OSWAL FATS AND OILS LIMITED
v.
ADDITIONAL COMMISSIONER (ADMINISTRATION), BAREILLY DIVISION, BAREILLY AND OTHERS
(Civil Appeal No. 7982 of 2002)

APRIL 01, 2010

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

U.P. Zamindari Abolition and Land Reforms Act, 1950:

s.154 – Restriction on transfer by bhumidhar – Purchase of 40.45 acres land in certain villages through different sale deeds by a Company – Order of Collector and Additional Commissioner that Company entitled to retain only 12.50 acres – Purchase of the remaining land measuring 27.95 acres in violation of ss. 154/167 and would vest in State Government – Upheld by High Court – Company and State Government entered into lease agreement whereby Company took 27.95 acres land on lease from Government by conceding that it had purchased excess land in violation of s. 154(1) and the same vested in State Government – Company withheld the lease agreement from Additional Commissioner, High Court and this Court – No prayer made to lead evidence to prove that purchase not in violation of s. 154(1) – No grievance that order of Collector was violative of natural justice – Collector was right in relying upon the written statement filed on behalf of Company admitting violation of s. 154 – By execution of lease agreement, object and purpose of the Act and order passed by Collector, stood frustrated – Thus, State Government directed not to renew lease of the Company after 30 years and deal with excess land as per the provisions of the Act.

s. 154(1) – Word 'person' appearing in s. 154(1) – Construction of – Held: It cannot be construed in a manner

which would defeat the object and the purpose of legislation – Word 'person' includes any company or association or body of individuals, whether incorporated or not – Co-operative society is also included by virtue of explanation to s. 154(1) – Words and phrases.

Interpretation of statutes: Use of word 'include' in interpretation clause – Held: Is used to enlarge the meaning of the words or phrases occurring in the body of the statue – When it is used, those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include – Words and phrases.

Practice and procedure: Concealment of material facts – Effect of – Held: Such person has no right to be heard on the merits of his grievance – Court not only has the right but a duty to deny relief to such person.

Costs: Imposition of – Aggrieved party not approaching quasi judicial and judicial forums including this Court with clean hands and obtaining interim orders – Issuance of direction to pay Rs.2 lacs as costs.

The appellant-company proposed to set up a paper project. It authorized Kamal Oswal (Director), T.R. Sharma (General Manager) and Jai Prakash Kaushal (Authorised Signatory) of the company to negotiate and finalise the purchase of land. An application was filed on behalf of the appellant for grant of permission u/s. 154(2) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 for purchase of land in excess of 12.5 acres. However, without waiting for the permission, the appellant purchased 40.45 acres land through different sale deeds. The State Government filed suits challenging the transfer of land in favour of the appellant. In the written statement, the appellant conceded that the land was purchased in

contravention of the Act and prayed that it may be allowed to retain 12.5 acres out of the disputed land. The Collector and the Additional Commissioner declared that the purchase made by the appellant in excess of 12.50 acres is against the provisions of ss. 154/167 of the Act and it would be entitled to retain only 12.50 acres and the remaining land measuring 27.95 acres would vest in the State Government. The Single Judge of High Court upheld the order. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. A person who does not disclose all material facts has no right to be heard on the merits of his grievance. A person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. He owes a duty to the court to bring out all the facts and refrain from concealing/ suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. [Paras 15] [948-E-G]

State of Haryana v. Karnal Distillery Co. Ltd. **(1977) 2 SCC 431;** *Vijay Kumar Kathuria v. State of Haryana* **(1983) 3 SCC 333;** *Welcome Hotel and Ors. v. State of Andhra Pradesh and Ors.* **(1983) 4 SCC 575;** *G. Narayanaswamy Reddy (dead) by LRs. and Anr. v. Government of Karnataka and Anr.* **(1991) 3 SCC 261;** *S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by LRs. and Ors.* **(1994) 1 SCC 1;** *Agricultural and Processed Food Products v. Oswal Agro Furane and Ors.* **(1996) 4 SCC 297;** *Union of India and others v. Muneesh Suneja* **(2001) 3 SCC 92;** *Prestige Lights*

Ltd. v. State Bank of India **(2007) 8 SCC 449;** *Sunil Poddar and Ors. v. Union Bank of India* **(2008) 2 SCC 326;** *K.D. Sharma v. Steel Authority of India Ltd. and Ors.* **(2008) 12 SCC 481;** *G. Jayshree and others v. Bhagwandas S. Patel and Ors.* **(2009) 3 SCC 141;** *Dalip Singh v. State of U.P. and Ors* ***C.A. No. 5239/2002*** **decided on 3.12.2009;** *Hari Narain v. Badri Das* **AIR 1963 S.C. 1558, referred to.**

R. v. Kensington Income Tax Commissioner **(1917) 1 KB 486, referred to.**

1.2. After one year and five months of passing of order by the Collector, the appellant and the State Government entered into a lease agreement dated 15.10.1994 whereby the latter agreed to give excess land measuring 27.95 acres to the appellant on lease for a period of 30 years at an yearly rent of Rs.281.05. The lease agreement was signed on behalf of the appellant by the Director and the General Manager (Liaison). In the lease agreement, the lessee-appellant candidly admitted that transfers made in its favour by the Bhumidhars were contrary to s. 154 of the Act and were void and, as such, land vested in the State Government u/s. 167. [Para 13] [946-F-H; 947-A]

1.3. The lease agreement was not brought to the notice of the Additional Commissioner and the Single Judge of the High Court and neither of them was apprised of the fact that the appellant had taken 27.95 acres land on lease from the Government by unequivocally conceding that it had purchased excess land in violation of s. 154(1) of the Act and the same vested in the State Government. In the list of dates and the memo of special leave petition filed in this Court also there is no mention of lease agreement dated 15.10.1994. This shows that the appellant has not approached the Court with clean hands. The withholding of the lease agreement from the Additional Commissioner, the High

Court and this Court appears to be a part of the strategy adopted by the appellant to keep the quasi-judicial and judicial forums including this Court in dark about the nature of its possession over the excess land and make them believe that it has been subjected to unfair treatment. If the factum of execution of lease agreement and its contents were disclosed to the Additional Commissioner, he would have definitely incorporated the same in order dated 30.5.2001. In that event, the High Court or for that reason this Court would have non-suited the appellant at the threshold. However, by concealing a material fact, the appellant succeeded in persuading the High Court and this Court to entertain adventurous litigation instituted by it and pass interim orders. If either of the courts had been apprised of the fact that by virtue of lease deed, the appellant has succeeded in securing temporary legitimacy for its possession over excess land, then there would have been no occasion for the High Court or this Court to entertain the writ petition or the special leave petition. [Para 14] [947-F-H; 948-A-D]

2.1. The appellant in his written statement filed before the Collector admitted that land had been purchased without waiting for the permission of the Government under the belief that permission will be granted for establishing the industry. Not only this, it was candidly stated that the appellant has no objection if any legal action is taken with regard to land in excess of 12.50 acres. In the proceedings of the suits, no prayer was made on behalf of the appellant for permission to lead evidence to prove that the purchase made by it from Bhumidhars was not in violation of Section 154(1) of the Act. Before the Additional Commissioner and the High Court, the appellant did not make a grievance that the Collector had passed order without giving it a reasonable or effective opportunity of hearing. Thus, the appellant cannot now contend that the Collector did not act in

consonance with the rule of *audi alteram partem*. [Para 21] [953-A-D]

2.2. Though, the counsel for the appellant made strenuous efforts to convince the Court that TR had no authority to make tacit admission of the illegality committed in the purchase of land and that he had no right to make an offer for surrender of excess land, but it is not impressing. A reading of resolution dated 14.10.1991 makes it clear that TR, the then General Manager of the appellant was authorised to take all actions necessary for transfer of land. That apart, in view of lease agreement dated 15.10.1994, which was not produced by the appellant before the Additional Commissioner, the Single Judge of the High Court and even this Court (for the first time, the lease agreement came to the fore when a copy thereof was annexed with the counter affidavit filed on behalf of the respondent), challenge to the competence of TR to make an admission that the land was purchased by the appellant without waiting for the State Government's permission and that appropriate legal action can be taken with regard to excess land pales into the realm of insignificance. The counsel was at loss to explain as to how in the face of the lease agreement, which was signed by none else than the Director of the appellant, whose name finds mention in Resolution dated 14.10.1991 and General Manager (Liaison) and which contains unequivocal admission that the land was purchased in violation of s. 154(1) and, as such, the transaction was void and that by virtue of s. 167, excess land vested in the State Government, it can be said that TR acted beyond his authority in filing the written statement. Thus, it is not possible to find any fault with the order of the Collector who relied upon the written statement filed on behalf of the appellant and declared that land in excess of 12.50 acres will vest in the State Government. [Para 22] [953-E-H; 954-A-C]

3.1. Section 154(1) declares that no Bhumidhar shall be entitled to transfer any land other than tea gardens by sale or gift to any person if holding of the transferee would exceed 12.50 acres. An explanation was subsequently added to clarify that the word 'person' shall include and be deemed to have included a co-operative society on June 15, 1976. Proviso to s. 154(1) lays down that where the transferee is a co-operative society, the land held by it having been pooled by its members u/s. 77(1)(a) of the Uttar Pradesh Cooperative Societies Act, 1965 shall not be taken into account for the purpose of computing 12.50 acres. Under sub-section (2), the State Government is empowered to authorize transfer of land in excess of the limit prescribed in sub-section (1) if it is of the opinion that such transfer is in favour of a registered co-operative society or an institution established for a charitable purpose, which does not have sufficient land for its need or the transfer is in the interest of general public. The substantive part of sub-section (3), which was added by an amendment made in 2005, lays down that every transfer of land in excess of the limit prescribed under sub-section (1) shall require prior approval of the State Government. By virtue of proviso to this sub-section, the State Government has been clothed with power to give *post facto* approval on payment of the specified amount as fine. Section 166 declares that every transfer made in contravention of the provision of the Act shall be void. This obviously includes s. 154(1). Section 167 enumerates the consequences of void transfers. Clause (a) of Section 167(1) lays down that a transfer which is void by virtue of Section 166, the subject matter of transfer shall be deemed to have vested in the State Government from the date of transfer. In terms of Section 167(2), the Collector is entitled to take over possession of any land or other property which has vested in the State Government under sub-section (1) and

also direct eviction of any person occupying such land or property. [Para 24] [957-B-H; 958-A-B]

3.2. The submission that a company is not a 'person' within the meaning of s. 154(1) of the Act and, therefore, the restriction contained therein is not applicable to transfer of land in favour of a company sans merit. A reading of s. 3(1) of the Uttar Pradesh General Clauses Act, 1904 makes it clear that the provisions contained in the U.P. General Clauses Act are applicable to all Uttar Pradesh Acts including the present Act. By virtue of s. 3(1) of the General Clauses Act, the definition of the word `person' contained in s. 4(33) will be deemed to have been engrafted in the Act and the same cannot be given a restricted meaning. Rather, in view of the definition contained in s. 4(33) of the U.P. General Clauses Act, the word 'person' appearing in s. 154(1) would include any company or association or body of individuals, whether incorporated or not. This is strengthened by the language of explanation added to s. 154(1) whereby it was declared that the expression 'person' shall include a co-operative society. The word 'include' is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statue and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. The word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to those words or expressions. [Para 25] [958-C, G-H; 959-A-E]

State of Bombay and Ors. v. Hospital Mazdoor Sabha and Ors. **AIR 1960 SC 610;** *CIT, A.P. v. Taj Mahal Hotel, Secunderabad* **(1971) 3 SCC 550, referred to.**

Dilworth v. Commissioner of Stamps **(1899) AC 99, referred to.**

3.3. The word 'person' appearing in s. 154(1) cannot be construed in a manner which would defeat the object and purpose of legislation. If a narrow meaning is given to the word 'person' appearing in s. 154(1), the purpose of legislation viz., abolition of zamindari and making tillers owner of the land, which is in consonance with the mandate of the object of social justice set out in the preamble and the provisions contained in Articles 38 and 39 of the Constitution, would be substantively defeated because in that event companies, corporations, etc. will be able to grab the land of the tillers by offering them comparatively remunerative prices and again make them landless poor. It cannot be said that the word 'person' in s. 154(1) means a human being or a natural person only and that the explanation by which a co-operative society was included in the said word is indicative of the legislature's intention to give a narrow meaning to the word 'person' The explanation instead of narrowing the meaning of the word 'person' makes it clear that the same would include a non-natural person. [Paras 27 and 30] [960-H; 961-A-B; 966-E-F]

Poppatlal Shah v. State of Madras **AIR 1953 SC 274;** *S.K. Gupta and Anr. v. K.P. Jain and Anr.* **(1979) 3 SCC 54;** *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors.* **(1987) 1 SCC 424;** *Central Bank of India v. State of Kerala and Ors.* **(2009) 4 SCC 94;** *Hasmukhlal Dahayabhai and others v. State of Gujarat and Ors.* **(1976) 4 SCC 100;** *Ramanlal Bhailal Patel v. State of Gujarat* **(2008) 5 SCC 449, relied on.**

4. The submission that if share of the individual Director is taken into consideration, the total land of the appellant would not exceed 12.50 acres is to be rejected in view of the contents of lease agreement. That apart, no evidence was produced before the Collector or the Additional Commissioner to prove that the land was purchased in the name of the Directors of the appellant. Even before the Single Judge of the High Court and this Court, no such evidence has been produced. [Para 31] [966-H; 967-A-B]

5. The submission that a direction may be given to the State Government to accord *post facto* sanction to the purchase of excess land cannot be entertained much less accepted because the appellant has been found guilty of not coming to the Court with clean hands. In any case, in the absence of any factual foundation, such a plea cannot be entertained at this stage. [Para 32] [968-F]

6. The appellant's grievance against the direction given by the Single Judge to the Chief Secretary to ensure that possession of excess land is taken without delay does not merit consideration because the State Government had already granted lease of excess land to the appellant. [Para 33] [968-G-H]

7. It is impossible to fathom any rational reason for this action of the State Government in granting lease of excess land to the appellant ignoring that the appellant had purchased land in patent violation of s. 154(1) of the Act. By executing lease agreement dated 15.10.1994, the concerned officers of the State effectively frustrated the object sought to be achieved by the legislature by enacting the Act and the order passed by the Collector. [Para 34] [968-A-B]

8. Since the appellant has not approached the quasi judicial and judicial forums i.e., the Additional

Commissioner, the High Court and this Court with clean hands and succeeded in securing interim orders, it is ordained to pay costs, which is quantified at Rs.2 lacs. With a view to ensure that functionaries of the State Government may not connive with the appellant and compound the wrong already done, the Government of Uttar Pradesh is directed not to renew the lease of the appellant at the end of 30 years period and deal with excess land in accordance with the provisions of the Act. [Para 35] [969-C-E]

Case Law Reference:

(1917) 1 KB 486	**Referred to.**	**Para 15**
(1977) 2 SCC 431	**Referred to.**	**Para 17**
(1983) 3 SCC 333	**Referred to.**	**Para 17**
(1983) 4 SCC 575	**Referred to.**	**Para 17**
(1991) 3 SCC 261	**Referred to.**	**Para 17**
(1994) 1 SCC 1	**Referred to.**	**Para 17**
(1996) 4 SCC 297	**Referred to.**	**Para 17**
(2001) 3 SCC 92	**Referred to.**	**Para 17**
(2007) 8 SCC 449	**Referred to.**	**Para 17**
(2008) 2 SCC 326	**Referred to.**	**Para 17**
(2008) 12 SCC 481	**Referred to.**	**Para 17**
(2009) 3 SCC 141	**Referred to.**	**Para 17**
AIR 1963 SC 1558	**Referred to.**	**Para 18**
(1899) AC 99	**Referred to.**	**Para 25**
AIR 1960 SC 610	**Referred to.**	**Para 25**
(1971) 3 SCC 550	**Referred to.**	**Para 25**

AIR 1953 SC 274	**Relied on.**	**Para 26**
(1979) 3 SCC 54	**Relied on.**	**Para 26**
(1987) 1 SCC 424	**Relied on.**	**Para 26**
(2009) 4 SCC 94	**Relied on.**	**Para 26**
(1976) 4 SCC 100	**Relied on.**	**Para 28**
(2008) 5 SCC 449	**Relied on.**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7982 of 2002.

From the Judgment & Order dated 16.07.2001 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 25819 of 2001.

Manoj Awarup, Lalita Kohli (for M/s. Manoj Swarup & Co.) for the Appellant.

T.N. Singh, Shekhar Raj Sharma, Chandra Prakash Pandey, for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Feeling aggrieved by refusal of the learned Single Judge of Allahabad High Court to quash orders dated 24.5.1993 and 30.5.2001 passed by Collector, Pilibhit (for short, 'the Collector') and Additional Commissioner (Administration), Bareilly (for short, 'the Additional Commissioner') respectively under the U.P. Zamindari Abolition and Land Reforms Act, 1950 (for short, 'the Act'), declaring that 27.95 acres land purchased by the appellant in Shahi and Khamaria Pul villages of District Pilibhit shall vest in the State Government, the appellant has filed this appeal.

2. The appellant is a company incorporated under Section 149(3) of the Companies Act, 1956. In 1991, the appellant decided to set up agro based paper projects in the State of

U.P. By resolution dated 14.10.1991, the Board of Directors of the appellant authorised Shri Kamal Oswal (Director), Shri T.R. Sharma (General Manager) and Shri Jai Prakash Kaushal (Authorised Signatory) to negotiate and finalise purchase of land in the State of Uttar Pradesh and/or other States and Union Territories, to sign sale deeds etc. for effective acquisition/transfer of land. Paragraphs (e) and (f) of that resolution read as under:

> "To sign for and on behalf of the company all sales deeds conveyance deeds, Intkals, Mutations and other documents necessary for the effective acquisition/transfer of the land in the name of the company and for this purpose to appear for and on behalf of the company before any court of law, Tehsildar, Naib Tehsildar, Patwari, Registrar, Sub Registrar of any other land transferring authority.
>
> And to do all other acts, things and deeds for and on behalf of the company which any of the above noted persons in the discharge of their lawful duties consider proper and in the best interest of the company."

3. Soon thereafter, an application dated 24.10.1991 was submitted on behalf of the appellant to Joint Director of Industries, Bareilly Zone, Bareilly for grant of permission under Section 154(2) of the Act for purchase of land in excess of 12.5 acres. The relevant portions of that application are extracted below:

> "Our Company is proposing to set up a 100 TPD (Gross) Agro based paper project in area adjoining villages of Shahi Kamariapul, Adhkata Nazrana. For this project we require about 200 Acres of land out of which about 50 Acres shall be in Pilibhit District and about 150 Acres in Nawabganj Tehsil of Bareilly District.
>
> The proposed paper project shall utilise Agricultural wastes such as wheat Straw, Rice Straw and Bagasse

> etc. as the main raw materials. The project shall generate direct employment opportunities for about 750 persons and for many more indirectly. The project shall be of special benefit to the people living in the areas near the site.
>
> *We through this letter are applying to your office for the permission under section 154 of ZALR Act for purchase of land in excess of 12.5 Acres for industrial purpose.* We are enclosing two additional copies of this letter. We are also enclosing the site plan, recommendations of Technical Consultants for your ready reference.
>
> We shall be pleased to furnish any other information required by you in this connection. We wish to bring to your kind notice that we plan to start the purchase of land for this project from next month i.e. Nov. 1991."

4. However without waiting for response of the concerned authority, the appellant purchased 40.45 acres land in Shahi and Khamaria Pul villages, Pargana Jahanabad, Tehsil and District Pilibhit through different sale deeds executed between January and April, 1992.

5. The State of Uttar Pradesh challenged transfer of various parcels of land in favour of the appellant by filing identical suits under Sections 154, 167, 168A and 194 of the Act. The transferors, who were impleaded as parties in all the suits did not contest the same. However, the appellant filed identical written statements in all the cases. In first paragraph of the written statement filed in Suit No.133 of 1993, the appellant admitted all the paragraphs of the suit. In the additional statement, the appellant virtually conceded that the land was purchased in contravention of the Act and stated that it may be allowed to retain 12.5 acres out of the disputed land. This is evinced from English translation of paragraphs 2 to 4 of the written statement which are reproduced below:

"2. That all the lands of both the village had been purchased for establishment of Industry after making the payment to the farmers. But I had the knowledge of law in Punjab and was not well conversant with the provisions of U.P. Zamindari Abolition Act therefore, I purchased the land in question which is more than 12 acres. We had given an application dated 24.10.1991 to the State Government for the permission of establishment of Industry and only thereafter we started purchasing the land without waiting for the permission from the Government because we had the belief that permission will be granted to us for establishment of Industry.

3. That we filed application for mutation of whole of the land under the sale and all of them had been accepted and we continued the purchasing of land because we had the belief that we are not violating any provision of Zamindari Abolition Act.

4. That the details of land which we want to keep for the establishment of factory, measuring twelve and a half acres out of the disputed land, are being given in the succeeding paras and we have no objection for any legal action with regard to the remaining land."

The particulars of the land suit sought to be retained by the appellant were given in the affidavit of Shri T.R. Sharma. A sketch map showing those khasra numbers were also filed with the written statement.

6. By an order dated 24.5.1993, the Collector declared that the purchase made by the appellant in excess of 12.50 acres is against the provisions of Sections 154/167 of the Act and that it will be entitled to retain only 12.50 acres and the remaining land measuring 27.95 acres would vest in the State Government. The relevant portion of the order passed by the Collector is extracted below:

"I have heard the arguments of Government Counsel (Revenue) for State and the learned counsel for M/s. Oswal Fats and Oil Limited and perused the records. After hearing the arguments of both the parties and the perusal of records, I have reached on the conclusion that the defendants M/s. Oswal Fats and Oil Limited, New Delhi have purchased the total land measuring 40.45 Acres in Village Shahi and Khamaria Pul, Pargana Jahanabad, Tehsil and District Pilibhit, as detailed above. However as per the provisions of Section 154/167 of Jamindari Abolition and Land Management Act, they can possess only 12.50 Acres land. Therefore, the transfer of remaining land measuring 27.95 Acres, which is in excess than 12.50 Acres, is against the provisions of Section 154/167 of Z.A. Act. The defendant Company Oswal Fats and Oil Limited has also given the option for 12.50 Acres land, in their affidavit. Therefore, the remaining land except the 12.50 Acres land mentioned in the Affidavit dated 19.05.93 is liable to be merged into the State."

7. The appellant questioned the order of the Collector by filing revision under Section 333 of the Act. In the memo of revision, it was claimed that excess land was purchased under the belief that the State Government would grant permission under Section 154(2). It was then urged that although the Board of Directors had given power to Shri T.R. Sharma to appear before any court of law on behalf of the appellant, he was not authorized to enter into a compromise or give consent for retaining the particular land. Another plea taken by the appellant was that the company consists of 8 directors and if each Director is entitled to have a share of 12.5 acres, the purchase made by the appellant will not exceed the prescribed limit. However, at the hearing of the revision petition, the plea that Shri T.R. Sharma had filed written statement and affidavit beyond the scope of his authority appears to have been given up and it was submitted that the general manager had been authorised to pursue the case but he did not do it properly. The

Additional Commissioner dismissed the revision of the appellant and confirmed the order of the Collector by recording following reasons:

> "It is clear from the perusal of records that the defendants themselves have admitted in their objections filed before the court below that the land in question had been purchased for establishment of Industry and purchased the land more than 12.50 acres intentionally. They have also given the details of land which they want to keep with them and agree for merging of remaining land into the State. Revisionist has stated that they had given an application for obtaining the permission and it has also been admitted that they had purchased the land in excess than 12.50 acres without waiting for the permission. In these circumstances, the court below has correctly passed an order for merging of 27.95 Acre land into the State, which is in excess than the 12.50 acres land and this order does not require any intervention. Therefore, the Revision, being devoid of merits, is liable to be dismissed."

8. The appellant challenged the orders of the Collector and the Additional Commissioner in Writ Petition No.25819/2001 by taking up the position that Shri T.R. Sharma was not authorised to enter into a compromise or to make a statement relinquishing the land in favour of the State Government. It was also pleaded that the appellant was entitled to purchase land in excess of 12.50 acres because its case is covered by the explanation appearing below Section 154(1) of the Act.

