JUGRAJ

v.

STATE OF PUNJAB

(Criminal Appeal No. 594 of 2005)

JANUARY 27, 2010*

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

Penal Code, 1860:

s. 302/34 – Murder – Four persons alleged to have shot dead a local MLA – Conviction by trial court – Acquittal by High Court of three of the accused – Observation by High Court that medical evidence did not support prosecution case inasmuch as five incised injuries caused to deceased were inflicted at least two hours after his death and prosecution failed to explain these injuries – HELD: Out of four eye witnesses only two were examined – Presence of one of the two witnesses examined seems to be doubtful – There is delay in lodging FIR and despatch of special report – Story given by other eye-witness was concocted to explain the delay in lodging FIR – No reference of names of accused in FIR though one of the eye witnesses claimed to have come to know their names during incident – In the circumstances, the best that can be said for the prosecution is that the matter was finally determined in the early hours of the following day and the FIR was thereafter lodged and then ante timed – This appears to be the import of the judgment of High Court as well – Besides, save for recovery of the gun, which was stated to have been made pursuant to statement of the appellant, the evidence with regard to all accused was identical – The evidence as to who fired the gun is ambivalent – Besides, the gun did not belong to the appellant and was not despatched to Forensic Science Laboratory promptly – In the light of observations of High Court itself there seems to be uncertainty

* Judgment Recd. on 12.5.2010

with regard to the prosecution case – Courts below have somewhat stretched credibility beyond a point which requires interference by this Court – Judgments of courts below set aside and appellant acquitted – Delay in lodging FIR and despatch of special report as also in despatch of crime weapon to Forensic Science Laboratory – Evidence – Non-explanation of injuries on deceased caused two hours after his death.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 594 of 2005.

From the Judgment & Order dated 7.12.2004 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 597 of 2002.

WITH

Criminal Appeal No.595 of 2005.

Anurag Kishore, Abhinav Shrivastava and Kamakshi S. Mehlwal for the Appellant.

Goodwill Indeevar and Kuldeep Singh for the Respondent.

The following Order of the Court was delivered

O R D E R

Criminal Appeal No. 594 of 2005

1. This appeal is directed against the judgment and order of the High Court of Punjab and Haryana dated 7th December, 2004 whereby the High Court has allowed the appeal of three of the co-accused but has dismissed the appeal of the appellant.

2. The facts of the case are as under:

2.1. At about 9:00p.m. on the night of December, 1, 1996, Bachhitter Singh, a former member of the Punjab Legislative

Assembly representing Kharar constituency was travelling in his jeep on the Landran-Kharar Road along with Sadhu Singh - P.W. 2, Narinder Singh P.W. 5, Gurmail Singh and one Ajit Singh Padiala. As they were passing by the warehouses at Landran, Bachhitter Singh told Narinder Singh P.W. 5 that as the bonnet of the jeep was loose, it should be properly fastened. On this Narinder Singh stopped the jeep and locked the bonnet and then returned to his seat when a Maruti car carrying four persons reached there. The driver of the car remained seated in the car with the engine on but the three passengers, all Sikh boys 20-25 years of age got out. Of the three persons one of them was armed with a .12 bore gun and the other two were armed with naked kripans. One of the boys who was armed with naked kripan got hold of Narinder Singh P.W. by his neck and thereafter gave two blows to Bachhitter Singh on his right flank. The second person started grappling with Bachhitter Singh on which the latter stumbled and fell down. The third person who was armed with a shot gun then fired a shot into the chest and arm of Bachhitter Singh. The assailants then broke the headlights of the jeep and drove away in their Maruti car. Sadhu Singh P.W. 2 accompanied by Ajit Singh left the site of the incident leaving Narinder Singh and Gurmail Singh to guard the dead body and made their way towards Kharar Police Station about 8 kms. away but as they reached close to Swaraj Tractor Factory just short of Kharar they came across a police Gypsy with S.H.O. Sub-Inspector Rajinder Singh on patrol duty. The Inspector along with Sadhu Singh and Ajit Singh returned to the place of incident and saw Bachhitter Singh lying dead on which they picked up his body and removed it to the Kharar Hospital. Sadhu Singh thereafter recorded the First Information Report at about 11:15p.m. the same night i.e. on the 1st of December, 1996 in which he did not name any of the assailants although he gave their physical description. A Special Report was allegedly despatched through Constable Jaspal Singh to the Magistrate shortly after midnight which was received by P.W. 9 - Gurmeet Kaur, Judicial Magistrate, Kharar at 9:15a.m. on 2nd December, 1996. The Sub Inspector also

returned to the place of incident on the morning of the 2nd December, 1996 to carry out further investigations and amongst other items picked up two empty .12 bore shells and a piece of a broken sling of a shot gun and these were duly deposited in the Malkhana and subsequently despatched to the Forensic Science Laboratory. He also recorded the statements of the eye witnesses including Narinder Singh -P.W. 5. In the meanwhile, it appears that the accused made extra judicial confessions to P.W. 6 and P.W. 7 Kuljeet Singh and Kuldip Singh respectively and Jugraj Singh appellant also made a disclosure statement which led to the recovery of the .12. bore gun allegedly used in the murder. It transpired after investigation that this weapon belonged to Gurmail Singh, Jugraj Singh's first cousin and he too was prosecuted for offences punishable under Sections 29 and 30 of Arms Act and was duly convicted and has already undergone the sentence as of now. The Forensic Science Laboratory in its Report opined that the two spent cartridges recovered from the place of incident had been fired from the gun in question. The trial court in its judgment dated 13th August, 2002, held that the statements of Sadhu Singh P.W. 2 and Narinder Singh P.W. 5 inspired confidence, that there was no delay in the lodging of the FIR and if there was any it had been explained by the prosecution, that the refusal of the accused to join the identification parade was a point to be taken against them as there was no evidence to suggest that they had been shown to the witnesses prior to the proposed identification parade and that the extra judicial confessions made to P.W. 6 and P.W. 7 further corroborated the prosecution story. The trial court accordingly convicted and sentenced the accused as under:-

(i) Jugraj Singh, Kulwinder Singh, Kuljit Singh and Inderpreet Singh were sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- each for the offence under Section 302/34 and in default of payment of fine to further undergo rigorous imprisonment for a period of four years each.

(ii) Jugraj Singh, Kuljit Singh, Kulwinder Singh and Inderpreet Singh were also sentenced to undergo rigorous imprisonment for a period of two years each under Section 324/34 of the IPC.

(iii) Jugraj was sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 1,000/- under Section 25 of the Arms Act, 1959 and in default of payment of fine to further undergo rigorous imprisonment for four months. It was also directed that all the sentences would run concurrently.

2.2. An appeal was thereafter taken to the High Court. The High Court by the impugned judgment dated 7th December, 2004 allowed the appeal of Kuldip Singh, Kulwinder Singh and Inderpreet Singh and dismissed the appeal filed by the present appellant Jugraj Singh. In arriving at its decision, the High Court observed that the medical evidence did not support the prosecution story inasmuch as the five incised injuries caused to the deceased were inflicted at least two hours after his death and not immediately after he had sustained the gun shot injuries and that the prosecution had not been able to explain the presence of these injuries, despite the fact that Gurmail Singh and Narinder Singh had been left behind to guard the spot after Sadhu Singh had left for the police station to report the murder. The High Court also held that the statements of Kuldip Singh, P.W. 6 with regard to the extra judicial confession of Jugraj and Kulwinder Singh and of Ajit Singh P.W. 7 with respect to Kuljit Singh and Inderpreet Singh could not be believed and the story projected by them appeared to be a concocted one. The Court, however, held that the recovery of the gun from Jugraj Singh appellant in Criminal Appeal No. 595 of 2005 which had been preceded by a disclosure statement was a material circumstance against him and the fact that the portion of the sling which had been broken off from the main part of the gun had been found by the Forensic Science Laboratory to be of the same make and quality, was positive corraboration that the

person who had shot the deceased was indeed Jugraj Singh. The Court then examined the circumstances with regard to the other three accused and found that there were no corroborating evidence to supplement the statements of the two eye witnesses with regard to their involvement and in conclusion observed as under:-

> "Our conclusion is irresistible that the matter was reported to the police some time at night but the case was finalized in the early hours on December 2, 1996, whereafter the special report was delivered to the Magistrate at 9:15a.m. The deceased had a gun shot injury on his chest with two corresponding exist wounds but no ante-mortem kirpan injuries. The post-mortem nature of the wounds as described by the Medical Board was such that they had been inflicted at least two hours after Bachhitter Singh had died, not immediately after the gun shot injuries. However, the above glaring defects in the prosecution case do not compel us to hold that Sadhu singh (P.W. 2) and Narinder Singh (P.W. 5) did not witness the occurrence. These two witnesses had accompanied the deceased in his jeep and did not witness the occurrence although their version was exaggerated and they had included Kulwinder Singh, Kuljit Singh and Inderpreet Singh also as accused. The recovery of the kirpans from Kulwinder Singh and Kuljit Singh and the car from Inderpreet Singh did not establish that they had also participated with Jugraj Singh in committing ;the murder of Bachhitter Singh."

3. We have heard the learned counsel for the parties at length in the appeal before us.

4. We find that out of the four eye witnesses only Sadhu Singh P.W. 2 and Narinder Singh P.W. 5 had been examined. Admittedly, Sadhu Singh P.W. 2, the author of the FIR did not know the accused by name or by face and had only given general descriptions as to their identities or features. Narinder Singh, P.W. 5, was however, very clear in his evidence when

he stated that he knew the names of the accused as they were calling out to each other by their pet names during the course of the entire incident. It has come in evidence that when Sadhu Singh had made his way to the Police Station to record the FIR, Narinder Singh P.W. 5 had also been present at that time. In this view of the matter, there appears to be some merit in the stand of the counsel for the appellant that had Narinder Singh been present at the place of incident or at the time of the recording of the FIR the names of the accused would have figured in the FIR itself. In this background, the delay in the lodging of the FIR and the delivery of the Special Report becomes significant. It is the admitted position that the incident happened at 9:00p.m., on the 1st of December, 1996 on the Landran-Kharar road about 8 kms. short of Kharar. Sadhu Singh had been at pains to say that he had to walk the distance of 8 kms. as the jeep had refused to start. Narinder Singh, P.W. the driver of the jeep too had stated likewise but they were confronted with their police statements where they had made no such claim. We are of the opinion that the story given by Sadhu Singh was concocted to explain, to a small extent, the delay in the lodging of the FIR. Be that as it may, even on admitted facts, the SHO, Rajinder Singh had reached the place of incident at about 9:30 or 10:00p.m. and the hospital at Kharar a short time later and the party had then moved on to the police station about ½ km. away from the hospital where the FIR had been recorded at about 11:15p.m. With the Special Report being delivered within Kharar itself at 9:15a.m. the next day as per the statement of Ms. Gurmeeet Kaur, the Judicial Magistrate. The prosecution, has, however, doubted the veracity of the statement of the Magistrate on the basis of the affidavit sworn by Constable Jaspal Singh who deposed that the copies of the Special Report had been handed over to him shortly after mid night and he had taken a copy first to the SSP, Ropar and to the Circle Officer Ropar about 35 kms. away and then returned to Kharar and handed over the report to the Magistrate at 3:30a.m. - a fact which has been denied by Ms. Gurmeet Kaur. It is, therefore, obvious that the best that can be said for

the prosecution is that the matter had been finally determined in the early hours of 2nd December, 1996 and the FIR had thereafter been lodged and then ante timed. This appears to be the import of the judgment of the High Court as well.

5. There is another significant circumstance in the prosecution story. It is the case of the prosecution that two shots had been fired at Bachhitter Singh which caused his immediate death. The Doctor, however, found five incised post mortem injuries on the dead body as well. No explanation is forthcoming as to how these had been caused inasmuch as that the dead body had not remained unguarded even for a moment and though Sadhu Singh had left for the police station, Narinder Singh P.W. 5 and Gurmail Singh P.W. 2 had been left behind to guard the site and that the SHO Rajinder Singh had reached the spot within an hour or two as per the prosecution version. We are further of the opinion that save for the recovery of the gun, the evidence with regard to all the accused was identical. The High Court has in its judgment clearly recognised this fact and has given clear and precise findings (quoted above), but nevertheless dismissed the appeal of Jugraj Singh while acquitting the other three accused on the identical evidence.

6. Mr. Kuldip Singh the learned counsel for the State, has however, submitted that the fact that the gun had been recovered at the instance of Jugraj Singh and that the empty shells had been found to match the gun was a circumstance in favour of the prosecution. It is true that the Report of the Forensic Science Laboratory does indicate that the cartridges had been fired from the gun. The question is as to who had fired the gun and to our mind the evidence on this is ambivalent. It must also be seen that the empty cartridges had been despatched to the Forensic Science Laboratory on the 4th December, 1996 and the gun recovered a day later on the basis of the disclosure statement made by Jugraj Singh, had been despatched to the Forensic Science Laboratory on the 12th of December. We are unable to understand as to why the

gun had not been despatched more promptly. Even otherwise, a connection between Jugraj Singh and the gun could have been found had it been said that he was the owner thereof. Incidentally, this is not the case as the gun was admittedly owned by Gurdeep Singh who was prosecuted, convicted and sentenced under Sections 29 and 30 of th Arms Act and his appeal is also before us today which we are told would be infructuous in a manner as he has already undergone his sentence. We are, therefore, of the opinion that in the light of the observations of the High Court itself there seems to be uncertainty with regard to the prosecution story and the courts below had somewhat stretched its credibility beyond a point which requires that we should interfere in the matter.

7. We, accordingly, allow the appeal, set aside the judgment of the trial court as well as the High Court and acquit the appellant. He shall be released from custody forthwith if not wanted in any other case.

8. Criminal Appeal No. 595 of 2005 filed by Gurdeep Singh is dismissed as having becomes infructuous as the appellant has already served the sentence.

R.P. Appeals disposed of.

R. HANUMAIAH & ANR.

v.

SECRETARY TO GOVERNMENT OF KARNATAKA REVENUE DEPARTMENT & ORS.

(Civil Appeal Nos. 1588-1589 of 2008)

FEBRUARY 24, 2010*

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

Suit:

Suit for declaration of title and injunction – Plaintiffs claiming to be owners of the suit land – Reliance placed on various documents – Trial court decreeing the suit – High Court setting aside the decree – On appeal, held: The suit land was a Government land – The land was not subjected to any land revenue – Documents relied on, do not establish title of the plaintiffs on the lands – Mysore Revenue Manual – Paras 236 and 376 – Karnataka Land Revenue Act, 1961 – s. 67.

Suit for declaration of title – Against Government and against private individual – Difference between – discussed.

Suit for declaration of title against Government – Grant of decree – Criteria for – Discussed.

Suit for declaration of title against Government – Onus to prove title – Held: It is for the claimants to establish their title to suit properties – Weakness of Government's defence or absence of contest, are not sufficient to decree declaratory suits against the Government.

Adverse possession – Right adverse to the Government – Claim of – Held: To claim adverse possession, claimant's

* judgment Recd. on 24.4.2010

possession should be actual, open and visible, hostile to the owner and continued during entire period necessary to create bar under the law of limitation.

Appellant-plaintiffs filed the present suit for declaration of title and consequential relief of permanent injunction in respect of the suit land (Survey Nos. 30 and 31), against the respondent-defendants. Appellants claimed to be owners of a tank in Survey No. 30 and a barren land in Survey No. 31. They claimed that the suit land was part of the land owned by their ancestors, and they were in continuous possession of the suit land as owners. The appellants filed a suit for permanent injunction when City Improvement Trusts Board attempted to interfere with their possession of the tank (Survey No. 30). Subsequently the present suit was filed wherein the appellants-plaintiff claimed title over the suit land Survey Nos. 30 and 31, placing reliance on Exs. P1, P2, P10, P11, P12 and P18. During pendency of the present suit, first suit was dismissed. Appeal against the order was also dismissed by High Court observing that the judgment would not affect the pending (present) suit. Plea of the respondent-defendants was that Survey No.30 was a Government tank shown as *Kharab* land in the revenue records and Survey No. 31 was also a government barren land shown in revenue records as Government *Kharab* land.

Trial court decreed the suit holding that appellants had made out their possession and title with regard to the suit property. High Court, in appeal, set aside the decree. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1.1. The appellants were not registered as the owners or khatedars or occupiers of the suit lands in any

revenue records. They did not have any document of title referring to the suit properties. The appellants did not have possession. Even assuming that the tank in Survey No. 30 was repaired/ maintained by the ancestors of plaintiff at some point of time, there is no document to show that the tank was used, maintained or repaired by the appellants or their predecessors during more than half a century before the filing of the suit. The suit has to fail. [Para 21] [926-B-D]

1.2. The High Court, being the first appellate court is the final court of fact. It has, after examining the evidence exhaustively recorded a finding that the appellants have not established their title or possession. There is no error in the findings and conclusions of the High Court. The appellants who came to court claiming title, not having established title, their suit is liable to be dismissed. [Para 19] [925-D-E]

2.1. Suits for declaration of title against the Government, though similar to suits for declaration of title against private individuals differ significantly in some aspects. The *first* difference is in regard to the presumption available in favour of the Government. All lands which are not the property of any person or which are not vested in a local authority, belong to the Government. All unoccupied lands are the property of the Government, unless any person can establish his right or title to any such land. This presumption available to the Government, is not available to any person or individual. The *second* difference is in regard to the period for which title and/or possession have to be established by a person suing for declaration of title. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit against any individual. On the other hand, title/possession for a period exceeding thirty years will

have to be established to succeed in a declaratory suit for title against Government. This follows from Article 112 of Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by Government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire State and it is not always possible for the Government to protect or safeguard its properties from encroachments. Many a time, its own officers who are expected to protect its properties and maintain proper records, either due to negligence or collusion, create entries in records to help private parties, to lay claim of ownership or possession against the Government. Any loss of Government property is ultimately the loss to the community. Courts owe a duty to be vigilant to ensure that public property is not converted into private property by unscrupulous elements. [Para 15] [921-G-H; 922-A-E]

2.2. Many civil courts deal with suits for declaration of title and injunction against Government, in a casual manner, ignoring or overlooking the special features relating to Government properties. Instances of such suits against Government being routinely decreed, either *ex parte* **or for want of proper contest, merely acting upon the oral assertions of plaintiffs or stray revenue entries are common. Whether the Government contests the suit or not, before a suit for declaration of title against a Government is decreed, the plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title for a minimum period of thirty years prior to the date of the suit (except where title is claimed with reference to a grant or transfer by the Government or a statutory development authority), or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring**

the presumptions available in favour of the Government, grant declaratory or injunctive decrees against the Government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted. [Para 16] [922-G-H; 923-A-B]

2.3. Section 67 of Karnataka Land Revenue Act, 1961 declares that all tanks and all lands which are not the property of any person are the property of the State Government. Weakness of Government's defence or absence of contest, are not therefore sufficient to decree declaratory suits against the Government. It is for the appellants to establish their title to the suit properties. [Para 18] [924-E; 925-B-C]

2.4. A court should necessarily seek an answer to the following question, before it grants a decree declaring title against the Government : whether the plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the plaintiff has established his adverse possession to the knowledge of the Government for a period of more than thirty years, so as to convert his possession into title. Incidental to that question, the court should also find out whether the plaintiff is recorded to be the owner or holder or occupant of the property in the Revenue Records or Municipal Records, for more than thirty years, and what is the nature of possession claimed by the plaintiff, if he is in possession – authorized or unauthorized; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title). [Para 16] [923-C-E]

2.5. Mere temporary use or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the

Government. In order to oust or defeat the title of the Government, a claimant has to establish a clear title which is superior to or better than the title of the Government or establish perfection of title by adverse possession for a period of more than thirty years with the knowledge of the Government. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period necessary to create a bar under the law of limitation. In short, it should be adequate in continuity, publicity and in extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient. Unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored. By its very nature, a claim based on adverse possession requires clear and categorical pleadings and evidence, much more so, if it is against the Government. [Para 17] [923-F-H; 924-A-B]

On facts:

3.1. Exhibit P18 is an extract of the register maintained by the Public Works Department showing the details of tanks in Bangalore Division. The said extract is in respect of Serial No.279 from the said register relating to a tank described as *'Maistry Kere'* or *'Maistry Palyada Kere'* **in** *Jakkasandra* **village, the extent of the water body being 11 acres. The name of the tank is followed by the word 'private' in the register and gives particulars of the** *Achkat* **area of the tank (that is area of land irrigated by the said tank) in the year 1906-07. The appellants took the plea that the description of the tank as 'private' in the Tank Register would demonstrate that the tank did not belong to the Government and that it was privately owned. The High Court however held that the mere use of the word 'private' after the description of the tank, will**

not establish appellant's title or possession in regard to Survey No.30. [Para 5] [916-E-G]

3.2. A reading of Para 376 of the Mysore Revenue Manual shows that a private tank can be constructed by a private individual, either in his own land or on Government unoccupied land. It also shows that private individuals may restore Government tanks. Therefore it follows that when a tank is described as 'private' in the Tank Register, that by itself will not establish that the land where the tank is situated is private land. When a tank enumerated in the Tank Register maintained by the Government, adds to the description of the tank, by the word 'private', it merely shows that the tank in question had been constructed by a private individual but it does not lead to the inference that the land on which the tank is constructed belonged to a private individual. [Para 7] [917-G-H; 918-A-B]

3.3. Para 236 of the Manual shows that a private land on being converted into a private tank would not get full exemption or remission from payment of land assessment, but was extended only a partial remission. In fact, if a tank was constructed on a private land, the land would be continued to be assessed to land revenue with appropriate partial remission. On the other hand, if it is a Government unoccupied land on which a private individual is permitted to construct the tank, it will continue to be shown as Government *Kharab* land and will not be subjected to any land revenue. In this case neither Survey No.30 nor Survey No.31 is assessed to land revenue and are shown as Government *Kharab* land in all revenue records (vide Ex. D7, D8, D9, D10, D11 and D12). Unarable lands including tanks are described as *Phut Kharab*. The Tank register extract (Ex.D15) and other documents produced by respondents show that the tank was breached and BDA had formed a layout in

a major portion of the tank land and the remaining area was being developed into a park by the Forest Department. Therefore, Ex. P18 proves that Survey No.30 was not a land owned by a private individual and that it belonged to Government. [Para 8] [918-C-F]

3.4. Ex. P1 which is an extract of *Phut Pahani* (Inspection Statement showing the old survey numbers and corresponding new numbers of lands and full information regarding tenure and occupancy of the land, described in the Mysore Revenue Manual), did not relate to nor provide proof of ownership of any land. Ex.P1 merely disclosed that when it was inspected on 18.6.1871, survey no.25 of *Jakkasandra* measuring 10 acres 28 guntas was a tank and that it was repaired by predecessor of appellant. This document therefore does not help the appellants to prove title of their predecessor to the tank. Unless the title to the land on which the tank is situated is established, the mere fact that the tank was shown to have been maintained or repaired by any private individual will not make him the owner of the tank. At best it will show that the tank was maintained by him as a private tank for the purpose of irrigation. [Para 10] [919-D-F]

3.5. Ex.P2 (settlement deed) does not refer to the tank. It does not give the total extent of the land. It does not disclose whether Survey. Nos. 30 and 31 formed part of *Dalavai Dinne* owned by the ancestors of appellants at any point of time. The settlement deed merely shows that the predecessor of the appellants had settled certain land, known as *Dalavai Dinne* which was assessed to land revenue, to his son and does not help the appellant to establish title to either survey Nos. 30 or 31. While the settlement deed describes the land settled as land assessed to land revenue, significantly, Survey Nos. 30 or 31 which are now claimed by the appellants as part of

***Dalavai Dinne* were never assessed to land revenue, but were always described as Government *Kharab* land. Ex.P1 and P2 are therefore of no assistance to the appellants. [Para 11] [919-G-H; 920-A-C]**

3.6. Ex.P.10 and P11 are contract notes executed by contractors said to have been engaged by the predecessor of the appellants for execution of certain works relating to the tank at *Dalavai Palya*. They are not signed by the predecessor of the appellants. Even assuming that the documents (Ex.P10 and P11) are genuine and related to a tank situated in Survey No.30, they would not help the appellants to establish title to Survey No. 30, or Survey. No. 31. [Para 12] [920-E-F]

3.7. Ex.P12 is said to be the Tank Majkur Register Extract maintained by the Assistant Superintendent of Land Records, Bangalore Sub-Division, showing that Re-survey No.30 measured 11 acres 21 guntas and the entire extent was *karab* (tank) and it corresponded to old survey No.25. It also records that the tank was dug by and was later repaired by predecesors of the appellants about 25 years ago and thereafter no one has repaired it and it is in the state of good repair. The date of inspection or entry is not mentioned and it does in no way help the appellants to prove title to the land. [Para 13] [920-H; 921-A-B]

3.8. The land acquisition reference proceedings relied upon by the appellant did not relate to Survey Nos. 30 or 31. It is related to other lands and the issue before the court was a dispute between the appellant and some other claimants. There is no adjudication of the title of the appellants or their ancestors in regard to Survey Nos. 30 or 31. Nor is there any finding by the court which can support the appellants' claim to Survey No.30 or Survey No. 31. Therefore, the High Court has rightly rejected the

said judgment as not relevant for examining the title of the appellants. [Para 14] [921-C-E]

3.9. The first appellant had earlier filed a suit for a permanent injunction, claiming that he was in possession of Survey. No. 30 (tank). That suit and appeal therefrom were dismissed by recording a finding that he failed to establish possession. The observation of the High Court while dismissing the appeal from the decision in the earlier injunction suit, that the dismissal will not come in the way of plaintiff establishing title in the subsequent suit for declaration of title, will not dilute the finding recorded by the trial court and High Court that the first appellant was not in possession, which has attained finality. [Para 20] [925-F-H; 926-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1588-1589 of 2008.

From the Judgment & Order dated 4.9.2007 of the High Court of Karnataka at Bangalore in R.F.A. No. 448 & 529 of 1996.

Raju Ramachandran, Sanjay R. Hegde, Joseph Pookkatt, Bhardwaj, S. Iyengar, S.N. Bhat for the Appellants.

S.S. Javeli, Basava Prabhu Patil, S.K. Kulkarni, M. Gireesh Kumar, A.S. Kulkarni, Vijay Kumar, Anitha Shenoy, Rashmi Nanda Kumar for the Respondents.

The Order of the Court was delivered by

O R D E R

R.V. RAVEENDRAN J. 1. These appeals by special leave are by the plaintiffs in a suit (O.S.No.714 of 1982 before the City Civil Judge, Bangalore City) for a declaration of title and consequential relief of permanent injunction in respect of

Sy.Nos. 30 and 31 of Jakkasandra Village, Begur Hobli, Bangalore South Taluk.

2. The case of plaintiffs in brief is as follows : Plaintiffs are the owners of a tank called "Maistry Kere" bearing Survey No.30, (Old Survey No.25) measuring 11 acres 21 guntas and land bearing Survey No.31 (Old Survey No.26) measuring 1 acre 9 guntas situate in Jakkasandra Village, described in the plaint schedule as items 1 and 2. The said tank and land were earlier part of Block No.61 measuring 297 Acres 16 Guntas known as 'Dalavai Dinne', which belonged to their Great great grandfather – Kurakalu Venkataramana Maistry. That the said Venkataramana Maistry executed a deed of settlement dated 7.1.1874 (Ex. P.2) settling the said Dalavai Dinne upon his son Chikkahanumaiah. The said Dalavai Dinne identified as Block No.61 was re-surveyed and allotted Re-Survey Nos.16, 19, 20, 21, 23, 27 to 35. A portion of the said Dalavai Dinne measuring 102 acres was acquired for St. John's Medical College under final notification dated 30.4.1963. Another extent of 180 acres of land therein was acquired for forming of Koramangala Layout, under final notification dated 28.9.1965. After such acquisition, the appellants were left with only Survey Nos.30 and 31 (suit schedule items 1 and 2 from out of the Dalavai Dinne) and they continued in possession thereof as owners. The documents trace their title for more than one and half centuries; and the suit properties have been owned and possessed by the family from around 1850, originally by Venkataramana Maistry, later his son Chikkahanumaiah, thereafter his son Kurakalu Ramaiah, thereafter his son B.M. Ramaiah, and finally the plaintiffs. When the City Improvement Trusts Board (predecessor of Bangalore Development Authority) attempted to interfere with their possession of Maistry Tank (Sy.No.30), the first appellant filed a suit (OS No.1 of 1976 in the Court of Civil Judge, Bangalore Rural District later renumbered as OS No.1305 of 1980 on the file of City Civil Court, Bangalore) for a permanent injunction. However, subsequently the appellants filed a comprehensive suit –

O.S.No.714 of 1982, for a declaration of title and consequential injunction on 15.3.1982 against Government of Karnataka and Bangalore Development Authority in regard to Sy.Nos.30 and 31. During the pendency of the second suit, the first suit for injunction was dismissed on 16.9.1985 and the appeal filed by the appellant against the said dismissal was also dismissed by the High Court on 20.12.1994, with an observation that anything stated in the said judgment with reference to the title to the suit land (Sy.No.30) will not affect the pending suit for declaration of title in OS No. 714 of 1982.

3. The respondents resisted the said suit. According to them, Survey No.30 was a government tank shown as Kharab land in the revenue records. Survey No.31 was also government barren land shown as Government Kharab land in the revenue records. The appellants were neither the owners nor were they in possession of the said survey Nos.30 and 31. On the said pleadings necessary issues relating to title, adverse possession, relief claimed were framed and parties went to trial. Both sides let in oral and documentary evidence. After appreciating the evidence, the trial court by its judgment dated 19.4.1996 decreed the suit. It held that the appellants had made out their title and possession in regard to the suit properties. Feeling aggrieved, the respondents filed an appeal and a learned Single Judge of the High Court of Karnataka by the impugned judgment dated 4.9.2007, allowed the appeal, set aside the judgment and decree of the trial court and dismissed the suit. The High Court held that the appellants had neither made out title nor possession in respect of the suit properties. The said judgment and decree is challenged in this appeal by special leave.

4. The appellants claimed title, and possession on the basis of title. The revenue records, in particular Ex. D4, D5, D7 to D12, show the two survey numbers as 'Government tank' and 'Government barren land'. The names of appellants are not

entered as owners in the revenue records. Though several documents have been marked by the parties, the entire case of appellants' in regard to title depends upon the documents Ex. P-1, P-2, P-10, P-11, P-12 and P-18. While the trial court held that these documents established the title of the appellants and consequently they were entitled to possession, the High Court on re-examination and re-appreciation of the evidence, in particular, the said documents, held that the appellants did not make out any title nor possession in regard to the suit properties. Therefore, the only question that arise for our consideration is whether Ex. P1, P2, P10, P11, P12 and P18 establish appellants' title to suit properties and whether the High Court committed an error in law in rejecting the said documents. In view of it, we will briefly analyse each of these documents.

Re : Ex P.18

5. Exhibit P18 is an extract of the register maintained by the Public Works Department showing the details of tanks in Bangalore Division. The said extract is in respect of Serial No.279 from the said register relating to a tank described as Maistry Kere or Maistry Palyada Kere in Jakkasandra village, the extent of the water body being 11 acres. The name of the tank is followed by the word 'private' in the register and gives particulars of the Achkat area of the tank (that is area of land irrigated by the said tank) in the year 1906-07. The appellants contend that the description of the tank as 'private' in the Tank register would demonstrate that the tank did not belong to the government and that it was privately owned. The High Court however held that the mere use of the word 'private' after the description of the tank, will not establish appellant's title or possession in regard to Survey No.30.

6. The appellants relied on paras 236(b) and 376 of the Mysore Revenue Manual in support of their contention that private tanks existed in the State of Mysore and that the State Government recognized the natural right of private individuals

to construct and own tanks. The appellants contended that when the records maintained by the Government in the usual course of business, showed a particular tank as 'private', it was a clear admission that the tank was not a government tank but was privately owned. We may refer to the provisions of the Mysore Revenue Manual relied on by the appellants. Section IV thereof related to "Private enterprise tanks". Para 236(b) stated that there were about 318 private enterprise tanks in the State. Para 376 of the Manual deals with construction of Saguvali Kattes (irrigation tanks) by the landholders, the relevant extract of which is extracted below :

> "376 (1). The right of land-holders to construct "Saguvali Kattes" on their own lands is not affected by :-
>
> (a) Section XX, paragraph 13 of the Rules of 1890 under the Land Revenue code, which relates to the construction of private tanks on Government unoccupied land: or
>
> (b) Appendix F to the said Rules, which relates to the restoration by private individuals of Government tanks and wells long in disuse.
>
> (2) Private individuals have the natural right to construct tanks on their own lands (Kandayam or Inam), so long as they do not thereby materially diminish the water flowing in defined channels through their lands for the benefit of Government works and private proprietors lower down such channels.
>
> x x x x x x x

7. A careful reading of para 376 of the Manual shows that a private tank can be constructed by a private individual, either in his own land or on Government unoccupied land. It also shows that private individuals may restore Government tanks. Therefore it follows that when a tank is described as 'private' in the tank register, that by itself will not establish that the land

where the tank is situated is private land. To put it differently, when a tank enumerated in the Tank register maintained by the government, adds to the description of the tank, by the word 'private', it merely shows that the tank in question had been constructed by a private individual but it does not lead to the inference that the land on which the tank is constructed belonged to a private individual.

8. Para 236 shows that a private land on being converted into a private tank would not get full exemption or remission from payment of land assessment, but was extended only a partial remission. In fact, if a tank was constructed on a private land, the land would be continued to be assessed to land revenue with appropriate partial remission. On the other hand, if it is a Government unoccupied land on which a private individual is permitted to construct the tank, it will continue to be shown as Government kharab land and will not be subjected to any land revenue. In this case neither Sy. No.30 nor Sy.No.31 is assessed to land revenue and are shown as Government Kharab land in all revenue records (vide Ex. D7, D8, D9, D10, D11 and D12). Unarable lands including tanks are described as *Phut Kharab*. The Tank register extract (Ex.D15) and other documents produced by respondents show that Maistry Palya tank (Sl.No.279 in the Register) was breached and BDA had formed a layout in a major portion of the tank land and the remaining area was being developed into a park by the forest department. We, therefore, cannot accept the contention of the appellant that Ex. P18, proves that Survey No.30 was a land owned by a private individual or that it did not belong to Government.

Re : Ex. P1 and P2

9. Ex.P2 is the copy of the settlement deed dated 7.1.1874 executed by Venkataramana Maistry under which he settled upon his son Chikkahanumaiah, the Dalavai Palya, which was a land assessed to land revenue, bounded East by

Jakkasandra boarder, South by Sabapathi Modaliyar Garden, West by Muni Reddy land and North by Srinangara Kere. Ex. P1 which is an extract of Phut Pahani chit of Jakkasandra, relating to revenue inspection of 18.6.1871. It shows that Survey No.25 measuring 10 acres 38 guntas in Jakkasandra village was a tank and described it as Phut Kharab land; that it formed part of Block No.61; and that the said tank was repaired by one Venkataramana Maistry. The appellants rely on Exs. P1 and P2 to prove the title of his ancestor Venkataramana Maistry in regard to the old tank situated in Survey No.25 measuring 10 acres 38 guntas and that the said survey No.25 was part of Block No. 61 (Dalayai Dinne in Jakkasandra) settled by Venkataramana Maistry on his son under the settlement deed (Ex.P2) dated 7.1.1874.

10. Phut Pahani is described in the Mysore Revenue Manual as an Inspection Statement showing the old survey numbers and corresponding new numbers of lands and full information regarding tenure and occupancy of the land. The Phut Pahani did not relate to nor provide proof of ownership of any land. Ex.P1 merely disclosed that when it was inspected on 18.6.1871, survey no.25 of Jakkasandra measuring 10 acres 28 guntas was a tank and that it was repaired by Venkataramana Maistry. This document therefore does not help the appellants to prove title of Venkataramana Maistry to the tank. Unless the title to the land on which the tank is situated is established, the mere fact that the tank was shown to have been maintained or repaired by any private individual will not make him the owner of the tank. At best it will show that the tank was maintained by him as a private tank for the purpose of irrigation.

11. Ex.P2 (settlement deed) does not refer to the tank. It does not give the total extent of the land. It does not disclose whether Sy. Nos. 30 and 31 formed part of Dalavai Dinne owned by the ancestors of plaintiffs at any point of time. The

settlement deed merely shows that the Venkataramana Maistry had settled certain land known as Dalavai Dinne which was assessed to land revenue to his son Chikkahanumaiah and does not help the appellant to establish title to either survey Nos.30 or 31. The fact that the ancestors of the appellants owned a large extent of land in Jakkaasandra village is not in dispute. In fact the appellant got compensation in regard to 102 acres of land acquired for St. John's Medical College and 180 acres of land acquired for Koramangala Layout aggregating to nearly 282 acres of land. While the settlement deed describes the land settled as land assessed to land Revenue, significantly, survey Nos. 30 or 31 which are now claimed by the appellants as part of Dalavai Dinne were never assessed to land revenue, but were always described as Government Kharab land. Ex.P1 and P2 are therefore of no assistance to the appellants.

Re : Ex. P10 & P11

12. The appellant next relied on Ex.P10 and P11 which are two contract notes. Ex.P10 is said to be of the year 1854-55. Ex.P.11 is said to be of the year 1865. These are contract notes executed by contractors said to have been engaged to Venkataramana Maistry for execution of certain works relating to the tank at Dalavai Palya. They are not signed by Venkataramana Maistry. As noticed earlier, the fact that Venkataramana Maistry had constructed a tank or maintained a tank, will not establish ownership to the land in which a tank was situated. Even assuming that the documents (Ex.P10 and P11) are genuine and related to a tank situated in Sy. No.30, they would not help the appellants to establish title to Sy. No. 30, or Sy. No.31.

Re : Ex.P12

13. Ex.P12 is said to be the Tank Majkur Register Extract maintained by the Assistant Superintendent of Land Records, Bangalore Sub-Division, showing that Re-survey No.30

measured 11 acres 21 guntas and the entire extent was karab (tank) and it corresponded to old survey No.25. It also records that the tank was dug by father of Ramaiah of Maistry Palya, that it was repaired by Ramaiah about 25 years ago and thereafter no one has repaired it and it is in the state of good repair. The date of inspection or entry is not mentioned and it does in no way help the appellants to prove title to the land.

Re : Judgment in Land Acquisition case

14. The appellant next relied upon the certified copy of the judgment of the reference court in LA. Misc. No.307 of 1966 by (Principal Civil Judge, Bangalore City) and connected cases (which the High Court took on record as evidence while hearing the appeal). The land acquisition reference proceedings did not relate to Sy Nos. 30 or 31. It is related to other lands and the issue before the court was a dispute between the appellant and some other claimants. The judgment sets out the case of the parties that Block No.61 called as Dalavai Dinne corresponded to survey Nos.16, 19, 20, 21, 23, and 27 to 35 and also refers to some of the documents which are produced in this case also. There is no adjudication of the title of the appellants or their ancestors in regard to Survey Nos. 30 or 31. Nor is there any finding by the court which can support the appellants' claim to Sy. No.30 or Sy.No. 31. Therefore, the High Court has rightly rejected the said judgment as not relevant for examining the title of the appellants.

Nature of proof required in suits for declaration of title against the Government

15. Suits for declaration of title against the government, though similar to suits for declaration of title against private individuals differ significantly in some aspects. The *first* difference is in regard to the presumption available in favour of the government. All lands which are not the property of any person or which are not vested in a local authority, belong to

the government. All unoccupied lands are the property of the government, unless any person can establish his right or title to any such land. This presumption available to the government, is not available to any person or individual. The *second* difference is in regard to the period for which title and/or possession have to be established by a person suing for declaration of title. Establishing title/possession for a period exceeding twelve years may be adequate to establish title in a declaratory suit against any individual. On the other hand, title/possession for a period exceeding thirty years will have to be established to succeed in a declaratory suit for title against government. This follows from Article 112 of Limitation Act, 1963, which prescribes a longer period of thirty years as limitation in regard to suits by government as against the period of 12 years for suits by private individuals. The reason is obvious. Government properties are spread over the entire state and it is not always possible for the government to protect or safeguard its properties from encroachments. Many a time, its own officers who are expected to protect its properties and maintain proper records, either due to negligence or collusion, create entries in records to help private parties, to lay claim of ownership or possession against the government. Any loss of government property is ultimately the loss to the community. Courts owe a duty to be vigilant to ensure that public property is not converted into private property by unscrupulous elements.

16. Many civil courts deal with suits for declaration of title and injunction against government, in a casual manner, ignoring or overlooking the special features relating to government properties. Instances of such suits against government being routinely decreed, either *ex parte* or for want of proper contest, merely acting upon the oral assertions of plaintiffs or stray revenue entries are common. Whether the government contests the suit or not, before a suit for declaration of title against a government is decreed, the plaintiff should establish, either his title by producing the title deeds which satisfactorily trace title

for a minimum period of thirty years prior to the date of the suit (except where title is claimed with reference to a grant or transfer by the government or a statutory development authority), or by establishing adverse possession for a period of more than thirty years. In such suits, courts cannot, ignoring the presumptions available in favour of the government, grant declaratory or injunctive decrees against the government by relying upon one of the principles underlying pleadings that plaint averments which are not denied or traversed are deemed to have been accepted or admitted. A court should necessarily seek an answer to the following question, before it grants a decree declaring title against the government : whether the plaintiff has produced title deeds tracing the title for a period of more than thirty years; or whether the plaintiff has established his adverse possession to the knowledge of the government for a period of more than thirty years, so as to convert his possession into title. Incidental to that question, the court should also find out whether the plaintiff is recorded to be the owner or holder or occupant of the property in the revenue records or municipal records, for more than thirty years, and what is the nature of possession claimed by the plaintiff, if he is in possession – authorized or unauthorized; permissive; casual and occasional; furtive and clandestine; open, continuous and hostile; deemed or implied (following a title).

17. Mere temporary use or occupation without the animus to claim ownership or mere use at sufferance will not be sufficient to create any right adverse to the Government. In order to oust or defeat the title of the government, a claimant has to establish a clear title which is superior to or better than the title of the government or establish perfection of title by adverse possession for a period of more than thirty years with the knowledge of the government. To claim adverse possession, the possession of the claimant must be actual, open and visible, hostile to the owner (and therefore necessarily with the knowledge of the owner) and continued during the entire period

necessary to create a bar under the law of limitation. In short, it should be adequate in continuity, publicity and in extent. Mere vague or doubtful assertions that the claimant has been in adverse possession will not be sufficient. Unexplained stray or sporadic entries for a year or for a few years will not be sufficient and should be ignored. As noticed above, many a time it is possible for a private citizen to get his name entered as the occupant of government land, with the help of collusive government servants. Only entries based on appropriate documents like grants, title deeds etc. or based upon actual verification of physical possession by an authority authorized to recognize such possession and make appropriate entries can be used against the government. By its very nature, a claim based on adverse possession requires clear and categorical pleadings and evidence, much more so, if it is against the government. Be that as it may.

Position in this case

18. Section 67 of Karnataka Land Revenue Act, 1961 declares that all tanks and all lands which are not the property of any person are the property of the state government. Sub-section (1) thereof which is relevant for our purpose is extracted below :

> "**67. Public roads, etc., and all lands which are not the property of others belong to the Government**.—(1) All public roads, streets, lanes and paths, bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water mark and of rivers, streams, nallas, lakes and **tanks** and all canals and water-courses and all standing and flowing waters, **and all lands wherever situated which are not the property of individuals or of aggregate of persons legally capable of holding property,** and except in so far as any rights of such persons may be established, in or over the same, and except as may be otherwise

provided in any law for the time being in force, **are and are hereby declared to be with all rights in or over the same or appertaining thereto, the property of the State Government.**

(emphasis supplied)

Weakness of government's defence or absence of contest, are not therefore sufficient to decree declaratory suits against the government. It is for the appellants to establish their title to the suit properties.

19. The respondents have relied upon several documents (mainly revenue records) to establish that the suit lands belong to the government. It is not be necessary to examine or refer to them, as the core issue is whether the appellants who filed the suit for declaration of title against the government, have made out their title or possession to the suit properties. The High Court, being the first appellate court is the final court of fact. It has, after examining the evidence exhaustively recorded a finding that the appellants have not established their title or possession. We find no error in the findings and conclusions of the High Court. We concur with the findings of the High Court, though for reasons slightly different from those of the High Court. The appellants who came to court claiming title, not having established title, their suit is liable to be dismissed.

20. One more aspect requires to be noticed. The first appellant had earlier filed a suit (OS No.1 of 1976 renumbered as OS No.1305 of 1980) for a permanent injunction, claiming that he was in possession of Sy. No.30 (tank). That suit and appeal therefrom were dismissed by recording a finding that he failed to establish possession. The observation of the High Court while dismissing the appeal from the decision in the earlier injunction suit, that the dismissal will not come in the way of plaintiff establishing title in the subsequent suit for declaration

of title, will not dilute the finding recorded by the trial court and High Court that the first appellant was not in possession, which has attained finality.

21. No other material has been relied upon by the appellants to establish their title or possession. The appellants were not registered as the owners or khatedars or occupiers of the suit lands in any revenue records. They did not have any document of title referring to the suit properties. The appellants did not have possession. Even assuming that the tank in Sy.No. 30 was repaired/ maintained by the ancestors of plaintiff at some point of time, there is no document to show that the tank was used, maintained or repaired by the appellants or their predecessors during more than half a century before the filing of the suit. The suit has to fail.

22. For the aforesaid reasons, we find no ground to interfere with the judgment and decree of the High Court. The appeals are dismissed. The application for intervention is also dismissed.

K.K.T. Appeals dismissed.

M/S. DILAWARI EXPORTERS

v.

M/S. ALITALIA CARGO & ORS.

(Civil Appeal No. 8699 of 2002)

APRIL 16, 2010

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

Contract Act, 1872 – ss. 186, 187, 188 and 237 – Agent's act – Whether binding on the Principal – Exporter/consigner entering in contract of shipping consignment with shipper, who was an agent of carter – Complaint by consigner against the carter as well as shipper – Complaint dismissed by National Consumer Commission holding that there was no privity of contract between the consigner and the carter – Held: The Principal is bound by the acts or obligations of the agent, if the agent has by his words or conduct induced third persons to believe that such acts were within scope of his authority – The onus to prove that the act of agent was within scope of his authority, is on the person claiming against the Principal – On facts, it is proved that shipper was the agent of the carter – Carter is bound by the acts of its agent i.e. shipper – Matter remitted to Commission to decide on merits – Evidence – Onus to prove – Carriage Act, 1865 – s. 4;II Schedule, rr. 5,6,10 and 11.

The appellant obtained an export order, it handed over the consignment to respondent No. 3 (Cargo clearing agent of respondent No. 1) for onward dispatch. For this, House Air Waybilll was prepared by respondent No. 3. Simultaneously respondent No. 1 prepared Master Air Waybill.

Since the consignment did not reach the destination

by the stipulated date, the importer cancelled the order. The appellant filed complaint before National Consumer Dispute Redressal Commission alleging deficiency in service on the part of the respondents, in particular by respondent No.1. The Commission dismissed the complaint on the preliminary ground that the appellant had no *locus standi* to file the complaint against respondent No. 1 as there was no privity of contract between the appellant and respondent No. 1.

Allowing the appeal and remitting the matter to National Consumer Dispute Redressal Commission, the Court

HELD: 1. In the light of s. 4 of the Carriage Act 1865 and rr. 5, 6, 10 and 11 of the Second Schedule to the Act, the Commission was right in saying that the "air waybill" is *prima facie* evidence of the conclusion of the contract; of the receipt of the cargo and of the conditions of carriage. However, the Commission has failed to examine the question in regard to the capacity in which respondent No.3 was operating and had collected the cargo from the appellant for being shipped, i.e. the nature of relationship between respondent No.3 and respondent No.1. [Paras 9 and 10] [938-E-G; 939-A-C]

2. Section 186 of the Contract Act, 1872 lays down that the authority of an agent may be expressed or implied. As per Section 187 of the Contract Act, an authority is said to be express when it is given by words spoken or written, and an authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, which may be accounted

circumstances of the case. Section 188 of the Contract Act prescribes that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. Section 237 of the Contract Act provides that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority. There is no gainsaying that onus to show that the act done by an agent was within the scope of his authority or ostensible authority held or exercised by him is on the person claiming against the principal. This, can be shown by practice as well as by a written instrument. [Para 11] [939-D-G]

3. Respondent No.3 had an express authority to receive the cargo for and on behalf of respondent No.1. This is manifest from the Master Air Waybill issued and signed by respondent No.3 on the Air Waybill printed by respondent No.1. But for the said authority, respondent No.3 could not use the Air Waybill proforma printed by respondent No.1. Though it is true that in the said Air Waybill the name of the Shipper has been mentioned as that of respondent No.3 but the said Air Waybill has also been signed by respondent No.3 as the agent of the carter – respondent No.1. The other relevant particulars like, the name of the consignee, the number of the House Air Waybill, etc. tally with the House Air Waybill issued by respondent No.3 to the appellant clearly showing the name of the consignor as that of the appellant. From the said documents, it would, appear that respondent No.3 was, in fact, acting in dual capacity – one as a Shipper

on behalf of the appellant and the other as an agent of respondent No.1. That being so, respondent No.1 was bound by the acts of their agent, viz. respondent No.3, with all its results. While holding that there was no privity of contract between the appellant and respondent No.1, this vital aspect of the matter escaped the attention of the Commission thus, vitiating its order. [Para 13] [940-C-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8699 of 2002.

