17A of the General Insurance Business (Nationalisation) Act 1972, is a delegated legislation and statutory in character – The validity of the said statutory scheme has been upheld by this Court (with reference to other provisions of the Act) – Consequently, the*

*. Judgment recd on 8.4.2010.

*provisions of the Scheme will prevail over the provisions of Contract Act or any other law or any principle of contract, and having regard to the binding nature of the scheme, the employees, upon exercising the option, cannot withdraw from the same – Paragraph 5(4) of the Special Voluntary Retirement Package categorically states that a Development Officer shall not be eligible to withdraw the option once made for the Special Voluntary Retirement Package – Thus, the general principle of contract that an offer could be withdrawn any time before its acceptance stands excluded – Clauses (3) and (5) of Para 5 deal with the question as to whether the retirement, in pursuance of option exercised by the employee, will come into effect without acceptance by the employer – These clauses have no bearing on the issue whether the employee can withdraw from the exercise of option and cannot be interpreted as giving an option to the employee to withdraw the option once exercised –Principles laid down in the decision in Swarnakar** – Explained – General Insurance Business (Nationalisation) Act 1972 – s. 17-A – Delegated Legislation – Contract. [para 6,7,8,9 and 12]*

Balram Gupta vs. Union of India **1987 SCR 1173 = 1987 (Supp) SCC 228;** *Punjab National Bank vs. P.K. Mittal* **1989 (1) SCR 612 = 1989 Supp (2) SCC 175;** *Union of India vs. Wg.Comdr. T. Parthasarathy* **2000 (4) Suppl. SCR 531 = 2001 (1) SCC 158, relied on.**

National Insurance Co.Ltd. v. General Insurance Development Officers Association* **2008 (5) SCR 1087 = 2008 (5) SCC 472; *Kishan Prakash Sharma v. Union of India* **2001 (5) SCC 212; and** *Union of India vs. Gopal Chandra Misra* **1978 (3) SCR 12 = 1978 (2) SCC 301, referred to.**

***Bank of India vs. Swaranakar & Ors*. **2002 (5) Suppl. SCR 438 = (2003) 2 SCC 721, explained.**

Case Law Reference:

2002 (5) Suppl. SCR 438 referred to para 4

2008 (5) SCR 1087	**relied on**	**para 6**
2001 (5) SCC 212	**relied on**	**para 6**
1978 (3) SCR 12	**referred to**	**para 7.1**
1987 SCR 1173	**relied on**	**para 7.2**
1989 (1) SCR 612	**relied on**	**para 7.3**
2000 (4) Suppl. SCR 531	**relied on**	**para 7.4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3295 of 2009.

From the Judgment & Order dated 27.8.2003 of the High Court of Judicature at Jabalpur, Bench at Indore in Writ Petition No. 880 of 2003.

Jaideep Gupta, Dinesh Mathur, Nishant Menon, Saurabh Jain, Dr. Ramesh Chandra Mishra for the Appellant.

R. Santhan Krishanan, Praveen Pandey, D. Mahesh Babu for the Respondents.

The Order of the Court was delivered by

O R D E R

R.V. RAVEENDRAN, J. 1. The respondents were working as Development Officers under the appellant - New India Assurance Co. Ltd. Section 17A of the General Insurance Business (Nationalisation) Act, 1972 ('the Act', for short) inserted by the Amendment Act 3 of 1985 empowered the Central Government to regulate, by issue of notifications, the pay scales and other terms and conditions of service of officers and other employees of the appellant by framing one or more schemes and by adding, amending or varying any scheme. In exercise of the powers under Section 17A of the said Act, the Central Government framed a Scheme by Notification dated

2.1.2003 to amend the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Scheme, 1976. Paragraph 15-C inserted by the said Amendment Scheme of 2003 gave a special option to the Development Officers of the appellant, to opt within 60 days of commencement of the said Amendment Scheme: (a) for Special Voluntary Retirement Package as per Annexure 1 appended thereto; or (b) to render his services as Development Officer (Administration) under paragraph 21A, as per Annexure II thereto. Sub-para (2) of the said Para 15-C provided that a Development Officer, who does not exercise either of the options, under sub-para (1) within the stipulated period of sixty days, shall continue to render services as such under the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003.

2. Annexure-1 appended to the Amendment Scheme of 2003 contained the Special Voluntary Retirement Package ('SVRP' for short). Para (1) of SVRP specified the eligibility criteria. Para (2) thereof prescribed the ex-gratia amount and Clause (3) prescribed the other benefits, which a Development Officer seeking SVRP will be entitled. Para 5 thereof laid down the General Conditions of the Scheme and Clauses (3), (4) and (5) of para 5 which are relevant for our purpose are extracted below:

> "(3) The mere request of such Development Officer seeking Special Voluntary Retirement Package shall not take effect unless it is accepted in writing by the Company.
>
> (4) *A Development Officer shall not be eligible to withdraw the option once made for Special Voluntary Retirement Package.*
>
> (5) The Company shall have absolute discretion either to accept or reject the request of a Development Officer seeking Special Voluntary Retirement Package

depending upon the requirement of the Company. The reasons for rejection of request of a Development Officer seeking Special Voluntary Retirement Package shall be recorded in writing by the Company. Acceptance or rejection of the request of a Development Officer seeking Special Voluntary Retirement Package shall be communicated to him in writing."

(emphasis supplied)

3. Respondents 1 and 2 on 3.3.2003 opted for the Special Voluntary Retirement Package. The Regional Office of appellant informed the Divisional Office at Indore by letter dated 28.3.2003 that in view of several writ petitions challenging the provisions of the Amendment Scheme, the Head Office had instructed that it will not be possible to relieve all the opting Development Officers with effect from 1.4.2003. The respondents were, accordingly informed on 29.3.2003. This was followed by a circular dated 31.3.2003 issued by the appellant stating that status quo should be maintained in regard to Development Officers who have opted for Special Voluntary Retirement Package. On 31.3.2003, the respondents requested the appellant to extend the scheme and give more time for exercising the option under the Scheme, and if that was not possible, then treat the option earlier exercised by them on 3.3.2003 as withdrawn as till that day (31.3.2003) there was no communication from the appellant regarding acceptance of the voluntary retirement.

4. On 1.4.2003, the appellant relieved the respondents from the services of the Company stating that the competent authority has accepted the voluntary retirement of the respondents. The respondents sent a letter dated 2.4.2003 stating that they should be permitted to continue in service until a fresh option was given. The appellant, by letter dated 3.4.2003, informed the respondents that they cannot withdraw from the option already given. This was followed by letter dated 12.5.2003 wherein the appellant reiterated that the

respondents were relieved on 1.4.2003 in view of the acceptance by the competent authority, of the option exercised by the respondents to retire from service. Feeling aggrieved, the respondents filed a writ petition seeking a direction to the appellant to reinstate them in the post of Development Officer. The said writ petition was allowed by the Madhya Pradesh High Court by order dated 27.8.2003, purporting to follow the decision of this Court in *Bank of India* vs. *Swaranakar & Ors.*, (2003) 2 SCC 721. It held that the SVRP Contained in the Amendment Scheme of 2003 was not a statutory scheme, but was contractual in nature; that the option exercised by the respondents to retire voluntarily in terms of SVRP was merely an offer by the respondents, and that before the acceptance of the request of respondents by the appellant, the respondents could withdraw their offer; and that as respondents had already withdrawn their offers on 31.3.2003, there was no occasion for the appellant to accept their offers. The said decision is challenged in this appeal.

5. The contentions urged give rise to the question whether a Development Officer who exercises the option under the Amendment Scheme of 2003, seeking the Special Voluntary Retirement Package, could withdraw the same before its acceptance.

6. The Special Voluntary Retirement Package was a part of the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme 2003 framed by the Central Government in exercise of the powers in Section 17A of the General Insurance Business (Nationalisation) Act 1972. The said Scheme is a delegated Legislation which is statutory in character. The validity of the said statutory scheme has been upheld by this Court (with reference to other provisions in the Scheme) in *National Insurance Co.Ltd. v. General Insurance Development Officers Association* – 2008 (5) SCC 472 following *Kishan Prakash Sharma v. Union of India* 2001 (5) SCC 212. Paragraph 5(4)

of the Special Voluntary Retirement Package categorically states that a Development Officer shall not be eligible to withdraw the option once made for the Special Voluntary Retirement Package.

7. It is true that the principles of Contract Law relating to offer and acceptance enables the person making the offer to withdraw the offer any time before its acceptance; and that any subsequent acceptance of the offer by the offeree, after such withdrawal, will not result in a binding contract. Where the voluntary retirement is governed by a contractual scheme, as contrasted from a statutory scheme, the said principle of Contract will apply and consequently the letter of voluntary retirement will be considered as an offer by the employee and therefore any time before its acceptance, the employee could withdraw the offer. But the said general principle of Contract will be inapplicable where the voluntary retirement is under a statutory scheme which categorically bars the employee, from withdrawing the option once exercised. The terms of the statutory scheme will prevail over the general principles of contract. This distinction has been recognized by a series of decisions of this Court. We may refer to a few of them :

(7.1.) In *Union of India vs. Gopal Chandra Misra* – 1978 (2) SCC 301, a Constitution Bench of this Court held :

> "It will bear repetition that the general principle is that *in the absence of a legal, contractual or constitutional* **bar**, a 'prospective' resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office-tenure of the resignor……. In the case of a Government servant/or functionary who cannot under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office, normally, the tender of resignation becomes effective and his service/ or office-tenure terminated, when it is accepted by the

> competent authority.
>
> [emphasis supplied]

(7.2.) In *Balram Gupta vs. Union of India* – 1987 (Supp) SCC 228, this Court held that *independent of any statutory Rules*, an employee who gives notice of voluntary retirement to take effect prospectively from a subsequent date, is at liberty to withdraw his notice of voluntary retirement, any time before it comes into effect. But this normal rule would not apply, where having regard to the statutory Rules governing the matter, the employee cannot withdraw except with the approval of an authority. But such approval can not be the *ipse dixit* of the approving authority. He should act reasonably and rationally. He cannot keep the matter pending for unduly long time, nor can he discriminate in dealing with applications of employees similarly situated.

(7.3.) In *Punjab National Bank vs. P.K. Mittal* – 1989 Supp (2) SCC 175, this Court held :

> "The result of the above interpretation is that the employee continued to be in service till April 21, 1986 or June 30, 1986, on which date his services would have come normally to an end in terms of his letter dated January 21, 1986. But, by that time, he had exercised his right to withdraw the resignation. Since the withdrawal letter was written before the resignation became effective, the resignation stands withdrawn, with the result that the respondent continues to be in the service of the bank. It is true that there is no specific provision in the regulations permitting the employee to withdraw the resignation. It is, however, not necessary that there should be any such specific rule. Until the resignation becomes effective on the terms of the letter read with Regulation 20, it is open to the employee, on general principles, to withdraw his letter of resignation. *That is why, in some cases of public services, this right of withdrawal is also made subject to the permission of*

the employer. There is no such clause here."

[emphasis supplied]

(7.4.) In *Union of India vs. Wg.Comdr. T. Parthasarathy* – 2001 (1) SCC 158, this Court held :

"So far as the case in hand is concerned, *nothing in the form of any statutory rules or any provision of any Act has been brought to our notice which could be said to impede or deny this right of the appellants.* On the other hand, not only the acceptance of the request by the Headquarters, the appropriate Authority was said to have been made only on 20-2-86, a day after the respondent withdrew his request for pre-mature retirement but even such acceptance in this case was to be effective from a future date namely 31-8-86. Consequently, it could not be legitimately contended by the appellants that there was any cessation of the relationship of master and servant between the Department and the respondent at any rate before 31-8-86. While that be the position inevitably the respondent had a right and was entitled to withdraw or revoke his request earlier made before it ever really and effectively became effective."

[emphasis supplied]

8. In this case the statutory scheme contains a specific provision that a Development Officer shall not be eligible to withdraw the option once made for Special Voluntary Retirement Package. In view of the said statutory provision, the general principle of contract that an offer could be withdrawn any time before its acceptance stands excluded.

9. Let us now consider whether Clauses (3) and (5) of Paragraph 5 of the Scheme have any relevance to the issue. Clause (3) provides that when an employee exercises an option seeking Special Voluntary Retirement Package, it will not take effect unless it is accepted in writing by the employer Company.

Clause (5) provides that the employer shall have the discretion either to accept or reject the request made by the Development Officer. The effect of these clauses is that voluntary retirement will not take effect unless it is accepted in writing by the employer. Where the employee exercises an option to retire from a future date, unless and until it is accepted in writing by the employer, the Development Officer will continue to be the employee, even after the date mentioned as the date of retirement. Similarly, where the employer rejects the request of the employee, the employer will continue as an employee, in spite of his exercise of option to retire. Neither Clause (3) nor Clause (5) can be interpreted as giving an option to the employee to withdraw the option once exercised. Clauses (3) and (5) of Para 5 deal with the question as to whether the retirement, in pursuance of option exercised by the employee, will come into effect without acceptance by the employer. These clauses have no bearing on the issue whether the employee can withdraw from the exercise of option.

10. The High Court proceeded on an erroneous assumption that the voluntary retirement package was not part of any statutory scheme, but was contractual in nature and therefore the general principles of contract will apply. The reliance placed by the High Court upon the decision of this Court in *Swarnakar*, to assume that every scheme for voluntary retirement is always contractual and not statutory, is misconceived.

11. A detailed reference to the decision in *Swarnakar* is necessary, to clear the misconception under which the High Court has proceeded. The said decision related to VRS Schemes floated by Nationalised Banks and the State Bank of India. The VRS schemes of Nationalized Banks contained a provision (Para 10.5) that it will not be open for an employee to withdraw the request made for voluntary retirement under the scheme, after having exercised such option. The scheme of State Bank of India was slightly different as it permitted

withdrawal of the application before a given date and also contained a provision laying down the mode and manner in which applications for voluntary retirement should be considered, which created an enforceable right in the employee if State Bank of India failed to adhere to its preferred policy. The Punjab & Haryana High Court held the VRS Scheme of the Nationalised Banks was not a valid piece of subordinate legislation. The other High Courts, on the other hand, held that the Clause 10.5 of the voluntary retirement scheme which barred an employee from withdrawing the request for voluntary retirement after having exercised the option was not operative as the employee had an indefeasible right to withdraw his offer before it was accepted. The decisions of the Punjab & Haryana High Court as also of the other High Courts were challenged by various Banks including State Bank of India and they were disposed of by the said common judgment.

(11.1.) This Court at the outset noticed that there was a difference in the scheme floated by the State Bank of India and the schemes framed by the Nationalised Banks. This Court held that the schemes of the Nationalised Banks were introduced by a circular dated 20.8.2000 with the purpose of downsizing the number of employees and that the terms and conditions of service of the employees of Nationalized Banks (except in the matter of pension) were not statutory in nature and the VRS schemes of the Nationalised Banks were floated by way of contract and did not have any statutory flavour. Consequently, it was held that the provisions of the Indian Contract Act, 1872 would apply to the VRS schemes of the Nationalised Banks. This Court also held that the scheme being an invitation to offer and not an offer by the Banks, the employee made an offer when exercising the option, and he can withdraw the offer any time before it was accepted by the employer. This Court further held that Clause 10.5 of the scheme barring employee from withdrawing the request for the voluntary retirement was an agreement without consideration and was therefore not valid. This Court observed that once it was found that by giving their

option under the Scheme, the employees did not derive an enforceable right, in the absence of any consideration, the term would be void in terms of Section 2(g) of the Contract Act as opposed to an enforceable agreement in terms of Section 2(h) of that Act. This Court further therefore concluded that once the application filed by the employees is held to be an offer, Section 5 of the Contract Act would come into play, *in the absence of any other independent binding contract or statute or statutory Rules to the contrary.*

(11.2.) In so far as the scheme of State Bank of India, this Court held that the terms and conditions of service of its employees were governed by statutory Rules and the scheme was also statutory in nature; that the provisions of the Scheme would show that there was some 'consideration' for the employee agreeing not to withdraw the voluntary retirement and consequently the scheme would be binding. As a result this Court allowed the appeals of the State Bank of India but dismissed the appeals of the Nationalised Banks except in cases where employees have accepted a part of the benefit under the scheme.

(11.3.) The effect of the decision in *Swarnakar* can be summarized thus :

(i) If a contractual scheme provides that the voluntary retirement by exercise of option by the employee, will come into effect only on its acceptance by the employer, it will not create any enforceable right in the employee to claim SV retirement. Any term in such a scheme that the employee shall not withdraw from the option once exercised, will be an agreement without consideration and therefore, invalid. Consequently, the employee can withdraw the offer (that is option exercised) before its acceptance. But if the contractual scheme gives the option to an employee to voluntarily retire in terms of the scheme and if there is no condition that it will be effective only on acceptance by the employer, the scheme gives an

enforceable right to the employee to retire, by exercising his option. In such a situation, a provision in the contractual scheme that the employee will not be entitled to withdraw the option once made, will be valid and binding and consequently, an employee will not be entitled to withdraw from the option exercised.

(ii) Where the scheme is statutory in character, its terms will prevail over the general principles of contracts and the provision of the Contract Act. Further, there will be no question of any "consideration" for the condition in the Scheme that the employee will not withdraw from the option exercised. Subject to any challenge to the validity of the scheme itself, the terms of the statutory scheme will be binding on the employees concerned, and once the option is exercised by an employee to voluntary retire in terms of the Retirement Package contained in the Scheme, the employee will not be entitled to withdraw from the exercise of the option, if there is a bar against such withdrawal.

12. The question therefore is whether Clause 4 of Para 5 of the SVRS contained in the Amendment Scheme of 2003 is void and whether Section 5 of the Contract Act which enables the person making the offer, to withdraw the offer, any time before its acceptance, would apply. The special voluntary retirement package is a part of the General Insurance (Rationalization of Pay Scales and Other Conditions of Service of Development Staff) Amendment Scheme, 2003, made by the Central Government in exercise of the power under Section 17A of the General Insurance Business Insurance (Nationalisation) Act, 1972. Section 17A, as noticed above, authorizes and empowers the Central Government, to frame, by notification published in the official gazette, one or more schemes for regulating the pay scales and other terms and conditions of service of officers and other employees of the Corporation or of any acquiring company (including the

appellant). Sub-section (6) of Section 17A provides that the provision of Section 17 and of any scheme framed under it shall have effect notwithstanding anything to the contrary contained in any other law or any agreement award or other instrument for the time being in force. Therefore the scheme is statutory in character. Consequently, the provisions of the Scheme will prevail over the provisions of Contract Act or any other law or any principle of contract, and having regard to the binding nature of the scheme, the employee upon exercising the option, cannot withdraw from the same.

13. We, therefore, allow this appeal and set aside the judgment of the High Court and dismiss the Writ Petition filed by the respondents before the High Court.

R.P. Appeal allowed.

RAVICHANDRAN

v.

STATE BY DY. SUPERIN. OF POLICE, MADRAS

(Criminal Appeal Nos. 909-910 of 2003)

MARCH 25, 2010

[DR. MUKUNDAKAM SHARMA AND H.L. DATTU, JJ.]

Penal Code, 1860:

ss. 120-B, 420/120-B, 477A/120-B and s.5(1)(d)/5(2) of Prevention of Corruption Act – Interpolation and forgery in permit for palmolein oil – Conviction by trial court, affirmed by High Court – HELD: There is no evidence on record to indicate any link to prove and establish that the interpolation and forgery was done by any of the accused persons namely, A1, A2 or A4 – Only because A4 is the brother of A3, it does not in any manner prove and establish that he had knowledge that the permit was interpolated when he had presented it before the office of the Federation – In the considered opinion of the Court, the interpolation as also the initials appended thereto have not been proved and established to be in the hand of A2 and A1 – The prosecution has miserably failed to prove and establish that the alleged interpolation and forgery was done by either A1, A2 or A4 – Since A-3 died pending appeal, Criminal Appeal Nos. 805-806 of 2003 stand abated – All the other appeals are allowed, the orders of conviction and sentences passed against each of the accused persons set aside – Abatement of appeal – Code of Criminal Procedure, 1973 – s.394(2), proviso – Prevention of Corruption Act, 1947 – ss.5(1)(d)/5(2) – Pondicherry Essential Commodities (Display of Stocks, Price and Maintenance of Accounts) Order, 1975 – Clause 4(9) – Essential Commodities Act, 1955 – s.7(1)(a)(ii). [para 13, 15-17]

Rahim Khan vs. Khurshid Ahmed and Others **(1974) 2 SCC 660; and** *Murari Lal vs. State of Madhya Pradesh* **AIR 1980 SC 531, referred to.**

Code of Criminal Procedure, 1973:

s.394(2), proviso – Application by legal representatives for leave to continue the appeal on death of accused-appellant – Allowed.

Case Law Reference:

(1974) 2 SCC 660	**referred to**	**para 14**
AIR 1980 SC 531	**referred to**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 909-910 of 2003.

From the Judgment & Order dated 31.12.2002 of the High Court of Judicature at Madras in Crl Appeal No. 220 of 1994 & 222 of 1994.

WITH

Crl. A. No. 1515-1516, 1527-1528, 805-806, 807-808 & 911-912 of 2003.

R. Venkatarmani, C.K.R. Lenin Sekar, Aljo, R. Nedumaran, Shivaji M. Jadhav, Arvind Kumar, Senthil Jagadeesan, V. Ramasubramanian for the Appellant.

P.P. Malhotra, ASG, M. Chatterjee, P.K. Dey, A. Deb Kumar, Arvind Kumar Sharma for the Respondent.

The following Order of the Court was delivered

O R D E R

1. All these appeals involve similar and connected facts. Since, the legal issues that arise for our consideration are also

similar, we proceed to dispose of all these appeals by this common judgment and order.

2. Before we delve into the facts of the case, it would be appropriate for us to deal with the miscellaneous applications that have been filed in this Court and also the statement of the learned counsel for the appellant in Criminal Appeal Nos. 805-806 of 2003.

3. Criminal Miscellaneous Petition Nos. 6391 to 6394 of 2010 in Criminal Appeal Nos. 1515-1516 of 2003 and Criminal Miscellaneous Petition Nos. 6396-6399 of 2010 in Criminal Appeal Nos. 1527-1528 of 2003 are applications filed by the legal representatives of the accused No. 1 namely, Kumaraguru seeking for substitution of their names in place of the deceased appellant-accused No. 1. During the pendency of the appeals in this Court, appellant-accused No. 1 died on 9th April, 2007. The present applications have therefore been filed by his legal representatives seeking for substitution of their names in place of the deceased appellant accused No. 1. In support of the aforesaid prayer, the legal representatives of the deceased appellant-accused No. 1 have relied upon the provisions of Section 394 of the Criminal Procedure Code, 1973. For the reasons stated in the said applications, the applications are allowed. The names of the applicants who are the legal representatives of the deceased-appellant accused No. 1 are, thus, allowed to be brought on record. The said applications stand disposed of in terms of the aforesaid order.

4. It is pointed out that during the pendency of the appeals in this Court, accused No. 3 namely, Tamizhselvan who was the owner of shop No. 18 had died. In that view of the matter, so far as the appeals against accused No. 3 are concerned, i.e. Criminal Appeal Nos. 805-806 of 2003, they stand abated. The same are dismissed, accordingly. The owner of shop No. 30, Kandasamy, accused No. 3 in the first appeal has not filed any appeal in this Court against the order of conviction and

sentence passed against him. It has been stated that he has served out the sentence awarded to him.

5. Brief facts, which are necessary to dispose of the present appeals, are that the appellants herein were charged under the provisions of Section 120-B, Section 420 read with Section 120B, Section 477A read with Section 120B IPC and under Section 5(1) (d) and 5(2) of the Prevention of Corruption Act, 1947 in SLP. C.C. No. 1 of 1985. In C.C. No. 3 of 1985, charges were framed against the appellants herein under clause 4(a) of the Pondicherry Essential Commodities (Display of Stocks, Price and Maintenance of Accounts) Order, 1975 read with Section 7(1)(a)(ii) of the Essential Commodities Act, 1955. The case of the prosecution is that the appellants herein, i.e., accused Nos. 1 and 2 prepared the permit for issuance of palmolein oil and the counter foil thereof was retained in the office. Both the aforesaid permits and the counter foil were in the handwriting of accused No. 2 which are also initialed and signed by A1 and A2. Subsequently, however, in the permit it was detected that there was interpolation and forgery in respect of shop No. 30. One of such permits indicates that the palmolein oil was meant to be issued in favour of Shop No. 38. The counter foil retained in the office indicates that it was meant to be issued and was in fact issued in favour of shop No. 38 but in the permit, it was detected later on that the same was converted and interpolated as shop No. 30. Delivery of the palmolein oil was also taken on behalf of shop No. 30.

6. In view of the aforesaid interpolation and forgery in the said documents, two separate cases were registered under the aforesaid provisions. After submission of the charge-sheet, trial was conducted and a number of witnesses i.e. P.W. 1 to P.W. 19 were examined and several documents were also placed on record which were marked as Exhibits P1 to P57.

7. All the accused were examined under Section 313 of the Code of Criminal Procedure and on conclusion of the trial, the trial Court, in Spl. C.C. No. 1 of 1985, convicted all the

accused persons namely A1-A3 for an offence under Section 120B IPC and sentenced each to undergo three years rigorous imprisonment and also convicted them under Section 420 read with Section 120B IPC and sentenced each of them to undergo three years rigorous imprisonment and also to pay a fine of Rs. 500/- each, in default to undergo one month simple imprisonment. The accused persons were further also convicted under Section 477A read with Section 120B IPC and sentenced each to undergo three years rigorous imprisonment. Ravichandran, A2 and A1 were also convicted under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 read with Section 120B IPC and sentenced each to undergo rigorous imprisonment for three years and to pay a fine of Rs. 500/- each, in default to undergo simple imprisonment for one month. Kandasamy A3 was convicted under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 read with Section 109 IPC and sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs. 500/-, in default to undergo simple imprisonment for one month. All the sentences were directed to run concurrently.

8. With respect to Spl. C.C. No. 3 of 1985, accused Nos. 1 and 2 were convicted under clause 4(a) of the Pondicherry Essential Commodities (Display of Stock, Prices and Maintenance of Accounts) Order 1975 read with Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 read with Section 109 of I.P.C. and sentenced each to undergo R.I. for 6 months. Accused No. 3 was convicted under clause 4(a) of the Pondicherry Essential Commodities (Display of Stocks, Prices and Maintenance of Accounts) Order 1975 read with Section 7(1)(a)(ii) of Essential Commodities Act, 1955 and he was sentenced to undergo R.I. for 6 months.

9. Aggrieved by the aforesaid judgment and order passed by the trial Court, the appellants preferred four separate appeals. Two appeals being C.A. Nos. 181 and 184 of 1994 were filed by accused No. 1. The other two appeals being C.A.

Nos. 220 and 222 of 1994 were filed by accused Nos. 2 and 3 jointly. The High Court by its judgment and order dated 31.12.2003 dismissed all the appeals.

10. Aggrieved by the aforesaid judgment and order of conviction and sentences, the appellants before us filed the appeals which were entertained. All the appeals have been listed for hearing and we have heard the learned counsel appearing for the parties.

11. Counsel for the appellants have submitted before us that the judgments are required to be set aside as none of the accused persons could be said to be guilty of the offences alleged against them. It is pointed out that although the aforesaid permit as also the counter foil were prepared by accused No. 2 and were signed by both the accused no. 2 and accused No. 1, yet there is no conclusive proof that the interpolation and forgery was done by both the accused persons. It was also pointed out during the course of arguments by the learned counsel appearing for the appellants that so far as accused No. 3 is concerned, he died during the pendency of the present appeals and he did not file any appeal himself before the Court. So far as accused No. 4 is concerned, counsel appearing on his behalf has drawn our attention to the fact that although he is the brother of A3 there is no evidence to show that he in fact knew that the aforesaid permit which was delivered by him in the office of the Federation was in any manner interpolated or forged.

12. Mr. P.P. Malhotra, the Additional Solicitor General of India appearing for the respondent-CBI tried to contend that it is the concurrent finding of facts of the two Courts below and therefore, the findings should not and cannot be interfered with by this Court. He also submitted that the findings on record fully prove and establish the guilt of the two accused persons and that there is enough material on record to show that the documents in question were forged at least with the knowledge and consent of the accused persons and therefore, the

conviction and sentences passed against them are legal and valid.

13. In the light of the aforesaid submissions, we have considered the entire record of the case. We have carefully scrutinised the evidence adduced in the present cases. After going through the same, we are of the considered opinion that there is no evidence on record to indicate any link to prove and establish that the interpolation and forgery was done by any of the accused persons namely, A1, A2 or A4. Only because A4 is the brother of A3 does not in any manner prove and establish that he had knowledge that the permit was interpolated when he had presented it before the office of the Federation.

14. In order to prove that the interpolation and the forgery was done by A1 and A2, the prosecution has led evidence of P.W. 3 and P.W. 6 who have stated that they knew the handwriting, signatures, initials and mode of writing the figures of A1 and A2. Before we deal with the testimony of P.W. 3 and P.W. 6 on the point of handwriting, signatures, initials of the accused persons, we wish to refer to two judgments of this Court. In *Rahim Khan vs. Khurshid Ahmed and Others* [(1974) 2 SCC 660], this Court held as follows:

> "39. There is also oral evidence identifying the signature of the returned candidate on Exhibits P3 and PW 11/1, particularly in the deposition of Habib, PW 23. He has not spoken to his familiarity with the handwriting of the appellant. Opinion evidence is hearsay and becomes relevant only if the condition laid down in Section 47 of the Evidence Act is first proved. There is some conflict of judicial opinion on this matter, but we need not resolve it here, because, although there is close resemblance between the signature of Rahim Khan on admitted documents and that in Exhibits P3 and PW 11/1, we do not wish to hazard a conclusion based on dubious evidence or lay comparison of signatures by Courts. In these circumstances, we have to search for other evidence, if any, in proof of circulation of the printed handbills by the returned candidate, or with his consent."

In *Murari Lal vs. State of Madhya Pradesh* [AIR 1980 SC 531], this Court held as under:-

> "11. We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallised into a rule of law, that opinion-evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight. We have said so much because this is an argument frequently met with in subordinate courts and sentences torn out of context from the judgments of this Court are often flaunted."

15. P.W. 6 stated in his examination-in-chief that he knew the accused persons, viz., A1 to A3 and that A2 was working in Civil Supplies Inspector's Office in the rank of UDC and that he had earlier worked with him in the Finance Department. P.W. 6 has however, nowhere stated in the examination-in-chief that the present instance of interpolation or forgery was in the hand of A2. In the cross-examination, P.W. 6 stated that although he had worked along with A2 in the Finance Department, but he was working in a different Section of the Department. He has clearly stated that he was working in the Budget Section called F1 whereas A2 was working in the Motor Conveyance Section called F2 Section. It has also been

brought to our notice that in the cross-examination, it was said that the files dealt by A2 and F2 Section in the Finance Department never came to the F1 Section where P.W. 6 was working. Therefore, in our considered opinion the interpolation as also the initials appended thereto have not been proved and established to be in the hand of A2 and A1.

16. In that view of the matter, we are of the considered opinion that the prosecution has miserably failed to prove and establish that the alleged interpolation and forgery was done by either A1, A2 or A4.

17. As earlier noted by us, Criminal Appeal Nos. 805-806 of 2003 stand abated. We allow all the other appeals and set aside the orders of conviction and sentences passed against each of the accused persons.

18. The bail bonds stand discharged.

R.P. Appeals allowed.

UNION OF INDIA & ANR.
v.
C.S. SIDHU
(Civil Appeal No. 4474 of 2005)

MARCH 31, 2010

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

Service Law:

Disability pension – Officer joined Indian Army through Short Service Commission on 22.5.1968 – Injured at high altitude field posting on 21.11.1970 – Released from service on 23.6.1978 – For disability pension period taken into account only from 22.6.1968 to 21.11.1970 – HELD: High Court has rightly held that for the purposes of qualifying service for disability pension, the entire period of commissioned service rendered by the officer from 22.6.1968 to 23.6.1978 has to be taken into account – Arrears with 8% interest per annum will be paid to the respondent within three months – Armed Forces – Military.

Armed Forces:

Army Officers and army-men – Concern shown by Court that they should be treated in a better and more humane manner by governmental authorities particularly in respect of their emoluments, pension and other benefits – Service Law – Disability pension.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4474 of 2005.

From the Judgment & Order dated 11.12.2003 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 12299 of 2002.

Parag P. Tripathi, ASG, Arti Gupta, Kunal Bahri and Anil Katiyar for the Appellants.

Susmita Lal (N.P.) for the Respondent.

The following Order of the Court was delivered by

ORDER

1. Heard Mr. Parag P. Tripathi, learned Addl. Solicitor General appearing for the appellants.

2. There is no appearance on behalf of the respondent today.

3. This appeal by special leave is directed against the impugned judgment and order dated 11.12.2003 of the Division Bench of the High Court of Punjab & Haryana whereby the writ petition filed by the respondent herein (writ petitioner before the High Court) has been allowed and the appellants herein (respondents before the High Court) have been directed to count the entire period of full pay commissioned service of the respondent from 22.06.1968 to 23.06.1978 as qualifying service and calculate his disability pension in accordance with pension scales as on 23.6.1978 and give him all other benefits l therefrom.

4. The facts in detail have been given in the impugned judgment and order. Hence, we are not repeating the same here.

5. The question involved in this appeal is whether the full pay commissioned service rendered by the respondent herein from 22.06.1968 to 23.06.1978 is to be counted as qualifying service by the Union of India for the purpose of granting disability pension to the respondent.

6. The respondent herein was an officer in the Indian Army who was given a short service commission on 22.06.1968. A short service commission is given for 5 years and can be extended by another 5 years only. He was posted at a high altitude field area and while on duty on 21.11.1970, he met with an accident and suffered severe injuries. As a result of the accident, respondent's right arm had to be amputated. He also

suffered a compound fracture of the femur (thigh bone) and fracture of the mandible (jaw bone). He was released from service of Army on 23.6.1978. For his disability pension, the period taken into account by the Army authorities was only from 22.6.1968 to 21.11.1970. Aggrieved by the said decision of the Army authorities, the respondent filed a writ petition before the High Court which has been allowed by the impugned judgment and order. Hence, the appellants are in appeal before us.

7. We have gone through the impugned judgment and order and we are in full agreement with the Division Bench of the High Court that for the purposes of qualifying service for disability pension the entire period of commissioned service rendered by the respondent from 22.6.1968 to 23.6.1978 has to be taken into account. Accordingly, we see no reason to interfere with the impugned judgment and order of the High Court. The appeal is accordingly dismissed. No order as to the costs. Arrears with 8% interest per annum will be paid to the respondent within three months.

8. Before parting with this case, we regret to say that the army officers and army men in our country are being treated in a shabby manner by the government. In this case, the respondent, who was posted at a high altitude field area and met with an accident during discharge of his duties, was granted a meager pension as stated in Annexure-P3 to this appeal. This is a pittance (about Rs. 1000/- per month plus D.A.). If this is the manner in which the army personnel are treated, it can only be said that it is extremely unfortunate. The army personnel are bravely defending the country even at the cost of their lives and we feel that they should be treated in a better and more humane manner by the governmental authorities, particularly, in respect of their emoluments, pension and other benefits.

R.P. Appeal dismissed.

M/S MARUTI CLEAN COAL & POWERS LTD.
v.
ALOK NIGAM & ANR.
(Interlocutory Application No. 3 of 2009
(In SLP(C) No. 20238 of 2006)

MARCH 31, 2010

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

Interim Orders:

Interlocutory application – For issuance of interim directions to South Eastern Coal Field Ltd. (SECL) to start supply of coal and issue Transit Passes/Delivery Orders through washery of petitioner on behalf of linked and other customers based on instructions/requests from them – Allowed – It is clarified that grant of this interim relief will be subject of the result of the title suit pending in the High Court – It is also clarified that if the issue of title is decided in favour of SECL, it would be open to the said company to lease the land to the petitioner or to take other steps in accordance with law – Coal – Coal washery.

A lease deed dated 5.12.2002 for a period of 99 years was executed in favour of the petitioner-Company by the State Government through the State Industrial Development Corporation, with regard to certain lands to enable the petitioner to set up a coal washery thereon. Subsequently, M/s. South Eastern Coal Field Ltd. (SECL) claiming title to the said land, filed a suit. A writ petition was also filed before the High Court to prevent the petitioner from setting up the coal washery on the ground that the land allotted was the forest land. The High Court passed an interim order in the writ petition allowing the petitioner to continue the construction of the building but restraining it from installing the machineries. In the

petition for special leave to appeal filed by the petitioner before the Supreme Court, interim order staying the construction was vacated. Since the petitioner had installed the machineries and the coal washery was set up but as supply of coal was not started, the petitioner filed the instant application seeking a direction to the SECL to start supply of coal and issue Transit Passes/ Delivery Orders through the washery of the petitioner.

Partly allowing the application, the Court

HELD: 1. The building constructed and the machineries installed have remained unused since long causing great financial loss to the petitioner-company. It is relevant to notice that as on date, there is no order subsisting, which restrains the petitioner from operating the washery in question. The assertion made by the petitioner that it has received all necessary approvals for running the washery including the approval from the Ministry of Environment, Electricity Department, Commercial Tax Department, licence under the Factories Act etc. is not disputed by any of the respondents. [Para 8] [333-B-C]

2. M/s SECL is hereby directed to start supply of coal and issue Transit Passes/Delivery Orders through the washery of the petitioner on behalf of linked and other customers based on instructions/requests from them. It is clarified that the grant of this interim relief will be subject to the result of Civil Suit No. 1-A of 2008 pending in the High Court. It is also clarified that if the issue of title is held in favour of M/s SECL, it would be open to the said company to lease the land to the petitioner-company or to take other steps with reference to the said land in accordance with law. [Para 9] [333-E, F]

T.N. Godavarman Thirumulpad vs. Union of India & Ors. **(2006) 5 SCC 28, cited.**

Case Law Reference:

(2006) 5 SCC 28 cited para 2

CIVIL APPELLATE JURISDICTION : Interlocutory Application Nos. 3 of 2009.

IN

SLP (Civil) No.20238 of 2006.

From the Judgment & Order dated 9.5.2003 of the High Court of Chhattisgarh at Bilaspur in WP (C) No. 1264 of 2003.

Mukul Rohtagi, Ranjit Kumar, Vikas Singh, Ajit Kumar Sinha, Saurav Kirpal, Ayush Agarwal, (for Suresh A. Shroff & Co.), Anurag Sharma, Sanjeev K.Bhardwaj, (for R.C. Kaushik), Ambhoj Kumar Sinha, Ashwarya Sinha, Swetabh Sinha for the appearing parties.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. By filing this Interlocutory Application, M/s. Maruti Clean Coal & Power Limited which has established a coal washery of 10 M.T.Y. capacity on Khasra Nos.850/30, 850/24, 850/31, 850/28, 850/27 and 850/32 of Village Ratija, District Korba leased by the State of Chhattisgarh through Chhattisgarh State Industrial Development Corporation ('CSIDC' for short), has prayed to direct M/s. South Eastern Coal Field Limited ('SECL' for short) to start supply of coal immediately and issue Transit Passes/Delivery Orders through the washery of the petitioner on behalf of linked and other customers on instructions/requests from all such customers/ purchasers of coal.

2. In order to understand the scope and ambit of the prayer made by the petitioner, it would be relevant to notice certain facts. M/s. Maruti Clean Coal & Power Limited is a company registered under the provisions of the Companies Act. It applied for the allotment of about 15 hectares (37.91 acres) of land of village Nawagaon Khurd (now Ratija), District Korba, ('the land' for short) for setting up a Coal Beneficiation Plant with a

capacity to wash 10 million tons of coal per annum. The land demanded was adjacent to already existing two coal washeries one of which was set up by ST-CLI in which one Aryan Coal Beneficiation Pvt. Ltd. has 26% holdings and another Coal Washery set up belongs to Aryan itself. The officials of the Revenue, Forest and Industry Departments of the State conducted a thorough inspection of the land demanded by the petitioner. After being satisfied that the land demanded was not forest land and requirements of environmental laws were complied with by the petitioner, the officials recommended to the State to allot the land to the petitioner. Pursuant to the said recommendation, a lease deed dated December 5, 2002 for a period of 99 years was executed in favour of the petitioner by the State of Chhattisgarh through CSIDC. The purpose for which the lease deed was executed was to enable the petitioner to set up a coal washery. Pursuant to the said lease deed, the petitioner was put in possession of the land. However, subsequently, SECL claimed title to the land and alleged that the land did not belong to the State Government and, therefore, could not have been leased by the State to the petitioner.

In March/April 2003, one Mr. B.L. Wadhera, a public spirited citizen instituted WP (C) No.1264/2003 before the High Court of Chhattisgarh at Bilaspur to prevent the petitioner from setting up its coal washery on the land allotted to it by the State Government on the ground that the land allotted were forest land. The High Court, by an ex parte order dated April 24, 2003, directed the petitioner to maintain status quo regarding the land allotted to it and not to cut trees standing on the land till further orders. In view of the dispute pertaining to the title of the land between SECL and the State Government, the Union of India, vide letter dated May 7, 2003 sent through the Ministry of Coal, gave the petitioner two options (1) to wait until title issue is decided; or (2) to proceed on the assumption that the title vests in SECL and on that basis, to request the SECL to allot the land to the petitioner. It was also mentioned in the said letter

that in the event the petitioner chose the second option, Coal India Limited and SECL would be requested by the Ministry to initiate action for leasing the land to the petitioner. The record shows that by letter dated May 9, 2003, the petitioner elected the second option. The petitioner filed an application for vacation of the stay order. The High Court, by order dated May 9, 2003, modified its earlier order and allowed the petitioner to continue with the construction of the main building but restrained it from installing the machineries. Meanwhile, the SECL wrote a letter dated June 27, 2003 to the Ministry of Coal stating that it had no objection in leasing the land to the petitioner subject to certain conditions including the condition that the fact that the land belonged and belongs to SECL is acceptable to the petitioner. Feeling aggrieved by order dated May 9, 2003, Mr. B.L. Wadhera filed SLP (C) No.22531 of 2003. This Court, by order dated November 24, 2003 stayed further construction on the land. Subsequently, the said SLP was tagged with IA No.857-858 of 2003 filed by Mr. Wadhera and one Mr. Deepak Aggarwal respectively. This Court, by judgment dated April 10, 2006 in case of *T.N. Godavarman Thirumulpad vs. Union of India & Ors.* (2006) 5 SCC 28, dismissed the application of Mr. Deepak Aggarwal observing that it was filed with mala fide intention. The interim order passed staying further construction was vacated. On the pronouncement of judgment by this Court, the petitioner filed an application in the writ petition pending before the High Court of Chhattisgarh with a prayer to dismiss the writ petition. The record shows that the said application was heard with two other connected petitions and judgment was reserved. However, the judgment could not be pronounced by the High Court. Therefore, the petitioner filed an application for vacating the interim orders dated April 23, 2003 and May 9, 2003. Listing of the said application was refused by the Registry on the ground that in the main matter, judgment was reserved. Meanwhile, the petitioner completed construction of the main building. The order for purchase of machineries to be installed was already placed.

3. On December 9, 2004, SECL filed Civil Suit No.90-A of 2004 against the State of Chhattisgarh and the petitioner contending, inter alia, that the land allotted to the petitioner company by the State of Chhattisgarh through CSIDC had vested in SECL and that SECL is the owner and in possession of the land in question. Various other litigations and proceedings were initiated by several parties pertaining to the land allotted to the petitioner company. The Ministry of Coal, by letter dated December 30, 2005 advised SECL to implement the instructions dated May 7, 2003 mentioned in para (b). The petitioner thereupon addressed a letter dated June 14, 2006 to SECL to inform the petitioner about the lease premium/rent to be deposited. The record of the case further shows that in spite of instructions issued by the Ministry of Coal and request made by the petitioner, SECL did not initiate steps for leasing the land to the petitioner. Therefore, the petitioner has filed Special Leave Petition No.20238 of 2006 challenging validity of order dated April 24, 2003 as modified by order dated May 9, 2003 in WP No.1264 of 2003 pending before the High Court of Chhattisgarh. In the abovereferred special leave petition, the Court has issued notice and the said SLP is pending for final disposal. Thereupon, the petitioner company filed Transfer Petition No.53 of 2007 in this Court to direct that all the connected matters including the suit, writ petitions and/or appeals be heard together and transferred to the High Court of Chhattisgarh at Bilaspur. The said Transfer Petition was allowed. Pursuant to the directions given by this Court, the number of Civil Suit was changed from 90-A of 2004 to Civil Suit No.1-A of 2008. The said suit and all other connected writ petitions, appeals etc. are pending adjudication before the High Court of Chhattisgarh at Bilaspur.

4. During the pendency of proceedings before the High Court of Chhattisgarh, the Prime Minister's Office vide letter dated June 26, 2007 to the Secretary, Ministry of Coal approved and recommended SECL to move an appropriate application before the High Court of Chhattisgarh seeking

permission of the Court for leasing the land to the petitioner company for establishment of a coal washery. Having regard to these directions, the Ministry of Coal issued a letter dated July 4, 2007 to M/s. Coal India Ltd. which is parent company of SECL, stating that in view of the decision by the competent authority, SECL should take appropriate action to lease the land to the petitioner company. Therefore, M/s. Coal India Ltd. addressed a letter dated July 5, 2007 to SECL directing it to take all necessary actions for execution of lease deed in favour of the petitioner company. On July 9, 2007, SECL issued a letter to the Chairman-cum-Managing Director of CMPDI requesting to make assessment of the land required to be leased out. In view of the directions contained in letter dated July 5, 2007 of Coal India Limited, SECL filed an application on July 16, 2007 before the High Court of Chhattisgarh at Bilaspur in WP No.3094 of 2007 seeking permission to execute a lease deed in favour of petitioner's company. It was also mentioned in the said application that the petitioner company had agreed to take the land on lease for establishment of a coal washery and agreed to pay the lease money to SECL. Subsequently, on August 9, 2007, an additional affidavit was filed enumerating three conditions precedent to the execution of lease deed in favour of petitioner-company. The record shows that the petitioner-company showed willingness to abide by those conditions but no lease deed is executed between the petitioner-company and SECL. In the title suit filed by SECL, an order was passed by the High Court directing the parties to appear before Mr. Gopal Subramanium, the then learned Additional Solicitor General of India, to explore the possibilities of a settlement. The record does not indicate that any settlement had taken place between the parties.

5. The grievance made by the petitioner in the instant application is that it has expended almost Rs.100 crores to set up a 10 million ton washery. It is averred in the application that the buildings have been constructed and expensive state of art machineries and equipments have also been purchased and

installed. The petitioner has mentioned that trial run was also done in the wahsery nearly two years ago and the petitioner is not able to operate the washery only due to refusal by SECL to issue Transit Passes/Delivery Orders for transport of coal purchased by the linked and other consumers through the petitioner's wahsery before delivery to such purchasers. According to the petitioner, the only ostensible reason for SECL to refuse grant of Transit Passes/Delivery Orders is the dispute as to the title of the land between the State of Chhattisgarh and SECL. The claim advanced by the petitioner is that washing of the coal before consumption has significant environmental benefits and is also in the public interest and as there is significant shortage of coal washeries, the petitioner's washery should be permitted to operate. Under the circumstances, the petitioner has filed this application and claimed relief to which reference is made earlier.

6. The respondents have filed affidavit in opposition.

7. This Court has heard the learned counsel for the parties at great length and in detail. The Court has also considered the documents forming part of the instant application as well as SLP (C) No.20238 of 2006.

8. During the course of hearing of the application, it was made clear by the learned counsel for the petitioner that the petitioner company is ready to take the land on lease from SECL and pay rent to the said company. The record shows that several cases have been clubbed together and Civil Suit No.1-A of 2008 relating to title of the land leased to the petitioner company by the State Government is pending disposal. The averments made by the petitioner that on the leased land, the petitioner has expended almost Rs.100 crores to set up a 10 million tons washery and has installed expensive machineries could hardly be controverted by the respondents. The petitioner company is neither claiming title to the land nor asserts that the coal coming to its company for wash belongs to it. By a scientific process, the petitioner washes the coal brought to the factory

by the purchasers. Once SECL sells coal to the highest bidder and the bidder pays the price, the property in coal would stand transferred to the purchaser and the purchaser would be free to deal with the quantity of coal purchased like any other prudent purchaser. Here, the petitioner-company is not concerned at all with the title of the coal in question. The building constructed and machineries installed have remained unused since long causing great financial loss to the petitioner-company. It is relevant to notice that as on date, there is no order subsisting which restrains the petitioner from operating the washery in question. The assertion made by the petitioner that it has received all necessary approvals for running the washery including the approval from the Ministry of Environment, Electricity Department, Commercial Tax Department, licence under the Factories Act etc. is not disputed by any of the respondents. Therefore, this Court is of the opinion that the prayer made by the petitioner–company in the instant application deserves to be granted, of course, subject to certain conditions.

9. For the foregoing reasons, the application partly succeeds. M/s South Eastern Coal Field Ltd. is hereby directed to start supply of coal and issue Transit Passes/Delivery Orders through the washery of the petitioner on behalf of linked and other customers based on instructions/requests from them. It is clarified that the grant of this interim relief will be subject to the result of Civil Suit No.1-A of 2008 pending in the High Court of Chhattisgarh at Bilaspur. It is also clarified that if issue of the title is held in favour of M/s. South Eastern Coal Field Ltd., it would be open to the said company to lease the land to the petitioner-company or to take other steps with reference to the said land in accordance with law. Subject to above mentioned clarifications/observations, rule is made absolute. There shall be no order as to costs.

R.P. Application Partly allowed.

LALU PRASAD YADAV

v.

STATE OF BIHAR & ANR.

(Criminal Appeal No. 662 of 2010)

APRIL 1, 2010

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

Code of Criminal Procedure, 1973 – s. 378(1) and (2) – Appeal against acquittal – Right of State Government to file – In a case where offence was investigated by Delhi Special Police Establishment (CBI) – Held: State Government is not the competent authority to file an appeal against acquittal in such cases – The opening words of s. 378(1) "save as otherwise provided in sub-section (2)" are intended to exclude the class of cases, mentioned in sub-section (2) out of the operation of the body of Sub-section (1) – Delhi Special Police Establishment Act, 1946 – Code of Criminal Procedure, 1898 – s. 417.

Interpretation of Statutes:

Changes in wordings and phrasing of statutory provision – Held: Such changes may be presumed to have been deliberate and with purpose to limit, qualify or enlarge the pre-existing law, as the changes of the words employ – Any construction which makes the exception clause, with which the Section opens, unnecessary and redundant, should be avoided.

Construction of statute – Language of a statute should be read as it is – Any construction resulting in rejection of words has to be avoided – However, such rule of construction is not without exception.

Precedent – The essence in a decision is its ratio and not every observation found therein – The observations in a judgment do no operate as a binding precedent.