9. The learned Single Judge rejected the argument on the issue of lack of authority of Shri T.R. Sharma to indirectly admit violation of Section 154(1) of the Act and to agree to surrender excess land by making the following observations:

> "It is apparent on face of record that petitioner Company has no authorization either general or special to hold land in excess of 12.50 acres by State Government.

> Indisputably the petitioner Company is not a Co-operative Society registered under the Co-operative Societies Act nor petitioner Company is established for charitable purposes. Nothing is brought to my notice that the present Company is established in the interest of general public. Contrary to it, there are overwhelming materials on record and also from attending circumstances it is inferable that the petitioner Company is an establishment established with profit orientation for its shareholders. It is pertinent to mention here that the petitioner Company has not produced its certificate of registration under the Companies Act. During the course of argument articles of association of Nuskar Enterprises Ltd. is produced by the learned counsel for the petitioner. It is not understandable as to why the certificate of registration under the Companies Act is not produced before the Court. It is also not understandable as to how the Articles of Association of Nuskar Enterprises Ltd. has nexus with the petitioner Company. I am of the view that even if the affidavit dated 19.5.1993 (Annexure-7 to the writ petition) of the General Manager of the petitioner Company giving consent to relinquish the land in excess of 12.50 acres in favour of State Government is ignored even then the findings of respondents No.1 and 2 are sustainable for the reasons given hereinabove."

The learned Single Judge then referred to the provisions of Sections 152, 154, 166 and 167 of the Act and held that the purchase made by the appellant in excess of 12.50 acres was illegal per se and its case does not fall within the ambit of the exceptions carved out in sub-section (2) of Section 154. The learned Single Judge rejected the appellant's plea that surrender made by Shri T.R. Sharma was unauthorized and held that the Collector did not commit any illegality by declaring that excess land will vest in the State Government. Simultaneously, he gave a direction to the Chief Secretary to

ensure that possession of the excess land is taken by the Government free from all encumbrances without any delay.

10. At this stage, we may mention that during the pendency of the suits filed by the State Government before the Collector, the appellant instituted Suit No.25/1992-93 under Section 143 of the Act, which was disposed of by Pargana Adhikari, Pilibhit vide her order dated 12.7.1993 by declaring that 7.97 acres land purchased by the appellant in Tehsil and District Pilibhit was non-agricultural land.

11. Shri Manoj Swarup, learned counsel for the appellant argued that the order passed by the Collector was vitiated due to violation of the basics of natural justice inasmuch as the concerned officer did not give reasonable opportunity to the appellant to defend its case on the issue of alleged violation of Section 154 of the Act and the Additional Commissioner and the learned Single Judge gravely erred in confirming/upholding the order of the Collector. The learned counsel further argued that Shri T.R. Sharma, who was holding the post of General Manager was not authorised to make any concession on behalf of the appellant or give consent for surrendering 27.95 acres land on the ground that the purchase of land was made in violation of mandate of Section 154 and the Collector was not at all justified in acting upon the concession made by Shri T.R. Sharma. Learned counsel then referred to Section 154 of the Act and submitted that the embargo contained in that section is not applicable to the appellant's case because purchase made by a company does not fall within the ambit of that section. The learned counsel reiterated the plea that if each director of the company is held entitled to purchase 12.50 acres of land, the purchase of 40.45 acres land by the appellant cannot be treated as violation of Section 154(1). He lastly argued that even if transfer of land in favour of the appellant is held to be contrary to the mandate of Section 154(1), the Court may direct the State Government to accord *post facto* sanction in terms of sub-section (3) of Section 154 which was inserted

by an amendment dated 24.3.2005. Learned counsel also criticized the direction given by the High Court to the Chief Secretary to take possession of the excess land and submitted that while deciding the writ petition filed by the appellant against the orders of the Collector and the Additional Commissioner, the learned Single Judge was not justified in treating the case as a public interest litigation.

12. Shri T.N. Singh, learned counsel appearing for the respondents supported the impugned order and argued that the Collector did not commit any error by declaring that the excess land will vest in the State Government because the purchase was made by the appellant without obtaining permission in terms of Section 154 of the Act. Learned counsel relied upon the averments contained in the written statement filed on behalf of the appellant in Suit No. 133/1993 and argued that after having indirectly admitted contravention of Section 154(1) of the Act, the appellant did not have the locus to challenge the orders of the Collector and the Additional Commissioner on the ground that Shri T.R. Sharma was not authorized to give option for retaining the particular parcels of land and the learned Single Judge rightly held that the transfers made in violation of Section 154 were null and void.

13. Before dealing with the respective arguments/ submissions, we consider it appropriate to note that after one year and five months of passing of order by the Collector, the appellant and the State Government entered into a lease agreement dated 15.10.1994 whereby the latter agreed to give excess land measuring 27.95 acres, the details of which were given in Schedule 'A' appended to the agreement, to the appellant on lease for a period of 30 years at an yearly rent of Rs.281.05. The lease agreement was signed on behalf of the appellant by Shri Kamal Oswal, Director and Shri J.P. Kaushal, General Manager (Liaison). In the lease agreement, a copy of which has been annexed as Annexure CA-1 with the counter affidavit filed on behalf of the respondents in this Court, the

lessee i.e., the appellant candidly admitted that transfers made in its favour by the Bhumidhars were contrary to Section 154 of the Act and were void and, as such, land vested in the State Government under Section 167. This is evinced from the following paragraphs of the lease agreement:

> "*AND WHEREAS the transfers as aforesaid made by the Bhumidhars in favour of the Lessee in respect of the land described in Schedule 'A' hereto being in contravention of Section 154 of the Uttar Pradesh Jamindari Abolition and Land Reforms Act, 1950 (hereinafter called "the said Act") were void under Section 166 of the said Act and consequently the said land vested in the Government of Uttar Pradesh (hereinafter called "the State Government") under Section 167 of the said Act, free from all encumbrances with effect from the date of their transfer.*
>
> *AND WHEREAS the lessor at the request of the Lessee has agree to demise and land vested in the State Government as aforementioned subject to the rights and restrictions and the several convenants hereinafter expressed for the purposes of the said project."*
>
> (emphasis supplied)

14. It is quite intriguing and surprising that the lease agreement was not brought to the notice of the Additional Commissioner and the learned Single Judge of the High Court and neither of them was apprised of the fact that the appellant had taken 27.95 acres land on lease from the Government by unequivocally conceding that it had purchased excess land in violation of Section 154(1) of the Act and the same vested in the State Government. In the list of dates and the memo of special leave petition filed in this Court also there is no mention of lease agreement dated 15.10.1994. This shows that the appellant has not approached the Court with clean hands. The withholding of the lease agreement from the Additional

Commissioner, the High Court and this Court appears to be a part of the strategy adopted by the appellant to keep the quasi-judicial and judicial forums including this Court in dark about the nature of its possession over the excess land and make them believe that it has been subjected to unfair treatment. If the factum of execution of lease agreement and its contents were disclosed to the Additional Commissioner, he would have definitely incorporated the same in order dated 30.5.2001. In that event, the High Court or for that reason this Court would have non suited the appellant at the threshold. However, by concealing a material fact, the appellant succeeded in persuading the High Court and this Court to entertain adventurous litigation instituted by it and pass interim orders. If either of the courts had been apprised of the fact that by virtue of lease deed dated 15.10.1994, the appellant has succeeded in securing temporary legitimacy for its possession over excess land, then there would have been no occasion for the High Court or this Court to entertain the writ petition or the special leave petition.

15. It is settled law that a person who approaches the Court for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. In one of the earliest decisions on the subject i.e., - *R. v. Kensington Income Tax Commissioner* (1917) 1 KB 486, Viscount Reading, Chief Justice of the Divisional Court observed:

> "Where an *ex parte* application has been made to this

Court for a *rule nisi* or other process, if the Court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that this Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

16. The above extracted observations were approved by the Court of Appeal in the following words:

"It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to that injunction: and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward. If an applicant does not act with *uberrima fides* and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted." His Lordship rightly pronounced: "The Court, for its own protection, is entitled to say: We refuse this writ… without going into the merits of the case on the ground of the conduct of the applicant in bringing the case before us." Warrington, L.J. was also of the same opinion. In a concurring judgment His Lordship observed: "It is perfectly well settled that a person who

makes an *ex parte* application to the Court – that is to say, in absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

17. This Court and different High Courts have repeatedly invoked and applied the rule that a person who does not disclose all material facts has no right to be heard on the merits of his grievance – *State of Haryana v. Karnal Distillery Co. Ltd.* (1977) 2 SCC 431, *Vijay Kumar Kathuria v. State of Haryana* (1983) 3 SCC 333, *Welcome Hotel and others v. State of Andhra Pradesh and others etc.* (1983) 4 SCC 575, *G. Narayanaswamy Reddy (dead) by LRs. and another v. Government of Karnataka and another* (1991) 3 SCC 261, *S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by LRs. and others* (1994) 1 SCC 1, *Agricultural and Processed Food Products v. Oswal Agro Furane and others* (1996) 4 SCC 297, *Union of India and others v. Muneesh Suneja* (2001) 3 SCC 92, *Prestige Lights Ltd. v. State Bank of India* (2007) 8 SCC 449, *Sunil Poddar and others v. Union Bank of India* (2008) 2 SCC 326, *K.D. Sharma v. Steel Authority of India Ltd. and others* (2008) 12 SCC 481, *G. Jayshree and others v. Bhagwandas S. Patel and others* (2009) 3 SCC 141 and C.A. No. 5239/2002 – *Dalip Singh v. State of U.P. and others,* decided on 3.12.2009.

18. In *Hari Narain v. Badri Das* AIR 1963 S.C. 1558, this Court revoked the leave granted to the appellant by making following observations:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave made under Article 136 of the Constitution,

care must be taken not to make any statements which are inaccurate, untrue and misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading. Thus, if at the hearing of the appeal the Supreme Court is satisfied that the material statements made by the appellant in his application for special leave are inaccurate and misleading, and the respondent is entitled to contend that the appellant may have obtained special leave from the Supreme Court on the strength of what he characterizes as misrepresentations of facts contained in the petition for special leave, the Supreme Court may come to the conclusion that in such a case special leave granted to the appellant ought to be revoked."

19. *In Dalip Singh's* case, the appellant's grievance was that before finalizing the case under the U.P. Imposition of Ceiling on Land Holdings Act, 1960, the prescribed authority did not give notice to the tenure holder Shri Praveen Singh (predecessor of the appellant). On a scrutiny of the records, this Court found that the prescribed authority had issued notice to Shri Praveen Singh, which was duly served upon him and held that the appellant is not entitled to relief because he did not approach the High Court with clean hands inasmuch as he made a misleading statement in the writ petition giving an impression that the tenure holder did not know of the proceedings initiated by the prescribed authority. The preface and para 21 of that judgment read as under:

"For many centuries, Indian society cherished two basic values of life i.e., `Satya' (truth) and `Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system

which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

21. From what we have mentioned above, it is clear that in this case efforts to mislead the authorities and the courts have transmitted through three generations and the conduct of the appellant and his son to mislead the High Court and this Court cannot, but be treated as reprehensible. They belong to the category of persons who not only attempt, but succeed in polluting the course of justice. Therefore, we do not find any justification to interfere with the order under challenge or entertain the appellant's prayer for setting aside the orders passed by the Prescribed Authority and the Appellate Authority."

20. Notwithstanding our conclusion that the appellant is guilty of contumacious conduct and is not entitled to any relief, we have thought it proper to deal with the argument advanced by the learned counsel for the appellant on the issues of violation of rules of natural justice and non applicability of Section 154 of the Act.

21. The question whether the appellant was denied reasonable opportunity to defend its cause needs consideration in the light of the written statements filed on behalf of the appellant before the Collector, wherein it was admitted that land had been purchased without waiting for the permission of the Government under the belief that permission will be granted for establishing the industry. Not only this, it was candidly stated that the appellant has no objection if any legal action is taken with regard to land in excess of 12.50 acres. In the proceedings of the suits, no prayer was made on behalf of the appellant for permission to lead evidence to prove that the purchase made by it from Bhumidhars was not in violation of Section 154(1) of the Act. Before the Additional Commissioner and the High Court, the appellant did not make a grievance that the Collector had passed order without giving it a reasonable or effective opportunity of hearing. In this view of the matter, the appellant cannot now contend that the Collector did not act in consonance with the rule of *audi alteram partem.*

22. Though, Shri Manoj Swarup made strenuous efforts to convince the Court that Shri T.R. Sharma had no authority to make tacit admission of the illegality committed in the purchase of land and that he had no right to make an offer for surrender of excess land, we have not felt impressed. A reading of resolution dated 14.10.1991 makes it clear that Shri T.R. Sharma, the then General Manager of the appellant was authorised to take all actions necessary for transfer of land. That apart, in view of lease agreement dated 15.10.1994, which was not produced by the appellant before the Additional Commissioner, the learned Single Judge of the High Court and even this Court (for the first time, the lease agreement came to the fore when a copy thereof was annexed with the counter affidavit filed on behalf of the respondent), challenge to the competence of Sri T.R. Sharma to make an admission that the land was purchased by the appellant without waiting for the State Government's permission and that appropriate legal action can be taken with regard to excess land pales into the

realm of insignificance. The learned counsel was at loss to explain as to how in the face of the lease agreement, which was signed by none else than Shri Kamal Oswal (Director of the appellant), whose name finds mention in Resolution dated 14.10.1991 and General Manager (Liaison) and which contains unequivocal admission that the land was purchased in violation of Section 154(1) and, as such, the transaction was void and that by virtue of Section 167, excess land vested in the State Government, it can be said that Shri T.R. Sharma acted beyond his authority in filing the written statement. This being the position, it is not possible to find any fault with the order of the Collector who relied upon the written statement filed on behalf of the appellant and declared that land in excess of 12.50 acres will vest in the State Government.

23. We shall now consider whether the restriction contained in Section 154(1) is not attracted in a case involving transfer of land by Bhumidhar in favour of a company. In this context, it is important to bear in mind that the Act was enacted by the State Legislature to achieve the goal of social and economic justice enshrined in the preamble of the Constitution. It provides for abolition of zamindari system, which involves intermediaries between tiller of the soil and the State and for acquisition of their rights, title and interest and to reform the law relating to land tenure. Sections 154, 166 and 167 of the Act, which contain restriction on transfer of land by Bhumidhar and also specify the consequences of transfer made in violation of that restriction, read as under:-

> *"154. Restriction on transfer by a bhumidhar.*– (1) Save as provided in sub-section (2), no bhumidhar shall have the right to transfer by sale or gift, any land other than tea gardens to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land if any, held by his family will, in the aggregate, exceed 5.0586 hectares (12.50 acres) in Uttar Pradesh.

Explanation.– For the removal of doubt it is hereby declared that in this sub-section the expression 'person' shall include and be deemed to have included on June 15, 1976 a 'Co-operative Society':

Provided that where the transferee is a co-operative society, the land held by it having been pooled by its members under clause *(a)* of sub-section (1) of section 77 of the Uttar Pradesh Co-operative Societies Act, 1965 shall not be taken into account in computing the 5.0586 hectares (12.50 acres) land held by it.

(2) Subject to the provisions of any other law relating to the land tenures for the time being in force, the State Government may, by general or special order, authorise transfer in excess of the limit prescribed in sub-section (1) if it is of the opinion that such transfer is in favour of a registered cooperative society or an institution established for a charitable purpose, which does not have land sufficient for its need or that the transfer is in the interest of general public.

Explanation.– For the purposes of this section, the expression 'family' shall mean the transferee, his or her wife or husband (as the case may be) and minor children, and where the transferee is a minor also his or her parents.

(3) For every transfer of land in excess of the limit prescribed under sub-section (1) prior approval of the State Government shall be necessary:

Provided that where the prior approval of the State Government is not obtained under this sub-section, the State Government may on an application give its approval afterward in such manner and on payment in such manner of an amount, as fine, equal to twenty-five per cent of the cost of the land as may be prescribed. The cost of the land

shall be such as determined by the Collector for stamp duty.

Provided further that where the State Government is satisfied that any transfer has been made in public interest, it may exempt any such transferee from the payment of fine under this sub-section.

166. Transfer made in contravention of the Act to be void.– Every transfer made in contravention of the provisions of this Act shall be void.

167. Consequences of void transfers.– (1) The following consequences shall ensue in respect of every transfer which is void by virtue of section 166, namely–

(a) the subject-matter of transfer shall with effect from the date of transfer, be deemed to have vested in the State Government free from all encumbrances;

(b) the trees, crops and wells existing on the land on the date of transfer shall, with effect from the said date, be deemed to have vested in the State Government free from all encumbrances;

(c) the transferee may remove other movable property or the materials of any immovable property existing on such land on the date of transfer within such time as may be prescribed.

(2) Where any land or other property has vested in the State Government under sub-section (1), it shall be lawful for the Collector to take over possession over such land or other property and to direct that any person occupying such land or property be evicted therefrom. For the purposes of taking over such possession or evicting such unauthorised occupants, the Collector may use or cause to be used such force as may be necessary."

24. While enacting law for abolition of zamindari system, the legislature was aware of the ground reality that despite the welfare measures which may be taken by the State to protect the interest of poor farmers, economically affluent class of people may persuade or pressurize them to part with their sole source of sustenance i.e., the land. This is the reason why a ceiling has been imposed on transfer of land by Bhumidhar. Section 154(1), in no uncertain terms, declares that no Bhumidhar shall be entitled to transfer any land other than tea gardens by sale or gift to any person if holding of the transferee would exceed 12.50 acres (Earlier the prescribed limit was 30 acres but by an amendment it was reduced to 12.50 acres). An explanation was subsequently added to clarify that the word 'person' shall include and be deemed to have included a cooperative society on June 15, 1976. Proviso to Section 154(1) lays down that where the transferee is a cooperative society, the land held by it having been pooled by its members under Section 77(1)(a) of the Uttar Pradesh Cooperative Societies Act, 1965 shall not be taken into account for the purpose of computing 12.50 acres. Under sub-section (2), the State Government is empowered to authorize transfer of land in excess of the limit prescribed in sub-section (1) if it is of the opinion that such transfer is in favour of a registered cooperative society or an institution established for a charitable purpose, which does not have sufficient land for its need or the transfer is in the interest of general public. The substantive part of sub-section (3), which was added by an amendment made in 2005, lays down that every transfer of land in excess of the limit prescribed under sub-section (1) shall require prior approval of the State Government. By virtue of proviso to this sub-section, the State Government has been clothed with power to give *post facto* approval on payment of the specified amount as fine. Section 166 declares that every transfer made in contravention of the provision of the Act shall be void. This obviously includes Section 154(1). Section 167 enumerates the consequences of void transfers. Clause (a) of Section 167(1) lays down that a transfer which is void by virtue of Section 166,

the subject matter of transfer shall be deemed to have vested in the State Government from the date of transfer. In terms of Section 167(2), the Collector is entitled to take over possession of any land or other property which has vested in the State Government under sub-section (1) and also direct eviction of any person occupying such land or property.

25. The argument of Shri Manoj Swarup that a company is not a 'person' within the meaning of Section 154(1) of the Act and, therefore, the restriction contained therein is not applicable to transfer of land in favour of a company sans merit. Since, the word `person' has not been defined in the Act, reference can usefully be made to the definition of that word in the Uttar Pradesh General Clauses Act, 1904. Sections 3 and 4(33) of that Act read as under:

> *"3. Application of the Act to other enactments.* – (1) The provisions of this Act shall apply to this Act and to all Uttar Pradesh Acts, whether made before or after the commencement of this Act.
>
> (2) The provisions of this Act in their application to any enactment or statutory instrument shall be subject to any contrary requirements of the context of the enactment or instrument that is to be interpreted.
>
> *4. Definitions.* – In all Uttar Pradesh Acts, unless there is anything repugnant in the subject or context, –
>
> xxxx xxxx xxxx
>
> (33) "Person" shall include any company or association or body of individuals, whether incorporated or not;
>
> xxxx xxxx xxxx"

A reading of Section 3(1) reproduced above makes it clear that the provisions contained in the U.P. General Clauses Act are applicable to all Uttar Pradesh Acts including the Act

with which we are concerned. To put it differently, by virtue of Section 3(1) of the General Clauses Act, the definition of the word 'person' contained in Section 4(33) will be deemed to have been engrafted in the Act and the same cannot be given a restricted meaning as suggested by the learned counsel. Rather, in view of the definition contained in Section 4(33) of the U.P. General Clauses Act, the word 'person' appearing in Section 154(1) would include any company or association or body of individuals, whether incorporated or not. This view of ours is strengthened by the language of explanation added to Section 154(1) whereby it was declared that the expression 'person' shall include a cooperative society. The word 'include' is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statue and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. The word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to those words or expressions. – *Dilworth v. Commissioner of Stamps* (1899) AC 99. In *State of Bombay and others v. Hospital Mazdoor Sabha and others* AIR 1960 SC 610, Gajendragadkar, J., observed:

> "It is obvious that the words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. Where we are dealing with an inclusive definition, it would be inappropriate to put a restrictive interpretation upon terms of wider denotation.

In *CIT, A.P. v. Taj Mahal Hotel, Secunderabad* (1971) 3

SCC 550, this Court interpreted the word 'plant' used in Section 10(2)(vi-b) of the Income Tax Act, 1922. Speaking for the Court, Grover, J., observed:

> "The very fact that even books have been included shows that the meaning intended to be given to 'plant' is wide. The word 'includes' is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include."

26. Moreover, if the word 'person' used in Section 154(1) is interpreted keeping in view the object of legislation and by applying the rule of contextual interpretation, the applicability of which has been recognised in *Poppatlal Shah v. State of Madras* AIR 1953 SC 274 (para 7), *S.K. Gupta and another v. K.P. Jain and another* (1979) 3 SCC 54 (para 25), *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and others* (1987) 1 SCC 424 (para 33) and *Central Bank of India v. State of Kerala and others* (2009) 4 SCC 94 (para 98), it becomes clear that the same would include human being and a body of individuals which may have juridical or non juridical status.

27. At the cost of repetition, we consider it appropriate to observe that the primary object of Section 154(1) is to put a restriction/ceiling on the transfer of land by a Bhumidhar to any other person by sale or gift. Though, sub-sections (2) and (3) of Section 154 empowers the Government to dilute the rigor of the restriction contained in Section 154(1), if that section is read in conjunction with Sections 166 and 167 which provide for consequences of transfer made in contravention of the Act including Section 154(1), the word 'person' appearing in Section 154(1) cannot be construed in a manner which would

defeat the object and purpose of legislation. If a narrow meaning is given to the word 'person' appearing in Section 154(1), the purpose of legislation viz., abolition of zamindari and making tillers owner of the land, which is in consonance with the mandate of the object of social justice set out in the preamble and the provisions contained in Articles 38 and 39 of the Constitution, would be substantively defeated because in that event companies, corporations, etc. will be able to grab the land of the tillers by offering them comparatively remunerative prices and again make them landless poor.

28. At this stage, we may notice two precedents which have direct bearing on the interpretation of word 'person'. In *Hasmukhlal Dahayabhai and others v. State of Gujarat and others* (1976) 4 SCC 100, this Court was called upon to interpret Section 6 of the Gujarat Ceiling Act, 1961. It was argued on behalf of the appellant that the concept of person embodied in Section 6(2) was contrary to the concept of that word in second proviso to Article 331A(1) of the Constitution. While repelling the challenge, this Court observed:

> "It is evident that Section 6 conceives of each "person" holding land as a single unit whose holding must not exceed the ceiling limit. Section 2 sub-section (21) says: " 'person' includes a joint family",. Thus, the term "person" is not, strictly speaking, defined in the Act. Section 2 sub-section (21) only clarifies that the term "person" will "include" a joint family also. It certainly does not exclude an individual from being a person in the eyes of law.
>
> This has been done apparently to make it clear that, in addition to individuals, as natural persons, families, as conceived of by other provisions, can also be and are persons. This elucidation of the term "person" is in keeping with Section 3(42) of the General Clauses Act, 1897, which lays down: " 'person' shall include any company or association or body of individuals, whether incorporated or not".

We have referred to the Central General Clauses Act 10 of 1897 and not to the State General Clauses Act, which also contains a similar clarification, because Article 367 of our Constitution provides that the definitions contained in the Central Act "apply for the interpretation of the Constitution". The argument which has been advanced before us is that the concept of the term "person", having been fixed by the Central General Clauses Act, this concept and no other must be used for interpreting the second proviso to Article 31-A(1) of the Constitution which lays down:

> "Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by *a person* under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit *applicable to him under any law* for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof."