From the Judgment & Order dated 15.4.2002 of the National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 156 of 1995.

Arvind Kumar Gupta for the Appellant.

Sanjay Gupta, Nina Gupta, Ishita Sehgal, Akshat Goel, Bina Gupta for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge in this appeal under Section 23 of the Consumer Protection Act, 1986 (for short "the Act") is to the order dated 15th April, 2002 passed by the National Consumer Disputes Redressal Commission (for short "the Commission") in Original Petition No. 156 of 1995. By the impugned order, the Commission has dismissed appellant's complaint alleging deficiency in service on the part of M/s Alitalia Cargo, respondent No.1 in this appeal, on the ground that there was no privity of contract between the appellant and respondent No.1. Respondent Nos. 2 and 3 in this appeal are M/s Omni Marg Travels (Pvt.) Ltd., General Sales Agents and M/s Fourways Movers (P) Ltd., Cargo Clearing Agents of respondent No.1 respectively.

2. The salient facts giving rise to the present appeal are as follows:

The appellant is engaged in the business of export of readymade garments and handicrafts. They obtained an order from one M/s D.D. Sales, a concern based in New York, USA for supply of 2050 pairs of Cotton Gents Dhotis, 150 sets of Cotton Ladies Ghagra-Choli, 150 pieces of Dupatas, etc. As per the agreement between the appellant and the said concern of New York, USA, these articles had to reach New York, USA before 10th of October, 1994. Accordingly, the appellant handed over the consignment of the said articles to respondent No.3 – M/s Fourways Movers (P) Ltd. on 4th October, 1994 for onward dispatch to New York, for which a House Air Waybill No. FMPL 0841 was prepared by respondent No.3. For the sake of ready reference, the said Bill is reproduced hereunder:

"Shippers Name and Address:

M/s. DILWARI EXPORTERS
1-8 JANGPURA-B,
MATHURA ROAD,
NEW DELHI-14 INDIA

Not Negotiable

HAWB NO.
FMPL 0841

HOUSE AIR WAYBILL
FOURWAYS MOVERS PVT. LTD.
39/6-7A, COMMUNITY CENTRE
EAST OF KAILASH,
NEW DELHI- 110065

Consignee's Name and Address
M/S D.D. Sales, 110-53
62ND DRIVE, FOREST HILLS N.Y.
11375, U.S.A.

Issuing Carter's Agent (Name and City)
FOURWAYS MOVERS P. LTD.
NEW DELHI

Accounting Information
"FREIGHT : PREPAID"

Agent's IATA CODE
14-3-3775

Airport of Departure (Addr. Of first Carter) MASTER AWB NO.
NEW DELHI / AZ **055 – 2342 9276**

By First Carter	Routing & Destination		
NYC	AZ		
Airport of Destination	Currency	Declared Value for Customs	Declared Value for Customs
NEW YORK	INR	NVD	US$29441.70

Amount of Insurance
Rs.1012706-00

The landing information
NOTIFY: SAME AS ABOVE. PLS. INFORM CONSIGNEE IMMEDIATELY ON ARRIVAL OF SHIPMENT AT DESTINATION. TEL. NO. (718) – 896-0575. ORIGINAL VISA (3 SETS) COPY OF INVOICE (3 SET) PACKING LIST (3 SET), ALL INDIA HANDICRAFT BOARD CERTIFICATE AND DECLARATION TO ACCOMPANY WITH THE SHIPMENT.

Carter Weight	Commodity Item No.	Chargeable Weight	Rate/ Charge	Total	Nature and Quantity of Goods (Incl.
MIRROR					POWERLOOM COTTON GENTS DHOTIES & INDIA ITEM GARMENTS HAND/ EMD/ PRINTED/ ZARI/ APPLIQUE/ BEAD/ WORK (P/L COTTON LADIES CHOLI GHAGRA SET & DUPTATTAS) AS PER INV. NO. DE/EXP/358/94-95 Dt. 28-9-94 RBI : DD : 008597
48 Prepaid	1360-OK Weight Charge	1360-OK Collect	85.00 Other Charges	115600-00	IEC:NC:05880 0952
215600-00		AWB: 60-00 HAWB: 150-00 SB: 175-00			
		CTG: 500-00 APT: 545-00 INS: 2886-00			

Total other charges Due Agent
1230-00

Total other Charges Due Carter
2886-00

FOURWAYS MOVERS PVT. LTD., NEW DELHI

Total prepaid
119716-00 4/10/94 NEW DELHI INDIA v.k.

Signature of Issuing Carter or its Agent
055 – 2342 9276

ORIGINAL 3 (FOR SHIPPER)"

Simultaneously, a Master Air Waybill on a numbered (055 – 2342 9276) proforma printed by "ALITALIA" – respondent No.1 was prepared. The said Air Waybill, containing relevant particulars, is also reproduced hereinbelow:

"DEK 2342 9276 **055- 2342 9276**

Shippers Name and Address:
M/s. FOURWAYS MOVERS P. LTD.
39/6, 7-A COMMUNITY CENTRE,
EAST OF KAILASH,
NEW DELHI/INDIA

Not Negotiable
Air Way Bill

ALITALIA

Issued by
Alitalia S.p.A.

Consignee's Name and Address

M/S D.D. Sales, 11053
62ND DRIVE, FOREST HILLS N.Y.
11375, U.S.A.

Issuing Carter's Agent (Name and City)
FOURWAYS MOVERS P. LTD.
NEW DELHI

Accounting Information
"FREIGHT : PREPAID"

Agent's IATA CODE
14-3-3775

Account No.
73279

Airport of Departure (Addr. Of first Carter) and requested Routing

NEW DELHI / AZ

By First Carter Routing & Destination

NYC AZ

Airport of Destination	Currency	Declared Value for Customs	Declared Value for Customs
NEW YORK		INR NVD	US$ 43698.60

Amount of Insurance
Rs.1503101-00

The landing information

NOTIFY: SAME AS ABOVE. PLS. INFORM CONSIGNEE IMMEDIATELY ON ARRIVAL OF SHIPMENT AT DESTINATION. TEL. NO. (718) – 896-0575. ONE ENV. CONTG. DOCS ATTD. ORIGINAL VISA (3 SETS) COPY OF INVOICE (3 SET), PACKING LIST, M ALL INDIA HANDICRAFT BOARD CERTIFICATE AND DECLARATION TO ACCOMPANY WITH THE SHIPMENT

Carter Weight	Commodity Item No.	Chargeable Weight	Rate/ Charge	Total	Nature and Quantity of Goods (Incl. POWERLOOM COTTON GENTS DHOTIES & INDIA
48	1993-OKQ	1993-OK	85.00	169405-00	ITEM GARMENTS GRI:AG:493861 493995, 493896

HAWB NO: 0841, 0842

Prepaid	Weight Charge	Collect	Other Charges
169405-00			AWB: 60-00 HAWB: 300-00 SB: 250-00
			CTG: 500-00 APT: 800-00 INS:4284-00
			INS: 2886-00

Total other charges Due Agent
2010-00
Total other Charges Due Carter
4284-00

FOURWAYS MOVERS

4/10/94 NEW DELHI INDIAv.k.
Signature of Issuing Carter or its Agent
055 – 2342 9276

ORIGINAL 3 (FOR SHIPPER)"

On 6th October, 1994, a carting order was prepared by "ALITALIA AIRLINES" handing over the consignment to AAI, Cargo Terminal (NITC), IGI Airport, New Delhi-110037 for shipment by Flight AZ-1905. The carting order bore the

are *ad idem* that the said House Air Waybill as also the Master Air Waybill were issued under the seal and signatures of M/s Fourways Movers (P) Ltd – respondent No.3. It is pertinent to note at this juncture itself that House Air Waybill No.0841 had the Master Air Waybill No.055 – 2342 9276, the running Bill number printed on ALITALIA's printed bill book. Similarly, the House Air Waybill No.0841 was recorded on the Master Air Waybill.

3. Since the consignment did not reach New York by the stipulated date, M/s D.D. Sales, the importer, cancelled the order on or around 16th October, 1994 and claimed damages from the appellant. The consignment reached the destination only on 20th October, 1994.

4. Alleging deficiency in service on the part of the respondents, in particular by respondent No.1, the appellant filed a complaint before the Commission claiming Rs.22.46 lakhs towards the value of the consignment along with interest at the rate of 18% per annum thereon and Rs.15 lakhs as special damages.

5. The complaint was contested by respondent No.1, repudiating the claim made by the appellant. In the counter affidavit filed by respondent No.1, while denying any negligence on their part resulting in deficiency in service, by way of a preliminary objection, it was pleaded that there was no privity of contract between them and the appellant and, therefore, the complaint was liable to be dismissed on that short ground. The stand of respondent No.1 before the Commission was that the Air Waybill No.055 2342 9276 dated 4th October 1994, which was issued by respondent No.3 "on behalf of respondent No.1" did not mention the flight number and the date in the column

provided for the same, since airlifting of cargo was always subject to load/space. It was reiterated that House Air Waybill No.0842 dated 4th October 1994 was neither issued by respondent No.1 nor on its behalf. Both the parties led evidence before the Commission by way of affidavits. Upon consideration of the evidence on record, the Commission dismissed the complaint on the afore-stated ground, namely, the appellant had no locus standi to file the plaint against respondent No.1. While holding so, the Commission observed thus:

> "It is not disputed by the parties that Air Waybill (sic) alone is a contract between the parties. Firstly we see that part III Chapter II of Schedule II of the Act does not even remotely refer to any other document except Air Waybill (sic). We find that on the Air Waybill (sic) which happens to be prima facie evidence of conclusion of contract of the receipt of Cargo and the conditions of Carriage, the name of the Shipper is shown as Fourway Movers Pvt. Ltd., O.P. No. 3, and not that of the Complainant nor is there any evidence/indication of any such capacity of the Respondent No.3 on the Air Waybill (sic). Therefore, it will not be possible to reach in the Air Waybill (sic) what is not set out or indicated therein. It is for this reason that we tend to agree with Respondent No.1 and accept its plea that the complainant has no locus-standi to file the present complaint against Respondent No.1, the Airline. Things would have been different if at the time of booking the cargo the Respondent No.3 had issued a communication to Respondent No.1 that it was acting as agent of the complainant."

The Commission, thus, declined to go into the merits of

the complaint though it did observe that there was a lot that could be said on merits of appellant's case.

6. Being aggrieved, the appellant – claimant is before us in this appeal.

7. Mr. Arvind Kumar Gupta, learned counsel appearing on behalf of the appellant, submitted that the Commission committed a serious error of law and on facts in dismissing the complaint on the sole ground that the appellant had failed to prove any privity of contract between them and the carrier i.e. respondent No.1. According to the learned counsel, it is clear from the House Air Waybill as also the Master Air Waybill No. 055 2342 9276, that both the bills were prepared contemporaneously by respondent No.3 as respondent No.1 - carter's agent when the consignment was handed over to them, and since the House Air Waybill records the appellant as the Shipper and respondent No.3 as the Issuing Carter's Agent, the mention of respondent No.3 as the Shipper as well as the Issuing Carter's Agent in the Master Air Waybill is of no consequence. It was strenuously urged that from the said Air Waybills, it is clear that respondent No.3 was acting as an agent of respondent No.1 and, therefore, the said respondent, as principal, was bound by all the acts of omission and commission of his agent. It was asserted that the Commission failed to apply its mind on this aspect of the matter and, therefore, erred in holding that there was no privity of contract between the appellant and respondent No.1.

8. Mr. Sanjay Gupta, learned counsel appearing on behalf of respondent No.1, on the other hand, supported the decision of the Commission and submitted that since the Master Air Waybill is the only contract of carriage between the Consignor

and the Carter and in the said Bill, respondent No.3 having been named as the Shipper and M/s D.D. Sales of New York as the consignee, respondent No.1 had no liability towards the appellant, notwithstanding the fact that the appellant had been named as the Shipper in House Air Waybill No. 0841. It was submitted that since as per Part III of Chapter II of the Second Schedule to the Carriage by Air Act, 1972 (for short "the Carriage Act"), it is the consignor who is required to make out the Air Waybill and handover the same to the carrier, it was the responsibility of the consignor to see that all the particulars and details of the cargo inserted in the Air Waybill are correct. It was thus, argued that respondent No.1 not being a party to the contract of carriage vis-à-vis the appellant, the said respondent cannot be held to be liable for any delay in delivery of the consignment in question.

9. There is no quarrel with the proposition that as per Section 4 of the Carriage Act, Rules contained in the Second Schedule govern the rights and liabilities of carriers, consignors, consignees, etc. Rules contained in the Second Schedule apply to all international carriage of persons, baggage or cargo performed by aircraft for reward. Chapter II of the said Schedule enumerates the documents of carriage. Rule 5 of Part III of the said Chapter stipulates that every carrier of cargo has the right to require the consignor to make out and hand over to him a document called as "air waybill"; every consignor has the right to require the carrier to accept this document. Rule 6 provides that the air waybill shall be made out by the consignor in three original parts and be handed over with the cargo in the manner prescribed therein. Rule 10 makes the consignor responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the air waybill. As per Rule 11, the air waybill is *prima facie* evidence of the conclusion of the contract, of the receipt of the cargo and

of the conditions of carriage. In the light of these provisions, we agree with the Commission that the "air waybill" is *prima facie* evidence of the conclusion of the contract; of the receipt of the cargo and of the conditions of carriage.

10. However, the question which, in our view, the Commission has failed to examine is in regard to the capacity in which respondent No.3 was operating and had collected the cargo from the appellant for being shipped to New York. In other words, what was the nature of relationship between respondent No.3 and respondent No.1?

11. Section 186 of the Indian Contract Act, 1872 (for short "the Contract Act") lays down that the authority of an agent may be expressed or implied. As per Section 187 of the Contract Act, an authority is said to be express when it is given by words spoken or written, and an authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, which may be accounted circumstances of the case. Section 188 of the Contract Act prescribes that an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. Section 237 of the Contract Act provides that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority. There is no gainsaying that onus to show that the act done by an agent was within the scope of his authority or ostensible authority held or exercised by him is on the person claiming against the principal. This, of course, can be shown by practice as well as by a written instrument.

12. Thus, the question for consideration is whether on the evidence obtaining in the instant case, can it be said that respondent No.3 had an express or implied authority to act on behalf of respondent No.1 as their agent? If respondent No.3 had such an authority, then obviously respondent No.1 was bound by the commitment respondent No.3 had made to the appellant.

13. Having examined the question in the light of the two afore-extracted "air waybills", which, according to both the contesting parties, are determinative of terms and conditions of contract between them, we are of the opinion that respondent No.3 had an express authority to receive the cargo for and on behalf of respondent No.1. This is manifest from the Master Air Waybill No.055 – 2342 9276 issued and signed by respondent No.3 on the Air Waybill printed by respondent No.1. But for the said authority, respondent No.3 could not use the Air Waybill proforma printed by respondent No.1. Though it is true that in the said Air Waybill the name of the Shipper has been mentioned as that of respondent No.3 but the said Air Waybill has also been signed by respondent No.3 as the agent of the carter – respondent No.1. The other relevant particulars like, the name of the consignee, the number of the House Air Waybill (0841), etc. tally with the House Air Waybill issued by respondent No.3 to the appellant clearly showing the name of the consignor as that of the appellant. From the said documents, it would, appear that respondent No.3 was, in fact, acting in dual capacity – one as a Shipper on behalf of the appellant and the other as an agent of respondent No.1. That being so, respondent No.1 was bound by the acts of their agent, viz. respondent No.3, with all its results. We are of the opinion that while holding that there was no privity of contract between the appellant and respondent No.1 this vital aspect of the matter

escaped the attention of the Commission thus, vitiating its order.

14. In view of the afore-going discussion, we have no option but to allow the appeal and set aside the impugned order. We order accordingly and remit the matter back to the Commission for fresh adjudication of the claim preferred by the appellant on merits. However, in the facts and circumstances of the case, there will be no order as to costs.

K.K.T. Appeal allowed.

ANDHRA PRADESH TOURISM DEVELOPMENT CORPN. LTD. & ANR.

v.

M/S. PAMPA HOTELS LTD.

(Civil Appeal No. 3272 of 2007)

APRIL 20, 2010

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

Arbitration and Conciliation Act, 1996:

ss. 7 and 2(h) – Party to arbitration agreement – Company entering into contract before the date on which it was entitled to commence business – On dispute invoking arbitration clause of the contract – Held: Since the company was non-existent on the date of contract, there was no contract – Consequently there was no arbitration agreement – The agreement would have been valid, if the contract were entered into by the promoters of the non-existing company on its behalf – Companies Act, 1956 – s. 149 (4) – Specific Relief Act, 1963 – s. 15(h).

*ss. 11 and 16 – Decision as regards existence or validity of arbitration agreement – Whether to be decided by Chief Justice/Designate or by the arbitrator – Chief Justice/ Designate in application u/s. 11 appointing the arbitrator and leaving the question as regards validity of the arbitration agreement to be decided by arbitrator relying on *Konkan Railway cases – Subsequent decision in **SBP case over-ruling Konkan Railway cases – SBP case resorting to prospective over-ruling – Held: In view of decision in SBP case, validity of arbitration agreement is to be decided by the Chief Justice/Designate – However, in view of prospective over-ruling direction in SBP case, the validity of the arbitration agreement in the present case, has to be decided by the arbitrator – The appeal to the Supreme Court cannot be*

treated as a pending application u/s. 11 and hence decision in SBP case will not apply – Prospective Over-ruling – Doctrine of Merger.

The questions which arose for consideration in the present appeal were:

(i) where the party seeking arbitration is a company which was not in existence on the date of the signing of the contract containing the arbitration agreement, whether it can be said that there is an arbitration agreement between the parties; and

(ii) whether the question as to the existence or validity of the arbitration agreement, has to be decided by the Chief Justice/Designate while considering the petition u/s. 11 of the Act or by the Arbitrator.

Disposing of the appeal, the Court

HELD: 1.1. The certificate of registration issued by Registrar of companies shows the date of its incorporations as 9.4.2003. Section 149(4) of the Companies Act, 1956 provides that any contract made by a company (which is already registered) before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on that company until that date, and on that date it shall become binding. The Lease Agreement and also the Management Agreement were made on 30.3.2002 between the appellant and the respondent. A certificate u/s. 149(3) of the Companies Act was issued by the Registrar of Companies only on 6.6.2003 certifying that respondent is entitled to commence business. It is thus clear that the applicant in application u/s. 11 of the Act was non-existent on 30.3.2002 when the arbitration agreement was entered into. [Paras 8 and 9] [951-B-E; 952-D-F]

1.2. Section 7 of Arbitration and Conciliation Act,

1996 defines an arbitration agreement as an agreement by *the parties* to submit to arbitration. The word 'party' is defined in Section 2(h) of the Arbitration Act as a party to an arbitration agreement. An agreement enforceable by law is a contract. An agreement has to be between two or more persons. Therefore if one of the two parties to the arbitration agreement was not in existence when the contract was made, then obviously there was no contract and if there was no contract, there is no question of a clause in such contract being an arbitration agreement between the parties. [Para 10] [952-G-H; 953-A]

1.3. The agreements are not entered by the promoters of the company, but purportedly by the company itself, represented by its Managing Director. Admittedly on 30.3.2002 there was no such company in existence. Admittedly there was no such company having its registered office at the address mentioned on that date. Admittedly, one of the signatories of the agreements was not the Managing Director of any company of that name on that date. When one of the parties to the Lease Agreement and Management Agreement, was a non-existent imaginary party, there is no contract. This is not a case of one of the parties being in existence, but being under some legal disability to enter into contracts. This is a case where there was no 'party' at all, but someone claiming that there was an existing company capable of entering into contracts. [Para 10] [953-B-E]

1.4. The position would have been different, had the agreement been entered by the promoters of the respondent-company before its incorporation for the purposes of the company and such contract was warranted by the terms of incorporation. It is evident from Section 15(h) of Specific Relief Act, 1963 that if the Lease Agreement and the Management Agreement had been entered into by the promoters of the company stating that they are entering into the contract for the purpose

of the company to be incorporated, in their capacity as promoters and that such contract is warranted by the terms of the incorporation of the company, the agreement would have been valid; and the term regarding arbitration therein could have been enforced. But for reasons best known to themselves, the agreement was entered not by the promoters on behalf of a company proposed to be incorporated by them, but by a non-existing company claiming to be an existing company. This clearly shows that there is no arbitration agreement between the respondent (applicant in the application u/s. 11 of the Act) and the appellant-company against whom such agreement is sought to be enforced. [Para 11] [953-E-F; 954-B-D]

2.1. The question as to who should decide the question whether there is an existing arbitration agreement or not has been decided in *****SBP* **case holding that the question whether there is an arbitration agreement and whether the party who has applied u/s. 11 of the Arbitration Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his Designate u/s.11 of the Act before appointing an arbitrator. Therefore there can be no doubt that the issue ought to have been decided by the Designate of the Chief Justice and could not have been left to the arbitrator. But, since the Designate of the Chief Justice proceeded on the basis that while acting u/s. 11 of the Arbitration Act, he was not acting under a judicial capacity but only under an administrative capacity and therefore he cannot decide these contentious issues by following the two decisions in **Konkan Railway* **cases which were then holding the field. [Para 12] [954-E-H; 955-A-B]

2.2. In *SBP* case a seven-Judge Bench of Supreme Court overruled the two decisions in *Konkan Railway*. The decision in *SBP* case was rendered a few weeks after the

impugned decision by the Designate. Having regard to the fact that several decisions rendered under section 11 of the Arbitration Act had followed the decisions in *Konkan Railway* case, this court, when it rendered its decision in *SBP* case, resorted to prospective overruling. [Para 13] [955-B-D]

2.3. It is not correct to say that the appeal to this Court should be considered as a continuation of the application u/s. 11 of the Arbitration Act or as pending matter to which the decision in *SBP* case would apply, even though the Designate had rendered the decision before the judgment passed in SBP case; and that a pending matter would refer not only to the original proceedings but also would include any appeal arising therefrom and therefore any proceeding which has not attained finality is a pending matter. This would have been the position if there was a statutory provision for appeal and *SBP* case had directed that in view of prospective overruling of *Konkan Railway* cases pending matters will not be affected. But sub-section (7) of Section 11 of the Arbitration Act makes the decision of the Chief Justice or his Designate final. There is no right of appeal against the decision u/s. 11 of the Act. Further, in *SBP* case, the Court issued the categorical direction that appointment of Arbitrators made till then are to be treated as valid and all objections are to be left to be decided u/s. 16 of the Act. [Para 15] [956-F-H]

2.4. On account of the prospective overruling direction in *SBP* case, any appointment of an arbitrator u/s. 11 of the Act made prior to 26.10.2005 has to be treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator u/s. 16 of the Act. The legal position enunciated in the judgment in *SBP* case will govern only the applications to be filed u/s. 11 of the Act from 26.10.2005 as also the applications u/s. 11(6) of the

Act pending as on 26.10.2005 (where the Arbitrator was not yet appointed). In view of this categorical direction in *SBP* case, it is not possible to say that this case should be treated as a pending application. [Para 16] [957-A-C]

2.5. The arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position in regard to the existence of arbitration agreement. Though such an exercise by the arbitrator will only be an academic exercise such an exercise becomes inevitable in view of the peculiar position arising out of the specific direction contained in para 47 (x) of the decision in *SBP* case and the subsequent decision in *Maharishi Dayanand University* **case. [Para 17] [957-D-F]**

***SBP and Co. v. Patel Engineering Ltd.* 2005 (8) SCC 618, followed.**

National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd **2009 (1) SCC 267;** *Sarwan Kumar v. Madan Lal Aggarwal* **2003 (4) SCC 147;** *Maharishi Dayanand University v. Anand Coop. L/C Society Ltd. and Anr.* **2007 (5) SCC 295, relied on.**

Konkan Railway Corporation Ltd. v. Mehul Construction Co*.* **2000 (7) SCC 201; *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd*. **2002 (2) SCC 388, referred to.**

Case Law Reference:

2005 (8) SCC 618	**followed.**	**Para 12**
2009 (1) SCC 267	**Relied on.**	**Para 12**
2000 (7) SCC 201	**Referred to.**	**Para 12**
2002 (2) SCC 388	**Referred to.**	**Para 12**
2003 (4) SCC 147	**Relied on.**	**Para 13**
2007 (5) SCC 295	**Relied on.**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3272 of 2007.

From the Judgment & Order dated 16.8.2005 of the High Court of Andhra Pradesh at Hyderabad in Arbitration Application No. 24 of 2005.

Bhaskar P. Gupta, T.V. Ratnam, K. Paari Vendhan for the Appellants.

L. Nageswara Rao, G. Ramakrishna Prasad, B. Suyodhan, Amarpal, Bharat J. Joshi for the Respondent.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. The respondent is a company incorporated on 9.4.2003 under the Companies Act, 1956. The appellant (Andhra Pradesh Tourism Development Corporation Ltd., for short 'APTDC') is a "government company" within the meaning of that expression in section 617 of the Companies Act, 1956.

2. According to the respondent, the parties had entered into two agreements in regard to a property known as Hill View Guest House, Alipiri, Tirupathi, measuring 1.08 acres. The first was a lease agreement under which APTDC granted a lease of the said property to the respondent for a term of 33 years; and the second was a development and management agreement under which APTDC entrusted to the respondent, the development of a Three-Star Hotel in Hill View Guest House property on construction, operation and management basis. According to the respondent, both agreements contained a provision for disputes resolution (clause 17 of the lease agreement and Article 18 of the management agreement) providing that in the event of disputes, best efforts shall be made to resolve them by mutual discussions, amicably; and in the event of the parties not finding an acceptable solution to the disputes within 30 days (60 days in the case of

management agreement), the same shall be referred to arbitration in accordance with the procedure specified in the Act.

3. APTDC claims that it had terminated the said agreements on 21.4.2004 and took possession of the property on 21.8.2004. The respondent filed Arbitration Application No. 24/2005 in March, 2005 before the Andhra Pradesh High Court under section 11 of the Arbitration and Conciliation Act, 1996 ['Act' for short], alleging that certain disputes had arisen between the parties in regard to the said Lease Agreement and Management Agreement, and the parties could not arrive at a mutually acceptable solution in respect of those disputes. The respondent therefore sought appointment of a sole arbitrator for adjudication of the disputes and differences between the parties (respondent and APTDC) in regard to lease agreement dated 30.3.2002 and the management agreement dated 30.3.2002 entered between the parties.

4. APTDC resisted the application. One of the contentions urged by APTDC was that there was no arbitration Agreement between them and therefore the question of appointing an Arbitrator under section 11 of the Act did not arise. It was pointed out that according to the respondent, the arbitration agreement came into existence on 30.3.2002, when parties executed the Lease Agreement and Management Agreement on 30.3.2002 containing the arbitration clause; that admittedly the respondent was not in existence on that date, as it was incorporated more than a year thereafter on 9.4.2003; and that when it is alleged that the parties to the petition had entered into contracts which contained arbitration agreements on 30.3.2002, and one of the parties thereof had not even come into existence on that date, obviously there was no contract much less any arbitration agreement between the parties.

5. The Designate of the Chief Justice of Andhra Pradesh allowed the application filed by the respondent under Section 11 of the Act by order dated 16.8.2005 and appointed a retired

Judge of the said High Court as Arbitrator, with the observation that the appellant herein is entitled to raise all its pleas including the validity of the arbitration agreement before the Arbitrator. He however noticed the contention that there was no arbitration agreement. He held that having regard to the decisions in *Konkan Railway Corporation Ltd. v. Mehul Construction Co*. [2000 (7) SCC 201] and *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd*. [2002 (2) SCC 388], he had only a limited administrative role under section 11 of the Act, that is, to appoint the arbitrator as per the agreed procedure, leaving all contentious issues including whether there was any arbitration agreement or not, to be decided by the Arbitrator. The said order is challenged in this appeal by special leave.

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

(i) where the party seeking arbitration is a company which was not in existence on the date of the signing of the contract containing the arbitration agreement, whether it can be said that there is an arbitration agreement between the parties ?

(ii) whether the question as to the existence or validity of the arbitration agreement, has to be decided by the Chief Justice/Designate when considering the petition under section 11 of the Act or by the Arbitrator ?

Re : Question (i) :

7. Section 7 of the Act defines an arbitration agreement. Sub-section (1) thereof provides that an arbitration agreement means an agreement *by the parties* to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-section (2) provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-

section (3) provides that an arbitration agreement shall be in writing. Sub-section (4) inter alia provides that an arbitration agreement is in writing if it is contained in a document signed by the parties. The specific and clear case of the respondent is that the arbitration agreement between the parties, is in writing contained in the Lease Agreement and Management Agreement signed by them on 30.3.2002.

8. The Lease Agreement was made on 30.3.2002 between 'APTDC' (Lessor) and Pampa Hotels Ltd. (Lessee). The opening part containing the description of the parties describes the lessee as follows:

> "M/S Pampa Hotels Limited, a company incorporated under the provisions of the Companies Act, 1956, and having its registered office at 209, T.P.Area, Tirupati through its Managing Director Sri S. Jayarama Chowdary hereinafter referred to as "Lessee", promoted inter alia for the purpose of implementing the project by M/s Sudalagunta Hotels Limited the successful bidder, of the other part."

Similarly the Management Agreement which was also made on 30.3.2002 between APTDC (the first party) and Pampa Hotels Ltd (the second party). described the second party as follows:

> "M/S Pampa Hotels Limited (promoted for the purpose of implementing the project by "the Bidder" Sudalagunta Hotels Limited) a company incorporated under the Companies Act, 1956, having its registered office at 209, T.P.Area, Tirupati represented by Sri S.Jayarama Chowdary, Managing Director (hereinafter referred to as "Company" which expression unless repugnant to the context or meaning thereto include its successors, administrators and assigns on the second part)."

It is not disputed that both the agreements contain a provision for arbitration. It is also not disputed that both of them were

signed by Mr. C.Anjaneya Reddy as Chairman of APTDC and Mr. S.Jayarama Chowdary as Managing Director of Pampa Hotels Ltd.

9. Pampa Hotels Ltd., (with the registered office at 209, TP Area, Tirupati, Chittoor District, represented by its Managing Director Shri Jayarama Chowdary), the applicant in the application under section 11 of the Act, was incorporated only on 9.4.2003. The certificate of registration issued by the Registrar of Companies shows the date of its incorporation as 9.4.2003. Section 34(2) of the Companies Act, provides that from the date of incorporation mentioned in the certificate of incorporation, such of the subscribers of the memorandum and other persons, as may from time to time be members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company. Sub-section (3) of section 149 provides that Registrar shall, on the filing of declaration/statement as stated therein, certify that the company is entitled to commence business. Section 149(4) of the Companies Act provides that any contract made by a company (which is already registered) before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on that company until that date, and on that date it shall become binding. A certificate under section 149(3) of the Act was issued by the Registrar of Companies only on 6.6.2003 certifying that respondent is entitled to commence business. It is thus clear that the applicant in application under section 11 of the Act was non-existent on 30.3.2002 when the arbitration agreement was entered into.

10. Section 7 of the Act as noticed above, defines an arbitration agreement as an agreement by *the parties* to submit to arbitration. The word 'party' is defined in section 2(h) of the Act as a party to an arbitration agreement. An agreement enforceable by law is a contract. An agreement has to be between two or more persons. Therefore if one of the two

parties to the arbitration agreement was not in existence when the contract was made, then obviously there was no contract and if there was no contract, there is no question of a clause in such contract being an arbitration agreement between the parties. The two agreements dated 30.3.2002 categorically refer to Pampa Hotels Ltd. as an existing company (promoted for the purpose of implementing the project by Sudalagunta Hotels Ltd.) incorporated under the provisions of the Companies Act, having its registered office at 209, T.P. Area, Tirupati and represented by its Managing Director Sri S. Jayarama Chowdary. The agreements are not entered by the promoters of the company, but purportedly by the company itself, represented by its Managing Director. Admittedly on 30.3.2002 there was no such company in existence. Admittedly there was no such company having its registered office at 209, T.P. Area, Tirupati on that date. Admittedly, S. Jayarama Chowdary was not the Managing Director of any company of that name on that date. When one of the parties to the Lease Agreement and Management Agreement, was a non-existent imaginary party, there is no contract. This is not a case of one of the parties being in existence, but being under some legal disability to enter into contracts. This is a case where there was no 'party' at all, but someone claiming that there was an existing company capable of entering into contracts.

11. The position would have been different, had the agreement been entered by the promoters of the respondent company before its incorporation for the purposes of the company and such contract was warranted by the terms of incorporation. Section 15 of the Specific Relief Act, 1963 provides as follows:

> *"Except as otherwise provided by this Chapter*, the specific performance of a contract may be obtained by – x x x x x (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company, provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

It is evident from section 15(h) of Specific Relief Act that if the lease agreement and the management agreement had been entered into by the promoters of the company stating that they are entering into the contract for the purpose of the company to be incorporated, in their capacity as promoters and that such contract is warranted by the terms of the incorporation of the company, the agreement would have been valid; and the term regarding arbitration therein could have been enforced. But for reasons best known to themselves, the agreement was entered not by the promoters of Pampa Hotels Ltd., on behalf of a company proposed to be incorporated by them, but by a non-existing company claiming to be an existing company. This clearly shows that there is no arbitration agreement between the respondent (applicant in the application under section 11 of the Act) and APTDC against whom such agreement is sought to be enforced.

Re : Question (ii) :

12. Let us next consider the question as to who should decide the question whether there is an existing arbitration agreement or not. Should it be decided by the Chief Justice or his Designate before making an appointment under section 11 of the Act, or by the Arbitrator who is appointed under section 11 of the Act? This question is no longer res integra. It is held in *SBP & Co. v. Patel Engineering Ltd.* [2005 (8) SCC 618] and *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.* [2009 (1) SCC 267] that the question whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement, is an issue which is to be decided by the Chief Justice or his Designate under section 11 of the Act before appointing an arbitrator. Therefore there can be no doubt that the issue ought

to have been decided by the learned Designate of the Chief Justice and could not have been left to the arbitrator. But as noticed above, the learned Designate proceeded on the basis that while acting under section 11 of the Act, he was not acting under a judicial capacity but only under an administrative capacity and therefore he cannot decide these contentious issues. He did so by following the two decisions in *Konkan Railway (supra)* which were then holding the field.

13. In *SBP* (supra), a seven-Judge Bench of this Court overruled the two decisions in *Konkan Railway.* The decision in *SBP* was rendered on 26.10.2005, a few weeks after the impugned decision by the Designate on 16.8.2005. Having regard to the fact that several decisions rendered under section 11 of the Act had followed the decisions in *Konkan Railway,* this court, when it rendered its decision in *SBP*, resorted to prospective overruling by directing as follows:

> "(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* [2002 (2) SCC 388] and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that *appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid*, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act."
>
> (emphasis supplied)

This Court in *Sarwan Kumar v. Madan Lal Aggarwal* [2003 (4) SCC 147] observed:

> "The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. *Invocation of doctrine of "prospective overruling" is left to the discretion of the court to mould with the justice of the cause or the matter before the court."*
>
> (emphasis supplied)

14. Learned counsel for the appellants contended that the impugned order was rendered on 16.8.2005; that as on 26.10.2005 when the decision in *SBP* was rendered, the time for filing a special leave petition under Article 136 of the Constitution had not expired; that the special leave petition was filed by the appellant on 22.11.2005, which has been entertained by granting leave. The appellants therefore contend that this appeal should be considered as a continuation of the application under section 11 of the Act or as pending matter to which the decision in *SBP* would apply, even though the Designate had rendered the decision on 16.8.2005. The appellants submitted that a pending matter would refer not only to the original proceedings but also would include any appeal arising therefrom and therefore any proceeding which has not attained finality is a pending matter.

15. What the appellants contend, would have been the position if there was a statutory provision for appeal and *SBP* had directed that in view of prospective overruling of *Konkan Railwa,y* pending matters will not be affected. But sub-section (7) of Section 11 of the Act makes the decision of the Chief Justice or his designate final. There is no right of appeal against the decision under Section 11 of the Act. Further, the seven Judge Bench in *SBP* issued the categorical direction that appointment of Arbitrators made till then are to be treated as valid and all objections are to be left to be decided under Section 16 of the Act.

16. On account of the prospective overruling direction in *SBP*, any appointment of an arbitrator under Section 11 of the Act made prior to 26.10.2005 has to be treated as valid and all objections including the existence or validity of the arbitration agreement, have to be decided by the arbitrator under section 16 of the Act. The legal position enunciated in the judgment in *SBP* will govern only the applications to be filed under Section 11 of the Act from 26.10.2005 as also the applications under section 11(6) of the Act pending as on 26.10.2005 (where the Arbitrator was not yet appointed). In view of this categorical direction in *SBP*, it is not possible to accept the contention of the appellant that this case should be treated as a pending application. In fact we may mention that in *Maharishi Dayanand University v. Anand Coop. L/C Society Ltd. & Anr.* [2007 (5) SCC 295], this Court held that if any appointment has been made before 26.10.2005, that appointment has to be treated as valid even if it is challenged before this Court.

17. In view of the above, we are not in a position to accept the contention of the appellant. But the arbitrator will have to decide the issue as to whether there is an arbitration agreement, with reference to the legal position explained by us in regard to the existence of arbitration agreement. Though such an exercise by the arbitrator will only be an academic exercise having regard to our decision in this case, such an exercise becomes inevitable in view of the peculiar position arising out of the specific direction contained in para 47 (x) of the decision in *SBP* and the subsequent decision in *Maharishi Dayanand University.*

18. We accordingly dispose of the appeal without interfering with the appointment but with a direction to the Arbitrator to decide the issue in regard to the existence/validity of the arbitration agreement as a preliminary issue relating to jurisdiction in the light of what has been stated above.

K.K.T. Appeal disposed of.

SHANTI BUDHIYA VESTA PATEL AND ORS.
v.
NIRMALA JAYPRAKASH TIWARI AND ORS.
(Civil Appeal Nos. 3549-3551 of 2010)

APRIL 21, 2010

[DR. MUKUNDAKAM SHARMA AND R.M. LODHA, JJ.]

Deed and document:

Power of Attorney (POA) – Party executing the POA is bound by the acts of the POA holder – On facts, predecessor-in-interest of appellant executed POA in favour of respondent 9 – On the death of predecessor, all the appellants executed POA in favour of respondent 9 – On the basis of POA, respondent 9 entered into consent terms with opposite parties – Consent terms challenged by appellants – Held: Appellants are estopped from questioning the acts done by respondent 9 – Court can accept the consent terms entered into by the POA holder on behalf of the parties and consent decree so obtained would be valid – Compromise/Settlement – Estoppel – Consent decree – Power of Attorney.

Code of Civil Procedure, 1908:

O.23 r.3 – Compromise under – Burden to prove that compromise tainted by fraud or coercion – Held: Lies on the party who alleges the same – On facts, particulars in support of the allegation of fraud or coercion in obtaining consent decree not properly pleaded as required by law – Consent decree would remain valid – Compromise/settlement – Consent decree.

The original plaintiff, 'BVP' was the predecessor of the appellants, who was appointed as a watchman by one 'RKT' for taking care of the suit property and for this

purpose, a Kachcha shed on the suit property was provided to him. In due course of time, 'BVP' extended the shed to construct 38 rooms which were let out by him. After the death of the real owner of the suit property, suit property was recorded in the name of wife of the owner, respondent no.7. In 1992, by way of consent decree, in a suit between respondent 7 and 8, the latter became the owner of the suit property. In 1994, 'BVP' entered into a Development Agreement with respondent 9 whereby 'BVP' transferred his rights, title and interest in the suit property in favour of respondent 9. In 1999, 'BVP' filed a suit against respondent no.7 and 'RKT', the predecessor-in-title of respondent no.1 to 6 for seeking a declaration that he was the owner of the suit property by adverse possession. 'RKT' also filed a suit for declaration of title in his favour. Against this, respondents 7 and 8 filed a counter claim seeking eviction of 'BVP' and his tenants from the suit property.

The trial court dismissed the suit filed by 'BVP' and allowed the counter claim filed by the respondents 7 and 8. Appeals were filed against the order of trial court. Respondent 9 who was Power of Attorney holder of 'BVP' also filed an appeal. During the pendency of appeals, 'BVP' died on 15.12.2004. On 7.1.2005, each of the appellants executed an irrevocable Power of Attorney in favour of respondent 9. On the basis of Power of Attorney, respondent 9 sought for impleadment of appellants.

On 26.4.2006, the appellants executed a Power of Attorney in favour of another person 'NMP' on the ground that respondent 9 colluded with respondent 8 and coerced them to enter into a compromise with respondent 7 and 8. The appellants also alleged that they were threatened with dire consequences by respondent 8 and 9 and in this regard, they had lodged complaint with the police and despite this, respondent 9 entered into

consent terms with respondents 7 and 8 and thereafter submitted to the eviction decree. On 13.6.2006, High Court allowed the application filed by respondent 9. The same was not challenged by any of the tenants.

The appellants filed applications before the High Court praying for recall of order dated 13.6.2006 alleging that fraud was played upon the High Court by filing the said consent terms. High Court dismissed the applications. Hence the appeals.

Dismissing the appeals, the Court

HELD: 1.1. A Development Agreement dated 12.01.1994 was entered into between 'BVP' and respondent no. 9 whereby and whereunder 'BVP' had transferred his rights, title and interest in the suit premises in favour of respondent no. 9 for a consideration of Rs 2,00,000/-. The records showed that the said amount was fully paid and also that the said agreement was registered with the office of the Sub-Registrar. Thus, by entering into the said agreement and accepting the said consideration in full and final satisfaction for the transfer of the suit property in favour of the respondent no. 9, 'BVP' divested himself of his right, title and interest in the suit property. Pursuant to the said agreement, 'BVP' executed an irrevocable Power of Attorney dated 17.02.1994 in favour of respondent no. 9 for a period of 15 years. A Deed of Confirmation dated 15.12.1995 duly registered on the same date was executed between 'BVP' and respondent no. 9 by which 'BVP' confirmed that the said Development Agreement was subsisting, valid and in full force and would be binding on the heirs, executors, administrators and assigns of the parties to the said Development Agreement. This was followed by a Declaration dated 23.08.2001 by 'BVP' wherein he acknowledged the rights, title and interest of the respondent no. 9 over the suit

property, the receipt of consideration of Rs.2,00,000/- and extended the period of the said Power of Attorney indefinitely and undertook to ratify and confirm the acts done by respondent no. 9. [Paras 19, 21] [971-B-E; 972-B-D]

1.2. The appellants challenged the consent decree passed by the High Court, particularly when each one of them had, upon the death of 'BVP', executed an Affidavit-cum-Declaration as well as separate Powers of Attorney dated 07.01.2005 in favour of the respondent no. 9. All the said Powers of Attorney were irrevocable and duly registered for valuable consideration. In the said affidavits, the appellants categorically admitted the right of ownership of respondent no. 9 over the suit property. By executing the said Powers of Attorney in favour of the respondent no. 9, the appellants had consciously and willingly appointed, nominated, constituted and authorized respondent no. 9 as their lawful Power of Attorney to do certain deeds, things and matters. The appellants also constituted respondent no. 9 as their lawful attorney authorizing him, to sign petitions, appear before the Courts and also to compromise or compound disputes. Thus, the appellants were estopped from questioning the acts done by respondent no. 9. The appellants could not be said to have any right to assail the consent decree passed by the High Court. The fact that under the consent terms the appellants were paid a sum of Rs 10,00,000/- when they were not entitled to the same also reinforces conviction that the consent terms arrived at were just. [Paras 23, 24, 25, 27] [972-E-G; 973-B-C, G-H; 974-B-D]

Jineshwardas (D) by LRs. and Ors. v. Jagrani (Smt.) and Another **(2003) 11 SCC 372, referred to.**

1.3. The predecessor-in-interest of the appellants had nothing remaining in the suit property after he had

transferred the same under the said Development Agreement to respondent no. 9 for a full and final consideration of Rs 2,00,000/-. Thus, the predecessor-in interest of the appellants had no right, title or interest subsisting in the suit property. The appellants are the legal heirs of 'BVP' and as such they could not have claimed a title better than that of 'BVP'. A general proposition of law is that no person can confer on another person, a better title than he himself has. [Para 28] [974-E-G]

Mahabir Gope v. Harbans Narain Singh **1952 SCR 775;** *Asaram v. Mst. Ram Kali* **1958 SCR 986;** *All India Film Corporation Ltd. v. Raja Gyan Nath* **(1969) 3 SCC 79;** *Byram Pestonji Gariwala v. Union Bank of India and Others* **(1992) 1 SCC 31, referred to.**

2. It is settled position of law that the burden to prove that a compromise arrived at under Order 23 Rule 3 CPC, was tainted by coercion or fraud lies upon the party who alleges the same. However, in the facts and circumstances of the case, the appellants, on whom the burden lay, have failed to do so. Although, the application for recall did allege some coercion, it could not be said to be a case of established coercion. Three criminal complaints were filed, but the appellants did not pursue the said complaints to their logical end. It is a plain and basic rule of pleadings that in order to make out a case of fraud or coercion, there must be an express allegation of coercion or fraud and all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars. In the present case, the appellants, however, failed to furnish the full and precise particulars with regard to the alleged fraud. Since the particulars in support of the allegation of fraud or coercion were not properly pleaded as required by law, the same must fail. Rather the Affidavits-

cum-Declarations executed by the appellants indicate that no coercion or fraud was exercised upon the appellants by respondent no. 8 or 9 at any point of time and thus the consent decree cannot be said to be anything but valid. [Paras 31- 33] [975-H; 976-A-D; 977-A-B]

Shankar Sitaram Sontakke v. Balkrishna Sitaram Sontakke **AIR 1954 SC 352;** *Loonkaran v. State Bank, Jaipur* **(1969) 1 SCR 122, relied on.**

Bishundeo Narain v. Seogeni Rai **1951 SCR 548, referred to.**

3. The allegation of appellants that they had revoked the Powers of Attorney executed by them in favour of the respondent no. 9 by filing complaints with the police is devoid of merit. Although there is no denying the fact that three complaints were filed on three different dates with the police against the alleged harassment and threats by respondent nos. 8 and 9, it is difficult to understand how the Powers of Attorney executed by the appellants or their predecessor-in-interest stood revoked. The record of the case would reveal that each of the complaints was filed by a separate person - the first complaint was filed by the appellants themselves, the second by an Advocate and the third by one 'NMP', who was himself a builder. All these complaints came to be filed when said 'NMP' came into the picture. Further, all the Powers of Attorney executed in favour of respondent no. 9 as also all the deeds and documents entered into between the predecessor-in-interest of the appellants and respondent no. 9 were duly registered with the office of the Sub-Registrar. Neither any document nor any of the Powers of Attorney was ever got cancelled by the appellants. [Para 36] [978-A-E]

4. The Power of Attorney in favour of said 'NMP' was

executed by the appellants on 26.04.2006 whereas the first complaint was filed with the police on 01.05.2006 and the consent terms were entered into on 22.05.2006. The consent decree was actually passed by the High Court on 13.06.2006. The appellants, thus, had ample time and opportunity with them to bring the said allegations to the notice and knowledge of the High Court at any time between 26.04.2006 and 13.06.2006. The appellants had considerable amount of time available with them. With regard to the complaints filed, the appellants did not take any follow up action to bring them their logical end.It is crystal clear that the appellants chose not to avail an opportunity which was available to them. In such circumstances, it would not be appropriate to say that the deeds and documents as well as the Powers of Attorney executed in favour of respondent no. 9 stood revoked merely by filing complaints with the police. A registered document has a lot of sanctity attached to it and this sanctity cannot be allowed to be lost without following the proper procedure. The stand taken by the appellants throughout that they had, by executing a Power of Attorney in favour of 'NMP', revoked the Powers of Attorney executed in favour of respondent no. 9 is found to be baseless. In fact, a look at the terms of the Power of Attorney executed in favour of 'NMP' would show to the contrary. [Paras 37 to 40] [978-G-H; 979-A-F]

5. Respondent no. 9 in the counter-affidavit filed in this Court, prayed for declaring the consent terms to be cancelled and annulled on the ground that the consent terms were rendered infructuous due to the failure of respondent no. 8 to perform his obligations as per the consent terms. A money game is being played. Since the stakes are high, each party is trying to draw the maximum advantage. There seems to be no other reason for respondent no. 9 having adopted such a course of action. In view of this, entering into the compromise as

also filing of the same in the High court by respondent no. 9 on behalf of the appellants was without any fraud and well within the scope of his authority. [Paras 41 and 42] [980-C-F]

Case Law Reference:

(2003) 11 SCC 372	**referred to**	**Para 26**
1952 SCR 775 All	**referred to**	**Para 28**
1958 SCR 986	**referred to**	**Para 28**
(1969) 3 SCC 79	**referred to**	**Para 28**
(1992) 1 SCC 31	**referred to**	**Para 30**
1951 SCR 548	**referred to**	**Para 32**
AIR 1954 SC 352	**relied on**	**Para 34**
(1969) 1 SCR 122	**relied on**	**Para 35**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3549-3551 of 2010.