Words and Phrases: 'Save' – Meaning of, in the context of s. 378(1) Cr.P.C.

The question for consideration in the present appeals was whether the State Government has competence to file an appeal from the judgment passed by Special Judge, CBI (AHD) acquitting the accused persons as the case has been investigated by the Delhi Special Police Establishment (CBI).

Appellant-accused and CBI contended that the cases are covered u/s. 378(2) Cr.P.C. and are excluded from the purview of s. 378(1) by virtue of the opening clause in sub-section (1) "Save as otherwise provided in sub-section (2)".

Respondent-State Government contended that use of expressions "in any case" in sub-section (1) and "also" in sub-section (2) indicates that legislature intended that general rule would be that State Government may file an appeal in any and every case and Central Government may additionally file an appeal in a case covered by sub-section (2); and that ss. 377 and 378 Cr.P.C. are in *pari materia* and interpretation given to s. 377 in *Eknath Shankarrao Mukkawar* case, needs to be accorded to s. 378.

Allowing the appeals, the Court

HELD: 1.1. Legislature has maintained a mutually exclusive division in the matter of appeal from an order of acquittal inasmuch as the competent authority to appeal from an order of acquittal in two types of cases referred to in sub-section (2) is the Central Government

and the authority of the State Government in relation to such cases has been excluded. As a necessary corollary, it has to be held, that the State Government is not competent to direct its public prosecutor to present appeal from the judgment passed by the Special Judge, CBI (AHD), Patna. [Para 40] [369-D-E]

1.2. The opening words of Section 378(1) Cr.P.C. – "Save as otherwise provided in sub-section (2)" – are in the nature of exception intended to exclude the class of cases mentioned in sub-section (2) out of operation of the body of sub-section (1). These words have no other meaning in the context but to qualify the operation of sub-section (1) and take out of its purview two types of cases referred in sub-section (2), namely, (i) the cases in which offence has been investigated by the Delhi Special Police Establishment constituted under Delhi Special Police Establishment Act, 1946 and (ii) the cases in which the offence has been investigated by any other agency empowered to make investigation into an offence under any Central Act other than Cr.P.C. [Para 27] [355-G-H]

1.3. By construing Section 378 in a manner that permits appeal from an order of acquittal by the State Government in every case, except two class of cases mentioned in sub-section (2), full effect would be given to the exception (clause) articulated in the opening words. The words – "save as otherwise provided in sub-section (2)" – were added in 1973 Code; Section 417 of 1898 Code did not have these words. It is familiar rule of construction that all changes in wording and phrasing may be presumed to have been deliberate and with the purpose to limit, qualify or enlarge the pre-existing law as the changes of the words employ. Any construction that makes exception (clause) with which a Section opens unnecessary and redundant should be avoided. If Section 378, sub-sections (1) and (2) is given the

interpretation which the State Government claims, that would be rendering the exception (clause)-reflected in the opening words "save as otherwise provided in sub-section (2)" – redundant, meaningless and unnecessary. [Para 27] [356-B-F]

1.4. If the Legislature had intended to give the right of appeal u/s. 378(1) to the State Government in all cases of acquittal including the class of cases referred to in sub-section (2), it would not have been necessary to incorporate the exception (clause) in the opening words. This objective could have been achieved without use of these words as erstwhile Section 417 of 1898 Code enabled the State Government to appeal from all cases of acquittal while in two types of cases mentioned in sub-section (2) thereof, appeal from the order of acquittal could be filed under the direction of Central Government as well. [Para 27] [356-G-H]

1.5. If a latter statute repealing and re-enacting former statute does not use the same language as in the earlier one, the alteration must be taken to have been made deliberately. The Parliament in 1973 Code re-enacted the provision for appeal from order of acquittal with certain modifications. It changed the language by addition of words – "save as otherwise provided in sub-section (2)". The alteration in language by addition of these words gives rise to an inference that the Legislature made conscious changes in Section 378 (1973 Code). The addition of words in Section 378(1) by way of exception (clause) cannot be set at naught by giving same interpretation which has been given to Section 417 (1898 Code). [Paras 29 and 31] [357-D; 360-E-F]

Khemraj vs. State of Madhya Pradesh **(1976) 1 SCC 385, held inapplicable.**

Union of India and Anr. v. Hansoli Devi and Ors **(2002) 7 SCC 273;** *The Bengal Immunity Company Limited v. The State of Bihar and Ors.* **(1955) 2 SCR 603;** *D.R. Fraser & Co. Ltd. v. The Minister of National Revenue* **AIR 1949 PC 120, referred to.**

***Robert Mitchell v. Soren Torup* (1766) Parker 227; *Becke v. Smith* (1836) 2 Meeson and Welsby 191;** *The Attorney-General v. Lockwood* **(1842) 9 Meeson and Welsby 378;** *The Sussex Peerage* **case (1844) XI Clark & Finnelly 85;** *Williams v. Milotin* **97 C.L.R.465, referred to.**

Concise Oxford English Dictionary (Tenth Edition, Revised); Webster Comprehensive Dictionary (International Edition); 'A Dictionary of Modern Legal Usage' **by Bryan A. Garner (1987);** *'Principles of Statutory Interpretation'* **by G.P. Singh, 12th Edition, 2010 page 310, referred to.**

2.1. One of the rules of construction of statutes is that language of the statute should be read as it is and any construction that results in rejection of words has to be avoided; the effort should be made to give meaning to each and every word used by the Legislature. However, such rule of construction of statutes is not without exceptions. [Para 32] [361-C]

Stone v. Yeovil Corp. **(1875-76) L.R. 1 CPD 691;** *Salmon v. Duncombe and Ors.* **(1886) 11 AC 627, referred to.**

2.2. The main object and legislative intent by the opening words – "save as otherwise provided in sub-section (2)" – in sub-section (1) of Section 378 Cr.P.C, 1973 being clear i.e., to fetter the general power given to the State Government in filing appeal from the order of acquittal in two types of cases stated in sub-section (2), the use of word "also" in sub-section (2) does not make

any sense. The word "also" in sub-section (2), if construed in the manner suggested by the State Government, may result in reducing the opening words in sub-section (1) a nullity and will deny these words their full play. Since exception (clause) in the beginning of sub-section (1) has been expressly added in Section 378 and it is not possible to harmonise the word "also" occurring in sub-section (2) with that, it appears that no sensible meaning can be given to the word "also" and the said word has to be treated as immaterial. To declare "also" enacted in sub-section (2) immaterial or insensible is not very satisfactory, but it is much more unsatisfactory to deprive the words – "save as otherwise provided in sub-section (2)" – of their true and plain meaning. In order that the exception (clause) expressly stated in the opening words of sub-section (1) might be preserved, it is necessary that word "also" in sub-section (2) is treated as immaterial. [Para 34] [362-D-G; A]

3.1. The phrase "in any case" in sub-section (1) of Section 378 means "in all cases", but the opening words in the said Section put fetters on the State Government in directing appeal to be filed in two types of cases mentioned in sub-section (2). A perusal of Section 24 Cr.P.C. would show that the Central Government appoints its public prosecutors for conducting prosecution, appeal or other proceedings on its behalf and a State Government appoints its public prosecutors in conducting prosecution, appeal or other proceedings on its behalf. One has no control over the other. The Central Government or the State Government, as the case may be, may appoint a special public prosecutor for the purpose of any case or class of cases. Under Section 378(1) the State Government may direct its public prosecutor to file an appeal from an order of acquittal while under Section 378(2) the Central Government may

direct its public prosecutor to file an appeal from an order of acquittal. The public prosecutor, thus, has to be associated in an appeal from an order of acquittal. [Para 35, 37] [363-B; 365-F-H]

3.2. The 1946 Act provides for constitution of a special police establishment for investigation of certain offences or class of offences as notified under Section 3 of the 1946 Act. A close look to the provisions of 1946 Act would show that investigation thereunder is a central investigation and the officers concerned are under the superintendence of the officer appointed by the Central Government. It is the Central Government that has the superintendence over Delhi Special Police Establishment. Therefore, it is the Central Government which is concerned with the investigation of the case by Delhi Special Police Establishment and its ultimate result. It is for this reason that sub-section (2) of Section 378 provides for appeal against acquittal in two types of cases mentioned therein on the direction of the Central Government by its public prosecutor. The opening words in sub-section (1), thus, qualify the general power given to the State Government in filing appeal from an order of acquittal so that the central agency, which is solely and intimately connected with the investigation of cases referred in sub-section (2), may approach the Central Government for direction to appeal in appropriate cases. [Para 37] [366-A-E]

4. The essence in a decision is its ratio and not every observation found therein. The ratio of decision in *Eknath Shankarrao Mukkawar* case is that the Legislature has maintained a watertight dichotomy in the matter of appeal against inadequacy of sentence; the competent authority to appeal against inadequacy of sentence in two types of cases referred to in sub-section (2) of Section 377 is

the Central Government. However, it is not correct to say that in *Eknath Shankarrao Mukkawar* case in the absence of use of word "also" in sub-section (2) of Section 377, it was held by this Court that the State Government was incompetent to file an appeal in a case falling under Section 377(2) and that Parliament remedied the lacuna by Act 45 of 1978 to include the word "also" therein and bring the same in pari materia with the provisions of Section 378(2) and that the Statement of Objects and Reasons for the said amendment makes it clear that the State Government is also competent to file an appeal in a case falling under Section 377(2). In the first place, the observations in *Eknath Shankarrao Mukkawar* case in relation to Section 378 do not operate as binding precedent as construction of Section 378 was neither under consideration nor in issue in that case. Secondly, and more importantly, although sub-section (2) of Section 377 came to be amended by Act 45 of 1978 to include the word "also" therein, but the Statement of Objects and Reasons relating to that amendment is of no relevance insofar as construction of Section 378 (1) and (2) is concerned. Insofar as Section 378 is concerned, the word "also" occurring in sub-section (2) cannot be accorded a meaning that would result in wiping out the effect of controlling words in sub-section (1) - "save as otherwise provided in sub-section (2)" – which are indicative of legislative intent to exclude two types of cases mentioned in sub-section (2) out of operation of the body of sub-section (1). [Para 39] [368-D-H; 369-A-C]

Eknath Shankarrao Mukkawar vs. State of Maharashtra **(1977) 3 SCC 25, explained and held inapplicable.**

State of Orissa v. Sudhansu Sekhar Misra and Ors. **AIR 1968 SC 647, relied on.**

Case Law Reference:

(1766) Parker 227	**Referred to.**	**Para 17**
(1836) 2 Meeson and Welsby 191	**Referred to.**	**Para 18**
(1842) 9 Meeson and Welsby 378	**Referred to.**	**Para 19**
(1844) XI Clark & Finnelly 85	**Referred to.**	**Para 20**
(2002) 7 SCC 273	**Referred to.**	**Para 21**
97 C.L.R. 465	**Referred to.**	**Para 25**
(1955) 2 SCR 603	**Referred to.**	**Para 28**
AIR 1949 PC 120	**Referred to.**	**Para 29**
(1976) 1 SCC 385	**held inapplicable.**	**Para 30**
(1875-76) L.R. 1 CPD 691	**Referred to.**	**Para 32**
(1886) 11 AC 627	**Referred to.**	**Para 33**
(1977) 3 SCC 25	**Explained and held inapplicable.**	**Para 39**
AIR 1968 SC 647	**Relied on.**	**Para 39**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 662 of 2010.

From the Judgment & Order dated 20.9.2007 of the High Court of Judicature at Patna in Govt. Appeal No. 1 of 2007.

WITH

Crl.A. No. 670 of 2010.

Ram Jethmalani, Pravin H. Parekh, Chitranjan Sinha, A. Mariarputham, L. Nageshwar Rao, Lata Krishnamurti, P.R.

Mala, E.R. Kumar, Sameer, Parekh, Saurabh Ajay Gupta, Somandari Gaud, Pranav Diesh (for Parekh & Co.) T.A. Khan, Devadatt Kamat, Arvind, K. Sharma, P.K. Dey (for B. Krishna Prasad), Vishwajit Singh, Veera Kaul Singh, Ritesh Agarwal, Siddharth Sengar, Abhindra Maheshwari for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. Section 378 of Code of Criminal Procedure, 1973 (for short, '1973 Code') enacts the provision for appeal from an order of acquittal. The said provision as it existed prior to 2005 amendment reads:

> "S.378. - *Appeal in case of acquittal.* - (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court or an order of acquittal passed by the Court of Session in revision.
>
> (2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.
>
> (3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

> (4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.
>
> (5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.
>
> (6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

3. The main question presented, in light of the aforesaid provision is, namely, as to whether the State Government (of Bihar) has competence to file an appeal from the judgment dated 18th December, 2006 passed by Special Judge, CBI (AHD), Patna, acquitting the accused persons when the case has been investigated by the Delhi Special Police Establishment (CBI).

4. Shri Lalu Prasad Yadav and Smt. Rabri Devi are husband and wife. Both of them have held the office of Chief Minister of the State of Bihar. These appeals concern the period from March 10, 1990 to March 28, 1995 and April 4, 1995 to July 25, 1997 when Shri Lalu Prasad Yadav was the Chief Minister, Bihar. Allegedly for acquisition of assets – both moveable and immoveable – by corrupt or illegal means disproportionate to his known sources of income during the aforesaid period, a first information report (FIR) was lodged by CBI against Shri Lalu Prasad Yadav and also his wife. As a

matter of fact, lodgement of FIR was sequel to direction by the Patna High Court to CBI to enquire and scrutinize all cases of excess drawls and expenditure in the Animal Husbandry Department, Government of Bihar during the period 1977-78 to 1995-96. CBI investigated into the matter and on August 19, 1998, a chargesheet was filed against Shri Lalu Prasad Yadav and Smt. Rabri Devi in the Court of Special Judge, CBI (AHD), Patna. The charges were framed against Shri Lalu Prasad Yadav under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 ('PC Act') that during the said period, he acquired assets which were disproportionate to his known sources of income and on 31st March, 1997 he had been in possession of pecuniary resources of property in his name and in the name of his wife and children to the extent of Rs. 46,26,827/- which he could not satisfactorily account for. Smt. Rabri Devi was charged under Section 109 of Indian Penal Code (IPC) read with Section 13(1)(e) and 13(2) of the PC Act for abetting her husband in the commission of the said offence. The Court of Special Judge, CBI (AHD), Patna, upon conclusion of trial, vide its judgment dated December 18, 2006 acquitted the accused holding that prosecution failed to prove the charges levelled against them.

5. It is pertinent to notice here that as per CBI, the central government after considering the conclusions and findings of the trial court took a conscious and considered decision that no ground whatsoever was made for filing an appeal against the judgment of the trial court.

6. On February 17, 2007 the state government, however, filed leave to appeal against the order of acquittal dated December 18, 2006 before the High Court of Judicature at Patna. The accused were arrayed as respondent nos. 1 and 2 respectively and the CBI was impleaded as respondent no. 3. The Single Judge of the High Court issued notice to the respondents to show cause as to why leave to appeal be not granted. In response thereto, on behalf of respondent nos. 1

and 2, a preliminary objection was raised with regard to maintainability of appeal by the state government. The preliminary objection about the maintainability of appeal raised by respondent nos. 1 and 2 was supported by respondent no. 3 (CBI). The learned Single Judge heard the arguments on the question of maintainability of appeal and vide his order dated September 20, 2007 overruled the preliminary objection and held that appeal preferred by the state government was maintainable. It is from this order that two appeals by special leave have been preferred. One of the two appeals is by the accused and the other by CBI.

7. We heard Mr. Ram Jethmalani, learned senior counsel (for accused) and Mr. A. Mariarputham, learned senior counsel (for CBI) – appellants – and Mr. L. Nageshwar Rao, learned senior counsel for the state government.

8. Mr. Ram Jethmalani submitted that the competence of the state government to file an appeal from the judgment and order of acquittal is to be determined by Section 378 of the 1973 Code as it existed prior to 2005; the law in force on the date of the chargesheet. He would submit that the key words in Section 378(1) are : "Save as otherwise provided in sub-section (2)" and by these words whatever is covered by sub-section (2) is left outside the purview of sub-section (1). According to him, the word "also" in sub-section (2) refers to the mode of exercising substantive right of appeal; the word "also" in the changed context means `likewise' and that means that the central government can also instruct the public prosecutor to present an appeal; it does not have to file vakalatnama signed by the President of India or for the State by the Governor of the State. Learned senior counsel argued that the High Court by giving undue weight to the word "also" in sub-section (2) has made the opening key words in sub-section (1) of Section 378 wholly redundant and useless thereby defeating the intention of the Legislature. He would, thus, submit that the court has to adopt one of the two courses,

namely, (i) assign to the word another of its meanings which the word does carry and harmonise it with the effect of the dominant words or (ii) reject the word as a useless surplusage.

9. Mr. Ram Jethmalani, learned senior counsel, referred to the judgment of this Court in *Eknath Shankarrao Mukkawar v. State of Maharashtra,*[1] and submitted that the construction of Section 377 put by this Court where similar words occur, must apply to the construction of Section 378 as well. He argued that the reliance placed by the High Court upon the decision of this Court in the case of *Khemraj vs. State of Madhya Pradesh*[2] was misconceived as the said case has no application on construction of Section 378 as the controlling words "save as otherwise provided" did not exist in Section 417 of Code of Criminal Procedure (for short, `1898 Code') and the observations made in that case are neither *ratio decidendi* nor *obiter dicta*.

10. Lastly, Mr. Ram Jethmalani contended that if there is a conflict of exercise of executive powers by the state government and the central government, by virtue of the proviso to Article 162 of the Constitution of India, the decision of the latter will prevail.

11. Mr. A. Mariarputham, learned senior counsel for CBI, adopted the arguments of Mr. Ram Jethmalani. He further submitted that by addition of words "save as otherwise provided in sub-section (2)", in Section 378, the Legislature brought changes in erstwhile Section 417 of 1898 Code and made its intention clear to take class of cases covered by sub-section (2) out of purview of sub-section (1).

12. On the other hand, Mr. L. Nageshwar Rao, learned senior counsel for the state government, vehemently supported the view of the High Court to sustain the maintainability of appeal filed by the state government. He submitted that right

1. (1977) 3 SCC 25.
2. (1976) 1 SCC 385.

of appeal is a creature of statute and the question whether there is right of appeal or not will have to be considered on an interpretation of the provision of the statute and not on the ground of propriety or any other consideration. According to him, when the language of statute is plain and unambiguous then literal rule of interpretation has to be applied and the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act or to have consideration of equity, public interest or to seek the intention of the Legislature. He would submit that the use of the expressions "in any case" in sub-section (1) and "also" in sub-section (2) clearly indicates that Legislature intended that the general rule would be that the state government may file an appeal in any and every case [including cases covered by sub-section (2)] and the central government may additionally file an appeal in a case covered by sub-section (2). Mr. L. Nageshwar Rao contended that the interpretation to the expression "save as otherwise provided in sub-section (2)", sought to be placed by the appellants, is not in accordance with the logic or the plain language of the provision and such interpretation would result in rendering the expression "in any case" in sub-section (1) and the word "also" in sub-section (2) redundant and otiose. He emphasized that no word or expression used in any statute can be said to be redundant or superfluous; that in matters of interpretation one should not concentrate too much on one word and pay too little attention to other words and no provision in the statute and no word in the section can be construed in isolation and every provision and every word must be looked at generally and in the context in which it is used.

13. Relying upon the case of Eknath Shankarrao Mukkawar1, Mr. L. Nageshwar Rao submitted that this Court has held that in the absence of use of the word "also" in sub-section (2) of Section 377, as contained in sub-section (2) of Section 378, the state government was incompetent to file an

appeal in a case falling under Section 377(2) and now in order to remedy the lacuna pointed out by this Court, Parliament amended Section 377(2) by Act No. 45 of 1978 to include the word "also" therein and bring the same in pari materia with the provisions of Section 378(2). He referred to the Statement of Objects and Reasons for the said amendment and argued that after the said amendment, the state government is also competent to file an appeal in a case falling under Section 377(2). Learned senior counsel urged that inasmuch as the provisions of Section 377 and Section 378 are now in pari materia and the same interpretation needs to be accorded to Section 378 as well.

14. Mr. L. Nageshwar Rao, learned senior counsel, strenuously urged that the interpretation sought to be placed by the appellants would lead to absurdity inasmuch as (i) even in a case where the state government requests and permits investigation under Section 6 of the Delhi Special Police Establishment Act, 1946 ('1946 Act', for short) and prosecution is conducted by the public prosecutor appointed by the state government, the state government would not be entitled to file an appeal in case of acquittal, but would have to approach the central government for the purpose (which has no role or connection with the investigation or the case); and (ii) in view of the express amendment to Section 377 of 1973 Code so as to enable the state government to file an appeal even where investigation was conducted by the CBI or central agency, the state government would be competent to file an appeal in case of award of inadequate sentence; but in a similar case that results in acquittal then the state government would not be able to file an appeal under Section 378.

15. In the Code of Criminal Procedure, 1861, Section 407 prohibited an appeal from acquittal. For the first time, the Code of Criminal Procedure, 1872 provided for an appeal by the government from an order of acquittal (Section 272). The said provision was re-enacted in Section 417 of the Code of

Criminal Procedure, 1882. The provision concerning an appeal in case of acquittal was retained in Section 417 of 1898 Code. The provision relating to an appeal from order of acquittal in 1898 Code (as amended by Amendment Act 26 of 1955) reads as under:-

> "S. 417.- *Appeal in case of acquittal.*- (1) Subject to the provisions of sub-section (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.
>
> (2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, the Central Government may also direct the Public Prosecutor to present an appeal to the High Court from the order of acquittal.
>
> (3) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court.
>
> (4) No application under sub-section (3) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal.
>
> (5) If, in any case, the application under sub-section (3) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1)."

16. In 1973 Code, appeal from an order of acquittal has been retained with some modifications. Section 378, sub-

section (1) opens with the words, "save as otherwise provided in sub-section (2)". The main thrust of the arguments by the learned senior counsel centered around the opening words, "save as otherwise provided in sub-section (2)", the phrase "in any case" in sub-section (1) and the word "also" in sub-section (2).

17. Way back in 1766, Parker, C.B., in *Robert Mitchell v. Soren Torup*[3] recognized the rule that in expounding Acts of parliament, where words are express, plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the Act by reason of some subsequent clause, from whence it might be inferred the intent of the Parliament was otherwise; and this holds with respect to penal, as well as other Acts.

18. Parke, B. in *Becke v. Smith,*[4] stated the following rule:

> "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

19. In *The Attorney-General v. Lockwood,*[5] the rule regarding construction of statutes was expounded in the following words:

> ".....The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity....".

3. (1766) Parker 227.

4. (1836) 2 Meeson and Welsby 191.

5. (1842) 9 Meeson and Welsby 378.

20. In The Sussex Peerage,[6] the House of Lords, through Lord Chief Justice Tindal, stated the rule for the construction of Acts of Parliament that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature.

21. A Constitution Bench of this Court in *Union of India & Anr. v. Hansoli Devi and Others,*[7] approved the rule exposited by Lord Chief Justice Tindal in *The Sussex Peerage's* case[6] and stated the legal position thus:

> "It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In *Kirkness* v. *John Hudson & Co. Ltd.,* (1955) 2 All ER 345, Lord Reid pointed out as to what is the meaning of "ambiguous" and held that:
>
> > "A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or

6. (1844) XI Clark & Finnelly 85.

7. (2002) 7 SCC 273.

phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, C.J. in the case of *Aswini Kumar Ghose* v. *Arabinda Bose, AIR 1952 SC 369,* had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In *Quebec Railway, Light Heat & Power Co. Ltd.* v. *Vandry, AIR 1920 PC 181,* it had been observed that the legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective……"

22. As noticed above, Section 378, sub-section (1), opens with the words - "save as otherwise provided in sub-section (2)". These words are not without significance. The immediate

question is as to what meaning should be ascribed to these words. In Concise Oxford English Dictionary (Tenth Edition, Revised), the word "save" is defined thus:

"save.- formal or poetic/literary except; other than…."

23. In Webster Comprehensive Dictionary (International Edition), the word "save" is defined as follows:-

"save.- Except; but - 1. Except; but 2. Archaic Unless".

24. A Dictionary of Modern Legal Usage by Bryan A. Garner (1987) states that "save" is an ARCHAISM when used for "except". It should be eschewed, although, as the examples following illustrate, it is still common in legal prose. e.g., `The law-of-the-circuit rule forbids one panel to overrule another save [read except] when a later statute or Supreme Court decision has changed the applicable law'.

25. In *Williams v. Milotin,*[8] the High Court of Australia, while construing the words "save as otherwise provided in this Act" stated:-

"….In fact the words "save as otherwise provided in this Act" are a reflexion of the words "except" – or "save" – "as hereinafter excepted".

26. Section 378 is divided into six sub-sections. Sub-section (1) provides that the state government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court or an order of acquittal passed by the court of session in revision. It opens with the words "save as otherwise provided in sub-section (2)" followed by the words "and subject to the provisions of sub-sections (3) and (5)". Sub-section (2) refers to two class of cases, namely, (i) those cases where the offence has been investigated by the Delhi Special

8. 97 C.L.R. 465.

Police Establishment constituted under 1946 Act and (ii) those cases where the offence has been investigated by any other agency empowered to make investigation into an offence under any Central Act other than 1973 Code and provides that the central government may also direct the public prosecutor to present an appeal to the High Court from an order of acquittal. Such an appeal by the central government in the aforesaid two types of cases is subject to the provisions contained in sub-section (3). Sub-section (3) provides that an appeal under sub-sections (1) and (2) shall not be entertained without leave of the High Court. Where the order of acquittal has been passed in a case instituted upon complaint, sub-section (4) provides that the complainant may apply for special leave to appeal from the order of acquittal and if such leave is granted, an appeal be presented by him to the High Court. The limitation is prescribed in sub-section (5). Insofar as the cases covered by sub-section (4) are concerned, where the complainant is a public servant, limitation prescribed is six months from the date of an order of acquittal and in all other cases, including the cases covered by sub-sections (1) and (2), a period of sixty days from the date of the order of acquittal. Sub-section (6) makes a provision that if an application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2). We have surveyed Section 378 in its entirety to have complete conspectus of the provision.

27. The opening words – "save as otherwise provided in sub-section (2)" – are in the nature of exception intended to exclude the class of cases mentioned in sub-section (2) out of operation of the body of sub-section (1). These words have no other meaning in the context but to qualify the operation of sub-section (1) and take out of its purview two types of cases referred in sub-section (2), namely, (i) the cases in which offence has been investigated by the Delhi Special Police Establishment constituted under 1946 Act and (ii) the cases in which the offence has been investigated by any other agency empowered

to make investigation into an offence under any Central Act other than 1973 Code. By construing Section 378 in a manner that permits appeal from an order of acquittal by the state government in every case, except two class of cases mentioned in sub-section (2), full effect would be given to the exception (clause) articulated in the opening words. As noticed above, the words – "save as otherwise provided in sub-section (2)" – were added in 1973 Code; Section 417 of 1898 Code did not have these words. It is familiar rule of construction that all changes in wording and phrasing may be presumed to have been deliberate and with the purpose to limit, qualify or enlarge the pre-existing law as the changes of the words employ. Any construction that makes exception (clause) with which section opens unnecessary and redundant should be avoided. If we give to Section 378, sub-sections (1) and (2), the interpretation which the state government claims; we would have to say that no matter that complaint was not lodged by the state government or its officers; that investigation was not done by its police establishment; that prosecution was neither commenced nor continued by the state government; that public prosecutor was not appointed by the state government; that the state government had nothing to do with the criminal case; that all steps from launching of prosecution until its logical end were taken by the Delhi Police Special Establishment and yet the state government may file an appeal from an order of acquittal under Section 378(1). That would be rendering the exception (clause) reflected in the opening words – "save as otherwise provided in sub-section (2)" – redundant, meaningless and unnecessary. If the Legislature had intended to give the right of appeal under Section 378(1) to the state government in all cases of acquittal including the class of cases referred to in sub-section (2), it would not have been necessary to incorporate the exception (clause) in the opening words. This objective could have been achieved without use of these words as erstwhile Section 417 of 1898 Code enabled the state government to appeal from all cases of acquittal while in two types of cases mentioned in sub-section (2) thereof, appeal

from the order of acquittal could be filed under the direction of central government as well.

28. In *The Bengal Immunity Company Limited v. The State of Bihar and others*[9] Venkatarama Ayyar, J. observed:

> "…..It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the Legislature is presumed to be acquainted with the construction which the Courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind……"

29. However, if the latter statute does not use the same language as in the earlier one, the alteration must be taken to have been made deliberately. In his classic work, Principles of Statutory Interpretation by G.P. Singh, 12th Edition, 2010 at page 310, the following statement of law has been made:

> "Just as use of same language in a later statute as was used in an earlier one in *pari materia* is suggestive of the intention of the Legislature that the language so used in the later statute is used in the same sense as in the earlier one, change of language in a later statute in *pari materia* is suggestive that change of interpretation is intended."

The learned author also refers to the observations of Lord MacMillan in *D.R. Fraser & Co. Ltd. v. The Minister of National Revenue:*[10] "When an amending Act alters the language of the principal Statute, the alteration must be taken to have been made deliberately".

9. (1955) 2 SCR 603

10. AIR 1949 PC 120.

30. It is important to bear in mind that this Court in Khemraj2 , has put the following construction to Section 417 of 1898 Code:

> **"10.** Section 417 Criminal Procedure Code, prior to the Amendment Act XXVI of 1955 provided for presentation of appeals by the Public Prosecutor on the direction of the State Government. The 1955 Amendment introduced several changes and provided for appeals at the instance of the complainant as also on the direction of the Central Government in cases investigated by the Delhi Special Police Establishment. Further changes were introduced in the matter of appeals against acquittal under Section 378 of the Code of Criminal Procedure, 1973, with which we are not concerned in this appeal in view of the repeal provisions under Section 484(1), CrPC.
>
> **11.** The Delhi Special Police Establishment (briefly "the Establishment"), a central police force, is constituted under the Delhi Special Police Establishment Act, 1946 (Act XXV of 1946) (briefly the Delhi Act). Under Section 2 of the Act, the Central Government may constitute a special police force, called the Delhi Special Police Establishment, for investigation of certain offences or class of offences as notified under Section 3 of the Delhi Act. Under Section 4 of the Act the superintendence of the Delhi Special Police Establishment vests in the Central Government and administration of the Special Police Establishment vests in an officer appointed by the Central Government who exercises powers exercisable by an Inspector General of Police as the Central Government may specify. Under Section 5 the powers and the jurisdiction of the Establishment can be extended by the Central Government to other areas in a State although not a Union territory. Once there is an extension of the powers and jurisdiction of the members of the Establishment, the members thereof while discharging such functions are deemed to be

members of the police force of the area and are vested with the powers, functions and privileges and are subject to the liabilities of a police officer belonging to that force. The police officer also subject to the orders of the Central Government exercises the powers of the officer-in-charge of a police station in the extended area. Under Section 6 consent of the State Government is necessary to enable the officer of the Establishment to exercise powers and jurisdiction in any area in the State not being a Union territory or railway area.

12. Investigation under the Delhi Act is, therefore, a central investigation and the officers concerned are under the superintendence of the officer appointed by the Central Government. The superintendence of the Establishment is also under the Central Government. The Central Government, therefore, is concerned with the investigation of the cases by the Establishment and its ultimate result. It is in that background that in 1955, Section 417 was amended by adding sub-section (2) to the section to provide for appeal against acquittal in cases investigated by the Establishment also on the direction of the Central Government. In view of the provisions of the Delhi Act it was necessary to introduce sub-section (2) in Section 417 so that this Central agency which is solely and intimately connected with the investigation of the specified offences may also approach the Central Government for direction to appeal in appropriate cases.

13. This, however, does not bar the jurisdiction of the State Government also to direct presentation of appeals when it is moved by the Establishment. The Establishment can move either the Central Government or the State Government. It will be purely a matter of procedure whether it moves the State Government directly or through the Central Government or in a given case moves the Central

Government alone. It will again be a matter of procedure when the Central Government decides to appeal it requests the State Government to do the needful through the Public Prosecutor appointed under the Code.

14. The word 'also' in sub-section (2) of Section 417 is very significant. This word seems not to bar the jurisdiction of the State Government to direct the Public Prosecutor to present an appeal even in cases investigated by the Establishment. Sub-section (1) of Section 417 is in general terms and would take in its purview all types of cases since the expression used in that sub-section is "in any case". We do not see any limitation on the power of the State Government to direct institution of appeal with regard to any particular type of cases. Sub-section (1) of Section 417 being in general terms is as such of wider amplitude. Sub-section (2) advisedly uses the word 'also' when power is given to the Central Government in addition to direct the Public Prosecutor to appeal."

31. The Parliament in 1973 Code re-enacted the provision for appeal from order of acquittal with certain modifications. It changed the language by addition of words – "save as otherwise provided in sub-section (2)". The alteration in language by addition of these words gives rise to an inference that the Legislature made conscious changes in Section 378 (1973 Code). We are afraid, the addition of words in Section 378(1) by way of exception (clause) cannot be set at naught by giving same interpretation which has been given to Section 417 (1898 Code). As a matter of fact, in Khemraj[2], this Court did notice that changes have been introduced in the matter of appeals against acquittal under Section 378 of the 1973 Code, but the Court did not deal with these changes as it was not concerned with that provision. In our opinion, the decision of this Court in Khemraj[2] cannot be applied as the language used in Section 417 (1898 Code) and Section 378 (1973 Code) is not in pari materia.

32. Much emphasis, however, has been placed on the word "also" in sub-section (2) of Section 378 by learned senior counsel for the state government. It has been urged that by use of the word "also", competence of the state government in directing the public prosecutor to file an appeal from an order of acquittal in the two types of cases covered by sub-section (2) is not taken away and rather the word "also" suggests that central government may also direct the public prosecutor to file an appeal from an order of acquittal in the class of cases mentioned in sub-section (2). Does the word "also" carry the meaning as contended by the learned senior counsel for the state government? One of the rules of construction of statutes is that language of the statute should be read as it is and any construction that results in rejection of words has to be avoided; the effort should be made to give meaning to each and every word used by the Legislature. However, such rule of construction of statutes is not without exceptions. In *Stone v. Yeovil Corp.,*[11] Brett J. observed :

> "The word "such" in the second branch of that clause would seem at first sight to apply to lands purchased or taken; but, if so read, it is insensible. It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated. It seems to me, therefore, that the word "such" must be eliminated from this part of the clause."

Archibald, J. concurred with Brett J. thus :

"But I agree with my Brother Brett that it is a true canon of construction, that, where a word is found in a statute or in any other instrument or document which cannot possibly have a sensible meaning, we not only may, but must, eliminate it in order that the intention may be carried out."

11. (1875-76) L.R. 1 CPD 691.

33. In *Salmon v. Duncombe and Others,*[12] Privy Council speaking through Lord Hobhouse stated :

> "It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the legislature; and, secondly, whether the last nine words of sect. 1 are so cogent and so limit the rest of the statute as to nullify its effect either entirely or in a very important particular."

34. The main object and legislative intent by the opening words – "save as otherwise provided in sub-section (2)" – in sub-section (1) of Section 378 being clear i.e., to fetter the general power given to the state government in filing appeal from the order of acquittal in two types of cases stated in sub-section (2), the use of word "also" in sub-section (2) does not make any sense. The word "also" in sub-section (2), if construed in the manner suggested by the state government, may result in reducing the opening words in sub-section (1) a nullity and will deny these words their full play. Since exception (clause) in the beginning of sub-section (1) has been expressly added in Section 378 and it is not possible to harmonise the word "also" occurring in sub-section (2) with that, it appears to us that no sensible meaning can be given to the word "also" and the said word has to be treated as immaterial. We are not oblivious of the fact that to declare "also" enacted in sub-section (2) immaterial or insensible is not very satisfactory, but it is much more unsatisfactory to deprive the words – "save as otherwise provided in sub-section (2)" – of their true and plain meaning. In order that the exception (clause) expressly stated in the

12. (1886) 11 AC 627.

opening words of sub-section (1) might be preserved, it is necessary that word "also" in sub-section (2) is treated as immaterial and we hold accordingly.

35. The phrase "in any case" in sub-section (1) of Section 378, without hesitation, means "in all cases", but the opening words in the said Section put fetters on the state government in directing appeal to be filed in two types of cases mentioned in sub-section (2).

36. Section 2(u) of 1973 Code defines "public prosecutor" which means any person appointed under Section 24 and includes any person acting under the directions of a public prosecutor. Section 24 reads as follows:

> *"S.24. - Public Prosecutors.*-(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.
>
> (2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area.
>
> (3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:
>
> Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.
>
> (4) The District Magistrate shall, in consultation with the

> Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.
>
> (5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).
>
> (6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:
>
> Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government, may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).
>
> Explanation.—For the purpose of this sub-section,—
>
> (a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;
>
> (b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.]
>
> (7) A person shall be eligible to be appointed as a Public

Prosecutor or an Additional Public Prosecutor under sub-section (I) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate."

37. A perusal of Section 24 would show that the central government appoints its public prosecutors for conducting prosecution, appeal or other proceedings on its behalf and a state government appoints its public prosecutors in conducting prosecution, appeal or other proceedings on its behalf. One has no control over the other. The central government or the state government, as the case may be, may appoint a special public prosecutor for the purpose of any case or class of cases. Under Section 378(1) the state government may direct its public prosecutor to file an appeal from an order of acquittal while under Section 378(2) the central government may direct its public prosecutor to file an appeal from an order of acquittal. The public prosecutor, thus, has to be associated in an appeal

from an order of acquittal. The 1946 Act provides for constitution of a special police establishment for investigation of certain offences or class of offences as notified under Section 3 of the 1946 Act. A close look to the provisions of 1946 Act would show that investigation thereunder is a central investigation and the officers concerned are under the superintendence of the officer appointed by the central government. It is the central government that has the superintendence over Delhi Special Police Establishment. What is, therefore, important to notice is that it is the central government which is concerned with the investigation of the case by Delhi Special Police Establishment and its ultimate result. It is for this reason that sub-section (2) of Section 378 provides for appeal against acquittal in two types of cases mentioned therein on the direction of the central government by its public prosecutor. The opening words in sub-section (1), thus, qualify the general power given to the state government in filing appeal from an order of acquittal so that the central agency, which is solely and intimately connected with the investigation of cases referred in sub-section (2), may approach the central government for direction to appeal in appropriate cases.

38. The decision of this Court in Eknath Shankarrao Mukkawar1, has been referred to and relied upon by Mr. Ram Jethmalani as well as Mr. L. Nageshwar Rao. We may appropriately consider the said decision now. In Eknath Shankarrao Mukkawar1, the construction of Section 377 (appeal against inadequacy of sentence) fell for consideration. Section 377 (1) and (2) of 1973 Code with which this Court was concerned in Eknath Shankarrao Mukkawar[1], reads as follows:-

"S.- 377.- *Appeal by the State Government against sentence.*- (1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any court other than a High Court, direct the Public Prosecutor to present an appeal to the High

Court against the sentence on the ground of its inadequacy.

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy."

This Court with reference to the aforesaid provision held:

"10**.** It is true that Section 378(2) follows the pattern of Section 417(2) of the old Code and the right to appeal is conferred upon both the State Government and the Central Government in express terms in Section 378(2). It is clear that the legislature has maintained a water-tight dichotomy while dealing with the matter of appeal against inadequacy of sentence. We agree that in the absence of a similar word "also" in Section 377(2) it is not possible for the court to supply a casus omissus. The two sections, Section 377 and Section 378 CrPC being situated in such close proximity, it is not possible to hold that omission of the word "also" in Section 377(2) is due to oversight or per incuriam.

11**.** Section 377 CrPC introduces a new right of appeal which was not earlier available under the old Code. Under sub-section (1) of Section 377 CrPC the State Government has a right to appeal against inadequacy of sentence in all cases other than those referred to in sub-section (2) of that section. This is made clear under Section 377(1) by its opening clause "save as otherwise provided in sub-section (2)". Sub-section (2) of Section 377, on the other hand, confers a right of appeal on the Central Government

against a sentence on the ground of its inadequacy in two types of cases:

(*1*) Those cases where investigation is conducted by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946.

(*2*) Those other cases which are investigated by any other agency empowered to make investigation under any Central Act not being the Code of Criminal Procedure.

12. There is no difficulty about the first type of cases which are investigated by the Delhi Special Police Establishment where, certainly, the Central Government is the competent authority to appeal against inadequacy of sentence."

39. The essence in a decision is its ratio and not every observation found therein, as stated by this Court in *State of Orissa v. Sudhansu Sekhar Misra and others*[13]. The ratio of decision in Eknath Shankarrao Mukkawar1 is that the Legislature has maintained a watertight dichotomy in the matter of appeal against inadequacy of sentence; the competent authority to appeal against inadequacy of sentence in two types of cases referred to in sub-section (2) of Section 377 is the central government. However, Mr. L. Nageshwar Rao submitted that in Eknath Shankarrao Mukkawar1, in the absence of use of word "also" in sub-section (2) of Section 377, it was held by this Court that the state government was incompetent to file an appeal in a case falling under Section 377(2). But now the lacuna pointed out by this Court has been remedied; Parliament amended by Act 45 of 1978 to include the word "also" therein and bring the same in pari materia with the provisions of Section 378(2) and the Statement of Objects and Reasons for the said amendment makes it clear that the state government is also competent to file an appeal in a case falling under Section 377(2). We are not persuaded by the submission of Mr. L. Nageshwar Rao for more than one reason. In the first place,

13. AIR 1968 SC 647.

the observations in Eknath Shankarrao Mukkawar1, in relation to Section 378 do not operate as binding precedent as construction of Section 378 was neither under consideration nor in issue in that case. Secondly, and more importantly, although sub-section (2) of Section 377 came to be amended by Act 45 of 1978 to include the word "also" therein, but the Statement of Objects and Reasons relating to that amendment is of no relevance insofar as construction of Section 378 (1) and (2) is concerned. Insofar as Section 378 is concerned, the word "also" occurring in sub-section (2) cannot be accorded a meaning that would result in wiping out the effect of controlling words in sub-section (1) - "save as otherwise provided in sub-section (2)" – which are indicative of legislative intent to exclude two types of cases mentioned in sub-section (2) out of operation of the body of sub-section (1).

40. In our opinion, the Legislature has maintained a mutually exclusive division in the matter of appeal from an order of acquittal inasmuch as the competent authority to appeal from an order of acquittal in two types of cases referred to in sub-section (2) is the central government and the authority of the state government in relation to such cases has been excluded. As a necessary corollary, it has to be held, and we hold, that the State Government (of Bihar) is not competent to direct its public prosecutor to present appeal from the judgment dated December 18, 2006 passed by the Special Judge, CBI (AHD), Patna.

41. In view of what we have discussed above, it is not necessary to consider the contention of Mr. Ram Jethmalani founded on the proviso to Article 162 of the Constitution that in case of conflict of exercise of executive powers by the state government and the central government, the decision of the latter shall prevail.

42. For the aforesaid conclusions, the reasons given by the High Court are not correct and the impugned order cannot be sustained.

43. The result is, both appeals are allowed, the order dated September 20, 2007 passed by the High Court is set aside and the Govt. Appeal No. 1 of 2007 – *State of Bihar v. Lalu Prasad and others* – presented before the High Court of Judicature at Patna is rejected as not maintainable.

K.K.T. Appeals allowed.

MYSORE URBAN DEVELOPMENT AUTHORITY BY ITS COMMISSIONER

v.

VEER KUMAR JAIN & ORS.

(Civil Appeal No. 2934 of 2010)

APRIL 1, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Land Acquisition Act, 1894:

ss. 16(2) and 48(1) – Notification withdrawing from acquisition – Cancellation of – Acquisition of land for Mysore Urban Development Authority – Notification dated 14.12.2000 issued u/s 16(2) confirming possession of land having been taken over – Later, Notification dated 15.9.2001 issued u/s 19(7) of Karnataka Urban Development Authorities Act and u/s 48(1) of the LA Act dropping acquisition proceedings in regard to some of the lands – When MUDA came to know of the land being denotified, it represented to Government which by Notification dated 22.7.2002 withdrew the Notification dated 15.9.2001 – Writ petition of land owners and purchaser dismissed – HELD: Order dated 22.7.2002 is inextricably linked to order dated 15.9.2001 which was invalid for the same reasons as the order dated 22.7.2002, namely, failure to provide opportunity of hearing to aggrieved party – Further, the order dated 22.7.2002 was passed to set right the violation of principles of natural justice in making the order dated 15.9.2001 – Therefore, interests of justice would be served if both the notifications dated 22.7.2002 and 15.9.2001 are set aside and the State Government is directed to consider the request of the land owners for withdrawal from acquisition afresh after giving due hearing to the land owners (and also the purchaser) and MUDA and then decide the matter in accordance with law – Orders of the High Court modified accordingly – Karnataka Urban Development Authorities Act,

1987 – ss.17(1) to (3) and 19(7) – Principles of natural justice – Opportunity of hearing. [para 14-15]

S.L. Kapoor vs. Jagmohan & Ors. **1981 (1) SCR 746 = 1980 (4) SCC 379 ;** *State Bank of Patiala vs. S.K. Sharma* **1996 (3) SCR 972 = 1996 (3) SCC 364 ;** *Managing Director ECIL Hyderabad .Vs. B. Karunakar* **1994 AIR 1074 = 1993 (2) Suppl. SCR 576 = 1993 (4) SCC 727 ;** *C.B. Gautam vs. U.O.I.* **1992 (3) Suppl. SCR 12 = 1993 (1) SCC 78;** *Roshan Deen vs. Preeti Lal* **2001 (5) Suppl. SCR 23 = 2002 (1) SCC 100 – referred to.**

Case Law Reference:

1981 (1) SCR 746	**referred to**	**para 13**
1996 (3) SCR 972	**referred to**	**para 13**
1993 (2) Suppl. SCR 576	**referred to**	**para 13**
1992 (3) Suppl. SCR 12	**referred to**	**para 13**
2001 (5) Suppl. SCR 23	**referred to**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2934 of 2010.

From the Judgment & Order dated 4.12.2007 of the High Court of Karnataka at Bangalore in W.A. No. 1995 of 2007 (LB-RES).

P. Vishwanatha Sheety, Vijaykumar L. Paradesi, K.V. Bharathi Upadhyaya for the Appellant.

Basava Prabhu S. Patil, Aniruddha P. Mayee, Harsh Khanna Rucha, A. Mayee for the Respondent.

The Order of the Court was delivered by

O R D E R

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

2. On 15.3.1990, a preliminary Notification under section 17 of the Karnataka Urban Development Authorities Act, 1987 ('KUDA Act' for short) was issued by the Mysore Urban Development Authority - the appellant herein ('MUDA' for short), proposing to acquire certain lands for development of Kuvempunagar residential layout and formation of a double Road. This was followed by a final declaration dated 24.5.1991 under Section 19(1) of the KUDA Act by the state government stating that it had granted sanction of the scheme and that the land proposed to be acquired by MUDA for the purposes of the scheme is required for a public purpose. The said final declaration was challenged and quashed by the High Court with liberty to proceed afresh from the stage of consideration of representations. After considering the representations, a fresh final declaration was issued on 4.10.1999. In pursuance of it, an Award was made on 16.10.2000 and possession of the lands was taken on 8th/9th December 2000. A notification dated 14.12.2000 was issued under section 16(2) of the Land Acquisition Act, 1894 ('LA Act' for short) confirming that possession of the lands had been taken over. In view of the above, MUDA claims that the acquired lands vested in the government and later in MUDA.

3. Acting on the applications of some land owners, the state government issued a notification dated 15.9.2001 under section 19(7) of the KUDA Act read with section 48(1) of LA Act dropping the acquisition proceedings, in regard to 17 acres 21 guntas of the lands described therein. Immediately thereafter, on 28.9.2001, the land owners sold the de-notified lands to the first respondent. When MUDA came to know about the de-notification, it represented to the government that the lands could not have been de-notified as the lands had vested

in it, on possession being taken. It was also submitted that the acquired lands could not be de-notified without hearing it. In view of it, the state government issued another notification dated 22.7.2002 under section 21 of the Karnataka General Clauses Act, withdrawing the notification dated 15.9.2001.

4. In this background, the first respondent, purchaser of the de-notified lands from the previous land owners filed a writ petition (WP No.30425/2002) before the Karnataka High Court, challenging the notification dated 22.7.2002 on the ground that the owners of the lands were not heard before withdrawing the notification dated 15.9.2001. It was also contended that once a notification was issued under section 48(1) of LA Act, it could not be withdrawn under any circumstances and Section 21 of General Clauses Act does not empower such withdrawal. A learned Single Judge, by judgment dated 28.8.2007, allowed the writ petition filed by the first respondent. He held that when a notification under section 48(1) is issued, a valuable right relating to property was acquired by the land owner in regard to the de-notified land, and therefore, a notification under Section 48(1) of LA Act cannot be withdrawn without hearing the concerned land owner. The learned Single Judge therefore quashing the cancellation notification dated 22.7.2002, but reserved liberty to the state government to consider the request of MUDA to withdraw the notification dated 15.9.2001, after hearing the then land owners and their transferee (the first respondent). Feeling aggrieved, MUDA filed a writ appeal which was dismissed by a Division Bench of the High Court on 14.12.2007. The said order is under challenge in this appeal by special leave.

5. The question for consideration is whether the order of withdrawal dated 22.7.2002 is valid; and what would be the appropriate relief on the facts and circumstances.

6. We may refer to the relevant provisions of the KUDA Act before dealing with the contentions. Sub-section (1) to (3)

of Section 17 provides for issue of a preliminary notification in regard to proposed acquisition and Section 19(1) to (3) relate to issue of a final declaration. Section 36 deals with provisions applicable to acquisition of land otherwise than by agreement and is extracted below :

> "36. 7Provisions applicable to the acquisition of land otherwise than by agreement.- (1) The Acquisition of land under this Act otherwise than by agreement within or without the urban area shall be regulated by the provisions, so far as they are applicable, of the Land Acquisition Act, 1894.
>
> (2) For the purpose of sub-section (2) of section 50 of the Land Acquisition Act, 1894, the Authority shall be deemed to be the local authority concerned.
>
> (3) After the land vests in the Government under section 16 of the Land Acquisition Act, 1894, the Deputy Commissioner shall, upon payment of the cost of the acquisition, and upon the Authority agreeing to pay any further cost which may be incurred on account of the acquisition, transfer the land to the Authority, and the land shall thereupon vest in the Authority".