It is true that, but for the provisions of Section 6, sub-section (2) of the Act, the term "person", which includes individuals, as natural persons, as well as groups or bodies of individuals, as artificial persons, such as a family is, the entitlement to the ceiling area would be possessed by every person, whether artificial or natural. In other words, if Section 6(2) of the Act was not there, each individual member of a family would have been entitled to hold land upto the ceiling limit if it was his or her legally separate property. This follows from the obvious meaning of the term "person" as well as the inclusive definitions given both

in the Act under consideration and in the General Clauses Act.

Spouses and minor children, as natural persons, have not been debarred from holding their separate rights to land by the provisions of the Act. It is not the object of the Act to do that. The object of the Act, as set out above, is twofold: firstly, to limit the ceiling area of each holder; and, secondly, to acquire what falls beyond the ceiling limit so that the State may distribute it to more needy persons. It is not disputed that compensation is provided for acquisition of what exceeds the ceiling area in every case. As was held by this Court in *H.H. Kesavananda Bharati Sripadagalavaru* v. *State of Kerala* the amount of compensation fixed cannot be questioned. Therefore, no provision of the Act could be or is challenged on the ground that the required compensation is not prescribed for an acquisition under it as required by Article 31(2) of the Constitution or is inadequate."

29. The issue was recently considered in *Ramanlal Bhailal Patel v. State of Gujarat* (2008) 5 SCC 449. That case involved interpretation of the provisions contained in the Gujarat Agricultural Land Ceiling Act, 1960. The High Court held that the word 'person' appearing in Section 6 of the Act includes an association of persons and as such 10 co-owners were entitled to only one unit i.e. 36 acres. It was argued on behalf of the appellant that the definition of "person" in the General Clauses Act cannot be read into the definition of "person" in the Ceiling Act and in any case co-owners cannot be considered as a body of individuals or association of persons and each co-owner should be considered as a person for the purposes of the Ceiling Act. The Court referred to the provisions of Gujarat General Clauses Act, which is *pari materia* to the General Clauses Act, 1897 and held:

"The extent of land that could be held by the appellants depends upon the interpretation of the word "person" in

Section 6(1) of the Ceiling Act which provides that "no *person* shall … be entitled to hold … land in excess of the ceiling area". If the ten co-owners are considered as an "association of persons" or "body of individuals", and consequently as a "person", then the ten co-owners together as a person, will be entitled to only one unit of land which is the ceiling area per person. But if "association of persons" or "body of individuals" is not a "person", or if a co-ownership is not an association of person/body of individuals, then each co-owner or the family of each co-owner, as the case may be will be a separate "person" having regard to the definition of person in Section 2(21) of the Ceiling Act, in which event, each family will be entitled to hold one unit of land.

The word "person" is defined in the Act, but it is an inclusive definition, that is, "a person includes a joint family". Where the definition is an inclusive definition, the use of the word "includes" indicates an intention to enlarge the meaning of the word used in the statute. Consequently, the word must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Thus, where a definition uses the word "includes", as contrasted from "means", the word defined not only bears its ordinary, popular and natural meaning, but in addition also bears the extended statutory meaning (see *S.K. Gupta* v. *K.P. Jain* following *Dilworth* v. *Commr. of Stamps* and *Jobbins* v. *Middlesex Country Council*).

The ordinary, popular and natural meaning of the word "person" is "a specific individual human being". But in law the word "person" has a slightly different connotation and refers to any entity that is recognised by law as having the rights and duties of a human being. Salmond defines "person" as "any being whom the law regards as capable of rights and duties" or as "a being, whether human or not,

of which rights and duties are the attributes" (*Jurisprudence*, 12th Edn., p. 299). Thus the word "person", in law, unless otherwise intended, refers not only to a natural person (male or female human being), but also any legal person (that is an entity that is recognised by law as having or capable of having rights and duties). The General Clauses Act thus defines a "person" as including a corporation or an association of persons or a body of individuals whether incorporated or not. The said general legal definition is, however, either modified or restricted or expanded in different statutes with reference to the object of the enactment or the context in which it is used. For instance, the definition of the word "person" in the Income Tax Act, is very wide and includes an individual, a Hindu Undivided Family, a company, a firm, an association of persons or body of individuals whether incorporated or not, a local authority and every other artificial juridical person. At the other extreme is the Citizenship Act, Section 2(*f*) of which reads thus: ' "Person" does not include any company or association or body of individuals whether incorporated or not.' Similarly, the definition under Section 2(*g*) of the Representation of People Act, 1950, is "person" does not include a body of persons.

Both definitions of the word "person", in the General Clauses Act and the Ceiling Act, are inclusive definitions. The inclusive definition of "person" in the General Clauses Act applies to all Gujarat Acts unless there is anything repugnant in the subject or the context. The inclusive definition of "person" in Section 2(21) of the Ceiling Act, does not indicate anything repugnant to the definition of "person" in the General Clauses Act, but merely adds "joint family" to the existing definition. Therefore the definition of person in the Ceiling Act, would include the definition of person in Section 3(35) of the General Clauses Act. The resultant position can be stated thus: the definition of person in the General Clauses Act, being an inclusive

definition, would include the ordinary, popular and general meaning and those specifically included in the definition. The inclusive definition of "person" in the Ceiling Act, in the absence of any exclusion, would have the same meaning assigned to the word in the General Clauses Act, and in addition, a "joint family" as defined. Thus, the word "person" in the Ceiling Act will, unless the context otherwise requires, refer to:

(i) a natural human being;

(*ii*) any legal entity which is capable of possessing rights and duties, including any company or association of persons or body of individuals (whether incorporated or not); and

(*iii*) a Hindu Undivided Family or any other group or unit of persons, the members of which by custom or usage, are joint in estate and residence."

30. In view of the above, the argument of the learned counsel that the word 'person' in Section 154(1) means a human being or a natural person only and that the explanation by which a cooperative society was included in the said word is indicative of the legislature's intention to give a narrow meaning to the word 'person' is liable to be rejected. In our view, the explanation instead of narrowing the meaning of the word 'person' makes it clear that the same would include a non natural person.

31. The submission that if share of the individual Director is taken into consideration, the total land of the appellant would not exceed 12.50 acres is being mentioned only to be rejected in view of the contents of lease agreement. That apart, no evidence was produced before the Collector or the Additional Commissioner to prove that the land was purchased in the name of the Directors of the appellant. Even before the learned

Single Judge of the High Court and this Court, no such evidence has been produced. In *Ramanlal Bhailal Patel's* case, this issue was considered and answered in negative in the following words:

> "Instead of buying the land (172 acres 36 guntas) jointly under the four sale deeds it was open to the ten persons to have bought the lands individually, that is each of them purchasing such extent of land as he or she wanted. If they had registered the sale deeds individually (subject to each of them being entitled to buy agricultural land, under the land reforms laws in force) each couple would have been entitled to hold land to the extent of one unit. Instead of each individual or couple purchasing the land in their respective names, if for convenience in negotiations, ten individuals buy the land jointly, the position will be no different. It cannot be said that merely because the sale deed is in the joint names of ten persons, they purchased the land as "an association of persons" or as "body of individuals" with the common intention of carrying on agricultural activities jointly or producing income, profit or gain or carry on some common joint venture. In fact before purchasing the lands, the ten persons had entered into an agreement placing on record that the object of purchasing the lands jointly was only to facilitate negotiations and avoid duplicating the purchase procedures and not to cultivate them jointly. There is no evidence of any joint cultivation, nor any evidence of any intention to have a joint venture. On the other hand, after purchase, they divided the lands and informed the Land Revenue Authorities and each co-owner was registered as the owner of the respective land allotted to him/her. This is not a case where a body of individuals purchased the land with the intention of having a continued community of interest by way of a joint venture or as a business venture. It is therefore not possible to treat the ten purchasers as an "association of persons/body of individuals" nor is it permissible to treat them as a single "person", thereby

> restricting their entitlement to hold land to only one unit, even though there are ten purchasers.
>
> The Tribunal and the High Court were right in holding that the word "person" in the Ceiling Act includes an "association of persons/body of individuals". But they were not justified in treating the co-owners as an "association of persons", or in holding that the ten co-owners will be entitled to own only one unit. Having regard to Section 6(2) of the Act, the share of each couple (husband and wife) in the land, plus any other land individually held by them will have to be calculated to find out whether they held any land in excess of the ceiling limit. Therefore, the share of each appellant in the lands jointly purchased, with the addition of the lands held by his spouse, and addition of any other land held by them, will give the basis for determining the surplus land. For example, if a husband's share as co-owner is 20 acres and wife's share as co-owner is 20 acres, and their other individual holding is another 10 acres (all of the same category in 'C' Class), the total holding of the family will be 50 acres (20+20+10 acres) and the surplus will be 14 acres."

32. The submission of Shri Manoj Swarup that a direction may be given to the State Government to accord *post facto* sanction to the purchase of excess land cannot be entertained much less accepted because the appellant has been found guilty of not coming to the Court with clean hands. In any case, in the absence of any factual foundation, such a plea cannot be entertained at this stage.

33. The appellant's grievance against the direction given by the learned Single Judge to the Chief Secretary to ensure that possession of excess land is taken without delay does not merit consideration because as mentioned in the earlier part of this judgment, the State Government had already granted lease of excess land to the appellant.

34. Before parting with the case, we deem it necessary to express our serious reservation about the bona fides of the State Government in granting lease of excess land to the appellant. It is impossible to fathom any rational reason for this action of the State Government ignoring that the appellant had purchased land in patent violation of Section 154(1) of the Act. By executing lease agreement dated 15.10.1994, the concerned officers of the State effectively frustrated the object sought to be achieved by the legislature by enacting the Act and the order passed by the Collector.

35. In the result, the appeal is dismissed. Since the appellant has not approached the quasi judicial and judicial forums i.e., the Additional Commissioner, the High Court and this Court with clean hands and succeeded in securing interim orders, it is ordained to pay costs, which is quantified at Rs.2 lacs. With a view to ensure that functionaries of the State Government may not connive with the appellant and compound the wrong already done, we direct the Government of Uttar Pradesh not to renew the lease of the appellant at the end of 30 years period and deal with excess land in accordance with the provisions of the Act.

N.J. Appeal dismissed.

GOA GLASS FIBRE LTD. & ANR.
v.
STATE OF GOA AND ANR.
(Writ Petition (c) No. 200 OF 2002 Etc.)

MAY 3, 2010

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

Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002:

*ss.2, 3 and 4 – Act prohibiting payment, requiring recovery of benefits from beneficiaries and extinguishing all liabilities of State arising from void Notifications – **Held:** Having regard to the fact that the action in issuing the Notifications was unauthorised and wholly illegal and as the industrial units could not be allowed to reap the benefits of the illegal notifications, the State Legislature in its competence rightly enacted the Act – It cannot be said that the Act is aimed at nullifying the judgment of the Supreme Court or giving effect to the judgment of the High Court – Constitution of India, 1950 – Articles 14 and 19(1)(g), Seventh Schedule – List III, Item 38.*

Constitution of India, 1950:

*Seventh Schedule – List III, Item 38 – Electricity tariff – Legislature of State of Goa enacting Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002 – **Held:** Competence of the State Legislature to enact the Act is traceable to Entry 38 in List III of the Seventh Schedule – The Act has been enacted in the larger public interest to save the public exchequer from being drained of – The State has every right to recover, by resorting to legislative measures, the benefits availed of by the persons who cannot be permitted to retain the same – The object of the Act is not to*

undo or reverse the judgments either of the Supreme Court or the High Court nor is it aimed at giving effect to the judgment of the High court – The Act meets and satisfies the constitutional test completely – Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002.

Articles 14, 19(1)(g) and 32 – Industrial Units challenging a State enactment on the ground of violation of Articles 14 and 19(1)(g) – ***Held:*** *No citizen has complained that his fundamental rights guaranteed under Article 19(1)(g) are violated by the Act – Nor is there anything in the Act which suggests invidious discrimination, unreasonable classification or manifest violation of equality clause – Therefore, the writ petition under Article 32 is not maintainable – Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002.*

The Legislature of the State of Goa enacted the Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002 making provisions for recovery of benefits under Notifications dated 15.5.1996 and 1.8.1996 availed of by certain Low Tension, High Tension and Extra High Tension electricity consumers, and to prohibit any further payment under the said notifications. The instant writ petitions were filed challenging the provisions of the said Act primarily on the grounds that it sought to nullify the judgment of the Supreme Court passed on 13.2.2001, affirming the view taken by the High Court in its judgment dated 21.1.1999 and that the Act also sought to give effect to the decision dated 19/24.4.2001 rendered by the High Court, which judgment had the effect of overruling the judgment of the Supreme Court passed on 13.2.2001, more so, when the said judgment was subject matter of appeal before the Supreme Court. The stand of the respondent State was that the Notifications dated 15.5.1996 and 1.8.1996 were not authorized by law inasmuch as the Minister for Power got the said notifications issued at his own level without

making a reference either to the Chief Minister or the Council of Ministers or without consulting the Finance Department, as was mandatorily required under the Rules; that there was neither financial sanction nor budgetary provision nor cabinet approval as required under Article 166(3) of the Constitution of India and, therefore, the notifications dated 15.05.1996 and 01.08.1996 could not be said to be the decision of the State Government in the strict sense of law and, as such, the claims for rebate under these Notifications which run into several crores of rupees could not be borne by the State Exchequer; and that since the two Notifications had illegally imposed a heavy burden on the State Exchequer, the State Legislature, keeping in view the public interest and its welfare, made the Act within its legislative and constitutional parameters.

Dismissing the writ petitions, the Court

HELD: 1.1. A statute can be invalidated or held unconstitutional on limited grounds, viz., on the ground of incompetence of the Legislature which enacts it and on the ground that such statute breaches or violates any of the fundamental rights or other constitutional rights, and on no other grounds. [Para 15] [983-C-D]

******Sanjeev Coke Manufacturing Company Vs. M/s. Bharat Coking Coal Ltd. & Anr.* **(1983) 1 SCR 1000 = (1983) 1 *SCC* 147 (172);** *State of A.P. vs. McDowell and Co.* **(1996) 3 SCR 721 = (1996) 3 SCC 709*;*** *Kuldip Nayar vs. Union of India and Ors.* **(2006) 5 Suppl. SCR 1 = (2006) 7 SCC 1, referred to.**

1.2. In the instant case, the Legislature in its competence has enacted the Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002, to achieve the purposes indicated therein. Having regard to the fact that the action in issuing the notifications dated

15.5.1996 and 1.8.1996 was unauthorized and wholly illegal and that the parties could not be allowed to reap the benefits of an illegal act, the State Legislature enacted the Act impugned. By the said enactment, the Legislature has imposed prohibition of further payments under the Notifications dated 15.5.1996 and 1.8.1996, has provided for recovery of rebate benefits from the beneficiaries and has extinguished the State's liability under the two Notifications. This exercise by the Legislature is independent of and de hors the results of W.P No.316 of 1998 (decided by High Court on 19/24.4.2001) and can be said to be uninfluenced by the said judgment. It was well within the Legislative power of the State Legislature to respond to the undisputed and disturbing facts, which had enormous financial implication on the State's finances, to enact the law with an object of remedying the unsatisfactory state of affairs which were known to the Legislature. Thus, the intent and object of the State Legislature in enacting the Act is clear and unassailable. [para 16-19] [983-D-H; 984-A-H]

1.3. The Act is not aimed at giving effect to the order dated 19/24.4.2001 passed by the High Court in W.P No.316 of 1998 nor is it passed because the special leave petition is pending before this Court, but has been passed with the object or aim to sustain the State Coffers and to prevent further abuse and payment out of the State funds. It has been enacted in the larger public interest to save the Public Exchequer from being drained off. These amounts always belonged to the State and, therefore, it has every right to recover the same, by resorting to legislative measures within the parameters of the constitution, from the beneficiaries who cannot be permitted to retain the benefits. It is no doubt true that the Judgment dated 19/24.04.2001 is in appeal before this Court in a batch of special leave petitions, but validity of the Act impugned does not depend upon the result of the

said petitions. The Act must stand or fall on its own strength. [para 20 and 24] [985-B-C; 988-D-E]

1.4. It is evident that the object of the Act is not to undo or reverse the judgments either of this Court or of the High Court. On a reading of the Act as a whole, it does not appear that the Legislature seeks to undo any judgment or any directions contained therein. Therefore, no exception can be taken to the constitutionality of the Act impugned on the ground that it seeks to undo or reverse any judgment. In the earlier round of litigation, this Court and the High Court merely dealt with and interpreted the rights of the consumers to recover and be paid the rebate on electricity tariff in view of the two notifications (dated 15.5.1996 and 1.8.1996) being in force. This Court and the High Court in those proceedings did not deal with or decide validity of the said notifications. What the Legislature seeks to do by the Act impugned is to cure the defect of any kind and thereby to ensure that the public funds are not drained off and it is in larger public interest that the Act is enacted. The Act which has been passed with a view to subserve the public cause, to prevent abuse of public exchequer, to remedy the fraud played by an individual on the public exchequer, to recover the amounts paid under the two Notifications and to prevent further loss of pubic funds, cannot be termed as unconstitutional. It cannot, therefore, be said that the Act impugned is aimed at nullifying the judgment of this Court passed on 13.02.2001, affirming the view taken by High Court of Bombay Panaji Bench, in its judgment dated 21.01.1999. [para 18 and 22] [984-A-C; 987-C, E-G]

2.1. It is a well settled law that the legislature can render the judicial decision ineffective by enacting a valid law on the subject within its legislative field by removing the base on which the decision was rendered. [para 24] [988-E]

2.2. The impugned Act meets and satisfies the constitutional test completely. The Act also satisfies parameters laid down by this Court in various judgments. Further the competence of the State Legislature to enact the Act impugned is traceable to Entry No. 38 in List III of the VII Schedule to the Constitution of India. The competence of the State Legislature to enact the Act has not been challenged. Therefore, the challenge made by the petitioners to the constitutionality of the Act on this ground must fall. [para 24] [988-E-G]

3. So far as the challenge to the validity of the Act with reference to Article 19(1)(g) of the Constitution is concerned, no citizen is before this Court with a complaint that his fundamental rights guaranteed under Article 19(1)(g) are violated by the Act. As regards the challenge on the allegations of violation of Article 14 of the Constitution, the petitioners have laid no basis thereof. There is nothing in the Act which suggests invidious discrimination, unreasonable classification or manifest violation of equality clause. In the absence of any valid ground under Article 14, the writ petition under Article 32 itself is not maintainable and is liable to be dismissed. The Act impugned does not suffer from any invalidity and the challenge made by the petitioners to its constitutionality fails. [para 26-27] [989-B-E]

S.S Bola Vs. B.D. Saldhana **(1997) 2 Suppl. SCR 507 = AIR 1997 Supreme Court 3127 and** *Indian Aluminium & Others Vs. State Of Kerala* **1996(1) SCC 637.**

Case Law Reference:

(1997) 2 Suppl. SCR 507	**referred to**	**para 11**
(1996) 1 SCC 637	**referred to**	**para 11**
(1996) 3 SCR 721	**referred to**	**para 15**

(2006) 5 Suppl. SCR 1	**referred to**	**para 15**
(1983) 1 SCR 1000	**referred to**	**para 23**

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 200 of 2002.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 199 of 2002

F.S. Nariman, L.N. Rao, Dr. Rajeev Dhawan, Shyam Diwan, Deeptakirth Verma, Subash Sharma, S. Karpe, Binu Tamta, A.Subhashini, Mohit Abraham, Dhruv Mehta, T.S. Sabasish (for K.L. Mehta & Co.), Santosh Paul, M.J. Paul, K.K. Bhat, Arvind Gupta, Sriharsh N. Bundela, Kavin Gulati, Rohina Nath, Rohan Dhiman, Rashmi Singh, Sharuk Narang, Ashu Kansal, Umesh Kumar Khaitan for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. The above writ petitions are filed under Article 32 of the Constitution of India, inter alia calling in question the vires and Constitutional validity of "The Goa (Prohibition of Further Payment and Recovery of Rebate Benefits) Act, 2002 (hereinafter referred to as `the Act') enacted by the Legislature of the State of Goa. The petitioners seek a declaration from this court that the Act is ultra vires of the Constitution of India and in the alternative seek a limited declaration that Sections 2,3,5 and 6 of the Act are unconstitutional and liable to be struck down.

2. The Act is attacked as unconstitutional mainly on the following grounds:

. That it seeks to nullify a judgment of this Court dated 13.02.2001 affirming the view taken by High Court

of Bombay Goa Bench, in its judgment dated 21.01.1999.

- That it seeks to give effect to the decision of the High Court of Bombay dated 19/24th April 2001, which judgment has the effect of over ruling the judgment of this Court dated 13.02.2001.

- That it seeks to give effect to the judgment of High Court of Bombay Panaji Bench, dated *19/24th* April 2001, when the said judgment is the subject matter of appeal before this Court in several Special Leave Petitions and thus seeks to frustrate the rights of the petitioners herein under Article 136 of the Constitution of India.

- That it seeks to take away the fundamental rights guaranteed to the petitioners under Article 14 and 19(1)(g) of the Constitution of India.

- That it is contrary to plethora of judgments of this Court.

- That as an Explanatory Memorandum and the Statement of Objects and Reasons of the Act relies upon the decision of the High Court of Bombay Panaji Bench, rendered on 19/24th April 2001 which held the Notifications dated 15.5.1996 and 1.8.1996 were issued without complying with the requirements of Article 166 (3) of the Constitution of India, when the very judgment is under appeal before this Court and the State without getting a Judgment rendered by this Court and frustrating adjudication by this Court has passed the Act impugned.

- That the Act does not seek to validate any action which has been held to be invalid by any Court of

Law, but only seeks to nullify the judgment of this Court [under Section 2 of the Act].

- That the Act under Section 3 gives power to the State to recover rebate already given to consumer like petitioners, which grant has already been upheld by the High Court by its judgment dated 21.1.1999 and affirmed by this Court by its judgment dated 13.2.2001.

- That the Act is unconstitutional because of non-application of mind, as Section 5 thereof speaks of consequences of non-refund and Section 2 which prohibits further payments.

- That the Act seeks to nullify a judgment of this Court and to give effect to judgment of High Court which has the effect of overruling the judgment of this Court, inasmuch as, the law of validation as settled by this Court in a catena of decisions stipulates that the Legislature is not competent to nullify a judgment of a Court of competent jurisdiction except where the judgment is rendered by a Court of law on the basis of any invalidity or illegality in the Act because of which the Statute or Act is declared invalid, in which event the Legislature is Competent to enact a validating Act by removing the basis of that invalidity or illegality in the earlier Statute. If the Legislature chooses to enact a law only for the purpose of nullifying a judgment that the same is impermissible.

3. The respondent - State of Goa has joined issues with petitioners and has filed a detailed Counter-Affidavit, inter alia, in support of the constitutionality of the impugned Act.

4. The State in its Counter-Affidavit after setting out the factual background leading to the issue of the Notifications

dated 15.05.1996 and 01.08.1996 and the filing of Writ Petition No. 316 of 1998 and the judgment of the High Court of Bombay Panaji Bench therein, has contended, that, the State deemed it expedient not only to prohibit any further payment under the said Notification, but also deemed it expedient to recover the benefits already availed of by certain consumers including the petitioners in terms of the earlier Notifications, having regard to the fact that the action in issuing the notifications was unauthorized and wholly illegal and that the parties could not be allowed to reap the benefits of an illegal act. It is stated by the respondent State, that, with this intent and object, the State Assembly passed the Bill known as Goa (Prohibition of Further Payments and Recovery of Rebate Benefits) Bill 2002, which was introduced in the House on 16.01.2002.

5. With reference to the principal contention of the petitioners that the Act impugned is unconstitutional and it seeks to nullify the judgment of this Court in G.R. Ispat's case, the State contends that the Act impugned is constitutionally valid and has been passed by the Legislature keeping in view the objects behind the Bill; that even assuming but not admitting in any manner that the impugned Act nullifies the judgment of this Court, the Legislature under the Constitution of India has the power to enact a law which may result in nullifying the Judgment or Order passed by the Courts, if the public interest and public welfare demands the Legislature to exercise its legislative power within the constitutional parameters as held by this Court in various pronouncements on the issue.