From the Judgment & Order dated 12.10.2007 of the High Court of Judicature at Bombay, in Civil Application No. 3628 of 2006 in First Appeal No. 1388 of 2003, Civil Application No. 3629 of 2006 in First Appeal No. 1389 of 2003 and Civil Application No. 3630 of 2006 in First Appeal No. 1390 of 2003.

WITH

C.A. No. 3552-3554 of 2010.

Dr. Rajeev Dhavan, Pallav Sishodia, Ashok H. Desai, Dushyant A. Dave, Jaydeep Gupta, Dilip A. Taur, Sagar Pawar, Santosh Kumar Tripathi, Shirin Khajuria, Kanika Gomber, Mallika Joshi, Rajiv Kumar Dubey, Rajan Narain, Mohan Jayakara, Javaid Muzaffar, Ashwin S. Umesh Kumar Khaitan, Anil Kumar for the appearing parties.

The Judgement of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. In the present appeals, the appellants have challenged the legality and validity of the order dated 12.10.2007 passed by the High Court of Judicature at Bombay whereby the High Court dismissed all the three Civil Applications preferred by the appellants herein seeking recall of an earlier order dated 13.06.2006 passed by the High Court which was based on the consent terms duly signed by all the parties.

3. In order to properly appreciate the precise nature and scope of the controversy arising in the present appeals, it would be appropriate as well as expedient to set out a brief statement of pertinent facts. The original appellant, Budhiya Vesta Patel, was the predecessor–in-interest of the present appellants. Budhiya Vesta Patel was appointed as a watchman by one R.K. Tiwari, who was cultivating grass on the suit property since 1954-55, to take care of the suit property and for this a Kachcha shed on the suit property was provided to him. In due course of time, Budhiya Vesta Patel extended the shed to construct a chawl known as Budhiya Patel Chawl consisting of 38 rooms, which were let-out by him.

4. After the death of the real owner of the suit property, Mr. Anant Mahadeo Tambe, husband of Leela Anant Tambe, respondent no. 7 herein, the suit property stood recorded in the name of respondent no. 7. By means of a consent decree passed in Suit No. 1230 of 1992 between respondent no. 7 and M/s. Hitesh Enterprises, respondent no. 8 herein, the latter became the owner of the suit property.

5. In the year 1999, Budhiya Vesta Patel filed a suit against respondent no. 7 and said R.K. Tiwari, the predecessor-in-title of Respondent nos. 1 to 6 herein, before the Bombay City Civil Court, Bombay being Suit No. 5163 of 1999 seeking a declaration that he is the owner of the suit property by adverse

possession. Since said R.K. Tiwari also claimed title to the suit property, he also filed a suit.

6. Against this, a counter-claim being Counter Claim No. 11 of 2002 seeking eviction of Budhiya Vesta Patel and his tenants from the suit property was filed by respondent no. 7 and respondent no. 8. The aforesaid suits were contested and on the basis of the pleadings of the parties, issues were framed and evidence was led.

7. The trial Court by its judgment and order dated 10.02.2003 and 11.02.2003 dismissed the suit filed by Budhiya Vesta Patel and allowed the counter claim filed by respondent Nos. 7 and 8. The trial Court negatived Budhiya Vesta Patel's claim of ownership of the suit property by adverse possession since his initial possession of the suit property was a permissive possession.

8. Aggrieved by the said judgment and order, several appeals came to be filed before the High Court of Bombay. Budhiya Vesta Patel had filed two appeals, being F.A. No. 1388 of 2003 and F.A. No. 1389 of 2003; the former against the dismissal of the suit filed by him and the latter against the decree passed against him in the counter claim. The third appeal being, F.A. No. 1390 of 2003, was preferred by one Yusuf Vali Mohd. Bilikhiya (respondent no. 9 herein), who was the Power of Attorney holder of Budhiya Vesta Patel. Respondent Nos. 1 to 6 also filed an appeal against the judgment and order of the trial Court which was registered as F.A. No. 1523 of 2003. However, subsequently, the same was withdrawn.

9. During the pendency of the aforesaid appeals, Budhiya Vesta Patel died on 05.12.2004. On 07.01.2005, each of the present appellants executed an irrevocable Power of Attorney in favour of respondent no. 9. On the basis of the said Powers of Attorney, respondent no. 9 filed three separate applications being Civil Application Nos. 3180 of 2005, 3181 of 2005 and

992 of 2005 in the aforesaid three appeals wherein he prayed that the legal representatives of Budhiya Vesta Patel, i.e., the appellants be brought on record in all the three appeals in place of Budhiya Vesta Patel.

10. On 26.04.2006, the appellants executed a Power of Attorney in favour of one Narender M. Patel. It is alleged by the present appellants that respondent no. 9 colluded with respondent no. 8 and, therefore, respondent no. 9 forced and coerced them to enter into a compromise with respondent nos. 7 and 8, which was strongly objected to by the appellants. On this, the appellants further allege that they were threatened with dire consequences by the aforesaid respondents. Consequently, the appellants got filed three complaints dated 01.05.2006, 17.05.2006 and 23.05.2006 with the police against respondent nos. 8 and 9. However, it is alleged that despite this, respondent no. 9 for himself and for and on behalf of the appellants as their Power of Attorney holder entered into consent terms with respondent nos. 7 and 8 in F.A. No. 1389 of 2003 and thereby submitted to the decree of eviction. The High Court, by its order dated 13.06.2006, allowed the aforesaid applications filed by respondent no. 9 and also disposed of the said appeals after taking on record the consent terms entered into between respondent nos. 7 and 8 on one hand and respondent no. 9 on the other. Subsequent to filing of the consent terms, the names of the tenants were deleted from the array of the parties. No appeal was, however, filed by any tenant.

11. The appellants filed, before the High Court, three civil applications being Civil Applications Nos. 3628 of 2006, 3629 of 2006 and 3630 of 2009 praying for recall of aforesaid order dated 13.06.2006 alleging that fraud had been played upon the High Court by filing the said consent terms. By a common order dated 12.10.2007, the High Court dismissed the aforesaid applications. Hence the parties are, in appeal, before us.

12. Before we proceed to give an account of the

submissions made by the counsel appearing for the parties, we wish to make note of a development that took place after filing of this SLP by the appellants. After this SLP was filed, respondent no. 9 filed a civil application before the High Court praying for setting aside the consent decree dated 13.06.2006 on the ground that respondent no. 8 had failed to perform his obligation under the consent terms, i.e., payment of Rs 1 crore and 15 lakhs to him. The High Court, by an order dated 06.07.2009, dismissed the said application.

13. We may now direct our attention to the rival submissions made before us by the parties.

14. Dr. Rajeev Dhawan, learned senior counsel appearing for the appellants, submitted that the aforesaid consent terms were filed without the knowledge and consent of the appellants and as such the consent decree was passed without taking the consent of the appellants who were necessary parties. It was also submitted that the purpose behind executing a General Power of Attorney in favour of respondent no. 9 by Budhiya Vesta Patel and, upon his death, by the appellants was to safeguard their property by issuing clear instructions to him. It was the stand of the Dr. Dhawan that the fraudulent act of the respondent no. 9 in arriving at a settlement with the respondent nos. 7 and 8 and consequently filing the same in the High Court without obtaining the consent of the appellants amounted to a breach of the scope of the authority conferred on him by the appellants and thus the consent decree passed by the High Court was a nullity. Dr. Dhawan tried to further assail the validity of the consent terms as also the consent decree on the ground that the terms of the compromise arrived at were iniquitous.

15. It was further submitted that since fraud had been played by respondent no. 9 on the appellants by trying to siphon off the properties belonging to the appellants, the Court has a responsibility to protect the rights and interests of the appellants and therefore the consent decree is required to be set aside and quashed. In the course of his submissions, Dr. Dhawan

also referred to the three complaints filed by the appellants with the police against harassment and threats given to them by respondent nos. 8 and 9. Dr. Dhawan pointed out before us that coercion and goon tactics, in addition to fraud, had been employed by respondent nos. 8 and 9 to force the appellants to sign the consent terms.

16. It was further submitted that the High Court erred in dismissing the applications filed by the appellants seeking recall of its earlier order. The High Court failed to see through the monstrous designs of respondent no. 9 even though ample material was placed on record and allegations of fraud were clearly made before the High Court.

17. On the other hand, Mr. Ashok H. Desai, Mr. Dushyant Dave and Mr. Jaydeep Gupta, learned senior counsel appearing for the respondent Nos. 7 and 8 as also respondent No. 9 strongly refuted the aforesaid submissions while bringing to the notice of the Court that, in fact, Budhiya Vesta Patel had himself entered into a Development Agreement dated 12.01.1994 with respondent no. 9 whereby the former transferred his rights, title and interest in the suit property to the latter for a consideration of Rs. 2,00,000/- which was fully paid by respondent no. 9 to the Budhiya Vesta Patel and accepted by him prior to the execution of the said agreement. It was further submitted that the irrevocable Powers of Attorney which were executed in favour of respondent no. 9 by Budhiya Vesta Patel and, upon his death, by the appellants made the acts, which were carried out by respondent no. 9 in the best interest of the appellants, binding on the appellants and that there existed no valid ground for setting aside the compromise arrived at between the parties and the consent decree passed by the High Court.

18. It was also submitted that as the appellants had failed to establish that under the terms of the Power of Attorney which had executed in his favour by the appellants, respondent No. 9 was not authorized to enter into a settlement of the kind he had

entered, it could not be said that there was a conflict of interest between the appellants and respondent No. 9 who was the agent of the appellants.

19. In the light of the rival submissions made by the counsel appearing for the parties, we have perused the entire record before us. There is no dispute with regard to the fact that a Development Agreement dated 12.01.1994 had been entered into between Budhiya Vesta Patel and respondent no. 9 whereby and whereunder Budhiya Vesta Patel transferred his rights, title and interest in the suit premises in favour of respondent no. 9 for a consideration of Rs 2,00,000/-. The records show that the said amount was fully paid and also that the said agreement was registered with the office of the Sub-Registrar. Thus, by entering into the said agreement and accepting the said consideration in full and final satisfaction for the transfer of the suit property in favour of the respondent no. 9, Budhiya Vesta Patel divested himself of his right, title and interest in the suit property. Pursuant to the said agreement, Budhiya Vesta Patel executed an irrevocable Power of Attorney dated 17.02.1994 in favour of respondent no. 9 for a period of 15 years.

20. We may here refer to some of the relevant portions of the aforesaid agreement, which are being reproduced hereinbelow:

> "AND WHEREAS it is hereby further agreed by and between the parties hereto that the Developer shall be at full liberty to assign, transfer the benefit of the Agreement in respect of the aid property to party or parties of his choice at such terms and conditions as to be or he may deem fit and proper without any further consultation or consent of the Owner in that behalf
>
> 4. The consideration payable by the developer to the Owner for his share right, title, interest has been fixed at Rs. 2,00,000/- (Rupees two lakhs only) and the said consideration has been paid by the Developer to the Owner on or before the execution of these presents (the receipt and payment whereof the Owner doth hereby admit and acknowledge and of and from the same do hereby forever discharge the Developer "

21. Further, a Deed of Confirmation dated 15.12.1995 duly registered on the same date was executed between Budhiya Vesta Patel and respondent no. 9 by which Budhiya Vesta Patel confirmed that the aforesaid Development Agreement was subsisting, valid and in full force and would be binding on the heirs, executors, administrators and assigns of the parties to the said Development Agreement. This was followed by a Declaration dated 23.08.2001 by Budhiya Vesta Patel wherein he acknowledged the rights, title and interest of the respondent no. 9 over the suit property, the receipt of consideration of Rs 2,00,000/- and extended the period of the said Power of Attorney indefinitely and undertook to ratify and confirm the acts done by respondent no. 9.

22. The appellants have challenged the consent decree passed by the High Court praying that the same should be set aside as it was obtained by playing a fraud upon them. We do not feel persuaded to hold so for a number of reasons which are being set out in the paragraphs below.

23. It is interesting to see the appellants challenge the consent decree passed by the High Court, particularly when each one of them had, upon the death of Budhiya Vesta Patel, executed an Affidavit-cum-Declaration as well as separate Powers of Attorney dated 07.01.2005 in favour of the respondent no. 9. All the said Powers of Attorney were irrevocable and duly registered for valuable consideration. A bare perusal of the said Affidavits-cum-declarations would reveal that the appellants knew that respondent no. 9 was the constituted attorney of their predecessor-in–interest and that the suit property had been transferred to respondent no. 9 for a consideration of Rs 2,00,000/-. It is pertinent to note that in the

said Affidavits-cum-Declarations each of the appellants had undertaken to be bound by all the deeds and documents entered into between their predecessor-in-interest and respondent no. 9 and they had also confirmed and ratified the said deeds and documents thereby conferring right on respondent no. 9 to enforce those at all times in the future. In fact, in the said affidavits, the appellants categorically admitted the right of ownership of respondent no. 9 over the suit property.

24. By executing the said Powers of Attorney in favour of the respondent no. 9, the appellants had consciously and willingly appointed, nominated, constituted and authorized respondent no. 9 as their lawful Power of Attorney to do certain deeds, things and matters. The relevant clauses are being extracted hereinbelow: -

> "6. To sign Petition or present Petitions or Petition, to file suit and to sign and verify claims, written statements, pleadings, applications, returns, and to appear, act in any Court- Civil, Criminal, Court Receiver and /or Revenue, original or appellate or Revisional or before any competent authority, Officer, or Officer for in respect of or in connection with the aforesaid and with buildings etc. thereon and/or any other proceedings, suit or appeal in connection with the management and superintendence of my said lands for any purpose whatsoever necessary.
>
> 7. To compromise, compound and/or negotiate and settle any dispute or disputes and refer the same to Arbitration."

25. It is thus crystal clear that the appellants had not only confirmed and ratified the deeds and documents entered into between their predecessor-in-interest and respondent no. 9 but also constituted respondent no. 9 as their lawful attorney authorizing him, inter alia, to sign petitions, appear before the Courts and also to compromise or compound disputes. In fact, the appellants are estopped from questioning the acts done by respondent no. 9.

26. The learned counsel appearing for respondent No. 7 placed reliance on a decision of this Court in *Jineshwardas (D) by LRs. And Ors. Vs. Jagrani (Smt.) and Another* reported in (2003) 11 SCC 372 to argue that the party executing the Power of Attorney is bound by the acts of the Power of Attorney holder and that the Court could accept a compromise terms entered into by the Power of Attorney holder on behalf of the parties and that such a compromise would be a valid compromise.

27. We are of the considered view that in the aforesaid circumstances, the appellants could not be said to have any right to assail the consent decree passed by the High Court. We do not think it proper for the appellants to question and challenge the consent terms signed and submitted by respondent no. 9 on their behalf which were duly accepted and acted upon by the High Court and which we also find to be just and reasonable. The fact that under the consent terms the appellants were paid a sum of Rs 10,00,000/- when they were not entitled to the same also reinforces our conviction that the consent terms arrived at were just.

28. As noted by us in one of the preceding paragraphs, the predecessor-in-interest of the appellants had nothing remaining in the suit property after he had transferred the same under the said development agreement to respondent no. 9 for a full and final consideration of Rs 2,00,000/-. Thus, the predecessor-in interest of the appellants had no right, title or interest subsisting in the suit property. The appellants are the legal heirs of Budhiya Vesta Patel and as such they could not have claimed a title better than that of Budhiya Vesta Patel. The predecessor-in interest of the appellants had relinquished his title, right or interest over/in the suit property in favour of respondent no. 9. A general proposition of law is that no person can confer on another a better title than he himself has. [Reference in this regard may be made to the decisions of this Court in *Mahabir Gope v. Harbans NArain Singh* 1952 SCR 775; *Asaram v. Mst. Ram Kali* 1958 SCR 986 and *All India*

Film Corporation Ltd. v. Raja Gyan Nath (1969) 3 SCC 79.]

29. It is also the case of the appellants that there was no due compliance with the provisions of Order 23 Rule 3. The counsel appearing for the appellants submitted that responsibility of the Court is to see that the consent terms have been arrived at in satisfaction of all the parties and that injustice is not caused to any party. The counsel further submitted that one of the modes by which Order 23 Rule 3 ensured this was by requiring the compromise agreement to be in writing and signed by the parties.

30. This was strongly refuted by the counsel appearing for the respondents stating that it is well settled that under Order 23 Rule 3 of the Code of Civil Procedure, 1908, a compromise may be signed by the counsel or the Power of Attorney holder. Counsel for the respondents referred to and relied upon the judgment of this Court in *Byram Pestonji Gariwala Vs. Union Bank of India and Others* (1992) 1 SCC 31 where it was held thus:

> "39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

31. It is settled position of law that the burden to prove that

a compromise arrived at under Order 23 Rule 3 of the Code of Civil Procedure was tainted by coercion or fraud lies upon the party who alleges the same. However, in the facts and circumstances of the case, the appellants, on whom the burden lay, have failed to do so. Although, the application for recall did allege some coercion, it could not be said to be a case of established coercion. Three criminal complaints were filed, but the appellants did not pursue the said criminal complaints to their logical end.

32. It is a plain and basic rule of pleadings that in order to make out a case of fraud or coercion there must be a) an express allegation of coercion or fraud and b) all the material facts in support of such allegations must be laid out in full and with a high degree of precision. In other words, if coercion or fraud is alleged, it must be set out with full particulars. In *Bishundeo Narain v. Seogeni Rai* reported in 1951 SCR 548 it was held thus:

> "27. We turn next to the questions of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.
>
> 28. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6 Rule 4 of the Civil Procedure Code."

33. In the present case, the appellants have, however, failed to furnish the full and precise particulars with regard to the alleged fraud. Since the particulars in support of the allegation of fraud or coercion have not been properly pleaded as required by law, the same must fail. Rather the Affidavits-cum-Declarations executed by the appellants indicate that no coercion or fraud was exercised upon the appellants by respondent no. 8 or 9 at any point of time and thus the consent decree cannot be said to be anything but valid.

34. In this regard, we wish to refer to the judgment of this Court in the case of *Shankar Sitaram Sontakke v. Balkrishna Sitaram Sontakke* reported in AIR 1954 SC 352 wherein this Court while dealing with the nature of a consent decree held in para 9 as under:

> "9. The obvious effect of this finding is that the plaintiff is barred by the principle of res judicata from reagitating the question in the present suit. It is well settled that a consent decree is as binding upon the parties thereto as a decree passed by invitum. The compromise having been found not to be vitiated by fraud, misrepresentation, misunderstanding or mistake, the decree passed thereon has the binding force of res judicata.

35. We may also refer to the decision of this Court in *Loonkaran v. State Bank, Jaipur* reported in (1969) 1 SCR 122 where interpreting Section 202 of the Indian Contract Act, this Court held thus:

> "Section 202 of the Contract Act provides that where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such agent. It is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked."

36. The appellants also alleged that they had revoked the Powers of Attorney executed by them in favour of the respondent no. 9 by filing complaints with the police. We are of the considered opinion that this contention of the appellants is devoid of merit. Although there is no denying the fact that three police complaints had been filed on three different dates with the police against the alleged harassment and threats by respondent nos. 8 and 9, it is difficult to understand how the Powers of Attorney executed by the appellants or their predecessor-in-interest stood revoked. The record of the case reveals that each of the complaints was filed by a separate person - the first complaint was filed by the appellants themselves, the second by an Advocate and the third by one Narendra M. Patel, who is himself a builder. It is significant to note that all these complaints came to be filed when said Narender M. Patel came into the picture. Further, it is important to take note of the fact that all the Powers of Attorney executed in favour of respondent no. 9 as also all the deeds and documents entered into between the predecessor-in-interest of the appellants and respondent no. 9 were duly registered with the office of the Sub-Registrar. Neither any document nor any of the Powers of Attorney was ever got cancelled by the appellants.

37. The appellants also further contended before us that they had revoked the Powers of Attorney executed in favour of respondent no. 9 by executing a fresh Power of Attorney in favour of said Narendra M. Patel. It is significant to note that despite filing of the complaints with the police nothing was done by the appellants to bring the allegations contained in the said complaints to the notice and knowledge of the High Court although that could have been comfortably done had the appellants wished to do so. The Power of Attorney in favour of said Narendra M. Patel was executed by the appellants on 26.04.2006 whereas the first complaint was filed with the police on 01.05.2006 and the consent terms were entered into on

22.05.2006. The consent decree was actually passed by the High Court on 13.06.2006.

38. The appellants, thus, had ample time and opportunity with them to bring the said allegations to the notice and knowledge of the High Court at any time between 26.04.2006 and 13.06.2006. The appellants had considerable amount of time available with them. As noted earlier, with regard to the complaints filed, the appellants did not take any follow up action to bring them their logical end.

39. It is crystal clear that the appellants chose not to avail an opportunity which was available to them. In such circumstances, it will not be appropriate to say that the deeds and documents as well as the Powers of Attorney executed in favour of respondent no. 9 stood revoked merely by filing complaints with the police. We cannot lose sight of the fact that a registered document has a lot of sanctity attached to it and this sanctity cannot be allowed to be lost without following the proper procedure.

40. In any event, if we direct our attention to the contents of the Power of Attorney executed by the appellants in favour of said Narender M. Patel, we find that the stand taken by the appellants throughout that they had, by executing a Power of Attorney in favour of Narender M. Patel, revoked the Powers of Attorney executed in favour of respondent no. 9 to be baseless. In fact, a look at the terms of the Power of Attorney executed in favour of Narender M. Patel would show to the contrary. The relevant portion of the said Power of Attorney is being extracted hereinbelow: -

> "6. To correspond with all the body cooperate for otherwise including government and semi- government bodies and Municipal Corporation of Greater Bombay and make applications etc. in respect of any of the matters pertaining to the said the property and the said premises.

> AND FURTHER that these presents and the powers hereby given shall in no wise extend or be deemed or continued to extend to repeal, revoke, determine or make void any other power or powers of attorney at any time heretobefore or hereafter given or executed by us to or in favour of any other person or persons for the same or any distinct or other purpose or purposes but such power or powers shall remain and be of the same authority, validity and power, force and effect as if these presents had not been made."

(emphasis supplied)

41. Before we part with the discussion, we wish to make note of the fact that respondent no. 9 has, in the counter-affidavit filed in this Court, prayed for declaring the consent terms to be cancelled and annulled on the ground that the consent terms have been rendered infructuous due to the failure of respondent no. 8 to perform his obligations as per the consent terms. We have a strong feeling that a money game is being played. Since the stakes are high, each party before us is trying to draw the maximum advantage. To us, there seems to be no other reason for respondent no. 9 having adopted such a course of action.

42. In view of the foregoing discussion, we are of the considered view that entering into the compromise as also filing of the same in the High court of Bombay by respondent no. 9 on behalf of the appellants was without any fraud and well within the scope of his authority. Accordingly, we find no merit in the present appeals and the same are hereby dismissed. There will be no order as to costs.

D.G. Appeals dismissed

S.R. SRINAVASA AND ORS.
v.
S. PADMAVATHAMMA
(Civil Appeal No. 4623 of 2005)

APRIL 22, 2010

[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]

Will:

Execution of Will and its genuineness – Burden to prove – Held: The initial burden is on the propounder to remove all the reasonable doubts – Presence of suspicious circumstances make initial burden heavier – Will in respect of suit property in favour of one of the daughter – No reason given as to why the other legal heirs were excluded from inheritance – None of the attesting witnesses examined – No reason given as to why the Will was presented before the Sub-Registrar on two separate occasion for registration – Non-examination of Sub-Registrar – Active participation of sole beneficiary in writing and registering the Will – Cumulative effect of all the circumstances would create suspicion about genuineness of Will – Registration by itself not sufficient to remove suspicion – Such suspicion cannot be removed by mere assertion of propounder that the Will bore signature of testator or that the testator was in sound and disposing state of mind at the time of making Will – Thus, Will not proved to be genuine – Evidence Act, 1882 – ss.63, 68 – Hindu Succession Act, 1956 – s.15(2)(a).

Attesting witness – Scribe of a Will – Held: Does not become attesting witness – It is essential that the witness should put his signature animo attestandi, that is for the purpose of attesting that he saw executant sign – If a person puts his signature on the document to certify that he is a scribe or an identifier or a registering officer then he is not signing

in the capacity of an attesting witness – Evidence Act, 1882 – ss.63, 68 – Witness.

The suit property devolved upon 'P' who was the mother of plaintiff and defendant 4 after death of their father. One of the sisters of plaintiff, 'I' was staying with the mother and looking after mother till she died. 'I' continued to be in possession of suit property. When 'I' died, her cremation was performed by her cousin, the defendant 1. Thereafter, Defendant 1 remained in possession of suit property and inducted defendant 2 and 3 as tenant.

The plaintiff filed a suit for declaration that she and defendant 4 were the absolute owner of the suit property. The defence of defendant 1 was that on 18.6.1974, the mother of plaintiff had executed Will in favour of 'I', and since there was no intestate succession, neither the plaintiff nor the defendant 4 could succeed to the suit property. The trial court dismissed the suit holding that the plaintiffs did not seriously dispute the execution of Will by 'P' in favour of 'I' and in fact admitted the execution of the Will in a subsequent suit being O.S. no. 233 of 1998 which was filed by the appellants as the legal heirs of the plaintiff. The first appellate court reversed the judgment of trial court. On appeal, High Court restored the judgment of trial Court. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1. It is not disputed that respondent No.1 was a rank outsider. He was not a lineal descendant of 'P'. He was son of P's sister. The property would be inherited by the appellants under Section 15(2) of the Hindu Succession Act if the Will dated 18.6.1974 was held not to be genuine. The basic aim of Section 15(2) is to ensure that inherited property of an issueless female

Hindu dying intestate goes back to the source. It was enacted to prevent inherited property falling into the hands of strangers. This is also evident from the recommendations of the Joint Committee of the Houses of Parliament. [Paras 18, 19, 21] [997-F; 998-D-E; 999-D-E]

State of Punjab v. Balwant Singh **1992 Supp (3) SCC 108;** *V. Dandapani Chettiar v. Balasubramanian Chettiar* **(2003) 6 SCC 633, relied on.**

Jayantilal Mansukhlal and another v. Mehta Chhanalal Ambalal **AIR 1968 Gujarat 212;** *Palanivelayutham Pillai and others v. Ramachandran and others* **(2000) 6 SCC 151;** *Somnath Berman v. Dr. S.P. Raju and another* **AIR 1970 SC 846;** *Smt. Jaswant Kaur v. Smt. Amrit Kaur and others* **AIR 1977 SC 74, referred to.**

1.2. By virtue of Section 15(2)(a) of the Act, the appellants would inherit the property in dispute. This right was sought to be defeated by defendant No.1 on the basis of the Will dated 18.6.1974, allegedly executed by 'P'. Defendant No.1 claimed that the plaintiffs cannot claim to 'inherit' the property on the basis of intestate succession. Undoubtedly, therefore, it was for defendant No.1 to prove that the Will was duly executed, and proved to be genuine. [Para 23] [1001-G-H; 1002-A]

H. Venkatachala Iyengar v. B.N. Thimmajamma, **1959 Supp (1) SCR 426;** *Jaswant Kaur v. Amrit Kaur* **(1977) 1 SCC 369, relied on.**

1.3. None of the attesting witnesses were examined. The scribe, who was examined as DW.2, did not state that he had signed the Will with the intention to attest. In his evidence, he merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. It is essential that the

witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. The said test was not satisfied by DW.2 the scribe. The effect of subscribing a signature on the part of the scribe cannot be identified to be of the same status as that of the attesting witnesses. [Paras 26, 27] [1004-B-H]

M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons **(1969) 1 SCC 573;** *N. Kamalam v. Ayyasamy* **(2001) 7 SCC 503, relied on.**

2.1. There is no admission about the genuineness or legality of the Will either in the plaint of OS No. 233 of 1998 or in the evidence of PW-1. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The High Court erred in holding that there was no need for independent proof of the Will, in view of the admissions made in OS No.233 of 1998 and the evidence of PW1. In fact there was no admission except that 'P' had executed a Will bequeathing only the immovable properties belonging to her in favour of 'I'. The First Appellate Court correctly observed that the said admission was only about the making of the Will and not the genuineness of the Will. The statements contained in the plaint as well as in the evidence of PW1 would not amount to admissions with regard to the due execution and genuineness of the Will dated 18.6.1974. The First Appellate Court on analysis of the entire evidence clearly recorded cogent reasons to conclude that the execution of the Will was

surrounded by suspicious circumstances. [Paras 31, 35, 36] [1006-D; 1007-H; 1008-A-F]

Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi **(1960) 1 SCR 773;** *Nagindas Ramdas v. Dalpatram Ichharam* **(1974) 1 SCC 242;** *Gautam Sarup v. Leela Jetly* **(2008) 7 SCC 85, relied on.**

2.2. It was noticed by the First Appellate Court that although 'P' was allotted certain specific property, there was no recital in the Will as to which of the properties were bequeathed to 'I'. Non-description of the schedule property creates a reasonable suspicion as to whether 'P' executed the Will. It was noticed that if she had the intention of bequeathing all her property to 'I', she would have mentioned the details of all the properties which belonged to her in the Will. The First Appellate Court further held that no reason was given as to why the Will was presented before the Sub Registrar on two separate occasions for registration. Although the son of 'P' died after having been divorced from his wife he is described in the Will as a bachelor. No reason was stated in the Will as to why the other two daughters were excluded from the property by 'P'. Since the suspicious circumstances were not explained by defendant No.1, the Will was not genuine. The First Appellate Court also noticed that although 'I' was the sole beneficiary in the Will, she was present at the time when the Will was written. She was also present in the office of Registrar when the Will was presented for registration. This would clearly show that 'I' had an evil eye on the suit property and, therefore, the descriptions of the other properties were not given. The active participation of 'I' in the writing and the registration of the Will may well create a suspicion about its genuineness. Since there were suspicious circumstances, it was necessary for the defendants to

explain the same. The registration of the Will by itself was not sufficient to remove the suspicion. The first appellate court also noticed that even in cases where the execution of the Will is admitted, at least one attesting witness of the Will has to be examined to receive the Will in evidence. DW2, who was examined was the scribe of the Will, gave no plausible reasons as to why the Will was presented twice before the Sub Registrar for registration. Nor was it stated by this witness as to why the Will was not registered on the first occasion. It was also held by the First Appellate Court that non-examination of the Sub Registrar created suspicion about the genuineness of the Will. Even the attesting witnesses to the Will were not examined. There was no evidence whether the Will was read over by the Sub Registrar or anybody else before it was registered. It was not explained as to how the Will came into possession of defendant No.1. There was no evidence when he was put in proper custody of the Will. Considering the cumulative effect of all the circumstances, the First Appellate Court correctly held that execution of the Will was surrounded by suspicious circumstances. [Paras 38-39] [1009-B-G; 1010-C-G]

Ramachandra v. Champabia **AIR 1965 SC 357, relied on.**

3. The High Court in its judgment seemed to have misread the entire evidence. The said findings recorded by the First Appellate Court were brushed aside by dubbing them as conjectural. The High court ought to have taken great care to satisfy its judicial conscience that the execution of the Will was not surrounded by suspicious circumstances. It is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed

by the mere assertion of the propounder that the Will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the Will was made. [Paras 40-42] [1011-A-C; 1012-D-E]

Case Law Reference:

AIR 1968 Gujarat 212	**referred to**	**Para 14**
(2000) 6 SCC 151	**referred to**	**Para 14**
AIR 1970 SC 846	**referred to**	**Para 17**
AIR 1977 SC 74	**referred to**	**Para 17**
1992 Supp (3) SCC 108	**relied on**	**Paras 14, 21**
(2003) 6 SCC 633	**relied on**	**Paras 14, 22**
(1959) Supp 1 SCR 426	**relied on**	**Para 25**
(1977) 1 SCC 369	**relied on**	**Para 25**
(1969) 1 SCC 573	**relied on**	**Para 26**
(2001) 7 SCC 503	**relied on**	**Paras 14, 27**
(1960) 1 SCR 773	**relied on**	**Paras 16, 32**
(1974) 1 SCC 242	**relied on**	**Paras 16, 33**
(2008) 7 SCC 85	**relied on**	**Paras 16, 34**
AIR 1965 SC 357	**relied on**	**Para 38**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4623 of 2005.

From the Judgment & Order dated 2.9.2003 of the High Court of Karnataka at Bangalore in R.S.A. No. 641 of 2003.

S.N. Bhat for the Appellant.

Nand Kishore (for P.P. Singh) for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1.This appeal by special leave has been filed by the legal heirs of the original plaintiff, Lalithamma. OS No.195 of 1986 had been filed by Lalithamma in the Court of Civil Judge, Mysore which was subsequently re-numbered as OS No.1434 of 1990 in the Court of Principal Civil Judge, (Junior Division), Mysore. The suit was for declaration that the plaintiff and defendant No.4 are the absolute owners of the suit schedule property and for possession thereof. The suit was dismissed by the trial court. The appeal filed by the plaintiffs against the aforesaid judgment was allowed. The suit filed by the plaintiffs was decreed as prayed. The High Court, however, in regular second appeal filed by the respondent herein, set aside the judgment of the first appellate court and restored the judgment of the trial court, i.e. the suit filed by the plaintiffs-appellants was dismissed. In these circumstances, the legal representatives of the original plaintiffs have filed the present appeal by special leave in this Court.

2. Briefly stated the facts of the case are that the plaintiffs claimed that Puttathayamma was wife of Sivaramaiah who pre-deceased her in 1950. Puttathayamma died on 15.11.1979. She had four children. Lalithamma (daughter) who died in 1990, was the original plaintiff. Subbaramaiah (son) who died issueless in 1973 and Smt. Kamalamma (daughter) also died issueless in 1998. She was impleaded as defendant No.4 in this suit. Smt. Indiramma was the 4th child. She also died issueless on 24.10.85. It is claimed that upon the death of Subbaramaiah, Puttathayamma inherited the suit property and became the absolute owner being class one heir of Subbaramaiah. Upon the death of Puttathayamma, the deceased plaintiff, defendant No.4, Kamalamma and Indiramma inherited her property. During her life time, Puttathayamma was living with Indiramma. Upon her death, Indiramma continued to be in possession of the property. The dispute about the property arose soon after the death of Indiramma.

3. Since the original plaintiff – Lalithamma and defendant No.4 were residing outside, they did not come to know about the death of their sister, Indiramma. Defendant No.1 claiming to be close relative of deceased Indiramma organized and performed her cremation ceremony. The house in which Indiramma was residing i.e., schedule property contained a lot of movable properties such as gold and silver jewellery and other articles which were of considerable value. He took charge of the house as well as the moveable properties by putting it under lock and key. On learning about the death of their sister, appellants and defendant No.4 came to Mysore. They demanded that defendant No.1 should hand over the possession of the house and moveable properties. He, however, refused to do so asserting that he was the absolute owner of the entire property. Not only this, it is stated that defendant No.1 had taken away several lacs of rupees which had been kept by Indiramma in various fixed deposits. Defendant No.1 had declined to hand over the title deeds of the schedule property as well as the bank deposit receipts.

4. The appellant and defendant No.4 also learnt that the first defendant had taken heavy advances from defendants No.2 and 3 and put them in possession of different portions of the schedule property as tenant. He had been recovering heavy rent from defendants No.2 and 3. During the pendency of the suit, defendants No.2 and 3 vacated the suit schedule property. Later, defendant no 5 was put in possession of the property.

5. In the suit, it is made clear that appellant and the 4th defendant will take separate action regarding the bank deposits and other moveable properties in appropriate proceedings after ascertaining the particulars thereof. It is clarified that the present suit was filed for declaration of the title to the property and for possession as the first defendant has denied their title by refusing to hand over the property to them.

6. We may also notice here that during the pendency of

the suit, defendant No.4 also passed away issueless. The amended suit was, therefore, pursued by the L.Rs of deceased Lalithamma.

7. In the written statement, it was claimed by the defendant No.1 that Puttathayamma had executed a Will on 18.6.1974 in favour of Indiramma. Consequently, there was no intestate succession. Testamentary succession devolved on late Indiramma. Therefore, neither the plaintiffs nor the 4th defendant could succeed to the properties of Puttathayamma at all. During the life time of Indiramma, her sister did not care to even look after her. The moment she died, they have claimed to be heirs of her estate. Defendant No.1, on the other hand, is the son of Seethamma, sister of Puttathayamma. He denied the entire claim made by the plaintiffs. He further explained that he had informed the plaintiff and defendant No.4 about the death of Indiramma. Although the plaintiff turned up on the 5th day, the 4th defendant did not choose to come at all. Defendant No.1 further claimed to have carried out extensive repairs of the house. It is also pleaded by defendant No.1 that Indiramma was the second wife of one Chalapati Rao, who pre-deceased her. Although Chalapati Rao did not beget any children with Indiramma, he died leaving four sons and two daughters from his first wife. According to the first defendant, the legal heirs of Chalapati Rao would have preference over the appellants and defendant No.4. Therefore, under any circumstances, no relief could be granted to them.

8. In reply to the amended plaint, defendant No.1 stated that an agreement of mortgage had been created in favour of 5th defendant in respect of the schedule property. Upon receiving Rs.1,00,000/-, defendant No.1 has put defendant No.5 in possession.

9. With these pleadings parties led their evidence. Upon consideration of the entire material, the suit filed by the

appellants herein was dismissed by the Trial Court.

10. The Trial Court notices that defendant No.1 is the son of Seethamma, sister of Puttathayamma. It is also noticed that Indiramma was the second wife of one Chelapathirao who had six children from his previous marriage. Indiramma, however, died issueless. The Will dated 18.6.1974 was produced by defendant No.1, during evidence. The Trial Court observed that the plaintiffs have not seriously disputed the execution of the Will by Puttathayamma in favour of Indiramma. Defendant No.1 had examined the scribe of the Will as DW2 to prove the Will. It has been held that the appellants in fact admitted the execution of the Will in a subsequent suit being OS No.233 of 1998 which was filed by the appellants herein as the legal heirs. In view of the testamentary succession, Indiramma became the absolute owner of the schedule property. Since husband of Indiramma had pre-deceased her, the property would devolve upon his children under Section 15 (1) (b) of the Hindu Succession Act, 1956 (hereinafter referred to as "the Act"). It would not devolve on the appellants and defendant No.4 under Section 15(2) of the Act. The Trial Court further notices the claim made by the first defendant during trial that Indiramma had executed a Will in his favour dated 2.10.1984, bequeathing the schedule property to him. The Trial Court further notices that though defendant No.1 had got the Will dated 2.10.84 marked as Exhibit, he had not chosen to examine any of the attesting witnesses to the document. Defendant No.1 had earlier not instituted any proceedings to prove his title over the schedule property pursuant to the alleged Will. Consequently, the claim of defendant No.1 over the schedule property has also been negatived. However, in view of the finding that appellants and defendant No.4 cannot not inherit the property of Puttathayamma under Section 15 (2) of the Act, the suit has been dismissed.

11. The aforesaid judgment of the Trial Court was challenged by the petitioners in appeal. The first appellate court

in a very elaborately written judgment recapitulated the undisputed facts. It is noticed that Puttathayamma had four children, namely, plaintiff, defendant No.4, Subbaramaiah (who pre-deceased Puttathayamma) and Indiramma. Indiramma was in possession of the schedule property. After the death of Puttathayamma, plaintiff and defendant No.4 were residing in their matrimonial homes away from Puttathayamma. Defendant No.1 had cremated Indiramma. Appellant and defendant No.4 had not been present at the time of the cremation. Subsequently, they demanded the possession of the house which the first defendant refused to hand over. The first defendant claimed to have put 5th defendant in possession as a mortgagee. Therefore they filed the suit claiming title over the property and possession thereof. In the written statement defendant No.1 claimed that entire movable and immovable property had been bequeathed to Indiramma in a Will dated 18.6.1974. The first appellate court upon examination of the entire evidence accepts the submission made on behalf of the petitioners that the execution of the Will is shrouded by suspicious circumstances. The first appellate court also negatived the submission made on behalf of the first defendant that the plaintiffs have admitted the execution of the Will in the subsequent suit. Upon examination of the evidence, the first appellate court had come to the conclusion that PW1 had not admitted the genuineness of the Will anywhere. This witness had also stated that he had come to know about the Will of Puttathayamma from the written statement filed by defendant No.1. It is, therefore, held that there can be no presumption with regard to the genuineness of the Will on the basis of the alleged admission. Therefore the first appeal was allowed, judgment and decree of the Trial Court were set aside. The suit filed by the plaintiffs/appellants was decreed with costs declaring that the legal representatives of the plaintiffs are the owners of the suit property and they are entitled for possession of the suit schedule property.

12. Aggrieved against this, defendant No.1 filed Regular

Second Appeal No.641 of 2003 in the High Court of Karnataka, Bangalore. The High Court allowed the Regular Second Appeal and nonsuited the plaintiffs, with the following observations:-

> "5. The contesting 1st defendant does not set up a rival claim of title, but only disputes the title of the plaintiffs and their right to seek possession. According to the 1st defendant, Ex.D7 is the registered will executed by Puttathayamma in favour of her daughter, Indiramma. As argued by Shri T.N. Raghupathy, learned counsel for respondents-appellants, I find that PW1-1st plaintiff has unequivocally admitted in his evidence, about issuance of legal notice prior to the filing of the suit and allegations are made therein about execution of the will by Puttathayamma in favour of Indiramma and also admits that she was married to one Chalapati Rao who predeceased her and through his first wife, had four children. Ex.D36 is the certified copy of the plaint in OS 233/98 filed by the plaintiffs herein. In the said suit, there is categorical averment to the effect that Puttathayamma, during her lifetime, had executed the will, bequeathing her immovable properties in favour of Indiramma. When execution of the will has become an admitted fact by the plaintiff, formal proof of execution by examining the attestors would not be necessary in law. Therefore, I am unable agree with Sri Kashinath, learned counsel for the respondent that the will is not prove. Further the finding of the appellate court that the will is shrouded with suspicious circumstances is based on unwarranted surmises and contrary to the admissions of the plaintiff. Accordingly, point no. (1) is answered in the affirmative."

13. The High Court further holds that since the property had been acquired by Indiramma through Will, Section 15(2) of the Act would not be applicable. It is noticed that "The provisions of Section 15 (2) will apply only when the property is acquired by a female by way of intestate succession, otherwise, the

property would devolve as directed under sub-Section (1). May be, the children of deceased husband of Indiramma being step sons, are not entitled to succession under sub-sec. (1) (a), but however as heirs of the husband, under sub-sec. (1) (b) of Sec.15, they will be entitled to succeed to the estate. In that view of the matter, the claim of title of property by the plaintiffs is untenable." It is further held that since the children of the first wife would be entitled to succeed to the estate, the appellants (plaintiffs) have no right to seek the relief of title by succession. Consequently, the appeal was allowed. The judgment and decree of the Appellate Court was set aside. The judgment and decree of the Trial Court was confirmed. This judgment is challenged before us in the present appeal.

14. Mr. Bhat, learned counsel for the appellants has submitted that the judgment of the High Court is wholly erroneous in facts as well as in law. According to the learned counsel, the first appellate court has rightly held that the execution of the Will has not been proved. There is no admission with regard to the execution or the genuineness of the Will in the second suit. It was merely stated that a Will has been executed by Puttathayamma. The Will had to be proved in accordance with the procedure laid down under Section 63 of the Act and in accordance with Section 68 of the Indian Evidence Act. The first appellate court, upon examination, of the entire circumstances came to the conclusion that the Will is shrouded by suspicious circumstances. The High Court, without examining any of the real issues has brushed aside the reasons given by the first appellate court. According to the learned counsel, the second suit had been filed by the appellants herein only to prevent respondent No.1 from dealing with the movable properties of Puttathayamma. Even if the execution of the Will is admitted, its genuineness had to be established by respondent No.1. None of the attesting witnesses were examined. The Sub Registrar was also not examined. DW2, the scribe did not anywhere mention that he had attested the Will. Therefore, his examination as a witness

would not cure the defects. The High Court has also ignored the fact that Indiramma has taken an active part in execution of the Will. She was present when the Will was written. She was also present before the Sub Registrar. According to the learned counsel, the mother was not in a fit state of mind to have executed the Will, shortly after the death of her only son. This fact has been totally ignored by the High Court. If she had been the author of the Will, she would not have described her son as a "bachelor" whereas in fact he was a "divorcee". According to the learned counsel, the Will is a manufactured document created by defendant No.1 to exclude the appellants from succession. Learned counsel further submitted that since it was a judgment of reversal, it was necessary for the High Court to give cogent reasons to explain as to how the conclusions reached by the first appellate court were not acceptable. The High Court has reversed the judgment without giving any reasons. In support of his submissions, learned counsel has relied on the following judgments:-

(1) *Jayantilal Mansukhlal and another vs. Mehta Chhanalal Ambalal,* AIR 1968 Gujarat 212;

(2) *State of Punjab vs. Balwant Singh and others,* 1992 Supp (3) Supreme Court Cases 108;

(3) *V. Dandapani Chettiar vs. Balasubramanian Chettiar (Dead) by L.Rs. and Others,* (2003) 6 Supreme Court Cases 633;

(4) *Palanivelayutham Pillai and others vs. Ramachandran and others,* (2000) 6 Supreme Court Cases 151; and

(5) *K. Kamalam (dead) and another vs. Ayyasamy and another,* 2001 (7) Supreme Court Cases 503.

15. According to the learned counsel, the property would be thus inherited by the appellants as Puttathayamma died

intestate. He further submitted that even if the Will dated 18.6.1974 is accepted as valid, defendant No.1 cannot inherit the property of Indiramma as she had died intestate. The Will dated 2.10.84 propounded by defendant No.1 to have been made by Indiramma has not been proved. Therefore, again under Section 15 (2) of the Act, the property will revert back to the plaintiffs/appellants. Learned counsel emphasized that defendant No.1 has no locus standi to contest the title of the appellants as he is a complete outsider for the family. Section 15 of the Act has been enacted to ensure that the property remains within the family. Therefore, this court has consistently held against stranger in matters of succession.

16. Learned counsel for the respondents, on the other hand, submitted that the Will from Puttathayamma is proved. There are no reasons to disbelieve a registered Will. The exclusion of the other daughters was because they were married and well settled. Therefore, the property was given in good faith to the unmarried Indiramma. Learned counsel further submitted that if a respondent is a trespasser, equally the appellants have not proved any better title. The first appellate court has wrongly stated that there is no explanation with regard to the custody of the Will as it was given to respondent No.1 by Indiramma. It is further submitted that the suspicious circumstances pointed out by the appellants are only conjectural. Therefore, the High Court has rightly disregarded the same. Genuineness of the Will cannot be disbelieved merely because the Sub Registrar or the scribe was not examined. It was not mandatory to examine either the scribe or the Sub Registrar. Indiramma's presence in the house at the time when the Will was written is natural as she was living with Puttathayamma. The description of the son in the Will as "bachelor" instead of "divorcee" would not be so material. The testator only wanted to say that he was unmarried. The appellants have failed to lead any evidence that Puttathayamma was not in a sound and disposing mind due to the death of her son. In fact it was only because her son had died that she

bequeathed her property to Indiramma. Learned counsel further submitted that in view of the admission about the execution of the Will made in the subsequent suit, it cannot possible by held that the Will was not duly proved. According to the learned counsel, admissions are the best form of evidence. Unless it is effectively rebutted, the same can be relied upon. He relies on the following judgments:-

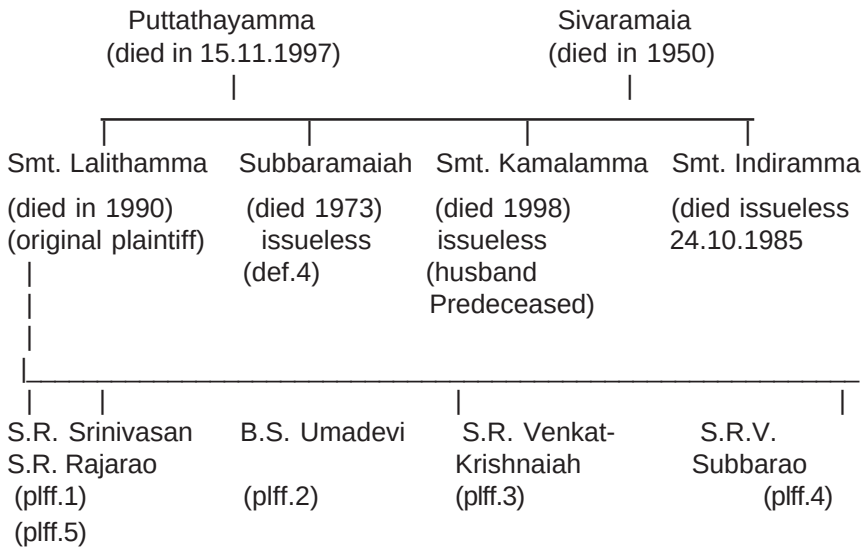
(1) *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi and others,* AIR 1960 Supreme Court 100;

(2) *Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others,* AIR 1974 Supreme Court 471; and

(3) *Gautam Sarup vs. Leela Jetly and others,* (2008) 7 SCC 85.