We may also refer to the relevant portions of Section 16 of LA Act (as amended in Karnataka) and section 48 of LA Act :

> "16. Power to take possession: (1) When the Dy. Commissioner has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government, free from all encumbrances.
>
> (2) The fact of such taking possession may be notified by Deputy Commissioner in the Official Gazette; and such notification shall be evidence of such fact".
>
> "48. Completion of acquisition not compulsory, but compensation to be awarded when not completed – (1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken". x x x x x

7. The appellant urged the following contentions:

(i) Section 16(1) of the LA Act provides that when the Deputy Commissioner takes possession of the land after making an award it shall vest absolutely in the government free from encumbrances. Sub-section (2) of section 16 provides that publication of a notification confirming the fact of taking of possession shall be evidence of such fact. In this case, the Deputy Commissioner took possession of the acquired lands, and thereafter, a notification under section 16(2) of the LA Act was issued on 9.12.2000 and that the said notification is evidence of the fact of taking possession. Once the possession is taken, the state government had no power or authority to issue a notification under section 48(1) of the LA Act and therefore, the order dated 15.9.2001 is void and *non est* and reviving such a notification would amount to perpetuation of illegality.

(ii) MUDA, the acquiring authority, for whose benefit the land was acquired, was not heard before issuing the notification dated 15.9.2001 under section 48(1) of the LA Act. The said notification was therefore rightly withdrawn by a notification dated 22.7.2002. If the notification dated 22.7.2002 is quashed, it would bring back to life, the notification dated 15.9.2001 issued under Section 48(1) of LA Act which was *per se* illegal and void, and that is impermissible.

(iii) Where the government, after issuing an order, finds that it is inherently defective or void, it can withdraw the same and then reconsider the issue as per law, and in such a situation, the question of violation of principles of natural

justice would not arise.

8. On the other hand, the first respondent submitted that a notification withdrawing an earlier notification under section 48 (dated 22.7.2002) could not have been issued without hearing the land owners in whose favour a right in property had accrued by issue of a notification under Section 48(1) of LA Act.

9. We may first refer to the relevant principles in regard to withdrawal from acquisition under Section 48(1) of the LA Act :

(i) Sub-Section (1) of section 48 clearly provides that the Government will have liberty to withdraw from the acquisition of any land, *of which possession has not been taken*. Therefore, the power under Section 48(1) of the LA Act could only be exercised before the possession of the acquired lands is taken. Once possession of the land is taken by the government, the land vests in the government and the power of the government under Section 48(1) of the LA Act to withdraw acquisition in regard to such land would cease to exist.

(ii) Where possession of the acquired land has not been taken, the power and discretion under Section 48(1) of the LA Act can be exercised by the state government, but only in a fair and non-arbitrary manner. Consequently, no order under Section 48(1) of the LA Act can be passed by the government, without hearing the local authority for whose benefit the acquisition is made, particularly when the preliminary notification has been issued by such local authority, and the final declaration states that the lands are acquired for such authority for a public purpose. (Vide: *Amarnath Ashram Trust Society v. Government of UP* - 1998 (1) SCC 591, *Larsen & Toubro Ltd. v. State of Gujarat* - 1998 (4) SCC 387 and *State Government Houseless Harijan Employees Association vs. State of Karnataka* - 2001 (1) SCC 610).

10. There is no dispute that the land owners were not heard before issuing the cancellation notification dated 22.7.2002. Therefore, the order dated 22.7.2002 is illegal being opposed to principles of natural justice. In such a case, usually the cancellation of de-notification, being opposed to principles of natural justice, would be set aside and the Government would be directed to reconsider the matter after giving due opportunity to the affected parties (land owners whose lands were withdrawn from acquisition) to have their say in the matter. But then we face a dilemma. If the order dated 22.7.2002 is quashed as being violative of the principles of natural justice, it will result in the revival of the order dated 15.9.2001 which also suffers from the same vice, as that was also made in violation of the principles of natural justice, without hearing the affected party, that is, MUDA.

11. The learned counsel for the first respondent contends that while he challenged the order dated 22.7.2002, MUDA did not challenge the order dated 15.9.2001 and therefore the validity of the order dated 22.7.2002 alone arises for consideration and not the validity of the order dated 15.9.2001. This contention is not tenable because of two reasons. Firstly, MUDA in fact protested against the order dated 15.9.2001, before the state government and the state government accepted the contentions of MUDA and withdrew the order dated 15.9.2001. As the state government granted it the relief, there was no need or occasion for MUDA to challenge the order dated 15.9.2001 in a court of law. Secondly as of now, the order dated 15.9.2001 is not in existence. Incidental to the question whether the order dated 22.7.2002 should be quashed, it is necessary to decide whether this court should by so quashing, revive an order dated 15.9.2001 which also suffers from the same vice of being in violation of principles of natural justice, or should quash that order also.

12. We are of the view that the order dated 22.7.2002 is inextricably linked with the validity of the order dated 15.9.2001

which was withdrawn by the order dated 22.7.2002. The principles that is pressed into service by the first respondent to challenge the order dated 22.7.2002 is available with equal force to hold that the order dated 15.9.1991 is also void. In fact the very argument which is urged by the first respondent in the writ petition to challenge the order dated 22.7.2002, was urged by MUDA before the Government, in addition to pointing out the inherent illegality of the order dated 15.9.2001, to withdraw the notification dated 15.9.2001. Accepting the said contentions and finding that the order dated 15.9.2001 was liable to be set aside as being in violation of principle of natural justice, the state government withdrew the notification dated 15.9.2001. It is another matter that in so doing, it did not hear the affected party namely the land owner. If the first respondent should succeed because the land owner was not heard before issuing the notification dated 22.7.2002, on the same reasoning the notification dated 15.9.2001 should also be quashed as the same could not have been issued without hearing the MUDA.

13. We may refer to some of the decisions of this court having a bearing on the issue. In *S.L. Kapoor v. Jagmohan and Ors*. [1980 (4) SCC 379] this court rather rigidly and sternly observed:-

> "In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will come from a person who has denied justice that the person who has been denied justice is not prejudiced."

In *State Bank of Patiala v. S.K. Sharma* [1996 (3) SCC 364] this court stated that the aforesaid observation should be understood in the context of the facts of that case and in the light of the subsequent Constitution Bench judgment in

Managing Director, ECIL, Hyderabad vs. B. Karunakar [1993 (4) SCC 727] and *C.B. Gautam v. Union of India* [1993 (1) SCC 78]. This Court observed:-

> "The decisions cited above make one thing clear, viz., principles of natural justice cannot be reduced to any hard and fast formulae. As said in *Russell v. Duke of Norfolk* – 1949 (1) All ER 109, way back in 1949, these principles cannot be put in a straight-jacket. Their applicability depends upon the context and the facts and circumstances of each case. (See *Mahender Singh Gill v. Chief Election Commissioner* – 1978 (1) SCC 405*).* The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected.
>
> While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arises before them."

Ensuring that there is no failure of justice is as important as ensuring that there is a fair hearing before an adverse order is made. This Court in *Roshan Deen v. Preeti Lal* - 2002 (1) SCC 100; this court held:

> "Time and again this Court has reminded that the power conferred on the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it. (vide *State of Uttar Pradesh vs. District Judge, Unnao & Ors.*_(1984) 2 SCC 673). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic

angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the byproduct of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

14. We have already noticed above that the order dated 22.7.2002 is inextricably linked to order dated 15.9.2001 which was invalid for the same reasons as the order dated 22.7.2002. Further, the order dated 22.7.2002 was passed to set right the violation of principles of natural justice in making the order dated 15.9.2001. It is possible for us to hold that the order dated 22.7.2002 did not call for interference in exercise of power of judicial review, as it merely cancelled an earlier invalid order which was made without hearing MUDA. But that may prejudice the landowners as they would have no forum to put forth their request for de-notification. We are of the view that the relief should be moulded appropriately so that the landowners should also have an opportunity to put forth their grievance. Interests of justice would be served if both the notifications dated 22.7.2002 and 15.9.2001 are set aside and the state government is directed to consider the request of the land owners for withdrawal from acquisition afresh after giving due hearing to the land owners (and also the first respondent) and MUDA and then decide the matter in accordance with law.

15. In view of the above, we allow this appeal and modify the orders of the High Court. Both the notifications dated 22.7.2002 and 15.9.2001 are quashed and the state government is directed to hear the request of the landowners for de-notification afresh. It will be open to the landowners to place such material as is available to them to show that the possession was not taken in regard to lands in question, and thereby rebut the presumption raised in view of Section 16(2) of LA Act; and then establish that circumstances warrant de-notification. On the other hand, it will be also open to MUDA

also to establish that possession was in fact taken and that power under section 48(1) could not therefore be exercised. The state government shall hear both the parties and pass appropriate orders in accordance with law within four months. Status quo will be maintained in regard to lands in question by the parties till then.

R.P. Appeal allowed.

BANARSI DASS
v.
STATE OF HARYANA
(Criminal Appeal No. 630 of 2003)

APRIL 5, 2010

[AFTAB ALAM AND SWATANTER KUMAR, JJ.]

Prevention of Corruption Act, 1947 – s.5(2) – Penal Code, 1860 – s.161 – Essential ingredients of s.5(2) of the Act and s.161 IPC – Held: To constitute offence under s.5(2) of the Act and s.161 IPC, prosecution has to prove demand and acceptance of illegal gratification by the accused in discharge of official duties – Mere recovery of money would not lead to inference of such demand and acceptance – On facts, trap laid down and money recovered from pocket of accused – Complainant and another prosecution witness however became hostile witnesses – In these circumstances, prosecution failed to establish the offence against the accused, that he accepted the money voluntarily as illegal gratification – Accused entitled to acquittal on technical grounds.

Administration of Criminal Justice: Conviction of an accused cannot be founded on the basis of inference – Offence should be proved against the accused beyond reasonable doubt – Criminal jurisprudence.

Prosecution case was that the land belonging to the mother of PW-2 was wrongly recorded in the name of tenants. PW-2 approached the appellant who was posted as Patwari during relevant time for making the necessary changes in the records. PW-2 also filed NOC obtained from the tenants. The appellant allegedly demanded illegal gratification of Rs.900 for making rectification in the records. The deal was finally struck at Rs.400 in the

presence of PW-4, a taxi driver who was hired by PW-2 while visiting the appellant. PW-2 reported the matter to police. Her statement was recorded and a trap was laid. PW-10, the SDM and PW-11, the DSP signed the four currency notes of Rs.100 each. PW-2 accompanied by PW-4 left for Patwar-khana. She took Rs.400 duly signed by the officers to pay gratification to the Patwari. The money was given to the appellant and thereafter PW-4 informed PW-10 and PW-11. They rushed to the spot in a jeep. On search of the appellant, four signed currency notes were recovered from the front left pocket of his shirt. Recovery memo for the same was prepared. The application of tenants was also found on the table of the appellant in Patwar-khana. After conclusion of the trap, the appellant was arrested and a case was registered under Section 161 IPC and under Section 5(2) of the Prevention of Corruption Act, 1947.

The prosecution examined four witnesses PW-2, PW-4, PW-10 and PW-11. Out of these material witnesses, PW-2 and PW-4 both were declared hostile. PW-2 stated in her examination-in-chief that she apprehended that appellant wanted illegal gratification and for that reason he was not recording the change in Khasra Girdawaris in favour of her mother. She further stated that she had learnt from co-villagers that Rs.300-400/- as reward was to be given for such a job. She also stated that she had signed the memos but she did not read them as she was confused.

The Special Judge convicted the appellant under Section 161 IPC and under Section 5(2) of the Prevention of Corruption Act, 1947 despite contradictions in the statements of prosecution witnesses. High Court upheld the order of conviction. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1. The High Court fell in error in drawing the inference of demand and receipt of the illegal gratification from the fact that the money was recovered from the accused. It is a settled canon of criminal jurisprudence that the conviction of an accused cannot be founded on the basis of inference. The offence should be proved against the accused beyond reasonable doubt either by direct evidence or even by circumstancial evidence if each link of the chain of events is established pointing towards the guilt of the accused. The prosecution has to lead cogent evidence in that regard. Applying these tests to the facts of the present case, PW-10 and PW-11 were neither the eye-witnesses to the demand nor to the acceptance of money by the accused from PW-2. Both PW-2 and PW-4 made statements before the Court which were quite different from the one made by them before the police during the investigation. PW-4 completely denied the incident and refused to acknowledge that the sum of Rs. 900/- was demanded by the accused from PW-2 in his presence and that the money was accepted in the Patwar-khana by the accused. PW-2 obviously did not state the complete truth before the Court. Though after being declared hostile in her cross-examination she supported some part of the prosecution case, but she virtually denied the essential ingredients to bring home the guilt of the accused either under Section 5 (2) of the Prevention of Corruption Act, 1947 or under Section 161 of the IPC. She seemed to have forgiven the accused for making such a demand and made such a statement before the Court that the Court should also ignore the offence. [Paras 9 and 10] [395-A-H]

1.2. The statement of PW-10 and PW-11 with regard to demand and acceptance was based on hearsay i.e. what was told to them together by PW-2 and even by PW-4 at that stage. The money was certainly recovered from

the pocket of the accused. The recovery memo was duly attested by witnesses. Thus, it cannot be said that the recovery from the pocket of the accused was of no consequence. However, to constitute an offence under Section 161 IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused. Similarly, in terms of Section 5 (1) (d) of the Act, the demand and acceptance of the money for doing a favour in discharge of its official duties is *sine qua non* to the conviction of the accused. PW-2 was educated up to 4th Class only. In her cross-examination she did support a few facts of the prosecution but on the material circumstance/fact she completely took a somersault while making a statement before the Court. PW-4 besides disowning his statement under Section 161 IPC in its entirety, stated that he was not present either when the bribe was demanded or when the same was accepted. The accused, when was put to incriminating evidence against him in terms of Section 313 Cr.P.C., did admit that PW-2 (complainant) came to her office with the police but stated that no other persons had accompanied them. PW-2 insisted on changing the Khasra Girdawaris and after she got annoyed, she got him falsely implicated. Money alleged to have been recovered from him, in fact, was lying on the table without his knowledge or demand. PW-2 also stated in her statement that she kept the money on the table after some altercation with the accused. In these circumstances, prosecution failed to establish the offence against the accused, that he accepted the money voluntarily as illegal gratification. The effect of the statement of PW-2 and PW-4 had a substantial adverse effect on the case of the prosecution. There were other witnesses examined by the prosecution who were formal witnesses but in the absence of support of PW-2 and PW-4, the prosecution could not establish the charge (demand and acceptance of illegal gratification by the accused), thus entitling him

to some benefit on the technical ground of two witnesses. [Paras 10, 11, 15 and 16] [395-C-H; 396-A-E; 399-E-H; 400-A-F]

C.M. Girish Babu v. CBI, Cochin, High Court of Kerala **(2009) 3 SCC 779;** *M.K. Harshan v. State of Kerala* **1996 (11) SCC 720;** *Sita Ram v. State of Rajasthan* **1975 (2) SCC 227, relied on.**

Aditya Nath Pandey v. State of U.P. **(2000) 9 SCC 206, referred to.**

Case Law Reference:

(2009) 3 SCC 779	**relied on**	**Para 1**
(2000) 9 SCC 206	**referred to**	**Para 1**
1996 (11) SCC 720	**relied on**	**Para 11**
1975 (2) SCC 227	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 630 of 2003.

From the Judgment & Order dated 20.11.2002 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 83-SB of 1988.

Jaspal Singh, Jaspreet Gogia for the Appellant.

Ranjit Rao for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal under Article 136 of the Constitution of India is directed against the final judgment and order of conviction dated 20.11.2002 passed by the learned Single Judge of the High Court of Punjab & Haryana at Chandigarh. Learned counsel appearing for the appellant has raised challenge to the impugned judgment, inter

alia, but primarily on the following grounds:

(a) There is no evidence to prove demand and voluntary acceptance of the alleged bribe so as to attract the offence under Section 5(2) of the Prevention of Corruption Act, 1947 (For short, 'the Act'). Reliance has been placed by the judgment of this Court in the case of *C.M. Girish Babu vs. CBI, Cochin, High Court of Kerala,* [2009 (3) SCC 779].

(b) The High Court as well as the trial Court have passed an order of conviction despite the fact that there was serious contradiction between the statements of the prosecution witnesses. And in fact, there was no cogent and reliable evidence to support the charge against the appellant. Even the recovery has not been proved in accordance with law. These factors clearly justify the benefit of doubt in favour of the appellant and thus entitling the accused of judgment of acquittal.

(c) The punishment awarded to the appellant is unreasonably excessive. The appellant has faced the agony of trial and thereafter other proceedings arising therefrom for the last 20 years. In these circumstances, the appellant has even faced great hardship having lost his livelihood which adversely affected the future of his family members. While relying upon the judgment of this Court in the case of *Aditya Nath Pandey v. State of U.P.* [2000 (9) SCC 206], it is contended that the sentence undergone would suffice and meet the ends of justice. Of course, this argument has been advanced without prejudice to the above contentions.

2. On behalf of the State, it has been argued that the judgment of conviction and sentence is duly supported by the

oral and documentary evidence produced by the prosecution. The prosecution has been able to bring home the charge against the accused. The ingredients of Section 5(2) of the Act as well as Section 161 of the Indian Penal Code (for short, 'the IPC') are duly satisfied. The appellant being a public servant has not to indulge in demanding bribe. Thus, no leniency is called for in favour of the accused. In order to examine the merit or otherwise the contentions raised, it is important for us to refer to the basic facts as emerged from the records, giving rise to the present appeal.

3. The appellant was newly posted as patwari in Village Piruwala. One Pritam Kaur had agricultural land at Village Piruwala. Her daughter, namely, Sat Pal Kaur was informed during 1986 that Khasra Girdawaris of Pritam Kaur's land had been recorded in the name of Jit Singh and others as tenants by the previous Patwari. Smt. Sat Pal Kaur took up the matter with those tenants who admitted that the Khasra Girdawaris has been wrongly recorded by the Ex-Patwari in their favour. She also obtained no-objection on the application moved by her mother which was submitted to the Tehsildar Chachhrauli. The application was moved for the purposes of incorporating the necessary changes at the time of the next Khasra Girdawaris in the coming season. Smt. Sat Pal Kaur contacted the village Patwari (appellant herein) in the Kharif season for recording Khasra Girdawaris in favour of her mother during the period of October, 1986. It is further the case of the prosecution that the appellant demanded illegal gratification of Rs. 900/- (rupees nine hundred) but that deal was struck at Rs. 400/- (rupees four hundred) for making the requisite changes, in the presence of Gurmej Singh, a taxi driver, whose taxi had been engaged by Sat Pal Kaur while visiting the appellant. Sat Pal Kaur contacted Shri Hari Singh, Deputy Superintendent of Police, Jagadhri at Bilaspur where Shri S.K. Joshi, Sub-Divisional Executive Magistrar, Jagadhri, was also present. She reported the matter. Her statement was recorded. She also produced four currency notes of the denomination of Rs. 100/- each and

the same were signed both by Hari Singh, DSP and S.K. Joshi, Sub-divisional Executive Magistrate. They went to Patwari of Chachhrauli. They were told by the officers that on demand she should hand over the money and once money was accepted she should inform the Police Station and the trap was accordingly planned. Sat Pal Kaur accompanied by Gurmej Singh left for Patwar-khana which was about one km. from the Police Station, Chachhrauli. She took Rs. 400/- duly signed by the said officers to pay as gratification to the Patwari. The money was given to the appellant and accordingly Gurmej Singh reported the matter to Shri Hari Singh, DSP and Shri S.K. Joshi at the Police Station. They rushed to the spot in a jeep that was parked at some distance from Patwar-khana. On actual search of the appellant, four currency notes duly signed by the officers were recovered from the front left pocket of the shirt. Recovery memo for the same was prepared. The tenants had raised no objection and that application was also found on the table of the appellant in Patwar-khana which was taken into possession. After conclusion of the trap, the appellant was arrested and a case was registered with the Police Station Chachhrauli. After completion of the investigation, a challan regarding commission of offence under Section 161 of the IPC and under Section 5(2) of the Act was filed before the Court of competent jurisdiction. The Court framed charges on both these offences and the appellant was put to trial.

4. The prosecution in support of its case examined Tara Chand Pawar (PW-1), Smt. Sat Pal Kaur (PW-2), Rajiv Sharma (PW-3), Gurmej Singh (PW-4), Daya Singh (PW-5), Subhash Chander Patwari (PW-6), Shiv Dayal Reader (PW-7), Prem Bihari Lal (PW-8), Ram Chander, ASI(PW-9), Shri S.K. Joshi (PW-10) and Shri Hari Ram, DSP (PW-11) and closed its evidence. When the appellant was examined under Section 313 of Criminal Procedure Code, 1973 (for short 'the Cr.P.C.'), he denied the allegations leveled against him and claimed to be innocent.

5. The special Judge, Ambala, by order dated 30.01.1988 convicted and sentenced the appellant under Section 161 of the IPC to undergo rigorous imprisonment for three years and under Section 5(2) of the Act to undergo rigorous imprisonment for four years and to pay a fine of Rs.1,000/-. Feeling aggrieved by this order, the appellant filed Criminal Appeal No. 83-SB of 1988 in the High Court of Punjab & Haryana at Chandigarh. The High Court by order dated 20.11.2002 dismissed the appeal holding that the appellant was rightly convicted.

6. To establish the charge against the appellant-accused, the prosecution in relation to the demand and receipt of the illegal gratification, had examined mainly four witnesses; Sat Pal Kaur (PW-2), Gurmej Singh (PW-4), S.K. Joshi (PW-10) and Hari Singh (PW-11). Out of these material witnesses, PW-2 and PW-4 both were declared hostile and were cross-examined by the public prosecutor. Leave to that effect was granted by the Court. PW-2 had stated in her examination-in-chief that she apprehended that appellant wanted illegal gratification and for that reason he was not recording the change in Khasra Girdawaris in favour of her mother. PW-2 further stated that she had learnt from co-villagers that Rs.300-400/- as reward was to be given for such a job. She had contacted the police thereafter. She was confronted with her statement EX.PB recorded under Section 161 of the IPC wherein she had stated that Banarsi Dass had demanded illegal gratification of Rs. 400/- from her in the presence of Gumrej Singh. She also stated that she had signed the memos but she did not read them as she was quite puzzled. In the cross-examination, she also stated that "earlier to the day of the raid, Banarsi Dass has demanded Rs. 900/-. It is correct that accused Banarsi Dass had apologized to me and I have accepted his apology". She further volunteered, "it is my humble request to the Court that the Court should also accept the apology of the accused who has got small children to maintain". Thereafter, she proceeded to state that she had paid a sum of Rs. 400/- to the accused for recording girdwari of the current

crop in favour of the mother. In her cross-examination, it has also been stated that when she placed Rs. 400/- on his table, the accused had already recorded girdawari in favour of Jit Singh and others and the same had been verified by the Kanungo. She (PW-2) had an altercation with the accused as to why he had recorded Girdwari in favour of Jit Singh and others. Then she placed Rs. 400/- on the table wherefrom the same was picked up by the police. Gumrej Singh (PW-4), the other witness who was also declared hostile and who was subjected to cross-examination by the prosecution, stated that the appellant had not accepted or demanded any money from Sat Pal Kaur in his presence. He denied that he had made any statement to the police (Ex.PW-3/A). His statement under Section 161 of the IPC was completely denied by him. According to him, he had taken Sat Pal Kaur to Chachhrauli but he remained sitting in the car, 100 yards away from Patwar-khana and he did not know the accused as he hailed from Chachhrauli.

7. Witnesses PW-10 and PW-11 are the Senior Officers of the Administration and the Police. The complainant complained to them about the appellant demanding bribe from her for correcting the Khasra Girdawaris in the name of the mother of PW-2. A trap was planned. In furtherance to which PW-2 had gone to the Patwar-khana and gave Rs. 400/- (the signed notes of Rs.100/- each) upon which the Gurmej Singh was supposed to have informed the police, about the acceptance of money by the appellant. Thereafter, the police came to the spot and recovered the money from the front left pocket of the appellant's shirt. The search of the appellant was conducted by the police and money was recovered (Ex.P1 to Ex.P4) for which memo Ex.PD. was prepared. The tainted notes, shirt and even the money otherwise recovered from the pocket of the appellant were taken into custody vide these exhibits.

8. It is apparent that PW-10 and PW-11 were not present

in the Patwar-khana when the money was demanded and accepted by the appellant. The prosecution primarily relied on the two witnesses PW-2 and PW-4 respectively who were declared hostile. Certainly the prosecution can rely upon the statements of these witnesses and list their depositions made before the Court by having those statements corroborated or contradicted, as the case may be, by their earlier statements recorded under Section 161 of the I.P.C. At this stage, the finding recorded by the High Court can usefully be referred to:

> "PW-2 Smt. Sat Pal Kaur has clearly stated that accused has informed her that Girdawari of her mother's land had been recorded in the name of Jit Singh and others as tenants. She had contacted Jit Singh and others and obtained no objection from them. The said application Ex.PA was forwarded by her through her servant to the Tehsildar. She had contacted Banarsi Dass and requested him to change the said girdawari in her mother's name, who told her that he will do so at the time of recording of khasra girdawari in the next season. She apprehended that he wanted illegal gratification and for that reason, he was not recording the change of girdawari in the name of her mother. She contacted the Police and informed them about the matter. She had visited Patwar-khana, where Banarsi Dass was present and placed Rs. 400/- on his table. In the meantime, police party came and seized that money. She was declared a hostile witness. In cross-examination, she admitted her statement made under Section 161 IPC. She also admitted that Gurmej Singh was not present when Banarsi Dass accused had made a demand of illegal gratification of Rs. 400/-. She admitted that it is correct that Banarsi Dass accused has apologized from her and she had accepted his apology. She further volunteered that it is her humble request to the Court that the Court should also accept the apology of the accused. The police party was sitting in the Thana. So. when the recovery was made by the police from the appellant-accused, somebody must

> have informed the police about the handing of the bribe and Gurmej Singh was the only person. Shri S.K. Joshi, Sub-Divisional Magistrate, Kalka has appeared as PW10. He has searched Smt. Satpal Kaur and her driver. Gurmej Singh visited the Police Station in the afternoon and complained that Shri Banarsi Dass Patwari Halqa has demanded Rs. 900/- for the correction of Khasra girdawari. Shri Hari Singh recorded the statement of Sat Pal Kaur and made search of her person and after the search, Rs.400/-, which were signed by him and Shri Hari Singh, were given to her. The DSP had prepared memo Ex-PC which was signed by him. He along with DSP, Smt. Sat Pal Kaur and Gurmej Singh went to Police Station Chachrauli and then went to Patwar-khana. Gurmej Singh was directed to come to the Police Station in case the accused accepted the money. After receiving message, they raided Patwar-khana. Accused was found sitting in the Patwar-khana and his person was searched by the DSP in his presence and currency notes Ex.P1 to Ex.P4 were recovered from the front pocket of the shirt, which the accused was wearing. These were taken into possession vide memo Ex.PD. Hari Singh also supported the same. So, if merely shadow witness had turned hostile, accused-appellant cannot be acquitted. Mr. S.K.Joshi (PW-10) can also be considered as a witness of recovery as currencynotes handed over to Smt. Sat Pal Kaur after being signed by PW-10 and PW-11 vide memo Ex.PC was recovered by DSP (PW-11) vide memo Ex.PD in the presence of Sat Pal Kaur PW-2 and Shri S.K. Joshi, PW-10".

9. The above findings recorded by the High Court show that the Court relied upon the statements of PW-10 and PW-11. It is further noticed that recovery of currency notes Ex. P-1 to P-4 from the shirt pocket of the accused, examined in light of Ex. PC and PD, there was sufficient evidence to record the finding of guilt against the accused. The Court remained

uninfluenced by the fact that the shadow witness had turned hostile, as it was the opinion of the Court that recovery witnesses fully satisfied the requisite ingredients. We must notice that the High Court has fallen in error in so far as it has drawn the inference of demand and receipt of the illegal gratification from the fact that the money was recovered from the accused.

10. It is a settled canon of criminal jurisprudence that the conviction of an accused cannot be founded on the basis of inference. The offence should be proved against the accused beyond reasonable doubt either by direct evidence or even by circumstancial evidence if each link of the chain of events is established pointing towards the guilt of the accused. The prosecution has to lead cogent evidence in that regard. So far as it satisfies the essentials of a complete chain duly supported by appropriate evidence. Applying these tests to the facts of the present case, P-10 and P-11 were neither the eye-witnesses to the demand nor to the acceptance of money by the accused from Smt. Sat Pal Kaur (PW-2). It is unfortunate but true that both PW-2 and PW-4 made statements before the Court which were quite different from the one made by them before the police during the investigation under Section 161 of the IPC. Gurmej Singh (PW-4) completely denied the incident and refused to acknowledge that the sum of Rs. 900/- only was demanded by the accused from PW-2 in his presence and that the money was accepted in the Patwar-khana by the accused. PW-2 obviously has not stated the complete truth before the Court. Though after being declared hostile in her cross-examination she has supported some part of the prosecution case, but she has virtually denied the essential ingredients to bring home the guilt of the accused either under Section 5 (2) of the Act or under Section 161 of the IPC. She seems to have forgiven the accused for making such a demand and made such a statement before the Court that the Court should also ignore the offence. We are not and should not even be taken to have suggested that PW-10 and PW-11 have not made

correct statement before the Court or that the Court has disbelieved any part of their statement. But, fact of the matter remains that their statement with regard to demand and acceptance is based on hearsay i.e. what was told to them together by PW-2 and even by PW-4 at that stage. The money was certainly recovered from the pocket of the accused vide memo Ex. P-D. We, therefore, do not accept the contention on behalf of the accused that the amount was not recovered and the recovery is improper in law. Ex. P-D has duly been attested by witnesses. Thus, it cannot be said that the recovery from the pocket of the accused is unsustainable in law and is of no consequence.

11. To constitute an offence under Section 161 of the IPC it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused. Similarly, in terms of Section 5 (1) (d) of the Act, the demand and acceptance of the money for doing a favour in discharge of its official duties is sine qua non to the conviction of the accused. In the case of M.K. Harshan v. State of Kerala [1996 (11) SCC 720], this Court in somewhat similar circumstances, where the tainted money was kept in the drawer of the accused who denied the same and said that it was put in the drawer without his knowledge, held as under :

> ".....It is in this context the courts have cautioned that as a rule of prudence, some corroboration is necessary. In all such type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, namely, acceptance is very important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been

put in the drawer as an illegal gratification. Unfortunately, on this aspect in the present case we have no other evidence except that of PW-1. Since PW-1's evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW-1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect, it is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5(1)(d) of the Act, particularly when the version of the accused appears to be probable".

12. Reliance on behalf of the appellant was placed upon the judgment of this Court in the case of *C.M. Girish Babu* (supra) where in the facts of the case the Court took the view that mere recovery of money from the accused by itself is not enough in absence of substantive evidence for demand and acceptance. The Court held that there was no voluntary acceptance of the money knowing it to be a bribe and giving advantage to the accused of the evidence on record, the Court in para 18 and 20 of the judgment held as under :

18. In *Suraj Mal v. State (Delhi Admn.)* [1979 (4) SCC 725] this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.

20. A three-Judge Bench in *M. Narsinga Rao v. State of A.P.* [2001 (1) SCC 691: SCC (Cri) 258] while dealing with the contention that it is not enough that some

currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24)

"24. … we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide *Madhukar Bhaskarrao Joshi v. State of Maharashtra* [2000 (8) SCC 571]).The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (Madhukar case, SCC p. 577, para 12)

'12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like "gratification or any valuable thing". If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

13. In fact, the above principle is no way derivative but is a reiteration of the principle enunciated by this Court in *Suraj Mal case* (supra), where the Court had held that mere recovery by itself cannot prove the charge of prosecution against the

accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money. Reference can also be made to the judgment of this Court in *Sita Ram v. State of Rajasthan* [1975 (2) SCC 227], where similar view was taken.

14. The case of *C.M. Girish Babu* (supra) was registered under the Prevention of Corruption Act, 1988, Section 7 of which is in pari materia with Section 5 of the Prevention of Corruption Act, 1947. Section 20 of the 1988 Act raises a rebuttable presumption where the public servant accepts gratification other than legal remuneration, which presumption is absent in the 1947 Act. Despite this, the Court followed the principle that mere recovery of tainted money divorced from the circumstances under which it is paid would not be sufficient to convict the accused despite presumption and, in fact, acquitted the accused in that case.

15. In light of the above principles enunciated by the Court now we may examine the evidence on record with specific emphasis to the demand and acceptance of illegal gratification for changing Khasra Girdawaris in the name of mother of Smt. Sat Pal Kaur (PW-2). Besides, the part of her statement which we have aforenoticed, she also stated that she had never made the statement Ex. PW-3/A before the police. Even on the memos which have been signed by her she stated that she had signed them without reading the same. She was educated up to 4th Class only. In her cross-examination she does support a few facts of the prosecution but on the material circumstance/ fact she has completely taken a somersault while making a statement before the Court. Gurmej Singh, besides disowning his statement under Section 161 of the IPC in its entirety, stated that he was not present either when the bribe was demanded or when the same was accepted. The accused, when was put to incriminating evidence against him in terms of Section 313 of the Cr.P.C., did admit that PW-2 (complainant) had come to the office of Patwar-khana with the police but stated that no

other persons had accompanied them. PW-2 insisted on changing the Khasra Girdawaris and after she got annoyed, she got him falsely implicated. Money alleged to have been recovered from him, in fact, was lying on the table without his knowledge or demand. PW-2 has also stated in her statement that she kept the money on the table after some altercation with the accused. In these circumstances, it is difficult for the Court to hold that the prosecution has established the offence against the accused, that he accepted the money voluntarily as illegal gratification. The effect of the statement of PW-2 and PW-4 has a substantial adverse effect on the case of the prosecution. There are other witnesses examined by the prosecution which are formal witnesses and in the absence of support of PW-2 and PW-4, the prosecution has not been able to establish the charge (demand and acceptance of illegal gratification by the accused), thus entitling him to some benefit on the technical ground of two witnesses i.e. PW-2 and PW-4, turning hostile.

16. In light of the statement of two hostile witnesses PW-2 and PW-4, the demand and the acceptance of illegal gratification alleged to have been received by the accused for favouring PW-2 by recording the Khasra Girdawaris in the name of her mother cannot be said to have been proved by the prosecution in accordance with law. We make it clear that it is only for the two witnesses having turned hostile and they having denied their statement made under Section 161 of the I.P.C. despite confrontation, that the accused may be entitled to accquital on technical ground. But, in no way we express the opinion that the statement of witnesses including official witnesses PW-10 and PW-11, are not accepted by the Court. Similarly, we have no reason to disbelieve the recovery of Ex. P-1 to P-4 vide Ex. P-D.

17. In the light of this we are of the considered view that the judgment of the High Court convicting the accused for the offences with which the accused was charged cannot be sustained in law.

18. For the reasons aforerecorded and particularly in view of the fact that two witnesses turned hostile, giving the benefit of doubt on technical ground to the accused, we hereby set aside the judgement of the High Court and acquit the accused of both the charges i.e. under Section 161 of the IPC and under Section 5 (2) of the Act. The appeal is accordingly allowed leaving the parties to bear their own costs. Bail bonds, if any, furnished by the appellant be released.

D.G. Appeal allowed.

BAHADUR SINGH
v.
STATE OF HARYANA
(Special Leave Petition (Crl.) No. 5523 of 2009)

APRIL 6, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 42 and 57 – Recovery of contraband from the premises, key of which was in possession of the accused – Conviction by courts below – Non-compliance of ss. 42 and 57 pleaded – Held: Non–compliance with Section 42 would not vitiate the trial, if it did not cause prejudice to the accused. Held further: Section 57 not mandatory. On facts, the provisions under the Sections were complied with – Accused was also found in possession of the contraband.

On a secret information, police party raided the house of the petitioner-accused. On interrogation, he disclosed that he had concealed six bags of Poppy Husk in a locked room and the key of the room was with him. On his opening the room, six bags of contraband were recovered. Trial Court convicted him. High Court upheld the conviction while reducing the sentence.

In the SLP, petitioner-accused contended that the trial stood vitiated for non-compliance with the mandatory provisions of Sections 42 and 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985; and that the petitioner cannot be said to have been found in conscious possession of the contraband.

Dismissing the SLP, the Court

HELD: 1.1 Non-compliance with the provisions of Section 42 of Narcotic Drugs and Psychotropic

Substances Act, 1985 may not vitiate the trial, if it did not cause any prejudice to the accused. Furthermore, whether there is adequate compliance of Section 42 or not is a question of fact to be decided in each case. [Para 13] [410-A-B]

1.2. With the advancement of technology and the availability of high speed exchange of information, some of the provisions of the NDPS Act, including Section 42, have to be read in the changed context. The delay caused in complying with the provisions of Section 42 could result in the escape of the offender or even removal of the contraband, there would be substantial compliance, if the information received were subsequently sent to the superior officer. [Para 12] [409-C-D]

1.3. In the instant case, as soon as the investigating officer reached the spot, he sent a wireless message to his immediate higher officer and subsequent to recovery of the contraband, a *Ruqa* contained all the facts and circumstances of the case was also sent to the Police Station from the spot from where the recovery was made on the basis whereof the First Information Report was registered and copies thereof were sent to the *Ilaqa* Magistrate and also to the higher police officers. There was, therefore, substantial compliance with the provisions of Section 42 of the NDPS Act and no prejudice was shown to have been caused to the accused on account of non-reduction of secret information into writing and non-sending of the same to the higher officer immediately thereafter. [Para 12] [409-E-H]

Karnail Singh vs. State of Haryana **(2009) 8 SCC 539, followed.**

State of Punjab vs. Balbir Singh **(1994) 3 SCC 299;** *Sajan Abraham vs. State of Kerala* **(2001) 6 SCC 692, relied on.**

Directorate of Revenue and Anr. vs. Mohammed Nisar Holia **(2008) 2 SCC 370;** *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat* **(2000) SCC (Cri) 496, referred to.**

2. Compliance with the provisions of Section 57 of NDPS Act is not mandatory, and, in any event, information of the arrest of the petitioner and seizure of the contraband had been duly reported to the local police-station on the basis of which the First Information Report had been drawn up. [Para 14] [410-B-C]

3. It is not correct to say that the petitioner had not been found in the conscious possession of the contraband, having particular regard to the fact that the six bags containing 32 kilograms of Poppy Husk in each of the bags were not only recovered from the premises of the petitioner but from a room which was opened by him with a key in his possession. [Para 15] [410-D-E]

Case Law Reference:

(2008) 2 SCC 370	**Referred to.**	**Para 4**
(2000) SCC (Cri) 496	**Referred to.**	**Para 5**
(2001) 6 SCC 692	**Relied on.**	**Para 12**
(2009) 8 SCC 539	**followed.**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 5523 of 2009.

From the Judgment & Order dated 12.2.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 107-DB of 2000.

R.K. Talwar, Yash Pal Dhingra for the Petitioner.

Rao Ranjit for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The petitioner was convicted for an offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act') and was sentenced to undergo rigorous imprisonment for a period of 12 years and to pay a fine of Rs. One lakh and in default of payment of the same to undergo further rigorous imprisonment for a period of three years. The allegation against the petitioner that he had been found in possession of six bags each containing 32 kilograms of Poppy Husk without any permit or licence, was found to have been proved by the Trial Court as well as the High Court. In order to appreciate the submissions made by Mr. R.K. Talwar, learned counsel appearing for the petitioner, it is necessary to set out the facts of the case in brief.

2. On 2nd December, 1995, Gian Singh, Inspector, along with other Police officers, was on patrol duty at the turning of Bhawani Khera on the Thanesar-Jhansa Road. He received a secret information that the petitioner herein, a resident of Singpura, was selling Poppy Husk in his house and the same could be recovered in case a raid was conducted. In the meantime, one Sukhdev Singh son of Sampuran Singh, reached the spot and he was also joined with the Police party as an independent witness. The police party thereafter raided the house of the petitioner, who was present, and on being interrogated he disclosed that he had concealed six bags in a locked room under the wheat chaff and that the key was with him. The disclosure statement made by the petitioner was reduced into writing and the thumb impression of the petitioner was affixed thereupon and attested by witnesses. Thereafter, Gian Singh sent a wireless message to the Deputy Superintendent of Police, Kurukshetra, who rushed to the spot and in his presence the petitioner led the police party to the room in question and opened the lock with a key which was in his possession and from the said room six bags, each

containing 32 kilograms of Poppy Husk, were recovered from underneath the wheat chaff kept in the room. Thereafter, as required, samples were taken out from the seized contraband and the remaining Poppy Husk was sealed and taken into possession vide a separate recovery memo and attested by the witnesses and the same was sent to the Police Station along with the Ruqa on the basis whereof the First Information Report (Exh.PB/1) was registered. A site plan was also prepared and statements were duly recorded. After completion of investigation challan was duly filed before the Special Court, Kurukshetra. Charge was framed against the petitioner under Section 15 of the NDPS Act, to which he pleaded not guilty and claimed to be tried. On the evidence adduced by the prosecution, the petitioner was found guilty of the charged offence and was convicted and sentenced in the manner indicated hereinbefore.

3. Aggrieved by the judgment of conviction and sentence, the petitioner preferred the appeal before the High Court, being Criminal Appeal No.107-DB of 2000, which was partly allowed to the extent that the sentence of imprisonment was reduced from 12 years to 10 years. The rest of the judgment of the Trial Court was not disturbed.

4. Mr. R.K. Talwar, learned Advocate, appearing for the petitioner, assailed the judgments both of the Trial Court as well as the High Court, mainly on two grounds. He urged that the prosecution case stood vitiated on account of non-compliance of the provisions of Sections 42 and 57 of the NDPS Act. He submitted that, as has been held in various decisions, the provisions of Section 42 of the NDPS Act are mandatory and any failure by the investigating agency to comply with the same would vitiate the investigation and also the trial on the basis of such investigation. In that regard Mr. Talwar referred to the decision of this Court in *Directorate of Revenue and another vs. Mohammed Nisar Holia* [(2008) 2 SCC 370] in which it was, inter alia, held that since the information as to the offence

had not been reduced into writing by the officer who received the same, but by someone later on, the High Court had rightly set aside the conviction of the accused on the basis that the statutory requirement of Section 42 had not been complied with. Mr. Talwar pointed out that in the said case this Court maintained the judgment of the High Court on the same grounds relating to non-compliance of the provisions of Section 42 of the NDPS Act.

5. Mr. Talwar also referred to the Constitution Bench decision of this Court in *Karnail Singh vs. State of Haryana* [(2009) 8 SCC 539] wherein the effect of the amendment of Section 42 with effect from 2.10.2001, relaxing the time for sending the information from "forthwith" "within 72 hours" was considered along with the effect of the decisions rendered by this Court in the case of *Abdul Rashid Ibrahim Mansuri vs. State of Gujarat* [(2000) SCC (Cri) 496] and *Sajan Abraham vs. State of Kerala* [(2001) 6 SCC 692] in the context of the advent of cellular phones and wireless phones in dealing with emergent situations. The Constitution Bench held that whether there was adequate or substantial compliance with Section 42 or not would have to be decided on the facts of each case and non-compliance with Section 42 may not otherwise vitiate the trial if it did not prejudice the accused.

6. Mr. Talwar next submitted that even the provisions of Section 57 of the NDPS Act had not been complied with, inasmuch as, after the petitioner's arrest the police authorities did not, within the time prescribed, make a full report of all the particulars of such arrest and seizure to his immediate superior. Mr. Talwar submitted that the prosecution also stood vitiated by the aforesaid lapse.

7. Apart from the two aforesaid points, Mr. Talwar also urged that the petitioner had not been found to be in conscious possession of the seized Poppy Husk and the mere fact that the bags containing the Poppy Husk were recovered from his premises did not automatically establish "conscious

possession". Mr. Talwar submitted that, in any event, having regard to the failure of the investigating agency in complying with the mandatory provisions of Sections 42 and 57, the trial of the petitioner and his conviction and sentence therein stood vitiated and the High Court erred in upholding the same.

8. Appearing for the State of Haryana, Mr. Rao Ranjeet, learned Advocate, while refuting the submissions of Mr. Talwar, submitted that the view of this Court with regard to the mandatory requirement of Section 42 had to a great extent been watered down with the advent of electronic equipment such as wireless as also cell phones. Mr. Ranjeet submitted that even prior to such consideration, this Court in *Sajan Abraham's* case (supra) had taken the view that in an emergent situation it may not always be possible to strictly comply with the provisions of Section 42 since the delay involved in effecting such strict compliance could help the offender to remove the contraband or to flee the place so as to make any raid for recovery of such contraband meaningless. He pointed out that in *Sajan Abraham's* case (supra) this Court had held that it was not possible for the officer concerned, who was on patrol duty, to comply with the requirements of sub-sections (1) and (2) of Section 42 as the same would have delayed the trapping of the accused which might have led to his escape.

9. With regard to non-compliance of Section 57 of the above Act it was held that the same was not mandatory and that substantial compliance would not vitiate the prosecution case, since the copies of the FIR along with other remarks regarding the arrest of the accused and seizure of the contraband articles had been sent by the concerned officer to his superior officer immediately after registering the case. It was held that this amounted to substantial compliance and mere absence of such report could not be said to have prejudiced the accused. It was further held that since the Section was not mandatory in nature, when there were substantial compliance, it would not vitiate the prosecution case.

10. Mr. Ranjeet also referred to the decision of this Court in *State of Punjab vs. Balbir Singh* [(1994) 3 SCC 299] where also similar views were expressed and such views had been relied upon by this Court in deciding *Sajan Abraham's* case (supra). Mr. Ranjeet submitted that no grounds have been made out on behalf of the petitioner warranting interference with the judgment impugned in the Special Leave Petition.

11. We have carefully considered the submissions made on behalf of the respective parties and we are inclined to agree with the submissions advanced by Mr. Rao Ranjeet appearing on behalf of the State of Haryana.

12. It cannot but be noticed that with the advancement of technology and the availability of high speed exchange of information, some of the provisions of the NDPS Act, including Section 42, have to be read in the changed context. Apart from the views expressed in *Sajan Abraham's* case (supra) that the delay caused in complying with the provisions of Section 42 could result in the escape of the offender or even removal of the contraband, there would be substantial compliance, if the information received were subsequently sent to the superior officer. In the instant case, as soon as the investigating officer reached the spot, he sent a wireless message to the Deputy Superintendent of Police, Kurukshetra, who was his immediate higher officer and subsequent to recovery of the contraband, a Ruqa containing all the facts and circumstances of the case was also sent to the Police Station from the spot from where the recovery was made on the basis whereof the First Information Report was registered and copies thereof were sent to the Ilaqa Magistrate and also to the higher police officers. As was held by the High Court, there was, therefore, substantial compliance with the provisions of Section 42 of the NDPS Act and no prejudice was shown to have been caused to the accused on account of non-reduction of secret information into writing and non-sending of the same to the higher officer immediately thereafter.

13. Apart from the decision in *Sajan Abraham's* case (supra), the decision of the Constitution Bench in *Karnail Singh's* case (supra), has also made it clear that non-compliance with the provisions of Section 42 may not vitiate the trial if it did not cause any prejudice to the accused. Furthermore, whether there is adequate compliance of Section 42 or not is a question of fact to be decided in each case.

14. As far as compliance with the provisions of Section 57 of NDPS Act is concerned, as has been indicated earlier, it has been held by this Court that the same was not mandatory, and, in any event, information of the arrest of the petitioner and seizure of the contraband had been duly reported to the local police station on the basis of which the First Information Report had been drawn up.

15. As to the submissions advanced with regard to conscious possession of the seized Poppy Husk, we are of the view that the same cannot be accepted having particular regard to the fact that the six bags containing 32 kilograms of Poppy Husk in each of the bags were not only recovered from the premises of the petitioner but from a room which was opened by him with a key in his possession.

16. We, accordingly, find no merit in the Special Leave Petition, and the same is dismissed.

K.K.T. SLP dismissed.

MOHAN KUMAR RAYANA
v.
KOMAL MOHAN RAYANA
(SLP(Civil) No. 9821-9822 of 2009)

APRIL 6, 2010

[ALTAMAS KABIR, G.S. SINGHVI AND CYRIAC JOSEPH, JJ.]

Family Law:

Breakdown of marriage – Custody of girl child – Family Court granting custody to mother and allowing the father access to child on alternate weekend and child to share 50% of school vacations with father – High Court declining to interfere with the order – HELD: In such matters, the interest of the minor is of paramount importance to the court which stands in loco parentis to the minor – Wishes of the minor are to be given due weightage – Keeping in view the interest of the minor, and on an assessment of her behavioural pattern towards both the parents, there is no reason to interfere with the order passed by the Family Court as affirmed by the High Court – Hindu Minority and Guardianship Act, 1956 – s.6.

In two separate petitions filed by the parents of the girl child, each claiming her custody, the Family Court granted custody of the child to the mother and directed that the father would have access to the child on every alternate weekend and the child would share 50% of the school vacations with her father. In the appeals filed by both the parents, the High Court declined to interfere with the order of the Family Court as in its opinion sufficient access provided to the father would meet the ends of justice, and directed that the custody of the child should continue with her mother.

Dismissing the petitions, the Court

HELD: 1. Having the interest of the minor in mind, this Court met her separately in order to make an assessment of her behavioural pattern towards both the parents. Much against the submissions which have been made during the course of hearing of the matter, the child appeared to have no inhibitions in meeting her father with whom she appeared to have an excellent understanding. There was no evidence of the child being hostile to her father when they met each other in the Court. However, the child seems to prefer her mother's company as the bonding between them is greater than the bonding with her father. She is a happy child, the way she is now and having regard to her age and the fact that she is a girl child, the Court is of the view that she requires her mother's company more at this stage of her life. [para 13] [420-F-H; 421-A-B]

Guarav Nagpal vs. Sumedha Nagpal **2008 (16) SCR 396 = (2009) 1 SCC 42, referred to.**

1.2. There is no doubt that the petitioner is very fond of his daughter and is very concerned about her welfare and future, but in view of his business commitments it would not be right or even practicable to disturb the status quo prevailing with regard to child's custody. The conditions laid down by the High Court regarding visitation rights to the father are sufficient for the child to experience the love and affection both of her father and mother. There is no reason why the father who will have access to his daughter on holidays and weekends, cannot look after her welfare without having continuous custody of her person. In such matters the interest of the minor is of paramount importance to the court which stands in *loco parentis* to the minor. Of course, the wishes of the minor are to be given due weightage, and, in the instant case, the same has been done. Therefore,

there is no reason to interfere with the order passed by the Family Court, as affirmed by the High Court. [Para 13-14] [421-B-E]

Case Law Reference:

2008 (16) SCR 396 referred to Para 7

CIVIL APPELLATE JURISDICTION : SLP (C) Nos. 9821-9822 of 2009.

From the Judgment & Order dated 16.1.2009 of the High Court of Judicature at Bombay in Family Court Appeal No. 29 of 2007 with Family Court Appeal No. 61 of 2007.

Dr. A.M. Singhvi, Shyam Divan, Madhavi Diwan, Shelly Baluja, Ankur Chawla, Sheely Satija, Kevic Setalvaya, Pallavi Langar (for Coac) for the Petitioner.