6. It is further stated that what is sought to be achieved by the impugned Act is to declare that the two notifications dated 15.05.1996 and 01.08.1996 as illegal, unauthorized, and to prohibit any further payments thereunder, in order to save public exchequer from getting denuded of its coffers. It is further stated, that, the decision of the State Government to issue Notifications mentioned above was not authorized by law in as much as the Council of Ministers had rescinded the Notification

and despite this, the Power Minister himself had issued a Notification at his own level without making a reference to either the Chief Minster or the Council of Ministers or consulting the Finance Department as mandatorily required under the Rules of Business. The decision of the then Minister for Power to issue the Notifications was wholly unauthorized as he had no authority in law to issue them at his level and as the subject matter was required to be placed before the Cabinet in view of the huge financial implication involved therein and in view of the fact that the Cabinet had earlier rescinded the Notification giving rebate and any modification or variation of such decision of the Council of Ministers, it had to place it before the Council of Ministers in view of the Business Rules framed under Article 166 (3) of the Constitution of India. The two notifications had imposed a heavy burden on the State Exchequer and under the Rules Of Business, concurrence of Finance Department of the State Government was mandatory and there was neither concurrence of the said Department nor was there any reference of the said Notifications to the said Department. The then Power Minister had made a note on the file concerned that he had consulted the Chief Minister which was found to be false as per the police investigation conducted and that the then Chief Minister had clearly stated that neither he was ever consulted by the Power Minister nor was the file ever shown to him and that this fact was taken note of by the High Court of Bombay Panaji Bench in its Judgment dated 19/24.04.2001 in Writ Petition No. 316 of 1998, which is appealed against and pending in SLP (Civil) No. 4233 of 2001 before this Court.

7. The State also contends, that, the impugned Act is not aimed at giving effect to the Order of the High Court of Bombay dated 19/24.04.2001 in W.P No.316 of 1998 nor is it passed because the abovementioned Special Leave Petition is pending before this Court, but has been passed and aimed to save the coffers of the State and to prevent further abuse and payment out of the State Funds which the State can ill afford. The State had lost almost an amount of about Rs.16 Crores

and a further sum of Rs.50 Crores of public money might have to be paid and there was neither any budgetary allocation nor any provision made for such payments and therefore instead of the monies coming into the State Exchequer by way of receipts by Government in accordance with Article 266 (1) of the Constitution of India, these payments were sought to be diverted to the private industrialists by virtue of the two notifications mentioned above and with a view to put an end to this illegality the impugned Act has been enacted in the larger public interest to safe the Public Exchequer from being drained off.

8. The State also contends, that, this Court and the High Court in the earlier round of litigation have dealt with and interpreted the rights of the Consumer to be paid the rebate on electricity tariff in view of the two notification being in force and not their validity and that such benefits could not be withdrawn by a mere administrative circular. In fact what was challenged in those writ petitions was the administrative order of the Chief Electrical Engineer dated 31.03.1998 and that the High Court held in those writ petitions that the two notifications could not be withdrawn by a mere administrative Order and it was on that basis, the High Court had sustained those two notifications. Now what is sought to be done by the present legislation, it is contended by the State, to cure the defect of any kind and thereby to ensure that public funds are not drained by resorting to dubious methods and it is in larger public interest that this Act is enacted.

9. It is reiterated by the State, that, the State of Goa is facing financial crunch and it is not possible for the State Government to bear such financial burden and therefore it is imperative that the amounts paid are recovered and further loss of public funds avoided and its payment prohibited and that it is on this ground that the legislation impugned has been enacted.

10. The State reiterates that there is nothing illegal about

the impugned legislation and that the same has been passed in the larger public interest and with a view to sub serve the pubic cause and to prevent abuse of public exchequer and to remedy the fraud played by an individual Minister on the public exchequer. It is further urged by the State Government that the balance of interest is in favour of the State as the petitioners on their own showing have become the beneficiaries of an illegal act of an individual Minister which cannot be allowed.

11. The State further asserts in response to the challenge made by the petitioners to the validity of the Act, that, it is a well settled law that the legislature can render the judicial decision ineffective by enacting a valid law on the subject within its legislative field by removing the base on which the decision was rendered and that the impugned Act squarely meets and satisfies the Constitutional Test and parameters laid down by this Court in various judgments and as illustration have referred to the Judgments of this Court in the case of S.S Bola Vs. B.D. Saldhana reported in AIR 1997 Supreme Court 3127 and Indian Aluminium & Others *Vs.* State Of Kerala reported in 1996(1) SCC 637. It is reiterated by the State, that, the State Legislature is competent to enact the Act impugned under Entry 38 of List III to the VIIth Schedule of the Constitution of India.

12. The petitioner has filed a rejoinder which reiterates more or less what is stated in the Writ Petition. In short, in the rejoinder the petitioner seeks to counter the reason and other grounds offered by the State Government in support of the Legislation impugned. It also disputes the correctness of certain statements made by the State Government in its affidavit in reply to the Writ Petition.

13. We have heard learned senior counsel Shri F.S. Nariman for the petitioners and Dr. Rajeev Dhavan and Shri Shyam Diwan, learned senior counsel for State of Goa. We also had the advantage of going through several rulings of this court cited by the learned counsels.

14. The Act impugned is attacked principally on the ground, that, it seeks to nullify a judgment of this Court dated 13.02.2001, affirming the view taken by High Court of Bombay Panaji Bench, in its judgment dated 21.01.1999 and that it seeks to give effect to the decision of the High Court of Bombay dated 19/24th April 2001, which judgment has the effect of over ruling the judgment of this Court dated 13.02.2001, more so when the said judgment is the subject matter of appeal before this Court in several Special Leave Petitions and thus seeks to frustrate the rights of the petitioners herein under Article 136 of the Constitution of India.

15. It is well settled that a Statute can be invalidated or held unconstitutional on limited grounds viz., on the ground of the incompetence of the Legislature which enacts it and on the ground that it breaches or violates any of the fundamental rights or other Constitutional Rights and on no other grounds. (See *State of A.P. vs. McDowell and Co.,* [(1996) 3 SCC 709], *Kuldip Nayar vs. Union of India and Ors.,* [(2006) 7 SCC 1].

16. The scheme of the Act appears to be simple. The Act imposes a Prohibition [under Section 2], requires recovery [under Section 3] and "extinguishes" all liabilities of the State that accrue or arise from the Notifications dated 15.05.1996 and 01.08.1996.

17. From the language of the Act it becomes clear that the Act is not influenced by the out come of the Judgment of the High Court in Manohar Parrikar's case. By the enactment, the Legislature has imposed prohibition of further payments under the Notifications, provides for recovery of rebate benefits from the beneficiaries and extinguishes the State's Liability under the Notifications mentioned supra. This exercise by the Legislature is independent of and de hors the results of the PIL of Manohar Parrikar and can be said to be uninfluenced by the said judgment. It was well within the Legislative power of the State to respond to the undisputed and disturbing facts which

had enormous financial implication on the State's Finances to enact the Law with an object of remedying the unsatisfactory state of affairs which were known to the Legislature.

18. That the object of the Act is not to undo or reverse the judgments of either this Court or that of the High Court. On a reading of the Act as a whole, it does not appear that the Legislature seeks to undo any judgment or any directions contained therein. As observed earlier the Act imposes a Prohibition [under Section 2], requires recovery [under Section 3] and "extinguishes" all liabilities of the State that accrue or arise from the Notifications dated 15.05.1996 and 01.08.1996. Therefore, no exception can be taken to the constitutionality of the Act impugned, on the ground, that it seeks to undo or reverse any judgment. The Legislature in its competence has enacted the Act to achieve the purposes indicated therein and not to frustrate any judgment of any court including that of this Court. It is to be noted that State Legislature was competent to enact the Act in its present form even before the judgment of the High Court in the PIL and the fact that it has come after the judgment in PIL does not render it unconstitutional on the ground that it seeks to nullify the judgment of this Court in the earlier proceedings.

19. The State, in the factual background leading to the issue of the Notifications dated 15.5.1996 and 01.08.1996 and the filing of Writ Petition No. 316 of 1998 and the judgment of the High Court of Bombay Panaji Bench therein, thought it fit and expedient to prohibit any further payment under the said Notifications and to recover the benefits already availed of by certain consumers including the petitioners towards the rebate in terms of these two notifications and having regard to the fact that the action in issuing the notifications was unauthorized and wholly illegal and that the parties could not be allowed to reap the benefits of an illegal act enacted the Act impugned. Thus the intent and object of the State Legislature in enacting the Act impugned is clear and unassailable. Therefore, the contention

of the petitioners that the Act impugned is unconstitutional and it seeks to nullify the judgment of this Court requires to be rejected.

20. The impugned Act is not aimed at giving effect to the Order of the High Court of Bombay dated 19/24.04.2001 in W.P No.316 of 1998 nor is it passed because the abovementioned Special Leave Petition is pending before this Court, but has been passed with an object or aim to sustain the State Coffers and to prevent further abuse and payment out of the State Funds. It has been enacted in the larger public interest to save the Public Exchequer from being drained off. These amounts always belonged to the State and, therefore, it has every right to recover the same, by resorting to legislative measures within the parameters of the Constitutional provision from the beneficiaries who cannot be permitted to retain the benefits.

21. The impugned Act is not aimed at giving effect to the order of the High Court of Bombay dated 19/24.04.2001 in W.P No.316 of 1998 as has been argued by the learned senior counsel for the petitioner. It is not passed because the abovementioned Special Leave Petition is pending before this Court. It has been passed with an aim to sustain the State Coffers and to prevent further abuse and payment out of the State's Exchequer. It is placed on record by the State Government, that, the coffers of the State had already lost an amount of almost 16 Crores which the State could not afford and a further sum of Rs. 50 Crores of public money would have been lost, had it not been checked and prevented by the Act impugned. In this regard it is necessary take notice of the reiteration of the State in its affidavit that the earlier affidavits filed for and on behalf of the State Government before the High Court in the earlier round of litigations did not reflect correct and true factual position, It is stated by the State Government that there was neither financial sanction nor budgetary provision nor cabinet approval as required under Article 166(3) of the Constitution of India and therefore the two notifications dated 15.05.1996 and 01.08.1996 in issue could not be said to be

the decision of the State Government in the strict sense of law and the claims for rebate under these Notifications which run into several Crores of Rupees could not be borne by the exchequer, more so when they are devoid of any legal sanctity and that it was impossible for the State to meet or bear such an enormous liability of such a magnitude. The respondent State in its affidavit draws support from certain observations from the Judgment of the High Court of Bombay dated 19/24.04.2001, to say that the Notifications mentioned above were *non-est* and action taken thereunder was null and void. It is the stand of the State, that, the High Court in W.P. No. 316 of 1998 has also dealt with the issue as to why the State had failed to bring before the High Court in the earlier batch of Writ Petition decided on 21.01.1999, wherein the High Court upheld the power of the State Government to withdraw the rebate by invoking provisions of Section 21 of the General Clauses Act. According to the State, the High Court in the earlier round of litigation gave a decision as regards the financial crunch faced by the Court and that the affidavits filed for and on behalf of the State Government therein by the then Chief Electrical Engineer of Goa Mr. T. Nagarajan, who as disclosed from the police investigations was himself a supporter of the illegal act of abuse of power and he could not be expected to place all facts before the High Court. The State further contends that the High Court in its judgment in W.P No. 316 of 1998, has noted that even the attempts to have the Notifications ratified by the cabinet failed and there being legal dissent, the Cabinet refused to ratify the decision and withdrew the same. Therefore, it cannot be said that the State had enacted the Act impugned to give effect to the judgment of the High Court in Writ Petition No. 316 of 1998.

22. It is also placed on record that there was neither any budgetary allocation nor any provision made for such payments and these payments were sought to be diverted to the private industrialists by virtue of the two notifications mentioned above and with a view to put an end to this illegality, the impugned

Act has been enacted in the larger public interest to save the Public Exchequer from being drained off. These amounts always belonged to the State Government and the State had every right to recover the same, by resorting to legislative measures from the beneficiaries of an illegal Act, who cannot be allowed to retain the benefits. In the earlier round of litigation before the High Court, the State had taken the stand that there was financial crunch being faced by the State Government and that it was the primary reason for the State Government to withdraw the rebate. This Court and the High Court in the earlier round of litigation merely dealt with and interpreted the rights of the Consumer to recover and be paid the rebate on electricity tariff in view of the two notifications being in force. This Court and the High Court in those proceedings did not deal with or decide their validity. The question there was, whether the benefits granted by the Notifications could be withdrawn by a mere administrative circular of the Chief Electrical Engineer dated 31.03.1998 and the High Court held in those writ petitions that the two notifications could not be withdrawn by a mere administrative Order and on that premise the High Court had directed the State to pay the amounts and this Court confirmed the same in its Order. What the Legislature seeks to do by the Act impugned is to cure the defect of any kind and thereby to ensure that public funds are not drained and it is in larger public interest that this Act is enacted. The Act which has been passed in the larger public interest and with a view to sub serve the public cause and to prevent abuse of public exchequer and to remedy the fraud played by an individual on the public exchequer and to recover the amounts paid under these two Notifications and to prevent further loss of pubic funds cannot be termed as unconstitutional. It cannot therefore be said that the Act impugned is aimed at nullifying a judgment of this Court dated 13.02.2001, affirming the view taken by High Court of Bombay Panaji Bench, in its judgment dated 21.01.1999. It can not also be said that the Act impugned seeks to give effect to the decision of the High Court of Bombay dated 19/24th April 2001, in Writ Petition No 316 of 1998.

23. The Act stands totally on a different footing and the judgment of the High Court dated 19/24.04.2001 has no bearing on it. The Act stands independent of the judgment of the High Court and its validity cannot be tested on these grounds. The petitioners have strongly relied upon the different stands allegedly taken by the State in the earlier proceedings and the present proceedings in support of their challenge to the constitutionality of the Act. This Court in *Sanjeev Coke Manufacturing Company Vs. MIs. Bharat Coking Cool Ltd & Anr,* [(1983) 1 *SCC* 147 (172)], has held that the validity of the Legislation is not to be judged by what is stated in an affidavit filed on behalf of the State and that it should fall or stand on the strength of its provisions.

24. It is no doubt true that the Judgment dated 19/24.04.2001 is in appeal before this Court in a batch of Special Leave Petitions and the validity of the impugned Act does not depend upon the result of the said Special Leave Petitions. In our opinion, the Act must stand or fall on its own strength. It cannot also be said that the Act seeks to give effect to the judgment dated 19/24.04.2001 of the High Court having regard what the State aims at or seeks to achieve by it. It is a well settled law that the legislature can render the judicial decision ineffective by enacting a valid law on the subject within its legislative field by removing the base on which the decision was rendered. The impugned Act meets and satisfies the Constitutional Test completely. The Act also satisfies parameters laid down by this Court in various judgments. Further the competence of the State Legislature to enact the Act impugned is traceable to Entry No. 38 in List III to the VII Schedule of the Constitution of India. The petitioners have not challenged the competence of the State Legislature to enact the Act impugned. Therefore, the challenge made by the petitioners to the constitutionality of the Act on this ground must fall.

25. The next contention urged by the petitioners is that, the Act does not seek to validate any action which has been held

to be invalid by any Court of Law, but only seeks to nullify the judgment of this Court. This contention should also fail for the reasons already explained in the preceding paragraphs.

26. The next contention of the petitioners is that the impugned Act is unconstitutional, because it seeks to take away the fundamental rights guaranteed to the petitioners under Article 14 and 19(1)(g) of the Constitution of India. While the argument based on Article 19(1)(g) of the Constitution of India was not urged seriously by the petitioners and rightly so, as no citizen is before this Court with a complaint that his fundamental rights guaranteed under this Article of the Constitution is violated by the State under the Act impugned. As regards the challenge to the validity of the Act on the allegations of violation of Article 14 of the Constitution of India, the petitioners have laid no basis thereof. There is nothing in the Act which suggests invidious discrimination, unreasonable classification or manifest violation of equality clause. In the absence of any valid ground under Article 14 of the Constitution of India, the Writ Petition under Article 32 itself is not maintainable and liable to be dismissed.

27. In view of the above discussion, we are of the opinion that the Act impugned does not suffer from any invalidity and the challenge made by the petitioners to its constitutionality fails. Accordingly, the Writ Petitions are dismissed without any order as to costs.

R.P. Writ Petitions dismissed.

EUREKA FORBES LIMITED

v.

ALLAHABAD BANK AND ORS.

(Civil Appeal No. 4029 of 2010)

MAY 03, 2010

[B. SUDERSHAN REDDY AND SWATANTER KUMAR, JJ.]

Recovery of Debts Due to Banks and Financial Institutions Act, 1993:

Object of the Act – Discussed.

s.2(g) and 17 – 'debt' – Meaning of – Jurisdiction of Debt Recovery Tribunal – Respondent nos.2 and 3 had obtained licence from appellant company to use their factory premises – They failed to pay the licence fee – Appellant sold the goods lying in the premises and adjusted the sale proceeds thereof towards the arrears of licence fee, without the consent of respondent no.1-bank, though said goods were hypothecated by respondent nos.2 and 3 in favour of respondent no.1 – Claim by respondent no.1-Bank against appellant before Debt Recovery Tribunal – Plea of appellant that the Tribunal lacked inherent jurisdiction to entertain and decide the claim since appellant was neither a borrower nor was there any kind of privity of contract between it and respondent no.1; and as such, money claimed from them was not a 'debt' – Further plea that there was lack of knowledge on the part of appellant that the goods in stock were hypothecated to respondent no.1 – Held: Appellant took no remedial or bonafide steps even after it admittedly came to know that the goods in question were hypothecated to the Bank – Even if certain amounts were due to appellant from respondent nos.2 and 3 on account of licence fee, still they could not have brushed aside the charge of respondent no.1 over the goods in question – The goods

in question were disposed off by appellant either in collusion with respondent nos.2 and 3 or at its own but with the knowledge that the goods were hypothecated to the Bank – The word 'debt' under s.2(g) is incapable of being given a restricted or narrow meaning – Claim raised by respondent no.1 fell well within the ambit and scope of s.2(g) and was well within the jurisdiction of the Tribunal exercising its power under s.17 – However, the entire suit could not have been decreed against the appellant – The cause of action in favour of respondent no.1 and against appellant, at best, could be limited to the hypothecated goods.

Maxims – Maxim "Nullus commodum capere potest de injuria sua propria" – Applicability of.

Doctrines/Principles:

Doctrine of full faith and credit – Applicability of.

Principle of public accountability and transparency in State action – Applicability of.

Respondent nos.2 and 3, who had obtained licence from appellant company to use their factory premises, failed to pay the licence fee. The appellant sold the goods lying in the premises and adjusted the sale proceeds thereof towards the arrears of licence fee, without the consent of respondent no.1-bank, though the said goods were hypothecated by respondent nos. 2 and 3 in favour of respondent no.1.

Respondent no.1 claimed that it had a charge over the movable assets disposed off by the appellant and filed a civil suit against the appellant and respondent nos.2 & 3 claiming a sum of Rs.22.11 Lakhs.

The suit was transferred to the Debt Recovery Tribunal. The appellant did not appear before the Tribunal and finally an ex-parte decree was passed against it, and

a recovery certificate was issued by the competent authority under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The prayer of appellant for setting aside ex-parte decree was rejected consistently by all the courts.

After having lost upto this Court, the appellant initiated another round of litigation. The matter came up before the appellate Tribunal which set aside the said ex-parte decree on the reasoning that, the claim in question was for damages in tort and not a debt, and also that it was beyond the scope of the jurisdiction vested in the Debt Recovery Tribunal under s.17(1) of the Act.

The High Court, however, held that, even claim for damages would fall well within the jurisdiction of the Debt Recovery Tribunal in the facts of the case, and set aside the judgment of the appellate Tribunal.

In appeal to this Court the main stand of the appellant was in relation to the jurisdiction and lack of knowledge of the fact that the goods in stock were hypothecated to the Bank along with the plant and machinery. While pressing into service the definition of the word 'debt' appearing in s.2(g) of the Act, it was vehemently contended by the appellant that the Debt Recovery Tribunal lacked inherent jurisdiction to entertain and decide the claim of respondent no.1 against the appellant. It was contended that the appellant was neither a borrower nor was there any kind of privity of contract between it and respondent no.1-bank; and as such, money claimed from them was not a 'debt' and, therefore, rigors of the recovery procedure under the provisions of the Act could not be enforced against the appellant.

Partly allowing the appeal, the Court

HELD: 1.1. From the documentary evidence on record, it is clear that all the correspondences and

conversations between respondent nos.2 and 3 on the one hand, and the appellant on the other had been without any intimation to the respondent no.1-Bank. In fact, all this had been done behind the back of the Bank. Another relevant aspect of the matter is the conduct of the appellant. This Court has serious issues that the appellant, after taking possession of the premises, had not come to know about the goods being hypothecated to the Bank. Owing to the sale of goods, complete knowledge, that the goods were hypothecated to the Bank is attributable to the appellant and hence, they could not have sold the said goods without permission of the Bank. [Paras 11 and 12] [1012-C-F; 1014-C-D]

1.2. It is an accepted precept of appreciation of evidence that a party which withholds from the Court best evidence in its power and possession, the Court would normally draw an adverse inference against that party. In any case, the *bonafide* of such a party would apparently be doubted. The appellant was possessed of best evidence in regard to the goods of which they had taken possession, in fact were hypothecated to the Bank. These goods including machines were sold by the appellant prior and subsequent to the issue of the advertisement. Thus, the best evidence in this regard, was obviously in appellant's power and possession which they did not produce before the Court despite prolonged litigation. As such, there is no hesitation in drawing some adverse inference against the appellant in this behalf. [Para 14] [1016-F-H; 1017-A-B]

1.3. The appellant took no remedial or *bonafide* steps even after it had admittedly come to know that the goods in question were hypothecated to the Bank. On the contrary, it issued advertisement for sale of hypothecated goods. On the face of this fact, they had no preferential right to sell the goods. They had been informed that possession of the property as well as the goods have

been taken unauthorizedly. Even if it is assumed that certain amounts were due to the appellant from respondent nos. 2 and 3 on account of licence fee, still they could not have brushed aside the charge of the Bank over the goods and machinery in question. Also in the alleged leave and licence agreement, there was no clause, at least none has been brought to the notice of this Court, that the appellant would have charge over the goods and machinery, in the event of default in the payment of licence fee. In other words, the charge of the Bank was binding upon the appellant. [Para 15] [1017-H; 1018-A-D]

1.4. From the documentary evidence, it is clear that the parties had the knowledge of the fact that respondent nos.2 and 3 enjoyed the financial assistance from the Bank and the goods were hypothecated to it. Even as per the statement of respondent nos.2 and 3, the appellant sold the hypothecated goods with complete knowledge. The goods in question, therefore, were disposed off by the appellant either in collusion with respondent nos.2 and 3 or at its own but with the knowledge that the goods were hypothecated to the Bank. Thus, to that extent, the liability of the appellant cannot be disputed. [Paras 17 and 18] [1019-C-E]

1.5. The Bank had been negligent and, to some extent, irresponsible, in invoking its rights and taking appropriate remedy in accordance with law. Mere irresponsibility, on the part of the Bank, however, would not wipe out the rights of the Bank in law. Without the consent of the Bank, no person can utilize the hypothecated goods for his own benefit or sale by the borrower or any person connected thereto. [Para 19] [1019-G-H]

1.6. Physical domain over the hypothecated goods is no way a *sine qua non* for enforcing Bank's rights

against the borrower. It was obligatory upon the appellant to deal with the goods only with the leave and permission of the Bank. Absence of such consent in writing obviously resulted in the breach of Bank's rights. [Para 20] [1020-G-H; 1025-A]

1.7. However, the entire suit could not have been decreed against the appellant. The respondent Bank was entitled to a limited relief, vis-à-vis, its hypothecated stocks, goods and machinery, if any. The cause of action in favour of the Bank and against appellant, at best, could be limited to the hypothecated stock and goods, as beyond that, there is no averment in the plaint which would justify grant of any larger relief in their favour. [Para 13] [1015-D-F]

Indian Oil Corporation v. NEPC India Ltd., **(2006) 6 SCC 736, referred to.**

2.1. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was enacted primarily for the reasons that, the Banks and financial institutions should be able to recover their dues without unnecessary delay, so as to avoid any adverse consequences in relation to the public funds. Under s.2(g), a claim has to be raised by the Bank against any person which is due to Bank on account of/in the course of any business activity undertaken by the Bank. Some of the general expressions used by the framers of law in this provision are "any liability"; "claim as due from any person"; 'during the course of any business activity undertaken by the Bank"; "where secured or unsecured"; and lastly "legally recoverable". All the above expressions used in the definition clause clearly suggest that, expression 'debt' has to be given general and wider meaning, just to illustrate, the word 'any liability' as opposed to the word 'determined liability' or 'definite liability' or 'any person' in contrast to 'from the

debtor'. The expression 'any person' shows that the framers do not wish to restrict the same in its ambit or application. The legislature has not intended to restrict to the relationship of a creditor or debtor alone. General terms, therefore, have been used by the legislature to give the provision a wider and liberal meaning. The plain reading of s.2(g) of the Act suggests that legislature has used a general expression in contra distinction to specific, restricted or limited expression. This means that, the legislature intended to give wider meaning to the provisions. Larger area of jurisdiction was intended to be covered under this provision so as to ensure attainment of the legislative object, i.e. expeditious recovery and providing provisions for taking such measures which would prevent the wastage of securities available with the banks and financial institutions. It will be difficult for the Court, even on cumulative reading of the provision, to hold that the expression should be given a narrower or restricted meaning. What will be more in consonance with the purpose and object of the Act is to give this expression a general meaning on its plain language rather than apply unnecessary emphasis or narrow the scope and interpretation of these provisions, as they are likely to frustrate the very object of the Act. [Paras 22, 23, 24 and 25] [1021-F; 1022-A-H; 1023-A-B]

2.2. It is clear that the word 'debt' under s.2(g) of the Recovery Act is incapable of being given a restricted or narrow meaning. The legislature has used general terms which must be given appropriate plain and simple meaning. There is no occasion for the Court to restrict the meaning of the word 'any liability', 'any person' and particularly the words 'in cash or otherwise'. In the present case, the documentary and oral evidence on record clearly established that the Bank has raised a financial claim upon the principal debtor, as well as upon the person who had intermeddled and/or at least dealt

with the charged goods without any authority in law. Not only this, the appellant had sold the hypothecated goods and stocks by public auction, despite the fact the appellant had due knowledge of the fact that the goods were charged in favour of the Bank. Another aspect of this case which required to be considered by this Court is, what was intended to be suppressed by the legislature by enacting the Act, and thereafter, by amending various provisions, including s.2(g). Obviously, the mischief which was intended to be controlled and/or prevention of wastage of securities provided to the Bank, was the main consideration for such enactment. The purpose was also to prevent wrong doers from taking advantage of their wrong/ mistakes, whether permissible in law or otherwise. These preventive measures are required to be applied with care and purposefully in accordance with law to ensure that the mischief, if not entirely extinguished, is curbed. [Para 36] [1029-E-H; 1030-A-E]

2.3. Maxim *"Nullus commodum capere potest de injuria sua propria"* has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case respondent nos. 2 & 3 and the appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon respondent Nos. 2 & 3 and in any case on the appellant.