17. In reply, Mr. Bhat has submitted that there is no clear admission in the subsequent suit which was only to prevent the respondents to be away from the movable property. In any event, admissions cannot be relied upon to dispense with proof of the Will as required under law. He relies on the judgments in the cases of *Somnath Berman v. Dr.S.P. Raju and another,* AIR 1970 Supreme Court 846 and *Smt. Jaswant Kaur v. Smt. Amrit Kaur and others,* AIR 1977 Supreme Court 74.

18. We have considered the submissions made by the learned counsel for the parties. It is not disputed that respondent No.1 is a rank outsider. He is not a lineal descendant of Puttathayamma. He is son of Puttathayamma's sister Seethamma. This would become clear from the genealogical graph of the family which is as under:-



19. Clearly if the Will dated 18.61974 is held not to be genuine, the property would be inherited by the appellants under Section 15 (2) of the Act. There is no dispute on this proposition of law by either side. The only question that needs determination in this case is as to whether the Will executed by Puttathayamma has been proved to be duly executed and the same was genuine.

20. The statutory provision regarding the rules of succession in case of female Hindus as enacted in Section 15 of the Hindu Succession Act, 1956 is as follows:

"15. *General rules of succession in the case of female Hindus*.—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,—

(*a*) firstly, upon the sons and the daughters (including the children of any predeceased son or daughter) and the husband;

(*b*) secondly, upon the heirs of the husband;

(*c*) thirdly, upon the mother and father;

(*d*) fourthly, upon the heirs of the father; and

(*e*) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

(*a*) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(*b*) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

21**.** A perusal of the aforesaid provisions would show that the basic aim of Section 15(2) is to ensure that inherited property of an issueless female Hindu dying intestate goes back to the source. It was enacted to prevent inherited property falling into the hands of strangers. This is also evident from the recommendations of the Joint Committee of the Houses of Parliament, which have been duly noticed by this Court in the case of *State of Punjab v. Balwant Singh,* 1992 Supp (3) SCC 108. The scheme underlying the introduction of the aforesaid provision had been discussed as follows**:**

"It came to be incorporated on the recommendations of the Joint Committee of the two Houses of Parliament. The reason given by the Joint Committee is found in clause (17) of the Bill which reads as follows:

"While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly

property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass."

15**.** The report of the Joint Committee which was accepted by Parliament indicates that sub-section (2) of Section 15 was intended to revise the order of succession among the heirs to a Hindu female and to prevent the properties from passing into the hands of persons to whom justice would demand that they should not pass. That means the property should go in the first instance to the heirs of the husband or to the source from where it came."

22. This Court had occasion to consider the scheme of the aforesaid Section in the case of *V. Dandapani Chettiar v. Balasubramanian Chettiar,*(2003) 6 SCC 633. The extent and nature of the rights conferred by this section is expressed as follows**:-**

"9. The above section propounds a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. This section groups the heirs of a female intestate into five categories described as Entries (*a*) to (*e*) and specified in sub-section (1). Two exceptions, both of the same nature are engrafted by sub-section (2) on the otherwise uniform order of succession prescribed by sub-section (1). The two exceptions are that if the female dies without leaving any issue, then (*1*) in respect of the property inherited by her from her father or mother, that property will devolve not according to the order laid down in the five Entries (*a*) to (*e*), but upon the heirs of the father; and (*2*) in respect of the property inherited by her from her husband or father-in-law, it will devolve not according to the order laid down in the five Entries (*a*) to (*e*) of sub-section (1) but upon the heirs of the husband. The two exceptions mentioned above

are confined to the property "inherited" from the father, mother, husband and father-in-law of the female Hindu and do not affect the property acquired by her by gift or by device under a Will of any of them. The present Section 15 has to be read in conjunction with Section 16 which evolves a new and uniform order of succession to her property and regulates the manner of its distribution. In other words, the order of succession in case of property inherited by her from her father or mother, its operation in confined to the case of dying without leaving a son, a daughter or children of any predeceased son or daughter."

"10**.** Sub-section (2) of Section 15 carves out an exception in case of a female dying intestate without leaving son, daughter or children of a predeceased son or daughter. In such a case, the rule prescribed is to find out the source from which she has inherited the property. If it is inherited from her father or mother, it would devolve as prescribed under Section 15(2)(*a*). If it is inherited by her from her husband or father-in-law, it would devolve upon the heirs of her husband under Section 15(2)(*b*). The clause enacts that in a case where the property is inherited by a female from her father or mother, it would devolve not upon the other heirs, but upon the heirs of her father. This would mean that if there is no son or daughter including the children of any predeceased son or daughter, then the property would devolve upon the heirs of her father. Result would be — if the property is inherited by a female from her father or her mother, neither her husband nor his heirs would get such property, but it would revert back to the heirs of her father."

23. As noticed earlier by virtue of Section 15(2) (a) of the Act, the appellants would inherit the property in dispute. This right is sought to be defeated by defendant No.1 on the basis of the Will dated 18.6.1974, allegedly executed by Puttathayamma. Defendant No.1 being the sole beneficiary under the Will claims that the plaintiffs can not claim to 'inherit'

the property on the basis of intestate succession. Undoubtedly, therefore, it was for defendant No.1 to prove that the Will was duly executed, and proved to be genuine.

24. The mode, the manner and the relevant legal provisions which govern the proof of Wills have been elaborately dilated upon by this Court in a number of cases. We may make a reference only to some of these decisions.

25. In the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma,* [1959 Supp (1) SCR 426] Gajendragadkar J. stated the true legal position in the matter of proof of Wills. The aforesaid statement of law was further clarified by Chandrachud J. in the case of ***Jaswant Kaur*** *v* ***Amrit Kaur*** [(1977) 1 SCC 369] as follows:

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on

proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence

of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

26. Applying the aforesaid principles to this case, it would become evident that the Will has not been duly proved. As noticed earlier in this case, none of the attesting witnesses have been examined. The scribe, who was examined as DW.2, has not stated that he had signed the Will with the intention to attest. In his evidence, he has merely stated that he was the scribe of the Will. He even admitted that he could not remember the names of the witnesses to the Will. In such circumstances, the observations made by this Court in the case of *M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons,* [(1969) 1 SCC 573], become relevant. Considering the question as to whether a scribe could also be an attesting witness, it is observed as follows:

> "It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

27. In our opinion, the aforesaid test has not been satisfied by DW.2 the scribe. The situation herein is rather similar to the circumstances considered by this Court in the case of *N. Kamalam v. Ayyasamy,* [(2001) 7 SCC 503]. Considering the effect of the signature of scribe on a Will, this Court observed as follows:

> "26.The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses."

"The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself — this is again, however, not the situation existing presently in the matter under consideration."

28. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will can be held to have been proved when the statutory requirements for proving the Will are satisfied. The High Court has however held that proof of the Will was not necessary as the execution of the Will has been admitted in the pleadings in O.S.No.233 of 1998, and in the evidence of P.W.1.

29. The contention that the execution of the Will has been admitted by the appellants herein had been negated by the First Appellate Court in the following manner:

"What is admitted under EXD 36 i.e. plaint in O.S No: 233/98 at Para 7 is only about the will and not the genuineness of the will. During evidence of PW 1, it is elicited in the cross examination that he came to know about the will of Puttathayamma as it was revealed in the written statement and that Puttathayamma might have written the will dated 4-7-74. But PW 1 has not admitted the genuineness of the will anywhere in his evidence. Therefore the contention of

the learned Advocate for the first respondent that the execution of the will is admitted and therefore its genuineness is to be presumed cannot be accepted"

30. The aforesaid findings are borne out from the record produced before us, which we have perused. There is no admission about the genuineness or legality of the Will either in the plaint of OS No.233 of 1998 or in the evidence of PW1. The High court committed a serious error in setting aside the well considered findings, which the first Appellate Court had recorded upon correct analysis of the pleadings and the evidence.

31. It is undoubtedly correct that a true and clear admission would provide the best proof of the facts admitted. It may prove to be decisive unless successfully withdrawn or proved to be erroneous. The legal position with regard to admissions and their evidentiary value has been dilated upon by this Court in many cases. We may notice some of them.

32. In the case of *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi* (1960) 1 SCR 773 it was observed as follows:

"An admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous."

33. In the case of *Nagindas Ramdas v. Dalpatram Ichharam,* (1974) 1 SCC 242, it has been observed:

"Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can

be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

34. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of *Gautam Sarup v. Leela Jetly,* (2008) 7 SCC 85 wherein it was observed as follows:

"16.A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom."

"28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

35. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the Will, in view of the admissions made

in OS No.233 of 1998 and the evidence of PW1. In fact there is no admission except that Puttathayamma had executed a Will bequeathing only the immovable properties belonging to her in favour of Indiramma. The First Appellate Court, in our opinion, correctly observed that the aforesaid admission is only about the making of the Will and not the genuineness of the Will. Similarly, PW1 only stated that he had come to know about the registration of the Will of his grandmother favouring Indiramma through the written statement of the first defendant. The aforesaid statement is followed by the following statements "Other than that I did not know about the Will. She was not signing in English. I have not seen her signing in Kannada. There was no reason for my grand mother to write a Will favouring Indiramma." Even in the cross-examination he reiterated that "I know about the will written by Puttathayamma on 18.6.1974 bequeathing the properties to Indiramma only through the written statement of the first defendant." In view of the above we are of the opinion that the High Court committed an error in setting aside the well-considered finding of the First Appellate Court. The statements contained in the plaint as well as in the evidence of PW1 would not amount to admissions with regard to the due execution and genuineness of the Will dated 18.6.1974.

36. In our opinion, the High Court also committed a serious error by totally disregarding the suspicious circumstances surrounding the execution of the Will. The First Appellate Court on analysis of the entire evidence had clearly recorded cogent reasons to conclude that the execution of the Will is surrounded by suspicious circumstances.

37. The First Appellate Court pointed out that the execution of the Will has not been proved as none of the attesting witnesses have been examined. The scribe who was examined as DW.2 nowhere stated that he had attested the Will. The animus to attest was not evident from the document. In the Will, D.W.2 had described himself as the scribe of the Will and signed as such. Therefore, in view of the ratio of law laid down

in *N. Kamalam* (supra) the statutory requirement of attestation was clearly not satisfied.

38. The First Appellate Court also observed that the Will is not genuine, its execution being shrouded in suspicious circumstances. It is noticed by the First Appellate Court that although Puttathayamma had been allotted certain specific property, there is no recital in the Will as to which of the properties had been bequeathed to Indiramma. It is further noticed that son of Puttathayamma died on 27.10.73. She had, therefore, inherited the property which had been allotted to the share of the respondent. The Will does not describe the exact property that may have been bequeathed by Puttathayamma in favour of Indiramma. Non-description of the schedule property creates a reasonable suspicion as to whether Puttathayamma executed the Will Ex.D7. It is noticed that if she had the intention of bequeathing all her property to Indiramma, she would have mentioned the details of all the properties which belonged to her in the Will. The First Appellate Court further holds that no reason has been given as to why the Will was presented before the Sub Registrar on two separate occasions for registration. Although the son of Puttathayamma died after having been divorced from his wife he is described in the Will as a bachelor. No reason has been stated in the Will as to why the other two daughters have been excluded from the property by Puttathayamma. Since the suspicious circumstances have not been explained by defendant No.1, the Will is not genuine. The First Appellate Court also notices that although Indiramma is the sole beneficiary in the Will, she was present at the time when the Will was written. She was also present in the office of Registrar when the Will was presented for registration. This would clearly show that Indiramma had an evil eye on the suit property and, therefore, the descriptions of the other properties were not given. The active participation of Indiramma in the writing and the registration of the Will may well create a suspicion about its genuineness. We may notice here the observations made by this Court in the case of *Ramachandra*

v. Champabia [AIR 1965 SC 357]. This Court has held as follows:

> "This Court also pointed out that apart from suspicious circumstances of this kind where it appears that the propounder has taken a prominent part in the execution of the will which confers substantial benefits on him that itself is generally treated as a suspicious circumstances attending the execution of the will and the propounder is required to remove the suspicion by clear and satisfactory evidence. In other words, the propounder must satisfy the conscience of the court that the document upon which he relies in the last will and testament of the testator."

39. Since there were suspicious circumstances, it was necessary for the defendants to explain the same. The registration of the Will by itself was not sufficient to remove the suspicion. The first appellate court also notices that even in cases where the execution of the Will is admitted, at least one attesting witness of the Will has to be examined to receive the Will in evidence. DW2, who has been examined is the scribe of the Will, has given no plausible reasons as to why the Will was presented twice before the Sub Registrar for registration. Nor is it stated by this witness as to why the Will was not registered on the first occasion. It is also held by the First Appellate Court that non-examination of the Sub Registrar creates suspicion about the genuineness of the Will. Even the attesting witnesses to the Will have not been examined. There is no evidence whether the Will was read over by the Sub Registrar or anybody else before it was registered. It is not explained as to how the Will came into possession of defendant No.1. There is no evidence when he was put in proper custody of the Will. Considering the cumulative effect of all the circumstances, the First Appellate Court has held that execution of the Will is surrounded by suspicious circumstances. Consequently, the appeal was allowed and the judgment of the Trial Court was set aside.

40. The High Court in its judgment seems to have misread the entire evidence. Aforesaid findings recorded by the First Appellate Court have been brushed aside by dubbing them as conjectural. We are unable to appreciate the course adopted by the High Court. It was so influenced by the alleged admission made by the plaintiffs in the second suit, it did not deem it appropriate to examine the material which formed the basis of the findings recorded by the First Appellate Court. It appears that the pleadings, documents and the evidence was not read by the High Court yet it concluded that the findings of the Appellate Court were conjectural. We are unable to endorse the view expressed by the High Court.

41. The High court ought to have taken great care to satisfy its judicial conscience that the execution of the Will was not surrounded by suspicious circumstances. The Appellate Court had pointed out so many suspicious circumstances which could not have been brushed aside as being conjectural. The findings were based on documentary evidence. It was necessary for the defendant No.1 to answer a number of pertinent questions relating to the execution of the Will.

42. It was also necessary for the High Court to exercise care and caution to ensure that the propounder of the Will has removed all legitimate suspicion. We have earlier noticed that in this case Indiramma was living with her mother Puttathayamma at the time of her death. She was the sole beneficiary under the Will dated 18.6.1974. Her sisters, the original plaintiff and defendant No.4 that is, Lalithamma and Kamalamma had been excluded from the inheritance. There is no convincing reason as to why they were excluded from the inheritance. The Will merely mentions that these two ladies are well settled in their lives whereas Indiramma was not married. The Will does not specify which of the properties has been bequeathed to Indiramma, although Puttathayamma has been allotted certain specific property. Puttathayamma's son had died on 27.10.73 and the Will is stated to have been made on 18.6.1974. The Will is signed by Indiramma, even though she

is the sole beneficiary under the Will. She was present in the office of the sub-Registrar at the time when the Will was registered. There is also a question as to why the Will was presented for registration on two different occasions. It appears that on the date when the Will was executed Indiramma also obtained a power of attorney from her mother which would demonstrate her anxiety to come into possession of the property immediately. Neither the scribe (DW2) nor DW1 were able to give any satisfactory explanation as to why the Will was not registered on the first occasion. In such circumstances it was the duty of the of the High Court to carefully examine the findings recorded by the lower Appellate Court together with the relevant documents on the record to ensure that there is a proper explanation given by defendant No.1 of the aforesaid suspicious circumstances. This Court in *Iyengar* case *(*supra) had clearly held that cases in which the execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. In such circumstances it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the Will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the Will was made.

43. In our opinion, the High Court failed to exercise proper care and caution by not thoroughly examining the evidence led by the party, especially when it was not in agreement with the reasons recorded by the First Appellate Court. In the case of *Jaswant Kaur v. Amrit Kaur,* (1977) 1 SCC 369 this Court reiterated the principles governing the proof of a Will which is alleged to be surrounded by suspicious circumstances. Justice Chandrachud speaking for the Court observed as follows:

> "8**.** The defendant who is the principal legatee and for all practical purposes the sole legatee under the will, is also the propounder of the will. It is he who set up the will in

answer to the plaintiff's claim in the suit for a one-half share in her husband's estate. Leaving aside the rules as to the burden of proof which are peculiar to the proof of testamentary instruments, the normal rule which governs any legal proceeding is that the burden of proving a fact in issue lies on him who asserts it, not on him who denies it. In other words, the burden lies on the party which would fail in the suit if no evidence were led on the fact alleged by him. Accordingly, the defendant ought to have led satisfactory evidence to prove the due execution of the will by his grandfather Sardar Gobinder Singh.

9**.** In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will."

44. In our opinion, the High Court failed to examine the entire issue in accordance with the aforesaid principles laid down by this Court. We are, therefore, unable to uphold the impugned judgment. The appeal is allowed. Judgment of the High court is set aside and the judgment of the First Appellate Court i.e. the Court of the Principal Civil Judge (Senior Division) at Mysore is restored.

D.G. Appeal allowed.

N. SURESH NATHAN & ORS., ETC. ETC.

v.

UNION OF INDIA & ORS. ETC. ETC.

(Civil Appeal No. 8468 of 2003)

APRIL 22, 2010

[J.M. PANCHAL AND A.K. PATNAIK, JJ.]

Assistant Engineers (Including Deputy Director of Public Works Department) Group B(Technical) Recruitment Rules, 1965:

rr. 5 and 11(1) – Promotion to post of Assistant Engineer under 50% quota for degree-holder category of Section Officers/Junior Engineers – HELD: Clause (1) of Rule 11 does not provide for a separate stream or channel of promotion exclusively for degree-holders, who have completed three years service – In view of r.5, post of Assistant Engineer being a selection post, merit is the sole criteria and seniority in the grade of Section Officers/Junior Engineers is not at all relevant – Therefore, all the Section Officers/Junior Engineers who are eligible for consideration under Rule 11(1) would be considered on the basis of comparative merit – Constitution of India, 1950 – Articles 16 and 141 – Code of Civil Procedure, 1908 – s.11.

Constitution of India, 1950:

Article 141 – Law declared by Supreme Court to be binding on all courts – Decision of Supreme Court in **N. Suresh Nathan's** *case – HELD: Was confined to the eligibility for consideration for promotion to 50% vacancies for the posts of Assistant Engineers/Public Works Department, Pondicherry meant for degree-holder or equivalent in the grade of Section Officer/Junior Engineer, and there was no law declared by the Court, to be binding under Article 141, on the*

issue as to how Section Officers/Junior Engineers who become qualified for promotion to the post of Assistant Engineers would be considered for promotion – Nor would the said decision constitute **res judicata** *on the issue – Precedents – Code of Civil Procedure, 1908 – s.11 – Assistant Engineers (Including Deputy Director of Public Works Department) Group B(Technical) Recruitment Rules, 1965 – rr. 5 and 11(1).*

Promotion of appellant nos. 1 to 7 to the posts of Assistant Engineers, Public Works Department was challenged by respondent nos. 2 to 7, before the Central Administrative Tribunal. The Tribunal dismissed the application holding that in view of the decision of the Supreme Court in *N. Suresh Nathan's*[1] **case, with regard to the procedure to be adopted for promotion of Section Officers/Junior Engineers, the applicants before it could not be allowed to raise the point once again nor was it open to the Tribunal to hold otherwise. But, the writ petition filed by the respondents challenging the order of the Tribunal was allowed by the High Court holding *inter alia* that the judgment of the Supreme Court in** *N. Suresh Nathan* **did not operate as** *res judicata.* **A review DPC was directed to be held.**

Disposing of the appeals, the Court

HELD: 1. In *N. Suresh Nathan & Ors.****, this Court confined its decision to the qualification or eligibility for consideration for promotion to 50% vacancies for the post of Assistant Engineer meant for degree-holders or equivalent in the grade of Section Officer/Junior Engineer and held that only those Section Officers/Junior Engineers, who had completed three years' service after obtaining degree, were qualified or eligible for consideration to the 50% vacancies meant for the category of degree-holders or equivalent. In the said**

1. (1991) 2 Suppl. SCR 423.

judgment, this Court did not decide on how the Section Officers/Junior Engineers who had completed three years' service in the grade after the degree in Civil Engineering or equivalent and had the qualification or eligibility for consideration for promotion to the 50% vacancies meant for the category of degree-holders would be considered for promotion. Therefore, in *N. Suresh Nathan & Ors.,* there was no law declared by this Court so as to be binding on the courts under Article 141 of the Constitution, on the issue as to how Section Officers/Junior Engineers, who become qualified or eligible for promotion to the post of Assistant Engineer would be considered for promotion; and, therefore, the decision in *N. Suresh Nathan* **would also not constitute** *res judicata* **on the said issue. [Para 13-15] [1027-F-H; 1028-A-D-E; 1029-A-B]**

N. Suresh Nathan & Ors. v. Union of India & Ors.* **(1991) 2 Suppl. SCR 423 = (1992) 1 Suppl. SCC 584 - explained and distinguished.

2.1. Clause (1) of Rule 11 is only a provision laying down the qualification or eligibility for promotion to 50% of the posts of Assistant Engineers and the qualification or eligibility provided therein is either three years service in the grade of Section Officer/Junior Engineer after degree in Civil Engineering or equivalent, or six years service in the grade of Section Officer/Junior Engineer with diploma in Civil Engineering. The provision also has a rider that if there are Section Officers/Junior Engineers, who have put in three years service after acquiring degree or equivalent, available for consideration for vacancies, then they will be considered first for promotion and the turn for consideration for promotion of diploma-holders in Civil Engineering with six years service in the grade of Section Officer/Junior Engineer will come only thereafter. Thus, the Rule itself provides that if for

vacancies in the posts of Assistant Engineers, Section Officers/Junior Engineers possessing a recognized degree in Civil Engineering or equivalent with three years' service in the grade are not available, then Section Officers/Junior Engineers holding diploma in Civil Engineering with six years' service in the grade would be eligible for promotion. It cannot, therefore, be accepted that Clause (1) of Rule 11 provides for a separate stream or channel of promotion exclusively for degree-holders, who have completed three years service. [para 23] [1033-E-H; 1034-A-C]

2.2. Rule 5 of the Recruitment Rules states that the post of Assistant Engineer in the Public Works Department is a selection post. The Recruitment Rules, however, do not lay down that seniority-cum-merit would be the criteria for promotion to the selection post of Assistant Engineer. The person, who is most meritorious, is the most suitable person to be promoted to the selection post. Thus, merit is the sole criteria for promotion to the selection post and, therefore, question of seniority in the grade of Section Officer/Junior Engineer is not at all relevant for promotion to the post of Assistant Engineer. [Para 29-30] [1036-E-F-G; 1037-E-F]

Dr. Jai Narain Misra v. State of Bihar & Ors. **(1971) 1 SCC 30; and** *Guman Singh, etc. v. State of Rajasthan & Ors.* **(1971) 2 SCC 452, relied on.**

R. B. Desai & Anr. v. S. K. Khanolkar & Ors. **(1999) 7 SCC 54;** *Chandravathi P.K. & Ors. v. C.K. Saji & Ors*. **2004 (2) SCR 330 = (2004) 3 SCC 734;** *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* **2007 (5) SCR 190 = (2007) 5 SCC 535; and** *M.B. Joshi v. Satish Kumar Pandey* **1993 Supp.(2) SCC 419, referred to.**

Suman Gupta v. State of J & K **(1983) 4 SCC 339;**

Munidra Kumar v. Rajiv Govil **(1991) 3 SCC 368;** *Satya Narain Shukla v. U.O.I.* **(2006) 9 SCC 69;** P.U. *Joshi v. Accountant General* **(2003) 2 SCC 632;** *U.O.I. v. Pushpa Rani* **(2008) 9 SCC 242;** *Inderjeet Khurana v. State of Haryana* **(2007) 3 SCC 102;** *U.O.I. v. A.K. Narula* **(2007) 11 SCC 10; and** *A. K. Raghumani Singh & Ors. v. Gopal Chandra Nath & Ors.* **(2000) 2) SCR 943 = (2000) 4 SCC 30, cited.**

2.3. In the absence of any indication in the Recruitment Rules that seniority in the grade of Section Officer/Junior Engineer will be counted for the purpose of promotion to the post of Assistant Engineer, consideration of all Section Officers/Junior Engineers under Clause (1) of Rule 11 of the Recruitment Rules who are eligible for such consideration has to be done on the basis of assessment of the comparative merit of the eligible candidates and the most suitable or meritorious candidate has to be selected for the post of Assistant Engineer. Such a method of selection will be consistent with Rule 5 of the Recruitment Rules and Article 16 of the Constitution which guarantees to all citizens equality of opportunity in matters of public employment. [Para 34] [1040-F-H; 1041-A]

2.4. In the considered opinion of the Court, therefore, the practice adopted by the Government on the advice of the UPSC of counting the service of the eligible candidates from the date of acquisition of the degree in Civil Engineering by them and the judgment and order of the High Court directing that the entire service of eligible candidates, both prior and after acquisition of the degree of Civil Engineering by them, would be counted for the purpose of promotion to the post of Assistant Engineer under Clause (1) of Rule 11 of the Recruitment Rules are contrary to the fundamental right guaranteed under Article 16 of the Constitution and r. 5 of the Recruitment Rules which are made under Article 309 of the Constitution. [Para 34] [1041-B-C]

3. The judgment of the High Court is set aside and the Government of Pondicherry is directed to consider, in accordance with merit, the cases of all Section Officers/ Junior Engineers, who have completed three years' service in the grade of Section Officers/Junior Engineers. It is made clear that the promotions to the posts of Assistant Engineers already made pursuant to the judgment and order of the High Court will not be disturbed until the exercise is carried out for promotion in accordance with merit as directed in this judgment and on completion of such exercise, formal orders of promotion to the vacancies in the posts of Assistant Engineers which arose during the pendency of the cases before this Court are passed in case of those who are selected for promotion and, after such exercise only, those who are not selected for promotion may be reverted to the post of Section Officer/Junior Engineer. [para 35] [1041-D-G]

Case Law Reference:

(1991) 2 Suppl. SCR 423	**distinguished**	**para 7**
(1999) 7 SCC 54	**referred to**	**para 8**
(2000) 2) SCR 943	**cited**	**para 8**
2004 (2) SCR 330	**referred to**	**para 18**
2007 (5) SCR 190	**referred to**	**para 19**
(1971) 1 SCC 30	**relied on**	**para 29**
(1971) 2 SCC 452	**relied on**	**para 30**
(1983) 4 SCC 339	**cited**	**para 31**
(1991) 3 SCC 368	**cited**	**para 31**
(2006) 9 SCC 69	**cited**	**para 31**
(2003) 2 SCC 632	**cited**	**para 31**

(2008) 9 SCC 242	**cited**	**para 31**
(2007) 3 SCC 102	**cited**	**para 31**
(2007) 11 SCC 10	**cited**	**para 31**
1993 Supp. (2) SCC 419	**referred to**	**para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8468 of 2003.

From the Judgment & Order dated 23.6.2003 of the High Court of Judicature at Madras in Writ Petition No. 11236 of 2000.

WITH

C.A. Nos. 698 of 2004, 3649-3650 of 2010 & 8470 of 2003.

J.L. Gupta, L.N. Rao, M.S. Ganesh, V.G. Kanagaraj, Rakesh Dwivedi, K.V. Viswanathan, Satya Mitra Garg, S. Thananjayan, G. Balaji (for M/s. Mahalakshmi Balaji & Co.) S.R. Setia, V.G. Pragasam, S.J. Aristotle, P. Ramasubramanian, M.A. Chinnasamy, K. Krishna Kumar, Neha Sharma, S. Krishna, Preetika Dwivedi, Mukti Chaudhary, Amit Singh, Abhishek Kaushik, P.B. Subramaian for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J.1. Leave granted in S.L.P. (C) Nos. 7174-7175 of 2009.

2. These are appeals against the judgment and order dated 23.06.2003 passed by a Division Bench of the Madras High Court in Writ Petition No.11236 of 2000.

3. The relevant facts briefly are that the Government of Pondicherry, Planning & Development Department, made the Assistant Engineers (including Deputy Director of Public Works Department) Group 'B' (Technical) Recruitment Rules, 1965 [for short 'the Recruitment Rules'] for the post of Assistant Engineers for the Public Works Department initially by a

Notification dated 31.01.1966. The Recruitment Rules were amended by a Notification dated 08.08.1986 and as per the amended Recruitment Rules the post of Assistant Engineer in the Public Works Department, Pondicherry, was a selection post and appointment to the 20% of the posts of Assistant Engineer was to be by direct recruitment and to the 80% of the posts by promotion. 50% of the promotion quota was to be filled up by Section Officers (now Junior Engineers) possessing a recognized degree in Civil Engineering or equivalent with three years service in the grade, failing which Section Officers holding diploma in Civil Engineering with six years service in the grade and the remaining 50% of the promotion quota was to be filled up by Section Officers (Junior Engineers) possessing a recognized diploma in Civil Engineering with six years service in the grade.

4. On 24.09.1968, the Chief Secretary, Government of Pondicherry, wrote to the Secretary, Union Public Service Commission (for short 'the UPSC') that there were Section Officers with diploma qualification who have acquired degree in Civil Engineering or equivalent and have putting in several years in service and having become qualified for consideration for 50% quota of the post of Assistant Engineers to be filled up by promotion and questions have arisen whether the service rendered by such Section Officers before and after possessing the degree or equivalent can be taken into account for consideration for promotion under the degree holders quota and whether their cases may be considered under the diploma holders quota as well for promotion to the post of Assistant Engineer. In the letter dated 24.09.1968, the Chief Secretary sought the advice of the Commission regarding the correct procedure to be followed in such cases. The UPSC gave its advice in its letter dated 06.12.1968 that the services of Section Officers, who qualify as graduates while in service, should be counted from the date they passed the degree or equivalent examination or from the date they started drawing Rs.225/- p.m. in the prescribed scale, whichever was earlier and Section

Officers may continue to be considered in the diploma holders quota in case it is advantageous to them and the Government followed this advice of the UPSC.

5. In 1989, however, some Junior Engineers, who were formerly Section Officers working in the Public Works and Local Administration Department of Government of Pondicherry, filed O.A. No. 552 of 1989 in the Central Administrative Tribunal, Madras Bench, (for short 'the Tribunal') and in its judgment and order dated 09.01.1990 the Tribunal held that when the Recruitment Rules require three years service in grade, the Section Officers (now Junior Engineers) who ceased to be mere diploma holders having acquired the degree qualification have to be regarded as having total experience put in the grade of Section Officers before and after acquiring the degree qualification and there was nothing in the Recruitment Rules to warrant the exclusion of a part of the experience acquired by such Junior Engineers while functioning in the grade of Section Officers (Junior Engineers). The Tribunal accordingly directed that the cases of the applicants in the O.A. be considered for promotion to the post of Assistant Engineers on par with other degree holders Junior Engineers taking due note of their total length of service rendered in the grade of Junior Engineers and such a consideration should be along side other Junior Engineers, who might have acquired the necessary degree qualification earlier than the applicants while holding the post of Junior Engineers.

6. The judgment and order dated 09.01.1990 of the Tribunal was challenged by N. Suresh Nathan and Others before this Court in Civil Appeal No. 4542 of 1991 and this Court interpreting Rule 11 of the Recruitment Rules held in the judgment reported in 1992 Supp. (1) SCC 584 that the period of three years' service in the grade required for degree-holders as qualification for promotion in the category of degree-holders must mean three years' service in the grade as a degree-holder and, therefore, that period of three years can commence only

from the date of obtaining the degree and not earlier and this interpretation of Rule 11 was in conformity with the past practice followed consistently by the Government and that the Tribunal was not justified in taking the contrary view and accordingly allowed the appeal. Review Petition No.50 of 1993 was filed against the judgment and order dated 22.11.1991 of this Court in the aforesaid case but the same was dismissed on 31.01.1993.

7. Thereafter, appellant Nos. 1 to 7 were promoted to the post of Assistant Engineer on 08.03.1997. Respondent Nos. 2 to 7 challenged the promotion of the appellant Nos. 1 to 7 before the Tribunal in O.A. No. 359 of 1997 contending *inter alia* that this Court in its judgment in *N. Suresh Nathan & Ors*. v. *Union of India & Ors*. (supra) has only held that three years' service required for eligibility for the promotion quota reserved for the category of degree-holders or equivalent should be considered from the date of acquiring the degree or equivalent, but has not decided the question of seniority as between degree-holders or equivalent and diploma-holders in the grade. The Government of Pondicherry in its reply filed in O. A. No.359 of 1997 before the Tribunal contended that the Departmental Promotion Committee met on 29.09.1996 and keeping in view the direction of this Court in the judgment in *N. Suresh Nathan & Ors*. v. *Union of India & Ors*. (supra) selected the Section Officers/Junior Engineers to the post of Assistant Engineers by preparing two lists, one list for considering promotions to the post of Assistant Engineer for the degree-holders quota and another list for considering promotion to the post of Assistant Engineers for the diploma-holders quota. The Government of Pondicherry further clarified in its reply that in the first list those who had joined as Section Officers/Junior Engineers with degree in Civil Engineering were placed above the Section Officers/Junior Engineers who had joined the service with diploma in Civil Engineering but had subsequently acquired degree in Civil Engineering and in the second list, the Section Officers/Junior Engineers who had joined with diploma were

placed in order of seniority counted from the date of the joining in the grade. By the judgment and order dated 27.08.1999, the Tribunal dismissed O.A. No.359 of 1997 after holding that this Court has already taken a specific view in N. Suresh Nathan's case (supra) with regard to the procedure to be adopted for promotion of Junior Engineers in the Public Works Department of Pondicherry construing the recruitment rules and the applicants in O.A. should not be allowed to raise the point once again and that the judgment of this Court in N. Suresh Nathan's case was binding on the Tribunal and it was not open for the Tribunal to hold otherwise insofar as the interpretation of the recruitment rules for the post of Assistant Engineer in the Public Works Department in Pondicherry is concerned.

8. Aggrieved, respondents Nos.3, 4, 5 and 6 filed Writ Petition No.11236 of 2000 before the Madras High Court against the judgment and order dated 27.08.1999 of the Tribunal in O.A. No.359 of 1997 and by the impugned judgment and order, a Division Bench of the Madras High Court held *inter alia* that in *N. Suresh Nathan & Ors*. v. *Union of India & Ors*. (supra) this Court only decided the question of eligibility for promotion to the posts of Assistant Engineer meant for the category of degree-holders or equivalent, but did not decide the question of seniority of Section Officers/Junior Engineers, who had acquired a degree in Civil Engineering or equivalent after joining as Section Officers/Junior Engineers and, therefore, the judgment of this Court in *N. Suresh Nathan & Ors.* (supra) did not operate as *res judicata*. The Division Bench of the Madras High Court, relying on the decisions of this Court in *R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* [(1999) 7 SCC 54] and A. K. Raghumani Singh & Ors. v. Gopal Chandra Nath & Ors. [(2000) 4 SCC 30], further held in the impugned judgment and order that the entire service of a person concerned even before acquiring the degree in Civil Engineering or equivalent have to be counted for the purpose of seniority and promotion and directed that a review DPC should be held to consider the question of promotion of the

petitioners before the High Court vis-à-vis respondents 2 to 8 and other eligible persons, who had become eligible by the date of sitting of the DPC in 1996 and accordingly allowed the Writ Petition.

9. Mr. Jawahar Lal Gupta, Mr. L. Nageswar Rao and Mr. M.N. Rao, learned senior counsel appearing for the appellants, submitted that the view taken by the High Court in the impugned judgment and order is the same as has been taken by the Tribunal in its order dated 09.01.1990 in the earlier O.A. No.552 of 1989 and as the order dated 09.01.1990 of the Tribunal in O.A. No.552 of 1989 has been set aside by this Court in N. Suresh Nathan & Ors. (supra), the impugned judgment and order of the High Court cannot be sustained. They referred to the earlier order dated 09.01.1990 of the Tribunal in O.A. No.552 of 1989 to show that the Tribunal had directed the authorities to consider the applicants in the O.A. for promotion to the post of Assistant Engineer at par with other degree-holder Junior Engineers taking due note of their total length of service rendered in the grade of Junior Engineer, both before and after acquiring the degree of Civil Engineering or equivalent, and submitted that this Court set aside this direction of the Tribunal in the judgment in N. Suresh Nathan & Ors. (supra). They further submitted that once this Court set aside the order dated 09.01.1990 of the Tribunal in O.A. No.552 of 1989 on the ground that the order of the Tribunal was not in conformity with Rule 11 of the Recruitment Rules and the practice followed by the Department, the decision of this Court on the issue constitutes *res judicata* and the interpretation of Rule 11 of the Recruitment Rules by this Court was a declaration of law binding on the High Court under Article 141 of the Constitution.

10. Mr. M.S. Ganesh, learned senior counsel appearing for the Government of Pondicherry, reiterated these contentions of the learned counsel for the appellants.

11. Mr. Rakesh Dwivedi and Mr. K.V. Viswanathan,

learned counsel appearing for respondents No. 2 to 19, in their reply, contended that the High Court has rightly held in the impugned judgment and order that in *N. Suresh Nathan & Ors* (supra), this Court only decided the question of eligibility of Section Officers or Junior Engineers for promotion to the post of Assistant Engineers meant for the category of degree-holders and not the method in which the eligible candidates will be considered for promotion.

12. Para 5 of the judgment in *N. Suresh Nathan & Ors.* (supra) which contains the ratio decided by this Court is quoted herein below:

> "5. The Recruitment Rules for the post of Assistant Engineers in the PWD (Annexure C) are at pages 57 to 59 of the paper book. Rule 7 lays down the qualifications for direct recruitment from the two sources, namely, degree-holders and diploma-holders with three years' professional experience. In other words, a degree is equated to diploma with three years' professional experience. Rule 11 provides for recruitment by promotion from the grade of Section Officers now called Junior Engineers. There are two categories provided therein – one is of degree-holder Junior Engineers with three years' service in the grade and the other is of diploma-holder Junior Engineers with six years' service in the grade, the provision being for 50 per cent from each category. This matches with Rule 7 wherein a degree is equated with diploma with three years' professional experience. In the first category meant for degree-holders, it is also provided that if degree-holders with three years' service in the grade are not available in sufficient number, then diploma-holders with six years' service in the grade may be considered in the category of degree-holders also for the 50 per cent vacancies meant for them. The entire scheme, therefore, does indicate that the period of three years' service in the grade required for degree-holders according to Rule 11

as the qualification for promotion in that category must mean three years' service in the grade as a degree-holder and, therefore, that period of three years can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma-holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years' service as a degree-holder. The only question before us is of the construction of the provision and not of the validity thereof and, therefore, we are only required to construe the meaning of the provision. In our opinion, the contention of the appellants degree-holders that the rules must be construed to mean that the three years' service in the grade of a degree-holder for the purpose of Rule 11 is three years from the date of obtaining the degree is quite tenable and commends to us being in conformity with the past practice followed consistently. It has also been so understood by all concerned till the raising of the present controversy recently by the respondents. The tribunal was, therefore, not justified in taking the contrary view and unsettling the settled practice in the department."

13. On a close reading of the aforesaid para 5 of the judgment of this Court in N. Suresh Nathan & Ors. (supra), we find that this Court confined its decision to the qualification or eligibility for consideration for promotion to 50% vacancies for the post of Assistant Engineer meant for degree-holders or equivalent in the grade of Section Officers/Junior Engineers and held that only those Sections Officers or Junior Engineers, who had completed three years' service after obtaining degree, were qualified or eligible for consideration to the 50% vacancies meant for the category of degree-holders or equivalent. In the judgment in N. Suresh Nathan & Ors. (supra), this Court did not decide on how the Section Officers/Junior Engineers who had completed three years' service in the grade after the degree in Civil Engineering or equivalent and had the qualification or eligibility for consideration for promotion to the 50% vacancies

meant for the category of degree-holders would be considered for promotion.

14. Article 141 of the Constitution states that the law declared by this Court shall be binding on all the courts within the territory of India. In *N. Suresh Nathan & Ors.* (supra) this Court has set aside the order of the Tribunal dated 09.01.1990 in O.A. No.552 of 1989 after declaring that Section Officers/ Junior Engineers having three years' service in the grade after they acquired degree in Civil Engineering or equivalent will become qualified or eligible for promotion to the 50% vacancies meant for the category of degree-holders or equivalent. In N. Suresh Nathan & Ors. (supra) this Court has not declared any law on how these Sections Officers/Junior Engineers, who had become qualified or eligible for promotion to the post of Assistant Engineer under the category of degree-holders or equivalent, would be considered for such promotion. There was, therefore, no law declared by this Court on how Section Officers or Junior Engineers, who become qualified or eligible for promotion to the post of Assistant Engineer would be considered for promotion, which was binding on the courts under Article 141 of the Constitution.

15. Section 11 of the Code of Civil Procedure Code (for short 'CPC') titled '*Res judicata'* states that no court shall try any issue which was directly or substantially in issue between the same parties and which has been heard and finally decided by a competent court. Thus, unless an issue directly and substantially raised in the former case is heard and decided by the competent court, the principle of *res judicata* will not be attracted. In N. Suresh Nathan & Ors. (supra) this Court, while setting aside the order dated 09.01.1990 in O.A. No.552 of 1989, has decided that those Section Officers/Junior Engineers who complete three years' service after acquiring the degree in Civil Engineering or equivalent are qualified or eligible for consideration for promotion to the 50% quota of vacancies for the post of Assistant Engineer under the degree-holders

category but has not decided how such Section Officers/Junior Engineers who are qualified or eligible will be considered for such promotion under the degree-holders category. The decision of this Court in N. Suresh Nathan & Ors. (supra), therefore, did not constitute *res judicata* on the issue regarding the manner in which Section Officers/Junior Engineers who were qualified or eligible for consideration for promotion to the post of Assistant Engineer would be considered for promotion.

16. The High Court was, therefore, right in taking the view that in N. Suresh Nathan & Ors. (supra), this Court was concerned only with the question of eligibility but was not concerned whether the past services rendered by the diploma-holders would be counted for the purpose of seniority and that neither Article 141 of the Constitution nor the principle of *res judicata* was a bar for Tribunal or the High Court to consider whether past services of Section Officers/Junior Engineers who were diploma-holders before they acquired degree in Civil Engineering or equivalent could be counted for the purpose of promotion for the 50% vacancies for the post of Assistant Engineers meant for the category of degree-holders or equivalent.

17. Learned counsel for the appellants next submitted that Rule 11 of the Recruitment Rules provides for two streams or channels of promotion to the post of Assistant Engineer, Public Works Department, one stream or channel is for Sections Officers or Junior Engineers possessing a recognized degree in Civil Engineering or equivalent and the other for Section Officers/Junior Engineers holding diploma in Civil Engineering. They submitted that it is for this reason that the UPSC in its letter dated 06.12.1968 advised the Government that the services of Section Officers/Junior Engineers, who qualify as graduates while in service, should be counted from the date they passed the degree or equivalent while considering them for promotion for the channel or stream of promotion meant for Section Officers or Junior Engineers having degree in Civil

Engineering or equivalent and the Government of Pondicherry has acted on this advice of the UPSC.

18. Mr. Nageswar Rao cited the decision in *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* [(2004) 3 SCC 734] in which the question for consideration was whether in terms of the scheme of the Kerala Engineering Service (General Branch) Rules, diploma-holders were entitled to claim any weightage for the service rendered by them prior to their acquisition of degree qualification in the matter of promotion or transfer to higher posts when specific quota is fixed for graduates and diploma-holders in the matter of promotion and this Court, on a conjoint reading of Rules 4 and 5 of the Kerala Engineering Service (General Branch) Rules, held that a diploma-holder Assistant Engineer who subsequently acquired a degree qualification would be eligible for promotion as Assistant Executive Engineer, only in the event he fulfils the conditions precedent therefor and not otherwise and his case could be considered only after the cases of promotion of those who had been holding such degree qualification have been considered.

19. Mr. Ganesh adopted these arguments of learned counsel for the appellants and cited the decision in *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* [(2007) 5 SCC 535] wherein this Court interpreting the rules for promotion to the post of Assistant Engineers in CPWD, which has adopted by the DDA, found that 25% of the total posts of Assistant Engineers were to be filled up by promotion from the category of graduate Junior Engineers and 25% of the total posts were to be filled up by diploma-holders with eight years' service and held that a separate quota was, thus, prescribed for promotion of Junior Engineers for degree and diploma-holders to the higher post of Assistant Engineer. He submitted that in the aforesaid case of *Shailendra Dania & Ors.* (supra), this Court emphatically held that the service experience required for promotion from the post of Junior Engineer to the post of Assistant Engineer in the limited quota of degree-holder Junior

Engineers in the service experience of a degree-holder and cannot be equated with the service rendered as a diploma-holder. Relying on this decision, learned counsel for the Government of Pondicherry submitted that the prior service experience of a Section Officer or Junior Engineer while he was diploma-holder and when he had not acquired the degree in Civil Engineering or equivalent cannot be counted for the purpose of consideration for the 50% quota of promotion to the post of Assistant Engineer meant for degree-holders.

20. Learned counsel appearing for the respondents 2 to 19, on the other hand, submitted that Rule 11 of the Recruitment Rules does not provide for two streams or channels of promotion as contended by learned counsel for the appellants and it only lays down the qualification or eligibility of three years' service after degree in Civil Engineering or equivalent as a qualification or eligibility and once a diploma-holder acquires a degree in Civil Engineering or equivalent, his entire length of service both prior to acquisition of such degree in Civil Engineering or equivalent and after acquisition of such degree or equivalent has to be taken into consideration at the time of consideration for promotion to the post of Assistant Engineer meant for degree-holders.

21. Mr. Viswanathan cited this Court's decision in *R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* [(1999) 7 SCC 54] for proposition that if at the time of consideration for promotion, the candidates concerned have acquired eligibility, then unless a rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. He submitted that in the present case, the rules for promotion from the post of Section Officer or Junior Engineer to Assistant Engineer did not give any such priority to the candidates acquiring earlier eligibility. He submitted that *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra) was a case where the rules, namely, the Kerala Engineering Service (General Branch) Rules, were different from the Recruitment

Rules in the present case and the Kerala Engineering Service (General Branch) Rules clearly provided for two different streams or channels of promotion for the posts of Assistant Engineer, i.e. for diploma-holders and degree-holders. He submitted that in *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* (supra) cited by the learned counsel for the appellants and the Government of Pondicherry, the question for consideration was whether a diploma-holder Junior Engineer, who obtained a degree while in service, became eligible for promotion to the post of Assistant Engineer on completion of three years of service after he obtained the Engineering degree or on completion of three years of service prior to obtaining the degree in Engineering and while answering this question, this Court held that a diploma-holder Junior Engineer became eligible for promotion to the post of Assistant Engineer on completion of three years' service after he obtained the Engineering degree. He submitted that the decision of this Court in *Shailendra Dania & Ors*. (supra), therefore, is not an authority for proposition that the service of diploma-holders put in prior to the acquisition of the degree or equivalent by him will have to be ignored while considering them for promotion to the post of Assistant Engineer meant for degree holders.