Meenakshi Lekhi, Abhijit Das, Gopal Jha, Ravi Kumar Tomar for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. These petitions involve the final stage of a custody battle on account of disruption and finally a break down of the marriage ties between the petitioner and the respondent.

2. The petitioner and the respondent got married in Hyderabad on 11th August, 2000. A girl child, Anisha, was born on 2nd March, 2002. The nuclear family, along with the mother of the petitioner-husband, resided together at Chamboor, Mumbai till July, 2004 when, for whatever reason, the respondent-wife left the matrimonial home to stay with her parents at Bandra. On 24th November, 2005, with the help of police personnel from Chamboor Police Station, she took away Anisha from the custody of the petitioner's mother. The petitioner recovered the custody of the daughter on 30th

November, 2005 and this resulted in both the husband as well as the wife filing separate Custody Petitions before the Family Court in December, 2005. On 20th December, 2005, the Family Court granted weekend access/visitation right to the respondent-wife and by a subsequent order dated 15th September, 2006. the Family Court granted interim custody of the child to the petitioner-husband pending hearing and final disposal of the Custody Petition. The child remained in custody of the petitioner-father between November, 2005 and 2nd February, 2007, when the husband was directed to make over the custody of the child to the respondent-wife and since then she has been in the custody of the respondent-wife.

3. Two appeals being Family Court Appeal No.29 of 2007 and Family Court Appeal No.61 of 2007 were filed by the petitioner-husband and the respondent-wife respectively. The Family Court Appeal No.29 of 2007, which was filed by the petitioner-husband, was directed against the judgment and order of the Family Court directing that custody of the minor child be made over to the respondent-wife. Despite the finding that during the period when Anisha was in the petitioner's custody she had been well looked after and cared for and the petitioner had dutifully discharged his parental responsibility towards her. In the other appeal, the respondent-wife challenged the order of access made in favour of the petitioner-husband on every alternate weekend and to share 50% of the School Vacations with the petitioner. In fact, at one stage this matter also once appeared before us and certain specific directions were given regarding the manner of access of the petitioner-husband to Anisha. While disposing of the pending appeals, the Division Bench of the High Court had occasion to consider the legal and practical approach regarding custody of the minor in the light of the well-established doctrine that in these cases, the welfare and interest of the minor was the paramount consideration. Having dealt with the relevant provisions of the Hindu Minority and Guardianship Act, 1956, since the parents as also the minor is a Hindu and while

passing the final order the Division Bench was fully alive to the fact that under Section 6 of the above Act the father is the natural guardian of the person of the minor during his minority. Despite the said legal position, the High Court, after carefully considering the various other aspects conducive to the child's welfare, and despite the interim order of custody in favour of the petitioner-husband, chose not to interfere with the order of the Family Court and directed that the custody of minor Anisha should continue to be with her mother, the respondent herein, and that sufficient access provided to the petitioner-father would meet the ends of justice. The petitioner's prayer for Anisha's custody, therefore, was rejected and being aggrieved thereby, the petitioner-husband has filed the instant Special Leave Petition.

4. On behalf of the petitioner-husband it was urged that the judgment and order of the High Court suffered from various infirmities. It was submitted that having found that Anisha had been well looked after during the period of petitioner's custody and the respondent-wife was trying to poison the child's mind against the petitioner and having also held that from the psychiatric evaluation made that the respondent-wife had a manipulative personality, apart from having a tendency towards psychosis which needed medical attention, the High Court erroneously chose note to interfere with the order of the Family Court directing custody of minor Anisha to be made over to the respondent-wife. It was further urged that the High Court had not properly appreciated the fact that when the respondent-wife left the matrimonial home in July, 2004 to pursue film and television career, she left Anisha behind when she was only 2 years and 4 months old, thereby virtually abandoning the child when she needed her mother's care the most. For more than 2 years she did not have any contact with Anisha till in May, 2005 she forcibly removed Anisha from her paternal grandmother's custody. It was submitted that the respondent-wife was so bent upon pursuing a career in films and television that she had no qualms about leaving a 2½ year old baby girl

who needed her attention and motherly affection.

5. Mr. Shyam Divan, learned Senior Advocate, who appeared with Dr. A.M. Singhvi, learned Senior Advocate, for the appellant, submitted that the final conclusion of the judgment and order of the High Court was against the grain of the findings therein regarding the petitioner's ability to look after the welfare of the minor child. Mr. Divan urged that both the parties were subjected to psychiatric evaluation on the directions of the High Court and in all the reports, and, in particular, in the report dated 20th September, 2007, submitted by Dr. Haridas, who was the Head of Department of Psychiatry, JJ Hospital, Mumbai, the respondent was diagnosed with a histrionic personality disorder of a nature that rendered her unfit for having custody of the child. It was pointed out that in the said report it was also mentioned that the respondent-wife was highly manipulative and readily spoke lies even for trivial matters and showed trends of psychosis. On a comparative assessment of both the parties, the report concluded that it would not be in the interest of the child to keep her in the custody of respondent-mother and that, on the contrary, the petitioner-father was more fit and capable to undertake the upbringing of the child. Mr. Divan submitted that even in the second report submitted on 22nd November, 2008, it was stated that there was no evidence to revise the recommendations made in the earlier report. Mr. Divan submitted that despite the opinion of the medical experts and the Court's own findings that the child was being manipulated, tutored and poisoned against the petitioner-husband by the respondent-wife, the High Court, as mentioned earlier, had erroneously chosen not to interfere with the order of the Family Court and in the ultimate analysis allowed the custody of the minor child to remain with the respondent-wife.

6. It was also submitted that in the face of the opinion of experts, the Family Court ought not to have relied upon the statements made by the Counsellors appointed by it or on the evidence of Shridhar Khochare, the Secretary of the Society

where the parents of the respondent resided, or the evidence of Dr. Vivek Hebar who had also seen the respondent-wife at the school where Anisha was studying. It was submitted that as against the opinion of Dr. Anjali Chhabaria, wherein it was clearly stated that Anisha had confided in her that the respondent was mad and was not good, the Family Court ought not to have given undue importance to the report of Mrs. A.R. Tulalwar who had interviewed Anisha on 13th January, 2006. It was also submitted that the attitude of the respondent-wife to block all interaction between the petitioner and the child in order to alienate the child completely from the petitioner and to deprive her of the petitioner's love and affection as a father, was also a factor which went against the respondent being given custody of the minor. Mr. Divan submitted that obsession of the respondent-wife for exclusive custody of the minor child was commented upon by the High Court and the very fact that she has also filed an appeal only with regard to 50% access given to the petitioner-husband during the minor's school vacations, also made her obsession for exclusive custody, to the detriment of the child's interest, very clear. It was submitted that a parent who poisons the child's mind against her father does not act in the child's welfare and should not, therefore, be entrusted with the custody of the child. Mr. Divan submitted that the minor child requires love and care of both the parents and even if the relationship between the two are disrupted, the child should not be deprived of a meaningful relationship with both the parents. It was urged that while the wishes of the minor are to be considered seriously in deciding a matter of custody, the same was not the sole criteria and it would have to be seen as to who would be more suitable for the upbringing of the child, who, till November, 2005, when the child was about 3½ years' old, did not even make an attempt to meet the child and was prepared to sacrifice the welfare of the child in order to pursue a film and television career. Mr. Divan submitted that in view of the conduct of the respondent and her denial of access to the minor despite the orders of this Court, the respondent should not be allowed to enjoy the fruits of her conduct.

7. In this regard, Mr. Divan referred to the decision of this Court in *Gaurav Nagpal vs. Sumedha Nagpal* [(2009) 1 SCC 42], wherein this Court, *inter alia*, held that the paramount consideration of the Court in determining the question as to who should be given the custody of a minor child, is the "welfare of the child" and not rights of the parents under the statute for the time being in force or what the parties say. The Court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings, but over and above physical comforts, the moral and ethical values should also be noted. They are equal, if not more important than the other. When the Court is confronted with conflicting statements made by the parents, each time it has to justify the demands and has not only to look at the issue on a legalistic basis but human angles are also to be considered as relevant for deciding the issues. In the facts of the said case where the father had flouted the orders of the Court in keeping the custody of the minor child with him, this Court observed that he cannot be a beneficiary of his own wrongs and the said fact cannot be ignored while considering the father's claim that the child had not been living with him since a long time. It was also observed that in child custody matters there should be a proper balance between the rights of the parents and the welfare of the child and in such circumstances, the choice of the minor is also an important consideration. Mr. Divan submitted that in the face of overwhelming evidence that the respondent should not be entrusted with the custody of the minor child, both the Family Court as well as the High Court quite inexplicably decided that the interest of the minor would be best served if custody was given to the respondent. It was submitted that if the welfare and future interest of the minor was to be taken into consideration, the order of the Family Court as affirmed by the High Court, was liable to be set aside and the custody of the minor child should be made over to the petitioner.

8. The submissions made by Mr. Shyam Divan were firmly

opposed by Ms. Meenakshi Lekhi, learned Advocate, who appeared for the respondent-wife. Learned counsel submitted that the allegation that the respondent-wife had abandoned her minor child was incorrect, since in March, 2005, when she left her matrimonial home, she took Anisha with her in terms of an arrangement between the petitioner and herself. Ms. Lekhi submitted that this aspect of the matter had been examined at some length by the learned Judge, Family Court, Mumbai at Bandra in his judgment dated 2nd February, 2007 and the allegation of the petitioner-husband that there was no communication between the respondent and the minor daughter stood contradicted by the evidence on record. In fact, the learned Judge, Family Court had gone on to observe that the contrary stand taken by the petitioner-husband and the positive statement brought out in his cross-examination was sufficient to dislodge his case that the respondent-wife had abandoned the child.

9. Ms. Lekhi also submitted that Mrs. A.R. Tulalwar, Marriage Counsellor appointed by the Principal Judge, Family Court, to ascertain the wishes of the minor child for the purpose of access by the respondent-wife, had in her final report indicated that the child shared a normal relationship with the respondent-wife and considering her age she needed her mother's company to strengthen the bond between them. It was also observed that the child was familiar with the mother and access would have to be worked out even outside the Court. In her second interview report, Mrs. Tulalwar further observed that Anisha share a very good relationship with her mother and was willing to spend time with her mother, and, in fact, this was her need at her age. Ms. Lekhi also referred to the interview which the Court had had with the child on 15th November, 2006, whereupon the Court concluded that as far as the wishes of the child were concerned, she did not want to leave her father as well as her mother, as she loved both of them very dearly and wanted them to reunite.

10. Ms. Lekhi submitted that the allegations regarding abandonment of the child by the respondent-wife were not, therefore, believed by the learned Principal Judge, Family Court, which ultimately felt that it would be in the best interest of the minor if her custody was made over to the respondent-wife.

11. As far as the allegations regarding denial of access by the respondent-wife to the petitioner to meet Anisha is concerned, it was urged that between 2007 till January, 2009, the petitioner made no attempt to exercise visitation rights given to him and did not make any attempt to meet the child. On the other hand, the petitioner who is very successful businessman and who has to go abroad very often, was not really interested in the welfare of the child since a suggestion had also been made by Dr. Haridas that if the petitioner-husband was not willing to accept custody of the child, she could always be sent to a boarding school.

12. Ms. Lekhi submitted that the order passed by the learned Principal Judge, Family Court, Mumbai at Bandra, as affirmed by the High Court, did not warrant any interference and the Special Leave Petitions were liable to be dismissed.

13. Having the interest of the minor in mind, we decided to meet her separately in order to make an assessment of her behavioural pattern towards both the petitioner as well as the respondent. Much against the submissions which have been made during the course of hearing of the matter, Anisha appeared to have no inhibitions in meeting the petitioner-father with whom she appeared to have an excellent understanding. There was no evidence of Anisha being hostile to her father when they met each other in our presence. From the various questions which we put to Anisha, who, in our view, is an extremely intelligent and precocious child, she wanted to enjoy the love and affection both of her father as well as her mother and even in our presence expressed the desire that what she wanted most was that they should come together again.

However, Anisha seems to prefer her mother's company as the bonding between them is greater than the bonding with her father. Anisha is a happy child, the way she is now and having regard to her age and the fact that she is a girl child, we are of the view that she requires her mother's company more at this stage of her life. There is no doubt that the petitioner is very fond of Anisha and is very concerned about her welfare and future, but in view of his business commitments it would not be right or even practicable to disturb the status quo prevailing with regard to Anisha's custody. The conditions laid down by the High Court regarding visitation rights to the petitioner are, in our view, sufficient for Anisha to experience the love and affection both of her father and mother. There is no reason why the petitioner, who will have access to Anisha on holidays and weekends, cannot look after her welfare without having continuous custody of her person. As has repeatedly been said, in these matters the interest of the minor is of paramount importance to the Court which stands in *loco parentis* to the minor. Of course, the wishes of the minor are to be given due weightage, and, in the instant case, the same has been done.

14. We, therefore, see no reason to interfere with the order passed by the learned Principal Judge, Family Court, Mumbai at Bandra, as affirmed by the Bombay High Court.

15. The Special Leave Petitions are, accordingly, dismissed and all interim orders are hereby dissolved.

R.P. SLPs dismissed.

KARAM KAPAHI & OTHERS
v.
M/S. LAL CHAND PUBLIC CHARITABLE TRUST & ANOTHER
(Civil Appeal No. 3048 of 2010)

APRIL 7, 2010

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

Constitution of India, 1950:

Article 136 – Suit by Trust (lessor) against Club (lessee) seeking termination of club's lease for non-payment of rent – Suit by Club questioning title of Trust – Admission by Club in the written statement that there was execution of lease deed and non-payment of rent – Application u/s. 114 of 1882 Act, by Club, seeking relief against forfeiture for non-payment of rent, in suit filed by Trust – Trust filing application u/O. 12 r. 6 for passing judgment on admission – High Court decreeing the suit for possession since clear admission by club about non-payment of rent and directing the Club to hand over vacant possession – Challenge to – Held: Controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by court – Court can consider the stand of the Club in its petition u/s.114 in pronouncing judgment on admission in view of clear words 'pleading or otherwise' used therein – Stand of the Club while questioning the title of the Trust is inconsistent with its stand in the application u/s. 114 – Club approbates and reprobates which is not legally permissible – Doctrine of Election is applicable – Suit by Club questioning title of the Trust was dismissed and nothing on record to show that it has been restored – Club is prima facie stopped from challenging the title of the Trust – Thus, Club not entitled to any equitable relief under Article 136 having regard to its conduct – It

adopted dilatory tactics in prolonging the litigation – Thus, order of High Court upheld – Code of Civil Procedure, 1908 – O. 12 r. 6 – Transfer of Property Act, 1882 – s. 114 – Evidence Act, 1872 – s. 116 – Doctrines.

Code of Civil Procedure, 1908:

Or. 12 r. 6 – Judgment on admission – Object of – Held: Is to give the plaintiff a right to speedy judgment – Under O. 12 r 6 admissions can be inferred from facts and circumstances of the case.

Doctrines/Principles:

Doctrine of Election – Applicability of.

Principle of 'approbate and reprobate' – Applicability of.

The respondent-Charitable trust had leased out certain property to the Club-lessee for 25 years. The trust and some of its members filed a suit against the Club seeking termination of club's lease for non-payment of lease rent by the Club. The trust had issued several letters as also legal notices calling upon the Club to pay the rent but the Club did not give reply. Thereafter, the trust by a legal notice terminated the tenancy of the Club. The Club filed a suit seeking a declaration to the effect that the trust has no right, title and interest in the suit premises; for cancellation and revocation of the sub-lease and restrain the trust from claiming and demanding any lease rent from the Club. The trust filed written statement. The application as well as the suit were dismissed for default. The Club filed its application for restoration of the suit and the same was kept pending. In the suit filed by the trust, the Club filed its written statement. It admitted that there was an execution of sub-lease between the parties though the title of the trust over the suit property was disputed; that it had not paid rent and was ready to deposit the same. The Club filed an application praying

that the trust be restrained from receiving the lease money. High Court dismissed the same and directed the Club to pay the arrears of rent. The said order became final. However, the Club did not comply with the direction given by the Single Judge. The Club filed an application u/s. 114 of the Transfer of Property Act seeking relief against forfeiture for non-payment of rent, in the suit filed by the Trust. Thereafter, the Trust filed an application under Order 12 Rule 6 CPC for passing a judgment on admission. The trust stated that in the written statement filed by the Club, the club admitted the relationship of lessor and lessee; rent being above Rs.3500/- p.m.; a notice of termination of lease of the Club has been duly served on the Club and non-payment of rent by the Club, were also admitted. Trial judge held that the Club was not entitled to relief u/s. 114 of the Transfer of Property Act; and that since there is clear admission by the club about non-payment of rent, the plaintiff-trust is entitled to a decree for possession in respect of the entire suit property. The Division Bench dismissed the appeal and directed the Club to hand over vacant possession in respect of the suit property to the Trust. Even after disposal of appeal, the club took several steps for delaying the execution of the decree. Applications were filed and were dismissed. Hence the present appeals, one by some members of the Club and other by the Club. This Court stayed the operation of the High Court's judgment.

Dismissing the appeals, the Court

HELD: 1.1. The principles behind Order 12 Rule 6 of CPC are to give the plaintiff a right to speedy judgment. Under this Rule either party may get rid of so much of the rival claims about 'which there is no controversy'. The thrust of the amendment to Order 12 Rule 6 by the Amendment Act of 1976 is that in an appropriate case, a

party, on the admission of the other party, can press for judgment, as a matter of legal right. However, the Court always retains its discretion in the matter of pronouncing judgment. [Paras 46 and 48] [443-G; 444-D]

Thorp vs. Holdsworth **(1876) 3 Chancery Division 637, referred to.**

1.2. If the provision of Order 12 Rule 1 is compared with Order 12 Rule 6, it becomes clear that the provision of Order 12 Rule 6 is wider in as much as the provision of order 12 Rule 1 is limited to admission by 'pleading or otherwise in writing' but in Order 12 Rule 6 the expression 'or otherwise' is much wider in view of the words used therein namely: 'admission of fact, either in the pleading or otherwise, whether orally or in writing'. Under Order 12 Rule 6 admissions can be inferred from facts and circumstances of the case. Admissions in answer to interrogatories are also covered under this Rule. In the instant case, where the controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by Court. [Paras 49, 50 and 55] [444-E-H; 445-G]

Shikharchand and Ors. vs. Mst. Bari Bai and Ors. **AIR 1974 Madhya Pradesh 75, approved.**

Charanjit Lal Mehra and Ors. v. Kamal Saroj Mahajan (Smt.) and Anr. **(2005) 11 SCC 279;** *Uttam Singh Duggal and Co. Ltd., v. United Bank of India and Ors.* **(2000) 7 SCC 120, referred to.**

Mullas's commentary on the Code, 16th Edition, Volume II, ***page*** **2177, referred to.**

1.3. In the instant case, even though statement made by the Club in its petition under section 114 of the Transfer of Property Act does not come within the definition of the word 'pleading' under Order 6 Rule 1 of

the Code, but in Order 12 Rule 6 of the Code, the word 'pleading' has been suffixed by the expression 'or otherwise'. Therefore, a wider interpretation of the word 'pleading' is warranted in understanding the implication of this rule. Thus, the stand of the Club in its petition under section 114 of the Property Act can be considered by the Court in pronouncing judgment on admission under Order 12 Rule 6 in view of clear words 'pleading or otherwise' used therein especially when that petition was in the suit filed by the Trust. However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word "may" has been used. But in the given situation, as in the instant case, the said provision can be applied in rendering the judgment. [Paras 58, 59 and 60] [447-C-F]

1.4. The Club has taken inconsistent pleas. On the one hand the Club alleged that the trust is not its lessor and has no right to receive the lease rent and it questions the title of the Trust. On the other hand the Club is seeking the equitable remedy against forfeiture under section 114 of the Transfer of Property Act where it has proceeded on the basis that the Trust is its lessor and the Club is the lessee and as a lessee it has to pay the lease rent to the Trust. The Club is relying on the same instrument of lease. Therefore, the Club seeks to approbate and reprobate. Legally this is not permissible. The common law doctrine of Election is a part of the jurisprudence and applies in the instant case. [Paras 61, 63 and 69] [447-G-H; 448-A, C; 450-C]

Nagubai Ammal and Ors. vs. B. Shama Rao and Ors. **AIR 1956 SC 593;** *Bhanu Ram vs. Baij Nath Singh and Ors.* **AIR 1961 SC 1327;** *C. Beepathuma and Ors. vs. Velasari Shankaranarayana Kadambolithaya and Ors.* **AIR 1965 SC 241, referred to.**

Verschures Creameries Ltd. vs. Hull and Netherlands Steamship Co. Ltd. **1921-2 KB 608;** *Streatfield vs. Streatfield* **9th Edition, Volume I, 1928, referred to.**

'*Equity-A course of lectures*' **by F.W. Maitland, Cambridge University, 1947;** *Halsbury's Laws of England* **Volume XIII page 454 para 512, referred to.**

1.5. From the pleadings between the parties it is clear that the Club admitted in its written statement that the Trust is its lessor; that it has not paid the lease rent; that the lease rent is more than Rs.3500/- per month in its reply to the Trust's petition under Order 12 Rule 6; and also admitted the receipt of notice of termination of lease issued by the Trust on the ground of non-payment of lease rent. [Para 71] [450-F-H; 451-A]

1.6. The suit filed by the Club questioning the title of the Trust as its lessor has been dismissed and nothing has been shown to this Court that it has been restored as on date. Such a plea is prima facie not acceptable in view of the provisions under section 116 of the Evidence Act. Section 116 prima facie applies to the instant case and the Club is prima facie stopped from challenging the title of the Trust. [Paras 72 and 73] [451-B; 451-G]

D. Satyanarayana vs. P. Jagadish **(1987) 4 SCC 424, distinguished.**

2.1. The jurisdiction of this Court under Article 136 of the Constitution is basically one of conscience. The jurisdiction is plenary and residuary in nature. It is unfettered and not confined within definite bounds. Discretion to be exercised here is subject to only one limitation and that is the wisdom and sense of justice of the judges. This jurisdiction has to be exercised only in suitable cases and very sparingly. While exercising jurisdiction under Article 136 the conduct of the party is

a relevant factor and in a given situation this Court may refuse its discretionary jurisdiction under Article 136. [Paras 76 and 79] [452-F; 453-B, C, D]

2.2. The Club is not entitled to any equitable relief under Article 136 of the Constitution having regard to its conduct. From the facts it is clear that the Club was very negligent in pursuing its case. Its case was dismissed on several occasions. The Club also adopted dilatory tactics in prolonging the litigation. Even after losing the appeal before the High Court, the Club, through its members initiated several proceedings to stall the execution of the decree and in those proceedings the High Court held that with knowledge of the Club those proceedings by the members were initiated. Even while filing the Special Leave Petition before this Court, initially the members of Club came with the usual plea of not being aware of the eviction proceeding against the Club as they were not parties to the same. On that plea the members initially obtained a stay of the execution proceedings. Thereafter, the Club taking advantage of the existing stay order, filed its SLP. On facts, it is clear that the conduct of the Club is such as to disentitle it to any discretionary remedy. Thus, for the reasons aforesaid, this Court is not inclined to interfere in exercise of its jurisdiction under Article 136. The costs assessed at Rs.25,000/- is to be paid by the Club to the Trust. The order of High Court is upheld. [Paras 74, 75 and 80] [451-H; 452-A-D; 453-F]

Kunhayammed and Ors. vs. State of Kerala and Anr. **(2000) 6 SCC 359;** *Preetam Singh vs. The State* **AIR 1950 SC 169;** *Municipal Board, Pratabgarh and Anr. vs. Mahendra Singh Chawla and Ors.* **(1982) 3 SCC 331;** *Transmission Corpn. of A.P. Ltd. vs. Lanco Kondapalli Power (P) Ltd.* **(2006) 1 SCC 540; *J**agraj Singh vs. Birpal Kaur* **(2007) 2 SCC 564 *T**anna and Modi vs. CIT, Mumbai* ***XXV and Ors.*** **(2007) 7 SCC 434;** *Prestige Lights Ltd. vs. State Bank of India* **(2007) 8 SCC 449, relied on.**

Case Law Reference:

(1876) 3 Chancery Division 637	**Referred to.**	**Para 46**
(2005) 11 SCC 279	**Referred to.**	**Para 50**
(2000) 7 SCC 120	**Referred to.**	**Para 51**
AIR 1974 Madhya Pradesh 75	**Approved.**	**Para 57**
1921-2 KB 608	**Referred to.**	**Para 63**
AIR 1961 SC 1327	**Referred to.**	**Para 63**
AIR 1956 SC 593	**Referred to.**	**Para 66**
AIR 1965 SC 241	**Referred to.**	**Para 68**
(1987) 4 SCC 424	**Distinguished.**	**Para 73**
(2000) 6 SCC 359	**Relied on.**	**Para 76**
AIR 1950 SC 169	**Relied on.**	**Para 76**
(1982) 3 SCC 331	**Relied on.**	**Para 78**
(2006) 1 SCC 540	**Relied on.**	**Para 79**
(2007) 2 SCC 564	**Relied on.**	**Para 79**
(2007) 7 SCC 434	**Relied on.**	**Para 79**
(2007) 8 SCC 449	**Relied on.**	**Para 79**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3048 of 2010.

From the Judgment & Order dated 9.1.2009 of the High Court of Delhi at New Delhi in RFA (OS) No. 34 of 2002.

WITH

Civil Appeal No. 3049 of 2010.

Ravi Shankar Prasad and Soli J. Sorabjee, Sandeep Narain (for S. Narain & Co.), Manu Nair (for Rajiv Nanda), Anand Misra, Ekta Kapil Gaurav Chauhan, Sudhanshu Goil and Bikash Mohanty (for B. Vijayalakshmi Menon) for the appearing parties.

The Judgment for the Court was delivered by

GANGULY, J. 1. Leave granted in both the petitions, being SLP(C) No. 9080/2009 filed by Karam Kapahi and three others and SLP(C) No.9091 of 2009 filed by M/s South Delhi Club Ltd.

2. Both the appeals impugn the judgment and order dated 9.1.2009 passed by a Division Bench of Delhi High Court in RFA (OS) No. 34/2002.

3. In the appeal filed by Karam Kapahi, Sujit Madaan, Anup Malik and Neeraj Girotra, it is asserted that as members of the M/s South Delhi Club Ltd. (hereinafter referred to as the 'Club') they are directly affected by the judgment and decree passed in Suit (Suit No.518 of 1999) filed by the respondent Trust. Challenging the judgment and decree in the suit, Appeal RFA (OS) No. 34 of 2002 was filed by the Club. Their main contention in the SLP is that they were not parties to the Suit but they may be affected by the orders passed therein. On such representation a Bench of this Court by an order dated 9.4.2009 permitted them to file a special leave petition and also issued notice and stayed further proceedings for the execution of the judgment and decree of the High Court.

4. About a fortnight thereafter, the Club filed another Special leave petition (C) No. 9091/2009 challenging the same judgment of the Appellate Bench of the High Court and a Bench of this Court on 24.4.2009 in view of the previous notice already against the same judgment issued notice in that special leave petition filed by the Club and directed it to be tagged with the earlier special leave petition (C) No. 9080/2009 filed by the

members. Both the matters were heard together in view of common questions of fact and law in these matters.

5. The material facts are as under.

6. Respondent No.1 – M/s Lal Chand Public Charitable Trust and Anr., a registered charitable trust (hereinafter, 'the Trust') was the lessor and the Club was the lessee. On or about 16.12.1998 the Trust and some of its members filed a Suit, being Suit No. 518/1999, before the Delhi High Court against the Club in view of termination of club's lease for non-payment of lease rent by the Club. The suit was for possession in respect of its land and building situated at Central Park, Greater Kailash-I, New Delhi and also for recovery of an amount of Rs. 11,60,000/- as damages and mesne profit and also for future damages.

7. In the said plaint the stand of the plaintiff-trust was that by a sub-lease dated 4.11.1965 property in question (fully described in the plan attached to the plaint) was leased to the Club for 25 years. Thereafter, Supplementary deed of Sub-lease dated 25.7.1979 was also executed between the parties and the same was duly registered. As the supplementary lease dated 25.7.1979 expired on 3.11.1990, the Club requested the Trust for a further renewal and further renewal was given for a period of 25 years from 4.11.1990 on the terms and conditions as stipulated in the Agreement and the said lease was also duly registered.

8. In terms of the sub-lease, the Club undertook to pay quarterly to the Trust on account of monthly lease rent by the 10th of the beginning of each quarter month, and a sum equivalent to 14% of the monthly subscription paid or payable by the members of the Club. It is also averred in the plaint that it is agreed between the parties that in case of default in payment of lease rent for two consecutive quarters, the Trust will be entitled to terminate the said sub-lease.

9. The case of the respondent-Trust is that the Club defaulted in payment of rent and before the filing of the Suit the Trust issued several letters dated 25.12.1996, 14.1.1997 and 18.6.1997 calling upon the Club to pay the rent but as the Club failed to pay the amount, the respondent-Trust served a legal notice dated 25.7.1997, again calling upon the Club to pay the entire lease rent failing which, it was made clear, that the Trust will take legal action. The exact averment in the plaint is as follows:

> "…thus compelling the plaintiff to serve a legal notice dated 25.7.1997 and by the said notice, the defendant was called upon to pay the entire lease money failing which the defendant was informed that the plaintiff shall be left with no option but to terminate the sub-lease and take further legal action in the matter. The said notice was duly received by the defendant and despite receipt of the notice; the defendant did not pay the amount."

10. In the Written Statement filed by the Club, paragraph (9) of the plaint was dealt with in paragraph (9) of the Written Statement but the aforesaid fact was not denied.

11. Prior to suit another legal notice dated 28.10.1997 was issued by the Advocate on behalf of the Trust to the Club wherein it was expressly stated that the Club has deliberately committed default in making payment for the quarters ending September 1996, December, 1996, March 1997, June 1997, September 1997, December 1997, March 1998, June, 1998 despite service of previous notices.

12. It appears that the Club did not respond to the said notice. This has been stated in paragraph 10 of the plaint and it has been further averred that the said notice dated 28.10.1997 sent by the Advocate on behalf of the trust was received by the Club but the Club did not give any reply. This fact was not denied in paragraph (10) of the Written Statement filed by the Club.

13. Thereafter a legal notice dated 2.12.1997 was sent on behalf of the Trust terminating the tenancy of the Club in view of non-payment of lease rent and the arrears and calling upon the Club to hand over the peaceful vacant possession. The said notice has been disclosed by the Club in its special leave petition before this Court.

14. After the Trust terminated the tenancy of the Club by its notice dated 2.12.1997, a reply was sent by the Club on 6.12.1997 with a plea that the Trust is not the lessor of the suit premises and has no right to let out the same to the Club and thus inter alia the title of the Trust over the suit premises was challenged. In the said reply, the Club pointed out to a suit filed by it, namely, Suit No. 1605 of 1997 (South Delhi Club Limited v. DLF Housing and Construction and others). However, prior thereto the Trust gave its notice dated 25.7.1997 demanding rent.

15. The main contention in Club's suit, inter alia, is that the Trust has divested itself from its ownership over the suit property and has ceased to be its owner and as such is not entitled to any beneficiary interest. In the suit a declaration was sought to the effect that the Trust has no right, title and interest in the suit premises and also for cancellation and revocation of the sub-lease dated 23.09.1992 and with a further prayer to restrain the Trust from claiming and demanding any lease rent from the Club.

16. To that suit, being 1605 of 1997, the Trust filed a written statement on 17.08.1998 and also filed an application for rejection of plaint (I.A. No. 7294 of 1998). The Club was to file its replication to the written statement filed by the Trust. The matter was repeatedly adjourned on 18.3.1995, 15.9.1999 and 19.1.2000 but the Club did not file its replication nor did it take steps to effect service on defendant no.5. Under those circumstances, the Court declined the prayer of the Club for further adjournment to file their replication and directed the matter to be listed on 21.2.2002. It appears that the Club was not taking any step and the matter was adjourned from time to

time. On 10.12.2001, the matter again appeared and it was recorded that there was no appearance on behalf of the plaintiff i.e. the Club and the matter was directed to be listed on 8.4.2002. Nobody appeared for the Club on 8.4.2002, and the Court was pleased to pass the following order:-

> "There is no appearance on behalf of the plaintiff. On the last date also, nobody had turned up on his behalf.
>
> In the circumstances, the application as well as suit are dismissed for default."

17. Then on 8.5.2002 the Club filed its application for restoration of the suit and the restoration application was listed for disposal on 1.10.2002. Then again by an order dated 11.12.2002 the restoration application was ordered to be listed on 6.2.2003.

18. In the course of hearing of the matter before this Court nothing was produced to show that the said suit has been restored. It appears that the said application for restoration was kept pending and the last order for its listing was passed on 16.5.2006.

19. Now coming back to the suit filed by the Trust, it appears that in that suit (No. 518 of 1999) the Club filed its written statement on 14.2.2000.

20. On a perusal of the written statement of the Club, the following position will emerge:

(a) The club has admitted that there was an execution of sub-lease dated 4.11.1965 between the parties though the title of the trust over the suit property was disputed. It was also admitted in paragraph 8 that the Club withheld the payment of rent and was ready to deposit the same before the Registrar of the High Court. In paragraph 15 of the written statement the arrears of rent were worked out. In

paragraph 10 of the written statement non-payment has been admitted but the Club gave its reasons for such non-payment. In paragraph 11, 12 and 13 the notice of termination of the lease was acknowledged.

(b) In the said suit the Club filed an I.A. being 1724 of 2000 inter alia praying that the Trust be restrained from receiving the lease money.

(c) The said I.A. came up for hearing on 24.07.2000 and a learned Judge of the Delhi High Court inter alia held since the Club admitted that it was inducted as a tenant in the suit premises under the lease deed, it cannot withhold the payment of rent/ damages inter alia on the ground that the suit premises belong to MCD who had never demanded any rent. The I.A. was thus dismissed and the Club was directed to pay the arrears of rent from July 1996 till the date of the said order within a month from the date of the order. The operative portion of High Court's order dated 24.7.2000 is set out below:-

"...It is pertinent to note that under Section 116 of the Indian Evidence Act, a tenant is estopped from denying the title of the lessor to the tenanted premises during the continuane of lease. The Defendant having admitted that it was inducted as a tenant in the Suit premises by the Plaintiff under aforesaid two registered lease deeds, can not now withhold the payment of rent/damages on the ground of premises allegedly belonging to MCD who has not demanded any rent. I.A. 1724/2000 is, therefore, liable to be dismissed and in I.A.2281/99 an Order under Rule 10 of Order 39 CPC deserves to be passed against the Defendant directing it to pay the arrears of rent/damages since July 1996 and future rent/damages at the last paid rate which the Defendant's counsel had also undertaken

to pay as is manifest from the Order dated 15th December, 1999.

Accordingly, I.A. 1724/2000 is dismissed. In I.A.2281/99 the Defendant is directed to pay arrears of rent/damages since July 1996 till date at the last paid rate within one month from today and it will also continue to make payment thereof for the subsequent period, month by month at the same rate to the Plaintiff Trust."

21. Prior to that order dated 24.7.2000 in the suit filed by the Trust (Suit No. 518 of 1999) an order was passed on 15.12.1999 wherein it was recorded by the High Court that the counsel for the Club undertook to pay rent and clear all damages on or before the next date of hearing. The exact order passed by the High Court is set out below:-

"Ld. Counsel for defendant submit that defendants would make the payment of the rent/damages at the "last paid rate" and clear all arrears on or before the next date of hearing. It is made clear that payments made towards rent/ damages would be without prejudice to the rights and contentions raised by the defendants assailing the right of the plaintiff to receive payment of rent/damages."

22. Challenging the Single Bench order dated 24.7.2000, the Club filed an appeal being FAO (OS) No. 272 of 2000 before the Division Bench and one of the contentions of the Club was that the learned Single Judge was in error in holding that under Section 116 of the Indian Evidence Act, a tenant is estopped from denying the title of the lessor to the tenanted premises during the continuance of the lease. However, the said appeal with all those contentions of the Club was dismissed in-limine by a Division Bench of the Delhi High Court by an order dated 19.9.2000 which reads as under:

"A copy of the order dated 15th December, 1999 passed in this very suit has been brought to our notice. In view of

the said order, in our view it is not even open to the appellant to raise this issue of payment of rent/damages to the respondents again. The said order has been passed protecting the rights and contentions of the respective parties. In view of the said order, this appeal is dismissed in limine."

23. It appears that the said order of the High Court dated 19.9.2000 was never challenged by the Club and it became final. However, the direction which was given by the learned Single Judge in its order dated 24.7.2000 referred to hereinabove was not complied with by the Club.

24. Then on 8.5.2001, the Club filed an application under Section 114 of the Transfer of Property Act in the suit filed by the Trust (Suit No.518 of 1999).

25. In the said application the stand of the Club is that the controversy between the parties, namely, the Trust and the Club has been resolved and the Club has no objection to pay the rent reserved under the said sub-lease dated 23.9.1992. In paragraphs (7) and (8), the Club made this categorical statement:

"7. That with the disclosure of the said documents the controversy between the parties stands resolved and the Defendant can have no objection to paying the rent reserved under the said sub-lease Deed dated 23.9.1992.

8. That the Defendant has paid a portion of the arrears of rent and undertakes to pay all future rent in accordance with the terms of the said sub-lease Deed dated 23.9.1992".

26. In that application a prayer was made for relieving the Club against forfeiture resulting from the non-payment of rent and to declare that the Club holds the suit property as if the forfeiture has not occurred on the Club's undertaking to honour all its obligations under the sub-lease dated 23.9.1992.

27. Sometime in May 2000, the Trust, in its Suit, filed an application under Order 12 Rule 6 of the Code of Civil Procedure for passing a judgment on admission. In the said application in paragraph 4, the Trust asserted that on a perusal of the written statement filed by the Club following things are admitted; (i) relationship of Lessor and Lessee (ii) Rent being above Rs.3500/- p.m. and (iii) a notice of termination of lease of the Club has been duly served on the Club and (iv) non-payment of rent by the Club.

28. To that application a reply was filed by the Club. While replying the averments made in paragraph 4 of that application, the Club only referred to the suit filed by the Club stating that the lease in question is fraudulent and is under challenge, but specific averments made in paragraph 4 of Trust's application were not denied. In answer to the averment made in paragraph 6 of the Trust's application about the monthly rent of the suit premises, no specific denial was given by the Club except urging that the lease deed is void ab-initio.

29. The suit filed by the Trust then came up for hearing and by a judgment and order dated 22.10.2002 the learned Trial Judge refused to grant relief under Section 114 of the Transfer of Property Act. The Court also held that since there is clear admission by the club about non-payment of rent the plaintiff is entitled to a decree for possession in respect of the entire suit property.

30. Then an appeal was filed by the Club impugning the said judgment which was dismissed by a Division Bench of the Delhi High Court by judgment and order dated 9.1.2009.

31. The Division Bench also held that the conduct of the Club disentitles it from the equitable relief under Section 114.

32. The Division Bench after dismissing the appeal directed the Club to hand over vacant possession in respect of the suit property to the Trust by 31.3.2009.

33. It is interesting to note that even though in its petition under Section 114 of the Transfer of Property Act, the Club took a stand that it has no objection of paying the rent reserved under the sub-lease dated 23.9.1992, in the appeal which was filed by the Club being RFA (OS) No.34 of 2002 against the order of Single Judge dated 22.10.2002, the Club took a totally contrary stand that the Trust has no right or title over the suit premises and it cannot demand the rent.

34. It appears that in the course of the appeal, the Club took various contrary stands and adopted various dilatory tactics**.** From the order passed by the Division Bench of the High Court, it appears that it has been noted that the appellant took various adjournments before concluding its arguments and sought adjournments on 21.7.2003, 11.12.2003, 12.4.2004, 13.10.2004, 23.11.2004 11.1.2005, 7.2.2005, 2.8.2005, 16.9.2005 and as a result of which the appeal was dismissed for non-prosecution on 18.10.2005 by the Division Bench.

35. Thereafter, the Club again filed an application for restoration of the appeal and the appeal was restored by the Division Bench on 16.1.2006 wherein the Court commented upon the dilatory tactics resorted to by the Club and restored the appeal by imposing a cost of Rs.10,000/- on the Club.

36. As the Division Bench refused to grant any stay of the order dated 30.11.2005 in respect of the execution proceeding, the Club filed a special leave petition being SLP (C) No. 25261 before this Court. The said Special Leave Petition was disposed of by this Court by an order dated 6.7.2006. While disposing of the said petition, this Court was pleased to observe that the appeal filed by the Club should be disposed of within a reasonable time and all dilatory tactics adopted by the tenant-Club should be defeated. After observing that this Court ordered that the High Court should dispose of the appeal with utmost expedition preferably within six months and made it clear that in case the tenant-Club adopts dilatory tactics in the disposal of the appeal within the time schedule, the High

Court shall record an order to that effect that the interim order passed by this Court shall stand vacated and the decree may be executed, if necessary, by deputation of armed forces.

37. Even though this Court by its order dated 6.7.2006 directed the disposal of the appeal within six months, it was disposed of, as stated above, only in the month of January, 2009.

38. Even after the disposal of the appeal, several steps were taken delaying the execution of the decree. Some Members of the Club filed a petition praying for extension of time for handing over possession beyond 31st March, 2009 as that was the deadline to hand over possession by the Club to the trust. The Members prayed for extension of time of eight weeks from 31.3.2009. The application by the members was dismissed by the Division Bench of the High Court by an order dated 24.3.2009.

39. Thereafter, another set of Members filed a suit being CS(OS) No. 509/2009 before the Delhi High Court with a prayer to set aside the judgment of the learned Single Judge dated 22.10.2002 which was affirmed by the Division Bench by its judgment dated 9.1.2009.

40. I.A. No. 3583/2009 was also filed in the said suit for staying the operation of the order dated 22.10.2002 passed by the Single Judge. The said application was also dismissed by a detailed order of the Delhi High Court on 30.3.2009. While doing so the Court observed that the Club and its members were fully aware about the pendency of the suit, the passing of the judgment and decree as well as of the appeal filed against the judgment otherwise resolution could not have been passed on 23.10.2002 in favour of Mr. Bhandari to file the appeal against the judgment and decree of the High Court.

41. The said judgment dated 30.3.2009 passed in the I.A. was not challenged.

42. In the earlier part of this judgment, this Court noted that the first special leave petition against the Division Bench Judgment was filed by some members of the Club, inter alia, on the ground that they are affected by the judgment and decree of the High Court to which they were not made parties and on such representation, this Court issued notice and stayed the operation of the High Court's judgment dated 9.1.2009. About a fortnight thereafter the Club filed its special leave petition and took advantage of the previous order of stay which was passed by this Court and got its special leave petition tagged with the petition filed by the Club members. Now this Court is hearing both the petitions together.

43. In the background of these facts, Mr. Ravi Shankar Prasad, learned Senior Counsel for the appellant-Club highlighted the following points in support of his submission that the appeal should be allowed:

(a) The High Court erred by applying the principles of Order 12 Rule 6 of Civil Procedure Code in the facts and circumstances of this case as there was no clear admission by the Club of case of the Trust in its plaint.

(b) The principles of Section 114 of the Transfer of Property Act are independent of the provision of Order 12 Rule 6. Section 114 of the Transfer of Property Act is an equitable remedy for a lessee in a given case and the stand taken in a proceeding under Section 114 cannot be taken into consideration to reach a finding under Order 12 Rule 6 of the Code.

(c) Assuming there is failure to deny case in the plaint that does not necessarily amount to proof and the Court before granting decree ought to have considered the proviso to Order 8 Rule 5 of the Code.

(d) The overall conduct of a litigant in pursuing the case at various stages cannot be considered for the purpose of disentitling it from getting an equitable relief in a proceeding under Section 114 of the Transfer of property Act.

(e) In the facts of this case, bar of estoppel under Section 116 of the Evidence Act does not operate on the Club from questioning the title of the Trust.

44. On the other hand, Mr. Soli J. Sorabjee, learned Senior Counsel appearing on behalf of the Trust advanced the following submissions:-

(a) The object of Order 12 Rule 6 is to enable a party to obtain speedy judgment and the application of the Rule cannot be narrowed down. According to the learned counsel, certain relevant and vital facts in the plaint of the Trust have been admitted by the Club.

(b) The learned Counsel further submitted that in the instant case, the Club cannot question the title of the landlord i.e. the Trust, and the suit (Suit No. 1605 of 1997) which it filed questioning the title of the Trust was dismissed and there is nothing on record to show that it has been restored.

(c) The contentions which the Club raised in its petition for relief under Section 114 of the Transfer of Property Act were not taken without prejudice to its stand in the written statement. Club's admissions in the written statement and in its petition under Section 114 of the Transfer of Property Act are clear and the Court can take both into consideration.

(d) The stand of the Club in its suit and in its application filed in the Trust's suit for restraining the Trust from

receiving the rent is inconsistent with the Club's stand in its application under Section 114 of the Transfer of Property Act. The Club thus approbates and reprobates which it legally cannot do.

(e) The Club did not accept the order dated 24.7.2000 passed by the learned Single Judge directing it to pay arrears from July 1996 but it was challenged by the Club by way of appeal, which was dismissed. Assuming subsequent payments were made pursuant to the said order dated 24.7.2000 that does not efface the consequences of non-payment in the past.

(f) Reliance on the first proviso to Order 8 Rule 5 of the Code is misconceived and in the instant case both the learned Single Judge and the Division Bench on appreciation of the pleading held that there were clear admissions.

(g) In the facts and circumstances of the case and on its overall conduct, the Club is not entitled to obtain the discretionary relief from this Court under Article 136 of the Constitution of India.

45. Considering the aforesaid rival contentions of the parties, this Court is unable to accept the stand of the appellant and is inclined to dismiss both the appeals for the reasons discussed hereinbelow.

46. The principles behind Order 12 Rule 6 are to give the plaintiff a right to speedy judgment. Under this Rule either party may get rid of so much of the rival claims about 'which there is no controversy' [See the dictum of Lord Jessel, the Master of Rolls, in *Thorp versus Holdsworth* in (1876) 3 Chancery Division 637 at 640]. In this connection, it may be noted that order 12 Rule 6 was amended by the Amendment Act of 1976.

47. Prior to amendment the Rule read thus:-

"6. Judgment on admissions. – Any party may, at any stage of a suit, where admissions of facts have been made, either on pleadings or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties and the Court may upon such application make such order or give such judgment, as the Court may think just."

48. In the 54th Law Commission Report, an amendment was suggested to enable the Court to give a judgment not only on the application of a party but on its own motion. It is thus clear that the amendment was brought about to further the ends of justice and give these provisions a wider sweep by empowering judges to use it 'ex debito justitial, a Latin term, meaning a debt of justice. In our opinion the thrust of the amendment is that in an appropriate case, a party, on the admission of the other party, can press for judgment, as a matter of legal right. However, the Court always retains its discretion in the matter of pronouncing judgment.

49. If the provision of order 12 Rule 1 is compared with Order 12 Rule 6, it becomes clear that the provision of Order 12 Rule 6 is wider in as much as the provision of order 12 Rule 1 is limited to admission by 'pleading or otherwise in writing' but in Order 12 Rule 6 the expression 'or otherwise' is much wider in view of the words used therein namely: 'admission of fact……either in the pleading or otherwise, whether orally or in writing'.

50. Keeping the width of this provision in mind this Court held that under this rule admissions can be inferred from facts and circumstances of the case [See *Charanjit Lal Mehra and others v. Kamal Saroj Mahajan (Smt.) and another,* (2005) 11 SCC 279 at page 285 (para 8)]. Admissions in answer to interrogatories are also covered under this Rule [See Mullas's commentary on the Code, 16th Edition, Volume II, page 2177].

51. In the case of *Uttam Singh Duggal & Co. Ltd., v. United Bank of India and others,* (2000) 7 SCC 120, this Court, while construing this provision, held that the Court should not unduly narrow down its application as the object is to enable a party to obtain speedy judgment.

52. In that case it was contended on behalf of the appellant, Uttam Singh Duggal, that:

(a) Admissions under Order 12 Rule 6 should only be those which are made in the pleadings.

(b) The admissions would in any case have to be read along with the first proviso to Order 8 Rule 5 (1) of the Code and the Court may call upon the party relying on such admission to prove its case independently.

(c) The expression 'either in pleadings or otherwise' should be interpreted ejusdem generis. [See para 11, pages 126-127 of the report]

53. Almost similar contentions have been raised on behalf of the Club. In *Uttam Singh* (supra) those contentions were rejected and this Court opined no effort should be made to narrow down the ambit of Order 12 Rule 6.

54. In *Uttam Singh* (supra) this Court made a distinction between a suit just between the parties and a suit relating to Specific Relief Act where a declaration of status is given which not only binds the parties but also binds generations. The Court held such a declaration may be given merely on admission (para 16, page 128 of the report).

55. But in a situation like the present one where the controversy is between the parties on an admission of non-payment of rent, judgment can be rendered on admission by Court.

56. Order 12 Rule 6 of the Code has been very lucidly discussed and succinctly interpreted in a Division Bench judgment of Madhya Pradesh High Court in the case of *Shikharchand and others vs. Mst. Bari Bai and others* reported in AIR 1974 Madhya Pradesh 75. Justice G.P. Singh (as His Lordship then was) in a concurring judgment explained the aforesaid rule, if we may say so, very authoritatively at page 79 of the report. His Lordship held:-

"... I will only add a few words of my own. Rule 6 of Order 12 of the Code of civil Procedure corresponds to Rule 5 of Order 32 of the Supreme Court Rules (English), now rule 3 of Order 27, and is almost identically worded (see Annual Practice 1965 edition Part I. p. 569). The Supreme Court Rule came up for consideration in *Ellis v. Allen* (1914) Ch 904. In that case a suit was filed for ejectment, mesne profits and damages on the ground of breach of covenant against sub-letting. Lessee's solicitors wrote to the plaintiff's solicitors in which fact of breach of covenant was admitted and a case was sought to be made out for relief against forfeiture. This letter was used as an admission under rule 5 and as there was no substance in the plea of relief against forfeiture, the suit was decreed for ejectment under that rule. Sargant, J. rejected the argument that the rule is confined to admissions made in pleadings or under rules 1 to 4 in the same order (same as ours) and said:

"The rule applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed."

Rule 6 of Order 12, in my opinion, must bear the same construction as was put upon the corresponding English rule by Sargent, J. The words "either on the pleadings or otherwise" in rule 6 enable us not only to see the admissions made in pleadings or under Rules 1 to 4 of the same order *but also admissions made elsewhere during the trial."*

(Emphasis added)

57. This Court expresses its approval of the aforesaid interpretation of Order 12 Rule 6 by Justice G.P. Singh (as His Lordship then was). Mulla in his commentary on the Code has also relied on ratio in *Shikharchand* (supra) for explaining these provisions.