The claim raised by respondent no.1- Bank falls well within the ambit and scope of s. 2(g) of the Act and the jurisdiction of the Debt Recovery Tribunal cannot be ousted on this ground. [Paras 37 and 40] [1030-F-G; 1033-F]

2.4. The provisions of s.2 (g) have to be construed,

so as to give it liberal meaning. The general expressions used in this provision will have to be understood generally. In the considered view of this Court, the claim of the Bank relatable to the hypothecated goods was well within the jurisdiction of the Tribunal exercising its power under s.17 of the Act. [Para 41] [1033-G-H; 1034-A]

Bank of India v. Vijay Ramniklal **AIR 1997 Gujarat 75 – distinguished.**

State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal & Ors. **(2004) 5 SCC 155;** *Raman Lal Bhailal Patel & Ors. v. State of Gujarat* **(2008) 5 SCC 449;** *Greater Bombay Coop. Bank Ltd. v. United Yarn Tex (P) Ltd. & Ors.* **(2007) 6 SCC 236;** *Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors.* **(2003) 2 SCC 455;** *United Bank of India v. Debt Recovery Tribunal & Ors.* **(1999) 4 SCC 69;** *P.S.L. Ramanathan Chettiar & Ors. v. O.R.M.P.R.M. Ramanathan Chettiar* **AIR 1968 SC 1047;** *Union of India v. Raman Iron Foundry* **(1974) 2 SCC 231;** *State Bank of Bikaner & Jaipur v. Ballabh Das & Co. & Ors.* **(1999) 7 SCC 539 and** *Ashok Kapil v. Sana Ullah (Dead) and Ors.* **1996 (6) SCC 342, referred to.**

3.1. There is another important facet of this case which cannot be ignored by the Court. It relates to the conduct of the respondent Bank and its officers/officials. The witnesses appearing on behalf of the Bank had stated that, at the stage of appraisal report itself, the Bank had come to know, that respondent nos. 2 and 3 have a leave and license agreement with the appellant. Despite that, and without proper verification, as it appears from the record, heavy loan was sanctioned and disbursed to the above respondents. Even thereafter, the Bank and its officers/officials appear to have taken no serious steps to ensure that the goods hypothecated to the Bank are not disposed off without its consent. The officers/officials of the Bank, even after knowing about the handing over

of the possession of the property including the hypothecated goods to the appellant and having communicated the same to the appellant, made no serious efforts to recover its debt and ensure that the goods are not disposed off, as the suit itself was filed for recovery of the amount after serious delay. These facts, to a great extent, are even confirmed in the affidavit filed on behalf of the Bank before this Court. There is no doubt that the Bank could have protected its interest and ensured recovery while taking due caution and acting with expeditiousness. There is definite negligence on the part of the concerned officers/officials in the Bank. They have jeopardized the interest of the Bank and consequently the public funds, only saving grace being that orders were passed by the competent forum, requiring the appellant to deposit some money in the suit for recovery of more than 22 lac which was filed by the Bank. [Para 42] [1034-B-H; 1035-A]

3.2. The concerned quarters in the Bank also failed to act despite the advertisement for sale of the hypothecated material given by the appellant, whereafter the machines like CTC is said to have been sold at a throwaway price. All these facts indicate definite negligence and callousness on the part of the concerned quarters. The legislative object of expeditious recovery of all public dues and due protection of security available with the Bank to ensure pre-payments of debts cannot be achieved when the officers/officials of the Bank act in such a callous manner. There is a public duty upon all such officers/officials to act fairly, transparently and with sense of responsibility to ensure recovery of public dues. Even, an inaction on the part of the public servant can lead to a failure of public duty and can jeopardize the interest of the State or its instrumentality. [Para 42] [1035-B-D]

3.3. The scheme of the Recovery Act and language

of its various provisions imposes an obligation upon the Banks to ensure a proper and expeditious recovery of its dues. In the present case, there is certainly *ex facie* failure of statutory obligation on the part of the Bank and its officers/officials. In the entire record, there is no explanation much less any reasonable explanation as to why effective steps were not taken and why the interest of the Bank was permitted to be jeopardized. The concept of public accountability and performance is applicable to the present case as well. These are instrumentalities of the State and thus all administrative norms and principles of fair performance are applicable to them with equal force as they are to the Government department, if not with a greater rigor. The well established precepts of public trust and public accountability are fully applicable to the functions which emerge from the public servants or even the persons holding public office. [Para 43] [1035-E-H; 1036-A]

3.4. Inaction, arbitrary action or irresponsible action would normally result in dual hardship. Firstly, it jeopardizes the interest of the Bank and public funds are wasted and secondly, it even affects the borrower's interest adversely provided such person was acting bonafide. Both these adverse consequences can easily be avoided by the authorities concerned by timely and coordinated action. The authorities are required to have a more practical and pragmatic approach to provide solution to such matters. The concept of public accountability and performance of functions takes in its ambit proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State instrumentalities and/or by the financial institutions. [Para 44] [1036-C-E]

3.5. The principles of public accountability and transparency in State action even in the case of

appointment, which essentially must not lack *bonafide* was enforced by the Court. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable both for their inaction and irresponsible actions. What ought to have been done, if not done, responsibility should be fixed on the erring officers then alone the real public purpose of an answerable administration would be satisfied. [Para 44] [1036-F-G]

3.6. The doctrine of full faith and credit applies to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is known fact that, in transactions of the Government business, none would own personal responsibility and decisions are leisurely taken at various levels. The principle of public accountability is applicable to such officers/officials with all its vigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, but are *ex facie* discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision making process but in the decision as well. Every public officer is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance. It needs to be seen in the facts and circumstances of the present case, why and how the interest of the Bank has been jeopardized, in what circumstances the loan was sanctioned and disbursed despite some glaring defects having been exposed in the appraisal report. Significant element of discretion is vested in the officers/officials of the Bank while sanctioning and disbursing the loans but this discretion is circumscribed by the inbuilt commercial

principles/restrictions as well as that such decisions should be free from arbitrariness, unreasonableness and should protect the interest of the Bank in all events. As regards, this aspect, it is for the appropriate authorities in the Bank to examine the matter from all quarters and then to take appropriate action against the erring officers/ officials involved in the present case, that too, in accordance with law. [Para 45] [1036-A; 1037-A-G]

State of Bihar v. Subhash Singh **(1997) 4 SCC 430;** *Centre for Public Interest Litigation & Anr. v. Union of India & Anr.* **(2005) 8 SCC 202 and** *State of Andhra Pradesh v. Food Corporation of India* **(2004) 13 SCC 53, relied on.**

4. The appellants would be liable to pay to the respondent Bank a sum of Rs. 9,63,975/-. (approximate value of the hypothecated stock sold by the appellants) with interest at the rate of 6% per annum. [Para 46] [1038-A-B]

Case Law Reference:

(2006) 6 SCC 736	**referred to**	**Para 19**
(2004) 5 SCC 155	**referred to**	**Para 26**
(2008) 5 SCC 449	**referred to**	**Para 27**
(2007) 6 SCC 236	**referred to**	**Para 28**
(2003) 2 SCC 455	**referred to**	**Para 28**
(1999) 4 SCC 69	**referred to**	**Para 29**
AIR 1968 SC 1047	**referred to**	**Para 31**
(1974) 2 SCC 231	**referred to**	**Para 31**
(1999) 7 SCC 539	**referred to**	**Para 32**
1996 (6) SCC 342	**referred to**	**Para 37**
AIR 1997 Gujarat 75	**distinguished**	**Para 38**

(1997) 4 SCC 430	**relied on**	**Para 43**
(2005) 8 SCC 202	**relied on**	**Para 44**
(2004) 13 SCC 53	**relied on**	**Para 45**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4029 of 2010.

From the Judgment & Order dated 12.10.2007 of the High Court of Calcutta is Revisional Application C.O. No. 554 of 2007.

R. F. Nariman, Pratap Venugopal, Surekha Raman (for K.J. John & Co.) for the Appellant.

Jaideep Gupta, Bijoy Kumar Jain, A.K. Jain, Pankaj Jain for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. While pressing into service the definition of the word 'debt' appearing in Section 2 (g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short as the 'Recovery Act'), it is vehemently contended before us that the Debt Recovery Tribunal (for short the 'Tribunal') lacks inherent jurisdiction to entertain and decide the claim of the Bank against the appellant. The appellant was neither a borrower nor was there any kind of privity of contract between the two. As such, money claimed from them was not a 'debt' and, therefore, rigors of the recovery procedure under the provisions of the Recovery Act could not be enforced against the appellant. This is a submission which, at the first blush, appears to be sound and acceptable. But, once it is examined in some depth and following the settled canons of law, one has to arrive only at a conclusion that the contention is without any substance and merit. At the very outset, as a guiding principle we may refer to the maxim '*a verbis legis non est recedendum*' but before

we proceed to examine the merit or otherwise of the principal contention raised before us, it will be necessary for us to refer to the basic facts giving rise to the present appeal, particularly, in view of the fact that it has a wretched and long history which began in the year 1988.

FACTS

3. Appellant is a company duly incorporated under the provisions of the Companies Act, 1956, while Respondent No. 1, Allahabad Bank is a body constituted under the Banking Companies (Acquisition and Transport of Undertakings) Act, 1976. Respondent No. 3 in the present appeal is a proprietorship firm of Respondent No. 2. The appellant company is stated to have entered into an agreement on 16th August, 1983 with respondent Nos. 2 & 3, granting licence in their favour to use premises at Jainkunj at Goragachha Road, Kolkata (hereinafter referred to as 'the premises') for a consideration of Rs.12,000/- payable to the appellant, along with the plant and machinery as well as their trade mark "OSBOURNE". It is further the case of the appellant that they had no knowledge of the fact that, respondent Nos. 2 & 3 had availed certain cash credit facility and had hypothecated their raw materials, semi-finished and finished products to Bank. However, on or about 28th February, 1987, the said respondents had requested the appellant to take over the possession of the said premises along with the closing stock lying therein. This was so requested because respondent Nos. 2 & 3 had not paid the licence fee for the use and occupation of the premises, goods etc. as agreed and further vide letter dated 23rd July, 1987, they stated that appellant could sell the stocks as well as lathe machine lying in the factory premises and adjust the sale proceeds thereof towards the arrears of licence fee. After taking possession of the factory premises, the appellant prepared an inventory of the stock in possession and as alleged by them, they had no knowledge that these stocks had been hypothecated by the said respondents in favour of the Bank. The letter dated 7th August, 1987 has been

annexed by the appellant in support of such averment. It appears from the record that the respondent Bank vide its letter dated 21st August, 1987 wrote to respondent Nos. 2 & 3 raising an issue as to how the possession of the stocks and machinery was given to the appellant. This was done in response to the letter of respondent Nos. 2 & 3 dated 18th August, 1987 and copy thereof was sent to the appellant while referring to the letter dated 7th August, 1987 addressed by the appellants to the other respondents. It will be useful to reproduce the relevant extract of the letter dated 21st August, 1987 which reads as under:

> "We acknowledge receipt of your letter dated 18.8.1987 along with enclosures.
>
> In this regard we fail to understand as to how you have permitted M/s Eureka Forbes Limited to take possession of your factory at 1, Goragacha Road, Kolkata – 700 043, the stocks and machineries of which are already hypothecated to us. And again you are advising us not to visit the factory at the moment which we are requesting you to do the same reputedly. Since April, 1986, you are also not submitting the stock statement and you have virtually stopped all your banking operations through us. Now we observe from the stock statement forwarded to us as enclosure that there are good amount of stock still lying at the factory."

4. To the above letter, the appellant responded vide its reply dated 23rd September, 1987 saying that the factory belongs to them and they had given the same on licence to respondent No. 3 and when the possession was handed over back to them certain stocks and machinery belonging to the respondent No. 3 were lying in the factory. They had made a specific request that these should be sold and adjusted towards the licence fee and the surplus money, if any, should be refunded to them. The respondent Bank claimed that they had a charge over the movable assets, in particular, the CTC

machine which appellant had disposed off. For the sale of CTC machine, they had issued an advertisement on 12th March, 1988 and the same was sold for Rs.1,48,975/-.

5. The Bank filed a suit in the District Court at Alipore against the present appellant and respondent Nos. 2 & 3 claiming a sum of Rs.22,11,618.62. In this suit, the present appellant filed a written statement making a preliminary objection that there was no privity of contract between the Bank and the present appellant. That it was not a borrower of the Bank and had no dealings with them as such, the suit was barred for misjoinder of parties and in fact no suit could lie against the present appellant. The plea of suit being barred by time, the principles of estoppel, waiver and acquiescence was also taken. It was stated on merits, that neither they were aware of any transaction between plaintiff Bank and respondent Nos. 2 & 3 nor of any charge over the machinery and equipment etc. The appellant denied the allegations made against them. Most of the paragraphs were denied for want of knowledge and emphasis was laid only on the above stated two averments. Appellant also averred that the Bank was trying to cover up lapses of its own officials by pressurizing them. It could not have accepted, as security, the factory or machinery as it was owned by the appellant and it had not given any consent for that purpose. This suit came to be transferred after the provisions of the Recovery Act came into force in the year 1994. Upon transfer it was numbered as T.A. No. 15/1994. The appellant was served with a notice from the Tribunal and it appointed one M/s Mallick and Palit as its Advocate to appear and pursue the case on its behalf. The appellant did not appear before the Tribunal and after some time the proceedings were carried on in their absence. The evidence was recorded and finally an ex-parte judgment was passed against the appellant on 15th June, 1995. In furtherance to the ex-parte judgment, a Recovery Certificate No. 48 of 1995 was issued by the competent authority under the provisions of the Act on 30th June, 1995. The appellant claims to have taken steps for setting aside the

ex-parte judgment. They filed a writ petition before the High Court of Kolkata, (being Writ Petition No. 1804 of 1995), challenging the constitutional validity of the provisions of the Recovery Act and also prayed for stay of execution of the ex-parte judgment dated 15th June, 1995. An interim order dated 3rd November, 1995 was passed in favour of the appellant directing that the execution proceedings should go on, however no final order be passed without the leave of the Court. The Tribunal vide its Order dated 4th March, 1996, appointed a receiver to prepare an inventory of hypothecated goods and a warrant of attachment was also issued. The High Court of Kolkata, again on application filed by the appellant directed the receiver only to make inventory of the goods and not to take any further action. During the pendency of these proceedings, the Recovery Officer upon further application by the respondent Bank, directed the receiver to make inventory of all the properties vide its Order dated 17th August, 1996. This order was challenged by the appellant before the Calcutta High Court which stayed further proceedings.

6. According to the appellant, it was advised to initiate proceedings to set aside the ex-parte decree and Recovery Certificate and hence an application was filed before the Tribunal for recalling the ex-parte order. Along with this, an application for condonation of delay was also filed. Consequent upon the dismissal of the application for condonation of delay, the appellant filed an appeal before the Debt Recovery Appellate Tribunal (for short the 'Appellate Tribunal') against the order dated 19th August, 1999, passed by the Tribunal. The same was also dismissed by the Appellate Tribunal vide its judgment dated 1st June, 2001. This again was assailed before the High Court under Article 227 of the Constitution of India. The same was also dismissed by the High Court of Kolkata vide Order dated 28th November, 2001. Still unsatisfied, the appellant filed a Special Leave Petition before this Court, being SLP (C) No. 7883 of 2002 against the Order of the High Court of Kolkata which was dismissed as withdrawn by this Court vide

Order dated 26th April, 2002. In other words, the Order of the Tribunal declining to set aside the ex-parte decree attained finality. The Revision Petition filed by the appellant before the High Court of Kolkata also came to be dismissed finally vide Order dated 2nd April, 2003. In furtherance to its zeal to somehow get the ex-parte decree set aside, the appellant preferred an appeal before the Appellate Tribunal against the order of the Tribunal dated 15th June, 1995. The Order dated 16th April, 2004 of the Appellate Tribunal was challenged before the learned Single Judge of the High Court. In those proceedings, an application for amendment to bring the subsequent events on record, was filed which was dismissed by the learned Single Judge vide Order dated 11th June, 2004. Against this Order, an appeal was filed before the Division Bench of Kolkata High Court which also met the same fate. However, the Division Bench while dismissing the appeal observed that the Order passed by the learned Single Judge was correct in law but it would not prevent the appellant from resorting to any remedy which is available to it in accordance with law.

7. In the Appeal preferred by the appellant, the Appellate Tribunal vide its Order dated 15th July, 2003 directed the appellant to deposit a sum of Rs.5,00,000/- as condition precedent for entertaining the said appeal. This sum was deposited and a reply affidavit to this application was filed on behalf of the Bank. Vide Order dated 16th April, 2004, the Appellate Tribunal dismissed the application for condonation of delay in filing the appeal. The order dated 16th April, 2004 of the Appellate Tribunal was challenged in a Civil Revision Application before the High Court of Kolkata. The High Court vide its interim Order dated 11th June, 2004 directed the appellant to deposit a sum of Rs.15,54,118.62 as a condition for hearing the appeal and the same was deposited. This application was against the interim order and the appeal remained pending before the Chairperson of the Appellate

Tribunal. Finally the appeal was allowed vide Order dated 28th December, 2006 by the Appellate Tribunal. While setting aside the ex-parte decree the Appellate Tribunal held as under:-

> "Having said all that, to my mind, the net result is, the ex-parte decree in question passed against the appellant, Eureka Forbes Ltd. by the Debts Recovery Tribunal, Calcutta, is without jurisdiction and therefore, the appeal must succeed. Consequently, the entire sum of money appropriated by the respondent-bank as per orders of the Hon'ble Court in C.O. No. 1568 of 2004 will be refundable together with interest at the lending rate also as per the said orders of the Hon'ble Court.
>
> Accordingly, the decree in question dated 15th June, 1995 in T.A. 15 of 1994 passed by the Debts Recovery Tribunal, Calcutta, and certificate in pursuance thereof as against the appellant, Eureka Forbes Ltd., is hereby set aside. The entire sum appropriated by the respondent bank in terms of the orders of the Hon'ble Court in C.O. No. 1568 of 2004 be refunded to the appellant by the bank together with interest at the lending rate within a period of three months from date. There shall be no orders as to costs."

8. Respondent Bank challenged the Order of the Appellate Tribunal under Article 227 of the Constitution of India being C.O. No. 554 of 2007, before the learned Single Judge of the Kolkata High Court which vide its judgment dated 12th October, 2007, restored the judgment and the order of the Tribunal. Aggrieved therefrom, the appellant preferred the appeal before the Division Bench of Kolkata High Court which, vide its Order dated 11th February, 2008, dismissed the appeal and sustained the Order of the learned Single Judge giving rise to the present Special Leave Petition.

9. The challenge to the impugned orders is *inter alia* on the ground that, Tribunal had no jurisdiction to entertain such

an application filed on behalf of the Bank as there was no privity of contract between the appellant and the Bank. Besides the issue of jurisdiction, the stand taken is that the Bank had not proved on record by way of any evidence that anything is due to it from the appellant. All the witnesses examined on behalf of the Bank have stated nothing to the above mentioned effect. In any case, in the subsequent proceedings the decree should have been set aside, as nothing in law could be stated to be due from the appellant. In the suit, which was decreed ex-parte by the Tribunal on 15th June, 1995, it was specifically averred in the plaint that, Respondent No. 3 along with other defendants illegally, erroneously, arbitrarily and whimsically had taken possession of the entire stock, machinery, equipments etc. without knowledge of the respondent Bank. The respondents had not allowed inspection of the factory and verification of the stock and other requisite elements. In fact, the appellant has misguided the Bank while informing vide their letter dated 18th August, 1987, that the workers had forcibly occupied the factory. Reference was also made to the fact that some stocks, plant and machine belonging to respondents had been given to the appellant for sale etc. as per the agreement between the parties. The goods, stocks were hypothecated to the Bank and according to the Bank, all the defendants in the suit were liable to pay the dues of the Bank. On this premise, the Bank prayed for decree for the entire amount and also interest @ 18.05% per annum. A specific prayer was made that the Bank has a valid and subsisting charge over the properties of defendant Nos. 1 & 2 for the due repayment to it. A decree for realization of hypothecated goods by and under the direction of the Court was also prayed for. We have already noticed above that there was denial of the allegations made in the plaint.

Merits of the case relatable to the factual matrix

10. The main stand of the appellant was in relation to the jurisdiction and lack of knowledge of the fact that the goods in stock were hypothecated to the Bank along with the plant and

machinery. The two important documents, dated 16th August, 1983 and 28th February, 1987, which have been placed on record, are of some significance. The agreement dated 16th August, 1983 states the conditions of the leave and licence agreement between respondent Nos. 2 & 3 and the appellant. It was indicated therein that they could use the plant and machine in the premises and it was for a period of three years with a deposit of Rs. 1,00,000/- and Rs.12,000/- per month as fee. Under Clause 6, the stocks at the relevant time were to be sold for a consideration of 0.75 lakhs and they were entitled to use the trade mark. However, vide letter dated 28th February, 1987, which is after the expiry of a period of more than three years, it was indicated by Respondent Nos. 2 & 3 to the appellant that, they wanted to give back possession of factory and there were stocks of about Rs.7,00,000/- which included raw material, semi-finished and finished goods, lathe worth Rs.1,15,000/- which could be sold to a subsequent licencee. Relevant paragraphs of this letter can be usefully reproduced at this stage:

> "2. We are having stocks worth about Rs.7 lacs which includes raw material, semi-finished & finished goods. We would be grateful if your subsequent licencee agree to take oil the stocks plus one Lathe worth Rs.1,15,000/- as we would be willing to negotiate with them.
>
> 5. We would be pleased to settle our account with you as soon as the factory stocks are sold to your future licences and also the worker's retrenchment dues. We state this as we have suffered heavy losses due to continues agitations and non-payment of due by our customers and also cancellation of our orders."