22. Rule 11 of the Recruitment Rules in the present case is quoted herein below :-

"11. In case of recruitment by promotion/deputation/ Transfer grades from which promotion/deputation/ transfer to be made.		Promotion 1. Section Officer possessing a recognized degree in Civil Engineering or Equivalent with 3 Years service in the grade failing which Section Officers holding diploma in Civil Engineering with 6 years service in the grade – 50%.

2.Section Officers possessing a recognized diploma in Civil Engineering with 6 years service in the grade – 50%"	

23. A plain reading of Rule 11 of the Recruitment Rules quoted above would make it clear that for the 50% quota for the posts of Assistant Engineer mentioned under Clause 1 of Rule 11, Section Officers (now Junior Engineers) possessing recognized degree in Civil Engineering or equivalent with three years' service in the grade, failing which Section Officers possessing diploma in Civil Engineering with six years' service in the grade would be eligible for consideration for promotion. All that the Rule provides is that if for vacancy in the post of Assistant Engineer, Section Officers possessing recognized degree in Civil Engineering or equivalent with three years' service in the grade are not available, Section Officers holding diploma in Civil Engineering with six years service in the grade could be considered for promotion. Clause 1 of Rule 11 is, therefore, only a provision laying down the qualification or eligibility for promotion to 50% of the posts of Assistant Engineer and the qualification or eligibility provided therein is either three years service in the grade of Section Officers or Junior Engineers after degree in Civil Engineering or equivalent or six years service in the grade of Section Officers or Junior Engineers with diploma in Civil Engineering. This provision also has a rider that if there are Section Officers/Junior Engineers, who have put in three years service after acquiring degree or equivalent, available for consideration for vacancies, then they will be considered first for promotion and the turn for consideration for promotion of diploma-holders in Civil Engineering with six years service in the grade of Section Officers/Junior Engineers will come only thereafter. Thus, the Rule itself provides that if for vacancies in the post of Assistant Engineer, Section Officers possessing a recognized degree in

Civil Engineering or equivalent with three years' service in the grade are not available, then Section Officers holding diploma in Civil Engineering with six years' service in the grade would be eligible for promotion. We, therefore, cannot accept the submission of learned counsel for the appellants and the Government of Pondicherry that Clause 1 of Rule 11 provides for a separate stream or channel of promotion exclusively for degree-holders, who have completed three years service and we are of the opinion that learned counsel for the respondents 2 to 19 are right in the submission that Clause 1 of Rule 11 only lays down the qualification or eligibility for consideration for promotion to 50% of the posts of Assistant Engineers.

24. In *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra), cited by Mr. L. Nageshwara Rao, on the other hand, this Court held that under Rules 4 and 5 of the Kerala Engineering Service (General Branch) Rules there were separate avenues of promotion for the degree-holders and the diploma holders. This will be clear from the observations of the Court in para 30 of the judgment in *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra), quoted herein below:

> "A bare perusal of Rules 4 and 5 of the Kerala Engineering Service (General Branch) Rules would clearly go to show that the avenues for promotion for the degree-holders and the diploma holders were separate. ……" [(2004) 3 SCC 734 at 748]

25. In *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* (Supra) cited by learned counsel Mr. Ganesh, this Court similarly found that there were two different channels or streams of promotion for degree-holders and diploma holders to the post of Assistant Engineer in the relevant rules. This will be clear from the findings in para 44 of the judgment quoted herein below:

> "…… There is watertight compartment for graduate Junior Engineers and diploma-holder Junior Engineers. They are

entitled for promotion in their respective quotas. Neither a diploma-holder Junior Engineer could claim promotion in the quota of degree-holders because he has completed three years of service nor can a degree-holder Junior Engineer make any claim for promotion quota fixed for diploma-holder Junior Engineers. [(2007) 5 SCC 533 at 560)]"

26. In the present case, on the other hand, Clause 1 of Rule 11 of the Recruitment Rules does not provide for "separate avenues" or "watertight compartments" for promotion to the post of Assistant Engineers for degree-holders and diploma-holders. As we have seen Clause 1 Rule 11 of the Recruitment Rules only lays down the qualification or eligibility for consideration for promotion to the post of Assistant Engineers earmarked for the 50% quota. The two decisions of this Court in *Chandravathi P. K. & Ors. v. C.K. Saji & Ors.* (supra) and *Shailendra Dania & Ors. v. S. P. Dubey & Ors.* (Supra) are, therefore, of no assistance to the appellants.

27. In *R. B. Desai & Anr. v. S. K. Khanolkar & Ors.* (supra) cited by Mr. Viswanathan, this Court found that the amended rules of 1988 pertaining to the promotion to the cadre of Assistant Conservator of Forests provided that Range Forest Officers with five years regular service in the grade and possessing diploma of Forest Rangers' Training from Forest Rangers College in India or equivalent were eligible for promotion to the post of Assistant Conservator of Forests and the Court held in para 9:

"……. that if at the time of consideration for promotion the candidates concerned have acquired the eligibility, then unless the rule specifically gives an advantage to a candidate with earlier eligibility, the date of seniority should prevail over the date of eligibility. The rule under consideration does not give any such priority to the candidates acquiring earlier eligibility and, in our opinion, rightly so. In service law, seniority has its own weightage

and unless and until the rules specifically exclude this weightage of seniority, it is not open to the authorities to ignore the same. [(1999) 7 SCC 54 at 58]

28. In the passage of the judgment of this Court in *R.B. Desai & Anr. V. S. K. Khanolkar & Ors.* (supra) quoted above, it is laid down that in service law, seniority has its own weightage and unless and until the rules specifically exclude this seniority, it is not open to the authorities to ignore the same. In the aforesaid case though the post of ACF was mentioned to be a selection post in the amended rules of 1988, the question whether for a selection post seniority would have weightage or merit would have weightage while considering the eligible candidates for promotion was not raised or decided and the only question which was raised before this Court was whether ranking assigned in the eligibility list or the ranking assigned to the seniority list should be given weightage and this Court held that between the candidates who are eligible, ranking in seniority must be given weightage irrespective of the date for which the candidate becomes eligible.

29. In the present case, we find that Rule 5 of the Recruitment Rules states that the post of Assistant Engineer in the Public Works Department, Pondicherry, is a selection post. The Recruitment Rules, however, do not lay down that seniority-cum-merit would be the criteria for promotion to the selection post of Assistant Engineer. In *Dr. Jai Narain Misra v. State of Bihar & Ors.* [(1971) 1 SCC 30] a three-Judge Bench of this Court held that the question of seniority was not relevant for promotion to the selection post in the language of the judgment of this Court in *Dr. Jai Narain Misra v. State of Bihar & Ors.* (supra):

"It was not disputed before us that the post of Director of Agriculture is a selection post. Therefore, the question of seniority was not relevant in making the selection. It is for the State Government to select such officer as it considers as most suitable. In this view we think the High Court was

not justified in going into the question of seniority nor will we be justified in going into that question."

Thus, the question of seniority in the grade of Section Officers or Junior Engineers is not at all relevant for promotion to the post of Assistant Engineer in the Public Works Department, Government of Pondicherry. The practice adopted by the Government of Pondicherry in consultation with the UPSC of counting the services of Section Officers or Junior Engineers, who qualified as graduates while in service from the date they passed the degree or equivalent examination and placing them in order of seniority accordingly for the purpose of consideration for promotion to the post of Assistant Engineer under Clause 1 of Rule 11 of the Recruitment Rules is contrary to Rule 5 of the Recruitment Rules. Similarly, the direction of the High Court in the impugned judgment and order to count the entire service of a person concerned even before acquiring degree in Civil Engineering for the purpose of seniority and promotion to the post of Assistant Engineer under Clause 1 of Rule 11 of the Recruitment Rules is contrary to Rule 5 of the Recruitment Rules.

30. The person, who is most meritorious, is the most suitable person to be promoted for the selection post. Merit, in other words, is the sole criteria for promotion to the selection post. In *Guman Singh, etc. v. State of Rajasthan & Ors.* [1971 (2) SCC 452] a five-Judge Bench of this Court speaking through Vaidialingam, J. explained how merit of candidates for promotion is to be assessed in para 35 at page 408 of the judgment in the following words:

"……. No doubt the term 'merit' is not capable of an easy definition, but it can be safely said that merit is a sum total of various qualities and attributes of an employee such as his academic qualifications, his distinction in the University, his character, integrity, devotion to duty and the manner in which he discharges his official duties. Allied to this may be various other matters or factors such as his

punctuality in work, quality and outturn of work done by him and the manner of his dealings with his superiors and subordinate officers and the general public and his rank in the service. We are only indicating some of the broad aspects that may be taken into account in assessing the merits of an officer. In this connection it may be stated that the various particulars in the annual confidential reports of an officer, if carefully and properly noted, will also give a very broad and general indication regarding the merit of an officer."

Where, therefore, there are large number of eligible candidates available for consideration for promotion to a selection post, the Government can issue executive instructions consistent with the principle of merit on the method to be followed for considering such eligible candidates for promotion to the selection post.

31. Learned counsel for the appellants however submitted that when the Recruitment Rules are silent on the procedure to be adopted by the Government in selecting the candidates for promotion, the Government is the best authority to decide what procedure to be adopted in such promotion and the Court will not interfere with the procedure so adopted unless it was unconstitutional, arbitrary, unreasonable or otherwise illegal. In support of this submission, Mr. L. Nageswar Rao cited the decisions of this Court in *Suman Gupta v. State of J & K* [(1983) 4 SCC 339], *Munidra Kumar v. Rajiv Govil* [(1991) 3 SCC 368], *Satya Narain Shukla v. U.O.I.* [(2006) 9 SCC 69], *P.U. Joshi v. Accountant General* [(2003) 2 SCC 632], *U.O.I. v. Pushpa Rani* [(2008) 9 SCC 242], *Inderjeet Khurana v. State of Haryana* [(2007) 3 SCC 102] and *U.O.I. v. A.K. Narula* [(2007) 11 SCC 10]. Learned counsel for the appellants submitted that in the present case the Government of Pondicherry in consultation with the UPSC has adopted the procedure since 1968 that the services of Section Officers/ Junior Engineers who qualified as graduates while in service

should be counted from the date they passed the degree or equivalent examination for the promotion under clause 1 Rule 11 of the Recruitment Rules and this procedure is not unconstitutional, arbitrary, unreasonable or illegal and, therefore, the High Court by the impugned judgment and order should not have interfered with this procedure and should not have directed that the entire service of a person concerned even before acquiring the degree in civil engineering or equivalent has to be counted for the purpose of seniority and promotion to the post of Assistant Engineer under clause 1 of Rule 11 of the Recruitment Rules. Learned counsel appearing for the Government of Pondicherry adopted this contention of the learned counsel of the appellants.

32. Learned counsel for the respondents No.2 to 19, in their reply, submitted that the Government cannot adopt a procedure for selection by way of promotion to the post of Assistant Engineer contrary to the Recruitment Rules. They submitted that the Recruitment Rules do not provide that for promotion under clause 1 of Rule 11, the services of Section Officers/Junior Engineers who qualified as graduates while in service, would be counted from the date they passed the degree or equivalent examination and their services prior to the date of passing the degree or equivalent examination would be ignored. They further submitted that the Government also cannot adopt the procedure of selection which violates the fundamental right guaranteed under Article 16 of the Constitution of India to equality of opportunity in matters of public employment. They submitted that once a candidate became eligible or qualified to be considered for promotion to the post of Assistant Engineer under clause 1 of Rule 11 of the Recruitment Rules, he has a right to be considered for such promotion and such consideration cannot be denied by laying down a procedure which ignores his seniority in the grade of Section Officer/Junior Engineer. They relied on the decision of this Court in *M.B. Joshi v. Satish Kumar Pandey* [1993 Supp.(2) SCC 419].

33. In *M.B. Joshi v. Satish Kumar Pandey* (supra), the State Government had been applying the principle of counting the seniority of Graduate Sub-Engineers from the date of their continuous officiation irrespective of the date on which such diploma-holder Sub-Engineer acquired the degree of graduation in Engineering and on the basis of such seniority, the Departmental Promotion Committee was considering Graduate Sub-Engineers for promotion to the post of Assistant Engineers. When this method adopted by the State Government was challenged by some of the Sub-Engineers before the Madhya Pradesh Administrative Tribunal, Jabalpur, the Tribunal held that the seniority of such Sub-Engineers must be determined from the date of acquiring the degree of graduation in Engineering and this Court held that the Tribunal was wrong in determining the seniority from the date of acquiring degree of Engineering and it ought to have been determined on the basis of length of service on the post of Sub-Engineer and the Government was right in doing so and there was no infirmity in the orders passed by the Government. In this case also, the question did not arise whether for selection post seniority would have weightage or merit would have weightage while considering the eligible candidates for promotion.

34. As we have seen, Rule 5 of the Recruitment Rules in the present case states that the post of Assistant Engineer is a selection post and the Recruitment Rules no where provide that seniority-cum-merit would be the criteria for promotion. In the absence of any indication in the Recruitment Rules that seniority in the grade of Section Officers / Junior Engineers will be counted for the purpose of promotions to the post of Assistant Engineer, consideration of all Section Officers / Junior Engineers under Clause 1 of Rule 11 of the Recruitment Rules who are eligible for such consideration has to be done on the basis of assessment of the comparative merit of the eligible candidates and the most suitable or meritorious candidate has to be selected for the post of Assistant Engineer. Such a method of selection will be consistent with Rule 5 of the

Recruitment Rules and Article 16 of the Constitution which guarantees to all citizens equality of opportunity in matters of public employment. In our considered opinion, therefore, the practice adopted by the Government of Pondicherry on the advice of the UPSC of counting the service of the eligible candidates from the date of acquisition of the degree in Civil Engineering by them and the impugned judgment and order of the High Court directing that the entire service of eligible candidates, both prior and after acquisition of the degree of Civil Engineering by them, would be counted for the purpose of promotion to the post of Assistant Engineer under Clause 1 of Rule 11 of the Recruitment Rules are contrary to the rules made under Article 309 of the Constitution and the fundamental right guaranteed under Article 16 of the Constitution.

35. For the aforesaid reasons, we set aside the impugned judgment of the High Court and direct the Government of Pondicherry to consider the cases of all Section Officers or Junior Engineers, who have completed three years' service in the grade of Section Officers or Junior Engineers, for promotion to the vacancies in the post of Assistant Engineer, Public Works Department, Government of Pondicherry, in accordance with their merit. We make it clear that the promotions to the post of Assistant Engineers already made pursuant to the judgment and order of the High Court will not be disturbed until the exercise is carried out for promotion in accordance with merit as directed in this judgment and on completion of such exercise, formal orders of promotion to the vacancies in the posts of Assistant Engineer which arose during the pendency of the cases before this Court are passed in case of those who are selected for promotion and after such exercise only those who are not selected for promotion may be reverted to the post of Section Officer or Junior Engineer.

The appeals are disposed of accordingly with no order as to costs.

R.P. Appeals disposed of.

ZAMEER AHMED LATIFUR REHMAN SHEIKH
v.
STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 1975-1977 of 2008 and Crl Appeal No. 940 of 2008)

APRIL 23, 2010

[R.V. RAVEENDRAN AND DR. MUKUNDAKAM SHARMA, JJ.]

Maharashtra Control of Organised Crime Act, 1999: s. 2(1)(e).

Part of s. 2(1)(e) referring to "promoting insurgency" – Constitutional validity of – Legislative Competence of Government of Maharashtra to enact such provision – Held: It is within the legislative competence of the State of Maharashtra to enact such a provision – Term "promoting insurgency" u/s. 2(1)(e) comes within the concept of public order – State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order – Said part of MCOCA relates to maintenance of public order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List – It cannot be held to be ultra vires in view of the doctrine of pith and substance – Constitution of India, 1950 – Article 246, Entry 1 of List I, Entries 1 and 2 of List II rw Entries 1, 2 and 12 of List III of the Seventh Schedule – Doctrines.

Part of s. 2(1)(e) referring to "promoting insurgency" – Challenge to, on the ground of repugnancy with Central Statute-Unlawful Activities (Prevention) Amendment Act, 2004 – Held: Both the acts operate in different fields and the ambit and scope of each is distinct from the other – There is no clear and direct inconsistency or conflict between the said provisions of the two Acts – Under MCOCA, emphasis is on

crime and pecuniary benefits arising therefrom – Essential element in UAPA is the challenge or threat or likely threat to the sovereignty, security, integrity and unity of India – MCOCA does not deal with the terrorist organisations which indulge in terrorist activities and similarly, UAPA does not deal with organised gangs or crime syndicate of the kind specifically targeted by MCOCA – Offence of organised crime under MCOCA and offence of terrorist act under UAPA operate in different fields and are of different kinds and their essential contents and ingredients are altogether different – Unlawful Activities (Prevention) Amendment Act, 2004 – ss. 2(1)(k) and 15 – Unlawful Activities (Prevention) Act, 1967 – s. 2(1)(o) Constitution of India, 1950.

***Constitution of India, 1950: Articles 245 and 246** – Legislative competence to enact a particular statute – Doctrine of pith and substance – Applicability of – Held: This Doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists – In such cases, Courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question –Where challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and if it is found in the pith and substance that subject matter of State Legislation is covered by an entry in State list, then any incidental encroachment upon an entry in Union List would not render the State law ultra vires the Constitution.*

***Doctrines:** Doctrine of pith and substance – Applicability of – Explained.*

Words and Phrases:

***'Insurgency'** – Meaning of – Held: Is a serious form of internal disturbance which causes a grave threat to the life of people, creates panic situation and also hampers the growth*

and economic prosperity of the State.

***'Continuing unlawful activity'** – Meaning of – In the context of clause (d) of sub-section (1) of s. 2 of the Maharashtra Control of Organised Crime Act, 1999.*

***'Organised crime' –** Meaning of – In the context of clause (e) of sub-section (1) of s. 2 of the Maharashtra Control of Organised Crime Act, 1999.*

***'Organised Crime Syndicate'** – Meaning of – In the context of clause (f) of sub-section (1) of s. 2 of the Maharashtra Control of Organised Crime Act, 1999.*

***'Terrorist act'** – Meaning of – In the context of ss. 2(1)(k) and 15 of the Unlawful Activities (Prevention) Amendment Act, 2004.*

***'Unlawful activity'** – Meaning of – In the context of s. 2(1)(o) of the Unlawful Activities (Prevention) Act, 1967.*

In the instant appeals, the appellants have challenged that constitutional validity of that part of s. 2(1)(e) of the Maharashtra Control of Organised Crime Act, 1999, which relates to 'promoting insurgency' on the grounds that the Maharashtra State legislature did not have legislative competence to enact such a provision; and that the said part of s. 2(1)(e) of MCOCA, is repugnant and has become void by enactment of the Unlawful Activities (Prevention) Amendment Act, 2004, amending the Unlawful Activities (Prevention) Act, 1967.

Dismissing the civil appeals and disposing of the Connected criminal appeal, the Court

HELD: Legislative Competence of Government of Maharashtra:

1. The term "promoting insurgency" as

contemplated u/s. 2(1)(e) of the Maharashtra Control of Organised Crime Act, 1999 comes within the concept of public order. Anything that affects public peace or tranquility within the State or the Province would also affect public order and the State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order. Even if the part of s. 2(1)(e) of the MCOCA incidentally encroaches upon a field under Entry 1 of the Union list, the same cannot be held to be *ultra vires* in view of the doctrine of pith and substance as in essence the said part relates to maintenance of Public Order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List. Therefore, it is within the legislative competence of the State of Maharashtra to enact such a provision under Entries 1 and 2 of List II read with Entries 1, 2 and 12 of List III of the Seventh Schedule of the Constitution. [Paras 42 and 43] [1072-G-H; 1073-A-D]

Ramesh Thappar v. State of Madras **1950 SCR 594;** *Superintendent, Central Prision v. Ram Manohar Lohia* **(1960) 2 SCR 821;** *Dr. Ram Manohar Lohia v. State of Bihar* **(1966) 1 SCR 709;** *Madhu Limaye v. Sub-Divisional Magistrate* **(1970) 3 SCC 746;** *Kanu Biswas v. State of West Bengal* **(1972) 3 SCC 831, relied on.**

Lakhi Narayan Das v. *Province of Bihar* **AIR 1950 FC 59, referred to.**

2.1. The term 'insurgency' has not been defined either under the MCOCA or any other statute. The word 'insurgency' does not find mention in the Unlawful Activities (Prevention) Act, 1967 even after the 2004 and 2008 amendments. Insurgency is undoubtedly a serious form of internal disturbance which causes a grave threat to the life of people, creates panic situation and also hampers the growth and economic prosperity of the

State. Although the term 'insurgency' defies a precise definition, yet, it could be understood to mean and cover breakdown of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the State and its sovereignty. [Paras 23, 24 and 26] [1063-C-H]

Sarbananda Sonowal v. Union of India **(2005) 5 SCC 665, relied on.**

2.2. It is a well-established rule of interpretation that the entries in the List being fields of legislation must receive liberal construction inspired by a broad and generous spirit and not a narrow or pedantic approach. Each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. It is also a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statute and while construing such statute every legally permissible effort should be made to keep the statute within the competence of the State Legislature. [Para 34] [1066-H; 1067-A-D]

Navinchandra Mafatlal v. Commr. of I.T. **AIR 1955 SC 58;** *State of Maharashtra v. Bharat Shanti Lal Shah* **(2008) 13 SCC 5;** *Charanjit Lal Choudhary v. Union of India* **AIR 1951 SC 41;** *T.M.A. Pai Foundation v. State of Karnataka* **(2002) 8 SCC 481;** *Karnataka Bank Ltd. State of AP* **(2008) 2 SCC 254, referred to.**

2.3. One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative

competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an Entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List. [Para 35] [1067-D-H; 1068-A-B]

A.S. Krishna v. State of Madras **AIR 1957 SC 297;** *Kartar Singh v. State of Punjab* **(1994) 3 SCC 569, referred to.**

2.4. The State Legislature does not have power to legislate upon any of the matters enumerated in the Union List. However, if it could be shown that the core area and the subject-matter of the legislation is covered by an entry in the State List, then any incidental encroachment upon an entry in the Union List would not be enough so as to render the State law invalid, and such an incidental encroachment will not make the legislation *ultra vires* the Constitution. [Para 38] [1069-F-G]

Bharat Hydro Power Corpn. Ltd. v. State of Assam **(2004) 2 SCC 553, referred to.**

2.5. The definition of "organized crime" contained in s. 2(1)(e) of the MCOCA makes it clear that the phrase "promoting insurgency" is used to denote a possible driving force for "organized crime". It is evident that the MCOCA does not punish "insurgency" per se, but punishes those who are guilty of running a crime organization, one of the motives of which may be the promotion of insurgency. It cannot be said that the MCOCA, in any way, deals with punishing insurgency directly. The legislation only deals with "insurgency" indirectly only to bolster the definition of "organized crime". [Paras 40 and 41] [1071-F-G; 1072-F]

2.6 Regarding the question of legislative competence of the Maharashtra State legislature to enact a law like MCOCA, the finding of High Court in the impugned judgment that MCOCA in pith and substance falls in Entry No. 1 of List III which refers to the criminal law, cannot be accepted. [Para 20] [1062-C-E]

State of Maharashtra v. Bharat Shanti Lal Shah and Ors. **(2008) 13 SCC 5, referred to.**

Repugnance with Central Statute:

3. The analysis relating to the essential elements of offence of 'promoting insurgency' u/s. 2 (1)(e) of the MCOCA and the offence of terrorist act and unlawful activity u/s. 15 and s. 2(1)(o) of the UAPA respectively, clearly establishes that the UAPA occupies a field different than that occupied by the MCOCA. There is no clear and direct inconsistency or conflict between the said provisions of the two Acts. Therefore, the final decision reached by the High Court in the impugned judgment that both the enactments can stand together as there is no conflict between the two, is concurred with. [Paras 64 and 65] [1090-G-H; 1091-A-B]

4.1. Section 2 of the MCOCA is the interpretation clause. Clause (d) of sub-section (1) of s. 2 of the MCOCA, defines the expression "continuing unlawful activity" to mean an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. Clause (e) defines the expression "organised crime" to mean any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. Clause (f), defines "organised crime syndicate" to mean a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime. The said definitions are interrelated; the "organised crime syndicate" refers to an "organised crime" which in turn refers to "continuing unlawful activity". MCOCA, in the subsequent provisions lays down the punishment for organised crime and has created special machinery for the trial of a series of offences created by it. [Para 54] [1080-F-H; 1081-A-D]

4.2. Prior to the 2004 amendment, the UAPA did not contain the provisions to deal with terrorism and terrorist activities. By the 2004 amendment, new provisions were inserted in the UAPA to deal with terrorism and terrorist activities. The Preamble of the UAPA was also amended to state that the said Act is enacted to provide for the

more effective prevention of certain unlawful activities of individuals and associations, and dealing with terrorist activities and for matters connected therewith. In 2008 amendment, the Preamble was again amended and the amended Preamble now also contains a reference to the resolution adopted by the Security Council of the United Nations on 28.09.2001 and also makes reference to the other resolutions passed by the Security Council requiring the States (Nations which are member of the United Nations) to take action against certain terrorist and terrorist organizations. It also makes reference to the order issued by the Central Government in exercise of power u/s. 2 of the United Nations (Security Council) Act, 1947 which is known as the Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007. [Para 55] [1081-E-H; 1082-A-B]

4.3. Section 2 (1)(k) and s. 15 of the UAPA, 1967 which were inserted by the 2004 amendment and define and deal with the term 'terrorist act'. From a perusal of s. 15 before and after amendment of the UAPA, it comes to light that though after amendment there have been certain additions to the provision but in substance the provision remains the same. Sub-Clauses (l) and (m) of sub section (1) of s. 2 of the UAPA, define the term 'terrorist gang' and 'terrorist organisation' respectively. Section 2 (1)(o) of the UAPA defines the term 'unlawful activity'.[Paras 56, 57 and 58] [1083-A-B; 1085-C-D; 1087-G-H]

4.4. A careful look of the exhaustive list of terrorist organisations in the First Schedule to the UAPA would indicate that all the organisations mentioned therein have as their aims and objects undermining and prejudicially affecting the integrity and sovereignty of India, which certainly stand on a different footing when compared to the activities carried out by the forces like the appellant. [Para 57] [1087-F-H]

4.5. No provision or word in a statute is to be read in isolation. In fact, the statute has to be read as a whole and in its entirety. A perusal of the Preamble, the Statement of Objects and Reasons and the Interpretation clauses of the MCOCA and the UAPA would show that both the acts operate in different fields and the ambit and scope of each is distinct from the other. The MCOCA principally deals with prevention and control of criminal activity by organised crime syndicate or gang within India and its purpose is to curb a wide range of criminal activities indulged in by organised syndicate or gang. The aim of the UAPA, on the other hand, is to deal with terrorist and certain unlawful activities, which are committed with the intent to threaten the unity, integrity, security or sovereignty of India or with the intent to strike terror in the people or any section of the people in India or in any foreign country or relate to cessation or secession of the territory of India. [Paras 59 and 60] [1088-E; 1089-C-E]

Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd. **(1987) 1 SCC 424, referred to.**

4.6. Under the MCOCA the emphasis is on crime and pecuniary benefits arising therefrom. In the wisdom of the legislature these are activities which are committed with the objective of gaining pecuniary benefits or economic advantages and which over a period of time have extended to promoting insurgency. The concept of the offence of 'terrorist act' u/s. 15 of the UAPA essentially postulates a threat or likely threat to unity, integrity, security and sovereignty of India or striking terror amongst people in India or in foreign country or to compel the Government of India or the Government of a foreign country or any other person to do or abstain from doing any act. The offence of terrorist act u/s. 15 and the offence of unlawful activity u/s. 2 (1) (o) of the UAPA have some elements in commonality. The essential element in

both is the challenge or threat or likely threat to the sovereignty, security, integrity and unity of India. While s. 15 requires some physical act like use of bombs and other weapons etc., s. 2 (1)(o) takes in its compass even a written or spoken words or any other visible representation intended or which supports a challenge to the unity, sovereignty, integrity and security of India. The said offences are related to the Defence of India and are covered by Entry 1 of the Union List. [Para 61] [1089-F-H; 1090-A-B]

4.7. The meaning of the term 'Unlawful Activity' in the MCOCA is altogether different from the meaning of the term 'Unlawful Activity' in the UAPA. The MCOCA does not deal with the terrorist organisations which indulge in terrorist activities and similarly, the UAPA does not deal with organised gangs or crime syndicate of the kind specifically targeted by the MCOCA. Thus, the offence of organised crime under the MCOCA and the offence of terrorist act under the UAPA operate in different fields and are of different kinds and their essential contents and ingredients are altogether different. [Para 62] [1090-C-E]

4.8. The concept of insurgency u/s. 2(1)(e) of the MCOCA, if seen and understood in the context of the Act, is a grave disturbance of the public order within the state. The disturbance of the public order, in each and every case, cannot be said to be identical or similar to the concepts of terrorist activity as contemplated respectively u/s. 2(1)(o) and s. 15 of the UAPA. Moreover, what is punishable under the MCOCA is *promoting insurgency* and not *insurgency per se*. [Para 63] [1090-F-G]

Saiyada Mossarrat v. Hindustan Steel Ltd., Bhilai Steel Plant, Bhilai (M.P.) and Ors. **(1989) 1 SCC 272;** *Kesho Ram and Co. v. Union of India* **(1989) 3 SCC 151;** *M. Karunanidhi v. Union of India* **(1979) 3 SCC 431;** *Govt. of A.P. v. J.B.*

Educational Society **(2005) 3 SCC 212;** *National Engg. Industries Ltd. v. Shri Kishan Bhageria* **(1988) Supp SCC 82, referred to.**

Crl Appeal No. 940 of 2008

5. The Criminal Appeal is disposed of with a direction that the Special Court constituted under the MCOCA shall consider the issue raised under the Misc Application in MCOCA Special Case on its own merits in light of the findings given by this Court in the said connected appeals, in case a fresh application is moved by the appellant before the Special Court. [Para 2] [1091-F-G]

Case Law Reference:

(2008) 13 SCC 5	**Referred to.**	**Paras 5, 21, 34**
(1989) 1 SCC 272	**Referred to.**	**Para 6**
(1989) 3 SCC 151	**Referred to.**	**Para 7**
(2005) 5 SCC 665	**Relied on.**	**Para 24**
1950 SCR 594	**Relied on.**	**Para 28**
(1960) 2 SCR 821	**Relied on.**	**Para 29**
(1966) 1 SCR 709	**Relied on.**	**Para 29**
(1970) 3 SCC 746	**Relied on.**	**Para 30**
(1972) 3 SCC 831	**Relied on.**	**Para 31**
AIR 1950 FC 59	**Referred to.**	**Para 33**
AIR 1955 SC 58	**Referred to.**	**Para 34**
AIR 1951 SC 41	**Referred to.**	**Para 34**
(2002) 8 SCC 481	**Referred to.**	**Para 34**
(2008) 2 SCC 254	**Referred to.**	**Para 34**

AIR 1957 SC 297	**Referred to.**	**Para 36**
(1994) 3 SCC 569	**Referred to.**	**Para 37**
(2004) 2 SCC 553	**Referred to.**	**Para 39**
(1979) 3 SCC 431	**Referred to.**	**Para 49**
(2005) 3 SCC 212	**Referred to.**	**Para 50**
(1988) Supp SCC 82	**Referred to.**	**Para 51**
(1987) 1 SCC 424	**Referred to.**	**Para 59**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1975 of 208.

From the Judgment & Order dated 19.7.2007 of the High Court of Judicature at Bombay in Writ Petition No. 1136 of 2007.

WITH

C.A. Nos. 1976, 1977 of 2008

Mohan Jain, ASG, Sushil Kumar, Shanti Bhushan, Harish N. Salve, Shekhar Naphade, Shakil Ahmed Syed, Shanid Azmi, Nitya Ramakrishnan, Trideep Pais, Ashwath Sitaraman (for K.J. John & Co.), Sanjay V. Kharde, Asha G. Nair, Ravindra Keshavrao Adsure, Dinesh Thakur, Rohini Mukherjee, Jaspreet Aulakh, Vibhav Misra, Subhash Kaushik, T.A, Khan, Arvind Kumar Sharma, P.K. Dey, P. Parmeswaran for the appearing parties.

Dr. MUKUNDAKAM SHARMA, J.

INTRODUCTION

1. This matter concerns an assortment of questions regarding the interpretation and constitutionality of certain provisions of the Maharashtra Control of Organized Crime Act, 1999, and as such calls for our utmost attention, particularly in view of the fact that, this legislation, although widely used for

maintaining law and order, has also generated some controversy alleging its sweeping powers.

2. Since its enactment in 1999, it has found favour with the law enforcement officials and has been enthusiastically applied wherever possible by the law enforcement agencies and the concerned Government.

3. These three appeals have been filed by the appellants herein to assail the common judgment and order dated 19.07.2007 rendered by the High Court of Judicature at Bombay in Writ Petition No. 1136 of 2007, whereby the High Court dismissed the Writ Petition filed by the appellants herein.

4. The appellants herein challenged before the High Court of Bombay, the constitutional validity of that part of Section 2(1)(e) of the Maharashtra Control of Organised Crime Act, 1999 ("MCOCA" hereinafter) which refers to 'insurgency'.

5. Before we proceed to discuss and deal with the issue at hand, it will be prudent to address an issue that goes to the very root of the jurisdiction of this Court to entertain the present appeal. The constitutional validity of the said provision of the MCOCA had earlier been under the scrutiny of this Court in the case of *State of Maharashtra v. Bharat Shanti Lal Shah and Ors* (2008) 13 SCC 5. The aforesaid case arose against the judgment of the High Court of Bombay dated 05.03.2003 in Crl. WP Nos. 27 of 2003, 1738 of 2002 and 110 of 2003, whereby the High Court negated the contention of the petitioners therein that Section 2 (1)(e) was violative of Article 13 (2) and Article 14 of the Constitution of India. In the said case, no appeal was filed against the said finding of the High Court upholding the constitutional validity of Section 2 (1)(e) of the MCOCA. However, since the said issue was raised before this Court during the course of arguments in the said case, this Court on a conjoint reading of the said provision with the object and purpose of the MCOCA held that there is no vagueness in the provision and the same also does not suffer from the vice of

class legislation. The said finding of this Court in the said case as enumerated, in paras 29 and 30, is as follows:-

> "29. In addition, Mr. Manoj Goel Counsel for the Respondent No. 3 submitted that Section 2 (d), (e) and (f) and Sections 3 and 4 of the MCOCA are constitutionally invalid as they are ultra virus being violative of the provisions of Article 14 of the Constitution. But we find that no cross appeal was filed by any of the respondents against the order of the High Court upholding the constitutional validity of provisions of Section 2(d), (e) and (f) and also that of Sections 3 and 4 of the MCOCA. During the course of hearing, Mr. Goel, the counsel appearing for one of the respondents herein tried to contend that the aforesaid provisions of Section 2(d), (e) and (f) of the MCOCA are unconstitutional on the ground that they violate the requirement of Article 13(2) of the Constitution and that they make serious inroads into the fundamental rights by treating unequals as equals and are unsustainably vague. Since such issues were not specifically raised by filing an appeal and since only a passing reference is made on the said issue in the short three page affidavit filed by the respondent No. 3, it is not necessary for us to examine the said issue as it was sought to be raised more specifically in the argument stage only.
>
> 30. Even otherwise when the said definitions as existing in Section 2(d), (e) and (f) of the MCOCA are read and understood with the object and purpose of the Act which is to make special provisions for prevention and control of organised crime it is clear that they are worded to subserve and achieve the said object and purpose of the Act. There is no vagueness as the definitions defined with clarity what it meant by continuing unlawful activity, organised crime and also organised crime syndicate. As the provisions treat all those covered by it in a like manner

and does not suffer from the vice of class legislation they cannot be said to be violative of Article 14 of the Constitution."

Thus, in the said case there was no specific challenge to the constitutional validity of Section 2(1)(e) of the MCOCA. Moreover, even in its observations, this Court had not gone into the question of constitutional validity of the said provision, so far as it relates to insurgency on the ground of lack of legislative competence.

6. We may also refer to the findings of this Court in a situation of this nature, where once the constitutional validity of a provision has been upheld and the same is again challenged on a ground which is altogether different from the earlier one. In *Saiyada Mossarrat v. Hindustan Steel Ltd., Bhilai Steel Plant, Bhilai (M.P.) and Ors.* [(1989)1SCC272] notwithstanding the fact that the Constitution Bench of this Court had once upheld the constitutionality of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, the petitioner therein had renewed his challenge on the ground that the Parliament did not have the legislative competence to legislate on the subject of the said legislation. On the facts before it, this Court held that since that specific aspect had not been debated before the Constitution Bench in the earlier case, it would not be appropriate to shut out the petitioner from raising the plea by recourse to the argument that the point had been concluded in the earlier case regardless of whether the matter had been debated or not.

7. In the later judgment in *Kesho Ram and Co. v. Union of India, [(1989) 3 SCC 151],* a larger Bench of this Court emphasized the binding nature of the judgments of this Court in the light of Article 141 of the Constitution and has held that the binding effect of a decision of this Court does not depend upon whether a particular argument was considered or not, provided the point with reference to which the argument is subsequently advanced was actually decided in the earlier

decision.

8. However, since there was no specific challenge before this Court to the constitutional validity of Section 2(1)(e) of the MCOCA and the point with reference to which the arguments were advanced in the present appeal was actually not decided in the earlier decision of this Court, we wish to proceed to examine the same.

9. The appellants have challenged the constitutional validity of Section 2(1)(e) of the MCOCA, so far it relates to 'promoting insurgency' on following two grounds:-

(a) the Maharashtra State legislature did not have legislative competence to enact such a provision; and

(b) the part of Section 2(1)(e) of the MCOCA, so far as it covers case of 'insurgency', is repugnant and has become void by enactment of the Unlawful Activities (Prevention) Amendment Act, 2004, amending the Unlawful Activities (Prevention) Act, 1967.

10. The learned senior counsel appearing for the parties have advanced elaborate arguments before us on the aforesaid issues.

11. Mr. Sushil Kumar, learned senior counsel appearing for the appellant in Civil Appeal No. 1975 of 2008 submitted that 'insurgency' is an offence falling within the ambit of Defence of India, Entry 1 of List I i.e., the Union List, as it threatens the unity, integrity and sovereignty of India and, in any event, under the residuary power conferred on the Parliament under Article 248 read with Entry 97 of the Union List and, therefore, the Maharashtra State legislature did not have legislative competence to enact the latter part of Section 2 (1)(e) of the MCOCA which relates to 'promoting insurgency'. Hence, according to him, that part of Section 2(1)(e) of the MCOCA

which refers to 'promoting insurgency' is ultra vires Article 246(3) of the Constitution.

12. Mr. Shanti Bushan, learned senior counsel appearing for the appellant in Civil Appeal No. 1977 of 2008, in addition to the above noted submission, submitted that Section 2(1)(e) of the MCOCA so far as it covers 'insurgency' is repugnant and has become void by enactment of the Unlawful Activities (Prevention) Amendment Act, 2004, amending the Unlawful Activities (Prevention) Act, 1967 ("UAPA" hereinafter). He submitted that insurgency and terrorism are two sides of the same coin and after the 2004 amendment, the UAPA exhaustively deals with the offence of terrorism and the meaning of the term insurgency as contained in Section 2 (1)(e) of the MCOCA is very well included in the definition of 'terrorist act' as contained in Section 15 of the UAPA. He further submitted that due to the said anomaly, an act would constitute an offence under Section 2 (1)(e) of the MCOCA as also under Section 15 of the UAPA and that while MCOCA lays down a different procedure and envisages a different competent court to try that offence, the UAPA provides for a different procedure and different court for the trial of the same offence. He submitted that the MCOCA will be within the competence of the State Legislature, but for the addition of the term 'insurgency' in Section 2(1)(e).

13. Mr. Bhushan submitted that although the UAPA does not expressly repeal the impugned provision of the MCOCA, yet the same cannot stand, for the case in hand is a case of implied repeal. Mr. Bhushan submitted that if the subsequent law enacted by the Parliament is repugnant (in direct conflict) to the State Law then the State Law will become void as soon as the subsequent law of Parliament is enacted. Thus, according to him, in the present case, after the 2004 amendment to the UAPA there is an implied repeal of the MCOCA, so far as it covers 'insurgency'.

14. As against this Mr. Shekhar Naphade and Mr. Harish

N. Salve, learned senior counsel appearing for the respondent State of Maharashtra submitted that the MCOCA deals with the activities of the organized gangs and the criminal syndicate and that no other law, including the UAPA, deals with the said subject. They further submitted that the aim, objective and the area of operation of the MCOCA and the UAPA are entirely different and that there is no overlapping in the working of the two Acts. As per the submissions of learned senior counsel, so far as the MCOCA is concerned, it deals with the prevention and control of criminal activity by organized crime syndicate or gang within India, whereas the aim of the UAPA is to deal with the terrorist activities both within and outside India. Hence, the target of the MCOCA is the organised syndicate gangs whereas the UAPA targets any person who indulges in terrorist activity, be it an individual or a group. They further submitted that the extension of the MCOCA to activities of organized gangs or syndicate where they sought to promote insurgency is a logical extension of the remedy provided under the MCOCA to deal with the growing menace in the society.

15. While making a comparison between the two Acts, they submitted that the UAPA punishes the acts of insurgency per se whereas under the MCOCA, it is not the act of insurgency per se which is punishable, for under the MCOCA, 'insurgency' is the motive for the act and not the act per se. They further submitted that at the first blush, they may appear to be similar but a closer scrutiny would dispel any such notion and would show a vast area of dissimilarity between the two.

16. While making their submissions on the issue of implied repeal, they submitted that promoting insurgency as one of the elements of the MCOCA may overlap in some cases in its application with the relevant provisions of the UAPA, but the question of implied repeal would arise only where it overlaps in its entirety. They further submitted that the law is settled on the point that a given act can constitute more than one offence under two or more statutes, but merely because an act also becomes an offence under a subsequent statute does not

automatically result in repugnancy or implied repeal of the offence defined in the earlier statue. The existing statute would stand repealed only if the ingredients of the offence created by the later statute are identical to the ingredients of the offence in the earlier statute. It is only when the ingredients of both the offences are identical which makes them irreconcilable that the statutes are held to be repugnant to each other.

17. Mr. Mohan Jain, learned ASG appearing for the Union of India, respondent No. 2 herein, and Mr. Amarendra Sharan, learned ASG appearing for the CBI, supported the contentions made by Mr. Naphade and Mr. Salve. In addition, they submitted that the MCOCA creates and defines a new offence and even if it be assumed that the part of the MCOCA containing the term 'promoting insurgency' incidentally trenches upon a field under the Union list then the same cannot be held to be ultra vires applying the doctrine of pith and substance, as in essence, the MCOCA deals with the subject on which the State legislature has power to legislate under the Constitution.

18. Before we proceed further to deal with and answer the issues that have been raised for our consideration, we wish to make note of a minor development which took place during the pendency of the present appeal. A further amendment was made to the UAPA, namely, the Unlawful Activities (Prevention) Amendment Act, 2008 and so the matter was again listed for hearing in order to ascertain the impact, if any, of the said amendment to the issue in hand. Mr. Shekhar Naphade, learned senior counsel has, in detail, taken us through the provisions of the 2008 amendment. At the time of hearing, the counsel appearing for both the parties have fairly agreed that the 2008 amendment did not bring about any such change which would affect the decision of this Court on the issues raised and urged. It is, therefore, not necessary for us to elaborate on the said amendments.

Legislative Competence of Government of Maharashtra

19. The legislature of a State derives its legislative power from the provisions of Article 246(3) of the Constitution of India. Article 246(3) confers on a State legislature the exclusive power to enact laws for the whole or any part of the territory of the State on any of the matters enumerated in List II in the Seventh Schedule to the Constitution.

20. So far as the question of legislative competence of the Maharashtra State legislature to enact a law like MCOCA is concerned, the Bombay High Court in the impugned judgment has held that MCOCA in pith and substance falls in Entry No. 1 of List III which refers to the criminal law. Though the Bombay High Court has noted the fact that the State of Maharashtra could have relied upon Entry 1 of List II i.e. the State List which refers to 'public order' to contend that the term 'promoting insurgency' is relatable to that entry, the High Court refrained itself from analyzing the said aspect because the respondent State had, before the High Court, taken a stand that 'promoting insurgency' would be covered by Entry 1 of List III i.e. the Concurrent List.

21. Before proceeding further, it would be appropriate on our part to mention that we do not concur with the said finding of the High Court that the MCOCA in pith and substance falls only in Entry No. 1 of List III. This Court in *Bharat Shanti Lal Shah* (supra) has already held that the subject-matter of the MCOCA is maintaining public order and prevention by police of commission of serious offences affecting public order, and thus would be within the purview of and be relatable to Entries 1 and 2 of List II as also to Entries 1, 2 and 12 of List III of Schedule VII to the Constitution of India. The question that needs to be determined in the present case is whether the said finding in *Bharat Shanti Lal Shah* (supra) can be extended to the term 'promoting insurgency', and also whether the term 'promoting insurgency', would be within the purview and relatable to Entry 1 of List II.

22. Section 2(1)(e) of the MCOCA, which includes within its ambit the term 'promoting insurgency', reads as follows:-

> "2. (1)(e) *'organised crime'* means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or *promoting insurgency."* [emphasis supplied]

23. The term 'insurgency' has not been defined either under the MCOCA or any other statute. The word 'insurgency' does not find mention in the UAPA even after the 2004 and 2008 amendments. The definition as submitted by Mr. Salve also does not directly or conclusively define the term 'insurgency' and thus reliance cannot be placed upon it. The appellants would contend that the term refers to rising in active revolt or rebellion. Webster defines it as a condition of revolt against government that does not reach the proportion of an organized revolution.

24. In *Sarbananda Sonowal v. Union of India,* [(2005) 5 SCC 665], this Court has held that insurgency is undoubtedly a serious form of internal disturbance which causes a grave threat to the life of people, creates panic situation and also hampers the growth and economic prosperity of the State.

25. We feel inclined to adopt the aforesaid definition for the current proceedings as there does not appear to exist any other satisfactory source.

26. Although the term 'insurgency' defies a precise definition, yet, it could be understood to mean and cover breakdown of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the state and its sovereignty.

27. In terms of Entry 1 of the State List, the State Legislature is competent to enact a law for maintenance of public order. The said entry is reproduced herein below:-

> *"Entry 1, List II*
>
> 1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power)."

28. It has been time and again held by this Court that the expression 'public order' is of a wide connotation. In *Ramesh Thappar v. State of Madras* [1950 SCR 594], it has been held by this Court that 'public order' signifies a state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established. This Court, in para 8, quoted a passage from Stephen's Criminal Law of England, wherein he observed as follows:

> "Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other and are not capable of being marked off by perfectly defined boundaries. All of them have in common one feature, namely, that the normal tranquility of a civilized society is in each of the cases mentioned disturbed either by actual force or at least by the show and threat of it."

This Court further observed that though all these offences involve disturbances of public tranquility and are in theory offences against public order, the difference between them is only one of degree. The Constitution thus requires a line, perhaps only a rough line, to be drawn between the fields of public order or tranquility and those serious and aggravated forms of public disorder which are calculated to endanger the security of the State.

29. In *Superintendent, Central Prision v. Ram Manohar*

Lohia [(1960) 2 SCR 821] this Court had held that "Public order" is synonymous with public safety and tranquility, and it is the absence of any disorder involving a breach of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. Subsequently, in *Dr. Ram Manohar Lohia v. State of Bihar* [(1966) 1 SCR 709], Hidayatullah, J., held that any contravention of law always affected order, but before it could be said to affect public order, it must affect the community at large. He was of the opinion that offences against "law and order", "public order", and "security of State" are demarcated on the basis of their gravity. The said observation is as follows:-

> **"55.** It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State……."

30. The Constitution Bench of this Court in *Madhu Limaye v. Sub-Divisional Magistrate,* [(1970) 3 SCC 746], while adopting and explaining the scope of the test laid down in *Dr. Ram Manohar Lohia v. State* (supra), stated that the State is at the centre of the society. Disturbances in the normal functioning of the society fall into a broad spectrum, from mere disturbance of the serenity of life to jeopardy of the State. The acts become more and more grave as we journey from the periphery of the largest circle towards the centre. In this journey we travel first though public tranquility, then through public order and lastly to the security of the State. This Court further held that in the judgment of this Court, the expression "in the interest

of public order" as mentioned in the Constitution of India encompasses not only those acts which disturb the security of the State or acts within ordre publique as described but also certain acts which disturb public tranquility or are breaches of the peace. It is not necessary to give the expression a narrow meaning because, as has been observed, the expression "in the interest of public order" is very wide.