58. Therefore, in the instant case even though statement made by the Club in its petition under Section 114 of the Transfer of Property Act does not come within the definition of the word 'pleading' under Order 6 Rule 1 of the Code, but in Order 12 Rule 6 of the Code, the word 'pleading' has been suffixed by the expression 'or otherwise'. Therefore, a wider interpretation of the word 'pleading' is warranted in understanding the implication of this rule. Thus the stand of the Club in its petition under Section 114 of the Transfer of Property Act can be considered by the Court in pronouncing judgment on admission under Order 12 Rule 6 in view of clear words 'pleading or otherwise' used therein especially when that petition was in the suit filed by the Trust.

59. However, the provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor it is peremptory since the word "may" has been used.

60. But in the given situation, as in the instant case, the said provision can be applied in rendering the judgment.

61. The contentions of the Club cannot be accepted on another legal ground also. It is clear that the Club has taken inconsistent pleas. On the one hand the Club alleged that the Trust is not its Lessor and has no right to receive the lease rent and it questions the title of the Trust. On the other hand the Club is seeking the equitable remedy against forfeiture under Section 114 of the Transfer of Property Act where it has proceeded on the basis that the Trust is its Lessor and the Club

is the Lessee and as a Lessee it has to pay the lease rent to the Trust. Therefore, the Club seeks to approbate and reprobate.

62. The phrase 'approbate and reprobate' is borrowed from Scots Law where it is used to express the Common law principles of Election, namely, that no party can accept and reject the same instrument.

63. In the instant case while filing its Suit and questioning the title of the Trust, the Club seeks to reject the lease deed. At the same time while seeking the equitable remedy under Section 114 of the Transfer of Property Act, the Club is relying on the same instrument of lease. Legally this is not permissible. {See the observation of Scrutton, L.J., in *Verschures Creameries Ltd. vs. Hull and Netherlands Steamship Co. Ltd.,*- 1921-2 KB 608, which has been approved by a Constitution Bench of this Court in *Bhau Ram vs. Baij Nath Singh and Ors.* – AIR 1961 SC 1327]

64. The principle of Election has been very felicitously expressed in the treatise '*Equity – A course of lectures*' by F.W. Maitland, Cambridge University, 1947. The learned author has explained the principle thus:

> "The doctrine of Election may be thus stated: That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it….."

65. In the old equity case of *Streatfield vs. Streatfield* (White and Tudor's Leading Cases in Equity, 9th Edition, Volume I, 1928) this principle has been discussed in words which are so apt and elegant that I better quote them:

> "Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention

of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both (f). The principle is stated thus in Jarman on Wills (g): "That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it" (h). The principle of the doctrine of election is now well settled."

66. This principle has also been explained by this Court in *Nagubai Ammal and Ors. vs. B. Shama Rao and Ors.*- AIR 1956 SC 593. Speaking for a three-Judge Bench of this Court, Justice Venkatarama Ayyar stated in para 23 at page 602 of the report:

"The doctrine of election is not however confined to instruments. A person cannot say at time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election."

(f) Story (3rd ed.), p.452; Dillon v. Parker, 1 Swans.394, note (b); Thellusson v. Woodford, 13 V. 220.

(g) (6th ed.), 532; and see Farwell on Powers (3rd ed.), p.429.

(h) See Walpole v. Conway, Barn. C. 159; Kirkham v. Smith, 1 Ves. Sen. 258; Macnamara v. Jones, 1 Bro. Ch. 481; Blake v. Bunbury, 4 Bro. Ch. 21; Wintour v. Clifton, 21 B. 447; 8 De G. M. & G. 641; Codrington v. C., L.R. 7 H.L. 854, 861; Pitman v. Crum Ewing, [1911) A.C., at pp.228, 233; Brown v. Gregson, [1920] A.C. 860, 868.

67. On the doctrine of election the learned Judge has also referred to Halsbury's Laws of England, (Volume XIII page 454 para 512) in which this principle of 'approbate and reprobate' has been described as a species of estoppel which seems to be 'intermediate between estoppel by record and estoppel in pais' (Page 602 of the report).

68. The said principle has also been accepted by this Court in *C. Beepathuma and Ors. vs. Velasari Shankaranarayana Kadambolithaya and Ors.* – AIR 1965 SC 241, paragraphs 17-18.

69. Therefore, the common law doctrine of Election is a part of our jurisprudence and squarely applies in this case inasmuch as the Club has advanced inconsistent pleas as noted hereinabove.

70. In so far as non-payment of lease rent is concerned, the Club has admitted it in its written statement in paragraphs (8) and (10). The Club has also admitted it in its reply to the Trust's petition under Order 12 Rule 6 referred to hereinabove. The Club has also admitted non-payment of rent in its petition under Section 114 of the Transfer of Property Act where it sought the equitable remedy of forfeiture and which has been denied to it by the High Court for valid reasons.

71. From the pleadings between the parties in this case the following things are admitted:

(a) the Club has admitted in its written statement that the Trust is its Lessor;

(b) the Club has also admitted that it has not paid the lease rent;

(c) the Club has also admitted that the lease rent is more than Rs.3500/- per month in its reply to the Trust's petition under Order 12 Rule 6;

(d) the Club has also admitted the receipt of notice of termination of lease issued by the Trust on the ground of non-payment of lease rent.

72. The Suit filed by the Club questioning the title of the Trust as its Lessor has been dismissed and nothing has been shown to this Court that it has been restored as on date. Such a plea is prima facie not acceptable in view of the provisions under Section 116 of the Evidence Act. However, in support of its case that the Club is not estopped under Section 116 of the Evidence Act to challenge the title of the lessor, learned Counsel for the Club relied on a judgment of this Court in *D. Satyanarayana vs. P. Jagadish* – (1987) 4 SCC 424. The principle laid down in that decision is not attracted in the facts of this case.

73. In *D. Satyanarayana* (supra) the tenant was a sub-tenant of the tenant-respondent. The sub-tenant was threatened with eviction by the superior landlord. Being threatened with such eviction, the sub-tenant started paying monthly rent directly to the superior landlord. In such a situation the Court held that an exception to the rule of estoppel under Section 116 of the Evidence Act can be made since title of the landlord came to an end as he was evicted by the title paramount. The Court held even if there is a threat of eviction by the title paramount, the tenant can attorn to the title paramount and a new jural relationship of landlord and tenant may come into existence. In such a situation, a sub-tenant can question the title of the tenant and the bar under Section 116 of the Evidence Act cannot apply. Here the fact situation is totally different. Here the Club was not facing threat of eviction from anybody excepting the Trust and there is no question of a superior landlord. In the instant case Section 116 prima facie applies and the Club is prima facie stopped from challenging the title of the Trust.

74. Apart from the reasons discussed above, in our opinion the Club is not entitled to any equitable relief under Article 136 of the Constitution having regard to its conduct. From the facts

discussed above it is clear that the Club was very negligent in pursuing its case. Its case was dismissed on several occasions. The Club also adopted dilatory tactics in prolonging the litigation. Even after losing the appeal before the High Court, the Club, through its members initiated several proceedings to stall the execution of the decree and in those proceedings the High Court held that with knowledge of the Club those proceedings by the members were initiated. Even while filing the Special Leave Petition before this Court, initially the members of Club came with the usual plea of not being aware of the eviction proceeding against the Club as they were not parties to the same. On that plea the members initially obtained a stay of the execution proceedings. Thereafter, the Club taking advantage of the existing stay order, filed its SLP.

75. In the backdrop of these facts one thing is clear that the conduct of the Club is such as to disentitle it to any discretionary remedy.

76. The jurisdiction of this Court under Article 136 of the Constitution is basically one of conscience. The jurisdiction is plenary and residuary in nature. It is unfettered and not confined within definite bounds. Discretion to be exercised here is subject to only one limitation and that is the wisdom and sense of justice of the judges (See *Kunhayammed and others vs. State of Kerala and another* – (2000) 6 SCC 359 at 371). This jurisdiction has to be exercised only in suitable cases and very sparingly as opined by the Constitution Bench of this Court in the case of *Preetam Singh vs. The State* reported in AIR 1950 SC 169, at paragraph 9.

77. Over the years this view has been repeated in several cases and some of which are noticed hereunder.

78. In *Municipal Board, Pratabgarh and another vs. Mahendra Singh Chawla and others* reported in (1982) 3 SCC 331, a two Judge Bench of this Court held that in exercising the discretionary jurisdiction under Article 136 law is to be

tempered with equity and if the equitable situation so demands the Supreme Court should mould the final order (See paragraph 6).

79. Subsequently in *Transmission Corpn. of A.P. Ltd. vs. Lanco Kondapalli Power (P) Ltd.* reported in (2006) 1 SCC 540 this Court held that while exercising jurisdiction under Article 136 the conduct of the party is a relevant factor and in a given situation this Court may refuse its discretionary jurisdiction under Article 136 (See paragraphs 54, 55 and 56). Similar views have been expressed in the case of *Jagraj Singh vs. Birpal Kaur* reported in (2007) 2 SCC 564 wherein this Court held that the conduct of the parties is relevant when the Court is exercising its jurisdiction under Article 136 (See paragraph 30). In *Tanna & Modi vs. CIT, Mumbai XXV and others* reported in (2007) 7 SCC 434 this Court held it does not exercise its discretionary jurisdiction under Article 136 just because it is lawful to do so (See paragraph 23). In the case of *Prestige Lights Ltd. vs. State Bank of India* reported in (2007) 8 SCC 449 the Court refused to exercise jurisdiction under Article 136 of the Constitution having regard to the conduct of the parties.

80. For the reasons aforesaid this Court is not inclined to interfere in exercise of its jurisdiction under Article 136. Both the appeals, the one filed by Karam Kapahi & Others and the next one filed by the M/s. South Delhi Club Ltd. are dismissed with costs assessed at Rs.25,000/- (Rupees Twenty-five thousand) to be paid by M/s South Delhi Club to M/s. Lal Chand Public Charitable Trust within four weeks from date. The Judgment of the High Court is affirmed.

N.J. Appeals dismissed.

UNION OF INDIA & ORS.
v.
V.N. SINGH
(Civil Appeal No (s). 32 of 2003)

APRIL 08, 2010

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

Army Act, 1950:

s. 122 – Period of limitation for trial – Irregularities with regard to local purchase of certain goods in a Army Depot – Disciplinary action against an officer – General Court Martial convened and punishment of forfeiture of 11 years past service for purposes of pension, imposed – Set aside by High Court holding that GCM proceedings time barred – Sustainability of – Held: Not sustainable – Period of limitation for trial of the officer commenced when GOC-in-Chief-next superior authority in chain of command in terms of s.122(1)(b), came to know about the commission of offence by the officer and issued direction to take disciplinary action against him – GCM commenced trial after two years, thus was within the period of limitation in terms of s.122(1)(b) – Staff officer who ordered preliminary investigation, was not the person aggrieved by the offence – He only had technical control over the department – Thus, order of High Court set aside.

s. 122(1)(b) – Term 'person aggrieved by the offence' – Held: Is attracted to natural persons-human beings who are victims of an offence and not to juristic persons like an organisation.

Words and Phrases: 'Aggrieved' – Meaning of.

During the inspection of Reserved Petroleum Depot, Delhi Cantonment, certain irregularities were noticed with regard to local purchase of certain goods. The

respondent was the Officiating Commandant in RPD. The Technical Court of Inquiry and Staff Court of Inquiry was convened. The disciplinary action was initiated against the respondent. The Commanding Officer invoked s.123 of the Army Act and took the respondent into close custody. The respondent challenged the said order. The High Court stayed the order of the Commanding Officer. As directed by the High Court, General Court Martial was convened and the respondent was found guilty of some charges and the punishment of forfeiture of 8 year's past service for purpose of pension was imposed subject to the confirmation by the Major General, GOC. The Confirming Authority sent back the report to GCM to revise/reconsider the exoneration of respondent from some charges. The respondent filed writ petition. On direction from the Confirming Authority, GCM was convened. It passed a fresh order forfeiting 11 years of past service of respondent for the purpose of pension as well as the punishment of severe reprimand. The Confirming Authority approved the finding of GCM and imposition of sentence but did not approve the punishment of severe reprimand. The said order was promulgated and was handed over to the respondent. The respondent filed application for amendment. The High Court holding that GCM proceedings were initiated after expiry of the period of limitation prescribed by s.122(1)(b), quashed the GCM proceedings as well as the sentence imposed upon the respondent. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Section 122 of the Army Act, 1950 prescribes period of limitation for trial by Court Martial of any person subject to the provisions of the Act for any offence committed by him. A fair reading of s. 122 makes it clear that after the expiry of the period of limitation, the

Court Martial will ordinarily have no jurisdiction to try the case. Section 122 is a complete Code in itself so far as the period of limitation is concerned for not only it provides in Sub-section (1) the period of limitation for such trials but specifies in Sub-section (2) thereof, the offences in respect of which the limitation clause would not apply. Since the Section is in absolute terms and no provision has been made under the Act for extension of time, it is obvious that any trial commenced after the period of limitation will be patently illegal. The question of limitation to be determined u/s. 122 of the Act is not purely a question of law. It is a mixed question of fact and law and therefore in exercise of Writ Jurisdiction under Article 226 of the Constitution, ordinarily the High Court will not interfere with the findings of Court Martial on question of limitation decided u/s. 122 of the Army Act. Section 122 in substance prescribes that no trial by Court Martial of any person subject to the provisions of the Act for any offence shall commence after the expiration of a period of three years. It further explains as to when period of three years shall commence. It provides that the period of three years shall commence on the date of the offence or where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority whichever is earlier. [Paras 6 and 7] [469-F; 470-F-H; 471-A-F]

1.2. With regard to the question as to who is the person aggrieved within the meaning of s. 122(1)(b), according to the respondent Brigadier KS was the person aggrieved and the period of three years shall commence from the date when commission of offence by the respondent came to his knowledge on May 17, 1993 when Lt. Col. PO submitted his report to KS. The term "the person aggrieved by the offence" would be attracted to

natural persons i.e. human beings who are victims of an offence complained of, such as offences relating to a person or property and not to juristic persons like an organisation as in the instant case. The plain and dictionary meaning of the term "aggrieved" means hurt, angry, upset, wronged, maltreated, persecuted, victimised etc. It is only the natural persons who can be hurt, angry, upset or wronged or maltreated etc. If a Government organisation is treated to be an aggrieved person then the second part of s. 122(1)(b) i.e. "when it comes to the knowledge of the competent authority to initiate action'' will never come into play as the commission of offence will always be in the knowledge of the authority who is part of the organisation and who may not be the authority competent to initiate the action. [Para 7] [471-F-H; 472-A-D]

1.3. A meaningful reading of the provisions of s. 122(1)(b) makes it absolutely clear that in the case of Government organisation, it will be the date of knowledge of the authority competent to initiate the action, which will determine the question of limitation. Therefore, the finding of the High Court that KS was an aggrieved person is legally and factually incorrect and unsustainable. Neither KS nor BS were competent to initiate action against the respondent because the term "competent to initiate action" refers to the competency of the authority to initiate or direct disciplinary action against any person subject to the provisions of the Army Act. When an offence or misconduct is alleged to have been committed by a person subject to the Army Act, then the Officer in chain of command is required to take action for investigation of the charges and trial by court martial as per s. 1, Chapter V of the Army Rules or order Court of Inquiry and subsequently finalise the Court of Inquiry u/s. 2 Chapter VI of the Army Rules. These

powers are vested in the officers in chain of command. Those powers are not vested with staff Officers. Since the respondent was commanding 4 RPD, his next officer in command was GOC, Delhi Area and the power to take disciplinary action was vested with him in terms of para 16(a)(i) of the Defence Service Regulations, read with the Command and Control instructions dated January 1, 1991 issued by the Headquarter Western Command. Therefore, KS had only technical control of 4RPD and had therefore recommended to his higher authority to close down the case but himself had not taken a decision to close down the case or to continue the case against the respondent. The power to initiate action in terms of s. 122(1)(b) of the Army Act was only with GOC Delhi Area who is next superior authority in chain of command. The record shows that even the power to convene a Court of Inquiry was available only with GOC Delhi Area and GOC-in-C Western command since they are the authorities in command of body of troops and the power to convene a Court of Inquiry in terms of Army Rule 177 is vested only with an Officer in command of body of troops. [Para 7] [472-D-H; 473-A-D]

1.4. The facts of the instant case establish that the Technical Court of Inquiry was convened by DDST Headquarter Delhi Area on January 8, 1994 which recommended examination of certain essential witnesses for bringing into light the correct details and the persons responsible for the irregularities by a Staff Court of Inquiry and accordingly the Staff Court of Inquiry was ordered on May 7, 1994 by GOC-in-C Western Command which concluded in its report dated August 31, 1994, mentioning for the first time the involvement of the respondent in the offence. The GOC Delhi Area i.e. the next Authority in chain of command to the respondent recommended on October 19, 1994 initiation of disciplinary action against the respondent whereas the

GOC-in-C Western Command gave directions on December 3, 1994, to initiate disciplinary action against the respondent. Therefore, the date of commencement of the period of limitation for the purpose of GCM of the respondent, commenced on December 3, 1994 when direction was given by GOC-in-C Western Command to initiate disciplinary action against the respondent. The plea that the date of submission of the report by Technical Court of Inquiry should be treated as the date from which period of limitation shall commence has no substance. No definite conclusion about the correct details and the persons responsible for the irregularities were mentioned in the report of Technical Court of Inquiry. [Para 7] [473-D-H; 474-A-B]

1.5. The High Court wrongly concluded that the period of limitation expired on March 4, 1996. The letter dated May 27, 1993 written by KS to Major General ASC Headquarter Western Command does not mention at all, the respondent as the person who had committed the irregularities except for a reference that there had been certain procedural lapses on the part of 4RPD. The said letter was addressed by KS apparently with a view to close the case in total disregard to the facts and the circumstances emerging from the case. This fact has been observed by the GOC-in-C Western Command who while giving direction to initiate administrative action against KS ordered initiation of departmental inquiry against the respondent. Even the reference to ACR of the respondent written by BS only mentions that the respondent had failed to monitor the local purchase of Hygiene and Chemicals but there is no mention that the respondent was himself responsible for the irregularities found to have been committed in the purchase of Hygiene and Chemicals. It was only after the detailed investigation by Staff Court of Inquiry that the irregularities committed by the respondent and his role in the purchase of

Hygiene and Chemicals came to light. The period of limitation for the purpose of trial of the respondent commenced on December 3, 1994 when the GOC-in-C Western Command being the competent authority directed disciplinary action against the respondent in terms of s. 122(1)(b). The period of three years from the direction dated December 3, 1994 would expire on December 2, 1997, whereas the GCM commenced the trial against the respondent on December 17, 1996 which was well within the period of limitation of three years. Therefore, the GCM commenced trial, against the respondent within the period of limitation as prescribed by s. 122(1)(b) of the Army Act. The impugned judgment is legally unsustainable and is set aside. [Paras 7 and 8] [474-B-H; 475-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 32 of 2003.

From the Judgment & Order dated 15.3.2002 of the High Court of Delhi at New Delhi in CWP No. 5451 of 1998.

Indira Jaisingh, ASG, V. Subramanium, SWA Qadri, Aditya Sharma, Anil Katiyar, S. Bakshi, Ram Bastian, B.V. Balaram Das for the Appellants.

Yatish Mohan, Vinita Y. Mohan, K.J. Janjani for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. The instant appeal is directed against Judgment dated March 15, 2002 rendered by the High Court of Delhi in C.W.P. No. 5451 of 1998 by which (1) the order dated October 30, 1996 invoking Section 123 of the Army Act and taking the respondent in close custody (2) the findings recorded by General Court Martial holding the respondent guilty of some of the charges and imposing punishment of forfeiture of 8 years past service of the respondent for the purposes of

the pension vide order dated April 3, 1997 (3) the order dated June 14, 1997 passed by Mr. K.K. Verma, the then Major General, General Officer Commanding, 22 Infantry Division, directing the General Court Martial to re-assemble in open Court at Meerut on June 28, 1997 for reconsidering its findings on the first, second, third, fourth, sixth, seventh and eighth charges levelled against the respondent and the adequacy of the sentence of forfeiture of 8 years of past service for the purpose of pension awarded to him by the General Court Martial (4) the revised order dated July 2, 1997 passed by General Court Marital adhering to its earlier findings but revoking its earlier order of sentence and imposing sentence of forfeiture of 11 years past service for the purposes of pension and severe reprimand subject to he confirmation by Major General, General Officer Commanding and (5) the communication dated April 8, 2000 addressed by Col. Dy. CDR Mr. P.K.Sharma promulgating the order of the Confirming Authority by which sentence of forfeiture of 11 years past service of the respondent for the purposes of pension, was confirmed and (6) the communication dated May 15, 2000 by DDA and QMG Mr. G.Vinod for CDR mentioning that the promulgation order carried out on May 15, 2000 was handed over to the respondent and order dated April 17, 2000 promulgating punishment of forfeiture of 8 years past service of the respondent for the purposes of pension and severe reprimand was de-promulgated and cancelled, are set aside, on the ground that trial of the respondent by Court Martial was time barred in view of the provisions of Section 122 (1)(b) of the Army Act, 1950 .

1. The facts emerging from the record of the case are as under:-

The respondent i.e. Mr. V.N.Singh who was Lt. Col. was posted as Officiating Commandant in 4 Reserved Petroleum Depot ('4 RPD' for short), Delhi Cantonment. During the inspection of 4RPD, certain irregularities were

noticed with regard to local purchase of the Hygiene and Chemicals in the month of May 1993. Therefore, by a letter dated May 5, 1993, the then Lt. Col. P.Oomen, who was Additional Director, Supply and Transport, Delhi area was directed by the then Brigadier Mr. K.S.Bharucha, who was holding the post of Deputy Director, Supply and Transport, Headquarters Delhi area ('DDST' for short), to carry out preliminary investigation of local purchase of Hygiene and Chemicals as well as other fuel oils and lubricant items by 4 RPD, during the year 1992-93. Accordingly, preliminary investigation was carried out by Lt. Col. P.Oomen. On May 17, 1993 he submitted his report to Brigadier K.S.Bharucha, DDST, who in turn forwarded the report on May 27, 1993 to Major General of Army Supply Corps ('ASC' for short) Headquarters Western Command, Chandimandir. In that report, the DDST recommended closure of the case.

The Major General, ASC, Headquarters Western Command, did not consider the case appropriate for closure. He therefore, forwarded the papers to the Headquarters Western Command. The Headquarters suggested to the Major General by letter dated June 12, 1993 to seek explanation of the respondent. The Major General ASC therefore issued a show-cause notice dated June 18, 1993 to the respondent and sought his explanation on the point of procedural lapses in local purchase. The respondent in his reply dated July 6, 1993 admitted certain procedural lapses on the part of 4 RPD and regretted the same, since such lapses were due to practical problems. Thereafter, the DDST accepted the explanation given by the respondent and again recommended the Headquarters Western Command (ST) Chandigarh to treat the case as closed if deemed fit by communication dated July 9, 1993. On September, 9, 1993, the Major General ASC, Headquarters Western Command, endorsed certain remarks in the pen picture of the respondent while writing his ACR. On January 8, 1994 a Technical Court of Inquiry was convened by Brigadier

Narsimhan, who had replaced Brigadier K.S.Bharucha, as DDST. The Lt. Col. Ram Darshan of 226 Company ASC Supplies was asked to act as the Presiding Officer. The report along with the proceedings of Technical Court of Inquiry were forwarded to the DDST. The DDST recommended to the Major General ASC, Headquarters Western Command, vide communication dated March 3, 1994 to go for a thorough investigation by Staff Court of Inquiry. Therefore, on May 7, 1994 a Staff Court of Inquiry was convened pursuant to the orders of the General Officer Commanding-in-Chief, ('GOC-in-C' for short) Western Command. Before Staff Court of Inquiry, ('S.C.I.' for short) witnesses were examined and documents produced. The Staff Court of Inquiry concluded its proceedings and submitted its recommendations on August 31, 1994 blaming the respondent specifically along with few other personnel for irregularities, in the local purchase of Hygiene and Chemicals during the period 1992-93. After examining the recommendations of SCI, the GOC, Delhi area, Major General A.R.K. Reddy, recommended on October 19, 1994, disciplinary action against the respondent. Thereafter, the GOC-in-C Western Command, Lt. Gen. R.K. Gulati, directed to initiate disciplinary action against the respondent vide communication dated December 3, 1994. On August 23, 1995 the disciplinary action was commenced against the respondent by way of hearing of parties as required by Rule 22 of the Army Rules and a direction for recording of summary of evidence was ordered by the Commanding Officer i.e. Commander 35 Infantry Brigade under whom the respondent was working at the relevant time. The Commanding Officer, vide order dated October 30, 1996 invoked the provisions of Section 123 of the Army Act 1950, and took the respondent into close custody as superannuation of the respondent was due on October 31, 1996 and it was apprehended that the respondent would flee the course of justice.

The respondent filed Criminal Writ Petition 726 of 1996 before the Delhi High Court challenging the order dated

October 30, 1996 on the ground that Section 123 of the Army Act was wrongly invoked and trial if any by GCM was barred by limitation under Section 122 of the Army Act. The respondent also prayed to direct the authority to pay compensation at the rate of Rs. 50,000/- for each day of illegal detention. By an order dated December 3, 1996, the High Court stayed the operation of order dated October 30, 1996 and directed the respondent to raise the points mentioned in his Writ Petition, before General Court Martial. On December 11, 1996, the General Officer Commanding, 22 Infantry Division issued an order convening General Court Martial ('GCM' for short). Accordingly, GCM was convened. By order dated April 3, 1997, the GCM found the respondent guilty of some charges and not guilty of some other charges. By the said order, the GCM imposed the punishment of forfeiture of 8 year's past service for the purpose of pension on the respondent subject to the confirmation of the same by the Major General, General Officer Commanding. This report of the GCM was sent to the Confirming Authority. The Confirming Authority vide order dated June14, 1997, sent back the report to GCM, under the provisions of Section 160 of the Army Act to revise/reconsider the exoneration of the respondent from some of the charges and decide whether the punishment imposed on the respondent was lenient or not. Thereupon, the respondent filed Writ Petition No. 5451 of 1997 challenging aforementioned order dated June 14, 1997 as well as validity of Sections 153, 154 and 160 of the Army Act, 1950. Writ Petition No. 5451 of 1997 was filed by the respondent without prejudice to the contentions and averments made in Criminal Writ Petition No. 726 of 1996.

In view of the directions from the Confirming Authority, GCM was convened. The GCM submitted its report dated July 2, 1997. The report indicates that the GCM adhered to its earlier finding but passed a fresh order of sentence forfeiting 11 years of past service of the respondent for the purpose of pension as well as the punishment of severe reprimand. A copy of the order dated July 2, 1997 was also forwarded to the

respondent. On receipt of the order dated July 2, 1997 the respondent brought to the notice of the Court hearing Criminal Writ Petition No. 726 of 1996, the subsequent developments which had\ taken place. The Court noticed that order dated June 14, 1997 passed by the Competent Authority, was subject matter of challenge, in Writ Petition No. 5451 of 1997 which was pending. On subsequent events being brought to the notice of the Court, the Court was of the opinion that keeping Criminal Writ Petition No. 726 of 1996 pending was of no use and ends of justice would be met if liberty is reserved to amend memorandum of Writ Petition No. 5451 of 1997 and to raise all questions in the said pending Writ Petition. After reserving necessary liberty to the respondent, the Court disposed Criminal Writ Petition No. 726 of 1996 by an order dated August 19, 1998. The order dated July 2, 1997 passed by GCM was considered by the Confirming Authority. The Confirming Authority approved the finding of GCM and imposition of sentence of forfeiture of 11 years past service of the respondent for the purpose of pension. However, the Confirming Authority did not approve/confirm the punishment of severe reprimand imposed by the GCM on the respondent. By communication dated April 8, 2000 the order of the Confirming Authority was promulgated. Thereafter, vide communication dated May 15, 2000 promulgation of order was handed over to the respondent. Thereafter, the respondent moved an application for amendment of Writ Petition No.5451 of 1997 which was allowed. By way of amendment the respondent challenged validity of orders dated April 3, 1997, July 2, 1997, October 30, 1996, April 8, 2000 and May 15, 2000 over and above claiming compensation. The High Court by Judgment dated March 15, 2002 has allowed the Writ Petition and quashed GCM proceedings as well as the sentence imposed upon the respondent after holding that GCM proceedings were initiated after expiry of the period of limitation prescribed by Section 122(1) (b) of the Army Act, 1950, which has given rise to the instant appeal.

3. This Court has heard Ms. Indira Jaisingh, the Learned Additional Solicitor General for the appellants and Mr. Yatish Mohan, the learned advocate for the respondent at great length and in detail. This Court has also considered the documents forming part of the instant appeal.

4. Ms. Indira Jaisingh, Learned ASG argued that in terms of Section 122(1)(b) of the Army Act, the then Brigadier K.S.Bharucha was not the person aggrieved by the offence and neither the then Brigadier K.S.Bharucha nor Major General BS Suhag were competent to initiate action against the respondent but G.O.C. Delhi area was Disciplinary Authority of the respondent who learnt about the offence having been committed by the respondent for the first time on receipt of the report of Staff Court of Inquiry submitted on December 3, 1994 and as the G.C.M. commenced the trial on December 17, 1996 the same could not have been treated as time barred under Section 122 (1)(b) of the Army Act. It was asserted that the Technical Court of Inquiry could not come to a definite conclusion about the correct details of purchase of Hygiene and Chemicals nor any definite conclusion could be reached about the persons responsible for the irregularities but the involvement of the respondent came to the light only in August 1994 when the Staff Court of Inquiry submitted its report and therefore the High Court was not justified in quashing the proceedings of G.C.M. on the ground that they were time barred. What was highlighted by the Learned A.S.G. was that in the letter dated May 27, 1993 addressed by Brigadier K.S.Bharucha to MG ASC Headquarter Western Command, there was no mention whatsoever about the respondent being the person who had committed the irregularities except a reference to the fact that certain procedural lapses had taken place on the part of 4RPD and as the said letter was apparently addressed with a view to closing the case in total disregard of the facts and circumstances of the case, the said letter could not have been taken into consideration for the purpose of coming to the conclusion that the proceedings of G.C.M. were time barred.

After referring to the A.C.R. of the respondent written by Major General BS Suhag it was argued that what becomes apparent therefrom is that the respondent had failed to monitor the local purchase of Hygiene and Chemicals but there was no mention that the respondent was himself involved in it and therefore the date on which the A.C.R. was written also could not have been taken into consideration for the purpose of determining whether the proceedings of G.C.M. were time barred. The Learned ASG stressed that the period of limitation for the purpose of trial of the respondent commenced on December 3, 1994, when the then GOC-in-Chief Western Command who is competent authority came to know about the commission of offence by the respondent and directed to take disciplinary action against the respondent and as period of limitation of three years in terms of Section 122(1)(b) expired on December 2, 1997 the same could not have been treated as time barred. The Learned Counsel asserted that the Judgment of the High Court questioned in the appeal is not only erroneous on the facts brought on the record of the case but also misinterprets the provisions of the Army Act and therefore the same should be set aside.

5. The Learned Counsel for the respondent argued that after scrutinising the entire documentary evidence the High Court has rightly reached to the conclusion that the trial of the respondent by GCM was time barred and rightly allowed the Writ Petition filed by him. It was maintained that during the inspection of 4RPD, certain irregularities were noticed with regard to the local purchase of Hygiene and Chemicals by 4RPD Delhi in the month of May 1993 and the respondent who was Officiating Commandant of said 4 RPD was immediately removed from the said post and was placed as Officiating Commandant of 5033 Army Service Corps battalion functioning directly under Headquarters 33 Corps, which indicates that in May 1993 the so-called involvement of the respondent in the irregularities noticed with regard to the local purchase of the Hygiene and Chemicals, had become evident and therefore the

proceedings initiated against him should be treated as time barred. The Learned Counsel for the respondent drew the attention of the Court to the communication dated May 5, 1993 addressed by DDST Brigadier K.S.Bharucha on behalf of the Headquarter Delhi Area to Lt. Col. P. Oomen, ADST asking him to conduct the inquiry into the lapses found in local purchase by 4 RPD, pursuant to which report was submitted to Headquarter Delhi Area, wherein it was concluded that irregularities were committed in purchase of Hygiene and Chemicals and therefore the period of limitation would start running from May 27, 1993 when the said report was submitted by Mr. K.S.Bharucha, DDST to Major General, Army Service Corps at Headquarter Western Command. According to the Learned Counsel for the respondent, the DDST issued a notice dated June 18, 1993 calling upon the respondent to explain procedural lapses in local purchase of Hygiene and Chemicals by 4RPD wherein there is reference to instructions of Headquarter Western Command dated June 12, 1993 and therefore the relevant period for the purpose of deciding the question whether the proceedings were time barred or not should be taken to be June 12, 1993. What was asserted was that while writing the ACR of the respondent on September 6, 1993 the Headquarter Western Command, Chandigarh in the column of brief comments had mentioned that the respondent needed to exercise more discretion and caution while dealing with funds and therefore the said date would also be relevant for the purpose of determining the question whether the proceedings were time barred. It was argued that the order dated October 30, 1996, taking the respondent into close custody under Section 123 of the Army Act, 1950, was passed because the respondent was charged for the offence of procedural lapses in local purchase of Hygiene and Chemicals during his tenure as Officiating Commandant of 4RPD Delhi Area Cantonment and therefore the date on which the respondent was taken into close custody would also be relevant for the purpose of determining the question whether the proceedings initiated against the respondent were time barred.

What was asserted was that the respondent was identified as the offender firstly in May 1993 after the report of Lt. Col. P. Oomen and secondly on May 27, 1993 when DDST Headquarter Delhi Area on behalf of GOC had submitted the report of inquiry to Headquarters ASC Western Command at Chandigarh concluding that, there was certainly procedural lapses in local purchase of Hygiene and Chemicals on the part of 4RPD which was under the control of the respondent and therefore the proceedings have been rightly treated as time barred by the High Court. According to the Learned Counsel for the respondent the competent authority of the respondent was his Commanding Officer i.e. Brigadier K.S.Bharucha, DDST and as the competent authority had initiated action on October 30, 1996 by detaining the respondent, the proceedings in question should be treated as time barred. The Learned Counsel argued that the person aggrieved within the meaning of Section 122 of the Act, means the person should be answerable to the superiors in chain of command for the act, commission or omission done by his subordinate and as DDST was aggrieved person under whom the respondent was discharging duties, the period of limitation would start running from the date of report of the Court of Inquiry, when identity of the offence and offender was ascertained and therefore the well reasoned judgment of the High Court should be upheld by this Court.

6. Section 122 of the Army Act, 1950 prescribes period of limitation for trial by Court Martial of any person subject to the provisions of the Act for any offence committed by him. The said Section reads as under:-

> "Section 122. Period of limitation for trial - (1) Except as provided by sub-section (2), no trial by court-marital of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence-
>
> (a) on the date of the offence; or

> (b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or
>
> (c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.
>
> (2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37.
>
> (3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory; or in evading arrest after the commission of the offence, shall be excluded.
>
> (4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army."

A fair reading of the abovementioned Section makes it clear that after the expiry of the period of limitation, the Court Martial will ordinarily have no jurisdiction to try the case. The purpose of Section 122 is that in a civilised society a person should not live, for the rest of his natural life, under a Sword of Damocles and the prosecution be allowed to rake up any skeleton from any cupboard at any time when the accused may have no further materials, oral or documentary, to prove that the skeleton is not from his cupboard. If the device is left open to the prosecution to convene a Court Martial at its leisure and convenience, Section 122 will lose all significance. Section 122

is a complete Code in itself so far as the period of limitation is concerned for not only it provides in Sub-section (1) the period of limitation for such trials but specifies in Sub-section (2) thereof, the offences in respect of which the limitation clause would not apply. Since the Section is in absolute terms and no provision has been made under the Act for extension of time, it is obvious that any trial commenced after the period of limitation will be patently illegal. The question of limitation to be determined under Section 122 of the Act is not purely a question of law. It is a mixed question of fact and law and therefore in exercise of Writ Jurisdiction under Article 226 of the Constitution, ordinarily the High Court will not interfere with the findings of court Martial on question of limitation decided under Section 122 of the Army Act.

7. Section 122 of the Army Act in substance prescribes that no trial by Court Martial of any person subject to the provisions of the Act for any offence shall be commenced after the expiration of a period of three years. It further explains as to when period of three years shall commence. It provides that the period of three years shall commence on the date of the offence or where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority whichever is earlier. In view of the provisions of Section 122(1)(b) a question arises as to who is the person aggrieved within the meaning of the said Section. According to the respondent Brigadier K.S.Bharucha was the person aggrieved and the period of three years shall commence from the date when commission of offence by the respondent came to his knowledge on May 17, 1993 when Lt. Col. P. Oomen submitted his report to Mr. Bharucha. The contention of the Union of India is that in terms of Army Act, Mr. K.S.Bharucha was neither the person aggrieved nor authority competent to initiate action and therefore the date on which the Lt. Col. P.Oomen submitted report would not be relevant for the purpose of determining the

question whether the trial commenced against the respondent was time barred. The term "the person aggrieved by the offence" would be attracted to natural persons i.e. human beings who are victims of an offence complained of, such as offences relating to a person or property and not to juristic persons like an organisation as in the present case. The plain and dictionary meaning of the term "aggrieved" means hurt, angry, upset, wronged, maltreated, persecuted, victimised etc. It is only the natural persons who can be hurt, angry, upset or wronged or maltreated etc. If a Government organisation is treated to be an aggrieved person then the second part of Section 122(1)(b) i.e. "when it comes to the knowledge of the competent authority to initiate action'' will never come into play as the commission of offence will always be in the knowledge of the authority who is part of the organisation and who may not be the authority competent to initiate the action. A meaningful reading of the provisions of Section 122(1)(b) makes it absolutely clear that in the case of Government organisation, it will be the date of knowledge of the authority competent to initiate the action, which will determine the question of limitation. Therefore, the finding of the High Court that Brigadier K.S.Bharucha was an aggrieved person is legally and factually incorrect and unsustainable. Further, neither Brigadier Mr. K.S.Bharucha, nor Major General BS Suhag were competent to initiate action against the respondent because the term "competent to initiate action" refers to the competency of the authority to initiate or direct disciplinary action against any person subject to the provisions of the Army Act. When an offence or misconduct is alleged to have been committed by a person subject to the Army Act, then the Officer in chain of command is required to take action for investigation of the charges and trial by court martial as per Section 1 Chapter V of the Army Rules or order Court of Inquiry and subsequently finalise the Court of Inquiry under Section 2 Chapter VI of the Army Rules. These powers are vested in the officers in chain of command. Those powers are not vested with staff Officers. Since the respondent was commanding 4 RPD, his next officer

in command was GOC, Delhi Area and the power to take disciplinary action was vested with him in terms of para 16(a)(i) of the Defence Service Regulations, read with the Command and Control instructions dated January 1, 1991 issued by the Headquarter Western Command. Therefore, Brigadier K.S.Bharucha had only technical control of 4RPD and had therefore recommended to his higher authority to close down the case but himself had not taken a decision to close down the case or to continue the case against the respondent. The power to initiate action in terms of Section 122(1)(b) of the Army Act was only with GOC Delhi Area who is next superior authority in chain of command. The record shows that even the power to convene a Court of Inquiry was available only with GOC Delhi Area and GOC-in-C Westernc ommand since they are the authorities in command of body of troops and the power to convene a Court of Inquiry in terms of Army Rule 177 is vested only with an Officer in command of body of troops. The facts of the present case establish that the Technical Court of Inquiry was convened by DDST Headquarter Delhi Area on January 8, 1994 which recommended examination of certain essential witnesses for bringing into light the correct details and the persons responsible for the irregularities by a Staff Court of Inquiry and accordingly the Staff Court of Inquiry was ordered on May 7, 1994 by GOC-in-C Western Command which concluded in its report dated August 31, 1994, mentioning for the first time the involvement of the respondent in the offence. The GOC Delhi Area i.e. the next Authority in chain of command to the respondent recommended on October 19, 1994 initiation of disciplinary action against the respondent whereas the GOC-in-C Western Command gave directions on December 3, 1994, to initiate disciplinary action against the respondent. Therefore, the date of commencement of the period of limitation for the purpose of GCM of the respondent, commenced on December 3, 1994 when direction was given by GOC-in-C Western Command to initiate disciplinary action against the respondent. The plea that the date of submission of the report by Technical Court of Inquiry should be treated as the date from

which period of limitation shall commence has no substance. It is relevant to notice that no definite conclusion about the correct details and the persons responsible for the irregularities were mentioned in the report of Technical Court of Inquiry. On the facts and in the circumstances of the case, this Court is of the view that the High Court wrongly concluded that the period of limitation expired on March 4, 1996. It is relevant to notice that the contents of the letter dated May 27, 1993 written by Brigadier K.S.Bharucha to Major General ASC Headquarter Western Command do not mention at all, the respondent as the person who had committed the irregularities except for a reference that there had been certain procedural lapses on the part of 4RPD. The said letter was addressed by Brigadier K.S.Bharucha apparently with a view to closing the case in total disregard to the facts and the circumstances emerging from the case. This fact has been observed by the GOC-in-C Western Command who while giving direction to initiate administrative action against Major General K.S.Bharucha ordered initiation of departmental inquiry against the respondent. Even the reference to ACR of the respondent written by Major General Suhag only mentions that the respondent had failed to monitor the local purchase of Hygiene and Chemicals but there is no mention therein that the respondent was himself responsible for the irregularities found to have been committed in the purchase of Hygiene and Chemicals. It was only after the detailed investigation by Staff Court of Inquiry that the irregularities committed by the respondent and his role in the purchase of Hygiene and Chemicals came to light. On the facts and in the circumstances of the case this Court finds that the period of limitation for the purpose of trial of the respondent commenced on December 3, 1994 when the GOC-in-C Western Command being the competent authority directed disciplinary action against the respondent in terms of Section 122(1)(b) of the Army Act. The period of three years from the direction dated December 3, 1994 would expire on December 2, 1997, whereas the GCM commenced the trial against the respondent on December 17, 1996 which was well within the period of

limitation of three years. Therefore the impugned Judgment is legally unsustainable and will have to be set aside.

8. For the foregoing reasons it is held that the GCM commenced trial, against the respondent within the period of limitation as prescribed by Section 122(1)(b) of the Army Act. The impugned Judgment is set aside. Appeal accordingly stands allowed. There shall be no orders as to cost.

N.J. Appeal allowed.

COMMISSIONER OF CENTRAL EXCISE, AHMEDABAD
v.
SOLID & CORRECT ENGINEERING WORKS & ORS.
(Civil Appeal Nos. 960-966 of 2003 etc.)

APRIL 8, 2010

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

Central Excise Act, 1944 – s. 2 (d) – Setting up of Asphalt Drum Mix Plant by using duty paid components – Whether amounts to manufacture of 'exigible goods' – Held: Setting of the plant does not amount to manufacture of 'exigible goods' as the same is not permanently fixed in earth.

Notification – Notification No. 1/93-CE, dated 28th February, 1993 – Issued u/s. 5A(1) of Central Excise Act – Benefit under – Entitlement of, to manufacturers of parts and components used for setting up Asphalt Drum/Hot Mix Plant.

Maxim – 'quidcquid plantatur solo, solo-cedit' – Applicability of.

Words and Phrases – ' Moveable property' – Meaning of – Transfer of Property Act, 1882 – s. 3 – General Clauses Act, 1897 – s. 3(26).

The questions for consideration before this Court were whether setting up of an Asphalt Drum Mix Plant by using duty paid components tantamounts to manufacture of excisable goods within the meaning of Section 2(d) of the Central Excise Act, 1944; and whether the respondents engaged in the manufacture of parts and components used for setting up of Asphalt Drum/Hot Mix Plant were entitled to the benefit of Notification No.1/93-CE, dated 28th February, 1993 issued under sub-section (1) of Section 5A of the Act, as amended from time to time.

Allowing the appeals and remanding the matters back to the Tribunal, the Court

HELD: 1.1. Once a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The same cannot thereafter be treated as moveable so as to be dutiable under the Excise Act. But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing. In the instant case all that has been said by the assessee is that the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent, cannot constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. In that view of the matter, it is held that the plants in question were not immovable property so as to be immune from the levy of excise duty. [Para 33] [496-D-G]

Triveni Engineering & Industries Ltd. and Anr. v. Commissioner of Central Excise **2000 (120) ELT 273 (SC);** *Quality Steel Tubes (P) Ltd. v. CCE, U.P.* **1995 (75) ELT 17 (SC);** *Mittal Engineering Works (P) Ltd. v. CCE, Meerut* **1996 (88) ELT 622 (SC);** *T.T.G. Industries Ltd. v. CCE, Raipur* **2004 (167) ELT 501 (SC) – distinguished.**

Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad **1998 (1) SCC 400;** *M/s Narne Tulaman Manufacturers Pvt. Ltd. Hyderabad v. Collector of Central Excise, Hyderabad* **1989 (1) SCC 172, relied on.**

1.2. The manufacture of the plants in question do not constitute annexation hence cannot be termed as

immovable property for the following reasons: (i) The plants in question are not *per se* immovable property. (ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act. (iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free. (iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed. [Para 24] [491-D-G]

1.3. The expression "attached to the earth" has three distinct dimensions, viz. (a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1½ feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. [Para 19] [489-A-C]

1.4. In English law the general rule is that what is annexed to the freehold becomes part of the realty under the maxim *quidcquid plantatur solo, solo cedit***. This maxim, however, has no application in India. Even so, the question whether a chattel is imbedded in the earth so as to become immovable property is decided on the same principles as those which determine what constitutes an annexation to the land in English law. The English law has evolved the twin tests of degree or mode of annexation and the object of annexation. The English law attaches greater importance to the object of annexation which is determined by the circumstances of**

each case. One of the important considerations is founded on the interest in the land wherein the person who causes the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises. The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant test in this country also. There are cases where machinery installed by monthly tenant was held to be moveable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy. The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act. [Paras 21 and 22] [489-G-H; 490-A, C-F]

Wake v. Halt **(1883) 8 App Cas 195 – referred to.**

2. The respondents engaged in the manufacture of parts and components used for setting up of Asphalt Drum/Hot Mix Plant were not entitled to the benefit of Notification No.1/93-CE, dated 28th February, 1993 issued under sub-section (1) of Section 5A of the Central Excise Act, 1944 as amended from time to time. The view taken by the Tribunal that the respondents-manufacturing units were entitled to the benefit of exemption under Notification No.1/93 as the use of brand name Solidmec for the plants or the components manufactured by such units did not disentitle the said units from claiming the benefit of the exemption having regard to the fact that the size of the sticker giving the brand name of the manufacturing units was bigger than that of Solidmec, the marketing company, is not correct. [Paras 8 and 35] [485-C-D; 497-A-C]

Case Law Reference:

1883 (8) App Cas 195	**Referred to.**	**Para 21**
1998 (1) SCC 400	**Relied on.**	**Para 26**
1989 (1) SCC 172	**Relied on.**	**Para 27**
2000 (120) ELT 273(SC)	**Distinguished.**	**Para 28**
1995 (75) ELT 17(SC)	**Distinguished.**	**Para 30**
1996 (88) ELT 622(SC)	**Distinguished.**	**Para 30**
2004 (167) ELT 501(SC)	**Distinguished.**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 960-966 of 2003.

From the Judgment & Order dated 19.8.2002 of the Customs, Excise and Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai in Final Order Nos. CI/2403-09/WZB/2002 in Appeal Nos. E/1203-1209/2001-Mumbai.

WITH

C.A. Nos. 5416-5462 of 2003.

P.P. Malhotra, ASG, Rupesh Kumar, Rashmi Malhotra, B.K. Prasad, Anil Katiyar for the Appellant.

S.K. Bagaria, Tarun Gulati, Rony John, Kishore Kunal, Pavan Kumar for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals under Section 35L(b) of the Central Excise Act, 1944 arise out of orders dated 19th August, 2002 and 8th April, 2003 passed by the Customs Excise and Gold (Control) Appellate Tribunal, West Regional Bench, Mumbai, whereby the Tribunal has set aside the order passed by the Commissioner of Customs & Central Excise,

Ahmedabad, confirming the duty demanded from the respondents as also levying penalties upon them under different provisions of the Central Excise Act, 1944. The controversy in the appeals lies in narrow compass, but before we formulate the precise questions that fall for our determination, it is necessary to briefly set out the factual backdrop in which the same arises.

2. M/s Solid and Correct Engineering Works, M/s Solid Steel Plant Manufacturers and M/s Solmec Earthmovers Equipment are partnership concerns engaged in the manufacture of parts and components for road and civil construction machinery and equipments like Asphalt Drum/Hot Mix Plants and Asphalt Paver Machine etc. M/s Solex Electronics Equipments is, however, a proprietary concern engaged in the manufacture of Electronic Control Panels Boards. It is not in dispute that the three partnership concerns mentioned above are registered with Central Excise Department nor is it disputed that the proprietary concern is a small scale industrial unit that is availing exemption from payment of duty in terms of the relevant exemption notification. M/s Solidmec Equipments Ltd. (hereinafter referred to as 'Solidmec' for short) the fifth unit with which we are concerned in the present appeals is a marketing company engaged in the manufacture of Asphalt Drum/Hot Mix Plants at the sites provided by the purchasers of such plants. It is common ground that Solidmec advertises its product and undertakes contracts for supplying, erection, commissioning and after sale services relating thereto. It is also admitted that all the five concerns referred to above are closely held by Shri Hasmukhbhai his brothers and the members of their families.

3. An inspection of the factories of the respondents by a team of officers from Central Excise, Preventing Wing, Headquarters, Ahmedabad, led to the issue of a notice dated 30th November 1999 to the four manufacturing units as well as to Solidmec calling upon them to show cause why the amounts

mentioned in the said notice be not recovered from them towards central excise duty. The notice accused the four manufacturing units of having wrongly declared and classified parts and components being manufactured by them as complete plants/systems, even when they were merely parts and components and not machines or plants functional by themselves. The erroneous classification and declaration was, according to the notice, intended to avoid payment of higher rate of duty applicable to parts of such plants and machinery at the material point of time. The notice also pointed out that the units manufacturing parts and components of the plants had availed benefit of exemption wrongly and in breach of the provisions of Rules 9(1) and 173F and other rules regulating the grant of such benefit.

4. In so far as Solidmec marketing company was concerned, the show cause notice alleged that Solidmec was engaged in the manufacturing of Asphalt Batch Mix, Drum Mix/ Hot Mix Plant by assembling and installing the parts and components manufactured by the manufacturing units of the group. According to the notice the process of assembly of the parts and components at the site provided by the purchasers of such plants was tantamount to manufacture of such plants as a distinct product with a new name, quality, usage and character emerged out of the said process. Resultantly the end-product; namely, Asphalt Drum/Hot Mix Plants became exigible to Central Excise duty, which duty Solidmec had successfully avoided. The notice also proposed to levy penalties upon all the five concerns under appropriate provisions of the Central Excise Act.