11. Another letter written by Respondent Nos. 2 & 3 to the appellant on 23rd July, 1987 referred to certain telephonic conversation. It was specifically recorded in it that possession of the factory will be handed over on 31st July, 1987. It was also

stated that there was financial crisis and that the stocks worth Rs.7,00,000/- and the lathe worth Rs. 1,15,000/- etc. could be sold and they will not be able to pay any licence fee in future. On 7th August, 1987, the possession of the premises was taken by the appellant and a list had been prepared, copy of the list placed on record shows the physical stock as on 7th August, 1987 and it contains bearings, plumber block, bearing of milling MC, GM Brass and Segment, old Osborn, C.I. of Milling M.C., C.I. components, AC IMCA machinery etc. It is interesting to note that all these correspondences and conversations between the parties had been without any intimation to the respondent Bank. In fact, all this had been done behind the back of the Bank. Besides this, the Bank had led oral and documentary evidence in support of its claim. The Bank had written the letter dated 21st August, 1987 in response to the letter of Respondent Nos. 2 & 3 dated 18th August, 1987, but the letter dated 18th August, 1987 has not been placed on record. However, vide letter dated 21st August, 1987 copy whereof was sent to the appellant as well, the bank had informed them that it had given the financial assistance to respondent Nos. 2 & 3 and the Bank was having charge over the stocks and machinery which had been hypothecated to the Bank. The Bank further expressed surprise as to how the appellant had taken possession of the unit. Another relevant aspect of the matter would be the conduct of the present appellant. We have serious issues that the appellant, after taking possession of the premises, had not come to know about the goods being hypothecated to the Bank. Advertisement for the sale of machinery was issued as late as on 12th August, 1988. In other words, they had sold goods, even machines, like CTC at a throw away price, even after having complete knowledge about the hypothecated goods. Thereafter, an ex-parte decree was passed, however they did not take any steps to get the same set aside, except when a recovery certificate had been issued by the competent authority. Thereafter, their prayer for setting aside ex-parte decree was rejected consistently by all

the courts. When the High Court of Kolkata was dealing with the Revision Petition filed against the Order dated 1st June, 2001, passed by the Appellate Tribunal, the Court had specifically noticed the conduct of the appellant and had observed as under:-

> "After hearing Mr. Mitra appearing on behalf of the petitioner and after going through the material on record I fully agree with the Tribunal below that the present proceedings have been initiated by the petitioner Balu: 10 with the sole object of delaying the execution of a decree passed in the year 1995. It has been rightly pointed out by those Tribunals that after filing written statement in the suit in 1989 till the decree was passed in 1998 the Tribunal below, the petitioner took no step in the original proceedings. There is no scope of doubt that notice of the proceedings was served through the Tribunal and the petitioner entered appearance through a lawyer. No reason has been assigned in the application what prevented the learned advocate-on record of the petitioner from contesting the proceedings before the Tribunal. In paragraph 5 of the application before the Tribunal it has simply been state that "although the petitioner engaged Mr. H.P. Balu of M/s. Mallick & Palit, solicitors to look after the petitioner's interest in the said matter, the said advocates chase not to appear in the proceedings for and on behalf of the petitioner and consequently the certificate was passed by the tribunal in favour of the plaintiff. It appears that the very same advocate-on-record has preferred writ application before this Court challenging the vires of the act and had also filed subsequent application under Article 227 of the Constitution of India impugning order passed in execution proceedings and the petitioner has obtained interim orders in those proceedings before this court. It is not the case of the petitioner that it has abandoned those proceedings and by the advice of the

> new lawyer has confined itself to the present proceedings. It appears that although those matters are still pending, the petitioner by filing instant proceedings has tried to find out an additional avenue for stalling the execution proceedings."

12. After having lost upto this Court, another round of litigation started, claiming it to be in furtherance to the Order of Kolkata High Court, granting them liberty to take steps in accordance with law. It is in furtherance of this observation of the High Court that, the proceedings again started from the Appellate Tribunal and now the present petition has been filed before this Court. We have already noticed that owing to the sale of goods, complete knowledge, that the goods were hypothecated to the Bank is attributable to the appellant and hence, they could not have sold the said goods without permission of the Bank. Admittedly nothing of this kind was done and the Bank was kept in dark.

13. The application for setting aside the ex-parte decree had been filed by the appellant along with an application for condonation of delay in filing the said application. However, the application for condonation of delay was rejected and subsequently the ex-parte decree was not set aside. This order of the Tribunal was neither interfered by the High Court nor by this Court in a Special Leave Petition preferred by the appellant. In view of the observations made by the High Court in the order, the appellant filed another application for setting aside the decree on the ground that the Tribunal had no jurisdiction. The said application came to be allowed by the Appellate Tribunal which accepted the contention raised on behalf of the appellant. The reasoning recorded in the judgment of the Tribunal was that, it was a claim for damages in tort and was not a debt, and also that it was beyond the scope of the jurisdiction vested in the Tribunal under Section 17(1) of the Recovery Act, as there were insufficient allegations or evidence. No liability in terms of the debt can be fastened on the appellant. This reasoning of the

Tribunal was set aside by the High Court of Kolkata in the impugned judgment and observed that, even claim for damages would fall well within the jurisdiction of the Tribunal in the facts of the case, and particularly, when the averments remained uncontroverted and no evidence was led by the appellant. The hypothecated goods at the place of business of Respondent Nos. 2 & 3 were there at the time of handing over of the possession of the factory back to the appellant, and this fact can hardly be disputed on record. A finding was recorded in the proceedings that appellant was an intermeddler and there was collusion between the appellant and Respondent Nos. 2 & 3. Based on this finding, it was further held that the case of the Bank was fully covered under the expression "debt", "any liability", "any person" and accordingly, the Court set aside the judgment of the Tribunal. In the light of the facts and circumstances of the case, we are unable to find the stand of the High Court to be erroneous. Of course, to some extent, the entire suit could not have been decreed against the appellant. The respondent Bank was entitled to a limited relief, vis-à-vis, its hypothecated stocks, goods and machinery, if any. It was not even the case of the Bank before the Tribunal that the present appellant was a borrower and in discharge of its final liability towards Bank the entire suit was liable to be decreed. The cause of action in favour of the Bank and against appellant, at best, could be limited to the hypothecated stock and goods, as beyond that, there is no averment in the plaint which would justify grant of any larger relief in their favour. We would shortly discuss the legal aspects as well as the reasoning in law, in this regard. The Bank has examined merely four witnesses in support of its case. There is no statement or note of any of these witnesses for imposition of any liability upon the appellant, except to the extent of goods hypothecated; such a conclusion can even be drawn from the letters dated 28th February, 1987, 23rd July, 1987, 7th August, 1987 and 21st August, 1987. The correctness of these letters has never been disputed by any of the parties and it was admitted by the appellant that the advertisement for sale of goods was issued

on 12th March, 1988. Certainly and apparently, the appellant had complete knowledge, that the entire stock, goods, machinery etc. had been hypothecated to the Bank. Certainly, there has been a definite lapse on the part of the Bank, as the loan facility was granted in the year 1984, i.e. subsequent to the execution of the leave and licence agreement dated 16th August, 1983. It is obvious from the facts appearing on record that the loan has been sanctioned in a most casual and undesirable manner without even verifying the basic securities of respondent Nos. 2 & 3.

14. Besides the fact that the present appellant had earlier raised all the pleas in their application for setting aside the ex parte decree which was rejected by the Tribunal, High Court as well as this Court, it also needs to be noticed that except making vague denials in the written statement, which they had filed before the Tribunal at the relevant point of time, they had raised no specific or concrete defence in regard to the sale of hypothecated goods by them. The fact, as already noticed, cannot be disputed that the goods in question which were hypothecated or were under the charge of the Bank have been sold by the appellant. The advertisement issued by them clearly shows that they had invited offers for sale of CTC machines and spares, which itself demonstrates that a number of machines and other goods have been sold by them. It is an accepted precept of appreciation of evidence that a party which withholds from the Court best evidence in its power and possession, the Court would normally draw an adverse inference against that party. In any case, the bona fide of such a party would apparently be doubted. The appellant was possessed of best evidence in regard to the goods of which they had taken possession on 7th August, 1987, in fact were hypothecated to the Bank. These goods including machines were sold by the appellant prior and subsequent to the issue of the advertisement dated 12th March, 1988. Thus, the best evidence in this regard, was obviously in appellant's power and

possession which they did not produce before the Court despite prolonged litigation. As such, we would have no hesitation in drawing some adverse inference against the appellant in this behalf. Another ancillary factor, which the Court has to take into consideration is that, the value declared by respondent Nos. 2 and 3 in relation to stocks, has not been denied specifically, either in correspondence or in the pleadings by the appellant. In the letter dated 28th February, 1987 value of goods worth Rs. 7,00,000/- and lathe machine worth Rs. 1,15,000/- was alleged to be lying in the factory, in addition to other materials. The inventory which was annexed to the letter of 7th August, 1987 refers to various components, parts, bearings etc. but does not refer to CTC machines. Admittedly, the appellants have sold these machines in furtherance to the advertisement dated 12th March, 1988. In short, an amount which cannot be disputed, as is evident from the documentary and oral evidence on record is, Stock A, Stock lying in the premises, 7 lacs lathe machine, Rs.1,15,000/- CTC machine, as sold by the appellant as per their own version, the CTC machine which was sold by the appellant for a sum of Rs. 1,48,975/-, thus, totaling up to Rs. 9,63,975/-. The respondent Bank would be entitled to receive the interest at the rate of 6% per annum from 14th March, 1988 till the date of payment of the amount. We are awarding the same rate of interest which has been awarded by the Tribunal and was accepted by the Bank.

15. It appears that the Bank is acting in a manner which is ex facie not in consonance with the commercial principles and in a most casual and irresponsible manner. The method in which the financial limits have been sanctioned to respondent Nos. 2 and 3 does not stand to reasoning. Admittedly, respondent Nos. 2 and 3 had no title to the property. What verification was done to the appraisal report has been left to imagination. The conduct of the appellant further creates some suspicion in the mind of the Court. The appellant took no remedial or bonafide steps even after it had admittedly come

to know that the goods in question were hypothecated to the Bank. On the contrary, it issued advertisement in March, 1988 for sale of hypothecated goods. On the face of this fact, they had no preferential right to sell the goods. In the letter dated 21st August, 1987, they had been informed that possession of the property as well as the goods have been taken unauthorizedly. Even if it is assumed that certain amounts were due to the appellant from respondent nos. 2 and 3 on account of licence fee, still they could not have brushed aside the charge of the Bank over the goods and machinery in question. Also in the alleged leave and licence agreement, dated 16th August, 1983, there was no clause, at least none has been brought to our notice, that the appellant would have charge over the goods and machinery, in the event of default in the payment of licence fee. In other words, the charge of the Bank was binding upon the appellant. The inventory of the goods had been prepared and signed by the parties. In the letter dated 7th August, 1987, these facts were confirmed in furtherance to the correspondence exchanged between the parties from 28th February, 1987.

16. Ashok Kumar Goswami, Senior Manager, Allahabad Bank, who was examined as witness No. 1 on behalf of the Bank, has stated that the loans were advanced to Respondent Nos. 2 & 3. According to him Exh. 7 is the agreement cum letter of hypothecation for packing credit advance under which the financial assistance was allowed to them. He also proved Exh. 11, statement of stock of finished goods, work in progress, raw-material and machinery executed by Respondent No. 2 for and on behalf of Respondent No. 3. The stocks statements were shown in Exh. 12, while Exh. 13, was a letter written by Respondent No. 2 on 29th May, 1984 to the Bank. He specifically stated that the hypothecated goods were handed over by Respondent Nos. 2 & 3 to the appellant behind the back of the Bank. Another witness, whose statement at this stage can be usefully looked into, is that of Sh. Sankar

Chakraborty, PW-2. Besides stating the general facts of the case, this witness specifically stated, that the Bank had impleaded the appellant, as they had taken possession of hypothecated goods of the Bank and that, the appellant had written a letter to the Bank and they raised a specific claim against it.

17. From the above stated documentary evidence, it is clear that the parties had the knowledge of the fact that respondent nos. 2 and 3 enjoyed the financial assistance from the Bank and the goods were hypothecated to it. Even as per the statement of respondent nos. 2 and 3, the appellant sold the hypothecated goods with complete knowledge. This included hypothecated stock worth Rs. 7,00,000/-, lathe machine of value of Rs. 1,15,000/-, in addition to CTC machine and other spares.

18. The goods in question, therefore, have been disposed off by the appellant either in collusion with respondent nos. 2 and 3 or at its own but with the knowledge that the goods were hypothecated to the Bank. Thus, to that extent, the liability of the appellant cannot be disputed.

LEGAL ASPECTS OF THE CASE:-

19. In continuation of the above factual matrix, now let us examine the principles of law which would be applicable to the facts and circumstances of the case and result thereof. There is, in fact, hardly any dispute before us that the goods in question had been hypothecated to the Bank. The appellant had complete knowledge of this fact, still it went on to sell the goods. The Bank had been negligent and, to some extent, irresponsible, in invoking its rights and taking appropriate remedy in accordance with law. Mere irresponsibility, on the part of the Bank, would not wipe out the rights of the Bank in law. Without the consent of the Bank, no person can utilize the hypothecated goods for his own benefit or sale by the borrower or any person connected thereto. It is nobody's case that the

Bank had consented to such sale. This Court in case of *Indian Oil Corporation v. NEPC India Limited* [(2006) 6 SCC 736] described the meaning of 'entrustment' in relation to hypothecation as follows:

> xxxx xxxx xxxx xxxx
>
> "The creditor may also have the right to claim payment from the sale proceeds (if such proceeds are identifiable and available). The following denifitions of the term 'hypothecation' in P. Ramanatha Aiyar's Advanced Law Lexicon [3rd Edn. (2005), Vol. 2 pp. 2179 and 2180] are relevant:
>
> "Hypothecation—It is the act of pledging an asset as security for borrowing, without parting with its possession or ownership. The borrowers enters into an agreement with the lender to hand over the possession of the hypothecated assets whenever called upon to do so. The charge of hypothecation is then converted into that of a pledge and the lender enjoys the rights of a pledge.
>
> * * *
>
> 'Hypothecation' means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property. [Borrowed from Section 2(n) of Scuritisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002]."

20. Physical domain over the hypothecated goods is no way a *sine qua non* for enforcing Bank's rights against the borrower. It was obligatory upon the appellant to deal with the goods only with the leave and permission of the Bank. Absence of such consent in writing would obviously result in breach of

Bank's rights.

21. The next question of law, that we are called upon to consider, is the ambit and scope of provisions of Section 2(g) of the Recovery Act, on which the entire case of the parties hinges. We have already noticed that the appellant has argued with great vehemence that, there was no privity of contract and they were not covered under the definition of 'debt', and as such, recovery proceedings could not be initiated, much less, recovery could be effected from them under the provisions of the Act. Section 2(g) of the Recovery Act reads as under:

> "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;"

22. The Recovery Act of 1993, was enacted primarily for the reasons that, the Banks and financial institutions should be able to recover their dues without unnecessary delay, so as to avoid any adverse consequences in relation to the public funds. The Statement of Objects and Reasons of this Act clearly state that Banks and financial institutions at present, experience considerable difficulties in recovering loans and enforcements of securities charged with them. The existing procedure for recovery of dues of the Bank and the financial institutions block significant portion of their funds in un-productive assets, the value of which deteriorates with the passage of time. Introduction of similar procedure was suggested by the Tiwari Committee. The Act provided for the establishment of Tribunals and Appellate Tribunals and modes for expeditious recovery

of dues to the Banks and financial institutions.

23. In this background, let us read the language of Section 2 (g) of the Recovery Act. The plain reading of the Section suggests that legislature has used a general expression in contra distinction to specific, restricted or limited expression. This obviously means that, the legislature intended to give wider meaning to the provisions. Larger area of jurisdiction was intended to be covered under this provision so as to ensure attainment of the legislative object, i.e. expeditious recovery and providing provisions for taking such measures which would prevent the wastage of securities available with the banks and financial institutions.

24. We may notice some of the general expressions used by the framers of law in this provision :

(a) any liability;

(b) claim as due from any person;

(c) during the course of any business activity undertaken by the Bank;

(d) where secured or unsecured;

(e) and lastly legally recoverable.

25. All the above expressions used in the definition clause clearly suggest that, expression 'debt' has to be given general and wider meaning, just to illustrate, the word 'any liability' as opposed to the word 'determined liability' or 'definite liability' or 'any person' in contrast to 'from the debtor'. The expression 'any person' shows that the framers do not wish to restrict the same in its ambit or application. The legislature has not intended to restrict to the relationship of a creditor or debtor alone. General terms, therefore, have been used by the legislature to give the provision a wider and liberal meaning.

These are generic or general terms. Therefore, it will be difficult for the Court, even on cumulative reading of the provision, to hold that the expression should be given a narrower or restricted meaning. What will be more in consonance with the purpose and object of the Act is to give this expression a general meaning on its plain language rather than apply unnecessary emphasis or narrow the scope and interpretation of these provisions, as they are likely to frustrate the very object of the Act.

26. In the case of *State of Gujarat and Ors. v. Akhil Gujarat Pravasi V.S. Mahamandal & Ors.* [(2004) 5 SCC 155], this Court was concerned with the question of payment of taxes in relation to the provisions of the Bombay Motor Vehicle Tax Act, 1958. The Court while interpreting the scope of the entries in the legislative lists held that, they should be construed widely and general words used therein must comprehend ancillary or subsidiary matters relating to Schedule VII, Articles 245 and 246. The Court held as under:-

> "In interpreting the scope of various entries in the legislative lists in the Seventh Schedule, widest-possible amplitude must be given to the words used and each general word must be held to extend to ancillary or subsidiary matters which can fairly be said to be comprehended in it. The entries should, thus be given a broad and comprehensive interpretation. In order to see whether a particular legislative provision falls within the jurisdiction of the legislature which has passed it, the Court must consider what constitutes in pith and substance the true subject-matter of the legislation and whether such subject-matter is covered by the topics enumerated in the legislative list pertaining to that legislature."

27. Again in the of case of *Raman Lal Bhailal Patel & Ors. v. State of Gujarat* [(2008) 5 SCC 449], this Court was dealing with the word 'person' appearing in the provisions of

Gujarat Agricultural Land Ceiling Act, 1960. The expression 'person' was defined with the inclusive definition that a person includes a joint family. The Court held that, where the definition is inclusively defining the word, there, the legislative intention is clear that it wishes to enlarge the meaning of the word used in the statute and that such word must be given comprehensive meaning. In law, the word 'person' was stated to be having a slightly different connotation and refers to any entity that is recognized by law as having rights and duties of human beings.

28. In the case of *Greater Bombay Coop. Bank Ltd. v. United Yarn Tex (P) Ltd. & Ors.* [(2007) 6 SCC 236], this Court took the view that, the elementary rule of interpretation of statute is that the words used must be given their plain grammatical meaning, therefore, the Court cannot add something which the legislature has not provided for. Similar view was also expressed by another Bench of this Court in the case of *Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation and Ors.* [(2003) 2 SCC 455], that the Court cannot write anything into the statutory provisions which are plain and unambiguous. A Statute is an edict of the legislature. The language employed in a statute is determinative factor of legislative intent. The first and the primary rule of construction is that, the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said.

29. The learned counsel for the appellant has heavily relied upon the judgment of the *United Bank of India v. Debt Recovery Tribunal & Ors.* [(1999) 4 SCC 69], to contend that the general expression must receive general meaning and in light of this principle, the present proceedings could not have been initiated, much less, recoveries effected under the provisions of the Recovery Act. We shall shortly discuss the merit of this contention.

30. Before we advert to the discussion while applying these

principles of interpretation to the provisions of Section 2 (g) of the Recovery Act, and also examine the merit of the contention raised on behalf of the respondent, it may be interesting to know as to how the word 'debt' has been defined and explained by this Court in different judgments, with different context and under different laws.

31. Years back this Court in the case of *P.S.L. Ramanathan Chettiar & Ors. v. O.R.M.P.R.M. Ramanathan Chettiar* [AIR 1968 SC 1047], explained the expression 'debt' as defined in the Madras Agriculturists Relief Act, 1938. The Court held that the definition appearing in Section 3 (iii) of the Act, despite the fact that it specifically states that 'debt' would not include rent as defined in clause (iv), or 'Kanartham', as defined in Section 3 (1)(1) of the Malabar Tenancy Act, 1929, held that the definition is still of a very wide magnitude and would include 'any liability' due from an agriculturists with the specified expressions. The Court held as under:

> "'Debt' has been defined in Sec. 3 (iii) of the Act as meaning "any liability" in Cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue court or otherwise, but does not include rent as defined in Clause (iv), or 'Kanartham' as defined in Section 3 (1) (1) of the Malabar Tenancy Act, 1929."

In the case of *Union of India v. Raman Iron Foundry* [(1974) 2 SCC 231], this Court quoted as under:

> "The classical definition of 'debt', is to be found in Webb v. Stenton where Lindley, L.J. said: "… a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in future – that is immaterial. There must be an existing obligation to pay a sum of money now or in future."

32. Still, in another case titled as *State Bank of Bikaner & Jaipur v. Ballabh Das & Co. & Ors.* [(1999) 7 SCC 539], the Court was concerned with the un-amended provisions of Section 2 (g) of the Recovery Act. The Court while setting aside the order of the High Court, while dealing with the word 'debt' followed by the words 'alleged as due', held as under:-

> "According to the definition, the term 'debt' means liability which is alleged as due from any person by a bank or a financial institutions or by a consortium of banks or financial institutions. It should have arisen during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force. The liability to be discharged may be in cash or otherwise. It would be immaterial whether the liability is secured or unsecured or whether it is payable under a decree or an order of any civil court or otherwise. However, it should be subsisting and legally recoverable on the date on which proceedings are initiated for recovering the same.
>
> The important words in the definition "alleged as due" have been overlooked by the High Court and, therefore, it has erroneously held that unless the amounts claimed by the Bank are determined or decided by a competent forum they cannot be said to be due and would not amount to "debt" under the Act. What was necessary for the High Court to consider was whether the Bank has alleged in the suits that the amounts are due to the Bank from the respondents, that the liability of the respondents has arisen during the course of their business activity, that the said liability is still subsisting and legally recoverable."

33. As already noticed, this judgment was pronounced by the Court while dealing with the un-amended provisions of Section 2 (g) of the Recovery Act. This section was amended by Act 1 of 2000 and the words 'alleged as due' stood

substituted by the expression 'claimed as due' with effect from 17th January, 2000. This shows the intention of the legislature to significantly introduce definite expression and give emphasis to the claim of the Bank rather than, what is allegedly due or determinatively due to the Bank from its borrowers. In this case, the application of the Bank had been dismissed by the High Court on the ground that it was not maintainable as it was not covered under the definition of the word 'debt'. While setting aside the order of the High Court, this Court held that, the High Court had gone wrong in holding that the application by the Bank was premature and till the Court determines the amount, such application could not be filed by the Bank. This Court clearly stated the dictum that, such application would be maintainable and the amount payable to the Bank does not have to be a determined sum under the provisions of the Recovery Act.