31. The meaning of the phrase "public order" has also been determined by this Court in *Kanu Biswas v. State of West Bengal* [(1972) 3 SCC 831] where it was held that the concept of "public order" is based on the French concept of "ordre publique" and is something more than ordinary maintenance of law and order.

32. It has been seen that the propositions laid down in the above noted cases have been time and again followed in subsequent judgments of this Court and still govern the field.

33. At this stage, it would also be pertinent to note the findings of the Federal Court in *Lakhi Narayan Das v. Province of Bihar* [AIR 1950 FC 59] where the Federal Court while considering the scope and ambit of the expression "public order", used in Entry 1 of the provincial list in the Government of India Act, 1935, in para 12 of the judgment observed as follows:-

> "The expression "Public Order" with which the first item begins is, in our opinion, a most comprehensive term and it clearly indicates the scope or ambit of the subject in respect to which powers of legislation are given to the province. Maintenance of public order within a province is primarily the concern of that province and subject to certain exceptions which involve the use of His Majesty's forces in aid of civil power, the Provincial Legislature is given plenary authority to legislate on all matters which relate to or are necessary for maintenance of public order."

34. It is a well-established rule of interpretation that the

entries in the List being fields of legislation must receive liberal construction inspired by a broad and generous spirit and not a narrow or pedantic approach. Each general word should extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended within it. [Reference in this regard may be made to the decisions of this Court in Navinchandra Mafatlal v. Commr. of I.T. [AIR 1955 SC 58], State of Maharashtra v. Bharat Shanti lal Shah [(2008) 13 SCC 5]]. It is also a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statute and while construing such statute every legally permissible effort should be made to keep the statute within the competence of the State Legislature [Reference may be made to the cases of: *Charanjit Lal Choudhary v. Union of India* [AIR 1951 SC 41], *T.M.A. Pai Foundation v. State of Karnataka* [(2002) 8 SCC 481], *Karnataka Bank Ltd. State of AP* [(2008) 2 SCC 254]].

35. One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls

under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List.

36. A Constitution Bench of this Court in *A.S. Krishna v. State of Madras* [AIR 1957 SC 297], held as under:

> "8. … But then, it must be remembered that we are construing a federal Constitution. It is of the essence of such a Constitution that there should be a distribution of the legislative powers of the Federation between the Centre and the Provinces. The scheme of distribution has varied with different Constitutions, but even when the Constitution enumerates elaborately the topics on which the Centre and the States could legislate, some overlapping of the fields of legislation is inevitable. The British North America Act, 1867, which established a federal Constitution for Canada, enumerated in Sections 91 and 92 the topics on which the Dominion and the Provinces could respectively legislate. Notwithstanding that the lists were framed so as to be fairly full and comprehensive, it was not long before it was found that the topics enumerated in the two sections overlapped, and the Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial Legislatures. It was in this situation that the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was intra vires, regard must be had to its pith and substance. That is to say, if a statute is found in substance to relate to a topic within the competence of the legislature, it should be held to be intra vires, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within it

competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the vires of the law even as regards the area of encroachment."

37. Again, a Constitutional Bench of this Court while discussing the said doctrine in *Kartar Singh v. State of Punjab* [(1994) 3 SCC 569] observed as under:

"60. This doctrine of 'pith and substance' is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden."

38. It is common ground that the State Legislature does not have power to legislate upon any of the matters enumerated in the Union List. However, if it could be shown that the core area and the subject-matter of the legislation is covered by an entry in the State List, then any incidental encroachment upon an entry in the Union List would not be enough so as to render the State law invalid, and such an incidental encroachment will not make the legislation ultra vires the Constitution.

39. In *Bharat Hydro Power Corpn. Ltd. v. State of Assam* [(2004) 2 SCC 553], the doctrine of pith and substance came to be considered, when after referring to a catena of decisions of this Court on the doctrine it was laid down as under:

"18. It is likely to happen from time to time that enactment though purporting to deal with a subject in one list touches also on a subject in another list and prima facie looks as if one legislature is impinging on the legislative field of another legislature. This may result in a large number of statutes being declared unconstitutional because the legislature enacting law may appear to have legislated in a field reserved for the other legislature. To examine whether a legislation has impinged on the field of other legislatures, in fact or in substance, or is incidental, keeping in view the true nature of the enactment, the courts have evolved the doctrine of 'pith and substance' for the purpose of determining whether it is legislation with respect to matters in one list or the other. Where the question for determination is whether a particular law relates to a particular subject mentioned in one list or the other, the courts look into the substance of the enactment. Thus, if the substance of the enactment falls within the Union List then the incidental encroachment by the enactment on the State List would not make it invalid. This principle came to be established by the Privy Council when it determined appeals from Canada or Australia involving the question of legislative competence of the federation or the States in those countries. This doctrine came to be established in India and derives its genesis from the approach adopted by the courts including the Privy Council in dealing with controversies arising in other federations. For applying the principle of 'pith and substance' regard is to be had (i) to the enactment as a whole, (ii) to its main objects, and (iii) to the scope and effect of its provisions. For this see *Southern Pharmaceuticals & Chemicals v. State of Kerala* [(1981) 4 SCC 391], *State of Rajasthan v. G. Chawla* [AIR 1959 SC 544], *Amar Singhji v. State of Rajasthan* [AIR 1955 SC 504], *Delhi Cloth and General Mills Co. Ltd. v. Union of India* [(1983) 4 SCC 166] and *Vijay Kumar Sharma v. State of Karnataka* [(1990) 2 SCC 562]. In the last-mentioned case it was held:

'(3) Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.' "

40. Now that we have examined under what circumstances a State Law can be said to be encroaching upon the law making powers of the Central Government, we may proceed to evaluate the current issue on merits. Let us once again examine the provision at the core of this matter:

"2(1)(e) "organized crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency;"

After examining this provision at length, we have come to the conclusion that the definition of "organized crime" contained in Section 2(1)(e) of the MCOCA makes it clear that the phrase "promoting insurgency" is used to denote a possible driving force for "organized crime". It is evident that the MCOCA does not punish "insurgency" per se, but punishes those who are guilty of running a crime organization, one of the motives of which may be the promotion of insurgency. We may also examine the Statement of Objects & Reasons to support the conclusion arrived at by us. The relevant portion of the Statement of Objects & Reasons is extracted hereinbelow: -

"1. Organised crime has been for quite some years now

come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract, killing, extortion, smuggling in contrabands, illegal trade in narcotics kidnappings for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime being very huge, it has had serious adverse effect on our economy. It was seen that the organised criminal syndicates made a common cause with terrorist gangs and foster narco terrorism which extend beyond the national boundaries. There was reason to believe that organised criminal gangs have been operating in the State and thus, there was immediate need to curb their activities.

…

2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organized crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of organized crime."

41. We find no merit in the contention that the MCOCA, in any way, deals with punishing insurgency directly. We are of the considered view that the legislation only deals with "insurgency" indirectly only to bolster the definition of "organized crime".

42. However, even if it be assumed that "insurgency" has a larger role to play than pointed out by us above in the MCOCA, we are of the considered view that the term "promoting insurgency" as contemplated under Section 2(1)(e) of the MCOCA comes within the concept of public order. From the ratio of the judgments on the point of public order referred to

by us earlier, it is clear that anything that affects public peace or tranquility within the State or the Province would also affect public order and the State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order. Even if the said part of the MCOCA incidentally encroaches upon a field under Entry 1 of the Union list, the same cannot be held to be ultra vires in view of the doctrine of pith and substance as in essence the said part relates to maintenance of Public Order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List.

43. Therefore, we are of the considered view that it is within the legislative competence of the State of Maharashtra to enact such a provision under Entries 1 and 2 of List II read with Entries 1, 2 and 12 of List III of the Seventh Schedule of the Constitution.

Repugnance with Central Statute

44. This brings us to the second ground of challenge i.e. the part of Section 2(1)(e) of the MCOCA, so far as it covers case of insurgency, is repugnant and has become void by the enactment of Unlawful Activities (Prevention) Amendment Act, 2004, amending the Unlawful Activities (Prevention) Act, 1967.

45. The Bombay High Court, in para 44 of the impugned judgment, has held that though 'promoting insurgency' is one of the facets of terrorism, the offence of terrorism as defined under the UAPA as amended by the 2004 Act is not identical to the offences under the MCOCA and the term 'terrorism' and 'insurgency' are not synonymous. As per the High Court both the enactments can stand together as there is no conflict between the two.

46. Before we proceed to analyze the said aspect, it would be appropriate to understand the situations in which repugnancy would arise.

47. Chapter I of Part XI of the Constitution deals with the subject of distribution of legislative powers of the Parliament and the legislature of the States. Article 245 of the Constitution provides that the Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State.

48. The legislative field of the Parliament and the State Legislatures has been specified in Article 246 of the Constitution. Article 246, reads as follows: -

> **"***246. Subject-matter of laws made by Parliament and by the legislature of States.*—(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').
>
> (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List').
>
> (3) Subject to clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').
>
> (4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Article 254 of the Constitution which contains the mechanism for resolution of conflict between the Central and the State legislations enacted with respect to any matter enumerated in List III of the Seventh Schedule reads as under:

> **"***254. Inconsistency between laws made by Parliament and laws made by the legislatures of States.*—(1) If any provision of a law made by the legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the legislature of the State shall, to the extent of the repugnancy, be void.
>
> (2) Where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the legislature of the State."

49. We may now refer to the judgment of this Court in *M. Karunanidhi v. Union of India,* [(1979) 3 SCC 431], which is one of the most authoritative judgments on the present issue. In the said case, the principles to be applied for determining repugnancy between a law made by the Parliament and a law made by the State Legislature were considered by a Constitution Bench of this Court. At para 8, this Court held that repugnancy may result from the following circumstances:

> "1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.
>
> 2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.
>
> 3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.
>
> 4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254."

In para 24, this Court further laid down the conditions which must be satisfied before any repugnancy could arise, the said conditions are as follows:-

"1. That there is a clear and direct inconsistency between the Central Act and the State Act.

2. That such an inconsistency is absolutely irreconcilable.

3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

Thereafter, this Court after referring to the catena of judgments on the subject, in para 38, laid down following propositions:-

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

50. In *Govt. of A.P. v. J.B. Educational Society,* [(2005) 3 SCC 212], *this Court while discussing the scope of Articles 246 and 254 and considering the proposition laid down by this Court in M. Karunanidhi* case (supra) *with respect to the situations in which repugnancy would arise, in para 9, held as follows:-*

"9. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

10. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the court to interpret the legislations made by Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non obstante clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List.

11. With respect to matters enumerated in List III (Concurrent List), both Parliament and the State Legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict.

Thereafter, this Court, in para 12, held that the question of repugnancy between the parliamentary legislation and the State legislation could arise in following two ways:-

"12…….First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with

respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the non obstante clause in Article 246(1), in the second, by reason of Article 254(1). Clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation."

51. In *National Engg. Industries Ltd. v. Shri Kishan Bhageria* [(1988) Supp SCC 82], Sabyasachi Mukharji, J., opined that the best test of repugnancy is that if one prevails, the other cannot prevail.

52. In the light of the said propositions of law laid down by this Court in a number of its decisions, we may now analyze the provisions of the two Acts before us.

53. The provisions of the MCOCA create and define a new offence of 'organised crime'. According to its Preamble, the said Act was enacted to make specific provisions for prevention and control of, and for coping with, criminal activity by organised crime syndicate or gang and for matters connected therewith or incidental thereto.

54. The Statement of Objects and Reasons of the MCOCA, inter alia, states that organized crime has for quite some years now come up as a very serious threat to our society and there is reason to believe that organized criminal gangs are operating in the State and thus there is immediate need to curb their activities. The Statement of Objects and Reasons in relevant part, reads as under:

"Organised crime has for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fuelled by illegal wealth generated by

contract killings, extortion, smuggling in contrabands, illegal trade in narcotics, kidnappings for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organised crime is very huge and has serious adverse effect on our economy. It is seen that the organised criminal syndicates make a common cause with terrorist gangs and foster narco-terrorism which extend beyond the national boundaries. There is reason to believe that organised criminal gangs are operating in the State and thus, there is immediate need to curb their activities.

It is also noticed that the organised criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

2. The existing legal framework i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime. Government has, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised crime."

After enacting the MCOCA, assent of the President was also obtained which was received on 24.04.1999. Section 2 of the MCOCA is the interpretation clause. Clause (d) of sub-section (1) of Section 2 of the MCOCA, defines the expression "continuing unlawful activity" to mean an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of

which more than one charge-sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. Clause (e) (extracted earlier hereinabefore), defines the expression "organised crime" to mean any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency. Clause (f), defines "organised crime syndicate" to mean a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime. The said definitions are interrelated; the "organised crime syndicate" refers to an "organised crime" which in turn refers to "continuing unlawful activity". MCOCA, in the subsequent provisions lays down the punishment for organised crime and has created special machinery for the trial of a series of offences created by it.

55. Prior to the 2004 amendment, the UAPA did not contain the provisions to deal with terrorism and terrorist activities. By the 2004 amendment, new provisions were inserted in the UAPA to deal with terrorism and terrorist activities. The Preamble of the UAPA was also amended to state that the said Act is enacted to provide for the more effective prevention of certain unlawful activities of individuals and associations, and dealing with terrorist activities and for matters connected therewith. In 2008 amendment, the Preamble has again been amended and the amended Preamble now also contains a reference to the resolution adopted by the Security Counsel of the United Nations on 28.09.2001 and also makes reference to the other resolutions passed by the Security Counsel requiring the States (Nations which are member of the United Nations) to take action against certain terrorist and terrorist organizations. It also makes

reference to the order issued by the Central Government in exercise of power under Section 2 of the United Nations (Security Council) Act, 1947 which is known as the Prevention & Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007. The Preamble of the UAPA now reads as under:

> "An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith.
>
> Whereas the Security Council of the United Nations in its 4385th meeting adopted Resolution 1373 (2001) on 28th September, 2001, under Chapter VII of the Charter of the United Nations requiring all the States to take measures to combat international terrorism;
>
> And whereas Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) of the Security Council of the United Nations require the States to take action against certain terrorists and terrorist organisations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule;A
>
> nd whereas the Central Government, in exercise of the powers conferred by section 2 of the United Nations (Security Council) Act, 1947 (43 of 1947) has made the Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007;
>
> And whereas it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the prevention of, and for coping with, terrorist activities and for matters connected therewith or

incidental thereto."

56. Section 2 (1)(k) and Section 15 of the UAPA, 1967 which were inserted by the 2004 amendment and define and deal with the term 'terrorist act', read as under :

"*2(k). `terrorist act'* has the meaning assigned to it in section 15 and the expression `terrorism' and `terrorist' should be construed accordingly."

"15. Terrorist act. Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act".

However, after the 2008 amendment, Section 15 has been substituted in the following manner:-

"15. Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror

in the people or any section of the people in India or in any foreign country,-

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances whether biological radioactive, nuclear or otherwise of a hazardous nature or by any other means of whatever nature to cause or likely to cause—

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or

abstain from doing any act,

commits a terrorist act.

Explanation.– For the purpose of this section, public functionary means the constitutional authorities and any other functionary notified in the Official Gazette by the Central Government as public functionary."

From a perusal of Section 15 before and after amendment of the UAPA, it comes to light that though after amendment there have been certain additions to the provision but in substance the provision remains the same.

57. Sub-Clauses (l) and (m) of sub Section (1) of Section 2 of the UAPA, which define the term 'terrorist gang' and 'terrorist organisation' respectively, read as under :

(l) *"terrorist gang"* means any association, other than terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act;

(m) *"terrorist organisation"* means an organisation listed in the Schedule or an organisation operating under the same name as an organisation so listed;

The following are the Terrorist Organisations which are mentioned in the First Schedule of the UAPA: -

"1. Babbar Khalsa International.

2. Khalistan Commando Force.

3. Khalistan Zindabad Force.

4. International Sikh Youth Federation.

5. Lashkar-E-Taiba/Pasban-E-Ahle Hadis.

6. Jaish-E-Mohammed/Tahrik-E-Furqan.

7. Harkat-Ul-Mujahideen/Harkat-Ul-Nsar/Harkat-Ul-

Jehad-E-Islami.

8. Hizb-ul-Mujahideen/Hizb-ul-Mujahideen Pir Panjal Regiment.

9. Al-Umar-Mujahideen.

10. Jammu and Kashmir Islamic Front.

11. United Liberation Front of Assam (ULFA).

12. National Democratic Front of Bodoland (NDFB).

13. People's Liberation Army (PLA).

14. United National Liberation Front (UNLF).

15. People's Revolutionary Party of Kangleipak (PREPAK).

16. Kangleipak Communist Party (KCP).

17. Kanglei Yaol Kanba Lup (KYKL).

18. Manipur People's Liberation Front (MPLF).

19. All Tripura Tiger Force.

20. National Liberation Front of Tripura.

21. Liberation Tigers of Tamil Eelam (LTTE).

22. Students Islamic Movement of India.

23. Deendar Anjuman.

24. Communist Party of India (Marxist-Leninist)—People's War, all its formations and front organisations.

25. Maoist Communist Centre (MCC), all its formations and front organisations.

26. Al Badr.

27. Jamiat-ul-Mujahidden.

28. Al-Qaida.

29. Dukhtaran-e-Millat (DEM).

30. Tamil Nadu Liberation Army (TNLA).

31. Tamil National Retrieval Troops (TNRT).

32. Akhil Bharat Nepali Ekta Samaj (ABNES).'.

33. Organisations listed in the Schedule to the U.N. Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007 made under section 2 of the United Nations (Security Council) Act, 1947(43 of 1947) and amended from time *to time."*

[Entry No. 33 was inserted by the 2008 amendment.]

The precise reason why we have extracted the list of terrorist organizations under the UAPA hereinbefore is to bring to the fore the contrast between the two legislations which are in question before us. The exhaustive list of terrorist organizations in the First Schedule to the UAPA has been included in order to show the type and nature of the organizations contemplated under that Act. A careful look of the same would indicate that all the organizations mentioned therein have as their aims and objects undermining and prejudicially affecting the integrity and sovereignty of India, which certainly stand on a different footing when compared to the activities carried out by the forces like the appellant.

58. Section 2 (1)(o) of the UAPA, which defines the term 'unlawful activity', reads as under: -

"(o) *"unlawful activity",* in relation to an individual or

association, means any action taken by such individual or association whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise, -

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;"

59. Before we proceed to analyse the provisions of the two statutes in order to ascertain whether they are repugnant or not, we may note that it is well settled that no provision or word in a statute is to be read in isolation. In fact, the statute has to be read as a whole and in its entirety. In *Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd.,* [(1987) 1 SCC 424], this Court while elaborating the said principle held as under:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context,

its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

60. A perusal of the Preamble, the Statement of Objects and Reasons and the Interpretation clauses of the MCOCA and the UAPA would show that both the acts operate in different fields and the ambit and scope of each is distinct from the other. So far as the MCOCA is concerned, it principally deals with prevention and control of criminal activity by organised crime syndicate or gang within India and its purpose is to curb a wide range of criminal activities indulged in by organised syndicate or gang. The aim of the UAPA, on the other hand, is to deal with terrorist and certain unlawful activities, which are committed with the intent to threaten the unity, integrity, security or sovereignty of India or with the intent to strike terror in the people or any section of the people in India or in any foreign country or relate to cessation or secession of the territory of India.

61. Under the MCOCA the emphasis is on crime and pecuniary benefits arising therefrom. In the wisdom of the legislature these are activities which are committed with the objective of gaining pecuniary benefits or economic advantages and which over a period of time have extended to promoting insurgency. The concept of the offence of 'terrorist act' under section 15 of the UAPA essentially postulates a threat or likely threat to unity, integrity, security and sovereignty of India or striking terror amongst people in India or in foreign country or to compel the Government of India or the Government of a foreign country or any other person to do or abstain from doing any act. The offence of terrorist act under Section 15 and the

offence of Unlawful activity under Section 2 (1) (o) of the UAPA have some elements in commonality. The essential element in both is the challenge or threat or likely threat to the sovereignty, security, integrity and unity of India. While Section 15 requires some physical act like use of bombs and other weapons etc., Section 2 (1)(o) takes in its compass even a written or spoken words or any other visible representation intended or which supports a challenge to the unity, sovereignty, integrity and security of India. The said offences are related to the Defence of India and are covered by Entry 1 of the Union List.

62. Moreover, the meaning of the term 'Unlawful Activity' in the MCOCA is altogether different from the meaning of the term 'Unlawful Activity' in the UAPA. It is also pertinent to note that the MCOCA does not deal with the terrorist organisations which indulge in terrorist activities and similarly, the UAPA does not deal with organised gangs or crime syndicate of the kind specifically targeted by the MCOCA. Thus, the offence of organised crime under the MCOCA and the offence of terrorist act under the UAPA operate in different fields and are of different kinds and their essential contents and ingredients are altogether different.

63. The concept of insurgency under Section 2(1) (e) of the MCOCA, if seen and understood in the context of the Act, is a grave disturbance of the public order within the state. The disturbance of the public order, in each and every case, cannot be said to be identical or similar to the concepts of terrorist activity as contemplated respectively under Section 2(1)(o) and Section 15 of the UAPA. Moreover, what is punishable under the MCOCA is promoting insurgency and not insurgency per se.

64. The aforesaid analysis relating to the essential elements of offence of 'promoting insurgency' under Section 2 (1) (e) of the MCOCA and the offence of terrorist act and unlawful activity under Section 15 and Section 2 (1)(o) of the UAPA respectively, clearly establishes that the UAPA occupies

a field different than that occupied by the MCOCA. There is no clear and direct inconsistency or conflict between the said provisions of the two Acts.

65. We therefore, for the reasons mentioned above, concur with the final decision reached by the High Court in the impugned judgment and repel the challenge unhesitatingly.

66. The appeals accordingly fail and are dismissed. No Costs.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 940 of 2008.

From the Judgment & Order dated 15.4.2008 of the Special Court under MCOC Act at Gr. Bombay in Misc. Application No. 142 of 2008 in MCOC Special Case No. 23 of 2006.

Mohan Jain, ASG, Shekhar Naphade, Anil K. Jha, Sanjay V. Kharde, Asha G. Nair, Ravindra Keshavrao Adsure, Dinesh Thakur, Rohini Mukherjee Jaspreet Aulakh, Vibhav Misra, Subhash Kaushik, T.A. Khan, Arvind Kumar Sharma, P.K. Dey, P.Parmeswaran for the appearing parties.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By a separate Judgment pronounced today, the three connected Civil Appeals being C.A. Nos. 1975-1977 of 2008 have been dismissed.

2. We dispose of the present Criminal Appeal with a direction that the Special Court constituted under the MCOCA shall consider the issue raised under Misc. Application No. 142 of 2008 in MCOCA Special Case No. 23 of 2006 on its own merits in light of the findings given by this Court in the said connected appeals, in case a fresh application is moved by the appeallant herein before the Special Court.

N.J. Appeals disposed of.

SANTOSH MOOLYA AND ANR.
v.
STATE OF KARNATAKA
(Criminal Appeal No. 479 of 2009)

APRIL 26, 2010

[P. SATHASIVAM AND R.M. LODHA, JJ.]

Penal Code, 1860: s.376 – Conviction for commission of rape – Two sisters victim of rape – Delay of 42 days in lodging complaint – Effect on prosecution case – Held: The victims explained that the delay was on account of their illiteracy and fear due to threat call of accused persons – In a case of rape, when victims are illiterate, their statements have to be accepted in toto without further corroboration – Courts to keep in mind that no self respecting woman would put her honour at stake by falsely alleging commission of rape on her – Evidence of victims found to be cogent, reliable and must be accepted – Conviction upheld – Crime against women – Delay/laches – Evidence of rape victim – Corroboration of.

Prosecution case was that the victims were sisters and they were raped by the appellants. After the rape, appellants threatened the victims that if they inform any one about the rape, they would kill them. The next day, victims informed the incident to PW-4 and PW-5 who asked them to lodge a complaint but they hesitated to do so. After a month and 14 days, PW-1 victim lodged a complaint. Victims were sent for medical examination and on the same day, both the appellants were arrested. Trial court convicted appellants under Section 376 and Section 506 IPC. High Court affirmed the same. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. The victims were sisters and both of them explained how they suffered at the hands of the accused. PW 1 was the elder sister. In her evidence, she deposed that on 02.06.2004, she and her younger sister PW 2 after completing their work were waiting near the bus stop in order to go to their place. The second accused-A-2 came in an auto-rickshaw which was driven by A1. She knew both the accused since they were also doing quarry work under their employer. According to PW 1, A-1 asked them to get into the auto because they were also going to the same place. Believing his statement, PW 1 and her sister PW 2 entered the autorickshaw and A-2 seated next to them. She further explained that after traveling sometime in the main road auto went off in a kutcha road and it was stopped after some distance. It was drizzling at that time. She further added that A-1 pulled her out of the auto and A-2 pulled her sister. Both of them were prevented from raising their voice since the accused covered their mouth and forced both of them to lie down on the ground. By threat, they made both PWs 1 and 2 to lie on the ground and removed their clothes and they were made naked. She narrated that thereafter, A1 had a forcible intercourse with her and A2 with her sister PW 2. PW1 further stated that both she and her sister tried to escape from the clutches of the two accused but could not succeed as there was no one to help them and added to it both the accused threatened that if they inform the incident to anyone, they would kill them. PW 1 further explained that she and her sister had injuries on their body and also in their private parts. Their clothes were torn and with great difficulty on reaching home, they informed their mother about the incident. In the same way, PW 2 also explained and narrated how she suffered and was raped at the hands of A2. [Paras 5, 6] [1099-C-G; 1099-H; 1100-A-B]

1.2. It is seen from the evidence of PWs 1 and 2 that on reaching their home, apart from informing their

mother, they also informed PW5 about the incident who, in turn, informed their owner PW 4. PW 1 explained that though PW 4 asked them to make a complaint, because of the threat posed by A-1 and A-2 and out of fear they did not inform the incident to the police and after gaining confidence and courage, finally a complaint was lodged with the police on 14.07.2004. Though there was a delay of 42 days in lodging complaint to the police, PWs 1 and 2, in their evidence, explained that all their family members including themselves were uneducated, there was no male member in their family for their assistance and they settled in the present village to eke out their livelihood. The mother of PWs 1 and 2 was examined as PW 14. She also corroborated the assertion of PWs 1 and 2 about their illiteracy and fear due to the threat call of A1 and A2. In those circumstances, the evidence of PWs 1 and 2 and their complaint cannot be rejected as unacceptable. In a case of rape, particularly when the victims are illiterate, uneducated, their statements have to be accepted in toto without further corroboration. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. [Paras 7, 8] [1100-C-G; 1102-E-F]

State of Punjab v. Gurmit Singh and Others **(1996) 2 SCC 384;** *Rajinder @ Raju v State of H.P.* **JT (2009) 9 SC 9;** *Sohan Singh and Another v. State of Bihar* **(2010) 1 SCC 68, relied on.**

1.3. The evidence of PW 1, PW 2, owner of the quarry PW 4 and mother of the victim PW-14, explained the delay

of 42 days in lodging the complaint. In addition to the same, except the victims, no male member was available in their family to help them. In fact they came to the village where the incident occurred to eke out their livelihood. Further, PWs 1 and 2 asserted that after committing rape, A-1 and A-2 threatened that they would kill them if they inform anyone. Due to threat from A1 and A2, coupled with illiteracy and poverty, the two victims were not taken to the doctor immediately after the incident but they were taken after a month and 14 days. In such circumstances, as rightly observed by the trial Court and the High Court, it was unlikely that any sign of sexual intercourse would be feasible by examining the private part of the victims. Added to it, PW 1 was a married woman and having children which indicate that she was accustomed to sexual intercourse and in view of the same, it would be difficult to expect the doctor, who examined after quite sometime, to indicate the sign of sexual intercourse. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix would not lead to any inference that the accused had not committed forcible sexual intercourse on the prosecutrix. There was no reason to disbelieve the statement of the victims PWs 1 and 2. On the other hand, their oral testimony was found to be cogent, reliable, convincing and trustworthy and must be accepted. [Paras 10, 12] [1103-A-C; 1103-E-H; 1104-A]

Case Law Reference:

(1996) 2 SCC 384	**relied on**	**Para 7**
JT (2009) 9 SC 9	**relied on**	**Para 8**
(2010) 1 SCC 68	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 479 of 2009.

From the Judgment & Order dated 13.3.2008 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 1498 of 2007.

Vijay Kumar, A.C. and Rameshwar Das for the Appellants.

Sanjay R. Hegde, Anil Mishra and Aditya Jain for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed against the final judgment and order dated 13.03.2008 passed by the High Court of Karnataka at Bangalore in Criminal Appeal No. 1498 of 2007 whereby the High Court dismissed the appeal filed by the appellants-accused affirming the conviction and sentence passed by the Additional District and Sessions Judge, Dakshina Kannada, Mangalore dated 1/3.9.2007 in S.C. No. 13 of 2005.

2. Background facts in a nutshell are as under:

On 02.06.2004, two sisters (both victims of rape), who were working in the quarry of one Subhash Jain- PW-4, after completing their work, were waiting for the bus near Sampige of Puttige Village by the side of the road to go to their residence in Badaga Mijaru Village, Ashwathapura, Santhakatte. At about 6.00 p.m., the appellants came there in an autorickshaw which was driven by Santhosh Moolya (A-1) and stopped the auto in front of the victims asking them to get into the auto as they were also going towards Ashwathapura side. Surendra Gowda (A-2) was already sitting in the auto. Both the sisters sat by his side. It was raining at that time. After some time, leaving the main road, the appellant moved the auto towards a kutcha road. Both the victims asked them as to where the auto was being taken. By that time, the accused stopped the auto at a lonely place and pulled both the victims out of the auto and after covering their mouth with hands, threatened to kill them if they gave rise to any shouting. Thereafter, both the victims were

made to lie on the ground and their clothes were removed. Santhosh Moolya, A-1 raped the elder sister and Surendra Gowda, A-2 raped the younger sister. While leaving the place, both the accused threatened the victims not to inform any one about the incident and also allow them to do the similar act in future failing which they would be killed. After sometime, the victims managed to get up and put on their clothes and walked towards their house and informed the incident to their mother (PW-14). On the next day, they informed the incident to one Nonayya Gowda, PW-5 a worker of the quarry, who, in turn, informed Subhash Jain (PW-4), who told them to file a complaint but they hesitate to file the complaint. On 14.07.2004, at about 4.30 p.m., Yamuna (PW-1) gave statement before the Sub-Inspector of Police, Moodbiri Police Station and that was reduced to writing by Ithappa, P.S.I. PW-13 and registered as Crime No. 62/2004 for the offence under Sections 376 & 506 read with Section 34 of I.P.C. C.P.I. of Mulki, who is PW-16, investigated the case. PW-16 sent the victims to Medical Officer, Moodgidri for medical examination and on the same day at about 10 p.m., the police arrested both the accused persons. On the next day, i.e. on 15.07.2004, PW-16 visited the scene of offence and prepared the Panchnama (Ex. P2) and recorded the statements and sent the accused for medical examination to the Government Hospital and thereafter, they were produced before J.M.F.C. Karkala. On the same day, PW-16 seized the clothes of the victims and the Auto. On 21.08.2004, PW-16 received certificate of two victims of sexual assault. PW-16 completed the investigation and filed the charge sheet on 05.09.2004. The III Addl. Civil Judge (Jr. Dn.) and J.M.F.C., Karkala on 07.02.2005 took cognizance of the offence punishable under Sections 376 and 506 read with 34 of I.P.C. and registered the case in C.C. No. 537 of 2004 and committed the same to the Sessions Court, Mangalore as the offence alleged against the accused are triable by the Court of Sessions. The prosecution examined 16 witnesses. The trial Judge, on 01/03.09.2007, passed an order convicting and sentencing both the accused to undergo rigorous imprisonment

for a period of seven years and to pay a fine of Rs.10,000/- and, in default, to suffer rigorous imprisonment for three months for offence punishable under Section 376 of I.P.C. and further held to undergo rigorous imprisonment for three months for offence punishable under Section 506(2) I.P.C. Aggrieved by the conviction and sentence passed by the trial Court, both the accused preferred an appeal before the High Court. The learned single Judge of the High Court, by order dated 13.03.2008, dismissed the appeal affirming the conviction and sentence passed by the trial Judge. Hence, the appellants have filed this appeal by way of special leave.

3. We have heard Mr. Vijay Kumar, learned amicus curiae appearing for the appellants-accused and Mr. Sanjay R. Hegde, learned counsel appearing for the State.

4. Contentions**:**

Learned amicus curiae, after taking us through the materials placed by the prosecution and the decision of the trial Judge as well as of the High Court, submitted that in view of inordinate delay in lodging complaint i.e. FIR was registered after 42 days of alleged incident, in the absence of proper explanation, the conviction and sentence cannot be sustained. He further submitted that in view of the contradiction in the evidence of PWs 1 and 2, it is not safe to rely on their testimony and convict the accused. Finally, he submitted that the evidence of doctors i.e., PWs 7 and 8 does not support the claim of PWs 1 and 2/alleged victims, in that event, it would not be proper to convict the accused under Section 376 IPC. On the other hand, learned counsel appearing for the State submitted that taking note of the evidence of victims PWs 1 and 2 and the acceptable explanation offered by them for the delay in lodging complaint as well as their family circumstances and of the fact that they received threat from the accused, they did not make a formal complaint immediately after the incident. According to him, inasmuch as the delay was properly explained by the prosecution, the courts below are justified in convicting and

sentencing the accused for offence under Section 376. He further pointed out the alleged contradictions are rather negligible or minimal. He further pointed out that in view of the assertion of the victims PWs 1 and 2, the prosecution claim cannot be thrown out. According to him, since both the Courts have accepted the case of prosecution, there is no valid ground for interference by this Court.

5. Discussion on merits**:**

The victims are sisters and both of them explained how they suffered at the hands of the accused. PW 1 is the elder sister. In her evidence, she has deposed that on 02.06.2004 she and her younger sister PW 2 after completing their work were waiting near the bus stop at Sampige in order to go to their place at Ashwathapura. The second accused – A-2 came in an auto-rickshaw which was driven by A1. She explained that they know both the accused since they were also doing quarry work under their employer. According to PW 1, Santhosh Moolya – A-1 asked them to get into the auto because they were also going to their place i.e. Ashwathapura. Believing his statement, PW 1 and her sister PW 2 entered the autorickshaw and A-2 seated next to them. She further explained that after traveling sometime in the main road auto went off in a kutcha road and it was stopped after some distance. It was drizzling at that time. She further added that A-1 pulled her out of the auto and A-2 pulled her sister. Both of them were prevented from raising their voice since the accused covered their mouth and forced both of them to lie down on the ground. By threat, they made both PWs 1 and 2 to lie on the ground and removed their clothes and they were made naked. She narrated that thereafter, A1 had a forcible intercourse with her and A2 with her sister PW 2.

6. While narrating what had happened after forcible intercourse by A1 and A2, PW1 explained that both she and her sister tried to escape from the clutches of the two accused but they could not succeed since there was no one to help them

and added to it both the accused threatened that if they inform the incident to anyone they would kill them. PW 1 further explained that she and her sister had injuries on their body and also in their private parts. Their clothes were torn and with great difficulty on reaching home, they informed their mother about the incident. In the same way, PW 2 also explained and narrated how she suffered and raped at the hands of A2.

7. It is further seen from the evidence of PWs 1 and 2 that on reaching their home, apart from informing their mother, they also informed about the incident to one Nonayya Gowda PW5 who, in turn, informed their owner Subhash Jain PW 4. PW 1 explained that though PW 4 asked them to make a complaint, because of the threat posed by A-1 and A-2 and out of fear they did not inform the incident to the police and after gaining confidence and courage, finally a complaint (Ex. P1) was lodged with the police on 14.07.2004. Though there was a delay of 42 days in lodging complaint to the police, PWs 1 and 2, in their evidence, explained that all their family members including themselves are uneducated, no male members in their family for their assistance and they settled in the present village to eke out their livelihood. Admittedly, on the date of the incident, they were working in quarry owned by PW 4 and while returning from their workplace by force A-1 and A-2 committed rape of PWs 1 and 2. The mother of PWs 1 and 2 was examined as PW 14. She also corroborated the assertion of PWs 1 and 2 about their illiteracy and fear due to the threat call of A1 and A2. In those circumstances, the evidence of PWs 1 and 2 and their complaint Ex.P1 cannot be rejected as unacceptable. In a case of rape, particularly, the victims are illiterate, uneducated, their statements have to be accepted in toto without further corroboration. In *State of Punjab vs. Gurmit Singh and Others,* (1996) 2 SCC 384 speaking for the Bench Dr. A.S. Anand, J. (as His Lordship then was) has observed thus:

> "… …. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting

woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an

imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. … …. "

8. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. [Vide *Rajinder @ Raju vs. State of H.P.,* JT 2009 (9) SC 9]

9. In *Sohan Singh and Another vs. State of Bihar,* (2010) 1 SCC 68, this Court has observed as under:

"When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious

thought, must have decided to lodge the FIR."

10. From the evidence of PW 1, PW 2, owner of the quarry PW 4 and mother of the victim PW-14, we are satisfied that though there was a delay of 42 days in lodging the complaint, the same was properly explained by the victims and the other witnesses. In addition to the same, we have also noticed that except the victims, no male member is available in their family to help them. In fact they came to the village where the incident occurred to eke out their livelihood. Further, PWs 1 and 2 asserted that after committing rape A-1 and A-2 threatened that they would kill them if they inform anyone. All these material aspects were duly considered by the trial Court and accepted by the High Court. We concur with the same.

11. Coming to the discrepancies in the evidence of PWs 1 and 2, as rightly pointed out by the prosecution and accepted by both the Courts below, they are negligible in nature and it had not affected their grievance, hence we reject the said contention also.

12. It was argued that the doctors PWs 7 and 8 did not notice any injury on the private part of PWs 1 and 2. It is relevant to note that due to threat from A1 and A2, coupled with illiteracy and poverty, the two victims were not taken to the doctor immediately after the incident but they were taken after a month and 14 days. In such circumstances, as rightly observed by the trial Court and the High Court, it is unlikely that any sign of sexual intercourse will be feasible by examining the private part of the victims. Added to it, PW 1 happens to be a married woman and having children which indicates that she is accustomed to sexual intercourse and in view of the same, it would be difficult to expect the doctor, who examined after quite sometime, to indicate the sign of sexual intercourse. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. As observed earlier, there is no

reason to disbelieve the statement of the victims PWs 1 and 2. On the other hand, their oral testimony which is found to be cogent, reliable, convincing and trustworthy has to be accepted. Further, both the Courts have rightly accepted the statement of prosecutrix.

13. In the light of the above discussion, we are in agreement with the conclusion arrived at by the trial Court as well as the High Court. Consequently, we dismiss the appeal as devoid of any merit.

D.G. Appeal dismissed.

AMARINDER SINGH

v.

SPECIAL COMMITTEE, PUNJAB VIDHAN SABHA & OTHERS

(Civil Appeal No. 6053 of 2008)

APRIL 26, 2010

[K.G. BALAKRISHNAN, CJI, R.V. RAVEENDRAN, P. SATHASIVAM, J.M. PANCHAL, AND R.M. LODHA, JJ.]

Constitution of India, 1950:

Article 194(3) – Powers and privileges of House of Legislature – Expulsion of Member of Vidhan Sabha for alleged improper exemption of land from acquisition scheme when he was Chief Minister during previous term of the House – HELD: The allegedly improper exemption of land was an executive act and it did not distort, obstruct or threaten the integrity of the legislative proceedings in any manner – The Vidhan Sabha exceeded its powers by expelling the Member on the ground of a breach of privilege when there existed none – Resolution passed by Punjab Vidhan Sabha on 10.9.2008 directing expulsion of appellant for the remainder of 13th Term of Vidhan Sabha is declared invalid – Judicial review.

Article 105(3) and 194(3) r/w Articles 122(1) and 212(1) – Expulsion of Member of Vidhan Sabha – Judicial review of – HELD: Though Articles 122(1) and 212(1) make it clear that Courts cannot inquire into matters relating to irregularities in observance of procedure before Legislature, but Courts can examine whether proceedings conducted under Article 105(3) or Article 194(3) are 'tainted on account of substantive or gross illegality or unconstitutionality' – In the instant case, the allegations of wrong doing pertain to executive act given effect to in previous term of the House – Besides, there was no conceivable obstruction caused to the conduct of routine

legislative business – Therefore, the act of recommending the expulsion cannot be justified as a proper exercise of 'powers, privileges and immunities' conferred by Article 194(3) and is constitutionally invalid.

Article 194(3) – House of Legislature – Exercise of powers and privileges relating to acts done in previous term of the House – Vidhan Sabha recommending expulsion of its member for alleged improper exemption of land from acquisition scheme, when he was Chief Minister during the previous term of the House – HELD: Ordinarily, legislative business does not survive the 'dissolution' of the House – In the instant case, the alleged improper exemption of land took place during the 12th Vidhan Sabha, and at the time of reconstitution of the 13th Vidhan Sabha, there was no pending motion, report or any other order of business which had a connection with the alleged improper exemption of land – It was, therefore, not proper for the Assembly to inquire into actions that took place during its previous term – Doctrine of lapse.

Legislature:

House of Legislature – Inquiring into sub-judice matter – HELD: Ordinarily, legislative proceedings should not touch on sub-judice matters – In the instant case, improper exemption of land had already been questioned and was pending before the High Court – Therefore, the Vidhan Sabha should have refrained from dealing with the same subject matter – Rules of Business and Conduct of the Punjab Vidhan Sabha – rr. 39(1), 50, 93(2)(iv) and 150(a) – Rules of Business and Conduct of the Lok Sabha – rr. 173, 188 and 352

Constitutionalism:

Constitution of India – Separation of powers – House of Legislature – Resolution containing directions as to how

investigation into the alleged wrong doings of a Member of the House, along with some others should be conducted as also certain directions to Vigilance Department in that regard – HELD: These functions are within the domain of Executive, and the Legislature would not assume the responsibility of monitoring an ongoing investigation – Further, a legislative body is not entrusted with the power of adjudicating a case once an appropriate forum is in existence under the constitutional scheme – There was an obvious jurisdictional error on the part of the Vidhan Sabha – Doctrines – Separation of powers.

The appellant, who was the Chief Minister of the State during the 12th term of the Vidhan Sabha, was elected as a Member of the House for its 13th term, which was constituted on 1.3.2007, and became the leader of the opposition. A privilege motion was moved in the 13th Vidhan Sabha in respect of grant of exemption of 32.10 acres of land from the acquisition scheme and tampering with the proceedings dated 1.3.2006 of the 12th Vidhan Sabha in that regard. The matter was referred to the Privilege Committee of the House, and its report was tabled before the House on 18.12.2007. The matter was further referred to the Special Committee to examine the role of the appellant in the matter. The report of the Special Committee, which was presented to the House on 5.9.2008, recorded the findings, *inter alia*, that the appellant and three others were involved in corruption, conspiracy to cause wrongful loss to public exchequer and abuse of public office in relation to exemption of land from the acquisition scheme. The House, accepting the report of the Special Committee, passed the resolution dated 10.9.2008 recommending expulsion of the appellant for the remaining term of the 13th Vidhan Sabha and a direction to the Secretary of the Vidhan Sabha to approach the Election Commission of India to have the

seat of the appellant declared as vacant. It was further recommended that since the House did not possess any investigation facilities, a custodial interrogation of the persons involved should be directed and the Director, Vigilance Department be instructed to file an FIR and, after investigation, to submit its report to the Speaker of the House. A notification was issued to that effect the same day, i.e. on 10.9.2008. The appellant filed a writ petition before the High Court, which did not grant any stay of operation of the resolution except protection to the appellant from custodial interrogation. Aggrieved, the appellant filed the appeal. A transfer petition was also filed which was allowed and the writ petition before the High Court was transferred to the Supreme Court. Two writ petitions under Article 32 of the Constitution were filed by the other persons involved in the exemption matter along with the appellant. Since the subject matter touched on substantial question of law requiring interpretation of Article 194(3) of the Constitution, the appeal and the connected matters were, ultimately, referred to the Constitution Bench.

The questions for consideration before the Court were: (i) "Whether the alleged misconduct on part of the appellant and the petitioners warranted the exercise of legislative privileges under Article 194(3) of the Constitution?"; (ii) "Whether it was proper for the Punjab Vidhan Sabha to take up, as a matter of breach of privilege, an incident that occurred during its previous term?"; and (iii) "Whether the impugned acts of the Punjab Vidhan Sabha violated the norms that should be respected in relation to *sub judice* matters?"