5. The respondents filed their responses to the show cause notice, which were duly considered by the Commissioner who confirmed the duty demanded in the show cause notice and levied suitable penalties upon each one of the units. Aggrieved by the order passed by the Commissioner the respondents preferred appeals before the Customs, Excise and Gold

(Control) Appellate Tribunal (for short 'CEGAT') which were partly allowed by the Tribunal by its order dated 19th August, 2002. Relying upon the material on record and the depositions of the partners comprising the concerns, the Tribunal held that Solidmec had supplied all the components at the buyer's site some of which had been manufactured by the manufacturing units of the group while others were purchased from the market. The cost of erection, commissioning etc. was also charged by Solidmec from the buyers. Solidmec was, therefore, engaged in the manufacture of the plants in question declared the Tribunal in the following words:

> "The sum total of the aforesaid evidence is that M/s Solidmec supplied all the essential components to make a hot mix plant at the buyer's site. Some of the components were manufactured by the manufacturing units and the other components were purchased from the market. These were erected and commissioned by Solidmec and the cost of erection, commissioning, etc., were charged from the buyers. In these circumstances they deserve to be termed as manufacturers."

6. The Tribunal next examined the question whether the plants so manufactured could be termed as "goods". Relying upon the decision of this Court in *Triveni Engineering & Industries Ltd. & Anr. V. Commissioner of Central Excise* 2000 (120) ELT 273 (SC) the Tribunal held that since the dimensions of the plant were substantial comprising three main components namely, 4 bin feeder, the conveyor and dryer unit and since the said components had to be separately embedded in earth on a foundation 1.5 feet deep what was manufactured could not be said to be "goods" especially when the same could not be dismantled and re-assembled without undertaking the necessary civil works. The duty demand raised against Solidmec was on that basis set aside leaving open certain other related issues including the question of jurisdiction of the Commissioner. The Tribunal further held that the manufacturing

units were entitled to the benefit of exemption under Notification 1/93. The use of brand name "Solidmec" for the plants or their components manufactured by the sister concerns did not, according to the Tribunal, disentitle the said units to the benefit of exemption having regard to the fact that the size of the stickers giving the brand name of the manufacturing units was bigger than that of Solidmec the marketing company. The plea of limitation raised by the respondents was, however, left undecided by the Tribunal keeping in view the fact that the erection of plants by Solidmec did not in the opinion of the Tribunal amount to manufacture of exigible goods. In the ultimate analysis the Tribunal upheld the demand of Rs.1,97,875/- against M/s Solmec Earthmovers Equipments and Rs.2,16,347/- against M/s Solid and Correct Engineering Works but reduced the penalty levied upon them to Rs.2 lakhs each. The penalty levied upon the partners was, however, remitted. The order of confiscation of the plant, land and building was in consequence of the findings recorded by the Tribunal set aside.

7. An application seeking rectification of the above order was then filed before the Tribunal by the respondents. It was argued that the Tribunal had upheld the duty and penalties levied upon the respondents-applicants on the premise that the respondents had not contested the classification of the products under Sub-heading 8474.90 as parts and components in place of Sub-heading 8474.10 applicable to complete machines. It was urged that although the applicants had not questioned the classification determined by the Department in the order passed by the Commissioner it had specifically pleaded that the entire demand for duty was barred by limitation. The Tribunal accepted that argument and accordingly by its order dated 8th April, 2003 modified its earlier order and deleted the demand of duty as also the penalty in toto. The subsequent order deleting the duty and penalty in toto has been questioned in CA Nos.5461-5462/2003.

8. We have heard Mr. P.P. Malhotra, learned Additional Solicitor General for the appellants and Mr. S.K. Bagaria, learned senior counsel for the respondents at length. Two questions in our opinion arise for our determination:

(1) Whether setting up of an Asphalt Drum Mix Plant by using duty paid components tantamounts to manufacture of excisable goods within the meaning of Section 2(d) of the Central Excise Act, 1944? and

(2) Whether the respondents engaged in the manufacture of parts and components used for setting up of Asphalt Drum/Hot Mix Plant were entitled to the benefit of Notification No.1/93-CE, dated 28th February, 1993 issued under sub-section (1) of Section 5A of the Central Excise Act, 1944 as amended from time to time?

9. We shall take up the questions ad seriatim.

Re: Question No.1

10. Section 3 of the Central Excise Act, 1944, inter alia, sanctions what was during the relevant period called 'central excise duty' on all "excisable goods" produced or manufactured in India at the rates set forth in First Schedule to the Central Excise Tariff Act, 1985. The term "excisable goods" appearing in Section 3 has been defined under Section 2(d) of the said Central Excise Act which reads as under:

"2(d): "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt.

Explanation: For the purposes of this clause, "goods" includes any article, material or substance which is capable

of being bought and sold for a consideration and such goods shall be deemed to be marketable."

11. Entry 8474 in the First Schedule to the Central Excise and Tariff Act, 1985 stipulates the rate at which excise was payable on machinery of the kind enumerated in that Entry which reads:

"Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand."

12. It is evident from the above that any machinery which is used for mixing is dutiable. That Asphalt Drum/Hot Mix Plant is a machinery meant for mixing etc. was not disputed before us. It was fairly conceded by Mr. Bagaria that assembling, installation and commissioning of Asphalt Drum/Hot Mix Plants amounted to manufacture inasmuch as the plant that eventually came into existence was a new product with a distinct name, character and use different from what went into its manufacture. Super added to the above is the fact that Section 2(f) of the Central Excise Act does not define the term "manufacture" exhaustively. The definition is inclusive in nature and has been understood to mean bringing into existence a new product with a distinct name, character and use. (See (i) *Union of India V. Delhi Cloth and General Mills Co. Ltd.* (1977) 1 ELT 199, (ii) *BPL India Ltd. V. CCE* (2002) 5 SCC 167, (iii) *Sirpur Paper Mills Ltd. V. Collector of Central Excise, Hyderabad* (1998 (1) SCC 400).

13. Mr. Bagaria strenuously argued that even when the setting up of the plant has been held to be tantamount to manufacture of a plant and even when the plant may be

machinery covered by Entry 8474 of the First Schedule to the Central Excise Act, the same would not necessarily amount to manufacture of 'exigible goods' keeping in view the fact that such plants have to be permanently embedded in earth. Reliance in support was placed by Mr. Bagaria upon the finding recorded by the Tribunal that the plant is required to be fixed to a foundation that is 1 and ½ ft. deep for the sake of stability of the plant which causes heavy vibrations while in operation. The following passage from the Tribunal's order was in particular relied upon by Mr. Bagaria in support of his submission that the size and nature of the plant was such as made its fixing to the ground essential:

> "The individual element such as feeder bins, conveyor, rotary mixing drum, asphalt tank, fuel tanks, etc. have to be separately embedded into the earth. This is done on a civil foundation of 1.5 deep. This is because the weight of the material as well as the vibrations caused by the movement thereof is very substantial. The drier at one time holds 40MT of raw material."

14. Relying upon certain decisions of this Court, Mr. Bagaria argued that the plants in question did not satisfy the test of marketability and moveability. According to Mr. Bagaria, the setting up of the plant was no more than an accretion/ annexation to immovable property which was far from manufacture of goods exigible to excise duty. We shall presently refer to the decisions relied upon by Mr. Bagaria, but before we do so we may briefly refer to the relevant statutory provisions to examine, what would constitute moveable or immoveable property.

15. The expression "moveable property" has been defined in Section 3(36) of the General Clauses Act, 1897 as under:

> "Section 3(36) : "movable property" shall mean property of every description, except immovable property."

16. From the above it is manifest that the answer to the

question whether the plants in question are movable property, would depend upon whether the same are immovable property. That is because anything that is not immovable property is by this very definition extracted above "moveable" in nature.

17. Section 3 of the Transfer of Property Act, 1882 does not spell out an exhaustive definition of the expression "immovable property". It simply provides that unless there is something repugnant in the subject or context 'immovable property' under the Transfer of Property Act, 1882 does not include standing timber, growing crops or grass. Section 3(26) of the General Clauses Act, 1897, similarly does not provide an exhaustive definition of the said expression. It reads:

> "Section 3(26) : "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

18. It is not the case of the respondents that plants in question are *per se* immoveable property. What is argued is that they become immovable as they are permanently imbedded in earth in as much as they are fixed to a foundation imbedded in earth no matter only 1½ feet deep. That argument needs to be tested on the touch stone of the provisions referred to above. Section 3(26) of the General Clauses Act includes within the definition of the term "immovable property" things attached to the earth or permanently fastened to anything attached to the earth. The term "attached to the earth" has not been defined in the General Clauses Act, 1897. Section 3 of the Transfer of Property Act, however, gives the following meaning to the expression "attached to the earth":

> "(a) rooted in the earth, as in the case of trees and shrubs;
>
> (b) imbedded in the earth, as in the case of walls and buildings;
>
> (c) attached to what is so imbedded for the permanent

beneficial enjoyment of that to which it is attached."

19. It is evident from the above that the expression "attached to the earth" has three distinct dimensions, viz. (a) rooted in the earth as in the case of trees and shrubs (b) imbedded in the earth as in the case of walls or buildings or (c) attached to what is imbedded for the permanent beneficial enjoyment of that to which it is attached. Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1½ feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above. That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached.

20. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.

21. In English law the general rule is that what is annexed to the freehold becomes part of the realty under the maxim *quidcquid plantatur solo, solo cedit*. This maxim, however, has no application in India. Even so, the question whether a chattel is imbedded in the earth so as to become immovable property is decided on the same principles as those which determine

what constitutes an annexation to the land in English law. The English law has evolved the twin tests of degree or mode of annexation and the object of annexation. In *Wake V. Halt* (1883) 8 App Cas 195 Lord Blackburn speaking for the Court of Appeal observed:

> "The degree and nature of annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land."

22. The English law attaches greater importance to the object of annexation which is determined by the circumstances of each case. One of the important considerations is founded on the interest in the land wherein the person who causes the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises. The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant test in this country also. There are cases where machinery installed by monthly tenant was held to be moveable property as in cases where the lease itself contemplated the removal of the machinery by the tenant at the end of the tenancy. The mode of annexation has been similarly given considerable significance by the courts in this country in order to be treated as fixture. Attachment to the earth must be as defined in Section 3 of the Transfer of Property Act. For instance a hut is an immovable property, even if it is sold with the option to pull it down. A mortgage of the super structure of a house though expressed to be exclusive of the land beneath, creates an interest in immovable property, for it is permanently attached to the ground on which it is built.

23. The courts in this country have applied the test whether the annexation is with the object of permanent beneficial

enjoyment of the land or building. Machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for more beneficial enjoyment of either the soil or concrete. Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached. Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.

24. Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:

(i) The plants in question are not *per se* immovable property.

(ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.

(iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.

(iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.

25. We may, at this stage, refer to the decisions of this Court which were relied upon by learned counsel for the parties

in support of their respective cases.

26. In *Sirpur Paper Mills Ltd.* (supra) this Court was dealing with a near similar situation as in the present case. The question there was whether the paper machine assembled at site mainly with the help of components bought from the market was dutiable under the Central Excise Act, 1944. The argument advanced on behalf of the assessee was that since the machine was embedded in a concrete base the same was immovable property even when the embedding was meant only to provide a wobble free operation of the machine. Repelling that contention this Court held that just because the machine was attached to earth for a more efficient working and operation the same did not *per se* become immovable property. The Court observed:

> "5. Apart from this finding of fact made by the Tribunal, the point advanced on behalf of the appellant, that whatever is embedded in earth must be treated as immovable property is basically not sound. For example, a factory owner or a householder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property. Some of the components of the water pump may even be assembled on site. That too will not make any difference to the principle. The test is whether the paper-making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the Company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property."

27. In *M/s Narne Tulaman Manufacturers Pvt. Ltd. Hyderabad V. Collector of Central Excise, Hyderabad* (1989 (1) SCC 172), this Court was examining whether the assembly of parts of machine by an assessee to bring into existence a

weighbridge as a complete machine amounted to manufacture hence liable to duty even when its parts are separately taxable. Answering the question in the affirmative this Court held that the assembling of the components of the weighbridge brought into existence a complete weighbridge which had a distinctive name, character and use hence exigible to duty. The fact that the assessee was himself manufacturing only one part of the component used in the erection of a weighbridge did not mean that the complete machine once the same was assembled by using duty paid parts was not exigible to excise duty.

28. In *Triveni Engineering's* case (supra), the question that fell for consideration was whether a turbo alternator comprising two components (i) steam turbine and (ii) complete alternator and fixing the same on a platform brought about a new dutiable product. The Court held that the process of fixing the same on a platform and aligning them in a specified manner that turbine was nothing but a manufacturing process and a new commodity come into existence in the said process. The machine so manufactured was, however, erected on a platform specially constructed for that purpose which made the machine immovable in character. The Court declared that while determining whether an article is permanently fastened to anything attached to the earth both the intention as well as the factum of fastening has to be ascertained from the facts and circumstances of each case. The following passage is apposite in this regard:

> "There can be no doubt that if an article is an immovable property, it cannot be termed as "excisable goods" for purposes of the Act. From a combined reading of the definition of "immovable property" in Section 3 of the Transfer of Property Act, Section 3(25) of the General Clauses Act, it is evident that in an immovable property there is neither mobility nor marketability as understood in the excise law. Whether *an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth.* And this has to be ascertained from the facts and circumstances of each case."
>
> (emphasis supplied)

29. Applying the above test to the case at hand, the plants in question were neither attached to earth within the meaning of Section 3(26) of the General Clauses Act nor was there any intention of permanently fastening the same to anything attached to the earth.

30. Reliance was placed by Mr. Bagaria upon the decision of this Court in *Quality Steel Tubes (P) Ltd. V. CCE, U.P.* 1995 (75) ELT 17 (SC) and *Mittal Engineering Works (P) Ltd. V. CCE, Meerut* 1996 (88) ELT 622 (SC). In *Quality Steel Tubes* case (supra) this Court was examining whether 'the tube mill and welding head' erected and installed by the assessee for manufacture of tubes and pipes out of duty paid raw material was assessable to duty under residuary Tariff Item No.68 of the Schedule being excisable goods. Answering the question in negative this Court held that tube mill and welding head erected and installed in the premises and embedded to earth ceased to be goods within the meaning of Section 3 of the Act as the same no longer remained moveable goods that could be brought to market for being bought and sold. We do not see any comparison between the erection and installation of a tube mill which involved a comprehensive process of installing slitting line, tube rolling plant, welding plant, testing equipment and galvanizing etc., referred to in the decision of this Court with the setting up of a hot mix plant as in this case. As observed by this Court in *Triveni Engineering & Industries* case (supra), the facts and circumstances of each case shall have to be examined for determining not only the factum of fastening/ attachment to the earth but also the intention behind the same.

31. In *Mittal Engineering Works* case (supra), this Court was examining whether the mono vertical crystallisers erected and attached by a foundation to the earth on the site of the sugar

factory could be treated as goods within the meaning of Central Excise Act, 1944. This Court on facts noted that mono vertical crystallisers are fixed on a solid RCC slab having a load bearing capacity of about 30 tonnes per sq. mt. and are assembled at site with bottom plates, tank coils, drive frames, supports, plates, distance places, cutters, cutter supports, tank ribs, distance plate angles, water tanks, coil extension pipes, loose bend angles, coil supports, railing stands, intermediate platforms, drive frame railings and flats, oil trough, worm wheels, shafts, housing, stirrer arms and support channels, pipes, floats, heaters, ladders, platforms, etc. The Court noted that the mono vertical crystallisers have to be assembled, erected and attached to the earth on a foundation at the site of the sugar factory and are incapable of being sold to consumers in the market as it is without anything more. Relying upon the decision of this Court in *Quality Steel Tubes* case (supra), the erection and installation of mono vertical crystallisers was held not dutiable under the Excise Act. This Court observed that the Tribunal ought to have remembered that mono vertical crystallisers had, apart from assembly, to be erected and attached by foundation to the earth and, therefore, were not, in any event marketable as they were. This decision also, in our opinion, does not lend any support to the case of the assessee in these appeals as we are not dealing with the case of a machine like mono vertical crystallisers which is permanently embedded in the structure of a sugar factory as was the position in the *Mittal Engineering Works* case (supra). The plants with which we are dealing are entirely over ground and are not assimilated in any structure. They are simply fixed to the foundation with the help of nuts and bolts in order to provide stability from vibrations during the operation.

32. So also in *T.T.G. Industries Ltd. V. CCE, Raipur* 2004 (167) ELT 501 (SC), the machinery was erected at the site by the assessee on a specially made concrete platform at a level of 25 ft. height. Considering the weight and volume of the machine and the processes involved in its erection and

installation, this Court held that the same was immovable property which could not be shifted without dismantling the same.

33. It is noteworthy that in none of the cases relied upon by the assessee referred to above was there any element of installation of the machine for a given period of time as is the position in the instant case. The machines in question were by their very nature intended to be fixed permanently to the structures which were embedded in the earth. The structures were also custom made for the fixing of such machines without which the same could not become functional. The machines thus becoming a part and parcel of the structures in which they were fitted were no longer moveable goods. It was in those peculiar circumstances that the installation and erection of machines at site were held to be by this Court, to be immovable property that ceased to remain moveable or marketable as they were at the time of their purchase. Once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The same cannot thereafter be treated as moveable so as to be dutiable under the Excise Act. But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing. In the instant case all that has been said by the assessee is that the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent cannot, in our opinion, constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. In that view of the matter we see no difficulty in holding that the plants in question were not immovable property so as to be immune from the levy of excise duty.

34. Our answer to question no.1 is accordingly in the affirmative.

Re: Question No.2

35. The Tribunal, as noticed in the earlier part of this order, has taken the view that the respondents-manufacturing units were entitled to the benefit of exemption under Notification No.1/93 as amended from time to time as the use of brand name Solidmec for the plants or the components manufactured by such units did not disentitle the said units from claiming the benefit of the exemption having regard to the fact that the size of the sticker giving the brand name of the manufacturing units was bigger than that of Solidmec, the marketing company. Mr. Bagaria learned senior counsel for the respondent fairly conceded that the reasoning given by the Tribunal based on the size of the sticker was not legally sustainable. He, however, urged that since the manufacturing units had also raised some other defences including one on the ground of limitation, even if the order passed by the Tribunal was set aside, the matter may have to go back to the Tribunal to enable it to examine the said alternative contentions. Mr. Malhotra did not have any serious objection to this course being followed. He urged and, in our opinion rightly so, that since the Tribunal's view on the question of exemption was unsustainable the order passed by the Tribunal has to be set aside and the matter remitted back for a fresh disposal qua the said units by reference to the other contentions urged on behalf of the units which the Tribunal has not examined. In that view of the matter our answer to question No.2 is in the negative.

36. In the result we allow these appeals, set aside orders dated 19th August 2002 and 8th April 2003 passed by the Tribunal and remand the matter back to the Tribunal for passing fresh orders on the subject appropriately dealing with the alternative contentions which the respondents may urge keeping in view the observations made hereinabove. The appellants shall also be entitled to one set of costs assessed at Rs.25,000/- only.

K.K.T. Appeals allowed.

HIRABHAI JHAVERBHAI
v.
STATE OF GUJARAT & ORS.
(Criminal Appeal No. 749 of 2010)

APRIL 9, 2010

[J.M. PANCHAL AND SURINDER SINGH NIJJAR, JJ.]

Code of Criminal Procedure, 1973:

s. 320(8) – Compounding of offence – Offence punishable u/s 324 IPC – Conviction and sentence of six months as imposed by trial court affirmed by High Court – In appeal before Supreme Court the victims impleaded as respondents – Affidavit filed stating that disputes between parties were settled and victims expressed their willingness to compound the offence – HELD: The offence was committed on 23.7.1986 on which date it was compoundable with permission of the Court – CrPC (Amendment) Act, 2005 which came into force w.e.f. 23.6.2006, making the offence punishable u/s 324 IPC as non-compoundable, is not applicable to the facts of the instant case – In view of the statement of the victims made in the affidavit and having regard to the facts and circumstances of the case, permission to compound the offence granted – Judgment of courts below, set aside – In view of s.320(8) Compounding of the offence shall have the effect of acquittal of the accused – Penal Code, 1860 – s.324.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 749 of 2010.

From the Judgment & Order dated 14.9.2006 & 9.11.2006 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 517 of 1994 & Criminal Misc Application No. 12531 of 2006 in Criminal Appeal No. 517 of 1994.

Meenakshi Arora for the Appellant.

Hemantika Wahi, Shamik Sanjanwala, Jesal, Anurag Sharma for the Respondents

The following Order of the Court was delivered

O R D E R

Leave granted.

The instant appeal is directed against the judgment dated September 14, 2006, rendered by the learned Single Judge of Gujarat High Court in Criminal Appeal No.517 of 1994 by which the conviction of the appellant recorded under Section 324 I.P.C. and imposition of sentence of S.I. for six months and fine of Rs.250/- in default simple imprisonment of 15 days vide judgment dated April 30, 1994 passed by the learned Addl.Sessions Judge, Bhavnagar in Sessions Case No.131 of 1987 is confirmed. The appeal is also directed against judgment dated November 9, 2006 rendered by the learned Single Judge of High Court of Gujarat in Criminal Miscellaneous Application No.12531 of 2006 by seeking permission of the Court to compound offence punishable under Section 324 IPC is rejected.

We have heard learned counsel for the appellant.

From the record it is evident that the incident in question took place on July 23, 1986. Pursuant to the order dated January 29, 2010 passed by this Court in the instant matter, the complainant and injured are impleaded as respondents and are represented through their learned counsel. They have filed affidavit stating that the disputes between the parties have been settled with the intervention of respectable persons of the society. They have also expressed their willingness to compound the offence. This Court finds that after coming into force of the Code of Criminal Procedure (Amendment) Act, 2005 from June

23, 2006 the offence u/s 324 IPC is made non-compoundable. However, in this case offence u/s 324 IPC was committed on July 23, 1986 on which date it was compoundable with the permission of the Court. As the Code of Criminal Procedure (Amendment) Act 2005 is not applicable to the facts of the case, offence u/s 324 IPC would be compoundable with the permission of the Court. In view of the statement, made by respondent Nos.2 to 4 in their affidavit and having regard to the facts and circumstances of the case, permission to compound the offence deserves to be granted to the original complainant and the injured.

Hence, the appeal is allowed. The two judgments impugned in the appeal are set aside. The injured complainant and two other injured are permitted to compound the offence punishable under Section 324 IPC. In view of sub-section (8) of Section 320 of the Code of Criminal Procedure, the composition of offence u/s 324 IPC shall have the effect of an acquittal of the appellant with whom the offence has been compounded.

R.P. Appeal allowed.

BATA INDIA LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, NEW DELHI

(Civil Appeal No. 2377 of 2002)

APRIL 12, 2010

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

Central Excise Act, 1944:

s.2(d) – Excisable goods – Unvulcanised sandwiched fabric assembly produced during the manufacturing process of footwear in assessee's factory and captively consumed – Held: Cannot be termed as "goods" – In the absence of proof of marketability, the intermediate product would not be goods much less excisable goods – Such a product is excisable only if it is a complete product having commercial identity capable of being sold to a consumer which has to be established by revenue – No evidence produced by revenue to show that the intermediate product "unvulcanised sandwiched fabric" as such was capable of being marketed – The mere fact that the said product was entrusted outside for some job work such as stitching is not an indication to show that it is commercially distinct or marketable product – Central Excise Tariff Act, 1985 – Sub-heading number 5905.10 – Notification No.143/94-CE dated 7.12.94.

Notification No.143/94-CE dated 7.12.94 – Exemption under – Held: Available in respect of unvulcanised sandwiched fabric assembly produced during the manufacturing process of footwear if captively used for the manufacture of exempted footwear.

***Words and phrases**: 'goods' – Meaning of, in the context of s.2(d) of Central Excise Act, 1944.*

The appellant-assessee has been in the business of manufacture of footwear. For the manufacture of foot wear, it purchased various raw materials from the market such as fabrics, rubbers, chemicals, solvents etc. During the manufacturing process, various chemicals/rubbers/ solvents etc., are mixed together and a thin layer of such mixed materials is sandwiched in between two sheets of textile fabric, in running length, through a three bowl calendering machine. The product is later cut and stitched according to the assessee's requirements and in-process materials are used as shoe-uppers in the foot wear. Such fabrics are also at times sent to job workers for stitching purposes only and the fabric sandwiched with the mixed materials are inputs of the intermediate stage during the course of manufacture of footwear. Vulcanisation of the foot wear takes place only after completing the entire process and then it becomes a finished product as a footwear, made available in the market and acquires commercial identity and turns out to be a commercially known product.

The question which arose for consideration in the instant appeal was whether 'unvulcanised sandwiched fabric assembly' produced in the assessee's factory and captively consumed can be termed as "goods" and can be classified as "rubberized cotton fabrics" falling under sub-heading number 5905.10 of the schedule to the Central Excise Tariff Act, 1985.

Allowing the appeal, the Court

HELD: 1.1. The unvulcanised sandwiched fabric is used as an intermediate product by the assessee. The burden to show that the product in question is marketed or capable of being bought or sold in the market so as to attract duty is entirely on the Revenue. Admittedly, the assessee is not marketing the product. Revenue did not

succeed in establishing that the product in question was either marketed or was capable of being marketed. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. No evidence was produced by the Revenue to show the product unvulcanised sandwiched fabric as such was capable of being marketed, without further processing. The mere fact that the product in question was entrusted outside for some job work such as stitching is not an indication to show that the product is commercially distinct or marketable product. Without proof of marketability, the intermediate product would not be goods much less excisable goods. Such a product is excisable only if it is a complete product having commercial identity capable of being sold to a consumer which has to be established by the Revenue. [Paras 12 and 18] [510-A-E; 513-E-F]

Union of India v. Delhi Cloth and General Mills Co. **(1997) 5 SCC 767;** *Union of India v Delhi Cloth and General Mills Company Limited* **AIR 1963 SC 791;** *A.P. State Electricity Board v. Collector of Central Excise, Hyderabad* **(1994) 2 SCC 428, relied on.**

Hindustan Ferodo Ltd. v. Collector of Central Excise, Bombay **(1997) 2 SCC 677;** *UOI v. Delhi Cloth & General Mills Co.* **1997 (1) ELT J-199, referred to.**

1.2. The test report dated 25.10.1994 of the Chemical Examiner, SPB Hand Book of rubber products and the statement of the Superintendent (Supply and Transportation) of the assessee's company do not show that the product in question was capable of being marketed. The mere theoretical possibility of the product being sold is not sufficient but there should be commercial capability of being sold. The materials

produced by the assessee would show that the product in question was only an intermediary product generally used for captive consumption which has no commercial identity as such. [Para 19] [513-G-H; 514-A-C]

Union of India v. Sonic Electrochem (P) Ltd. **(2002) 7 SCC 435;** *Cipla Ltd. v. Commissioner of C. Ex., Bangalore* **2008 (225) ELT 403 (SC);** *Gujarat Narmada Valley Fert. Co. Ltd. v. Collector of Ex.& Cus.***(2005) 7 SCC 94, relied on.**

Union of India (UOI) v. Bata India Ltd. **1993 (68) ELT 756 (Cal), referred to.**

2. By Notification No.143/94-CE dated 7.12.94 the product in question stands exempted if captively used for the manufacture of exempted footwear. [Para 21] [514-G]

Case Law Reference:

(1997) 2 SCC 677	**referred to**	**Para 10, 13**
(2002) 7 SCC 435	**relied on**	**Para 10, 15**
2008 (225) ELT 403 (SC)	**relied on**	**Para 10, 17**
(2005) 7 SCC 94	**relied on**	**Para 10, 16**
1997 (1) ELT J-199	**referred to**	**Para 11**
(1997) 5 SCC 767	**relied on**	**Para 12**
AIR 1963 SC 791	**relied on**	**Para 12**
(1994) 2 SCC 428	**relied on**	**Para 12**
1993 (68) ELT 756 (Cal)	**referred to**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2377 of 2002.

From the Judgment & Order dated 24.12.2001 of the CEGAT, Eastern Bench, Kolkata in Appeal No. ER-52 of 1998.

Ravinder Narain, Sonu Bhatnagar, Mallika Joshi, Rashmi Malhotra, Rajan Narain for the Appellant.

V. Shekhar, T.V. Ratnam, Paari Vendaan, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The question that arises for consideration in this appeal is whether unvulcanised sandwiched fabric assembly produced in the Assessee's factory and captively consumed can be termed as "goods" and can be classified as "rubberized cotton fabrics" falling under sub-heading number 5905.10 of the schedule to the Central Excise Tariff Act, 1985.

2. The above question came up for consideration before the Customs, Excise and Gold (Control) Appellate Tribunal (for short 'the Tribunal). The Member (Judicial) took the view that the product would not attract duty unless it is established that the goods in question is marketable or capable of being marketed as a distinct product and that the Revenue has failed to discharge the burden to prove the marketability and dutiability of the intermediate product in the manufacture of rubber/canvas foot wear. The Member (Technical), however, disagreed with that finding and held that the Revenue has discharged its burden and took the view that the goods in question attracts duty.

3. In view of the difference of opinions expressed by the two members, the matter was placed before a third member who concurred with the view expressed by the Member (Technical) and a final order was passed on the above issue by the Tribunal on 24.12.2001 holding that double textured rubberized fabric/unvulcanised sandwiched fabric is an excisable product liable to central excise duty. No opinion was expressed by any of the members on the question of exemption, applicability of notification and the quantum of

penalty imposed and those issues were left to be considered when the appeal is finally posted for hearing.

4. Aggrieved by the findings of the Tribunal dated 24.12.2001 the assessee has come up before us with this appeal.

5. The Assessee is a well known manufacturer of foot wear. For the manufacture of foot wear, various raw materials are purchased by the assessee from the market and / or from their respective manufacturers such as fabrics, rubbers, chemicals, solvents etc. During the process of manufacturing of foot wear various chemicals / rubbers / solvents etc., are mixed together and a thin layer of such mixed materials is sandwiched in between two sheets of textile fabric, in running length, through a three bowl calendering machine. The product is later cut and stitched according to the assessee's requirements and in-process materials are used as shoe-uppers in the foot wear. Such fabrics are also at times sent to job workers for stitching purposes only and the fabric sandwiched with the mixed materials are inputs of the intermediate stage during the course of manufacture of footwear. Vulcanisation of the foot wear takes place only after completing the entire process and then it would be a finished product as a footwear, made available in the market and acquires commercial identity and turns out to be a commercially known product.

6. The Collector of Central Excise (in short the Collector) noticed that during the manufacture of foot wear the assessee manufactures an excisable product called double textured fabric which is further used as upper material in the manufacture of foot wear and this double textured fabric is nothing but rubberized, water proof fabric with a thin layer of rubber sandwiched between two sheets of cotton fabric in running length. As a result of that process a double textured fabric emerges as a distinct product with specific properties and character other than that of original fabric used as input which

is known in commercial trade parlance as double textured fabric which is used in considerable quantities for making rain-coats, holdalls, hand bags etc.

7. The Collector therefore, came to the conclusion that this double textured fabrics are marketable products fulfilling the requirement of the definition of excisable goods as per Section2(d) of the Central Excise 1944 (in short the Act) attracting the levy of central excise duty under the Act. The Collector then issued a show cause notice dated 29.03.1995 to the assessee stating it had manufactured and cleared double textured fabric valued at Rs.7,96,43,247/- for captive consumption in the manufacture of shoe-uppers used in 2,51,29,646 numbers of exempted canvas shoes without payment of duty amounting to Rs.88,80,782/- during the period from 01.04.1990 to 31.08.1994 without the cover of excise gate pass, without filing classification list, price list without accounting for production and clearance in the statutory central excise records and without observing other formalities prescribed under the Central Excise Rules, 1944. The assessee was directed to show cause why the above amount be not recovered from them under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11(A) of the Act and also to show cause why penal action be not taken against them under Rule 173 Q(1) of the Central Excise Rule, 1944. Yet another show cause notice dated 30.03.1995 also was issued to the assessee claiming duty amounting to Rs. 5,95,181 during the period from 01.09.1994 to 06.12.1994 stating that the assessee had failed to pay duty for the rubberized fabric manufactured and cleared for captive consumption for the above period as well and to show cause why penal action be not initiated under Rule 173Q(1) of Rules 1944.

8. The assessee filed detailed objections to the show cause notices on 22.09.1995 and 19.02.1996 respectively, and the matter was heard by the Commissioner, Central Excise who confirmed the demands made in both the show cause notices

and a total amount of Rs.89,77,064 was demanded from the assessee. The Commissioner of Central Excise also imposed a penalty of Rupees 1 crore on the assessee under Section 173 Q(1) of the Central Excise Rules, 1944. Aggrieved by the above mentioned order the assessee approached the Tribunal and the Tribunal by a majority order held that double textured rubberized fabrics / vulcanized stitched fabric is an excisable product attracting duty the correctness or otherwise of that order is the issue that has come up for consideration before us.

9. Shri Ravindra Narain, learned counsel appearing for the assessee submitted that the Tribunal has committed a grave error in holding that the product manufactured by the assessee for their captive consumption is liable to duty under the Act. He submitted that the Tribunal has not properly appreciated the manufacturing process undertaken by the assessee and the question whether that intermediate product has commercial identity or marketability. Learned counsel also submitted that the Revenue has not discharged their burden of proof to establish that the product is excisable and marketable and capable of being marketed and that the Revenue has only produced three documents viz., the test report dated 20.10.1994, the SSB hand book of rubber products and the statement of Superintendent (Supply and Transportation) of the assessee's company which are insufficient to hold that product is marketable or capable of being marketed. On the other hand assessee has produced sufficient materials to establish that the material used by the assessee is not marketable and has no commercial identity.

10. Shri Narain also submitted that marketability is an essential ingredient to hold whether a product is dutiable or excisable and it is for the Revenue to prove the same. Learned counsel also submitted that it is not the function of the Tribunal to enter into that arena and make suppositions, rather it should examine the question whether sufficient materials have been

produced by the Revenue to discharge its burden. In support of his contention learned counsel placed reliance on various decisions of this court such as *Hindustan Ferodo Ltd*. vs. *Collector of Central Excise, Bombay* (1997) 2 SCC 677; *Union of India* vs. *Sonic Electrochem (P) Ltd*. (2002) 7 SCC 435; Cipla Ltd. vs. Commissioner of C.Ex., Bangalore 2008 (225) ELT 403 (SC).; *Gujarat Nermada Valley Fert. Co. Ltd.* vs. *Collector of Ex.& Cus*.(2005) 7 SCC 94.

11. Mr. V. Sekhar, learned senior counsel appearing for the Revenue, on the other hand, contended that the materials produced by the Revenue would be sufficient to hold that the product in question is a distinct product having commercial identity and is capable of being marketed. Learned counsel submitted that by the process undertaken by the assessee a new product emerges which is capable of being brought to market or being sold. Learned senior counsel also submitted that the material is also being sent out of the factory to the job workers for stitching purposes and is brought back from them, and, hence the said product is a commercially distinct product liable to be classified under the sub-heading 5905.10 of schedule to Central Excise Tariff Act. Reference was also made to the judgment of this court in *UOI* vs. *Delhi Cloth & General Mills Co.* 1997 (1) ELT J-199. Referring to the division bench judgment of the Calcutta High Court reported in (1993) 68 ELT 756 (Calcutta), learned counsel submitted that the Calcutta High Court on identical products, dealt with by the assessee, decided against the assessee.

12. We have heard counsel on either side at length and have also gone through the show cause notices issued by the Collector, objections filed by the assessee and the order passed by the Commissioner, views expressed by both the members and the order passed by the Tribunal on the question of exigibility of the product. The process undertaken by the assessee has been elaborately dealt with in the above mentioned orders and it is unnecessary to reiterate the same.

Suffice it to say that the product in question is used as an intermediate product, goes to make the component for the final product. The burden to show that the product in question is marketed or capable of being bought or sold in the market so as to attract duty is entirely on the Revenue. Reference may be made to the decision of this Court in *Union of India* vs. *Delhi Cloth and General Mills Co.* (1997) 5 SCC 767. The test of marketability often called 'Vendability test' has been elaborately considered by a constitution Bench Judgment of this Court in *Union of India* vs. *Delhi Cloth and General Mills Company Limited* AIR 1963 SC 791. This legal position has been reiterated by this Court in *A.P. State Electricity Board* vs. *Collector of Central Excise, Hyderabad* (1994) 2 SCC 428 and various other decisions, wherein this Court held that the marketability is essentially a question of fact to be decided on the facts of each case and there can be no generalization, and the fact that goods are not in fact marketed is of no relevance and the question whether they are capable of being marketed. Admittedly, the assessee is not marketing the product but still the question is whether the product is capable of being marketed.

13. The Revenue in this case has not produced any material before the Tribunal to show that the product is either been marketed or capable of being marketed but expressed its opinion unsupported by any relevant materials. This Court in *Hindustan Ferrado Limited* (supra) explained the function of the Tribunal in such situations as follows:-

> "It is not the function of the Tribunal to enter into the arena and make suppositions that are tantamount to the evidence that a party before it has failed to lead. Other than supposition, there is no material on record that suggests that a small scale or medium scale manufacturer of brake linings and clutch facings "would be interested in buying" the said rings or that they are marketable at all. As to the brittleness of the said rings, it was for the Revenue to

demonstrate that the appellants' averment in this behalf was incorrect and not for the Tribunal to assess their brittleness for itself. Articles in question in an appeal are shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunal makes for better appreciation of the record, but not its substitution."

14. In the above case this Tribunal was concerned with articles such as rings punched from asbestos boards and two types of asbestos fabrics, namely, special fabrics in coil of continuous length and M.R. grey in rolls. This Court noticed that the Revenue had not produced any evidence to establish that the said rings fell within Item 22F of Schedule to the Act and held in favour of the assessee.

15. In *Sonic Electrochem Limited* (supra) this Court was dealing with the question whether plastic body, a part of electronic mosquito repellant and fragrant mat are chargeable to excise duty under Articles 5(f) of Notification 160/68-CE dated March 1, 1986 and sub-heading 3307.49 respectively of the Central Excise and Tariff Act, 1985. In that case, this Court held that in order to establish that goods are liable to duty, two test have to be satisfied viz., (a) manufacture and (b) marketability. On the question of marketability of the articles this Court held as follows :-

"…..Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being got and sold. The fact that product in question is generally not been got and sold or has no demand in the market would be irrelevant. The plastic body of EMR does not satisfy the aforementioned criteria. There are some competing manufacturers of EMR.

Each is having a different plastic body to suit its design and requirement. If one goes to the market to purchase plastic body of EMR of the respondents either for replacement or otherwise one cannot get it in the market because at present it is not a commercially known product. For these reasons, the plastic body, which is a part of the EMR of the respondents, is not 'goods' so as to be liable to duty as parts of EMR under para 5(d) of the said exemption notification."

16. In *Gujarat Narmada Valley Fertilisers Corporation* (supra), this Court was dealing with the question whether the intermediate chemicals which are formed in the process of manufacture Butachlor are liable to tax under the Salt Act and held that the test report produced by the Revenue will not establish the marketability of the product. It further held that unless the product is capable of being marketed and is known to those who are in the market as having an identity as distinctly identifiable that the article is subject to excise duty, the product cannot be treated as a product that is marketable. Marketability cannot be established by mere stability of the product. Something more would have to be shown to establish that the products are known in the market as commercial product.

17. In *Cipla Limited* (supra) this Court was examining the question whether Benzyl Methyl Salycylate (BMS) is marketable and therefore liable to excise duty. After referring to various earlier decisions of this Court , it was held that marketability is an essential ingredient to hold that an article is dutiable or excisable to duty and it is well established principle of law that the burden is on the Revenue to prove that the goods are marketable or excisable and held that the product in question was neither marketed nor marketable and was only an intermediate product. It is useful to refer to the law laid down by this Court which reads as follows:-

"Since marketability is an essential ingredient to hold that a product is dutiable or exigible, it was for the Revenue to

prove that the product was marketable or was capable of being marketed. Manufacturing activity, by itself, does not prove the marketability. The product produced must be a distinct commodity known in the common parlance to the commercial community for the purpose of buying and selling. Since there is no evidence of either buying or selling in the present case, it cannot be held that the product in question was marketable or was capable of being marketed. Mere transfer of BMS by the appellant from its factory at Bangalore to its own unit at Patalganga for manufacture of final product was either marketed or was marketable."

18. Revenue in this case has not succeeded in establishing that the product in question was either marketed or was capable of being marketed. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. No evidence has been produced by the Revenue to show the product unvulcanised sandwiched fabric as such is capable of being marketed, without further processing. The question is not whether there is an hypothetical possibility of a purchase and sale of the commodity but whether there is sufficient proof that the product is commercially known. The mere fact that the product in question was entrusted outside for some job work such as stitching is not an indication to show that the product is commercially distinct or marketable product. Without proof of marketability the intermediate product would not be goods much less excisable goods. Such a product is excisable only if it is a complete product having commercial identity capable of being sold to a consumer which has to be established by the Revenue.

19. The test report dated 25.10.1994 of the Chemical Examiner, SPB hand book of rubber products and the statement of the Superintendent (Supply and Transportation) of the assessee's company do not show that the product in question is capable of being marketed. The mere theoretical possibility

of the product being sold is not sufficient but there should be commercial capability of being sold. Theory and practice will not go together when we examine the marketability of a product. On the other hand materials produced by the assessee i.e. affidavit of Mr. Shomnath Chokravarty, Consultant – Rubber and Plastic Technology, affidavit of the Production Manager of the assessee Company, certificate of Prof. C.K.Das, IIT, Kharagpur, affidavit of Ms. Parvati Pada Mukherjee, certificate from Footwear Design and Development Institute, Ministry of Commerce, Government of India and The Vanderbilt Rubber Handbook, would show that the product in question is only an intermediary product generally used for captive consumption which has no commercial identity as such.

20. We are also of the view that no reliance can be placed on the Division Bench Judgment of the Calcutta High Court reported in *Union of India (UOI)* vs. *Bata India Ltd.* 1993 (68) ELT,756 (Cal) since this Court while dismissing SLP(C)No.6146 of 1993 filed by the assessee against the above judgment clearly opined that the merits of the case was not being looked into since the operative portion of the judgment was in favour of the assessee herein and hence the question as to whether the product was excisable or not was not decided.

21. In view of the above facts and circumstances, we are inclined to allow this appeal and set aside the order of the Tribunal and quash the show cause notices issued to the assessee since the Revenue had not produced any relevant materials to show the marketability of the product. We are informed that *vide* Notification No.143/94-CE dated 7.12.94 the product in question stands exempted if captively used for the manufacture of exempted footwear. Civil appeal is, therefore, allowed as above, directing the Tribunal to dispose of the appeal without delay.

D.G. Appeal allowed.

S. KALADEVI
v.
V.R. SOMASUNDARAM AND ORS.
(Civil Appeal No. 3192 of 2010)

APRIL 12, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Registration Act, 1908*: s.49, proviso – Unregistered sale deed is admissible in evidence in a suit for specific performance of the contract – Evidence Act, 1872 – Specific performance – Transfer of property Act, 1882.*

The question which arose for consideration in the present appeal was whether the courts below erred in holding that an unregistered sale deed was not admissible in evidence in a suit for specific performance of the contract.

Allowing the appeal, the Court

HELD: The Trial Court erred in not admitting the unregistered sale deed in evidence in view of the proviso to Section 49 of the Registration Act, 1908 and the High Court ought to have corrected the said error by setting aside the order of the trial court. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral

transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act. By admission of an unregistered sale deed in evidence in a suit for specific performance as evidence of contract, none of the provisions of 1908 Act is affected; rather court acts in consonance with proviso appended to Section 49 of 1908 Act. [Paras 8, 11, 16] [519-C-D; 521-A-E; 525-B]

K.B. Saha and Sons Private Limited v. Development Consultant Limited **(2008) 8 SCC 564, relied on.**

Kalavakurti Venkata Subbaiah v. Bala Gurappagari Guruvi Reddy **(1999) 7 SCC 114, referred to.**

Case Law Reference:

(2008) 8 SCC 564	**relied on**	**Para 12**
(1999) 7 SCC 114	**referred to**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3192 of 2010.

From the Judgment & Order dated 13.11.2008 of the High Court of Judicature at Madras in C.R.P.(PD) No. 261 of 2008.

K.V. Vishwanathan, B. Rajunath, Vijay Kumar for the Appellant.

T.S.R. Venkatramana, G.S. Mani, R. Satish for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA,J. 1. Leave granted.

2. The short question is one of admissibility of an unregistered sale deed in a suit for specific performance of the contract.

3. The appellant and the respondents are plaintiff and defendant nos. 1, 2 and 3 respectively in the suit presented in the Court of Subordinate Judge, Gobichettipalayam. The plaintiff in the suit claimed for the reliefs of directing the defendants to execute a fresh sale deed with regard to the suit property in pursuance of an agreement for sale dated 27.02.2006 on or before the date that may be fixed by the court and failing which execution of the sale deed by the court. She also prayed for grant of permanent injunction restraining the defendants from disturbing with her peaceful possession and enjoyment of the suit property.

4. According to the plaintiff, 1st defendant for himself, as the guardian father of 3rd defendant and 2nd defendant jointly entered into an oral agreement with her on 27.02.2006 to sell the suit property for a consideration of Rs. 1,83,000/-. It was agreed that the sale deed, in pursuance of the oral agreement for sale, would be executed and registered on the same day. The plaintiff purchased the stamp papers; paid the entire sale consideration to the defendants; the defendants put the plaintiff in possession of the suit property and also executed a sale deed in her favour. On 27.02.2006 itself, the said sale deed was taken to the Sub-Registrar's office. The Sub-Registrar, however, informed that in view of an order of attachment of the suit property the sale deed could not be registered. The sale deed, thus, could not be registered. The defendant nos. 1 and 2 then promised the plaintiff that they would amicably settle the matter with the concerned party who had obtained

attachment of the suit property and get the sale deed registered no sooner the attachment was raised. The plaintiff averred that she called upon the defendants to get the sale deed registered, but the defendants avoided the same by putting forth the reason that attachment in respect of the suit property was subsisting. On 04.02.2007 however, the plaintiff called upon defendant nos. 1 and 2 to cooperate in getting the sale deed registered, but instead of doing that the defendants attempted to interfere with her possession and enjoyment of the suit property necessitating action by way of suit.

5. The 1st defendant filed written statement and traversed plaintiff's case. He denied having entered into an oral agreement for sale with the plaintiff for himself and as a guardian father of 3rd defendant and the 2nd defendant jointly on 27.02.2006 as alleged. He also denied having delivered physical possession of the suit property to the plaintiff. The 1st defendant set up the defence that he had taken loan from one Subramaniam and when Subramaniam demanded the repayment thereof, he approached plaintiff and requested her to lend Rs. 1,75,000/- as loan. Upon plaintiff's insistence that 1st defendant should execute an agreement for sale in her favour, he and the 2nd defendant signed the document believing that to be agreement for sale on 27.02.2006 and went to the office of Sub-Registrar for getting the agreement for sale registered. However, when the Sub-Registrar asked the 1st defendant whether the consideration has been received and sale deed could be registered, he and the 2nd defendant learnt that plaintiff had fraudulently obtained the signatures on sale deed by falsely stating that it was only an agreement for sale and hence they went away refusing to agree for the registration of the said document.

6. On the basis of the pleadings of the parties, the issues were struck. It appears that on 05.12.2007 at the time of examination of PW. 1, the unregistered sale deed dated 27.02.2006 was tendered for being marked. The counsel for

the defendants objected to the said document being admitted in evidence being an unregistered sale deed. The trial court by its order dated 11.12.2007 sustained the objection and refused to admit the sale deed in evidence.

7. The plaintiff unsuccessfully challenged the order of the trial court dated 11.12.2007 by filing revision petition before the High Court and hence this appeal by special leave.

8. After having heard Mr. K. V. Vishwanathan, learned senior counsel for the appellant and Mr. T.S.R. Venkatramana, learned counsel for the respondents, we are of the opinion that having regard to the proviso to Section 49 of the Registration Act, 1908 (for short, '1908 Act'), the trial court erred in not admitting the unregistered sale deed dated 27.02.2006 in evidence and the High Court ought to have corrected the said error by setting aside the order of the trial court.

9. Mr. T.S.R. Venkatramana, learned counsel for the respondents, however, strenuously urged that 1908 Act is a complete code by itself and is a special law and, therefore, any dispute regarding the registration, including the refusal to register by any party, is covered by the provisions of that Act and the remedy can be worked out under it only. He referred to Sections 71 to 77 of the 1908 Act and submitted that refusal to register a document by a party is exhaustively dealt with by the said provisions and the provisions of the Specific Relief Act, 1963 (for short, '1963 Act') cannot be and should not be invoked in a case of failure to register a document which is complete in other respects, except for want of registration. Learned counsel for the respondents submitted that the defendants refused to admit execution of the said document before the concerned Sub-Registrar because of the fraud played by the appellant (plaintiff) inasmuch as instead of writing an agreement to sell, she got executed a full fledged sale deed contrary to the agreement and understanding. The defendants accordingly walked out of the office of Sub-Registrar without admitting the execution of the sale deed and under these

circumstances the only remedy available to the appellant was to get an endorsement "registration refused" and then file an application before the Registrar under Section 73 of the 1908 Act. He also referred to Section 3 of 1963 Act and submitted that the provisions of 1963 Act would not override the provisions of 1908 Act.

10. Section 17 of 1908 Act is a disabling section. The documents defined in clauses (a) to (e) therein require registration compulsorily. Accordingly, sale of immovable property of the value of Rs. 100/- and more requires compulsory registration. Part X of the 1908 Act deals with the effects of registration and non-registration. Section 49 gives teeth to Section 17 by providing effect of non-registration of documents required to be registered. Section 49 reads thus:

> "S.49.- *Effect of non-registration of documents required to be registered.*- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall –
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power,
>
> unless it has been registered:
>
> Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

11. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

12. Recently in the case of K.B. Saha and Sons *Private Limited v. Development Consultant Limited*[1], this Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

> "……The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character

> of the possession of the person who holds under it……"

This Court then culled out the following principles:-

> "1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
>
> 2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.
>
> 3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
>
> 4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.
>
> 5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

13. In *Kalavakurti Venkata Subbaiah v. Bala Gurappagari Guruvi Reddy*[2], the question presented before this Court was whether a decree to enforce the registration of sale deed could be granted. That was a case where respondent therein filed a suit for specific performance seeking a direction to register the sale deed. The contention of the appellant, however, was that

decree for specific performance based on unregistered sale deed could not be granted. This Court noticed the provisions contained in Part XII of 1908 Act, particularly Section 77, and difference of opinion between the various High Courts on the aspect and observed:-

> "The difference of opinion amongst the various High Courts on this aspect of the matter is that Section 77 of the Act is a complete code in itself providing for the enforcement of a right to get a document registered by filing a civil suit which but for the special provision of that section could not be maintainable. Several difficulties have been considered in these decisions, such as, when the time has expired since the date of the execution of the document whether there could be a decree to direct the Sub-Registrar to register the document. On the other hand, it has also been noticed that an agreement for transfer of property implies a contract not only to execute the deed of transfer but also to appear before the registering officer and to admit execution thereby facilitating the registration of the document wherever it is compulsory. The provisions of the Specific Relief Act and the Registration Act may to a certain extent cover the same field but so that one will not supersede the other. Where the stage indicated in Section 77 of the Act has reached and no other relief except a direction for registration of the document is really asked for, Section 77 of the Act may be an exclusive remedy. However, in other cases it has no application, inasmuch as a suit for specific performance is of a wider amplitude and is primarily one for enforcement of a contract and other consequential or further relief. If a party is seeking not merely the registration of a sale deed, but also recovery of possession and mesne profits or damages, a suit under Section 77 of the Act is not an adequate remedy."