34. Similar contention had been raised before us on the strength of the judgment of this Court in the Case of *United Bank of India* (Supra) on behalf of the appellant. Firstly, we fail to understand as to what advantage the learned counsel appearing for the appellant wishes to draw from this judgment and secondly, this judgment has clearly returned the finding, even on the facts of that case, that application under the provisions of the Recovery Act was maintainable within the scope of Section 2 (g) of the Act. The Court held as under :

> "In view of the rival stands of the parties, the short question that arises for consideration is, as to whether the said claim of the plaintiff can be said to be a claim for recovery of debts due to the plaintiff as provided under Section 17(1) of the Act. The answer of this question in turn would depend upon the meaning of the expression "debt" as defined in Section 2(g) of the Act. Before we examine the two provisions referred to above, it is to be borne in mind that the procedure for recovery of debts due to the banks and financial institutions which was being

> followed, resulted in a significant portion of the funds being blocked. To remedy the locking up of huge funds, the Financial Institutions Bill, 1993", which was passed by Parliament and the Act has come into existence.
>
> The Act and the relevant provisions will have to be construed bearing in mind the objects for which Parliament passed the enactment. The prime object of the enactment appears to be provide for the establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto.
>
> In the case in hand, there cannot be any dispute that the expression "debt" has to be given the widest amplitude to mean any liability which is alleged as due from any person by a bank during the course of any business activity undertaken by the bank either in cash or otherwise, whether secured or unsecured, whether payable under a decree or order of any court or otherwise and legally recoverable on the date of the application. In ascertaining the question whether any particular claim of any bank or financial institution would come within the purview of the tribunal created under the Act, it is imperative that the entire averments made by the plaintiff in the plaint be looked into and them find out whether notwithstanding the specially-created tribunal having been constituted, the averments are such that it is possible to hold that the jurisdiction of such a tribunal is ousted. With the aforesaid principle in mind, on examining the averments made in the plaint, we have no hesitation to come to the conclusion that the claim in question made by the plaintiff is essentially one for recovery of a debt due to it from the defendants and, therefore, is the Tribunal which has the exclusive jurisdiction to decide the dispute and not the ordinary civil court."

35. As is obvious from the above recorded findings, the Court while referring to Section 2 (g), 17(1) and 31 (1) of the Recovery Act, observed that jurisdiction of the Civil Court was barred under the provisions of the Act and the suits or proceedings shall transfer to the Tribunal upon coming into force of the Recovery Act. The Court was primarily concerned with the matters being transferred from Civil Courts to Tribunal, still while referring to the provisions of Section 2 (g), held that the claim of the Bank was covered under the provisions of the Act. The suit, as instituted in the year 1991, had claimed various relief including the claim for damages. The objection raised was that, there was undetermined amount and other relief could not be referred to the Tribunal for adjudication. The suit was subsequently transferred to the Tribunal under the provisions of the Act and the Court while giving wide meaning to the expression 'debt', clearly held that, this expression was of liberal amplitude and there was occasion for the Court to grant a restricted meaning. Thus, in our view, even the case of *United Bank of India* (supra) no way supports the submissions made on behalf of the appellant.

36. On the plain analysis of the above stated judgment of this Court, it is clear that the word 'debt' under Section 2 (g) of the Recovery Act is incapable of being given a restricted or narrow meaning. The legislature has used general terms which must be given appropriate plain and simple meaning. There is no occasion for the Court to restrict the meaning of the word 'any liability', 'any person' and particularly the words 'in cash or otherwise'. Under Section 2 (g), a claim has to be raised by the Bank against any person which is due to Bank on account of/in the course of any business activity undertaken by the Bank. In the present case, Bank had admittedly granted financial assistance to respondent nos. 2 and 3, who in turn had hypothecated the goods, plants and machinery in favour of the Bank. There cannot be any dispute before us that the goods in question have been sold by the appellant without the consent of the Bank. Respondent nos. 2 and 3 have hardly raised any

dispute and resistance, to the claim of the Bank. In fact, even before this Court there is no representation on their behalf. The documentary and oral evidence on record clearly established that the Bank has raised a financial claim upon the principal debtor, as well as upon the person who had intermeddled and/or at least dealt with the charged goods without any authority in law. Not only this, the appellant had sold the hypothecated goods and stocks by public auction, despite the fact the appellant had due knowledge of the fact that the goods were charged in favour of the Bank. Another aspect of this case which required to be considered by this Court is, what was intended to be suppressed by the legislature by enacting the Recovery Act, 1993 and thereafter, by amending various provisions, including Section 2(g) in the year 2000. Obviously, the mischief which was intended to be controlled and/or prevention of wastage of securities provided to the Bank, was the main consideration for such enactment. The purpose was also to prevent wrong doers from taking advantage of their wrong/mistakes, whether permissible in law or otherwise. These preventive measures are required to be applied with care and purposefully in accordance with law to ensure that the mischief, if not entirely extinguished, is curbed.

37. Maxim Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case Respondent Nos. 2 & 3 and the appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon respondent Nos. 2 & 3 and in any case on the appellant. The Bench of this Court in the case of *Ashok Kapil v. Sana Ullah (Dead) and Ors.* [1996 (Vol. 6) SCC 342], referred to rule of mischief and while explaining the word 'building', held as under,:-

"Stroud's Judicial Dictionary (Vol. I of the 5th Edition) states that 'what is a building must always be a question of degree and circumstances'. *Quoting from Victoria City Corpn. v. Biship of Vancover Island* (AC at p.390), the celebrated lexicographe commented that 'ordinary and natural meaning of the word building includes the fabric and the ground on which it stands". In Black's Law Dictionary (5th Edn.) the meaning of the building is given as " A structure or edifice enclosing a space within its walls, and usually, but no necessarily, covered with a roof". (emphasis supplied). The said description is a recognition of the fact that roof is not a necessary and indispensable adjunct for a building because there can be roofless buildings. So a building, even after losing the roof, can continue to be a building in its general meaning. Taking recourse to such meaning in the present context would help to prevent a mischief.

38. The learned counsel for the appellant also relied upon the judgment of the Gujarat High Court in the case of *Bank of India v. Vijay Ramniklal* [AIR 1997 Gujarat 75], in support of the contention, that claim of bank was not 'debt' within the meaning of Section 2(g) of the Act so as to give jurisdiction to the Tribunal. We are not impressed by this argument. Firstly, the judgment of the Gujarat High court is entirely on different facts and in that case an employee of the Bank had misappropriated the amount of the Bank, the Bank had instituted an application under the provisions of the Recovery Act. Rightly so it was held by the High Court, that it was not a 'debt' within the meaning of Section 2 (g) and, therefore, could not be tried before the Tribunal. We may state another illustration to demonstrate the case where the Tribunal may not have jurisdiction. Some persons commit a theft in the Bank and take away the money and/or the goods hypothecated to the Bank or the goods in the custody of the Bank. Upon Bank's lodging a first information report (FIR) to the police, those

persons are traced, arrested and tried in accordance with law for theft. In such a case, the Tribunal may not have jurisdiction to entertain and decide an application for recovery of money or value of goods in terms of Section 17 of the Recovery Act. That is neither the case here nor in any of the judgments which have been relied upon by the parties before us, except in the case of Gujarat High Court. In the case in hand, the goods were hypothecated to the Bank and the appellant admittedly had knowledge prior to the sale of the goods, that they were hypothecated to the Bank. If the contention of the appellant is accepted, it will amount to giving advantage or premium to the wrong doers. It would also further perpetuate the mischief intended to be suppressed by the enactment. This could completely defeat the very object and purpose of the Act. A party which had pledged or mortgaged properties in favour of the Bank, then would transfer such properties in favour of a third party. In the event, the Bank takes action under the provisions of the Recovery Act, they would take the objection like the present appellant. This would tantamount to travesty of justice and would frustrate the very legislative object and intent behind the provisions of the Recovery Act. Therefore, such an approach or interpretation would be impermissible.

39. We have already noticed that the legislature has not used words of a restrictive or definite nature. It has intentionally made use of the expressions which are quite general and can be construed widely in their common parlance. There is no occasion for this Court to read the word other than the one intended by the legislature in the provisions of Section 2 (g) of the Recovery Act. Wherever the legislature requires, it uses the expressions of definite connotations and consequences, for example, in the Interest Act, 1978, the word 'debt' has been defined under Section 2(c) of that Act by using specific terms of restricted character. It means 'any liability for an 'ascertained sum' of money and includes a debt payable in any kind but does not include a 'judgment debt'. In this definition, the 'ascertained sum' obviously means a sum which has been determined under

any methods of the adjudicative process while, on the other hand, the expression 'payable in kind' is a general expression, again the excluding clause in relation to 'judgment debt' is specific. Such is not the language or the purport of Section 2 (g) of the Recovery Act. Mr. R.F. Nariman, the learned senior counsel appearing for the appellant, while referring to the provisions of Section 19 (8) and Section 19 (11) respectively, of the Recovery Act contended, that these sections clearly postulate that, a non applicant in proceedings before the Tribunal can raise a plea of set off, as well as a counter claim, but where the counter claim is objected to on the ground that it ought not to be disposed off by way of a counter claim, as it is an independent action, then the person raising a counter claim can take leave of the Tribunal for exclusion of such counter claim. With reference to language of these two provisions, it is contended that, the claim like the one raised by the respondent Bank against the appellant, is a claim which cannot be raised in the proceedings before the Tribunal and the Bank ought to have taken independent steps, if any, in accordance with law. On the other hand, Mr. Jaideep Gupta, learned senior counsel for the respondent-Bank argued that, this argument has no bearing on the matter in controversy before us, in as much as, the claim of the Bank is maintainable within the definition of 'debt' under the Recovery Act.

40. This contention of appellant needs to be noticed only for being rejected. In our detailed discussion above, we have clearly held that, the claim raised by the Bank falls well within the ambit and scope of Section 2 (g) of the Recovery Act and the jurisdiction of the Tribunal cannot be ousted on this ground.

41. Thus, in our opinion, the provisions of Section 2 (g) have to be construed, so as to give it liberal meaning. The general expressions used in this provision will have to be understood generally. Neither there is scope to hold nor is the legislative intent that these provisions should be given a narrower or a restricted meaning. In our considered view, the

claim of the Bank relatable to the hypothecated goods was well within the jurisdiction of the Tribunal exercising its power under Section 17 of the Recovery Act.

Applicability of the principles of public accountability on the facts of the present case :

42. Having answered both the questions of fact partially and law against the present appellant, still there is another important facet of this case which cannot be ignored by the Court. It relates to the conduct of the respondent Bank and its officers/officials. The witnesses appearing on behalf of the Bank had stated that, at the stage of appraisal report itself, the Bank had come to know, that respondent Nos. 2 and 3 have a leave and license agreement with the appellant. Despite that, and without proper verification, as it appears from the record, heavy loan was sanctioned and disbursed to the above respondents. Even thereafter, the Bank and its officers/officials appear to have taken no serious steps to ensure that the goods hypothecated to the Bank are not disposed off without its consent. The officers/officials of the Bank, even after knowing about the handing over of the possession of the property including the hypothecated goods to the appellant and having communicated the same to the appellant vide their letter dated 24th August, 1987, made no serious efforts to recover its debt and ensure that the goods are not disposed off, as the suit itself was filed for recovery of the amount on 1st February, 1989 after serious delay. These facts, to a great extent, are even conformed in the affidavit which was filed on behalf of the Bank by one Shri Kamal Kumar Kapoor as late as on 22nd August, 2009 before this Court. There is no doubt in our mind that the Bank could have protected its interest and ensured recovery while taking due caution and acting with expeditiousness. There is definite negligence on the part of the concerned officers/officials in the Bank. They have jeopardized the interest of the Bank and consequently the public funds, only saving grace being that orders were passed by the competent forum,

requiring the appellant to deposit some money in the suit for recovery of more than 22 lac which was filed by the Bank in the year 1989. Even this order was also vacated by the Tribunal vide its order dated 28th December, 2006 wherein it passed the order for refund of the amount. The concerned quarters in the Bank also failed to act despite the advertisement for sale of the hypothecated material given by the appellant on 12th March, 1988, whereafter the machines like CTC is said to have been sold at a throwaway price. All these facts indicate definite negligence and callousness on the part of the concerned quarters. The legislative object of expeditious recovery of all public dues and due protection of security available with the Bank to ensure pre-payments of debts cannot be achieved when the officers/officials of the Bank act in such a callous manner. There is a public duty upon all such officers/officials to act fairly, transparently and with sense of responsibility to ensure recovery of public dues. Even, an inaction on the part of the public servant can lead to a failure of public duty and can jeopardize the interest of the State or its instrumentality.

43. In our considered opinion, the scheme of the Recovery Act and language of its various provisions imposes an obligation upon the Banks to ensure a proper and expeditious recovery of its dues. In the present case, there is certainly ex facie failure of statutory obligation on the part of the Bank and its officers/officials. In the entire record before us, there is no explanation much less any reasonable explanation as to why effective steps were not taken and why the interest of the Bank was permitted to be jeopardized. The concept of public accountability and performance is applicable to the present case as well. These are instrumentalities of the State and thus all administrative norms and principles of fair performance are applicable to them with equal force as they are to the Government department, if not with a greater rigor. The well established precepts of public trust and public accountability are fully applicable to the functions which emerge from the

public servants or even the persons holding public office. In the case of *State of Bihar v. Subhash Singh* [(1997) 4 SCC 430], this Court, in exercise of the powers of judicial review stated that, the doctrine of full faith and credit applies to the acts done by officers in the hierarchy of the State. They have to faithfully discharge their duties to elongate public purpose.

44. Inaction, arbitrary action or irresponsible action would normally result in dual hardship. Firstly, it jeopardizes the interest of the Bank and public funds are wasted and secondly, it even affects the borrower's interest adversely provided such person was acting bonafide. Both these adverse consequences can easily be avoided by the authorities concerned by timely and coordinated action. The authorities are required to have a more practical and pragmatic approach to provide solution to such matters. The concept of public accountability and performance of functions takes in its ambit proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State instrumentalities and/or by the financial institutions. In the case of Centre for Public Interest Litigation & Anr. v. Union of India & Anr. [(2005) 8 SCC 202], this Court declared the dictum that State actions causing loss are actionable under public law and this is as a result of innovation to a new tool with the court, which are the protectors of civil liberty of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action even in the case of appointment, which essentially must not lack bonafide was enforced by the Court. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable both for their inaction and irresponsible actions. What ought to have been done, if not done, responsibility should be fixed on the erring officers then alone the real public purpose of an answerable administration would be satisfied.

45. The doctrine of full faith and credit applies to the acts

done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is known fact that, in transactions of the Government business, none would own personal responsibility and decisions are leisurely taken at various levels (Refer : *State of Andhra Pradesh v. Food Corporation of India* [(2004) 13 SCC 53].

Principle of public accountability is applicable to such officers/officials with all its vigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, but are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision making process but in the decision as well. Every public officer is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance. It needs to be seen in the facts and circumstances of the present case, why and how the interest of the Bank has been jeopardized, in what circumstances the loan was sanctioned and disbursed despite some glaring defects having been exposed in the appraisal report. Significant element of discretion is vested in the officers/officials of the Bank while sanctioning and disbursing the loans but this discretion is circumscribed by the inbuilt commercial principles/restrictions as well as that such decisions should be free from arbitrariness, unreasonableness and should protect the interest of the Bank in all events. We are neither competent nor do we wish to venture to examine this aspect, it is for the appropriate authorities in the Bank to examine the matter from all quarters and then to take appropriate action against the erring officers/officials involved in the present case, that too, in accordance with law.

46. For the reasons afore-recorded, we partially allow this

appeal and while modifying the order of the High Court to the extent that, the appellants would be liable to pay to the respondent Bank a sum of Rs. 9,63,975/-. (approximate value of the hypothecated stock sold by the appellants) with interest at the rate of 6% per annum on the above sum during the period from 14th March, 1988, the date of filing of the plaint, to the date of actual realization as originally allowed by the Tribunal.

47. We further direct the Chairman of the Allahabad Bank to examine this case in light of our discussion supra and take appropriate action against erring officers/officials in accordance with law.

48. However, in the facts and circumstances of the case, the parties are left to bear their own costs.

B.B.B. Appeal partly allowed.

NORTH DELHI POWER LIMITED

v.

GOVT. OF NATIONAL CAPITAL TERRITORY OF DELHI & ORS.

(Civil Appeal No. 4269 of 2006)

MAY 03, 2010

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

Service Law:

Re-organization of Delhi Vidyut Board (DVB) – Statutory transfer scheme – Tripartite agreements between Govt. of National Capital Territory of Delhi, DVB and DVB Joint Action Committee (consisting of various Unions etc.) – DVB unbundled into private companies including appellants-DISCOMs w.e.f. 1-7-2002 – All employees transferred – Plea of appellants that they had no liability relating to employees, who ceased to be employees of the erstwhile Delhi Electric Supply Undertaking (predecessor of DVB) prior to 1-7-2002 on account of their retirement, removal, dismissal or compulsory retirement in accordance with the provisions of the Act – Held: The plea is not tenable – The Rules indicated that the liability was innate and accepted by the appellants-DISCOMS – Appellants, being the transferee companies, had taken over the liabilities of the erstwhile staff also – Delhi Electricity Reforms Act, 2000 – ss.14, 15, 16, 57 and 60 – Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 – rr.3, 6, 8 and 12.

From 1-7-2002, Delhi Vidyut Board (DVB) was unbundled into private companies including the appellants DISCOMs. Another company called DPCL (holding company) was also constituted with the aim and object of holding shares in the DISCOMs.

Since the employees of DVB had displayed their apprehension and reservations to the effect that on emergence of the private companies their services may not be protected, therefore, these employees were taken into confidence by assuring them that their services will be protected by entering into Tripartite Agreements which were executed between Government of National Capital Territory of Delhi (GNCTD), DVB and DVB Joint Action Committee (which consisted of various Unions as well as Junior Engineer Officer Association).

The question which arose for consideration in the present appeals was whether the appellants DISCOMs are responsible for meeting the liabilities relating to employees, who ceased to be the employees of the erstwhile Delhi Electric Supply Undertaking (predecessor of DVB) prior to 1-7-2002 on account of their retirement, removal, dismissal or compulsory retirement in accordance with the provisions of the Delhi Electricity Reforms Act, 2000.

Dismissing the appeals, the Court

HELD: 1.1. It is difficult to accept the contention that any prejudice was caused to the appellants DISCOMS. On the other hand, the question of liability seems to have been thrashed very minutely by the High Court in the light of the provisions of the Delhi Electricity Reforms Act, 2000, the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001, Tripartite Agreements and the other agreements including the bid documents. It cannot be said that clothing appellant-NDPL with a liability regarding the personnel who were retired, compulsorily retired or otherwise dead, dismissed etc. could be termed as "additional liability". In fact the reading of the said Rules and, more particularly, Rule 6(8) would indicate that liability was innate and accepted by the DISCOMS. [Paras 21 and 23] [1065-E-F; 1066-C]

2. Rule 6(8) not only specifies the employment related matters but also clarifies what those matters would be which include pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners. The words 'existing pensioners' are extremely important. A plain reading of this Rule would leave no manner of doubt in respect of the liability having been transferred to transferee company and the NDPL is certainly the one. The language is broad enough to include all dismissed, dead, retired and compulsorily retired employees. As if that was not sufficient, sub-Rule (9) requires the Government to make appropriate arrangements in terms of the Tripartite Agreements in regard to the fund of terminal benefits to the extent it is unfunded on the date of transfer from the Board. A glance at the sub-rules 9(a) and 9(b) is sufficient to come to the conclusion that the liabilities have undoubtedly been transferred to the DISCOMS which include both NDPL as well as the BSES. No employees were ever transferred to the DPCL. All transferees came only to the DISCOMS like the NDPL under the transfer scheme. The High Court has correctly interpreted these Rules and has correctly come to the conclusion that the liabilities would rest with the DISCOMS including NDPL and BSES. [Paras 26, 27 and 28] [1068-A-D; 1069-A-D]

3.1. The purpose of Rule 8(3) is to cap any liability arising out of litigation, suits, claims etc. either pending on the date of transfer and/ or arising due to events prior to the date of transfer to be borne by the relevant DISCOM 1, DISCOM 2 or DISCOM 3, respectively. The nature of the liability and its being imposed on the DISCOMS alone is as clear as sunshine. To that extent, there can be no doubt that it includes all the liabilities including the liabilities on account of the personnel. The capping of the liability was at the instance of the DISCOMS only. They

were more aware of the language brought in. They were also aware of the liabilities which arose, particularly, in view of Rule 6 (8) and they had open eyedly accepted Rule 8(3). They cannot now find fault with the constitutionality of the provisions. [Paras 29 and 31] [1069-F-H; 1070-A-G; 1071-A]

3.2. The suggestion that the *non obstante* clause in Rule 8(3) if widely construed, would render the clause unconstitutional, is not acceptable. The language of the clause is clear, unambiguous and must be given its natural meaning. If such a meaning is given, any other interpretation is not possible except the one rendered by the High Court. The constitutionality of Rule 8(3) cannot be doubted under any circumstances. [Paras 30 and 31] [1070-B-C; G]

M. Rathinaswami & Ors. v. State of Tamil Nadu & Ors. **2009 (5) SCC 625;** *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Others* ***2006 (10) SCC 452;*** *Ramdev Food Products (P) Ltd.v. Arvindbhai Rambhai Patel* **2006 (8) SCC 726;** *Madan Mohan Pathak & Anr. v. Union Of India & Ors.* **1978 (2) SCC 50;** *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.* **2008 (4) SCC 190 and** *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. & Anr.* **2005 (7) SCC 234, distinguished.**

4. The argument raised that the liability in respect of existing pensioners would devolve on the Holding company, i.e. DPCL and not on the appellant is clearly incorrect. The transfer of personnel and all the principles are governed by Rule 6 alone. As provided in Rule 6(2), there are lists wherein the personnel have been classified into five groups based on the principle of "as is where is", where a specific reference is to be found to GENCO, TRANSCO and three DISCOMS. Very significantly, there is no reference to DPCL. Thus, no employee was transferred to DPCL. This is in case of the existing employees. Sub Rule (8), however, takes into sweep not

only the existing employees, who find the reference in the lists prepared under Rule 6(2), but also makes a reference to the employment related matters including provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of personnel and the existing pensioners. There was no question of existing pensioners being covered under the lists prepared under Rule 6(2). By using the words "existing pensioners" and by providing that the relevant transferee would stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters, the legislative intention is very clearly displayed to the effect that the existing pensioners on the day of transfer were also covered and stood transferred to the DISCOMS and not to DPCL and it is only the transferee DISCOM, who would substitute for the Board. Once these Rules are read in proper perspective, there is hardly any doubt about the liability of DISCOMS in respect of existing pensioners on the day of transfer. There can be no dispute that those who retired and those who were serving with the Board would stand transferred in respect of their liabilities etc. to the successor company. The High Court has correctly appreciated this position. [Paras 32 and 33] [1072-G-H; 1072-A, E-H; 1073-A-C]

5.1. Under Rule 12(1), a finality is given to the decision of the Government in respect of any doubt, dispute, difference or issue as regards the transfers under these Rules. The Rule provides that under any such eventuality, the decision of the Government shall be final subject to the provisions of the Act. Sub Rule (2) of Rule 12 provides that the Government may, by order, publish in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act, which provisions may appear to be necessary for removing the difficulties arising in implementing the transfers under these Rules. Section 57 of the Act is also clear and provides power to the Government to remove any difficulties. [Para 34] [1073-C-F]

5.2. As an answer to the letter received from Delhi TRANSCO Ltd., a 100 per cent Government company, seeking clarifications from the Government with respect to the competent authority/new entity to deal with vigilance/disciplinary/court cases in relation to the employees of erstwhile DVB who could not become part of any of the companies on 01.07.2002 in terms of the Rules, the Government had issued a letter to Delhi TRANSCO Ltd., The letter pertained to removal of doubts, disputes and differences under the provisions of the Rules and issue of clarificatory order of the Government under Rule 12. It was then conveyed that the vigilance, disciplinary and Court cases in respect of employees of the then DVB who could not become part of any of the companies, namely, DPCL, Delhi TRANSCO, Indraprastha Power Generation Co. Ltd., BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd. and NDPL on 01.07.2002 i.e. on the date of restructuring due to retirement/dismissal / removal/ compulsory retirement shall be processed and decided by such company which would have been the controlling authority of the employee but for their retirement/dismissal/removal/ compulsory retirement etc.. It is absolutely clear that by this letter the whole liability was put on the head of the DISCOMS. [Para 34] [1074-B-G]

5.3. The argument made that the Government had already exhausted its power under Rule 12(1) while taking the earlier decision dated 17.09.2002 and, hence, it had lost the power to pass any fresh orders, is clearly incorrect. There can be no finality in the matter of removal doubts or the removal difficulties and also taking the decisions under Rule 12(1). The argument that once the Government has exercised the powers under the Rule

12(1), the power gets exhausted and the decision becomes final and binding on all the parties, including the Government, is clearly incorrect. The argument that there is no further power under the Rule in the Government to issue any letter dated 21.01.2004, is also an incorrect argument. Nothing stopped the Government from taking any decision and it has taken a clearest possible decision by letter dated 21.01.2004 which is binding on all the parties. This is apart from the fact that the Government has not dealt with the subject in its earlier decision dated 17.09.2002 as regards the controversy which has fallen for consideration in this matter. [Para 42] [1079-C-F]

Case Law Reference

2009 (5) SCC 625	**distinguished**	**Para 30**
2006 (10) SCC 452	**distinguished**	**Para 31**
2006 (8) SCC 726	**distinguished**	**Para 31**
1978 (2) SCC 50	**distinguished**	**Para 31**
2008 (4) SCC 190	**distinguished**	**Para 31**
2005 (7) SCC 234	**distinguished**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4269 of 2010.