Disposing of the appeal and the connected matters, the Court

HELD: 1.1. The exercise of legislative privileges is not

an end in itself. They are supposed to be exercised in order to ensure that legislative functions can be exercised effectively, without undue obstructions. The important consideration for scrutinising the exercise of legislative privileges is whether the same was necessary to safeguard the integrity of legislative functions. [Para 24] [1136-D, E, F]

1.2. A breach of privilege by a member of the legislature can only be established when his act is directly connected with or bears a proximity to his duties, role or functions as a legislator. This test of proximity should be the rule of thumb, while of course accounting for exceptional circumstances where a person who is both a legislator and a holder of executive office may commit a breach of privilege. It is the considered view of the Court that such a breach has not occurred in the instant case. [Para 35] [1157-B]

Raja Ram Pal v. *Hon'ble Speaker, Lok Sabha* **(2007) 1 SCR 317 = (2007) 3 SCC 184, relied on.**

Re Special Reference **1 of 1964, 1965 SCR 413 = AIR 1965 SC 745;** *State of Karnataka v. Union of India,* **1978 (2) SCR 1 = (1977) 4 SCC 608, referred to.**

New Brunswick Broadcasting Co. v. Nova Scotia, **(1993) 100 DLR 4th 212, referred to.**

Parliamentary Procedure- Law Privileges, Practice & Precedents **by Subhash C. Kashyap *Vol.* 2 (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2000) p.1555; Erskine May,** *Parliamentary Practice, 16th edn.* **(London: Butterworths, 1957);** *Halsbury's Laws of England,* ***4th edn.*** **(Reissue Vol. 34, at p. 553;** ***76th*** *Report of the Senate Committee of Privileges (Australia); Hatsell's Collection of Cases of Privileges of Parliament* **(1776);** Sir Erskine May's

Parliamentary Practice **(1950); Advanced Law Lexicon,by Ramanatha Aiyar 2nd edn. Vol. 3 (New Delhi: Wadhwa & Co. Nagpur, 1997);** ***Report of the*** *Select Committee on Parliamentary Privilege* **(1967) (UK), referred to.**

1.3. Even considering the parliamentary practice in India, it is quite apparent that the expulsion of members should only be sustained if their actions have caused obstructions to legislative functions or are likely to cause the same.Legislatures have power to expel their members, subject to the judicially prescribed guidelines. [para 36] [1157-D]

Raja Ram Pal v. *Hon'ble Speaker, Lok Sabha* **(2007) 1 SCR 317 = (2007) 3 SCC 184; and** *P.V. Narasimha Rao v. State,* **1998 (2) SCR 870 = (1998) 4 SCC 626, referred to.**

*Practice and Procedure of Parliament***,by Kaul and Shakdher,** ***5th edn.*** **(New Delhi: Metropolitan Book Co. Pvt. Ltd., 2001) pp. 191-193;** *Parliamentary Procedure- Law Privileges, Practice & Precedents* **by Subhash C. Kashyap *Vol.* 2 (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2000), p.1555, referred to.**

1.4. The various grounds for disqualification of members of legislative assemblies (MLAs) have been enumerated in Articles 190 and 191 of the Constitution. For most circumstances, there is elaborate machinery in place to decide questions pertaining to the disqualification of members and the vacancy of seats. If a sitting member of a legislature is found guilty of committing a statutory offence, then disqualification can be a consequence as per the scheme contemplated in the Representation of the People Act, 1951. It is for the purpose of tackling unforeseen and novel impediments to legislative functioning that the 'powers, privileges and immunities' contemplated by Article 194(3) of the

Constitution have not been codified. But, the expressions such as 'lowering the dignity of the house', 'conduct unbecoming of a member of the House' and 'unfitness of a member' are openly-worded and abstract grounds which, if recognised, will trigger the indiscriminate and disproportionate use of legislative privileges by incumbent majorities to target their political opponents as well as dissidents. [Para 33,38] [1161-B; 1151-A; 1160-H; 1161-A; 1161-C]

1.5. In *Raja Ram Pal's* case, the majority decision of this Court did recognise that the legislature's power to punish for its contempt could be exercised to expel legislators for grounds other than those prescribed in the Constitution, but it was not the intention of this Court to prescribe an untrammeled power. By laying down a clear set of guidelines for judicial review over the exercise of parliamentary privileges, this Court had made its intentions quite clear. Accordingly, the power of a legislative chamber to punish for its own contempt should broadly coincide with the legislature's interest in protecting the integrity of its functions. [Para 38] [1161-D, E]

Raja Ram Pal v. *Hon'ble Speaker, Lok Sabha* **(2007) 1 SCR 317 = (2007) 3 SCC 184, relied on.**

1.6. In the instant case, the allegedly improper exemption of land was an executive act attributable to the appellant and it did not distort, obstruct or threaten the integrity of legislative proceedings in any manner. Therefore, the exercise of legislative privileges under Article 194(3) of the Constitution was not proper. The considered view of the Court is that the Punjab Vidhan Sabha exceeded its powers by expelling the appellant on the ground of a breach of privilege when there existed none. [para 55(i)] [1171-E-G]

2.1. In view of the principles of judicial review in relation to exercise of parliamentary privileges as culled out in *Raja Ram Pal's* case, this Court is empowered to scrutinize the exercise of legislative privileges which admittedly include the power of a legislative chamber to punish for contempt of itself. The specific guidelines in the said case advocate due deference to the actions of the legislature in the ordinary course of events. Articles 122(1) and 212(1) of the Constitution make it amply clear that Courts cannot inquire into matters related to irregularities in observance of procedures before the legislature. However, the Courts can examine whether proceedings conducted under Article 105(3) or 194(3) are 'tainted on account of substantive or gross illegality or unconstitutionality'. [para 29-30] [1146-C-E-G]

2.2. This Court recognizes that the threshold for exercising judicial review in a case such as the instant one is indeed very high and it must begin with a presumption that the legislatures' actions were valid. The facts in the instant case do not merely touch on a procedural irregularity. The relevant fact here is not only that the allegations of wrongdoing pertain to an executive act, but the fact is also that there is no conceivable obstruction caused to the conduct of routine legislative business.Sufficient material has been produced to demonstrate that it was not necessary for the Punjab Vidhan Sabha to have exercised its powers under Article 194(3) to recommend and then notify the expulsion of the appellant. It cannot be said that the alleged misconduct on part of the appellant had the effect of obstructing the ordinary legislative functions of the Vidhan Sabha. Therefore, the act of recommending the appellant's expulsion through the impugned resolution cannot be justified as a proper exercise of 'powers, privileges and immunities' conferred by Article 194(3). [para 29-30] [1146-F-H; A, B, C]

3. Ordinarily, legislative business does not survive the 'dissolution' of the House. The exception to this norm is covered by the 'doctrine of lapse' wherein the successor House can choose to take up a pending motion or any order of business after the re-constitution of the House. However, this exception is not applicable in the facts of the instant case. The allegedly improper exemption of a plot of land took place during the 12th term of the Punjab Vidhan Sabha which was subsequently dissolved; whereas the constitution of the Special Committee, to inquire into the same, took place during the 13th term. Therefore, it was not proper for the 13th Punjab Vidhan Sabha to claim a breach of privileges on account of the alleged misconduct which actually took place during its 12th term; especially when at the time of the reconstitution of the 13th Punjab Vidhan Sabha, there was no pending motion, report or any other order of business which had a connection with the allegedly improper exemption of land. However, this view should not be mistaken for a general proposition since it may be that in some circumstances the acts that have taken place during the previous terms of a Legislature could actually have the effect of distorting, obstructing or diluting the integrity of legislative business in the succeeding term. Evidently, no such consequence or tendency has been demonstrated in the instant case. [para 39-40,44,45 and 55(ii)] [1167-A; 1168-B; 1177-H; 1178-A]

Gujarat Assembly Election **case (2002) 3 Suppl. SCR 366 = (2002) 8 SCC 237;** *Purushothaman Nambudiri v. State of Kerala,* **1962 Suppl. SCR 753 = AIR 1962 SC 694;** *Sub-Committee on Judicial Accountability v. Union of India* **(1991) 2 Suppl. SCR 1 = (1991) 4 SCC 699, referred to.**

Black's Law Dictionary, 8th edn. **(West Group) p. 506;**

Advanced Law Lexicon by **P. Ramanatha Aiyar*, 3rd edn., Vol. 2D-I*** **; and *Practice and Procedure of Parliament*,by Kaul and Shakdher, *5th edn.* (New Delhi: Metropolitan Book Co. Pvt. Ltd., 2001) pp. 191-193, referred to.**

4.1. It is a settled principle that ordinarily the content of legislative proceedings should not touch on *sub judice* **matters. The rationale for this norm is that legislative debate or scrutiny over matters pending for adjudication could unduly prejudice the rights of the litigants. In the case at hand, the allegedly improper exemption of land from the Amritsar Improvement Scheme had already been questioned before the High Court of Punjab and Haryana and the subject matter of dispute was pending before it. This fact was well known at the time of the constitution of the Special Committee by the Vidhan Sabha on 18.12.2007. Therefore, the Punjab Vidhan Sabha should have refrained from dealing with the same subject matter and ought not to have constituted a committee to inquire into it. Rules 39(1), 50, 93(2)(iv) and 150(d) of the Rules of Business and Conduct of the Punjab Vidhan Sabha are quite categorical in laying down a prohibition on the taking up of any matter which is pending adjudication before a court of law. Analogues provisions are Rules 173,188 and 352 of the Rules of Business and Conduct of the Lok Sabha. [para 46,49, 51 and 55] [1168-D; 1170-F; 1172-H; A, B; 1178-D 1178-D]**

Parliamentary Procedure- Law Privileges, Practice & Precedents ***Vol.*** **2 by Subhash C. Kashyap, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2000) ; and Griffith and Ryle,** *Parliament, Functions and Procedure* **(2003), Chapter 6 Para 6-075, referred to.**

4.2. The doctrine of separation of powers is an inseparable part of the evolution of parliamentary democracy itself. Our institutions of governance have been intentionally founded on the principle of separation

of powers and the Constitution does not give unfettered power to any organ. All the three principal organs are expected to work in harmony and in consonance with the spirit and essence of the Constitution. The resolution dated 10-9-2008 passed by the Punjab Vidhan Sabha contains directions as to how the investigation into the appellant's and petitioners' alleged wrongdoing should be conducted. The resolution directs the filing of FIRs and custodial interrogation in addition to directing the Vigilance Department, to find out where the appellant and the others have stored their 'ill gotten wealth' and further directs the Vigilance Department to report back to the Speaker of the Punjab Vidhan Sabha. These functions are within the domain of the executive. It is up to the investigating agencies themselves to decide how to proceed with the investigation in a particular case. The role of the legislature in this regard can at best be recommendatory and the Speaker of the Legislature would not assume the responsibility of monitoring an ongoing investigation. [Para 52-53] [1173-C, E; 1175-E-G]

4.3. Further, a legislative body is not entrusted with the power of adjudicating a case once an appropriate forum is in existence under the constitutional scheme. A determination of guilt or innocence by way of fact-finding is a role properly reserved for the trial judge. The only exception to this principle is when the impugned acts have the effect of distorting, obstructing or threatening the integrity of legislative proceedings or are likely to do the same, thereby warranting the exercise of privileges. There was an obvious jurisdictional error on part of the Punjab Vidhan Sabha in the instant case. [para 52-53] [1173-E; 1174-H; 1175-A]

Indira Nehru Gandhi v. Raj Narain, **1976 SCR 347 = (1975) Supp SCC 1, referred to.**

Kilbourn v. Thompson **103 US 168 (1881), referred to.**

5. It is declared that the resolution passed by the Punjab Vidhan Sabha on 10-9-2008, directing expulsion of the appellant for the remainder of the 13th term of the Vidhan Sabha is constitutionally invalid. Therefore, the appellant's membership in the Punjab Vidhan Sabha is directed to be restored. However, nothing in this judgment should act as a hurdle against the investigation, if any, into the alleged role of the appellant and the petitioners in the improper exemption of land from the Amritsar Improvement Scheme that was notified on 13-1-2006. [para 56] [1178-F, G]

Case Law Reference:

(2007) 1 SCR 317	**relied on**	**para 12**
(1993) 100 DLR 4th 212	**referred to**	**para 20**
(1965) SCR 413	**referred to**	**para 21**
(1978) 2 SCR 1	**referred to**	**para 22**
(1998) 2 SCR 870	**referred to**	**para 36**
(2002) 3 Suppl. SCR 366	**referred to**	**para 42**
(1962) Suppl. SCR 753	**referred to**	**para 43**
(1991) 2 Suppl. SCR 1	**referred to**	**para 43**
1976 SCR 347	**referred to**	**para 52**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6053 of 2008.

From the Judgment & Order dated 15.9.2007 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 16216 of 2008.

WITH

T.C. (C) No. 1 of 2009, W.P. (C) Nos. 442 and 443 of 2008.

Gopal Subramanium, ASG, K. Parasaran, Uday Umesh Lalit, Ashok H. Desai, Ravi Shankar Prasad, Shyam Diwan K. Parasaran, Uday Umesh Lalit, Jayshree Anand, AAG Atul Nanda, Rameeza Hakeem, Abhijat, P. Medh, Law Associates & Co. K.K. Mahalik, Nitu Kumai Sinha, Kuldip Singh, Gaurav Agrawal, Ajay Pal, Aprajita Singh, Nikhil Jain, Aman Pal, Sukhda Pritam, Ardendhu Mauli K. Prasad, Gorminder Singh, Anuradha Biundra, Menka Guruswamy, Charu Sangwan, Paruthi K. Goswamy, Chaman Lal Premi, Jai Shree Anand, Ajay Bansal, Aman Ahluwalia, Balaji Subramanian (for B.K. Prasad) for the appearing parties.

The Judgment of the Court was delivered by

K. G. BALAKRISHNAN, CJI 1. The appellant was the Chief Minister of the State of Punjab during the 12th term of the Punjab Vidhan Sabha. The appellant was duly elected as a member of the Punjab Vidhan Sabha for its 13th term.

2. The Punjab Vidhan Sabha on 10-9-2008 passed a resolution which directed the expulsion of the appellant for the remainder of the 13th term of the same Vidhan Sabha. This resolution was passed after considering a report submitted by a Special Committee of the Vidhan Sabha (Respondent No. 1) on 3-9-2008 which recorded findings that the appellant along with some other persons (petitioners in the connected matters) had engaged in criminal misconduct. The Special Committee had itself been constituted on 18-12-2007 in pursuance of a resolution passed by the Vidhan Sabha. It had been given the task of inquiring into allegations of misconduct that related back to the appellant's tenure as the Chief Minister of the State of Punjab during the 12th term of the Punjab Vidhan Sabha. More specifically, it was alleged that the appellant was responsible for the improper exemption of a vacant plot of land which was licensed to a particular private party (measuring 32.10 acres) from a pool of 187 acres of land that had been notified for acquisition by the Amritsar Land Improvement Trust on 5-12-2003. The Amritsar Land Improvement Trust is a statutory body

which had notified the plan for acquisition in pursuance of a developmental scheme, as contemplated under Section 36 of the Punjab Land Improvement Act, 1922. Earlier, on 23-6-2003, a private party (M/s. Veer Colonizers) had applied for a licence under Section 5 of the Punjab Apartment and Property Regulation Act, 1995 to develop the above-mentioned plot of 32.10 acres which was situated in the proximity of the Amritsar-Jalandhar road. At the time of the colonizer's application for a development licence, the said plot was not covered by any acquisition scheme, though it had been covered by two schemes in the past which had lapsed by then. After the notification of the scheme, the colonizer approached the concerned authorities, seeking an exemption from the proposed acquisition of land. Subsequently on 7-10-2005, the Amritsar Land Improvement Trust granted a No-objection certificate, thereby permitting the exemption of the said plot of 32.10 acres from the scheme for acquisition. This decision to exempt the said plot of 32.10 acres was notified by the State Government on 13-01-2006 under Section 56 of the Punjab Town Improvement Act. Since the appellant was serving as the Chief Minister of the State at the time, it was alleged that the decision to exempt the plot was an executive act that could be attributed to him.

3. However, some other private parties who owned plots in the pool of land that had been notified for acquisition by the Amritsar Land Improvement Trust on 5-12-2003, raised objections against the exemption referred to above. The gist of their objections is that the State Government had unduly favoured one private party by exempting the said plot of 32.10 acres from the scheme for acquisition. In fact the validity of the exemption was questioned in several cases instituted before the High Court of Punjab and Haryana, namely those of *Major General Sukhdip Randhawa (Retd.) & Ors. Vs. State of Punjab* (CWP No. 16923 of 2006), *M/s. Daljit Singh Vs. State of Punjab* (CWP No. 20266 of 2006), *Sudarshan Kaur Vs. State of Punjab* (CWP No. 2929 of 2007) and Basant

Colonisers & Builders (P) Ltd. Vs. State of Punjab (CWP No. 7838 of 2008). All of these cases were pending before the High Court at the time of the hearings in the present case.

4. Following the elections held to re-constitute the Punjab Vidhan Sabha in February 2007, there was a transition in power in the State. The 13th Vidhan Sabha was constituted on 1-3-2007. The appellant who had served as the Chief Minister of the State during the 12th term of the Vidhan Sabha, became the leader of the opposition in the 13th term. In pursuance of a news report dated 22.3.2007, some members of the Legislative Assembly moved a privilege motion in respect of allegations of tampering in the proceedings of the 12th Vidhan Sabha (dated 1-3-2006). These allegations were in regard to a starred question relating to the grant of exemption of 32.10 acres of land. On 5-4-2007 the notice of motion was referred to the Privileges Committee of the House by the Speaker. Thereafter, questions were raised on the floor of the house which cast aspersions on the appellant's past conduct. On 18-12-2007, the report of the Privileges Committee was tabled before the House. The incumbent Chief Minister brought a motion which specifically questioned the appellant's role in the exemption of the 32.10 acre plot from the acquisition scheme notified by the Amritsar Improvement Trust. Following this motion, the Speaker of the House approved the constitution of a Special Committee to inquire into the alleged misconduct. The terms of reference for the Special Committee required it to examine as to what were the reasons for exempting the said plot measuring 32.10 acres of land. As part of this inquiry, the Special Committee had to examine whether any rule/norms had been violated on account of this exemption and whether it had caused monetary losses to the State exchequer. The stated objective was to identify those responsible for such losses.

5. The Special Committee submitted its report on 3-9-2008 which was presented to the House on 5-9-2008. The report included findings that Captain Amarinder Singh (former

Chief Minister, appellant in Civil Appeal No. 6053 of 2008), Choudhary Jagjit Singh [former Local Bodies Minister, petitioner in Writ Petition (Civ.) No. 443 of 2008], Late Sh. Raghunath Sahai Puri [former Housing Minister, since deceased] and Sh. Jugal Kishore Sharma [former Chairman of Amritsar Land Improvement Trust, petitioner in Writ Petition (Civ.) No. 442 of 2008) had been involved in 'corruption, conspiracy to cause wrongful loss and abuse of public office' in relation to the exemption of land from the above-mentioned acquisition scheme. It must be noted that out of the four individuals named in the report, only Captain Amarinder Singh was elected as a member of the 13th Punjab Vidhan Sabha. After considering these findings, the Punjab Vidhan Sabha passed the impugned resolution on 10-9-2008 which is extracted below:

> "After accepting the report submitted by the Special Committee appointed by this House, this august House recommends the following action:
>
> *** *** ***
>
> (i) Captain Amarinder Singh is expelled for the remaining term of the 13th Punjab Vidhan Sabha. The Secretary of the Vidhan Sabha is instructed to approach the Election Commission of India to have his seat declared as vacant.
>
> (ii) The recommendations of the Privilege Committee have been tabled in the House on 18.12.2007 and they be forwarded to Chief Secretary, Punjab Government with the undermentioned instructions:-
>
> Because this House does not possess any facility to investigate and find out where the accused have stashed away the ill gotten wealth or how it has been distributed, it is essential to have custodial interrogation. Director Vigilance Department, Punjab which deals with corruption cases and is an

arm of the Punjab Government be instructed to file a FIR keeping in mind the various instructions of the CrPC.

The vigilance department is to investigate and submit its report to the Speaker of this House within two months from today."

6. In pursuance of the said resolution, the secretariat of the Punjab Vidhan Sabha issued a notification on 10-9-2008 which declared that Captain Amarinder Singh had been expelled from the membership of the 13th Vidhan Sabha for the remaining term of the State Legislature, (that is 3.5 years). It was also declared that his assembly constituency seat (76-Patiala Town) was rendered vacant, thereby setting aside his election to the same. Aggrieved by the findings of the report submitted by the Special Committee on 3-9-2008, the appellant moved the High Court of Punjab and Haryana (C.W.P. 11548 of 2008). Following the impugned resolution on 10-9-2008, the said petition was withdrawn and C.W.P. 16216 of 2008 was instituted before the High Court to challenge the Special Committee's report as well as the impugned resolution dated 10.9.2008. On 15-9-2008, a division bench of the High Court issued an order directing that the case be heard on merits on 1-12-2008. The High Court did not grant a stay on the operation of the impugned resolution, but granted protection to Captain Amarinder Singh from custodial interrogation and directed further listing on 1-12-2008. Dissatisfied with the High Court's order, the appellant approached this court by way of a petition seeking special leave to appeal. The appellant contended that the High Court ought to have stayed the report dated 3.9.2008 and the Resolution and Notification dated 10.9.2008. He apprehended that a fresh election would be conducted in the intervening period, thereby compromising his rights.

7. A division bench of this court directed notice on 26-9-2008 and referred the case for hearing by a three judge bench. On 3-10-2008, a three judge bench (B.N. Agarwal, G.S. Singhvi

and Aftab Alam, JJ.] granted leave in the special leave petition (C.A. No. 6053/2008). It allowed Transfer Petition (C) No. 1087/2008 for transfer of CWP No. 16216/2008 from the Punjab and Haryana High Court (the transferred case is T.C. (C) No. 1 of 2009,) and directed the same to be heard with the Civil Appeal along with W.P. (C) No. 442/2008 and W.P. (C) No. 443/ 2008. The three judge bench did not grant a stay on the operation of the impugned resolution which had directed the expulsion of the appellant from the Vidhan Sabha. However, relief was granted to the extent that even though the appellant could not participate in the legislative proceedings, his seat would not fall vacant until the adjudication of this case. A stay was also granted in respect of the Vidhan Sabha's specific directions to the Punjab Vigilance Department, but it was clarified that the appellant and the petitioners could be investigated in accordance with law. Subsequently, the three judge bench found that the subject matter touched on substantial questions of law requiring the interpretation of Article 194(3) of the Constitution, thereby deeming it fit to refer these matters to a constitution bench by way of an order dated 11-2-2009.

OVERVIEW OF CONTENTIONS

8. The counsel appearing for the appellant and the petitioners have prayed that the impugned resolution as well as the report submitted by the Special Committee be invalidated in their entirety. Accordingly, the appellant has sought restoration of his membership for the remainder of the 13th term of the Punjab Vidhan Sabha. The main thrust of the appellant's contentions is that the acts of constituting the Special Committee on 18-12-2007, the submission of its report on 3-9-2008 and the impugned resolution passed by the Assembly on 10-9-2008 cannot be defended as a proper exercise of legislative privileges under Article 194 of the Constitution. It was urged that the allegations of misconduct on part of the appellant and the petitioners were relatable to their executive actions which in no way disrupted or affected the

legislative functions of the Punjab Vidhan Sabha. It was reasoned that legislative privileges are exercised to safeguard the integrity of legislative proceedings and the alleged misconduct did not threaten the same in any manner. Another contention was whether it was proper for the 13th Vidhan Sabha to exercise its privileges to inquire into acts that had occurred during the 12th term of the Vidhan Sabha. It was also pointed out that the alleged misconduct on the part of the appellant and the petitioners had already been questioned before the High Court of Punjab Haryana by private parties whose lands had not been exempted from the Amritsar Improvement Scheme. Thus, it was argued that it was improper for the legislature to act in respect of subject-matter which was pending adjudication, thereby violating the norm of not interfering in *sub judice* matters. It was further argued that even though legislative privileges are exercised to ensure the dignity and discipline of the House, the same cannot encroach into the judicial domain by recording a finding of guilt and recommending punitive action in respect of the alleged misconduct. To support this objection, it was urged that the appellant and the petitioners had not been given a fair opportunity to contest or meet the allegations against them and hence the proceedings of the Special Committee were violative of the principles of natural justice.

9. The respondents' case is that the Punjab Vidhan Sabha had legitimately exercised its privileges to recommend punitive action in the present case, since the alleged misconduct on part of the appellant and the petitioners had brought disrepute to the House as a whole. It was reasoned that even though the power of expulsion for such misconduct has not been enumerated in Articles 190 and 191 of the Constitution [which prescribe the grounds for disqualification of MLAs] the legislature had a broad power to take punitive action for the breach of its privileges which includes the power to punish for its own contempt. It was submitted that the appellant and the petitioners had committed a breach of privilege as well as

contempt of the house since they had previously suppressed efforts of the legislature to inquire into the alleged misconduct in relation to the Amritsar Improvement Scheme. Since legislative privileges have not been codified and are shaped by precedents, the counsel for the respondents have cited some English precedents in support of their contention that privileges can be exercised to punish *mala fide* acts which do not directly obstruct the proceedings of the House, but impede its dignity nevertheless.

10. In the course of the hearing on merits before this constitution bench, Shri K. Parasaran and Shri U.U. Lalit, Sr. Advs. appeared on behalf of the appellant. Thereafter, Shri Ashok Desai, Sr. Adv. appeared for the respondent whose submissions were supplemented by Shri Ravi Shankar Prasad, Sr. Adv., while Shri Gopal Subramanium, (Additional Solicitor General, now Solicitor General) represented the views of the Union government.

11. In light of the facts of this case and the contentions outlined above, the following questions arise for consideration:

I. Whether the alleged misconduct on part of the appellant and the petitioners warranted the exercise of legislative privileges under Article 194(3) of the Constitution?

II. Whether it was proper for the Punjab Vidhan Sabha to take up, as a matter of breach of privilege, an incident that occurred during its previous term?

III. Whether the impugned acts of the Punjab Vidhan Sabha violated the norms that should be respected in relation to *sub judice* matters?

Re: Question I.

12. Learned counsel appearing for the respondents have submitted that it was proper for the Punjab Vidhan Sabha to

constitute the Special Committee and pass the impugned resolution which recommended the expulsion of the appellant. The core of their argument is that the misconduct on part of the appellant had brought disrepute to the Vidhan Sabha and it was justifiable to exercise legislative privileges for mitigating the same. The respondents have adopted a two-pronged line of reasoning. Firstly, they have asserted that the alleged misconduct on part of the appellant amounted to a breach of privilege as well as contempt of the House. Secondly, they have contended that since the 'powers, privileges and immunities' conferred on State Legislatures by Article 194(3) of the Constitution have not been codified, it would not be proper to place limitations on their exercise. The implicit rationale is that legislative assemblies should retain flexibility in the exercise of their privileges and the power to punish for contempt, so that they can tackle new and unforeseen impediments to their reputation and functioning. The respondents' submissions have dwelt at length with the idea that the legislature's power to punish for its own contempt cannot be trammeled since it is different from the remedial objective of exercising privileges to maintain the dignity and discipline of the house. The respondents have extensively relied on the constitution bench decision in *Raja Ram Pal v. Hon'ble Speaker, Lok Sabha,* (2007) 3 SCC 184*,* where this Court had upheld the Lok Sabha's power to expel its members in view of misconduct in the nature of accepting bribes to ask specified questions on the floor of the House. However, the majority opinions of this Court had also clarified that the exercise of parliamentary privileges in such cases was open to judicial scrutiny.

13. As outlined earlier, the appellant has questioned the impugned resolution since it recommends punitive action in respect of his misconduct which was allegedly committed in his capacity as the Chief Minister of the State of Punjab. It was submitted that the alleged irregularity in exempting a plot of land from an acquisition scheme was entirely relatable to the discharge of executive functions. The act of exempting land did

not in any way obstruct the functions of the Punjab Vidhan Sabha. It was urged that even though the exercise of legislative privileges and the concomitant power to punish for contempt have not been codified, they cannot be construed as unlimited powers since that could lead to their indiscriminate and disproportionate use. The counsel appearing for the appellant and the petitioners have also submitted that when the Special Committee was constituted on 18-12-2007 it did not bear the nomenclature of a privileges committee and at the time it was not apparent to the appellant and the petitioners that they were facing such an action. However, the respondent submits that the incumbent Chief Ministers' motion brought on 18-12-2007 was in the nature of a privileges motion. Irrespective of the contested facts, it will be proper for us to view this controversy from the prism of legislative privileges. Mr. Gopal Subramanium drew our attention to the two main considerations that should guide the adjudication of this case, namely those of 'history' and 'necessity'. Considerations of history require us to examine whether there are any applicable precedents for the exercise of legislative privileges in similar circumstances. The consideration of necessity entails that the scope of privileges should be identified on the basis of what is necessary to prevent or punish obstructions to legislative functioning.

14. Before addressing these contentions, we can take a bird's eye view of the law on legislative privileges. The State Legislatures are conferred with 'powers, privileges and immunities' by way of Article 194 of the Constitution which reads:

> *"194. Powers, privileges, etc., of the Houses of Legislatures and of the members and committees thereof.*- (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.
>
> (2) No member of the Legislature of a State shall be liable

to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution (Forty-fourth Amendment) Act, 1978.

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

15. The powers and privileges conferred on the State Legislatures are akin to those conferred on the Union Parliament by Article 105. Therefore, the principles and precedents relatable to the exercise of parliamentary privileges are relevant for deciding this case. Both Articles 105 and 194 explicitly refer to the freedom of speech in the House and the freedom to publish proceedings without exposure to liability. However, other legislative privileges have not been enumerated. Article 105(3) and 194(3) are openly worded and prescribe that the powers, privileges and immunities available to the legislature are those which were available at the time of the enactment of the Constitution (Forty-Fourth) Amendment Act, 1978. Subhash C. Kashyap has elaborated on the Indian position with these words [In *Parliamentary Procedure – The*

Law, Privileges, Practice and Precedents, Vol. 2 (New Delhi, Universal Law Publishing Co. Pvt. Ltd., 2000) at p. 1555]:

"As regards other privileges, Art. 105(3) as originally enacted provided that that in other respects, the powers, privileges and immunities of Parliament, its committees and members, until defined by Parliament by law, shall be the same as those of the House of Commons of the United Kingdom as on the coming into the force of the Constitution on 26 Jan. 1950. This clause was however, amended in 1978, to provide that in respect of privileges other than those specified in the Constitution, the powers, privileges and immunities of each House of Parliament, its members and Committees shall be such as may from time to time be defined by Parliament by law and until so defined shall be those of that House, its members and Committees immediately before coming into the force of section 15 of the Constitution (44th Amendment), 1978 (w.e.f. 20 June 1978). This amendment has in fact made only verbal changes by omitting all references to the British House of Commons but the substance remains the same. In other words, each House, its Committees and members in actual practice, shall continue to enjoy the powers, privileges and immunities (other than those specified in the Constitution) that were available to the British House of Commons as on 26 Jan. 1950."

16. Since the scope of 'powers, privileges and immunities' available under Article 105(3) and 194(3) has not been codified by way of statute till date, it is open for us to consider the principles and precedents relatable to the British House of Commons. In *Raja Ram Pal's* case (supra.) C.K. Thakkar, J. in his concurring opinion had described Parliamentary Privileges as those fundamental rights which the House and its Members possess so as to enable them to carry out their functions effectively and efficiently. It was observed:

"*519.* In its creative sense, in England the House did not

sit down to build its edifice of the powers, privileges and immunities of Parliament. The evolution of the English parliamentary institution has thus historical development. It is the story of conflict between the Crown's absolute prerogatives and the Common's insistence for powers, privileges and immunities; struggle between high handed actions of monarchs and people's claim of democratic means and methods. Parliamentary privileges are the rights which the Houses of Parliament and Members posses so as to enable them to carry out their functions effectively and efficiently. Some of the parliamentary privileges thus preceded Parliament itself. They are, therefore, rightly described by Sir Erskine May as "fundamental rights" of the Houses as against the prerogatives of the Crown, the authority of ordinary courts of law and the special rights of the House of Lords."

17. The evolution of legislative privileges can be traced back to medieval England when there was an ongoing tussle for power between the monarch and the Parliament. In most cases, privileges were exercised to protect the members of parliament from undue pressure or influence by the monarch among others. Conversely, with the gradual strengthening of parliament there were also some excesses in the name of legislative privileges. However, the ideas governing the relationship between the executive and the legislature have undergone a sea change since then. In modern parliamentary democracies, it is the legislature which consists of the people's representatives who are expected to monitor executive functions. This is achieved by embodying the idea of 'collective responsibility' which entails that those who wield executive power are accountable to the legislature. However, legislative privileges serve a distinct purpose. They are exercised to safeguard the integrity of legislative functions against obstructions which could be caused by members of the House as well as non-members. Needless to say, it is conceivable that in some instances persons holding executive office could

potentially cause obstructions to legislative functions. Hence, there is a need to stress on the operative principles that can be relied on to test the validity of the exercise of legislative privileges in the present case. In his widely cited work, Sir Erskine May (1950) has answered the question 'What constitutes privilege?' in the following manner [See: Erskine May, *Parliamentary Practice, 16th edn.* (London: Butterworths, 1957) in 'Chapter III: General View of the Privilege of Parliament' at p. 42] :

> "Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land is, to a certain extent an exemption from the ordinary law.
>
> The privileges of individual members of the House of Lords may be distinguished from, the privileges of individual members of the House of Commons; both again have common privileges as members of the Parliament; and the Lords have special privileges as peers, distinct from those which they have as members of a House co-ordinate with the House of Commons." [Stubbs, *Constitutional History*, iii (4th edn.) p.504]
>
> The particular privileges of the Commons have been defined as:-
>
> "The sum of the fundamental rights of the House and of its individual Members as against the prerogatives of the Crown, the authority of the ordinary courts of law and the special rights of the House of Lords."

Distinction between function and Privilege proper-

It is more convenient to reserve the term 'privilege' to

certain fundamental rights of each House which are generally accepted as necessary for the exercise of its constitutional functions.

Ancillary nature of Privilege - A necessary means to fulfillment of functions- The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are "absolutely necessary for the due execution of its powers."

In *Halsbury's Laws of England, 4th edn. (*Reissue Vol. 34*,* at p. 553) it has been stated:

"*Claims to rights and privileges*- The House of Lords and the House of Commons claim for their Members, both individually and collectively, certain rights and privileges which are necessary to each House, without which they could not discharge their functions and which exceed those possessed by other bodies and individuals. In 1705, the House of Lords resolved that neither House had power to create any new privilege and when this was communicated to the Commons, that House agreed…."

18. It would be instructive to refer to the following extracts from a lecture on Parliamentary Privileges by Viscount Kilmer – The Lord High Chancellor of Great Britain, [Delivered on May 4, 1959 at the University of London] :-

"The first question which springs to the mind is, 'What precisely is Parliamentary Privilege?'- and its question which is not altogether easy to answer.

A privilege is essentially a private advantage in law enjoyed by a person or a class of persons or an association which is not enjoyed by others. Looked at from this aspect, privilege consists of that bundle of advantages which members of both Houses enjoy or have at one time enjoyed to a greater extent than their fellow citizens: freedom to access to Westminster, freedom from arrest

or process, freedom from liability in the courts for what they say or do in Parliament. From another point of view, Parliamentary Privilege is the special dignity and authority and enjoyed by each House in its corporate capacity such as its right to control its own proceedings and to punish both members and strangers for contempt. I think these are really two sides of the coin. Any Parliament, it is to function properly, must have some privileges which will ensure freedom (to a greater or lesser degree) from outside interference. If the business of Parliament is of supreme importance, then nobody else must be allowed to impede it, whether by throwing fireworks from the gallery or bringing actions against members for what they say in debate.

A close parallel is provided by the powers of the superior courts to punish for contempt. If you try to interfere with the administration of justice either by throwing tomatoes at the judge or by intimidating a witness you will be liable to be proceeded against for contempt. Once again, a body whose functions are of paramount importance can be seen making certain that outside interference is reduced to a minimum."

19. In Australia, the scope of Parliamentary Privileges was enunciated in the *76th Report of the Senate Committee of Privileges*, wherein it was observed:

"The word "privilege", modern usage, connotes a special right accorded to a select group which sets that group apart from all other persons. The Macquarie Dictionary's primary definition of privilege is as follows: "A right of immunity enjoyed by a person or persons beyond the common advantage of others. The privileges of Parliament are immunities conferred in order to ensure that the duties of members as representatives of their constituents may be carried out without fear of intimidation or punishment, and without improper impediment. These immunities, established as part of the common law and recognized in

statutes such as the Bill of Rights of 1688, are limited in number and effect. They relate only to those matters which have common to be recognized as crucial to the operation of a fearless Parliament on behalf of the people. As pointed out in a submission by the Department of the Senate to the Joint Select Committee on Parliamentary Privilege, a privilege of Parliament is more properly called an immunity from the operation of certain laws, which are otherwise unduly restrictive of the proper performance of the duties of members of Parliament."

20. In a Canadian case reported as *New Brunswick Broadcasting Co. v. Nova Scotia,* (1993) 100 DLR (4th) 212, Lamer, C.J. had cited the following extract from an academic commentary [See: Joseph Maingot, *Parliamentary Privilege* (Toronto: Butterworths, 1982) at p. 12]:

"Parliamentary privilege is the necessary immunity that the law provides for members of Parliament and for members of the legislatures of each of the ten provinces and two territories, in order for these legislators to do their legislative work. It is also necessary immunity that the law provides for anyone while taking part in a proceeding in Parliament or in a legislature. Finally, it is the authority and power of each House of Parliament and of each legislature to enforce that immunity.

Parliamentary privilege and immunity with respect to the exercise of that privilege are founded upon necessity. Parliamentary privilege and the breadth of individual privileges encompassed by that term are accorded to members of the House of Parliament and the legislative assemblies because they are judges necessary to the discharge of their legislative function.

The contents and extent of parliamentary privileges have evolved with reference to their necessity. In *Precedents of Proceedings in the House of Commons,* Vol. I, 3rd Ed.

(London: T Payne, 1796), John Hatsell defined at p. 1 the privileges of parliament as including those rights which are absolutely necessary for the due execution of its power". It is important to note that, in this context, the justification of necessity is applied in a general sense. That is, general categories of privilege are deemed necessary to the discharge of the Assembly's function. Each specific instance of the exercise of a general privilege needs to be shown to be necessary."

21. In the past, this Court has adopted a similar conception of legislative privileges to interpret Article 194(3). For example in *Re Special Reference* 1 of 1964, AIR 1965 SC 745, (also known as the *U.P. Assembly* case) Gajendragadkar C.J. had held, at Para. 33:

"… The Constitution-makers must have thought that the legislatures will take some time to make laws in respect of their powers, privileges and immunities. During the interval, it was clearly necessary to confer on them the necessary powers, privileges and immunities. There can be little doubt that the powers, privileges and immunities which are contemplated by clause (3), are incidental powers, privileges and immunities which every legislature must possess in order that it may be able to function effectively, and that explains the purpose of the latter part of clause (3)."

22. In *State of Karnataka v. Union of India,* (1977) 4 SCC 608, a seven judge bench of this Court construed the powers contained in Article 194(3) as those 'necessary for the conduct of the business of the House', at Para. 57:

"*57*. It is evident, from the Chapter in which Article 194 occurs as well as the heading and its marginal note that the 'powers' meant to be indicated here are not independent. They are powers which depend upon and are necessary for the conduct of the business of each House.

> They cannot also be expanded into those of the House of Commons for all purposes… We need not travel beyond the words of Article 194 itself, read with other provisions of the Constitution, to clearly read such a conclusion."

23. Y.K. Sabharwal, C.J. (majority opinion) in Para. 471 of *Raja Ram Pal's* case *(supra.)* has quoted from *Parliamentary Privilege- First Report (Lord Nicholas)* which describes Parliamentary Privilege as:

> "Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their Members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection Members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished."

In *U.P. Assembly* case (supra.), this Court had also drawn a distinction between the exercise of legislative privileges and that of ordinary legislative functions in the following manner:

> "There is a distinction between privilege and function, though it is not always apparent. On the whole, however, it is more convenient to reserve the term 'privilege' to certain fundamental rights of each House which are generally accepted as necessary for the exercise of its constitutional functions. The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights which are absolutely necessary for the due execution of its powers. They are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity."

In *Hatsell's Collection of Cases of Privileges of Parliament* (1776), Parliamentary privileges have been defined as those rights which are 'absolutely necessary for the due execution of its powers'. A similar definition has also been quoted in Sir Erskine May's *Parliamentary Practice* (1950) and is also found in Ramanatha Aiyar, *Advanced Law Lexicon,* 2nd *edn. Vol. 3* (New Delhi: Wadhwa & Co. Nagpur, 1997) which defines privilege as:

> "The distinctive mark of a Parliamentary Privilege is its ancillary character. They are rights which a sovereign legislature must possess for the due execution of its powers. Some of them are enjoyed by individual members of the House."

24. The observations cited above make it amply clear that the exercise of legislative privileges is not an end in itself. They are supposed to be exercised in order to ensure that legislative functions can be exercised effectively, without undue obstructions. These functions include the right of members to speak and vote on the floor of the house as well as the proceedings of various legislative committees. In this respect, privileges can be exercised to protect persons engaged as administrative employees as well. The important consideration for scrutinising the exercise of legislative privileges is whether the same was necessary to safeguard the integrity of legislative functions. We are also expected to look to precedents involving the British House of Commons. The most elaborate list of Parliamentary Privileges exercised by the British House of Commons has been compiled by Pritiosh Roy in his work *Parliamentary Privilege in India* which has been quoted in *Raja Ram Pal's* case (supra.) at Paragraphs 94-97 and has been reproduced below:

> (1) Privilege of freedom of speech, comprising the right of exclusive control by the House over its own proceedings. It is a composite privilege which includes:

(i) the power to initiate and consider matters of legislation or discussion in such order as it pleases;

(ii) the privilege of freedom in debate proper- absolute immunity of members for statements made in debate, not actionable at law;

(iii) the power to discipline its own members;

(iv) the power to regulate its own procedure- the right of the House to be the sole judge of the lawfulness of its own proceedings;

(v) the right to exclude the jurisdiction of the Courts;

(vi) the right to exclude strangers;

(vii) the right to ensure privacy of debate;

(ix) the right to control or prohibit publication of its debates and proceedings;

2. Privilege of freedom from arrest or molestation the claim of the Commons to freedom of members from arrest in civil action or suits during the time of the Parliament and during the period when a member journeys to or returns from the Parliament. This privilege includes:

(i) exemption of a member from attending Court as a witness- service of a civil or criminal process within the precincts of the House is a breach of privilege.

(ii) a member cannot be admitted as bail;

(iii) exemption of a member from jury service

(iv) no such privilege claimed in respect of criminal offences or statutory detention;

(v) right of the House to be informed of arrest of

members on criminal charges;

(vi) extension of the privilege to witnesses summoned to attend before the House or its committees, and to officers in immediate attendance upon the service of the House.

(3) Privilege of freedom of access to the sovereign through the Speaker.

(4) Privilege of the House of receiving a favourable construction of the proceedings of the House from the sovereign.

(5) Power of the House to inflict punishment for contempt on members or strangers- a power akin to the powers possessed by the superior courts of justice to punish for contempt.

It includes:

(i) the power to commit a person to prison, to the custody of its own officers or to one of the State prisons, [the keystone of parliamentary privilege] the commitment being for any period not beyond the date of the prorogation of the House;

(ii) the incompetence of the courts of justice to admit a person committed by the House to bail;

(iii) when the person is committed by the House upon a general or unspeaking warrant which does not state the particular facts constituting the contempt the incompetence of the courts of justice to inquire into the nature of contempt;

(iv) the power of the House to arrest an offender through its own officers or through the aid and power of the civil government;

(v) the power of the officers of the House to break open outer doors to effect the execution of the warrant of arrest;

(vi) the power of the House to administer reprimand or admonition to an offender;

(vii) the power of the House to secure the attendance, whether in custody or not, of persons whose conduct is impugned on a matter of privilege;

(viii) the power of the House to direct the Attorney General to prosecute an offender where the breach of privilege is also an offence at law and the extent of the power of the House to inflict punishment is not considered adequate to the offence;

(ix) the power of the House to punish a member by (a) suspension from the service of the House, or (b) expulsion, rendering his seat vacant.

6. Privilege of the House to provide for its own due constitution or composition. It includes:

(i) the power of the House to order the issue of new writs to fill vacancies that arise in the Commons in the course of a Parliament;

(ii) the power of the House in respect of the trial of controverted elections of members of the Commons;

(iii) the power of the House to determine the qualifications of its members to sit and vote in the House in cases of doubt- it includes the power of expulsion of a member. A major portion of this ancient privilege of the House of Commons has been eroded by the statute.

7. The power of the House to compel the attendance of witnesses and the production of papers."

25. However, we are only obliged to follow British precedents to the extent that they are compatible with our constitutional scheme. This is because the legislatures in India do not have a wide power of self-composition in a manner akin to the British House of Commons. This position was clarified in *Raja Ram Pal's* case, (Supra.) at Para. 87:

"87. In *U.P. Assembly Case* (Special Reference No.1 of 1964) it was settled by this Court that a broad claim that all the powers enjoyed by the House of Commons at the commencement of the Constitution of India vest in an Indian Legislature cannot be accepted in its entirety because there are some powers which cannot obviously be so claimed. In this context, the following observations appearing at SCR p.448 of the judgment should suffice: (AIR 1965 SC 745, p.764, para. 45)

> "Take the privilege of freedom of access which is exercised by the House of Commons as a body and through its Speaker 'to have at all times the right to petition, counsel, or remonstrate with their Sovereign through their chosen representative and have a favourable construction placed on his words was justly regarded by the Commons as fundamental privilege' [Sir Erskine May's *Parliamentary Practice*, (16th Edn.), p.86]. It is hardly necessary to point out that the House cannot claim this privilege. Similarly, the privilege to pass acts of attainder and impeachments cannot be claimed by the House. The House of Commons also claims the privilege in regard to its own Constitution. This privilege is expressed in three ways, first by the order of new writs to fill vacancies that arise in the Commons in the course of a Parliament; secondly, by the trial of controverted

elections; and thirdly, by determining the qualifications of its members in cases of doubt (May's *Parliamentary Practice*, p.175). This privilege again, admittedly, cannot be claimed by the House. Therefore, it would not be correct to say that all powers and privileges which were possessed by the House of Commons at the relevant time can be claimed by the House."

26. Hence, it is a well-settled position that all the privileges claimed by the House of Commons cannot be automatically claimed by legislative bodies in India. With respect to the examples noted above, it is quite apparent that vacancies arising in the legislative bodies (Union Parliament and State Legislative Assemblies) are duly filled up through the election procedures contemplated by the Constitution that have been fleshed out in detail through the Representation of People Act, 1951. Similarly disputes relating to elections are heard by the competent courts and disqualifications are effected as per the grounds enumerated in the Constitution. While Articles 101 and 102 enumerate the grounds for vacation of seats and the disqualification of Members of Parliament (MPs) respectively, Article 190 and Article 191 deal with these aspects in relation to Members of State Legislatures. The manner of effecting disqualifications has also been laid down in relation to the various grounds for the same.

27. In *Raja Ram Pal's* case, (supra.) the majority had decided that the parliamentary privileges available under Article 105(3) could be legitimately exercised to expel members for grounds other than those prescribed for disqualification of members under Article 102. This Court had upheld the validity of the proceedings of a privileges committee of the Lok Sabha which had inquired into the improper acts of some MPs and recommended their expulsion. In that case, the misconduct was in the nature of accepting bribes in return for asking specified questions on the floor of the house. One of

the expelled MPs had been reported for accepting gratification in lieu of improper allocation of funds under the Member of Parliament Local Area Development Scheme (MPLADS). The acceptance of bribes had been recorded on camera by some journalists and later on the video-footage was treated as conclusive evidence of guilt by the privileges committee. In the present case, the respondents have cited this decision in support of their contention that it was proper for the Punjab Vidhan Sabha to have exercised its' power to punish for contempt [derived from Article 194(3) of the Constitution] in order to recommend the expulsion of the appellant. It was argued that the Vidhan Sabha was empowered to expel members on grounds other than those prescribed for disqualification of members under Article 191. However, an important consideration in that case was that the misconduct which was the ground for the MPs' expulsion had a direct connection with their legislative functions, namely those of asking questions at the behest of vested interests and the improper allocation of funds under the MPLADS scheme respectively. With respect to the allegations against the appellant in the present case, it is quite difficult to see how the improper exemption of a particular plot of land from an acquisition scheme caused an obstruction to the conduct of legislative business. If it is indeed felt that the allegations of misconduct on part of the former Chief Minister had brought disrepute to the entire House, then the proper course is to pursue criminal investigation and prosecution before the appropriate judicial forum.

28. At this juncture, we must reiterate the principles which guide judicial scrutiny of the exercise of legislative privileges (including the power to punish for contempt of the House). In *Raja Ram Pal's* case, Y.K. Sabharwal, C.J. had framed the following guidelines, at Para. 431:

"431. Summary of the Principles relating to Parameters of Judicial Review in relation to exercise of Parliamentary

Provisions

We may summarize the principles that can be culled out from the above discussion. They are:

a. Parliament is a co-ordinate organ and its views do deserve deference even while its acts are amenable to judicial scrutiny;

b. Constitutional system of government abhors absolutism and it being the cardinal principle of our Constitution that no one, howsoever lofty, can claim to be the sole judge of the power given under the Constitution, mere co-ordinate constitutional status, or even the status of an exalted constitutional functionaries, does not disentitle this Court from exercising its jurisdiction of judicial review of action which part-take the character of judicial or quasi-judicial decision;

c. The expediency and necessity of exercise of power or privilege by the legislature are for the determination of the legislative authority and not for determination by the courts;

d. The judicial review of the manner of exercise of power of contempt or privilege does not mean the said jurisdiction is being usurped by the judicature;

e. Having regard to the importance of the functions discharged by the legislature under the Constitution and the majesty and grandeur of its task, there would always be an initial presumption that the powers, privileges etc have been regularly and reasonably exercised, not violating the law or the Constitutional provisions, this presumption being a rebuttable one;

f. The fact that Parliament is an august body of co-ordinate constitutional position does not mean that there can be no judicially manageable standards to review exercise of its power;

g. While the area of powers, privileges and immunities of the legislature being exceptional and extraordinary its acts, particularly relating to exercise thereof, ought not to be tested on the traditional parameters of judicial review in the same manner as an ordinary administrative action would be tested, and the Court would confine itself to the acknowledged parameters of judicial review and within the judicially discoverable and manageable standards, there is no foundation to the plea that a legislative body cannot be attributed jurisdictional error;

h. The Judicature is not prevented from scrutinizing the validity of the action of the legislature trespassing on the fundamental rights conferred on the citizens;

i. The broad contention that the exercise of privileges by legislatures cannot be decided against the touchstone of fundamental rights or the constitutional provisions is not correct;

j. If a citizen, whether a non-member or a member of the Legislature, complains that his fundamental rights under Article 20 or 21 had been contravened, it is the duty of this Court to examine the merits of the said contention, especially when the impugned action entails civil consequences;

k. There is no basis to claim of bar of exclusive cognizance or absolute immunity to the Parliamentary proceedings in Article 105(3) of the Constitution;

l. The manner of enforcement of privilege by the legislature can result in judicial scrutiny, though subject to the restrictions contained in the other Constitutional provisions, for example Article 122 or 212;

m. Articles 122(1) and Article 212(1) displace the broad doctrine of exclusive cognizance of the legislature in England of exclusive cognizance of internal proceedings

of the House rendering irrelevant the case law that emanated from courts in that jurisdiction; inasmuch as the same has no application to the system of governance provided by Constitution of India

n. Article 122(1) and Article 212(1) prohibit the validity of any proceedings in legislature from being called in question in a court merely on the ground of irregularity of procedure;

o. The truth or correctness of the material will not be questioned by the court nor will it go into the adequacy of the material or substitute its opinion for that of the legislature;

p. Ordinarily, the legislature, as a body, cannot be accused of having acted for an extraneous purpose or being actuated by caprice or *mala fide* intention, and the court will not lightly presume abuse or misuse, giving allowance for the fact that the legislature is the best judge of such matters, but if in a given case, the allegations to such effect are made, the Court may examine the validity of the said contention, the onus on the person alleging being extremely heavy

q. The rules which the legislature has to make for regulating its procedure and the conduct of its business have to be subject to the provisions of the Constitution;

r. Mere availability of the Rules of Procedure and Conduct of Business, as made by the legislature in exercise of enabling powers under the Constitution, is never a guarantee that they have been duly followed;

s. The proceedings which may be tainted on account of substantive or gross illegality or unconstitutionality are not protected from judicial scrutiny;

t. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action;

u. An ouster clause attaching finality to a determination does ordinarily oust the power of the court to review the decision but not on grounds of lack of jurisdiction or it being a nullity for some reason such as gross illegality, irrationality, violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity;"

29. Hence, we are empowered to scrutinize the exercise of legislative privileges which admittedly include the power of a legislative chamber to punish for contempt of itself. Articles 122(1) and 212(1) make it amply clear that Courts cannot inquire into matters related to irregularities in observance of procedures before the legislature. However, we can examine whether proceedings conducted under Article 105(3) or 194(3) are 'tainted on account of substantive or gross illegality or unconstitutionality'. The facts before us do not merely touch on a procedural irregularity. The appellant has contended that the Punjab Vidhan Sabha has committed a substantive jurisdictional error by exercising powers under Article 194(3) to inquire into the appellant's actions which were taken in his executive capacity. As explained earlier, the relevant fact here is not only that the allegations of wrongdoing pertain to an executive act, but the fact that there is no conceivable obstruction caused to the conduct of routine legislative business.