14. This Court then held that the first appellate court rightly

took the view that under Section 49 of the 1908 Act, unregistered sale deed could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property. It was held:

> "……The document has not been presented by the respondent to the Sub-Registrar at all for registration although the sale deed is stated to have been executed by the appellant as he refuses to cooperate with him in that regard. Therefore, various stages contemplated under Section 77 of the Act have not arisen in the present case at all. We do not think, in such a case when the vendor declines to appear before the Sub-Registrar, the situation contemplated under Section 77 of the Act would arise. It is only on presentation of a document the other circumstances would arise. The first appellate court rightly took the view that under Section 49 of the Act the sale deed could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property…..".

15. The issue before us is only with regard to the admissibility of unregistered sale deed dated 27.2.2006 in evidence and, therefore, it is neither appropriate nor necessary for us to consider the contention raised by learned counsel for the respondents about the maintainability of suit as framed by the plaintiff or the circumstances in which the sale deed was executed. If any issue in that regard has been struck by the trial court, obviously, such issue would be decided in accordance with law. Suffice, however, to say that looking to the nature of the suit, which happens to be a suit for specific performance, the trial court was not justified in refusing to admit the unregistered sale deed dated 27.2.2006 tendered by the plaintiff in evidence.

16. The argument of learned counsel for the respondents with regard to Section 3(b) of 1963 Act is noted to be rejected. We fail to understand how the said provision helps the

respondents as the said provision provides that nothing in 1963 Act shall be deemed to affect the operation of 1908 Act, on documents. By admission of an unregistered sale deed in evidence in a suit for specific performance as evidence of contract, none of the provisions of 1908 Act is affected; rather court acts in consonance with proviso appended to Section 49 of 1908 Act.

17. The result is that appeal is allowed, the order of the High Court dated 13.11.2008 and that of the trial court dated 11.12.2007 are set aside. The trial court shall mark the unregistered sale deed dated 27.2.2006 tendered by the plaintiff in her evidence and proceed with the suit accordingly. The parties shall bear their own costs.

D.G. Appeal allowed.

M.C. ALI AND ANR.
v.
STATE OF KERALA
(Criminal Appeal Nos. 499 of 2002)

APRIL 13, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860: ss.302, 307, 149, 34 – Murder of one and grievous injuries to others allegedly on account of religious enmity – Acquittal by trial court disbelieving prosecution story – High Court setting aside acquittal and ordering conviction under ss.302, 307, 149, 34 – Correctness of – Held: High Court erred in interfering with the order of acquittal recorded by trial Court – The sequence of events and the evidence were meticulously examined by the Trial Court – Trial Court noticed that the incident took place in dark, but no torches were recovered from the accused – The evidence of injured prosecution witness PW1 was not believed as his behaviour appeared wholly unnatural – PW2 was present when police reached scene of incident but his statement was not recorded – Names of accused were mentioned in the First Statement but not in the inquest report recorded later in time – There was no explanation for injuries suffered by the accused – Even the witnesses were interested witnesses and could not be believed in the absence of independent corroboration – Findings recorded by trial court were neither perverse nor unreasonable – Conviction set aside – Evidence – Interested witness.

Prosecution case was that PW-5, his family and close relatives were believer of a particular sect in the muslim community and were socially boycotted by the large section of the community. This created frequent conflicts

in the locality between the two groups. PW-5 brought PW-1 and deceased from a different place to work in his fields. PW-1 and deceased were residing in the house of PW-5. On 30.1.1994, PW-5 received information about the injuries suffered by the son of his brother CW9. Due to the tension prevailing in the locality between the two groups of the community, PW-5 asked PW1 and the deceased to accompany his son PW-2 to visit the house of CW9. At 9.15 p.m., they proceeded towards the house of CW9 through paddy fields, holding torches in their hands. A group of 15 persons was standing at the end of the paddy fields. The group also had torches in their hands. They flashed torches on them. Accused persons were in possession of MO1 weapon, knives and sticks. They suddenly attacked PW-1, 2 and the deceased. A1 to A4 inflicted cuts on the neck of the deceased and as a result he fell down. A-1 to A-6 again attacked deceased. PW-1 ran from the spot to save himself, and took shelter in the house of CW-9. PW-2 who also suffered injuries, ran for his life and reached the house of CW9. As deceased did not reach the house of CW-9, PW-1 along with the son of CW9 went to the scene of occurrence and saw the deceased lying dead.

PW-5 also heard a lot of noise from the side of paddy field. He went towards the paddy field and on the way he saw accused 1 to 4, 7, 9, and 11 to 13. All of them possessed knife and sticks. Fearing attack PW-5 ran towards his house.

PW-8, the Head Constable registered FIR at 00.30 hours on 31.1.1994. On that day morning, it was sent to the Magistrate who signed it at 3.30 p.m. Trial court did not believe the prosecution story and acquitted all the accused. High Court set aside the acquittal and ordered conviction under Sections 302, 307, 49 and 34 IPC. Hence these appeals.

Allowing the appeals, the Court

HELD: 1.1. If two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the findings of acquittal. The acquittal re-enforces and reaffirms the presumption of innocence of the accused. [Para 44] [556-B]

Antar Singh v. State of M.P. **(1979) 1 SCC 79;** *Chandrappa v. State of Karnataka* **2007 (4) SCC 415;** *Kali Ram v. State of H.P.* **(1973) 2 SCC 808, relied on.**

1.2. The incident took place in the dark. The Trial Court noticed that none of the torches were recovered or produced by any of the concerned persons. There was also no moon light. In such circumstances, the recognition of the six accused could not be possible. The Trial Court had meticulously examined each and every issue. It also noticed that there was anticipation of trouble otherwise there was no occasion for PW2 to be accompanied by PW1 and the deceased for going to the house of CW.9, brother of PW5. The Trial Court also traced the progress of these three individuals through the paddy field. Since it was a dark night, it was not entirely unbelievable that the torches were introduced to ensure that the accused could be said to have been identified. Surprisingly, after the deceased was fatally injured, PW1 bolted from the scene of crime. This PW1 was so loyal to PW5 that he had been taking undue advantage of being a scheduled caste and lodging false complaints against the accused persons under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Yet when the other faithful servant of PW5 was being brutally murdered, he ran away. The Trial Court, therefore, rightly concluded that the behaviour of PW1 was wholly unnatural. [Para 47] [557-C-G]

1.3. The Trial Court meticulously examined the sequence of events with regard to the recording of the FIR. The FIR was recorded at 0030 hrs on 31.1.1994. It was not received by the Magistrate till 3.30 p.m. on 31.1.1994. The Trial Court also noticed that the names of the accused were mentioned in First Information Statement Ex.P.1. But they were not mentioned in the relevant column of the inquest report. If Ex.P.1 had been prepared prior to the inquest report Ex.P.14, the names would surely have been mentioned therein. These conclusions again cannot be said to be perverse. [Para 49] [558-D-F]

1.4. The Trial Court also noticed that due to the long enmity of P.W.5 and his family with the accused, the evidence had to be scrutinized carefully. The deceased as well as PW1 were the employees of PW5 who were brought from the State of Karnataka as the local labour was not available. The Trial Court noticed that in case there had been an assault, as projected by the prosecution, there was no reason why PW1 would have been spared while the deceased was brutally murdered. After all, it was P.W.1 who had proceeded against those accused while working under PW5 by filing false cases against the accused. The Trial Court also noticed that delay in recording the statement of P.W.2 cannot be easily brushed aside. He was conscious through all the night and yet the statement was not recorded at the initial stage by PW7. He became unconscious only at the time when general anesthesia was given to him at 11.40 a.m. the following day. The Trial Court noticed that there was absolutely no explanation with regard to the injuries suffered by the accused. This apart, all the witnesses being interested witnesses, their evidence could not be believed in the absence of independent corroboration. Taking into consideration the entire facts and circumstances of the case, it would not be possible to

agree with the High Court that the findings recorded by the Trial Court were perverse or that only one conclusion consistent with the guilt of the accused was possible. The two views being reasonably possible the High Court ought not to have interfered with the verdict of acquittal recorded by the Trial Court. [Paras 50- 52] [558-G-H; 559-A-B; 559-C-F]

Case Law Reference:

(1979) 1 SCC 79	**relied on**	**Para 43**
2007 (4) SCC 415	**relied on**	**Para 44**
(1973) 2 SCC 808	**relied on**	**Para 44**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 499 of 2002.

From the Judgment & Order dated 18.12.2001 of the High Court of Kerala at Ernakuklam in Crl. A.No. 444 of 1998 (B).

WITH

Crl. A. Nos. 500-501 & 434 of 2002.

Ranjeet Kumar, E.M.S. Anam, Syed Ahmad Saud, Mohd. Moonis Abbasi, Shakil Ahmed Syed for the Appellants.

C.S. Rajan, G. Prakash, Ramesh Babu M.R. (NP) for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These three appeals have been filed against a common judgment of the High Court whereby the six appellants in the three appeals have been convicted under Sections 302, 307, 149 and 34 of the Indian Penal Code (for short 'IPC'); the sentence to life imprisonment for offences under Section 302 read with Section 149 or 34 of the IPC; rigorous imprisonment for five years under Section 307

read with Section 149 or 34 of the IPC; rigorous imprisonment for six months each under Sections 143 and 148 of the IPC.

2. Initially 13 persons including the six appellants had been charge-sheeted in Kumbla Police Station, Crime No.22/1994 for offences punishable under Sections 143, 148, 324, 307 and 302 of the IPC read with Section 149 of the IPC. Upon trial, the six appellants had been convicted under Sections 143, 147, 148, 307 and 302 read with Section 149 of the IPC and sentenced to life imprisonment together with various other periods of imprisonment under different sections. The sentences were directed to run concurrently. Accused Nos. 7 to 13 were found not guilty and acquitted of all the charges. The convicted accused filed Criminal Appeal No.391/96 before the High Court of Kerala. At the same time, the acquittal of accused Nos.7 to 13 was challenged through revision by K. Hussain (PW2) the son of Moosa Haji, PW5 (the injured witness), through Criminal Revision Petition No.1115/96. Through a common judgment, the High Court was pleased to accept the appeal filed by the convicts and their convictions as well as their sentences were set aside. The case was remanded to the Trial Court for fresh disposal after complying with the provisions under Section 233 of the Criminal Procedure Code. Criminal Revision Petition No.1115/96 against acquittal of accused Nos.7 to 13 was dismissed.

3. On remand, accused Nos.1 to 6 appeared before the Court on 9.1.1998. They were given an opportunity to adduce defence evidence. Consequently, they examined DW1 to DW5 and marked Exbts. D7 to D10. At the time of the remand, the earlier Sessions Judge who had convicted accused Nos.1 to 6 had been transferred, therefore, the evidence was recorded by his successor in office. On a reappraisal of the evidence led by the parties, the Sessions Judge came to the conclusion that the prosecution had failed to prove the offences alleged against the accused. They were, therefore, all acquitted.

4. These acquittals were challenged by the Sate of Kerala

in Criminal Appeal No.444/98 and by PW2, K. Hussain, in Criminal Revision No.552/98. The High Court, by a common judgment, came to the conclusion that the prosecution had conclusively proved the case against accused Nos. 1 to 6 and the findings recorded by the Sessions Judge were perverse and manifestly erroneous. Therefore, the judgment of the Trial Court was set aside. They have all been convicted for various offences, as noticed above.

5. Against the conviction and sentence, accused Nos.1 and 4, namely, K. M. Iddinkunhi and Andan, have filed Criminal Appeal No.434/2002, accused Nos. 2 and 3, namely, M.C. Ali and Andunhi have filed Criminal Appeal No.499/2002 and accused Nos.5 and 6, namely, B.K. Bayan Kunhi and K.B. Abbas have filed Criminal Appeal Nos.500-501/2002.

6. We have heard the learned counsel for the parties. Before we consider the submissions made by the learned counsel, it would be appropriate at this stage to notice the case as presented by the prosecution.

7. It is claimed by the prosecution that Moosa Haji, (PW5), his family and some of his close relatives are believers of Shemsia Thareequat sect in the Muslim community. They are the worshippers of Sun and followers of Sai Baba. They are not accepted by a large section of the Muslim community. Therefore, the local Jumaath had unleashed "a sort of an overt and covert attack on PW5 and other followers of Thareequat movement." This had created fights between the two groups of the locality which caused friction in the relationships, activities and life which ended up in a number of disputes including criminal cases. The majority in the Muslim community of the area had ex-communicated PW5 and other followers of Thareequat movement. It is further alleged by the prosecution that some of the religious scholars had even called upon the members of the Muslim community to annihilate the followers of the Thareequat movement on the belief that such actions would bring the reward from the Almighty. Such type of social

boycotting had put PW5 and other followers in a situation of not even getting employees to work in the agricultural fields and also for other work. This had compelled them to bring the workers from other areas. PW1, Chandrasekhara, was thus brought by PW5 from Ubradka, Mittur, Karnataka State and deceased Faizal from Manjeri. Because of the threat of other people of the Jumaath both PW1 and deceased Faizal were residing in the house of PW5. PW1 Chandrasekhara belonged to Scheduled Caste.

8. On 30.1.1994, PW5 Moosa Haji and his son PW2 Hussain returned at about 8 p.m. to their home. They came to know that the child of CW9, Mammunhi Haji, the brother of PW5, had met with an accident and suffered some injuries. On receipt of this information, PW5 asked PW2 to go to the house of CW9 and enquire about the details. Because of the tension prevailing in the locality between the two groups of Muslim community, PW5 asked PW1 and the deceased Faizal to accompany PW2 to the house of CW9. Thus all the three proceeded to the house of CW9, at about 9.15 p.m. There were two ways to reach the house of CW9 from the house of PW5. Both were through the paddy fields, one on the higher level and the other on the lower level. They had proceeded along the path way leading through the higher level. When they reached the Thrikkandam paddy field of one Kunhamu Haji, they proceeded westwards to reach the house of CW9. The paddy field was free of paddy as the harvest was over. They walked through the bund of the fields. All three of them had torches in their hands. While thus proceeding, they found a group of about 15 persons standing on the north-western end of the paddy field. While they were proceeding westwards the group of 15 moved towards eastwards along the same bund. The group also had torches in their hands and they had flashed the torches on PWS, 1, 2 and Faizal who also flashed back their torches. In this light PW1 identified A1 to A6 as he knew them by name. A7 to A13 were also present in the group whom

PW1 could identify, but did not know their names at that time. PW2 knew A1 to A13.

9. When both the groups thus reached at the paddy field, the accused suddenly attacked PWs 1, 2 and Faizal. A1 had MO1 weapon in his possession and A2 to A6 were in possession of knives. A7 to A13 were in possession of sticks like MO2. A1 to A4, with the weapons in their hands, inflicted cuts on the neck of Faizal. When PW2 intervened, A1, A3, A5 and A6 attacked PW2 with weapons in their possession. Because of the severity of the injury suffered by Faizal, he fell down. A1 to A6 had again attacked Faizal who was lying down by inflicting cut injuries on his body. The other accused had beaten Faizal and PW2 with sticks. The accused were shouting to do away with PW2 and Faizal. To save his life, PW1, i.e., Chandrasekhara jumped from the higher level of the ridge to the lower level and took shelter in the house of CW9 Mammunhi Haji. PW2 Hussain, who also suffered injuries, ran for his life and reached the house of CW9. As Faizal did not reach the house of CW 9 Mammunhi Haji, PW 1 along with a son of CW 9 went to the scene of occurrence and saw that Faizal was lying dead in the paddy field.

10. PW 5 Moosa Haji heard a lot of noise from the side of the paddy field. He sensed something bad must have happened, as his son and employees had gone in that direction. Therefore, becoming restless, he proceeded towards the direction from where the noise originated. He ran towards the west of his house and as he reached the path to the mosque on the north direction, he saw some persons entering that pathway from the paddy field in the west. Some people had already gone towards north. On reaching nearer, he identified accused 1 to 4, 7, 9 and 11 to 13. All of them possessed weapons like knife or sticks. PW 5 Moosa Haji enquired as to what happened to which A 7 replied that they had killed two persons. Suddenly A 13 gave a cut to PW 5 with a sharp edged knife-like weapon. While warding off the same, PW 5, fearing

further attack, ran towards his house. He locked the door and remained inside. His attempts to contact CW 9 Mammunhi Haji over the telephone were not successful.

11. PW7, the then Sub-Inspector, Kumbla Police Station, received information at 9:50 pm on 30.1.1994 over telephone that some incident had taken place at Ujar Ulwar village resulting in the death of one person. The informant did not disclose his identity. PW7 entered this information in general diary (Ex. P9). He then proceeded to the place of occurrence with whatever force he had in the police station.

12. On reaching the place of occurrence, after making inquiries near the local mosque, he was able to trace out the house of PW5, who was inside the house. He (PW5) narrated what had happened to the Sub-Inspector and took the police party along the pathway to the house of his brother, CW9. At the house of CW9, they saw PW2 who had sustained injuries. At that time they learnt that Faizal had been murdered. The Sub-Inspector (PW7) immediately made arrangements to take PW2 and PW5 to the hospital in the police jeep.

13. First Information Statement was taken from PW1 by PW7 in the house of CW9. Since Police jeep was sent with PW2 and PW5 to the hospital, he sent a constable to Kumbla Police Station. The Head Constable (PW8) on general diary charge (GD charge) duty, registered the FIR at 00.30 hours on 31.1.1994. On that day morning itself it was sent to the Magistrate and the Magistrate signed it on the same day at 3.30 p.m. According to the prosecution, Circle Inspector, Kumbla Police Station (PW9) who was at Kasargod on law and order duty in connection with the meeting of the Muslim League, received wireless information that two groups had clashed at Ujar Ulwar village. He, therefore, rushed to the village with police party where he met PW7. Both of them made arrangement for maintaining law and order. They also posted guards at the scene of occurrence during the night. The injured witnesses PW2 and PW5, who were traveling in the police jeep,

reached Bayikatta. From there they got into the car of their relative as the jeep had to be returned to the Sub-Inspector PW7. At that stage, PW5 remembered that he had forgotten to take any money. They, therefore, went to the house of one Mohan Kamath, a friend of PW5, who also accompanied them to the City Hospital Research and Diagnostic Centre at Mangalore.

14. When the first accused was questioned, he made a confessional statement to PW9 about the place of concealment of MO1, weapon of offence. A1, after recording the statement, took PW9 to the ditch with thick grass on the eastern side of the paddy fields where the occurrence took place. He took out knife (MO1) from the place where it had been concealed. This was duly sealed by PW9 under Ex.P8 seizure mahazar on 3.2.1994. The seizure mahazar is attested by PW6. The accused were produced before the Magistrate Court and remanded in custody. The MO1 was then forwarded for chemical examination. The report of the chemical analysis Ex.P21 shows there was human blood on MO2 series, the sticks. There was no blood on MO1, 6 and 9.

15. Dr. S. Adhyanth PW3, the duty medical officer, examined PW2 and PW5. He issued the wound certificate (P4) in respect of PW2 and admitted him for treatment. He was discharged on 7.2.1994. The same doctor also issued the wound certificate (P5) on examination of PW5 who was treated as an outpatient. The doctor PW3 sent intimation Exbs.P6 and P13 to the police regarding the admission of PW2 and treatment of PW5. Further investigation was conducted by PW9 from 31.1.94. He conducted the inquest on the dead body of Faizal. He also seized material objects (MOs 2 to 9) and prepared Ex.P14 report. A knife (MO6) covered with newspaper (MO9) was found kept at the back of waist of the deceased. During the inquest PW9 got the photographs of the dead body and the scene of occurrence which is marked at Ex.P2 (series). Ex.P2 (A) shows that MO6 was on the waist of

the deceased. The photos and the negatives were seized under Ex.P17 seizure mahazar, when produced by the photographer. PW9 also drew up Ex.P.15 scene mahazar. In Ex.P1, PW1 mentioned only the names of accused A1 to A6. But he stated several more accused were there whose names were not given. But according to him, he could identify them. After questioning PW2 and PW5, names of other accused were included.

16. Dead body of Faizal was sent for post mortem and PW3 received the post mortem certificate (Ex.P3) from the then doctor of Community Health Centre, Kasargod. The post mortem certificate was marked by consent of both sides under Section 294 of the Criminal Procedure Code. In the First Information Statement (Ex.P1), PW1 Chandrasekhara had stated the names of accused 1 to 6. He also stated that there were 7 more accused whose names were not known to him but he could identify them on sight. PW2, according to the prosecution, was under general anesthesia for suturing of the wounds and, therefore, could not be questioned immediately. However, he was questioned by PW9 on 3.2.1994 in the City Hospital. Thereafter PW9 filed report (array of accused) P.16 in Court on 3.2.1994 including the names of accused 7 to 12. PW5 was questioned by the investigating officer, PW9. On 4.2.1994 on the basis of his statement name of 13th accused was added. Accused Nos. 1 and 3 to 6 surrendered before the investigating officer in his office on 3.2.1994. They were duly arrested. Accused Nos.A8 to 12 were arrested between 29.4.1994 and 30.4.1994.

17. At the same time, A2 to A7 also claim to have suffered some injuries on the night of 30.1.1994. They went to Unity Health Complex at Mangalore on 31.1.1994, where they were admitted and treated as in-patient. Exs. P23 and P24 are the treatment particulars whereas Exbs.P25 and P26 are the case sheets respectively of the accused. PW10 and DW1 had treated them during this period. They were discharged on

23.3.1994 on which date PW9 arrested them. A13 was absconding but later appeared before the Magistrate Court.

18. While at the Unity Health Complex**,** a statement was given by M.C. Ali (A2), which was recorded by the Kadari Police Station as the First Information Statement (Ex.P22). In this he claimed that on 30.1.1994, he and his neighbour Abdul Rahiman were returning from Kasargod at 9.30 p.m. after attending a Muslim League meeting. When they reached a place called Trikkandam through Kunjamu Haji's field at 10.15 p.m., they found Mammunhi Haji's son Hussain, his brother Abdul Khader, Moosa Haji, his son Hussain, his brother-in-law Jamal Bayikkatta coming from the opposite direction. The complainant also stated that these people had enmity with them and thus they blocked them and told "we will not leave anybody". Mammunhi Haji's son and Jamal inflicted injuries on his left hand shoulder and armpit. When Abdul Rahiman came to block, Moosa Haji and his son inflicted injuries on his right hand and the wounds started bleeding. At that time complainant fell down and he was beaten up on his right leg and left side of the head with a stick and as a result of which he became unconscious. He has also stated in his complaint that there was a case pending regarding the issue of a mosque between him and the accused and thus the accused had caused injuries to them with sword-like knife, sticks, etc. On the basis of the aforesaid statement, Crime No. 67/94, transfer FIR (Ex.P11) for offences under Sections 143, 147, 148, 324, 341, 506 read with 149 IPC was registered. The same was later on transferred to Kumbla Police Station, where PW8 registered it as Ex.P12 of Kumbla Police Station. PW9 also conducted the investigation of FIR (Ex.P12). On completion of the investigation charges were filed against five accused persons including PW2 and PW5.

19. On committal this case was numbered as SC No.66/95 against the 13 accused. The case against 5 accused, registered on the basis of FIR Ex.P12, was numbered as SC

111/95. The trial of both the cases was taken up simultaneously one after the other and judgment in both the sessions cases was pronounced on the same day. We have noticed above that after trial accused 1 to 6 were convicted in SC No.66/95.

20. On remand, the accused had examined DWs 1 to 5. The Trial Court takes note of the post mortem report of the dead body. It was marked as Ex.P3 by consent of both the sides. The report indicates the following external and internal injuries:

> "Entire body of an adult male lying supine. Rigor mortis present in both upper & Lower limbs. Bleeding from both nostrils present.
>
> *External injuries:-* Incised wound on the face transversely placed extending from the center of upper lip to Lt. Cheek 14 x 3 x 3 c.m. exposing the oral cavity cutting the full thickness of facial muscles. 2) Incised wound on the Lt. Cheek below the Lt. Eye transversely placed 6 x 1 c.m. skin deep. 3) Incised wound on the lower part of chin transversely placed 10 x 6 c.m. flap of skin & subcutaneous tissue raised exposing the lower part of mandible. 4) Incised wound on the Right side of neck transversely placed 12 x 5 x 6 c.m. cutting the muscles of neck on Right side with carotid artery and jugular veins and trachea being cut.
>
> Incised wound on the inner aspect of left ankle region transversely placed 6 x 1 x1 c.m. cutting the lower end of tibia. 6) Incised wound 1 c.m. above injury No.5 transversely placed 4 x 1 c.m. skin deep. 7) Incised wound on the front of right leg transversely placed 5 x2 c.m. cutting the tibia which is fractured. 8) Incised wound on the front or right leg 6 c.m. above injury No.7, 4 x 5 c.m. skin deep. 9) Incised wound on the dorsum of right second toe 5 x 0.5 x 1 c.m. along the long axis of the toe cutting the tendons and bone. 10) Linear abrasion obliquely placed on the front of right thigh 6 c.m. long. 11) Linear abrasion

> obliquely placed on the front of left thigh 5 c.m. long. 12) Linear abrasion transversely placed on the front of left shoulder 3 c.m. long. 13) Incised wound on the right side of scalp running anterior posterior 6 x 1 c.m. exposing the skull.
>
> *Internal Examination :-* Thoracic cage intact. Heart & Lungs intact. Plae stomach, contains partly digested food materials. Liver, spleen and kidneys plae. Urinary bladder contains 150 c.c. of Urine, skull intact, Brain and meninges pale".

21. The opinion as to the cause of death of Faizal given in Ex.P3 is that "the deceased dies due to hemorrhage and shock due to injuries to major vessels of neck". During the hearing neither the prosecution nor the defence has challenged the finding and the opinion contained in Ex.P3. Therefore it was accepted by the Trial Court that Faizal died due to hemorrhage and shock suffered by him because of the injuries on the major vessels of the neck.

22. We may also notice here that the injuries noted in the wound certificate (Ex.P4) issued to PW2 on examination by the doctor PW3. PW2 was examined at 1.15 am on 31.1.1994. The certificate indicates the following injuries:

> "1. L shaped incised wound on the parietalaspect of the skull 5 x 6 c.ms;
>
> 2. Two small incised wounds on the right parietal region of the skull;
>
> 3. Incised wound over the nose 2 cm x 1 cm;
>
> 4. Swelling and deformity over the lower end of left hand. X-ray of the left hand showed comminuted fracture ofright ulna lower end."

23. As noticed earlier, he was admitted on 31.1.94 and

discharged on 7.2.94. The injury No.4 was grievous while the other injuries were simple. The doctor also noticed that the history was of alleged assault by known persons at Ulwar, Kumbla at 10.15 pm on 30.1.1994. PW5, who was examined by doctor PW3 at 1.25 am on 31.1.1994, was also issued wound certificate Ex.P5. As per Ex.P5 statement following injuries were suffered by PW5:

"1. Incised wound over the first web space of the left hand with partial tear of the flexor tendons (1" x ½")'

2. Incised wound on the base of the leftthumb 3/4 "x ¼".

24. Doctor also opined that injury No.1 in respect of PW5 was grievous in nature. PW3 sent intimation Ex.P6 to the police. As per the intimation report P6, RMO had come to the hospital. On the basis of Ex.P6, it has been noticed that PW2 was taken to the operation theatre for suturing and closed reduction under general anesthesia was done. The report also shows that at 11.40 am on 31.1.1994 the patient was not in a position to give a statement. The Trial Court notices that after remand the defence had examined DW1 to DW5 and marked Exs. D7 to D10, the prosecution had marked Ex. P25 (a-g). Thus the total evidence in this case was PW1 to 10 and Exts P1 to P26 series together with MO1 to 9 for the prosecution and DW1 to 5 and Exts.D1 to D10 for the defence. The Trial Court, after hearing submissions from the prosecution as also the defence, formulated the following points for consideration:

"1. What was the cause of death of Faizal?

2. Whether the accused 1 to 6 along withothers had formed themselves in to anunlawful assembly and acted, infurtherance of their common object, as alleged against them by the prosecution?

3. What offence, if any, is proved against the accused 1 to 6?

4. Regarding sentence?"

25. As noticed earlier, the post mortem report has been accepted by both the sides, according to which Faizal died due to hemorrhage and shock suffered by him because of the injuries on the major vessels of neck. While discussing points No.2 and 3, the Trial Court notices that PW1 is a native of Mittur, in State of Karnataka and has been living in the house of PW5 as a worker under him for the last about 10 years. He had gone with PW2, and the deceased Faizal to the house of CW9 at about 9.15 pm on 30.1.1994. It is alleged by the prosecution that the occurrence took place, whilst they were enroute to the house of CW9. PW1 has supported the prosecution version. It was he who gave Ex.P1 FIS to PW7 on the basis of which crime against A1 to A6 was registered at Kumbla Police Station. The Trial Court then notices the sequence of events as narrated earlier. Prosecution mainly relied on the evidence of PW1, 2 and 5 in support of its version.

26. The Trial Court noticed the entire sequence of events, narrated above. It also noticed the defence version. It was noticed that the learned counsel appearing for the accused had pointed out that there was delay in sending Ex.P1 and P10 to the Court; PW1 was probably not present at the scene of the incident; the injuries sustained by A2 and A7 were not explained by the prosecution and the registration of a counter case by A2 would be sufficient to show that it was the PWs who were the offenders.

27. The Trial Court further notices that the local Muslim community who are in majority have a long standing enmity with PW5, his family and other close relatives. The religious scholars had even called upon their followers to do away with the believers of Shemsia Thareequat sect of the Muslim community. Their life and movement had been made impossible in the locality. The majority of the Muslim community was encouraged to disrupt the life of the family of PW5 and his relatives. They had been boycotted and were not allowed to

socialize with the local Jumaath. The Trial Court also notices the prosecution version that on 30.1.1994 at about 8 pm, PW5 and his son PW2 returned to the house. They were informed that CW9, brother of PW5, who was residing at some distance from the house of PW5 had telephoned to inform that his son had sustained some injuries because of a fall. Therefore PW5 had asked PW1 and deceased Faizal to go along with PW2 to the house of CW9. PW1 and Faizal had been asked to go along with PW2 due to the peculiar situation existing in the locality against PW5 and his family. At about 9.15 P.M. they proceeded to the house of CW9 Mammunhi Haji.

28. In appreciating the evidence with regard to the alleged occurrence, the Trial Court notices the background of both PW1 and deceased Faizal with regard to their relationship with PW5 Moosa Haji. It is noticed that PW1, who belongs to a schedule caste community, had been working for PW5 for the last 10 years. At the time of the occurrence he was allegedly residing in the house of PW5. He admits that his native place is Mittur Sullia in the State of Karnataka. Faizal was also working under PW5 and he is the native of Manjeri, Malappuram District. He had also been brought by PW5 for employment as he was unable to find any local workers. The Trial Court notices that according to both PW1 and PW2 they had taken the shortest route through the paddy field to the house of CW9. All of them had torches in their hands. Whilst they were going they found a group of 15 people standing together about 50 meters away from them. At that time they were passing through the pathway near the house of A4. They did not suspect anything when they had moved forward for another 10.5 meters. One of the individuals from the crowd flashed the torch light at them. Other members of the crowd flashed their torch lights on the ground. By that time the distance between the deceased PW1 and PW2 and the other group was about 5 meters. All three of them also flashed back their torch lights. PW1 and PW2 were walking with Faizal in the front, in the torch light. Suddenly they cut Faizal on his neck causing injuries. PW2 intervened. Then

A2, A3 and A5 and A6 caused injuries with their weapons on the hands, head, face and other parts of the body of PW2 by cutting with the weapons. Faizal fell down and PW1 ran away from the scene. PW1 stated that after seeing that PW2 and Faizal were injured, he ran for safety to the house of CW9. The door of the house was closed as they were afraid of further attacks. Since Faizal did not reach the house of CW9, PW1 and son of CW9 went to the place of occurrence. They saw that Faizal was lying dead in the paddy field. Both of them returned to the house of CW9 and reported the matter. PW7 then got the information over the telephone as narrated earlier. He came to the place of occurrence, and went to the house of PW5. He had also sustained injuries in the same incident, after Faizal had been killed and PW2 had been injured. PW5 then took the police party to the house of CW9 by the same route which had been taken by PW1, PW2 and Faizal. Statement made by PW 1 was recorded as First Information Statement by PW 7 which is produced as Ex. P1. This was sent to PW8 who recorded the FIR. The FIR according to PW7 was recorded at 00.30 hrs on 31.1.1994. It was received by the Judicial Magistrate, Ist Class, Kasargod at 3.30 pm on 31.1.1994. The Trial Court notices the submissions of the defence that this gap of 15 hrs clearly shows that PW1 was not present in the house of CW9 when PW7 went to that house. In fact, no First Information Statement was recorded by PW7 at that place. According to the defence Ex.P10 FIR was registered much later. This gap has given an opportunity for the prosecution to manipulate the case and book innocent persons who were thought to be inimical with PW5 and his family.

29. Analyzing the aforesaid submissions of the defence, the Trial Court notices that Ex.P10 FIR was received by Kasargod Magistrate at 3.30 pm on 31.1.94. The distance from Kumbla Police Station to Kasargod is less than 15 kilometers. They had a duty police constable who comes to the court to attend the day's cases at Kumbla Police Station. Therefore, there was no difficulty for the Kumbla Police Station

authority to send Ex.P10 and Ex.P1 along with police constable so that they will be received at least by the office of the Magistrate if not the Magistrate himself before 11 am on that day. The Trial Court scrutinizes the effect of late receipt of the FIR by the Court very closely. The prosecution had submitted that the delay in receiving Ex.P10 FIR was not fatal to the prosecution case as it did not prejudice the accused and it was not introduced to make any improvements or distort the version of the occurrence. After appreciating the aforesaid legal position the Trial Court notices that since it is the case of the prosecution that PW1 had run away from the place of occurrence after witnessing the assault, the action of PW1 and the evidence of the prosecution needs close scrutiny. Therefore late receipt of Ex.P10 and P1 assumes importance. The Trial Court then notices that it is recorded in the inquest report Ex.P14 that the inquest on the dead body of Faizal was conducted on 31.1.1994. The inquest commenced at 10 a.m. and was completed at 12.30 p.m. The query at Sl.No.12 (a) of the prescribed form is to be filled by PW9 under Section 174 Criminal Procedure Code. The query is "while conducting inquest is any person suspected who and why". In answer to this Ex.P.14, PW9 recorded that "accused are known". The Trial Court also notices that P.W.9 did not record who the accused are and why they are suspected.

30. The Trial Court agrees with the suggestions made by the defence that Ex.P.14 was perhaps prepared prior to Ex.P.1. Vague answer was given to Question 12 (a) of Ex.14, so that other persons could be added as the accused. Therefore, it has been held that Ex.P1 has not been registered as alleged by P.W.7. Another suspicious circumstance was that PW1 had deposed that Ex.P1 was recorded by himself. But in cross examination, he conceded that Ex.P1 was not in his own hand writing and is in that of some other person's hand writing. The Trial Court, therefore, holds that Ex.P1 was not recorded as alleged by the prosecution at the place and time recorded both in Ex.P1 as well as in Ex.P10. The Trial Court also notices that

when PW1 appeared as DW5 after the remand, he deposed that he had been working for PW5 for the last 10 years. He also deposed that he would do whatever PW5 asked him to do. However, since the witness had clarified in the re-examination that he did not understand the question, the Trial Court ignored the earlier statement.

31. The Trial Court then examines the sequence by which the names of accused No.7 to 12 have been incorporated. The Trial Court takes note of the fact that both the parties claim to have recognized each other in torch light. After analyzing the evidence with regard to the assault, the Trial Court notices that there is no reason as to why the attackers would allow PW1 to escape. After all they were fifteen persons in a group and had every intention to kill the three members of the opposite group approaching them. The Trial Court also concludes that behaviour of PW1, PW2 and Faizal to continue walking towards the other group even though they were carrying weapons in their hands would not be consistent with normal human conduct. The normal instinct would have been either to retaliate or to run away from the scene. On the basis of the above the Trial Court had formed an opinion that the prosecution had not placed before the Court the exact situation under which the attack had really occurred. This would put a cloud of suspicion over the presence of PW1 at the scene of the crime. In case PW1 was present, he ought to have identified the accused with their respective weapons. If he had fled the scene, he could not have given all the graphic details of the assault, in the FIS, as recorded in the house of CW9. For this reason perhaps PW9 was not in a position to reply to the prescribed query at Sl.12A under Section 174, Criminal Procedure Code while conducting the inquest.

32. The Trial Court pointed out numerous other infirmities in the prosecution case. It is noticed that PW1 was such a dedicated worker of PW5. He had even made a false complaint against three of the accused under Section 3(1)(X)

of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and under Section 506(2) read with Section 34 IPC. All the accused were acquitted as the prosecution version was disbelieved. The Trial Court also refers to another judgment Ex.D8 in case No.98/1995 delivered on 30.5.1996 in which four accused were proceeded against by PW1 under Sections 341, 323, 324 IPC read with 34 IPC and Section 310 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. In this also the Court observed that it is not safe to accept and to act upon the evidence of PW1, therefore the accused were acquitted. The Trial Court, therefore, notices that PW1 is not a believable witness. He is a sincere employee of PW5. In view of his past conduct the locals probably had more hatred towards PW1 than Faizal. Therefore it becomes more suspicious that Faizal gets killed while PW1 is left uninjured by the same group.

33. Moving on to the evidence of PW2, who was admitted and treated in the city hospital Bangalore at 1.15 A.M. on 31.1.1994, the Trial Court takes note of the wound certificate issued by PW3. PW3 stated that till PW2 was taken to the operation theatre, he was in a position to speak. It is further stated by this witness that the effect of general anesthesia may last for two and a half hours and thereafter the patient will be normal. According to the endorsement made on Ex.P6 by Dr. Geeta Rao the then RMO, PW2 had been taken for suturing and closed reduction under general anesthesia at 11.40 am on 31.1.1994. PW2 was not questioned until 3.2.1994. He was able to speak till he was taken for suturing at 11.40 on 31.1.1994. Although PW2 was present in the house of CW9, PW7 did not record any statement from him. Since PW2 was the injured witness he would have surely given a true version. He was present at the scene of occurrence. He had faced the attackers whereas PW1 had fled the scene on seeing the assailants. The prosecution had totally failed to explain as to why PW2 was not questioned till 3.2.1994. The explanation given by prosecution that PW2 was not in a position to speak

is belied by the statement of PW3 together with the endorsement as well as the recorded content in Ex.P4. From the above also the Trial Court formed an opinion that the prosecution is not placing the whole truth before the Court.

34. The Trial Court then critically examined the evidence of PW5, father of PW2. PW3 had also treated PW5 and given wound certificate Ex.P5. It is noticed that PW9 did not question PW5 till 4.2.94. It was after questioning PW5 that A13 was added to the earlier accused and then no explanation was available as to why PW5 was not questioned till 4.2.94. The only explanation given by the prosecution is that he was not available for interrogation. Rejecting the aforesaid explanation the Trial Court concluded that PW9 deliberately delayed recording the statement of PW5 to implicate other innocent persons. At this stage, the prosecution had argued that the statements of PW2 and PW5 cannot be discarded only on the ground that they are interested witnesses. The principle of law is accepted by the Trial Court. Therefore, the evidence of these witnesses was very carefully scrutinized. The Trial Court notices that there is absolutely no independent evidence in this case to corroborate the evidence of these interested witnesses. Neither the immediate neighbours nor any of the people living in the vicinity have been examined. The explanation given by the prosecution is that due to enmity towards PW5 and his family none has come forward to give the evidence. The Trial Court, therefore, observes that in such circumstances the evidence of PW1 and PW2 had to be carefully examined to rule out any inherent inconsistencies. The Trial Court further notices that there is no independent evidence with regard to the injuries caused to PW2 by A2, A3, A5 and A6. If these four persons had actually attacked PW2, he would have suffered many more grievous injuries. The only grievous injury suffered by him was fracture of ulna lower and other injuries were simple in nature. PW2 at that time had run away. Faizal after suffering fatal injuries had fallen down. Again there is no corroboration from any independent witness.

35. To make the matter even worse, A2 and A7 had suffered a number of injuries. PW10 had deposed that A2 had suffered the following injuries:

"(1) incised wound right shoulder 2" in length

(2) incised wound left side of chest 1½" in length,

(3) incised wound left elbow 3" in length,

(4) incised wound left forearm 3" in length and

(5) fracture of lateral condyle of left humerus."

36. According to PW10 injury No.5 is a grievous injury. Similarly, injuries in respect of A7 were given in Ex.P24. This also shows that he had sustained an incised wound 2½ inches long over the left forearm with tendons divided. This injury is grievous in nature. As noticed earlier, this assault had resulted in the registration of transfer FIR in Crime No.67 of 1994 which was subsequently transferred and registered as FIR Ex.P12 at Kumbla Police Station. There is no explanation offered of the injuries. The Trial Court notices that in this case PW9 had concluded after the investigation that both the cases are true. But none of the prosecution witnesses PW1, PW2 and PW5 speak about the manner and the circumstances under which A2 to A7 had sustained injuries. Therefore, this also leads to the conclusion that the prosecution story as put through PW1, 2, and 5 is not correct.

37. The defence has also pointed out that the investigating team did not even care to collect blood stained earth from the scene of the occurrence. There was no moonlight on 30.1.1994. The torches allegedly possessed by Faizal, PW1 and PW2 at the time of the occurrence were not recovered. In spite of the availability of son of CW9 and CW9 himself, they were examined as witnesses. The Trial Court, however, observed that "these small issues were, however, not considered to materially effect the case as put forward by the

prosecution either in favour of the prosecution or in favour of the defence." However, otherwise on independent assessment of the evidence the Trial Court concluded that there was no evidence to connect accused with the crime.

38. The High Court in the impugned judgment has narrated the entire sequence of events as recapitulated by us above. The High Court also noticed briefly the reasons given by the Trial Court for not believing the prosecution story. It is observed that there is no delay in recording the F.I. Statement. According to the High Court, there is no circumstance to doubt that Ex.P.1 was not recorded at the time and place of the incident. There is no reason for PW7, the Sub-Inspector or PW9, the Investigating Officer, to make any false case. The High Court also concluded that it was unlikely that P.W.9, the Investigating Officer, and P.W.8 who had registered the FIR being Muslims, would concoct the story against the accused who were also Muslims. It was unlikely that they would have supported PW5 and his family who had leniency towards BJP. The High Court also concluded that there was no delay in forwarding the FIR to the Magistrate. Ex. P10 FIR was registered at 00.30 hrs on 31.1.1994. Ex P9 shows that there was only PW 8, Head Constable and another constable in the police station at that time. Other Police personnel were on law and order duty. Ex.P.10 was sent to the Court through a Constable PC 450 at 8 a.m. on 31.1.1994. If the Magistrate noted his initial only at 3 p.m. the prosecution cannot be faulted. Even if there is delay, it has been clearly explained. Mere delay in receipt of occurrence report by itself does not make the investigation tainted. The High Court also observed that on getting telephonic information, after entering the same in the G.D., the police party rushed to the spot. On reaching the spot without any delay, F.I. Statement was recorded. There was no delay in starting the investigation. Injured were sent to the hospital in the police jeep itself. Law and order situation was tense. Ex.P.1 was recorded at the house of C.W.9 at 11.45 p.m. and the FIR was registered at 00:30 hours on 31.1.1994. With regard to the non-

mentioning of the accused in the column provided under Sl.No.12 (a) of the inquest report (Ex.P.14), it is noted that the names of the accused are mentioned at the column where it is provided that "any person was questioned and whether statement was recorded from any person and their statement." The High Court accepted the fact that the statement was recorded from C.W.9 who had not seen the incident. The eye witnesses PW1, PW2 and PW5 were not present when the inquest report was prepared. That is why in column 12(a), it was recorded that "accused are known". Their names were actually mentioned at column No.13 in Ex.P.14. The High Court also observed that non-examination of C.W.9 is not fatal. The High Court also makes the observation that the object of preparing the inquest report is only to draw a report of the apparent cause of death describing the wounds found on the body of the deceased and stating in what manner and by what weapon or instrument such injuries were inflicted. It is neither necessary nor obligatory on the part of the investigating officer to investigate into or ascertain who were the persons responsible for the death. Since the names of the accused have been mentioned in column No.13 it would not, in any manner, weaken the prosecution case. The High Court also negatived the reasoning of the Trial Court as to why the FIS was not recorded on the basis of the information given by P.W.1 rather than P.W.2 who was injured. According to the High Court, there is no rule or mandate under Section 154 of the Code of Criminal Procedure that F.I. Statement should be recorded only from an eye witness. The High Court reiterated that the police reached the trouble spot on receiving information by telephone. They went to the house of PW5 hearing that some incident had taken place near his house. PW5 then took them to the house of C.W.9. There they saw PW1 and PW2. The High Court also notices that when P.W.1 saw that the deceased fell down and PW 2 injured, he then escaped to the house of C.W.9. Since he had seen the persons who had attacked the deceased, he identified at least A1 to A6 with their names. It is noticed by the High Court that PW2 was seriously injured. His presence

was also not doubted. He was made an accused in the counter case. The High Court noticed that although PW2 was injured, he was not unconscious. According to the wound certificate, Ex.P4 on 31.1.1994 at 11.40 a.m. he was not in a position to give a statement. At the time the anxiety of the police was to send the injured for treatment, therefore, the names of the accused were subsequently disclosed by PW2. The High Court then considered the conduct of PW1 in filing complaints under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It is, however, observed that the evidence of PW1 cannot be ignored on the ground that he was a loyal servant of PW5. Non recording of the statement of PW2 and P.W.5 immediately was also explained by the High Court on the ground that there was a law and order problem in the area. When the police went to record the statement on the next day, P.W.2 was under general anesthesia. He was not in a position to give a statement. He was only questioned when he was in a position to speak. With regard to adding the names of accused nos. 7 to 13, it is held that at the maximum, the other persons added by PW.2 or 5 when they were questioned can be absolved by giving the benefit of doubt. The High Court then examined the circumstance that the incident happened in the night after 9.15 p.m. PW1 and PW2 are natural witnesses. PW2 was an injured eyewitness. PW5 was also injured.

39. On the basis of the law as settled by this Court in a number of judgments which are noticed by the High Court, it is held that relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person leaving a way for the real accused to escape. PW2 is not only related to PW5 but he was also seriously injured. The High Court reiterates that the presence of PW2 at the scene of occurrence is not disputed due to the registration of the counter case. With regard to the non explanation of the injury on the accused, it is stated that PW9 and PW10 spoke about the same. The injuries were also explained by PW10, the

doctor, who stated that the injuries in Ex.P.23 and P.24 certificates can be caused otherwise than by assault, i.e., by a fall or by a road transport accident.

40. Upon consideration of the entire evidence, the High Court held that the prosecution was able to prove the case conclusively against A1 to A6 beyond any shadow of doubt. The High Court also recorded that "the findings by the Sessions Court otherwise is perverse and manifestly erroneous. Appreciation of evidence by the Sessions Court in this case lacks coherence and findings are based on unwarranted assumptions. Hence, even though it is an order of acquittal, interference is required." The High Court also observed that "in this case, only conclusion possible from the evidence is that accused Nos. 1 to 6, i.e., respondents in this appeal are guilty of the charges levelled against them." With these observations, the judgment of the Trial Court was set aside and the appellants were convicted as noticed by us above.

41. We have heard the learned counsel for the parties. Mr. Ranjit Kumar, Learned Senior Counsel, appearing for the appellants in Criminal Appeal No.434 of 2002 has addressed the Court on all the issues discussed by the Trial Court as also by the High Court. The learned senior counsel has reiterated the infirmities in the prosecution evidence as narrated by the Trial Court. Learned counsel submitted that the findings of the Sessions Court were just and reasonable and the High Court ought not to have interfered in the appeal. It is settled law that if two views are possible, the one which favours the accused has to be accepted. That being the position, the High Court erred in upsetting the acquittal and recording the conviction of the appellants. The submissions made before the Trial Court as before the High Court have been reiterated. It is not necessary to recapitulate the same again.

42. On the other hand, the learned counsel appearing for the State of Kerala has submitted that acquittal of the appellants

has been set aside by the High Court on a thorough appreciation of the evidence. Each and every circumstance relied upon by the Trial Court had been answered by the High Court. It is unbelievable that PW2 and PW5, who were injured witnesses, would falsely implicate the accused. According to the learned counsel, only one conclusion was possible which has been duly recorded by the High Court.

43. We have considered the submissions made by the learned counsel. We may notice here that the High Court has clearly recorded the legal proposition involved in this case in the following words:

> "Being an appeal against acquittal, we are bound to see whether views expressed by the learned Sessions Judge are reasonably possible. If the views expressed are reasonably possible, even if another view is possible, appellate court will not interfere in it."

The aforesaid statement of law recognizes the settled position in the case of *Antar Singh v. State of M.P.,* (1979) 1 SCC 79:

> **"**This Court has repeatedly held that although in an appeal against acquittal, the powers of the High Court in dealing with the case are as extensive as of the Trial Court, but before reversing the acquittal, the High Court should bear in mind that the initial presumption of the innocence of the accused is in no way weakened, if not reinforced, by his acquittal at the trial; and further, the opinion of the Trial Court which had the advantage of observing the demeanour of the witnesses, as to the value of their evidence should not be lightly discarded. Where two views of the evidence are reasonably possible, and the Trial Court has opted for one favouring acquittal, the High Court should not disturb the same merely on the ground that if it were in the position of the Trial Court, it would have taken the alternative view and convicted the accused

accordingly."

44. This settled proposition of law has been reiterated by this Court in the case of *Chandrappa v. State of Karnataka* {2007 (4) SCC 415}. In this case, the provisions of Section 378 of the Code of Criminal Procedure, 1997 were critically examined. After adverting to numerous decisions of this Court, it was observed as follows:

> "From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (*1*) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (*3*) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall

> be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.
>
> (*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the Trial Court."

From the above, it becomes evident that if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the findings of acquittal. The acquittal re-enforces and reaffirms the presumption of innocence of the accused. The High Court, in fact, makes a reference to the judgment of this Court in the case of *Kali Ram v. State of H.P.,* (1973) 2 SCC 808, wherein this Court has observed :

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted."

45. Having noticed the aforesaid principle, the High Court reviewed the entire evidence. It reached the conclusions which are opposite to the conclusions recorded by the Trial Court. We are unable to accept the opinion of the High Court that findings recorded by the Trial Court are perverse and manifestly erroneous.

46. We have very elaborately dealt with the judgments of both the courts below, to show that the Trial Court had meticulously examined the entire evidence, to record its conclusions. We may now briefly indicate our reasons for not

agreeing with the view expressed by the High Court, that the conclusions reached by the Trial Court were perverse and manifestly erroneous.

47. There was a clear cut enmity between PW5 and his family on the one side and the accused party on the other side. It was a religious dispute which undoubtedly led to high tension. The majority group had gone so far as to encourage the members of its community to annihilate PW5 and his family. Prior to the assault, there was a meeting of the Muslim community. The incident took place in the dark. The Trial Court noticed that none of the torches were recovered or produced by any of the concerned persons. There was also no moon light. In such circumstances, the recognition of the six accused may not be possible. The Trial Court on this matter reached a reasonable conclusion. The Trial Court had meticulously examined each and every issue. The Trial Court also noticed that there was anticipation of trouble otherwise there was no occasion for PW2 to be accompanied by PW1 and Faizal for going to the house of CW.9, brother of PW5. The Trial Court also traced the progress of these three individuals through the paddy field. Since it was a dark night, it was not entirely unbelievable that the torches had been introduced to ensure that the accused could be said to have been identified. Surprisingly, after Faizal was fatally injured, PW1 bolts from the scene of crime. This PW1 is so loyal to PW5 that he has been taking undue advantage of being a scheduled caste and lodging false complaints against the accused persons under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Yet when the other faithful servant of PW5 was being brutally murdered, he decided not to defend and ran away. The Trial Court, therefore, concluded that the behaviour of PW1 was wholly unnatural.

48. Moving on to the evidence of PW5, the Trial Court noticed that when he went out of the house, he heard lot of noise from the side of the paddy field. When he went towards

the west of his house, he saw some persons entering the pathways from the paddy field. He identified the accused persons. When he enquired from A7 as to what had happened, he was also attacked and injured. He also ran back to the house. His attempt to contact his brother and others on the telephone remained unsuccessful. In the meantime, PW1 and 2 had reached the house of CW.9. Subsequently, Faizal's dead body was discovered by PW1 and the son of CW.9. The police arrived at the scene. Although PW2, the injured witness, was available, his statement was not recorded. It was PW1 who gave the F.I. Statement. It must be remembered that he had run away when the deceased was being assaulted. In such circumstances, we are unable to hold that the conclusions reached by the Trial Court were unreasonable or perverse.

49. The Trial Court meticulously examined the sequence of events with regard to the recording of the FIR. It cannot be held that the conclusion reached by the Trial Court that the occurrence report could not have been sent earlier, as the same was yet to be prepared, is not possible. The FIR was recorded at 0030 hrs on 31.1.1994. It was not received by the Magistrate till 3.30 p.m. on 31.1.1994. The Trial Court also noticed that the names of the accused were mentioned in Ex.P.1. But they were not mentioned in the relevant column of the inquest report. If the First Information Statement Ex.P.1 had been prepared prior to Ex.P.14, the names would surely have been mentioned therein. These conclusions again, in our opinion, cannot be said to be perverse.

50. The Trial Court also noticed that due to the long enmity of P.W.5 and his family with the accused, the evidence had to be scrutinized carefully. Faizal as well as PW1 were the employees of PW5 who had been brought from the State of Karnataka as the local labour was not available. The Trial Court noticed that in case there had been an assault, as projected by the prosecution, there was no reason why PW1 would have been spared while Faizal was brutally murdered. After all, it was

P.W.1 who had proceeded against those accused while working under PW5 by filing false cases against the accused. The Trial Court also noticed that delay in recording the statement of P.W.2 cannot be easily brushed aside. He was conscious through all the night and yet the statement was not recorded at the initial stage by PW7. He became unconscious only at the time when general anesthesia was given to him at 11.40 a.m. the following day.

51. Mr. Ranjit Kumar also pointed out that PW2 in the witness box merely stated that he was tired at the time when P.W.7 had come to the house of CW9. The Trial Court noticed that there was absolutely no explanation with regard to the injuries suffered by the accused. This apart, all the witnesses being interested witnesses, their evidence could not be believed in the absence of independent corroboration.

52. In our opinion, taking into consideration the entire facts and circumstances of the case, it would not be possible to agree with the High Court that the findings recorded by the Trial Court were perverse or that only one conclusion consistent with the guilt of the accused was possible. We are of the opinion that the two views being reasonably possible the High Court ought not to have interfered with the verdict of acquittal recorded by the Trial Court. Consequently, we allow the appeal and set aside the judgment of the High Court.

Criminal Appeal No.434 of 2002 and

Criminal Appeal Nos. 500-501 of 2002:-

1. In view of the judgment passed in Criminal Appeal No.499 of 2002, these appeals are also allowed.

D.G. Appeals allowed.

M/S. MODERN INDUSTRIES

v.

M/S. STEEL AUTHORITY OF INDIA LTD. TH. M.D. & ORS.

(Civil Appeal Nos. 3305-3306 of 2010)

APRIL 15, 2010

[R.V. RAVEENDRAN AND R.M. LODHA, JJ.]

Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993:

s. 6(1) and (2) *– Object and purpose of – Expression 'amount due from a buyer', followed by expression 'together with the amount of interest' u/s 6(1) – Interpretation of – Held: Object and the purpose of the Act is to ensure that buyer promptly pays the amount due towards the goods supplied or services rendered by the supplier – It also provides for payment of interest statutorily on the outstanding money in case of default – Said expression must be interpreted keeping in mind the purpose and the object of the Act and its provisions – Restricted meaning is not justified – s. 6(1) provides that the amount due from buyer together with amount of interest calculated as per ss.4 and 5 shall be recoverable by supplier from buyer by way of suit or other proceeding under any law for the time being in force – Scheme of s. 6 r/w ss.3, 4 and 5 does not envisage multiple proceedings – On facts, order of High Court that expression 'amount due from a buyer' would be amount admitted to be due in its plain and natural meaning and when admitted due amount is not paid by buyer, ss.3 to 6 along with other provisions of the Act would be applicable, cannot be accepted and is set aside – The Act is applicable to the instant case, since parties entered into contract in 1983 which got altered from time to time and was last altered in 1995, and by that time the Act had come into force.*

s. 6(1) and (2) – *Action contemplated in s. 6 by way of suit or any other legal proceeding u/s. 6(1) or by making reference to Industry Facilitation Council u/s. 6(2) – Maintainability of, only if it is for recovery of principal sum along with interest as per ss. 4 and 5 and not for interest alone – Held: U/s. 6(2) action by way of reference to IFC could be maintained for recovery of principal amount and interest or only for interest where liability is admitted or has been disputed in respect of goods supplied or services rendered – IFC has competence to determine the amount due for goods supplied or services rendered in cases where the liability is disputed by the buyer – On facts, order of High Court that since buyer has alleged breach of contract by supplier, there was no amount admitted to be due or settled amount and, thus, there was no question of delayed payment and reference of the dispute to IFC u/s. 6(2) was without jurisdiction, cannot be accepted and is set aside.*

Words and Phrases:

Word 'together' *– Meaning of, in the context of s. 6(1) of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 – Held: Word 'together' ordinarily means conjointly or simultaneously but the said meaning may not be apt in the context of s. 6 – Word 'together' in s. 6(1) would mean 'along with' or 'as well as'.*

Word 'Due' *– Meaning of – Held: Has different meanings in different context – In narrow sense, word 'due' may import a fixed and settled obligation or liability – In wider context, amount can be said to be 'due', which may be recovered by action – Amount that can be claimed as 'due' and recoverable by an action may sometimes be also covered by expression 'due'.*

The questions which arose for consideration in these appeals are as to the meaning of the expression, 'amount due from a buyer, together with the amount of interest'

under sub-section (1) of s. 6 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and as to whether the Industry Facilitation Council cannot go beyond the scope of interest on delayed payments upon the matter being referred to it by any party to dispute under sub section (2) of s. 6 of the Act.

Allowing the appeals, the Court

HELD: 1. The wholesome purpose and object behind the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 as amended in 1998 is to ensure that buyer promptly pays the amount due towards the goods supplied or the services rendered by the supplier. It also provides for payment of interest statutorily on the outstanding money in case of default. Section 4 fixes the rate of interest at one-and-half time of Prime Lending Rate charged by the SBI in case of default by the buyer in making payment of the amount to the supplier. The rate of interest fixed in section 4 overrides any agreement between the buyer and supplier to the contrary. Section 5 imposes a liability on the buyer to pay compound interest at the rate mentioned in section 4 on the amount due to the supplier. Section 6 is a crucial provision. Sub-section (1) thereof provides that the amount due from buyer together with amount of interest calculated in accordance with the provisions of sections 4 and 5 shall be recoverable by supplier from the buyer by way of a suit or other proceeding under any law for the time being in force. It thus provides for enforcement of right relating to recovery of amount due and the amount of interest which supplier may be entitled to in accordance with sections 4 and 5. The mode of such enforcement is by way of suit or any other proceeding under any law for the time being in force. Sub-section (2), however, overrides the mode of enforcement of right

provided in sub-section (1) by enabling any party to a dispute to make a reference to the Industry Facilitation Council (IFC) for recovery of amount due together with amount of interest as provided in sections 4 and 5. Once such dispute is referred, IFC acts as an arbitrator or conciliator and the provisions of Arbitration and Conciliation Act, 1996 get attracted as if the arbitration and conciliation were being conducted pursuant to an arbitration agreement referred to in sub-section (1) of section 7 of that Act. A plain reading of section 6 would show that nature of dispute to be adjudicated by the IFC as an arbitrator or resolution thereof as a conciliator is in respect of the matters referred to in sub-section (1), i.e., the amount due from a buyer together with the amount of interest calculated in accordance with the provisions of sections 4 and 5. [Para 19] [576-F; 577-A-H; 573-A]

2.1. The word 'due' has variety of meanings, in different context it may have different meanings. In its narrowest meaning, the word 'due' may import a fixed and settled obligation or liability. In a wider context the amount can be said to be 'due', which may be recovered by action. The amount that can be claimed as 'due' and recoverable by an action may sometimes be also covered by the expression 'due'. The expression 'amount due from a buyer' followed by the expression 'together with the amount of interest' under sub-section (1) of section 6 of 1993 Act must be interpreted keeping the purpose and object of 1993 Act and its provisions, particularly sections 3, 4 and 5 in mind. This expression does not deserve to be given a restricted meaning as that would defeat the whole purpose and object of 1993 Act. [Para 34] [584-G-H; 585-A-C]

2.2. The scheme of section 6 of 1993 Act read with sections 3, 4 and 5 does not envisage multiple proceedings. Rather, whole idea of section 6 is to

provide single window to the supplier for redressal of his grievance where the buyer has not made payment for goods supplied or services rendered in its entirety or part of it or such payment has not been made within time prescribed in section 3 for whatever reason and/or for recovery of interest as per sections 4 and 5 for such default. It is for this reason that sub-section (1) of section 6 provides that 'amount due from the buyer together with the amount of interest calculated in accordance with the provisions of sections 4 and 5' shall be recoverable by the supplier from buyer by way of a suit or other legal proceeding. Sub-section (2) of section 6 talks of a dispute being referred to IFC in respect of the matters referred to in sub-section (1), i.e. the dispute concerning amount due from a buyer for goods supplied or services rendered by the supplier to buyer and the amount of interest to which supplier has become entitled under sections 4 and 5. [Para 34] [585-F-H; 586-A-B]

2.3. It is true that word 'together' ordinarily means conjointly or simultaneously but this ordinary meaning put upon the said word may not be apt in the context of section 6. It cannot be said that the action contemplated in section 6 by way of suit or any other legal proceeding under sub-section (1) or by making reference to IFC under sub-section (2) is maintainable only if it is for recovery of principal sum along with interest as per sections 4 and 5 and not for interest alone. The word 'together' in section 6(1) would mean 'alongwith' or 'as well as'. Seen thus, the action under section 6(2) could be maintained for recovery of principal amount and interest or only for interest where liability is admitted or has been disputed in respect of goods supplied or services rendered. Under section 6(2) action by way of reference to IFC cannot be restricted to a claim for recovery of interest due under sections 4 and 5 only in cases of an existing determined, settled or admitted

liability. IFC has competence to determine the amount due for goods supplied or services rendered in cases where the liability is disputed by the buyer. Construction put upon section 6(2) by the buyer does not deserve to be accepted as it will not be in conformity with the intention, object and purpose of 1993 Act. Preamble to 1993 Act, does not persuade to hold otherwise. It is so because Preamble may not exactly correspond with the enactment; the enactment may go beyond Preamble. [Para 34] [586-B-G]

Assam State Electricity Board and Ors. v. Shanti Conductors Pvt. Ltd. and Anr. **(2002) 2 GLR 550, approved.**

State of Kerala and Ors. v. *V.R. Kalliyanikutty and Anr.* **(1999) 3 SCC 657;** *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors.* **(2005) 8 SCC 534;** *Bonam Satyavathi v. Addala Raghavulu* **1994 (Suppl) 2 SCC 556;** *Central Bank of India v. State of Kerala and Ors.* **(2009) 4 SCC 94;** *Eastern Coalfields Limited v. Sanjay Transport Agency and Anr.* **(2009) 7 SCC 345;** *Assam Small Scale Industries Development Corpn. Ltd. and Ors.* v. *J.D. Pharmaceuticals and Anr.* **(2005) 13 SCC 19;** *Shakti Tubes Ltd.* v. *State of Bihar and Ors.* **(2009) 7 SCC 673;** *Madan Mohan and Anr.* v. *Krishan Kumar Sood* **1994 Supp (1) SCC 437;** *Maharashtra State Cooperative Bank Limited v. The Assistant Provident Fund Commissioner and Ors.* **(2009) 10 SCC 123;** *Secur Industries Ltd.* v. *Godrej & Boyce Mfg. Co. Limited and Anr.* **(2004) 3 SCC 447, referred to.**

Irish Land Commission v. Viscount *Massereene and Ferrard* **(1904) 2 I.R. 1113;** *Hibernian Bank* v. *Yourell* **(1919) 1 I.R. Ch. D. 310, referred to.**

Webster Comprehensive Dictionary, **International Edition;** *Concise Oxford English Dictionary* **10th Edition, Revised ;** *Black's Law Dictionary* **Eighth Edition;** *Wharton's Law Lexicon* Fourteenth Edition; *Law Lexicon by P.*

Ramanatha Aiyar; **2nd Edition Reprint 1997;** *Jowitt's Dictionary of English* ***Law*** **2nd Edition (Vol. 1);** *Stroud's Judicial Dictionary' of Words and Phrases*, **Referred to.**

3. The reasoning of the High Court that expression 'amount due from a buyer' would be amount admitted to be due in its plain and natural meaning and when admitted due amount is not paid by the buyer, the provisions of sections 3 to 6 along with other provisions of 1993 Act would be applicable; and that High Court's finding that since the buyer has alleged breach of contract by the supplier, there was no amount admitted to be due or settled amount and, therefore, there was no question of delayed payment and reference of the dispute to the IFC under sub-section(2) of section 6 was without jurisdiction, cannot be accepted. The interpretation put by the High Court upon the expression 'amount due from the buyer' is fallacious. [Paras 36 and 37] [587-D; 588-C-E]

4. It cannot be said that 1993 Act is not applicable to the instant case as contract was entered into on January 15, 1983 and 1993 Act came into effect on September 23, 1992. Such a contention was not raised before the High Court; it is canvassed before this Court for the first time. Secondly, and more importantly, from the available material, it transpires that although the initial contract was entered into between the parties in January 1983 but it got altered from time to time in view of negotiations between the parties about supply of raw-materials by the buyer free of cost; the defect in drawings and assignment of additional works and last of such alteration was on April 29, 1995. By that time, the 1993 Act had already come into force. The 1993 Act is prospective in operation. [Paras 38, 39 and 41] [588-F-H; 589-A]

Assam Small Scale Industries Development Corporation Ltd. and Ors.v. J.D. Pharmaceuticals and Anr. **(2005) 13 SCC**

19; *Shakti Tubes Limited v. State of Bihar and Ors.* **(2009) 7 SCC 673, referred to.**

5. It was submitted on behalf of the buyer that IFC's award was delivered ex-parte and no reasons have been given in support thereof; the award does not reflect any application of mind; and that if appeals are allowed and award is sustained that would cause grave prejudice to the buyer inasmuch as the original contract was for a sum of Rs. 8.19 lakhs, out of which Rs. 6.07 lakhs have already been paid in July, 1997 and goods worth balance amount were given to the supplier and yet buyer is saddled with the liability for an amount of Rs. 24,86,998/- with interest at the rate of 18 per cent compounded with monthly rests from September 24, 1997 which may run into crores of rupees. The situation in which the buyer has been placed is their own creation. They chose not to contest the claim of the supplier before IFC on merits. No written statement was filed despite opportunity granted by IFC. The buyer did not challenge nor disputed diverse claims made by the supplier (including additional work) before IFC. Even before the High Court, no submission seems to have been made on merits of the award at all. In the circumstances, the buyer does not deserve any indulgence from this Court. Pertinently, though 1993 Act provides a statutory remedy of appeal against the award but the buyer did not avail the statutory remedy and instead challenged the award passed by IFC before High Court in extraordinary jurisdiction under Article 226 of the Constitution bypassing statutory remedy which, was not justified. [Para 42] [591-D-H; 592-A-B]

Case Law Reference:

(2005) 8 SCC 534	**Referred to.**	**Para 17**
1994 (Suppl) 2 SCC 556	**Referred to.**	**Para 17**

(2009) 4 SCC 94	**Referred to.**	**Para 17**
(2009) 7 SCC 345	**Referred to.**	**Para 17**
(1904) 2 I.R. 1113	**Referred to.**	**Para 27**
(1919) 1 I.R. Ch. D. 310	**Referred to.**	**Para 28**
1994 Supp (1) SCC 437	**Referred to.**	**Para 29**
(1999) 3 SCC 657	**Referred to.**	**Para 30**
(2009) 10 SCC 123	**Referred to.**	**Para 31**
(2002) 2 GLR 550	**Approved.**	**Para 34**
(2004) 3 SCC 447	**Referred to.**	**Para 35**
(2005) 13 SCC 19	**Referred to.**	**Para 39, 40**
(2009) 7 SCC 673	**Referred to.**	**Para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3305-3306 of 2010.

From the Judgment & Order dated 18.2.2008 of the High Court of Orissa, Cuttack in OJC Nos. 4271 and 9111 of 2000.

Prashant Bhushan, Sumeet Sharma, Y. Raja Gopala Rao for the Appellant.

Ashwani Kumar, Sunil Kumar Jain, Aneesh Mittal, K.P.S. Chani, Shibashish Misra, D.S. Mahra for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. Two main questions arise for consideration – first, as to the meaning of the expression, 'amount due from a buyer, together with the amount of interest' under sub-section (1) of Section 6 of the Interest on Delayed Payments to Small Scale

and Ancillary Industrial Undertakings Act, 1993 (for short, '1993 Act') and then, as to whether the Industry Facilitation Council (IFC) cannot go beyond the scope of interest on delayed payments upon the matter being referred to it by any party to dispute under sub-section (2) of Section 6.

3. M/s. Modern Industries, Rourkela (for short, 'supplier') got an order from the Steel Authority of India Limited – Rourkela Steel Plant (for short, 'buyer') on January 15, 1983 for manufacture of Right Manipulator Side Guard. The order value was Rs. 8.19 lakhs. Inter alia, the terms and conditions of the order were : (i) the job should be done exactly as specified in the drawings; (2) the alignment of bearing housings be made by the supplier and for this purpose, a spare shaft assembly would be issued against indemnity bond for checking the perfect alignment and free rotation of the shaft ; (3) the essentiality certificate would be issued by the buyer; (4) O.S.T./ T.O.T. 5% to be paid extra and (5) 90 per cent payment to be made against the proof of dispatch (R/R) and inspection certificate, balance 10 per cent payment would be made within thirty days after receipt of materials at site in good condition. It appears that initially buyer did not issue raw-materials but later on the buyer on May 28, 1985 agreed to supply the materials free of cost. The supplier also informed the buyer that the drawings were defective. According to the supplier, there was delay in supply of materials and removal of defects from drawings. The buyer ultimately extended the period of supplies till June 4, 1997. It is admitted case of the parties that supplies were made within extended period. The buyer ordered for release of Rs. 6,07, 493/- as an interim payment but deducted the balance payment of Rs. 2,11,506/- out of Rs. 8.19 lakhs of the original order as the cost of the supply of materials. The supplier, accordingly, raised a dispute in respect of balance payment together with interest on delayed payment before IFC under Section 6(2) of 1993 Act.

4. IFC took cognizance of the dispute referred to it by the

supplier and issued notice to the buyer on September 21, 1999. On October 23, 1999, nobody appeared for buyer before IFC. However, IFC directed the buyer to settle the claims of the supplier within thirty days of receipt of the communication and gave an opportunity to submit their defence within ten days of receipt of the said communication and also depute a duly authorized officer to attend the proceedings. Vide its letter dated December 20, 1999, the buyer objected to the jurisdiction of IFC in dealing with the matter. It appears that on February 15, 2000, a representative of the buyer appeared before the IFC. On that date, the IFC again directed the buyer to settle the dispute amicably in the presence of Joint Director of Industries (Planning), Rourkela and also file its written statement regarding its outcome on March 24, 2000. On March 24, 2000, the representative of the buyer was not present before IFC nor any written statement was filed as directed on February 15, 2000. In the circumstances, IFC passed an ex-parte award against the buyer in the sum of Rs. 24,86,998/- with interest at the rate of 18 per cent being one-and-half times of Prime Lending Rate of the SBI compounded with monthly rests. IFC also directed that the interest would be payable with effect from September 24, 1997 (the date of last delivery, i.e., May 28, 1997 plus maximum 120 days of credit period) till the date of full payment.

5. The ex-parte award passed against the buyer was kept in abeyance by IFC on May 6, 2000 for one month at the instance of the buyer to enable it to discuss and settle the matter with the supplier. However, no settlement took place between the parties and IFC on July 11, 2000 reiterated its ex-parte award dated March 24, 2000.

6. Two writ petitions came to be filed by the buyer before the High Court of Orissa. In the first writ petition, ex-parte award dated March 24, 2000 was challenged and in the other, award dated July 11, 2000 as well as ex-parte award dated March 24, 2000 was assailed. In both writ petitions, the buyer also challenged the validity of the Interest on Delayed Payments to

Small Scale and Ancillary Industrial Undertakings (Amendment) Act 1998 (for short, '1998 Amendment Act').

7. The Division Bench of the High Court vide its judgment dated February 18, 2008 allowed these writ petitions and quashed and set aside the awards dated March 24, 2000 and July 11, 2000. It is from this judgment that present appeals by special leave have arisen.

8. 1993 Act was sequel to a policy statement on small scale industries made by the Government in Parliament that suitable legislation would be brought to ensure prompt payment of money by buyers to the small industrial units. It was felt that inadequate working capital in a small scale and ancillary industrial undertaking was causing an endemic problem and such undertakings were very much affected. The Small Scale Industries Board - an apex advisory body on policies relating to small scale industrial units - also expressed its views that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payment of interest on the outstanding money, in case of default, should be made. It was felt that the buyers, if required under law to pay interest, would refrain from withholding payments to small scale and ancillary industrial undertakings. With these objects and reasons, initially an Ordinance, namely, the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Ordinance, 1992 was promulgated by the President on September 23, 1992 and then Bill was placed before both the Houses of Parliament and the said Bill having been passed, 1993 Act was enacted. The Preamble to the 1993 Act reads, 'An Act to provide for and regulate the payment of interest on delayed payments to small scale and ancillary industrial undertakings and for matters connected therewith or incidental thereto'.

9. By 1998 Amendment Act, with effect from August 10, 1998, 1993 Act was amended whereby few new provisions were inserted and some existing provisions amended.

10. Section 2(c), (e) and (f) define "buyer", "small scale industrial undertaking" and "supplier" as follows :

"S.2.- *Definitions.* – In this Act, unless the context otherwise requires, –

(c) "buyer" means whoever buys any goods or receives any services from a supplier for consideration;

(e) "Small scale industrial undertaking" has the meaning assigned to it by clause (j) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951);

(f) "supplier" means an ancillary industrial undertaking or a small scale industrial undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State (or Union territory and includes, –

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956).]"

11. Section 3 fastens liability on buyer to make payment for the goods supplied or the services rendered by the supplier to him within the time mentioned therein. It reads :

"S.3.- *Liability of buyer to make payment.*—Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:"

12. Section 4 imposes a liability of interest upon the buyer on failure to make payment of the amount due to the supplier. Originally in 1993 Act, Section 4 was as follows :

"S.4.- *Date from which and rate at which interest is payable.*—Where any buyer fails to make payment of the amount to the supplier, as required under Section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at such rate which is five per cent points above the floor rate for comparable lending.

Explanation.—For the purposes of this section, "floor rate for comparable lending" means the highest of the minimum lending rates charged by scheduled banks (not being co operative banks) on credit limits in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949)."

After amendment in 1998, Section 4 reads :

"S.4.- *Date from which and rate at which interest is payable.*—Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at one-and-half time of Prime Lending Rate charged by the State Bank of India.

Explanation.—For the purposes of this section, "Prime Lending Rate" means the Prime Lending Rate of

the State Bank of India which is available to the best borrowers of the bank."

13. Section 5 imposes a liability on the buyer to pay compound interest. It reads :

"S.5.- *Liability of buyer to pay compound interest.*—Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly rests) at the rate mentioned in section 4 on the amount due to the supplier."

14. The mode of recovery of amount due is provided in Section 6. Erstwhile Section 6 in 1993 Act read:

"S.6-. *Recovery of amount due.*—The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceedings under any law for the time being in force."

After amendment in 1998, Section 6 provides :

"S.6.- *Recovery of amount due.*—(1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.

(2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such disputes as if the arbitration or conciliation were pursuant to an arbitration

agreement referred to in sub-section (1) of section 7 of that Act."

15. Section 7 provides that no appeal against any decree, award or other order will be entertained by any court or other authority unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, other order in the manner directed by such court or, as the case may be, such authority.

16. Mr. Prashant Bhushan, learned counsel for the supplier urged that the IFC under Section 6(2) has jurisdiction to decide the dispute between supplier and buyer relating not only in respect of interest but also the principal amount payable by buyer to supplier. He submitted that the interpretation put by the High Court upon the provisions of 1993 Act is erroneous and that jurisdiction of IFC in resolving the dispute under Section 6 (2) is not only confined to the dispute relating to interest but would also be available where there is dispute regarding the principal amount payable by the buyer to the supplier. He submitted that the High Court seriously erred in holding that the requirement of 'settled amount' between the supplier and buyer is *sine qua non* for the applicability of 1993 Act.

17. On the other hand, Mr. Ashwani Kumar, learned senior counsel for the buyer submitted that findings of the High Court on the applicability of 1993 Act and the issue of jurisdiction of the IFC are meritorious in law for the reasons given in the judgment. He submitted that the entire scheme and structure of 1993 Act, including the Preamble and the Statement of Objects and Reasons when construed harmoniously, would show that Section 6(2) can only be invoked in cases of an existing determined, settled or admitted liability. He would submit that the use of word 'due' in Section 6 indicates that penal interest provisions in Sections 4 and 5 of 1993 Act get attracted where the principal amount payable is not in dispute, is settled or admitted or has been found by a competent forum

to be 'due'. According to him, special law does not intend to substitute the regular procedure for determining a disputed liability where there is a bona fide dispute as to the amount due. He referred to the Blacks Law Dictionary, Stroud's Judicial Dictionary of Words and Phrases and Aiyer's Law Lexicon and also invited our attention to the decision of this Court in *State of Kerala* and Others v. *V.R. Kalliyanikutty and Another*[1] in support of his argument that the expression 'amount due' in Section 6 pre-supposes an existing determined, settled or admitted liability. He would submit that the Preamble and the Statement of Objects and Reasons and the headings of Section can be referred to in determining the applicability and scope of a statutory enactment. In this regard, he relied upon decisions of this Court in *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat and Others*[2], *Bonam Satyavathi* v. *Addala Raghavulu,*[3] *Central Bank of India* v. *State of Kerala and Others*[4] and *Eastern Coalfields Limited* v. *Sanjay Transport Agency and Another*[5].

18. Mr. Ashwani Kumar would also submit that 1993 Act even otherwise is not applicable to the present case as the contract pertaining to which the buyer has been saddled with a monetary liability was executed on January 15, 1983 and that 1993 Act came into effect much later. He relied upon two decisions of this Court, namely, *Assam Small Scale Industries Development Corpn. Ltd. and Others* v. *J.D. Pharmaceuticals and Another*[6] and *Shakti Tubes Ltd.,* v. *State of Bihar and Others*.[7]

19. The wholesome purpose and object behind 1993 Act

1. (1999) 3 SCC 657.
2. (2005) 8 SCC 534.
3. 1994 (Suppl) 2 SCC 556.
4. (2009) 4 SCC 94.
5. (2009) 7 SCC 345.
6. (2005) 13 SCC 19.
7. (2009) 7 SCC 673.

as amended in 1998 is to ensure that buyer promptly pays the amount due towards the goods supplied or the services rendered by the supplier. It also provides for payment of interest statutorily on the outstanding money in case of default. Section 3, accordingly, fastens liability upon the buyer to make payment for goods supplied or services rendered to the buyer on or before the date agreed upon in writing or before the appointed day and when there is no date agreed upon in writing, the appointed day shall not exceed 120 days from the day of acceptance. Section 4 fixes the rate of interest at one-and-half time of Prime Lending Rate charged by the SBI in case of default by the buyer in making payment of the amount to the supplier. The rate of interest fixed in Section 4 overrides any agreement between the buyer and supplier to the contrary. Section 5 imposes a liability on the buyer to pay compound interest at the rate mentioned in Section 4 on the amount due to the supplier. Section 6 is a crucial provision. Sub-section (1) thereof provides that the amount due from buyer together with amount of interest calculated in accordance with the provisions of Sections 4 and 5 shall be recoverable by supplier from the buyer by way of a suit or other proceeding under any law for the time being in force. It thus provides for enforcement of right relating to recovery of amount due and the amount of interest which supplier may be entitled to in accordance with Sections 4 and 5. The mode of such enforcement is by way of suit or any other proceeding under any law for the time being in force. Sub-section (2), however, overrides the mode of enforcement of right provided in sub-section (1) by enabling any party to a dispute to make a reference to the IFC for recovery of amount due together with amount of interest as provided in Sections 4 and 5. Once such dispute is referred, IFC acts as an arbitrator or conciliator and the provisions of Arbitration and Conciliation Act, 1996 get attracted as if the arbitration and conciliation were being conducted pursuant to an arbitration agreement referred to in sub-section (1) of Section 7 of that Act. A plain reading of Section 6 would show that nature of dispute to be adjudicated by the IFC as an arbitrator or resolution thereof as a conciliator

is in respect of the matters referred to in sub-section (1), i.e., the amount due from a buyer together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5.

20. What exactly is the meaning of words 'amount due from a buyer' which are followed by the expression 'together with the amount of interest' under sub-section (1) of Section 6 of 1993 Act? Do these words mean an admitted sum due? Or do they mean the amount claimed to be due?

21. The meaning of the word 'due' has been explained in Webster Comprehensive Dictionary, (International Edition) as follows :

"1. Owing and demandable; owed; especially, payable because of the arrival of the time set or agreed upon. 2. That should be rendered or given; justly claimable; appropriate."

22. Concise Oxford English Dictionary (10th Edition, Revised) explains 'due' as follows :

"DUE •……**?**(of a person) at a point where something is owed or merited. **?**required as a legal or moral obligation. 2 proper; appropriate…….

…….

-ORIGIN ME: from OFr. d*eu* 'owed', based on L. *debitus* 'owed', from debere 'owe' ".

23. In Black's Law Dictionary (Eighth Edition), the word 'due' is explained :

"adj. 1. Just, proper, regular, and reasonable <due care> <due notice>. 2. Immediately enforceable <payment is due on delivery>. 3. Owing or payable; constituting a debt….."

24. Wharton's Law Lexicon (Fourteenth Edition) makes the

following comment with regard to word 'due' :

> "anything owing. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done."

25. P. Ramanatha Aiyar in 'Law Lexicon'; 2nd Edition (Reprint 1997) explains the word 'due'; as a noun : an existing obligation; an indebtedness; a simple indebtedness without reference to the time of payment : a debt ascertained and fixed though payable in future; as an adjective : capable of being justly demanded; claimed as of right; owing and unpaid, remaining unpaid; payable; regular; formal; according to rule or form.

26. Jowitt's Dictionary of English Law; 2nd Edition (Vol. 1) defines 'due'; 'anything owing, that which one contracts to pay or perform to another. As applied to a sum of money, 'due' means either that it is owing or that it is payable; in other words, it may mean that the debt is payable at once or at a future time. It is a question of construction which of these two meanings the word 'due' bears in a given case'.

27. In *Irish Land Commission* v. Viscount *Massereene and Ferrard,*[8] Gibson J. stated that word 'due' may mean immediately payable (its common signification), or a debt contracted, but payable in future. It was also highlighted that the interpretation of the word 'due' must be according to the reason and context of the statute.

28. In the case of *Hibernian Bank* v. *Yourell*[9], O'Connor M.R. construed the word 'due' in Section 24(8) of the Conveyancing and Law of Property Act, 1881 as due and legally recoverable.

29. The expression 'amount due' occurring in different statutes has come up for consideration before this Court. In

8. (1904) 2 I.R. 1113.

9. (1919) I I.R. Ch. D. 310.

Madan Mohan and Another v. *Krishan Kumar Sood*[10], this Court while dealing with the expression 'amount due' occurring in the third proviso to clause (i) of sub-section (2) of Section 14 of H.P. Urban Rent Control Act, 1987, held that the expression 'amount due' in the context will mean the amount due on and up to the date of the order of eviction; it will take into account not merely the arrears of rent which gave cause of action to file a petition for eviction but will include the rent which accumulated during the pendency of the eviction petition as well.

30. A three-Judge Bench of this Court in *V.R. Kalliyanikutty*[1] had an occasion to interpret the words 'amounts due' used in Section 71 of Kerala Revenue Recovery Act, 1968. Section 71 of Kerala Act provided thus :

> "S.71.- *Power of Government to declare the Act applicable to any institution.*—The Government may, by notification in the Gazette, declare, if they are satisfied that it is necessary to do so in public interest, that the provisions of this Act shall be applicable to the recovery of amounts due from any person or class of persons to any specified institution or any class or classes of institutions, and thereupon all the provisions of this Act shall be applicable to such recovery."

After referring to Wharton in Law Lexicon and Black's Law Dictionary, it was held that the words 'amounts due' in Section 71 did not include time barred debt. This Court, however, highlighted that in every case the exact meaning of the word 'due' will depend upon the context in which the word appears.

31. In *Maharashtra State Cooperative Bank Limited* v. *The Assistant Provident Fund Commissioner and Others*[11], before a three-Judge Bench of this Court interpretation of the

10. 1994 Supp (1) SCC 437.

11. (2009) 10 SCC 123.

expression 'any amount due from an employer' used in Section 11(2) of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 came up for consideration. Section 11(2) of the said Act is as follows:

> "S.11.- *Priority of payment of contributions over other debts*.—(l) Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due—
>
> (a) * * * * *
>
> (b) * * * * *
>
> (2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer whether in respect of the employee's contribution (deducted from the wages of the employee) or the employer's contribution, the amount so due shall be deemed to be the first charge on the assets of the establishment, and shall, notwithstanding anything contained in any other law for the time being in force, be paid in priority to all other debts."

While interpreting the said expression 'any amount due from an employer', this Court referred to Section 11(1) besides the other provisions of the said Act, namely, Sections 7A, 7Q, 14B and 15(2) and held that the said expression cannot be accorded restricted meaning confining it to the amount determined under Section 7(A) or the contribution payable under Section 8. This is what this Court said :

> **"**67. The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay

> damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.
>
> 68. As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14-B and accumulations required to be transferred under Section 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression "any amount due from the employer" and confine it to the amount determined under Section 7-A or the contribution payable under Section 8.
>
> 69. If interest payable by the employer under Section 7-Q and damages leviable under Section 14 (*sic* Section 14-B) are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the authorities concerned to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the

deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned Senior Counsel for the appellant Bank that the amount of interest payable under Section 7-Q and damages leviable under Section 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act."

32. In *Assam State Electricity Board and Ors.* v. *Shanti Conductors Pvt. Ltd. and Another*[12], inter-alia, the question that fell for consideration before the Full Bench of Gauhati High Court was as to whether the suit for recovery of a mere interest under 1993 Act is maintainable. The argument on behalf of the appellant therein was that no suit merely for the recovery of the interest under 1993 Act is maintainable under the provisions of Section 6. It was contended that both principal sum and the interest on delayed payment simultaneously must co-exist for maintaining a suit under Section 6 of the 1993 Act.

33. The Full Bench held that the suit is maintainable for recovery of the outstanding principal amount, if any, along with the interest on delayed payments as calculated under Sections 4 and 5 of the 1993 Act. It said :

"The opening words of Section 6(1) "the amount due from the buyer, together with the amount of interest....." can only mean that the principal sum due from the buyer as well as or along with the amount of interest calculated under the provisions of the Act, are recoverable. The word 'together' here would mean 'as well as' or 'alongwith'. This cannot mean that the principal sum must be due on the date of the filing of the suits. The suits are maintainable for recovery of the outstanding, principal amount, if any, along with the amount of interest on the delayed payments as calculated under Sections 4 and 5 of the Act. We are unable to agree with that if the principal sum is not due, no suit would lie for the recovery of the interest on the delayed payments,

12. (2002) 2 GLR 550

which might have already accrued. If such an interpretation is given the very object of enacting the Act would be frustrated. The Act had been enforced to see that small scale industries get the payment regarding supply made by them within the prescribed period and in case of delay in payments the interest would be at a much higher rate (1 1/2 times of lending rate charged by the State Bank of India). The obligation of payment of higher interest under the Act is mandatory. Sections 4 and 5 of the Act of 1993 contain a non-obstante clause i.e. "Notwithstanding any thing contained in any agreement between the buyer and the supplier". In other words, the parties to the contract cannot even contract out of the provisions of the 1993 Act. Even if such provision that interest under the Act on delay meant would not be chargeable is incorporated in the contract, Sections 4 and 5 of the Act of 1993 would still prevail as the very wording of these sections indicate. Take for instance that the buyer has not paid the outstanding amount of the supply by the due date. After much delay he offers the outstanding amount of the supply to the supplier. If the argument of the learned counsel for the appellant is to be accepted, then, if the supplier accepts entire amount he would be losing, his right to recover the amount of interest on the delayed payment under the Act. Therefore, he would have to refuse to accept the amount of payment and then file a suit for recovery of the principal amount and the interest on the delayed payment under the Act. The Act does not create any embargo against supplier not to accept principal amount at any stage and thereafter file a suit for the recovery or realization of the interest only on the delayed payments under the Act."

34. The word 'due' has variety of meanings, in different context it may have different meanings. In its narrowest meaning, the word 'due' may import a fixed and settled obligation or liability. In a wider context the amount can be said

to be 'due', which may be recovered by action. The amount that can be claimed as 'due' and recoverable by an action may sometimes be also covered by the expression 'due'. The expression 'amount due from a buyer' followed by the expression 'together with the amount of interest' under sub-section (1) of Section 6 of 1993 Act must be interpreted keeping the purpose and object of 1993 Act and its provisions, particularly Sections 3, 4 and 5 in mind. This expression does not deserve to be given a restricted meaning as that would defeat the whole purpose and object of 1993 Act. Sub-section (1) of Section 6 provides that the amount due from buyer together with amount of interest calculated in accordance with the provisions of Sections 4 and 5 shall be recoverable by the supplier from the buyer by way of suit or other proceeding under any law for the time being in force. If the argument of senior counsel for the buyer is accepted, that would mean that where the buyer has raised some dispute in respect of goods supplied or services rendered by the supplier or disputed his liability to make payment then the supplier shall have to first pursue his remedy for recovery of amount due towards goods supplied or services rendered under regular procedure and after the amount due is adjudicated, initiate action for recovery of amount of interest which he may be entitled to in accordance with Sections 4 and 5 by pursuing remedy under sub-section (2) of Section 6. We are afraid the scheme of Section 6 of 1993 Act read with Sections 3,4 and 5 does not envisage multiple proceedings as canvassed. Rather, whole idea of Section 6 is to provide single window to the supplier for redressal of his grievance where the buyer has not made payment for goods supplied or services rendered in its entirety or part of it or such payment has not been made within time prescribed in Section 3 for whatever reason and/or for recovery of interest as per Sections 4 and 5 for such default. It is for this reason that sub-section (1) of Section 6 provides that 'amount due from the buyer together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5' shall be

recoverable by the supplier from buyer by way of a suit or other legal proceeding. Sub-section (2) of Section 6 talks of a dispute being referred to IFC in respect of the matters referred to in sub-section (1), i.e. the dispute concerning amount due from a buyer for goods supplied or services rendered by the supplier to buyer and the amount of interest to which supplier has become entitled under Sections 4 and 5. It is true that word 'together' ordinarily means conjointly or simultaneously but this ordinary meaning put upon the said word may not be apt in the context of Section 6. Can it be said that the action contemplated in Section 6 by way of suit or any other legal proceeding under sub-section (1) or by making reference to IFC under sub-section (2) is maintainable only if it is for recovery of principal sum along with interest as per Sections 4 and 5 and not for interest alone? The answer has to be in negative. We approve the view of Gauhati High Court in *Assam State Electricity Board12* that word 'together' in Section 6(1) would mean 'alongwith' or 'as well as'. Seen thus, the action under Section 6(2) could be maintained for recovery of principal amount and interest or only for interest where liability is admitted or has been disputed in respect of goods supplied or services rendered. In our opinion, under Section 6(2) action by way of reference to IFC cannot be restricted to a claim for recovery of interest due under Sections 4 and 5 only in cases of an existing determined, settled or admitted liability. IFC has competence to determine the amount due for goods supplied or services rendered in cases where the liability is disputed by the buyer. Construction put upon Section 6(2) by learned senior counsel for the buyer does not deserve to be accepted as it will not be in conformity with the intention, object and purpose of 1993 Act. Preamble to 1993 Act, upon which strong reliance has been placed by learned senior counsel, does not persuade us to hold otherwise. It is so because Preamble may not exactly correspond with the enactment; the enactment may go beyond Preamble.

35. In *Secur Industries Ltd.* v. *Godrej & Boyce Mfg. Co. Limited and Another*[13], this Court observed that sub-section (2) of Section 6 expressly incorporates the provisions of the Arbitration and Conciliation Act, 1996 and it further creates a legal fiction whereby disputes referred to IFC are to be deemed to have been made pursuant to an arbitration agreement as defined in sub-section (1) of Section 7 of that Act. There is, thus, no reason as to why IFC, which acts as an Arbitrator or Conciliator under the provisions of Arbitration and Conciliation Act, 1996, cannot deal with the dispute concerning principal amount due to the supplier for the goods supplied or services rendered.

36. The High Court, in the impugned order, however, held that expression 'amount due from a buyer' would be amount admitted to be due in its plain and natural meaning and when admitted due amount is not paid by the buyer, the provisions of Sections 3 to 6 along with other provisions of 1993 Act would be applicable. In the opinion of High Court since the buyer has alleged breach of contract by the supplier, there was no amount admitted to be due or settled amount and, therefore, there was no question of delayed payment and reference of the dispute to the IFC under sub-section(2) of Section 6 was without jurisdiction. The High Court in the impugned order held thus :

> "16. Therefore, the said matter before the IFC would be limited to the amount due from the buyer together with amount of interest calculated only in accordance with the provisions of Sections 4 and 5 of the Act. Section 4 applies only when Section 3 is applied. Therefore, the ultimate focus in the Act is on Section 3 as already discussed above. Section 3 speaks about the settled amount and not the amount which may be calculated according to the calculations of the supplier disputed by the buyer or where there is dispute regarding delayed supply causing loss to the buyer or defective supply of the materials. Therefore "the amount due from a buyer would be interpreted in its plain and natural manner i.e. amount admitted to be due" and when it is not paid by the buyer, the provisions of Section 3 to 6 along with other provisions of the Act would be applicable.
>
> 17. In the instant case, the buyer i.e. the petitioner has alleged that the supply was not made by the opposite party No. 2 in time and there was delay in supply of materials which caused loss to the petitioner and by the time of supply of materials, technology has already been changed. Therefore, in nutshell, the petitioner has alleged breach of contract by opposite party No. 2 and therefore, in case of allegation of breach of contract, it cannot be said that there is any amount admitted to be due or settled amount. Hence, there is no question of delayed payment and referring the dispute to the IFC under the provisions of Sub-section 2 of the Section 6, to our mind, would be without jurisdiction."

37. We find it difficult to accept the reasoning of the High Court. The interpretation put by the High Court upon the expression 'amount due from the buyer' is fallacious for the reasons indicated above which we need not respect.

38. Now, the submission of learned senior counsel for the buyer with regard to the applicability of the 1993 Act to the present case may be considered. His argument is that 1993 Act is not applicable to the present case as contract was entered into on January 15, 1983 and 1993 Act came into effect on September 23, 1992. The argument does not appeal us for more than one reason. In the first place, this contention was not raised before the High Court; it is canvassed before us for the first time. Secondly, and more importantly, from the available material, it transpires that although the initial contract was entered into between the parties in January 1983 but it got altered from time to time in view of negotiations between the

13. (2004) 3 SCC 447.

parties about supply of raw-materials by the buyer free of cost; the defect in drawings and assignment of additional works and last of such alteration was on April 29, 1995.

39. That 1993 Act is prospective in operation is settled by two decisions of this Court. In *Assam Small Scale Industries Development Corporation Ltd. and Others6,* this Court held :

> "**37.** We have held hereinbefore that clause 8 of the terms and conditions relates to the payments of balance 10%. It is not in dispute that the plaintiff had demanded both the principal amount as also the interest from the Corporation. Section 3 of the 1993 Act imposes a statutory liability upon the buyer to make payment for the supplies of any goods either on or before the agreed date or where there is no agreement before the appointed day. Only when payments are not made in terms of Section 3, Section 4 would apply. The 1993 Act came into effect from 23-9-1992 and will not apply to transactions which took place prior to that date. We find that out of the 71 suit transactions, Sl. Nos. 1 to 26 (referred to in the penultimate para of the trial court judgment), that is supply orders between 5-6-1991 to 28-7-1992, were prior to the date of the 1993 Act coming into force. Only the transactions at Sl. Nos. 27 to 71 (that is supply orders between 22-10-1992 to 19-6-1993), will attract the provisions of the 1993 Act.
>
> **38.** The 1993 Act, thus, will have no application in relation to the transactions entered into between June 1991 and 23-9-1992. The trial court as also the High Court, therefore, committed a manifest error in directing payment of interest at the rate of 23% up to June 1991 and 23.5% thereafter."

40. *Assam Small Scale Industries Development Corporation Ltd. and Others6* has been followed recently by this Court in the case of *Shakti Tubes Limited7* . In *Shakti Tubes Limited*[7], this Court said :

> "18**.** In our considered opinion, the ratio of the aforesaid decision in *Assam Small Scale Industries case,(2005)13 SCC 19,* is clearly applicable and would squarely govern the facts of the present case as well. The said decision was rendered by this Court after appreciating the entire facts as also all the relevant laws on the issue and therefore, we do not find any reason to take a different view than what was taken by this Court in the aforesaid judgment. Thus, we respectfully agree with the aforesaid decision of this Court which is found to be rightly arrived at after appreciating all the facts and circumstances of the case.
>
> 21. We have considered the aforesaid rival submissions. This Court in *Assam Small Scale Industries case,(2005)13 SCC 19* has finally set at rest the issue raised by stating that as to what is to be considered relevant is the date of supply order placed by the respondents and when this Court used the expression "transaction" it only meant a supply order. The Court made it explicitly clear in para 37 of the judgment which we have already extracted above. In our considered opinion there is no ambiguity in the aforesaid judgment passed by this Court. The intent and the purpose of the Act, as made in para 37 of the judgment, are quite clear and apparent. When this Court said "transaction" it meant initiation of the transaction i.e. placing of the supply orders and not the completion of the transactions which would be completed only when the payment is made. Therefore, the submission made by the learned Senior Counsel appearing for the appellant-plaintiff fails.
>
> 22. Consequently, we hold that the supply order having been placed herein prior to the coming into force of the Act, any supply made pursuant to the said supply orders would be governed not by the provisions of the Act but by the provisions of Section 34 CPC.

31. Even otherwise, we are of the considered view that there was neither any alteration of the contract nor any novation of the contract in the present case. The correspondence between the parties clearly disclosed that after the respondents issued the supply order, the appellant-plaintiff did not supply the pipes in terms of the supply order and it urged mainly for the increase in the price of the goods. Subsequently, they relied upon the price escalation clause and asked for increase in the price of pipes."

41. These two decisions, however, do not help the case of the buyer for what we have indicated above viz., that in the present case the original contract got altered from time to time and it was last altered on April 29, 1995. By that time, 1993 Act had already come into force.

42. Lastly, it was submitted by learned senior counsel for the respondents that IFC's award was delivered ex-parte and no reasons have been given in support thereof; the award does not reflect any application of mind. He would submit that if appeals are allowed and award is sustained that would cause grave prejudice to the buyer inasmuch as the original contract was for a sum of Rs. 8.19 lakhs, out of which Rs. 6.07 lakhs have already been paid in July, 1997 and goods worth balance amount were given to the supplier and yet buyer is saddled with the liability for an amount of Rs. 24,86,998/- with interest at the rate of 18 per cent compounded with monthly rests from September 24, 1997 which may run into crores of rupees. The situation in which the buyer has been placed is their own creation. They chose not to contest the claim of the supplier before IFC on merits. No written statement was filed despite opportunity granted by IFC. The buyer did not challenge nor disputed diverse claims made by the supplier (including additional work) before IFC. Even before the High Court, no submission seems to have been made on merits of the award at all. In the circumstances, the buyer does not deserve any

indulgence from this Court. Pertinently, though 1993 Act provides a statutory remedy of appeal against the award but the buyer did not avail of the statutory remedy and instead challenged the award passed by IFC before High Court in extraordinary jurisdiction under Article 226 of the Constitution bypassing statutory remedy which, in our view, was not justified.

43. The result is that appeals are allowed and impugned judgment dated February 18, 2008 passed by the High Court is set aside. Parties shall bear their own costs.

N.J. Appeals allowed.