30. Before commenting further on the merits of the contentions, we must draw attention to the specific guidelines in *Raja Ram Pal's* case (supra.) that advocate due deference to the actions of the legislature in the ordinary course of events. We do recognize that the threshold for exercising judicial review in a case such as the present one is indeed very high and we must begin with a presumption that the legislatures' actions were valid. However, the counsel for the appellant and the

petitioners have produced sufficient materials to demonstrate that it was not necessary for the Punjab Vidhan Sabha to have exercised its powers under Article 194(3) to recommend and then notify the expulsion of the appellant. We fail to see how the alleged misconduct on part of the appellant had the effect of obstructing the ordinary legislative functions of the Vidhan Sabha. In its role as a deliberative body which is expected to monitor executive functions in line with the idea of 'collective responsibility', the Punjab Vidhan Sabha was of course free to inquire into the alleged misconduct and examine its implications. However, the act of recommending the appellant's expulsion through the impugned resolution cannot be justified as a proper exercise of 'powers, privileges and immunities' conferred by Article 194(3).

31. In their submissions, the counsel for the respondents have cited some English precedents in an attempt to draw an analogy with the facts in the present case. The intended purpose of doing so is to demonstrate the exercise of legislative privileges in the past to punish conduct that took place outside the 'four walls of the house' and yet diminished the reputation of the legislature. We have already explained that all British precedents cannot be automatically followed in the Indian context. One reason for this is that Indian legislatures are controlled by a written constitution and hence they do not have an absolute power of self-composition, unlike the British House of Commons which is controlled by an unwritten constitution. Another reason is that some of the English precedents involving the exercise of privileges were clear instances of overbreadth. Far from being good law as contended by the respondents, these old English cases have been subsequently described by authors as examples of arbitrary exercise of privileges. In fact Para. 217 of *Raja Ram Pal's* case (supra.) conveys this position in the following words:

> "*217.* Constitutional History of England by Professor F.W. Maitland (1st Edn. 1908, reprinted 1941), based on his

> lectures, is divided chronologically. In the last and most contemporary 'Period V' titled "Sketch of Public Law at the Present Day (1887-88)", he deals with the House of Commons in Part III. It has been opined by him that the earlier exercise of privileges from the fourteenth to the eighteenth century have fallen into utter desuetude an may furnish only an example of an arbitrary and sometimes oppressive exercise of uncanalised power by the House. After mentioning the membership and the qualification of the voters as also principles and the mode of election and dealing with the power of the voters as also principles and the mode of election and dealing with the power of determining disputed elections by the House of Commons, one of the facets of the privilege of the House of Commons to provide for and regulate its own constitution, in the context of the vacation of seats in the House by incurring disqualifications, he refers in sub-para (6) to the power of expulsion. His words may be extracted:
>
> > "The House has an undoubted power of expelling a Member, and the law does not attempt to define the cases in which it may be used. If the House voted the expulsion of A.B. on the ground that he was ugly, no court could give A.B. any relief. Probably it would not be exercised now- a days, unless the Member was charged with crime or with some very gross misbehaviour falling short of crime, and in general the House would wait until he had been tried and convicted by a court of law. In 1856, a Member who had been indicted for fraud and who had fled from the accusation was expelled."

32. The respondents have quoted Para. 215 of *Raja Ram Pal's* case (supra.) to contend that even in cases of criminal offences such as forgery, perjury, breach of trust, corruption in public offices etc. wherein there may be no direct obstruction

to legislative business, members have been expelled from the British House of Commons through the exercise of Parliamentary privileges. In fact, Para. 215 paraphrases a passage from Sir Erskine May's prominent work which touches on the power of the House to expel its' members. However, the exact passage dealing with the power of expulsion, [See Erskine May*, Parliamentary Practice, 15th Edn.* (1950)] states that at the time of writing (i.e. 1950) the power of expulsion was reserved only for cases involving conviction for grave misdemeanors. A reading of the original passage makes it amply clear that Sir Erskine May was referring to grounds on which members had been expelled in the past. However, citing the same does not amount to their endorsement and the respondent's reliance on the said passage is quite misplaced. The original passage is reproduced below:

EXPULSION BY THE COMMONS

> "The purpose of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution. But it is more convenient to treat it among the methods of punishment at the disposal of the House. At the present time expulsion is practically reserved for the punishment of persons convicted of grave misdemeanors, whose seats are not, as in the case of Members convicted of treason or felony, automatically vacated.
>
> Members have been expelled as being in open rebellion; as having been guilty of forgery; of perjury; of frauds and breaches of trust; of misappropriation of public money; of conspiracy to defraud; of fraudulent conversion of property; of corruption in the administration of justice, or in public offices, or in the execution of their Members of the House; of conduct unbecoming the character of an officer and a gentlemen; and contempt, libels and other offences

> committed against the House itself."

33. At this juncture, we must clarify that if a sitting member of a legislature in India is found guilty of committing a statutory offence, then disqualification can be a consequence as per the scheme contemplated in the Representation of People Act, 1951. The respondents have also referred to the Table produced in Para. 582 of *Raja Ram Pal's* case (supra.) which surveys the exercise of privileges by the British House of Commons between 1667 and 1954. They have drawn our attention to some of the instances to contend that members were indeed expelled for acts that took place outside the 'four walls of the house' and had no direct bearing on legislative functions. However as we have explained above, it is not appropriate to mechanically rely on all of these precedents. If we must look to English precedents for guidance, we find a far more appropriate sample set in the table of cases from the period 1945-1965 which forms an Appendix to the *Report of the Select Committee on Parliamentary Privilege (1967)* in the United Kingdom. The same has been reproduced below:

RECENT CASES OF PRIVILEGE (1945-65)

DATE	Subject of Complaint	Report and Recommendation of the Committee of Privileges	Action by the House
March 1945 H.C. 63 (1944-45)	Offer of a bribe (Henderson's Case)	Offer was a conditional donation- no question of bribery arose and no breach of privilege	Tacit Acceptance
October 1945 H.C. 31 (1945-46)	Service of summons within the precincts on a sitting day (Verney's Case)	Breach of privilege but particular circumstances did not require further action	Tacit acceptance
July 1946 H.C. 181 (1945-46)	Poster designed to intimidate Members (Mrs.	Breach of privilege but too petty in scale to justify further action	Tacit Acceptance

	Tennant's Case)	by House	
December 1946H.C. 36 (1946- 47)	Assault on Member (Piratin's Case)	Member and assailant both guilty of contempt	Resolution : Member guilty of gross contempt, assailant guilty of contempt (10 February 1947)
March 1947 H.C. 118 (1946-47)	Improper pressure on Member by Trade Union (W.J.Brown's Case)	Nothing improper and no breach of privilege	Resolution: Inconsistent with duty of Member to enter contractual agreements limiting his independence in Parliament
April 1947 H.C. 138 (1946-47)	Newspaper suggested Members accepted payments for information (Gary Allighan's Case)	1) Grave contempt by newspaper and by Mr. Allighan 2) Disclosure of information from party meetings for payment constitutes breach of privilege	(1) Member expelled; Editor summoned to Bar and reprimanded (30 October,1947) 2) This view not accepted by House
July 1947 H.C. 137 (1946- 47)	Refusal by witnesses before Committee of Privileges to answer certain questions (Case of Schofield and Dobson)	House to take such steps as may seem necessary	Witnesses ordered to attend at Bar of House and examined by Mr. Speaker Resolution: Refusal to answer constitutes contempt (12 August 1947)
August 1947 H.C. 142 (1946-47)	Personal statement by Member about acceptance of payments by newspaper	Member guilty of privilege	Member ordered to be reprimanded for dishonourable conduct (House did not confirm the view of the

	referred to Committee (Walkden's Case)		Committee on breach of privilege) 30 October and 10 December 1947)
March 1948 H.C. 112 (1947-48)	Broadcast reflecting on allegiance of Members (Colm Brogan's Case)	Inconsistent with dignity of House to examine further	Tacit acceptance
July 1949 H.C. 261 (1948-49)	Misrepresentation by newspaper of Member's speech (Case of "Daily Worker")	Technical breach of privilege but no action called for	Tacit acceptance
March 1951 H.C. 149 (1950-51)	Broadcast commenting on future decision by House on privilege matter (B.B.C. case)	No contempt	Tacit acceptance
March 1951 H.C. 227 (1950-51)	Letter reflecting on integrity of Members (Clan Briton case)	Letters did not reflect on Members in their capacity as such and therefore no breach of privilege	Tacit acceptance
June 1951 H.C. 227 (1950-51)	Disclosure by newspaper of evidence given to Estimates Committee (Case of Daily Telegraph)	An inquiry into the facts did not reveal any intention any intention to infringe privilege	Tacit Acceptance
June 1951 H.C. 235 (1950-51)	Speech by Lady Mellor imputed partially to the Deputy Speaker (Lady Mellor's Case)	Words constituted a breach of privilege but circumstances did not require further action by House	Tacit Acceptance
July 1951 H.C. 244	Obstruction by police of Member	No breach of privilege	Tacit Acceptance

(1950-51)	driving to attend House and subsequent summons (John Lewis's Case)		
April 1953 H.C. 171 (1952-53)	Lady Member's disrespect in "Sunday Express" article describing other Members (Mrs. Ford's case)	Unauthorized reports of proceedings in House amount to breach of privilege; but normally House waives its privileges. Apologies having been made, no further action needed	Tacit acceptance
December 1953 H.C. 31 (1953-54)	Reflection on Members in newspaper article imputing motives in voting (Case of "Daily Worker")	Breach of privilege; but matter not worthy of occupying further time of the House	Tacit Acceptance
March 1955 H.C. 112 (1954-55)	Deputy Assistant Chaplain General threatens a subordinate with a view to influencing proceedings in Parliament	No precedent for regarding it as breach of privilege; but matter for responsible Minister	Tacit Acceptance
November 1956 H.C. 27 (1956-57)	Molestation of Member by telephone (Editor of Sunday Graphic's case)	Serious breach of privilege; but in view of humble apology, no further action needed	Tacit acceptance
November 1956 H.C. 38 (1956-57)	Imputation in newspaper article that Members were receiving "prodigious"	Editor of "Sunday Express" guilty of serious contempt and should be reprimanded	Editor ordered to attend at Bar and apology made at Bar of House Resolution: He
	supplementary petrol allowances (Case of "Sunday Express")		was guilty of serious contempt (24 January 1957)
December 1956 H.C. 39 (1956-57)	Offensive newspaper cartoon reflecting on conduct of Members (Case of "Evening News")	Cartoon constituted reflection on Members and contempt, but in view of withdrawal of cartoon from later editions and publication of unqualified apology, no further action needed	Tacit Acceptance
January 1957 H.C. 74 (1956- 57)	Broadcast and newspaper comment on matter under consideration by Committee of Privileges (Case of B.B.C. and "Romford Recorder" newspaper)	No contempt by B.B.C. or by newspaper	Tacit acceptance
April 1957 H.C. 305 (1956-57)	Action by London Electricity Board in threatening to institute proceedings for libel respecting statement in letter by Member to Minister (Strauss Case)	Breach of privilege	Resolution: London Electricity Board had not commented any breach of privilege Division: Ayes 219; Noes 196 (8 July 1958)
July 1960 H.C. 284 (1959-60)	Letter containing threat to Member (Colin Jordan's case)	Breach of privilege; but no further action needed as offence had not been repeated	Tacit acceptance
March 1964	Reflection on allegiance of	No breach of privilege and no contempt of the	Tacit acceptance

H.C. 247 (1963-64)	Members made outside House (Quintin Hogg's Case)	House; no further action needed	
February 1965 H.C. 129 1964-65	Imputation against Member's drunkenness (Duffy's case)	Gross contempt of House and breach of privilege; but no further action needed following letter from Member withdrawing remarks	Tacit acceptance
May 1965 H.C. 228 (1964-65)	Letter threatening Members of House (case of anonymous threatening letters)	Breach of privilege and improper attempt to influence Members; in their parliamentary conduct; but dignity of House best maintained by taking no further action	Tacit acceptance
July 1965 H.C. 269 (1964-65)	Speech by Chancellor of the Exchequer outside House reflecting on Members (Callaghan's case)	No contempt and no further action needed	Tacit acceptance

34. A perusal of the above-mentioned table reveals the following:

(i) The only cases in this Table where the House was of the view that a breach of privileges had taken place were those in which the questionable conduct bore a direct nexus to the functioning or the proceedings of the House or the functioning of a member within the House. Even in such cases no serious action followed, much less an action of expulsion. These were:

. Service of summons in the precincts of the House without permission of the House (Verney's case 1945-46)

. Misrepresentation by a newspaper of the speech of a Member within the House (Walkden's Case 1946-47)

. Speech by a Member imputing impartiality to the Deputy Speaker of the House

. Unauthorized reports of proceedings of the House (Mrs. Ford's case 1952-53)

. Intimidation/molestation/threat of a Member in the House (Mrs. Tennant's case 1945-46) and (Editor of "Sunday Graphic's" case 1956-57) and (Colin Jordan's case 1959-60)

(ii) The instances where the House was of the view that contempt of the House had taken place were those where there were direct obstructions and imputations against members, namely when:

. There was an assault on the Member in the House (Piratin's case 1946-47)

. There was a refusal by a witness to answer questions before a Privileges Committee (Case of Schofield and Dobson 1946-47)

. There was an imputation by a newspaper that members were receiving unusually large petrol allowances (case of "Sunday Express" 1956-57)

. There was an imputation regarding a Member's drunkenness (Duffy's case 1964-65)

(iii) In the one instance where the Privileges Committee did indeed recommend the expulsion of a member (Gary Allighan, 1947) the House ultimately did not accept the

same recommendation.

35. It would be safe to say that a breach of privilege by a member of the legislature can only be established when a member's act is directly connected with or bears a proximity to his duties, role or functions as a legislator. This test of proximity should be the rule of thumb, while of course accounting for exceptional circumstances where a person who is both a legislator and a holder of executive office may commit a breach of privilege. It is our considered view that such a breach has not occurred in the present case.

36. Even if we turn to parliamentary practice in India, it is quite apparent that the expulsion of members should only be sustained if their actions have caused obstructions to legislative functions or are likely to cause the same. The following examples have been discussed in *Raja Ram Pal's*_case (supra.) at Paragraphs 301-317:

. One can refer to the chain of events leading up to the resignation of Mr. H.G. Mudgal from the Lok Sabha on 24-9-1951. Mr. H.G. Mudgal was charged with having engaged himself in 'certain dealings with the Bombay Bullion Association which included canvassing support and making propaganda in Parliament on problems like option business, stamp duty etc. and receipt of financial or business advantages from the Bombay Bullion Association' in the discharge of his duty in Parliament. Subsequently, a Committee appointed by Parliament to inquire into the said member's activities found his conduct to be derogatory to the dignity of the House and inconsistent with the standard which Parliament was entitled to expect from its members. In pursuance of these findings, a motion for expulsion was brought before the House which prompted the member to submit his resignation. [See: Kaul and Shakdher, *Practice and*

Procedure of Parliament, 5th edn. (New Delhi: Metropolitan Book Co. Pvt. Ltd. 2001) at p. 262] It is pertinent to note that the misconduct which triggered a recommendation for expulsion had a clear nexus with legislative functions.

. Another relevant instance is that of the expulsion of Mr. Subramanium Swamy from the Rajya Sabha. On 2-9-1976 the Rajya Sabha adopted a motion appointing a committee to investigate the conduct and activities of Mr. Swamy, within and outside the country, including alleged anti-India propaganda calculated to bring into disrepute Parliament and other democratic institutions of the country and generally behaving in a manner unworthy of a member. The Committee presented its report on 12-11-1976 recommending expulsion and on 15-11-1976 the Rajya Sabha adopted a motion to expel the said member. [See: Subhash C. Kashyap, *Parliamentary Procedure- Law Privileges, Practice & Precedents Vol. 2*, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2000) at p. 1657]

. We can also invite attention to the instance when Mrs. Indira Gandhi and two others were expelled from the Lok Sabha by way of a motion adopted on 19-12-1978. The background was that on 18-11-1977, a motion was adopted by the House referring to the Committee of privileges a question of breach of privilege and contempt of the House against Mrs. Gandhi and others regarding obstruction, intimidation, harassment and institution of false cases by Mrs. Gandhi and others against certain officials. The Committee of Privileges recorded a finding that Mrs. Indira Gandhi had committed a breach of privilege and contempt of the House by causing obstruction, intimidation, harassment and

institution of false cases against the officers concerned who were collecting information for the purpose of an answer to a certain question that had been asked in the House. The nature of punitive action to follow was left to the wisdom of the House. On 19-12-1978, the House adopted a motion which recommended Mrs. Gandhi's expulsion among other things. However, this expulsion was undone during the term of the Seventh Lok Sabha, wherein there was a substantive debate on whether the House had the power to expel its members in the exercise of privileges. At that point of time, the majority of the House had resolved that there was no power of expulsion in such circumstances. However, the position has since been clarified in *Raja Ram Pal's* case (supra.) which has recognised the power of legislatures to expel their members, subject to the judicially prescribed guidelines. Nevertheless, what is relevant for the present case is that the initial recommendation for expulsion was triggered by conduct that bore a direct causal link to legislative functions.

. Another comparable instance was noted by S.C. Agarwal, J. in his dissenting opinion in *P.V. Narasimha Rao v. State,* (1998) 4 SCC 626, wherein it was observed:

"*25.* It does not, however, constitute breach or contempt of the House if the offering of payment of bribe is related to the business other than that of the House. In 1974, the Lok Sabha considered the matter relating to offer or payment of bribe in the import licences case wherein it was alleged that a Member of Lok Sabha had taken bribe and forged signatures of the Members for furthering the cause of certain applicants. The question of privilege was disallowed since it was considered that the conduct of the Member, although improper, was not related to the

business of the House. But at the same time it was held that as the allegation of bribery and forgery was very serious and unbecoming of a Member of Parliament, he could be held guilty of lowering the dignity of the House.

(See: Kaul and Shakdher at pp. 254, 255)."

37. As outlined earlier, the respondents have also contended that the power of a legislature to punish for its own contempt should not be seen as incidental to its' power of self-composition and that it should have a wider import than the remedial power of preventing obstructions to legislative functions. It will be useful to refer to the following extract from the respondents' written submissions:

"… Even if the House of Legislature has limited powers, such power is not only restricted to ex facie contempts, but even acts committed outside the House. It is open to the Assembly to use its power for protective purposes, and the acts that it can act upon are not only those that are committed in the House, but upon anything that lowers the dignity of the House. Thus, the petitioners' submission that the House only has the power to remove obstructions during its proceedings cannot be accepted."

In pursuance of this line of reasoning, the respondents have argued that the appellant's actions have lowered the dignity of the house and the same amounts to conduct unbecoming of a member of the House, even though such conduct had no bearing on legislative functions. It was urged that the underlying motive behind the expulsion was not merely that of punishment but also to remove a member who was seen as unfit to continue as a member of the legislature.

38. We are unable to agree with this line of reasoning presented on behalf of the respondents. Expressions such as 'lowering the dignity of the house', 'conduct unbecoming of a member of the House' and 'unfitness of a member' are openly-worded and abstract grounds which if recognised, will trigger

the indiscriminate and disproportionate use of legislative privileges by incumbent majorities to target their political opponents as well as dissidents. The various grounds for disqualification of members of legislative assemblies (MLAs) have been enumerated in Articles 190 and 191 of the Constitution. For most circumstances, there is an elaborate machinery in place to decide questions pertaining to the disqualification of members and the vacancy of seats. However, it is for the purpose of tackling unforeseen and novel impediments to legislative functioning that the 'powers, privileges and immunities' contemplated by Article 194(3) of the Constitution have not been codified. In *Raja Ram Pal's* case (supra.) the majority decision of this Court did recognise that the legislature's power to punish for its contempt could be exercised to expel legislators for grounds other than those prescribed in the Constitution, but it was not the intention of this Court to prescribe an untrammeled power. By laying down a clear set of guidelines for judicial review over the exercise of parliamentary privileges, this Court had made its intentions quite clear. Accordingly, we are of the view that the power of a legislative chamber to punish for its own contempt should broadly coincide with the legislature's interest in protecting the integrity of its functions. There can of course be some exceptional circumstances where acts that take place outside the 'four walls of the house' could have the effect of distorting, obstructing or diluting the integrity of legislative functions. An obvious example is that of legislators accepting bribes in lieu of asking questions or voting on the floor of the House. However, with respect to the facts before us, the respondents have failed to demonstrate how the alleged misconduct on part of the appellant and the petitioners could have a comparable effect. Using the route of legislative privileges to recommend the appellant's expulsion in the present case is beyond the legitimate exercise of the privilege power of the House.

Re: Question II.

39. The next aspect that merits our attention is whether it was proper for the Punjab Vidhan Sabha to consider the alleged misconduct as a breach of privilege in spite of the fact that it took place during the Vidhan Sabha's previous term. The allegedly improper exemption of a plot of land (measuring 32.10 Acres) from the Amritsar Improvement Scheme had been notified on 13-1-2006, during the 12th term of the Punjab Vidhan Sabha. On 22-02-2006, a question pertaining to this allegedly improper exemption was raised in the House and the same was discussed on 22-02-2006, 28-02-2006 and 1-3-2006 respectively. At this juncture it must be clarified that there were separate allegations in the respondent's submissions which suggest that the appellant had played a part in suppressing some materials when questions had been asked about the allegedly improper exemption. However, the said suppression of materials had been inquired into by another Committee and there were no findings against the appellant.

40. As mentioned earlier, the House was subsequently dissolved and a new regime was voted to power in the elections held in February 2007. It was during the present term of the House (i.e. the 13th term of the Punjab Vidhan Sabha) that the allegedly improper exemption was made the subject-matter of an inquiry by a Special Committee which was constituted in pursuance of a resolution passed by the House on 18-12-2007. The Special Committee presented its report on the floor of the House on 3-9-2008, which in turn became the basis of the impugned resolution of the Punjab Vidhan Sabha that was passed on 10-9-2008. Before addressing the contentious issue, it is necessary to understand the implications of the dissolution of a legislative chamber, since the Punjab Vidhan Sabha had been dissolved and re-constituted during the period between the operative dates, i.e. the date of notification of the allegedly improper exemption of land from the Amritsar Improvement Scheme (13-1-2006) and the constitution of the Special Committee to inquire into the said allegations of misconduct (18-12-2007).

41. The literal meaning of 'dissolution' is listed in *Black's Law Dictionary, 8th edn.* [(West Group) at p. 506] as 'the act of bringing to an end; termination'. P. Ramanatha Aiyar, *Advanced Law Lexicon, 3rd edn., Vol. 2D-I*, (Wadhwa & Co., 2005) furnishes the following definition, at p. 1435:

> "*Dissolution and prorogation.*- Constitution of India, Art.107 (3), 174(2) (a) & (b), 196. Dissolution of Parliament is invariably proceeded by prorogation, and what is true about the result of prorogation, is, it is said a *fortiori* true about the result of dissolution. Dissolution of Parliament is sometimes described as "a civil death of Parliament". Ilbert in his work on 'Parliament' has observed that 'prorogation' means the end of a Session (not of parliament)'; and adds that "like dissolution it kills all bills which have not yet been passed". He also describes dissolution as "an end of Parliament (not merely of a session) by royal proclamation", and observes that "it wipes the slate clean of uncompleted bills or other proceedings".

The effects of dissolution have also been discussed in the following manner [Cited from: Kaul and Shakdher, *Practice and Procedure of Parliament*, *5th edn.* (New Delhi: Metropolitan Book Co. Pvt. Ltd., 2001) at pp. 191-193]:

EFFECTS OF DISSOLUTION

> "Dissolution, as already stated, marks the end of the life of a House and is followed by the constitution of a new House. One the House has been dissolved, the dissolution is irrevocable. There is no power vested in the president to cancel his order of dissolution and revive the previous House. The consequences of dissolution are absolute and irrevocable. In Lok Sabha, which alone is subject to dissolution under the Constitution, dissolution "passes a sponge over the Parliamentary slate". All business pending before it or any of its committees lapses on dissolution. No part of the records of the dissolved House can be

> carried over and transcribed into the records and registers of the new House. In short, dissolution draws the final curtain upon the existing House.
>
> *Business before a Committee:* All business pending before Parliamentary Committees of Lok Sabha lapse on dissolution of Lok Sabha. Committees themselves stand dissolved on dissolution of a Lok Sabha. However, a Committee which is unable to complete its work before the dissolution of a House may report to the house to that effect, in which case any preliminary memorandum or note that the committee may have prepared or any evidence that it may have taken is made available to the new Committee when appointed."

42. Coming to judicial observations, the effect of dissolution of a House were discussed by this Court in the *Gujarat Assembly Election* case, (2002) 8 SCC 237. V.N. Khare, J. (as His Lordship then was) had made the following observations:

> "*40…* Dissolution ends the life of the legislature and brings an end to all business. The entire chain of sittings and sessions gets broken and there is no next session or the first sitting of the next session after the House itself has ceased to exist. Dissolution of Legislative Assembly ends the representative capacity of legislators and terminates the responsibility of the Cabinet to the Members of the Lok Sabha or the Legislative Assembly, as the case may be."

Furthermore, Pasayat, J. had explained:

> "*135.* Dissolution brings a legislative body to an end. It essentially terminates the life of such body and is followed by constitution of a new body (a Legislative Assembly or a House of People, as the case may be). Prorogation on the other hand relates to termination of a session and thus precludes another session, unless it coincides with the end of the legislative term. The basic difference is that

prorogation unlike dissolution does not affect a legislative body's life which may constitute from session to session, until brought to an end by dissolution. Dissolution draws the final curtain upon the House. Once the House is dissolved it becomes irrevocable. There is no power to recall the order of dissolution and/ or revive the previous House. Consequently effect of dissolution is absolute and irrevocable. It has been described by some learned authors that dissolution "passes a sponge over the parliamentary slate". The effect of dissolution is in essence termination of current business of the legislative body, its sittings and sessions. There is a cessation of chain of sessions, sittings for a dissolved legislative body and there cannot be any next session or its first sitting. With the election of a legislative body a new chapter comes into operation. Till that is done the sine *qua non* of responsible government i.e. accountability is non-existent. Consequentially, the time stipulation is non-existent. Any other interpretation would render use of word "its" in relation to "last sitting in one session" and "first sitting in the next session" without significance."

43. In *Purushothaman Nambudiri v. State of Kerala,* AIR 1962 SC 694, Gajendragadkar J. (as His Lordship then was) had reflected on the effects of the dissolution of the House. The context in that case was that a Legislative Assembly had passed a bill and later the President had sent the bill back for reconsideration by the successor assembly. The question of whether the successor assembly needed to consider the bill afresh and pass it again was answered in the affirmative:

"6. ... The duration of the Legislative Assembly is prescribed by Article 172 (1), and normally at the end of five years the life of the Assembly would come to an end. Its life could come to an end before the expiration of the said period of the five years if during the said five years the President acts under Article 356. In any case there is no continuity in the personality of the Assembly where the

life of one Assembly comes to an end and another Assembly is in due course elected. If that be so, a bill passed by one Assembly cannot, on well recognized principles of democratic government be brought back to the successor Assembly as though a change in the personality of the Assembly had not taken place. The scheme of the Constitution in regard to the duration of the life of State Legislative Assembly, it is urged, supports the argument that with the dissolution of the Assembly all business pending before the Assembly at the date of dissolution must lapse. This position would be consonant with the well recognized principles of democratic rule. The Assembly derives its sovereign power to legislate essentially because it represents the will of the citizens of the State, and when one Assembly has been dissolved and another has been elected in its place, the successor Assembly cannot be required to carry on with the business pending before its predecessor, because that would assume continuity of personality which in the eyes of the Constitution does not exist. Therefore, sending the bill back to the successor Assembly with the message of the President would be inconsistent with the basic principles of democracy."

In *Sub-Committee on Judicial Accountability v. Union of India,* (1991) 4 SCC 699, G.N. Ray, J. had discussed the effect of dissolution of the Lok Sabha:

"*51.* Adverting to the effect of dissolution on other business such as motions, resolutions etc. the learned authors say:

> "All other business pending in Lok Sabha e.g. motions, amendments, supplementary demands for grants etc., at whatever stage, lapses upon dissolution, as also the petitions presented to the House which stand referred to the Committee on Petitions."

44. On the basis of the authorities cited above, it is evident that ordinarily legislative business does not survive the dissolution of the House. The exception to this norm is covered by the 'doctrine of lapse' wherein the successor House can choose to take up a pending motion or any order of business after the re-constitution of the House. However, this exception is not applicable in the facts of the present case. At the time of the reconstitution of the Punjab Vidhan Sabha following the State elections in February 2007, there was no pending motion, report or any other order of business which had a connection with the allegedly improper exemption of land. It was much later, i.e. on 18-12-2007 that a Special Committee was constituted to inquire into the same. Hence, in this case the Special Committee proceeded to enquire into the executive acts of the appellants and petitioners which had taken place during the previous term of the Punjab Vidhan Sabha. It is quite untenable to allow the exercise of legislative privileges to punish past executive acts especially when there was no pending motion, report or any other order of business that was relatable to the said executive acts at the time of the re-constitution of the House.

45. While the legislature is free to inquire into acts and events that have taken place in the past, the same is ordinarily done in the nature of fact-finding to improve the quality of law-making. Legislative oversight over executive actions is an important facet of parliamentary democracy and such oversight can extend to executive decisions taken in the past. However, it is altogether another matter if privileges are purportedly exercised to punish those who have held executive office in the past. It is quite inconceivable as to how the allegedly improper exemption of land (notified on 13-1-2006) had the effect of obstructing the legislative business in the 13th term of the Punjab Vidhan Sabha. Hence, it is our considered view in respect of the facts in the present case, that it was improper for the 13th Punjab Vidhan Sabha to claim a breach of privileges on account of the alleged misconduct which actually

took place during the 12th term of the Vidhan Sabha. However, our view should not be mistaken for a general proposition since it is within our imagination that in some circumstances the acts that have taken place during the previous terms of a Legislature could actually have the effect of distorting, obstructing or diluting the integrity of legislative business in the present term. Evidently, no such consequence or tendency has been demonstrated in the present case.

Re: Question III.

46. As noted in the survey of facts at the beginning of this opinion, the allegedly improper exemption of land from the Amritsar Improvement Scheme is the subject-matter of disputes that are pending before the High Court of Punjab and Haryana. Admittedly, these proceedings had been instituted soon after the notification of the said exemption (dated 13-1-2006) and the fact of their pendency was well known at the time of the constitution of the Special Committee by the Punjab Vidhan Sabha on 18-12-2007. This begs the question as to whether it was proper for the Punjab Vidhan Sabha to inquire into subject-matter which was already in question before a judicial forum.

47. The norms to be followed by a legislature in respect of *sub judice matters* have been discussed in the following words [Cited from: Griffith and Ryle, *Parliament, Functions and Procedure* (2003), Chapter 6 at Para 6-075):

> "A more significant reason for not allowing a notice of motion is if the matter is sub judice (awaiting decision in the courts); the same rule applies to debate and questions. The sub judice rule does not, however, apply to legislative business or where a ministerial decision is in question (e.g. in an application for judicial review). It applies only to cases in UK courts, not ones in courts elsewhere, even if they concern UK matters (e.g. the European Court of Human Rights). The Speaker has discretion to waive the rule and would normally do so when the case in question concerned

issues of national importance such as the economy, public order or essential services.

This long standing practice has been confirmed by resolutions of the House. Cases which are active in a criminal court in the United Kingdom must not be referred to; this applies from the moment charges are made until the verdict is given. The same applies to civil actions once arrangements are made for a hearing. Cases which have been decided can become sub judice again if one party applies for leave to appeal. Under this rule, which comes into operation in relation to some half-dozen cases a session, motions (or questions) may not be tabled until the case is decided. If a motion has been tabled before the matter became sub judice it is taken off the Order Paper until the case ceases to be sub judice."

48. In fact, the relevant rules of the *Rules of Business and Conduct of the Punjab Vidhan Sabha* themselves incorporate these norms. Reference may be made to the language of Rule 39(10), 50, 93(2)(iv) and 150(d) which lay down the following:

"39. In order that a question may be admissible it shall satisfy the following conditions, namely-:

…

(10) It shall not ask for information on any matter which is under adjudication by a court of law having jurisdiction in any part of India;

… 50. The right to move the adjournment of the business of the Vidhan Sabha (Assembly) for the purpose of discussing a definite matter of urgent public importance shall be subject to the following restrictions, namely -:

****

(ix) the motion shall not deal with a matter on which a

resolution could not be moved;

****

(xi) the motion shall not deal with any matter which is under adjudication by a Court of law;

… 93. (1) The matter of every speech shall be strictly relevant to the matter before the House.

(2) A member while speaking shall not-

****

(iv) refer to a matter of fact on which a judicial decision is pending;

.. 150. In order that a resolution may be admissible, it shall satisfy the following conditions, namely-

****

(d) it shall not relate to any matter which is under adjudication by a Court of law having jurisdiction in any part of India."

49. The above-mentioned rules which govern the business and conduct of the Punjab Vidhan Sabha are quite categorical in laying down a prohibition on the taking up of any matter which is pending adjudication before a court of law. Analogues provisions control the business and conduct of the Lok Sabha [See Rules 173, 188 and 352 of the *Rules of Business and Conduct of the Lok Sabha*]. While Articles 122(1) and 212(1) of the Constitution prohibit judicial scrutiny over questions relating to compliance with these rules, our attention has been drawn to the fact that the Punjab Vidhan Sabha proceeded to inquire into the allegedly improper exemption of land from the Amritsar Improvement Scheme, even though the same had been questioned before the High Court of Punjab and Haryana.

50. Subhash C. Kashyap [in *Parliamentary Procedure-*

Law Privileges, Practice & Precedents Vol. 1, (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2000)] has described a prominent example where the Speaker of the Lok Sabha had disallowed discussion on subject-matter that was pending before the courts. The following extract also touches on arguments for allowing the legislature to discuss *sub judice* matters in exceptional cases (at pp. 1225- 1226):

> (iii) The following motion tabled by a member (Madhu Limaye) was included in the List of Business for 7 May 1968:
>
> That this House disapproves of the statements made by Shri Ranganathan, Under Secy., Ministry Of External Affairs, on behalf of the Government of India in his affidavit in opposition on the 21 Apr. 1968, before the Delhi High Court which are contrary to the statements made by the Minister of Home Affairs in the House on the 28 Feb. 1968 in regard to implementation of Kutch Award.
>
> When Limaye was called to move his motion, a point of order was raised by a member (Narayan Rao) and Law Minister (P. Govinda Menon) that discussion on affidavit would mean discussing a *sub judice* matter. The Speaker reserved his ruling. On 9 May 1968, the Speaker ruled *inter alia* as follows:
>
> > The rule on whether a motion which relates to a matter which is under adjudication by a court of law should be admitted or discussed in the House has to be interpreted strictly. While on the one hand the Chair has to ensure that no discussion in the House should prejudice the course of justice, the Chair has also to see that the House is not debarred from discussing an urgent matter of public importance on the ground that a similar, allied or linked matter is before a court of law. The test of *sub judice* in my opinion should be that the matter sought to be raised in the House is substantially identical with the one which a court of law has to adjudicate. Further, in case the Chair holds that a matter is *sub judice* the effect of this ruling is that the discussion on the matter is postponed till the judgment of the court is delivered. The bar of *sub judice* will not apply thereafter, unless the matter becomes *sub judice* again on an appeal to a higher court. Applying these two tests to the present notice of motion by Shri Limaye, I consider that in view of the statement by the Law Minister, that 'the question that the affidavit filed by the Under Secretary is slightly at variance with what the Home Minister has stated has been raised in the court and is under adjudication by the court' the very matter which is sought to be raised by the member is awaiting adjudication by the court of law.
> >
> > Hence I consider that discussion on the notice of motion should be postponed until the court has delivered its judgment. I am however, clear that the matter is of public importance which should be discussed in the House and its importance will not be lost if the House awaits until the Court has adjudicated in the matter. [*LS Deb.* 6.5.1968, *cc* 2198- 2203; 7.5.1968, *cc.* 2649-65; 9.5.1968, *cc*. 3149- 56]"

51. It is a settled principle that ordinarily the content of legislative proceedings should not touch on *sub judice* matters.

As indicated in the extract quoted above, the rationale for this norm is that legislative debate or scrutiny over matters pending for adjudication could unduly prejudice the rights of the litigants. In the case at hand, the allegedly improper exemption of land (measuring 32.10 acres) from the Amritsar Improvement Scheme had already been questioned before the High Court of Punjab and Haryana. Thus, the Punjab Vidhan Sabha ought not to have constituted a committee to inquire into the same.

CONCERNS ABOUT INTRUSION INTO THE EXECUTIVE AND JUDICIAL DOMAIN

52. The doctrine of separation of powers is an inseparable part of the evolution of parliamentary democracy itself. Renowned French philosopher Montesquieu had drawn the attention of political theorists to the dangers inherent in the concentration of legislative, executive and judicial powers in one authority and stressed on the necessity of checks and balances in constitutional governance. Our institutions of governance have been intentionally founded on the principle of separation of powers and the Constitution does not give unfettered power to any organ. All the three principal organs are expected to work in harmony and in consonance with the spirit and essence of the Constitution. It is clear that a legislative body is not entrusted with the power of adjudicating a case once an appropriate forum is in existence under the constitutional scheme. It would be pertinent to cite the following observations made by M.H. Beg J. (as His Lordship then was) in *Indira Nehru Gandhi v. Raj Narain,* (1975) Supp SCC 1:

> *"392…*One of these basic principles seems to me to be that, just as courts are not constitutionally competent to legislate under the guise of interpretation, so also neither our Parliament nor any State Legislature, in the purported exercise of any kind of law- making power, perform an essentially judicial function by virtually withdrawing a particular case, pending in any court, and taking upon itself the duty to decide it by an application of law or its own

> standards to the facts of that case. This power must at least be first constitutionally taken away from the court concerned and vested in another authority before it can be lawfully exercised by that other authority. It is not a necessary or even a natural incident of a "constituent power". As Hans Kelsen points out, in his "*General Theory of Law and the State*" (see p.143), while creation and annulment of all general norms, whether basic or not so basic, is essentially a legislative function their interpretation and application to findings reached, after a correct ascertainment of facts involved in an individual case, by employing the judicial technique, is really a judicial function. Neither of the three constitutionally separate organs of State can, according to the basic scheme of our Constitution today, leap outside the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the logical meaning of the principle of supremacy of the Constitution."

53. The impugned resolution (dated 10-9-2008) passed by the Punjab Vidhan Sabha contains directions as to how the investigation into the appellant's and petitioners' alleged wrongdoing should be conducted. The resolution directs the filing of First Information Reports (FIRs) and custodial interrogation in addition to directing the Vigilance Department, Punjab to find out where the appellant and the others have stored their 'ill gotten wealth' and further directs the Vigilance Department to report back to the Speaker of the Punjab Vidhan Sabha. These functions are within the domain of the executive. It is up to the investigating agencies themselves to decide how to proceed with the investigation in a particular case. The role of the legislature in this regard can at best be recommendatory and the Speaker of a Legislature may not assume the responsibility of monitoring an ongoing investigation. A determination of guilt or innocence by way of fact-finding is a role properly reserved for the trial judge. The only exception to this principle is when the impugned acts have the effect of

distorting, obstructing or threatening the integrity of legislative proceedings or are likely to do the same, thereby warranting the exercise of privileges. As we have already noted above, there was an obvious jurisdictional error on part of the Punjab Vidhan Sabha in the present case.

54. A decision of the United States Supreme Court which raised similar concerns was that of *Kilbourn v. Thompson,* 103 US 168 (1881). In that case, the House of Representatives of the United States Congress had appointed a Special Committee to investigate into activities related to a 'real estate pool', since it had attracted investments from one Jay Cook & Co. who was a debtor-in-bankruptcy to the Government of the United States. The Special Committee was set up and it had served a *sub poena* to Kilbourn, requiring the latter to present himself before the Special Committee and to answer questions and produce documents. Kilbourn appeared but he refused to cooperate with the Committee's proceedings. The House of Representatives passed a resolution directing that Kilbourn be arrested and placed under custody until such time as he purged himself of the contempt and communicated to the House his willingness to submit to the jurisdiction of the Special Committee. The matter reached the Supreme Court of the United States by way of a writ of *habeas corpus* filed by Kilbourn. The relevant observations by Miller, J. are produced as follows:

> "In looking to the preamble and resolution under which the committee acted, before which Kilbourne refused to testify, we are of the opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was, in its nature, clearly judicial.
>
> The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the

> division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial, and not to the legislative, department of the government. We think it equally clear that the power asserted is judicial, and not legislative. (103 US 168, 192-193)
>
> ***
>
> How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cook & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction? Again, what inadequacy of power existed in the court, or, as the preamble assumes, in all courts, to give redress which could lawfully be supplied by an investigation by a committee of one House of Congress, or by any act or resolution of Congress on the subject? The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in said of such relief than the powers which belong to a body whose function is exclusively legislative. If the settlement to which the preamble refers as the principal reason why the courts are rendered powerless was obtained by fraud, or was without authority, or for any conceivable reason could be set aside

or avoided, it should be done by some appropriate proceeding in the court which had the whole matter before it, and which had all the power in that case proper to be entrusted to any body, and not by Congress or by any power to be conferred on a committee of one of the two Houses." (103 US 168, 194)

The observations cited above are self-explanatory and we echo the concerns about the overreach into the judicial domain in the fact-situation before us.

CONCLUSION

55. In the light of the preceding discussion we have arrived at the following conclusions:

(i) If there were any irregularities committed by the appellant and the petitioners in relation to the exemption of land (notified on 13-1-2006) from the Amritsar Improvement Scheme, the proper course of action on part of the State Government should have been to move the criminal law machinery with the filing of a complaint followed by investigation as contemplated under the Code of Criminal Procedure. It is our considered view that the Punjab Vidhan Sabha exceeded its powers by expelling the appellant on the ground of a breach of privilege when there existed none. The allegedly improper exemption of land was an executive act attributable to the appellant and it did not distort, obstruct or threaten the integrity of legislative proceedings in any manner. Hence, the exercise of legislative privileges under Article 194(3) of the Constitution was not proper in the present case.

(ii) Furthermore, the allegedly improper exemption of land took place during the 12th term of the Punjab Vidhan Sabha, whereas the constitution of the Special Committee to inquire into the same took

place during the 13th term. It was not proper for the Assembly to inquire into actions that took place during its previous term, especially when there was no relatable business that had lapsed from the previous term. If we were to permit the legislature to exercise privileges for acting against members for their executive acts during previous terms, the Courts are likely to be flooded with cases involving political rivalries. One can conceive that whenever there is a change of regime, the fresh incumbents would readily fall back on the device of legislative privileges to expel their political opponents as well as dissidents. Such a scenario would frustrate some of the basic objectives of a parliamentary democracy.

(iii) When it was well known that the allegedly improper exemption of land from the Amritsar Improvement Scheme was the subject-matter of proceedings instituted before the High Court of Punjab and Haryana, the Punjab Vidhan Sabha should have refrained from dealing with the same subject-matter.

56. We accordingly declare that the resolution passed by the Punjab Vidhan Sabha on 10-9-2008, directing the expulsion of the appellant for the remainder of the 13th term of the Vidhan Sabha is constitutionally invalid. Hence, we direct the restoration of the appellant's membership in the Punjab Vidhan Sabha. However, nothing in this judgment should act as a hurdle against the investigation, if any, into the alleged role of the appellant and the petitioners in the improper exemption of land from the Amritsar Improvement Scheme that was notified on 13-1-2006. To repeat a cliché, the law will take its own course.

57. This appeal and the connected petitions are disposed off accordingly, however with no order as to costs.

R.P. Appeal and connected matters, disposed of.

Carter Weight	Commodity Item No.	Chargeable Weight	Rate/ Charge	Total	Nature and Quantity of Goods (Incl. POWERLOOM COTTON GENTS DHOTIES & INDIA ITEM GARMENTS HAND/ EMD/ PRINTED/ ZARI/ APPLIQUE/ BEAD/ MIRROR WORK (P/L COTTON LADIES CHOLI GHAGRA SET & DUPTATTAS) AS PER INV. NO. DE/EXP/358/94-95 Dt. 28-9-94 RBI : DD : 008597
48	1360-OK	1360-OK	85.00	115600-00	IEC:NC:05880 0952

Prepaid Weight Charge 215600-00 — Collect — Other Charges

AWB: 60-00 HAWB: 150-00 SB: 175-00

CTG: 500-00 APT: 545-00
INS: 2886-00

Total other charges Due Agent
1230-00

Total other Charges Due Carter
2886-00

FOURWAYS MOVERS PVT. LTD., NEW DELHI

Total prepaid
119716-00

4/10/94 NEW DELHI INDIA v.k.

Signature of Issuing Carter or its Agent
055 – 2342 9276

ORIGINAL 3 (FOR SHIPPER)"

Simultaneously, a Master Air Waybill on a numbered (055 – 2342 9276) proforma printed by "ALITALIA" – respondent No.1 was prepared. The said Air Waybill, containing relevant particulars, is also reproduced hereinbelow:

"DEK 2342 9276 **055- 2342 9276**

Shippers Name and Address:
M/s. FOURWAYS MOVERS P. LTD.
39/6, 7-A COMMUNITY CENTRE,
EAST OF KAILASH,
NEW DELHI/INDIA

Not Negotiable
Air Way Bill

ALITALIA

Issued by
Alitalia S.p.A.

Consignee's Name and Address

M/S D.D. Sales, 11053
62ND DRIVE, FOREST HILLS N.Y.
11375, U.S.A.

Issuing Carter's Agent (Name and City) Accounting Information
FOURWAYS MOVERS P. LTD.
NEW DELHI "FREIGHT : PREPAID"

Agent's IATA CODE Account No.
14-3-3775 73279

Airport of Departure (Addr. Of first Carter) and requested Routing

NEW DELHI / AZ

By First Carter Routing & Destination

NYC AZ

Airport of Destination	Currency	Declared Value for Customs	Declared Value for Customs
NEW YORK	INR	NVD	US$ 43698.60

Amount of Insurance
Rs.1503101-00

The landing information

NOTIFY: SAME AS ABOVE. PLS. INFORM CONSIGNEE IMMEDIATELY ON ARRIVAL OF SHIPMENT AT DESTINATION. TEL. NO. (718) – 896-0575. ONE ENV. CONTG. DOCS ATTD. ORIGINAL VISA (3 SETS) COPY OF INVOICE (3 SET), PACKING LIST, M ALL INDIA HANDICRAFT BOARD CERTIFICATE AND DECLARATION TO ACCOMPANY WITH THE SHIPMENT

Carter Weight	Commodity Item No.	Chargeable Weight	Rate/ Charge	Total	Nature and Quantity of Goods (Incl. POWERLOOM COTTON GENTS DHOTIES & INDIA ITEM GARMENTS
48	1993-OKQ	1993-OK	85.00	169405-00	GRI:AG:493861 493995, 493896

HAWB NO: 0841, 0842

Prepaid Weight Charge 169405-00 — Collect — Other Charges

AWB: 60-00 HAWB: 300-00 SB: 250-00

CTG: 500-00 APT: 800-00 INS:4284-00
INS: 2886-00

Total other charges Due Agent
2010-00

Total other Charges Due Carter
4284-00

FOURWAYS MOVERS

4/10/94 NEW DELHI INDIAv.k.
Signature of Issuing Carter or its Agent
055 – 2342 9276

ORIGINAL 3 (FOR SHIPPER)"