From the Judgment & Order dated 30.03.2006 of the High Court of Delhi at New Delhi in LPA No. 98 of 2005.

WITH

C.A. No. 4270 of 2006.

P.P. Malhotra, ASG, P.P. Rao, Sudhir Nandrajog, P.S. Patwalia, Jayant Nath, Anupam Verma, Abhay Kumar, Abhishek Munot, Ashish Kumar, Vibha Datta Makhija, Mansoor Ali Shoket, A. Ahlawat, Rani Chhabra, S.K. Dubey, Rakesh K. Sharma, Jamal Akhtar, Ashok Gurnani (for Rachna Gupta), Devashish Bharukha for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This judgment shall dispose of the two appeals being CA No. 4269 of 2006 and CA No. 4270 of 2006. Civil Appeal No.4269/2006 has been filed on behalf of North Delhi Power Limited and Civil Appeal No.4270 of 2006 has been filed by BSES Rajdhani Limited. Since a common question falls for consideration in both the appeals, the same are disposed of by this common judgment. The question can be framed as under:

> "Whether the appellants are responsible for meeting the liabilities relating to employees who ceased to be the employees of erstwhile Delhi Electric Supply Undertaking (Predecessor of Delhi Vidhyut Board – DVB) prior to 1.7.2002 on account of their retirement, removal, dismissal or compulsory retirement in accordance with the provisions of Delhi Electric Reforms Act, 2000?"

By the impugned judgment dated 30.3.2006 passed by the Delhi High Court, the High Court has held that the appellants alone would be responsible to meet such liabilities.

2. In order to understand the nature of controversy and the ramifications thereof, some facts common to both these appeals would be necessary.

Common Facts:

3. The Legislative Assembly of the National Capital Territory of Delhi passed the Act on 23.11.2000 being Delhi Electric Reforms Act, 2000 (hereinafter called the "Act, 2000"). This Act came into force on 8.3.2001. The Preamble of this Act reads as under:

> "An Act to provide for the constitution of an Electricity Commission, restructuring of the electricity industry (rationalization of generation, transmission, distribution and supply of electricity), increasing avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and

management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi and for matter connected therewith or incidental thereto.

BE it enacted by the Legislative Assembly of the National Capital Territory of Delhi in the Fifty-first year of the Republic of India as follows:"

Section 2 pertains to definitions of relevant terms used in the Act and sub-section (1) contains the definitions clauses. Sub-sections (2) and (3) of Section 2 run as under:

"(2) Words and expressions used but not defined in this Act and defined in the Electricity (Supply) Act, 1948 (Central Act 54 of 1948) have the meanings respectively assigned to them in that Act.

(3) Words and expressions used but not defined either in this Act or in the Electricity (Supply) Act, 1948 (Central Act 54 of 1948) and defined in the Indian Electricity Act, 1910 (Central Act 9 of 1910) have the meanings respectively assigned to them in that Act."

Thus the definitions of relevant terms under Electricity (Supply) Act, 1948 and Electricity Act, 1910 were incorporated in the Act, 2000. Section 3 of the Act, 2000 provides for establishment of Delhi Electricity Regulatory Commission. The functions of this Commission are provided in Section 11. Some of the functions, amongst others, as provided in Section 11 (1) are as under:

"(c) to regulate power, purchase and procurement process of the licensees and transmission utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the National Capital Territory of Delhi;

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act;

(e) to aid and advise the government in matters concerning electricity generation, transmission, distribution and supply in the National Capital Territory of Delhi;

(h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the National Capital Territory of Delhi and also to ensure a fair deal to the customers;

(k) to regulate the assets, properties and interest in properties concerned or related to the electricity industry in the National Capital Territory of Delhi including the conditions governing entry into, and exit from the electricity industry in such manner as to safeguard the public interest;

(l) to issue licences for transmission, bulk supply, distribution or supply of electricity and determine the conditions to be included in the licences;"

4. Under Section 14 of the Act, 2000, the subject of incorporation of companies for the purposes of generation, transmission or distribution of electricity was dealt with. Sub-sections (1), (2) and (6) of Section 14, which are relevant for our purposes provide as under:

"14(1) The government may, as soon as may be after the commencement of this Act, cause one or more companies to be incorporated and set up under the provisions of the Companies Act, 1956 (Central Act 1 of 1956) for the purpose of generation, transmission or distribution of electricity, including

companies engaged in more than one of the said activities in the National Capital Territory of Delhi and may transfer the existing generating stations or the transmission system or distribution system, or any part of the transmission system or distribution system, to such company or companies.

14(2) The government may designate any company set up under sub-section (1) to be the principal company to undertake all planning and coordination in regard to generation or transmission or both; and such company shall undertake works connected with generation or transmission and determine the requirements of the territory in consultation with the other companies engaged in generation or transmission for the National Capital Territory of Delhi, the Commission, the Regional Electricity Board and the Central Electricity Authority and any other authority under any law in force for the time being, or any other government concerned.

14(6) The government may convert the companies set up under this Act to joint venture companies through a process of disinvestment, in accordance with the transfer scheme prepared under the provisions of this Act."

Section 15 of the Act, 2000 provides for Reorganisation of Delhi Vidyut Board and transfer of properties, functions and duties thereof. Sub-sections (3), (6), (7) and (9) of Section 15, which are relevant for purposes provide:

"15(3) Such of the rights and powers to be exercised by the Board under the Electricity (Supply) Act, 1948 (Central Act 54 of 1948), as the government may, by notification in the official gazette, specify, shall be exercisable by a company or companies established as the case may be, under Section 14,

for the purpose of discharge of the functions and duties with which it is entrusted.

15(6) A transfer scheme may –

(a) provide for the formation of subsidiaries, joint venture, companies or other schemes of divisions, amalgamation, merger, reconstruction or arrangements;

(b) define the property, interest in property, rights and liabilities to be allocated –

(i) by specifying or describing the property, rights and liabilities in question,

(ii) by referring to all the property, interest in property, rights and liabilities comprised in a specified part of the transferor's undertaking, or

(iii) partly in one way and partly in the other:

Provided that the property, interest in property, rights and liabilities shall be subject to such further transfer as the government may specify;

(c) provide that any rights, or liabilities specified or described in the scheme shall be enforceable by or against the transferor or the transferee;

(d) impose on any licensee an obligation to enter into such written agreements with, or execute such other instruments in favour of any other subsequent licensee as may be specified in the scheme;

(e) make such supplemental, incidental and consequential provisions as the transferor licensee considers appropriate including provision specifying the order in which any transfer or transaction is to be regarded as taking effect;

(f) provide that the transfer shall be provisional subject to the provisions of Section 18.

15(7) All debts and obligations incurred, all contracts entered into and all matters and things done by, with or for the Board, or a company or companies established as the case may be, under Section 14 or generating company or distribution company or companies before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by, with or for the government or the transferee and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or instituted by or against the government or concerned transferee, as the case may be.

15(9) The Board shall cease to exist with the transfer of functions and duties specified and with the transfer of assets as on the effective date."

Section 16 is extremely important which deals with the subject of Personnel. It provides:

"(1) The government may by a transfer scheme provide for the transfer of the personnel from the Board to a company or companies established as the case may be, under Section 14 and distribution companies (hereinafter referred to as "transferee company or companies") on the vesting of properties, rights and liabilities in a company or companies established, as the case may be, under Section 14 or the distribution companies.

(2) Upon such transfers the personnel shall hold office in the transferee company on terms and conditions that may be specified in the transfer scheme

subject, however, to the following, namely:

(a) that the terms and conditions of the service applicable to them in the transferee company shall not in any way, be less favourable than or inferior to those applicable to them immediately before the transfer;

(b) that the personnel shall have continuity of service in all respects; and

(c) that the benefits of service accrued before the transfer shall be fully recognized and taken in account for all purposes including the payment of any and all terminal benefits."

Section 57 of the Act, 2000 which deals with the Power to remove difficulties reads as under:

"(1) If any difficulty arises in giving effect to the provisions of this Act or rules, regulations, schemes or orders made thereunder, the government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removing the difficulty:

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

(2) Every order made under this section shall be laid, as soon as may be after it is made before the Legislative Assembly of the National Capital Territory of Delhi."

5. In accordance with the above provisions a Transfer Scheme called "Delhi Electricity Reforms (Transfer Scheme) Rules, 2001" (hereinafter referred to as "the Scheme, 2001")

came into existence. Rule 2 of the Scheme, 2001 deals with the definitions of various terms. Relevant Clauses (b), (c), (h) and (k) of Rule 2 read as under:

"(b) "assets" includes all rights, interests and claims of whatever nature as well as block or blocks of assets of the Delhi Vidyut Board;

(c) "Board" means the Delhi Vidyut Board constituted under Section 5 of the Electricity (Supply) Act, 1958 (54 of 1948);

(h) "DISCOMS" means and includes DISCOM 1, DISCOM 2 and DISCOM 3 collectively.

(k) "liabilities" include all liabilities, debts, duties, obligations and other outgoings including contingent liabilities, statutory liabilities and government levies of whatever nature, which may arise in regard to dealings before the date of the transfer in respect of the specified undertakings;"

Rule 3 of the Scheme, 2000 provides for transfer of assets, etc., of the Board to the Government as defined in Rule 2(c) above. It provides that all the assets, liabilities and proceedings of the Board shall stand transferred to and vest in the government absolutely. Sub-Rule (2) of Rule 3 is significant and provides as under:

"3(2) Nothing in Sub-rule (1) shall apply to rights, responsibilities and obligations in respect of the personnel and personnel related mattes, which have been dealt in the manner provided under Rule 6."

Rule 4 is connected only to Rule 3(1) and has nothing to do with Rule 3(2) which deals with the personnel which subject is exclusively dealt with in Rule 6. Sub-rule (8) of Rule 6 is very significant and runs as under:

"6(8) Subject to sub-rule (9) below, in respect of all statutory and other schemes and employment related matters, including the provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners, the relevant transferee shall stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters shall become those of such transferee and the services of the personnel shall be treated as having been continuous for the purpose of the application of this sub-rule."

Sub-rule (9) of Rule 6 provides:

"6(9) The government shall make appropriate arrangements as provided in the tripartite agreements in regard to the funding of the terminal benefits to the extent it is unfunded on the date of the transfer from the Board. Till such arrangements are made, the payment falling due to the existing pensioners shall be made by the TRANSCO, subject to appropriate adjustments with other transferees.

For the purpose of this sub-rule, the term –

(a) "existing pensioners" mean all the persons eligible for the pension as on the date of the transfer from the Board and shall include family members of the personnel as per the applicable scheme; and

(b) "terminal benefits" mean the gratuity, pension, dearness and other terminal benefits to the personnel and existing pensioners."

6. It is an admitted case that while the government was contemplating unbundling of Delhi Vidyut Board (hereinafter

referred to as "DVB") for handing over the distribution of electricity to private companies as also for restructuring the electricity industry and rationalization of generation, transmission and supply of electricity by increasing the avenues for participation of private sector in the electricity industry in the National Capital Territory of Delhi, the erstwhile employees of the DVB displayed their apprehension and reservations to the effect that on emergence of the private companies their services may not be protected. Therefore, these employees were taken into confidence by assuring them that their services will be protected by entering into Tripartite Agreements which were executed on 28.10.2000 and 9.11.2000 between Government of National Capital Territory of Delhi ("GNCTD"), DVB and Delhi Vidyut Board Joint Action Committee. The said committee consisted of various Unions as well as Junior Engineer Officer Association. Under these Tripartite Agreements, the existing pensioners as well as the employees were protected. All the existing welfare schemes and benefits to the retired employees were allowed to continue.

7. After the Act and the scheme came on the anvil, as a first step of privatization, the Request for Qualification (RFQ) Documents for privatization of electricity distribution in Delhi was floated on 15.2.2001 giving in detail the status of the DVB, the manner of the privatization where it was specifically provided that DVB is being offered to private companies as a going concern on business valuation method, transferring all the past, present and future liabilities including that of existing employees as well as the retirees. The details of the employees as on 1.1.2000 were also provided. Para 11.6 of the RFQ Document mentions about the fact that apart from existing employees which were 24,634 in number as on 1.1.2000, there were about 9200 retired employees. The aforementioned transfer scheme was notified on 21.11.2001. Under the scheme the distribution companies, generation, transmission and holding companies were identified. At the time when the bids were put in by the companies who were in consideration and the negotiations were on, the DISCOMS put in revised bids. The present appellants which were South-West Delhi Electricity Distribution Company Ltd. (now known as BSES Rajdhani Power Ltd.), as also North-West Delhi Distribution Company Ltd. (now known as NDPL) were amongst those who submitted the revised bids documents. Their demand was that the contingent liability arising out of any event including any legal proceedings prior to the transfer should be limited to Rs.1 crore per annum considered individually or collectively during the first five years. Based on that sub-rule (3) in Rule 8 came to be added in the Scheme, 2001 on 26.6.2002 which is as under:

> "Notwithstanding anything contained in these Rules including the schedules, the liabilities arising out of litigation, suits, claims, etc., pending on the date of the transfer and/or arising due to events prior to the date of the transfer shall be borne by the relevant distribution company, viz., DISCOM 1, DISCOM 2 and DISCOM 3 respectively, subject to a maximum of Rs.1 crore per annum. Any amount above this shall be to the account of the holding company in the event for any reason the Commission does not allow the amount to be included in the revenue requirement of the DISCOM."

Resultantly from 1.7.2002, the DVB unbundled into six companies, they being DISCOM 1 (BSES Yamuna Power Ltd.), DISCOM 2 (BSES Rajdhani Power Ltd.)-appellant and DISCOM 3 (North Delhi Power Ltd.)-appellant, Delhi Power Supply Company Ltd. (TRANSCO) and generation company (GENCO). Another company called "DPCL" (holding company) was also constituted with aims and objects to hold shares in the aforementioned DISCOM companies. The said DPCL holds 49% shares in DISCOM 1, 2 and 3 and holds 100% shares in GENCO and TRANSCO. For all practical purposes DVB ceased to exist from 1.7.2002.

8. There are various schedules attached to the Scheme, 2001. The distribution undertaking its assets, liabilities and

proceedings concerning the distribution areas are specified in Part III of Schedule H. Relevant Schedules are Part I for DISCOM 1, BSES and Part III for DISCOM 3, NDPL.

9. Rule 12 of the Scheme, 2001 provides that the decision of the Government shall be final and sub-Rule (1) stipulates that if any doubt, dispute, difference or issue shall arise in regard to the transfers under these Rules, subject to the provisions of the Act, the decision of the government thereon, shall be final and binding on all parties.

10. On the backdrop of these legal provisions it will now be proper to see the individual facts in the two appeals.

11. The Letters Patent Appeal filed by the appellant before the High Court was dismissed. It so happened, that respondent No.3 herein Shri K. R. Jain, who was an erstwhile employee of the Delhi Electric Supply Undertaking (DESU), superannuated from service on 31.07.1996. Eventually, Delhi Vidyut Board (DVB) became successor of Delhi Electricity Supply Undertaking (DESU). NDPL was incorporated on 04.07.2001 and inherited the distribution undertaking on 01.07.2002 along with the assets, liabilities, personnel and proceedings in pursuance of statutory transfer scheme notified by the Government pursuant to Sections 14-16 and 60 of the Delhi Electricity Reforms Act, 2000. It was much before that, that respondent No. 3 was superannuated. His pension was paid from the Terminal Benefit Fund, 2002 of DVB. The DVB had floated Time Bound Terminal Scale Scheme by its Office Order dated 23.07.1997 and Resolution No. 216 dated 16.07.1997. Claiming that though he had superannuated on 31.07.96, still he was covered by the scheme, respondent No.3 filed a Writ Petition No. 2337 of 2004 seeking appropriate direction against Delhi Government, Delhi Power Co. Ltd. and Delhi Power Supply Company and claimed benefits arising out of the Scheme. Significantly enough, NDPL was not made a party nor was there any claim against it. This Writ Petition was allowed by the Learned Single Judge, holding that respondent No.3 was

entitled to avail the benefits under Time Bound Promotional Scale Scheme (TBPS) and that DVB had unjustly denied him his dues. Holding the present appellant as a successor, Mandamus was issued against the appellant who was not a party and was not given an opportunity of hearing. This was based on the statement of an advocate appearing for respondent Nos. 1 and 2 herein to the effect that it was the appellant-petitioner who was the successor and was as such responsible to implement the judgment dated 23.03.2004.

12. On 23.11.2004 an application was filed for recall/ modification of the judgment before the Learned Single Judge of the Delhi High Court. This application was, however, allowed holding that:

(a) respondent No.3 had retired from DVB on 31.07.96 from Ashok Vihar

(b) All liabilities of DVB, other than those specifically transferred in terms of Schedules 'B' to 'F' of the Transfer Scheme shall be the liability of the holding company.

(c) In terms of the Rule 6 (2) and (8) of the transfer scheme, only such proceedings were transferred to successor companies as were pending on 01.07.2002. Since no proceedings were pending qua the entitlements of respondent No.3, hence it was the holding company and not the present appellant who would be liable to pay the arrears and other entitlements of respondent No. 3 under the TBPS Scheme.

13. Respondent No.1 and 2 filed a Letters Patent Appeal against the modified order of the Learned Single Judge dated 23.11.2004 vide LPA No. 98/2005. This appeal came to be allowed by the Division Bench of the High Court. The High Court held that the appellant-petitioner alone was responsible

for the payments claimed by respondent No.3.

14. The second matter has emanated out of the judgment and order dated 25.05.2006 wherein the Learned Single Judge of the High Court has dismissed the Writ Petition filed by the appellant-petitioner being Writ Petition No. 5110 of 2005 [BSES Rajdhani Power Ltd. v. Govt. of NCT of Delhi & Another]. By that Writ Petition, validity and legality of the letter dated 21.01.2004 issued by the Government of NCT of Delhi was challenged. By this letter, a clarification was issued by the Government to the effect that vigilance/ disciplinary/ Court cases in respect of employees of erstwhile DVB, who could not become part of any of the companies on the date of restructuring due to retirement/dismissal/removal/compulsory retirement shall be processed and decided by the successor company like the appellant-petitioner who would have been the controlling authority of the employees but for their retirement/ removal/dismissal/compulsory retirement as per the Schedule in the Transfer Scheme. In pursuance of this letter, all the cases were forwarded with records involving employees who, due to their retirement/suspension/ termination or death were allegedly not transferred to DISCOMS on 01.07.2002. This was resisted by DISCOMS including the appellant herein on the ground that such employees who were not transferred to them were in fact liability of the holding company. Representations were sent against this clarificatory letter dated 21.01.2004. Such representations were sent even by NDPL. However, in K.R. Jain's case, the Division Bench deciding the LPA, took the view that such employees were the liability of the transferee DISCOMS like NDPL or, as the case may be, the BSES. Relying on that judgment, the Writ Petition of the petitioner was dismissed by judgment dated 25.05.2006 by the Learned Single Judge of the High Court. Since it would have been futile for the appellant to go to the Division Bench, it has straightaway moved this Court by way of the present appeal.

15. In the impugned judgment, the whole history of the

legislation was traced by the Division Bench and after noting Rules 2 (k), (n) and (l), and Rule 3 along with Rule 12, it was observed that the assets and liabilities as given in Schedule A to G to different companies did not relate to the liabilities regarding the personnel vide Rule 3 (2). Rule 6 was noted to be dealing with the responsibilities of the personnel and a categorical finding was recorded that the Schedules under Rule 4 were not helpful to determine the liabilities in respect of the personnel, even if they were retired personnel and pensioners. Noting Section 16 of the DERA, 2000 and Rule 6 of the DERR, 2001 and, more particularly, noting Rule 6 (8), the High Court chose not to agree with the contentions raised before it that the responsibility of the NDPL was only with respect to those personnel who had been transferred to the NDPL as per the list mentioned in Appendix E. It located the following categories of the personnel required to be dealt with:

> "16. There would be the following categories of personnel required to be dealt with:
>
> (a) existing employees of DVB on the date of transfer scheme who were on roll and working;
>
> (b) employees under suspension and facing disciplinary/ departmental proceedings at the time of the transfer scheme.
>
> (c) employees terminated, dismissed as a consequence of departmental proceedings and who had initiated litigation/cases, proceedings against DVB and such proceeding/ litigation was pending at the time of disbanding of DVB.
>
> (d) retired employees who after retirement filed cases in courts claiming some benefits or dues, and such cases were pending at the

time of the transfer scheme.

(e) retired/dismissed employees of DVB who filed court cases after the transfer scheme and such case got decided in their favour."

There is no dispute in respect of personnel at (a). However, Mr. Raj Birbal, learned Senior Counsel for NDPL contends that the responsibility of NDPL is only in respect of those personnel who have been transferred to NDPL as per the list mentioned in appendix E. We do not agree with this contention.

16. The High Court also noted that except for Rule 6 (8), (9) and (11), other provisions dealt with existing working personnel of DVB at the time of transfer and that Rule 6 (11) took care of the categories (b) and (c) shown earlier. It also noted Rule 8 regarding the pending suits and proceedings and refuted the contention raised on behalf of NDPL that Rule 8 covers litigations only in respect of cases between DVB and consumers, contractors and third parties and not those cases which were between DVB and its retired employees. For that purpose, the High Court noted the phraseology "*all proceedings*" appearing in Rule 8 (1). It also refuted the argument that if the liability created in Rule 8 (3) had been of the employees, it would not have limited the liability only to DISCOMS to rupees one crore and it would have mentioned TRANSCO and GENCO also, and held that the limit of rupees one crore in that provision was fixed at the representation of DISCOMS like the NDPL, only in their respect. The High Court then noted Rule 5(2), clothing the transferee with the responsibility of all contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature relating to respective undertaking and assets and liabilities transferred to it, to which Board was a party, subsisting or having effect on the date of transfer, in the same manner as the Board was liable immediately before the date of transfer and the same shall be in force and effect against or in favour of respective transferee and may be enforced effectively as if the respective

transferee had been a party thereto instead of the Board. Interpreting it in the light of various judgments of this Court, the High Court concluded that not only the assets and liabilities were transferred to the transferee company but the entire past and future litigation were also transferred to the transferee company and such litigation could have been in respect of the employees, consumers and other parties. It reiterated that the scheme of the Rules provided that all corresponding employees were transferred by way of forming list in respect to employees who were working in the respective area while all employees who were under suspension or termination and in respect of whom any kind of proceedings defined in section 2 (n) were pending at that stage, were also specifically made the responsibility of the transferee company under Rule 6 (11). The High Court again referred to Rule 5(2) to note the responsibility of the transferee company and also made reference to Section 15 of the Act.

17. Lastly, the High Court has relied on the letter dated 21-22.01.2004 which was issued by the Government for removal of doubt, dispute and difference under its power under Rule 12 (1) which clearly fixed the responsibility on the DISCOMS. In that letter, on a reference having been made by the Delhi TRANSCO seeking clarification from the Government with respect to the competent authority to deal with vigilance, disciplinary and Court cases in relation to the employees of the erstwhile DVB who could not become part of any of the companies on 01.07.2002 in terms of the transfer scheme due to retirement/dismissal/removal/compulsory retirement by the then DVB, the Government clarified that such cases would be processed and decided by such company who would have been the controlling authority of the employee but for their retirement/removal/ dismissal/compulsory retirement etc. as per Schedule 'B', 'C', 'D', 'E' and 'F", thereby clearly fixing the responsibility on the DISCOMS like the present appellant herein.

18. This judgment was severely criticized by the learned Senior Counsel Shri P.P. Rao as well as Shri P.S. Patwalia. They firstly attacked the procedural aspect of the matter. They pointed out that in the initial Writ Petition i.e. WP (C) 2331/2004 by Shri K.R. Jain, the present appellant was not a party and as such it had no opportunity to put its say. They pointed out that in his judgment dated 23.03.2004, the Learned Single Judge, even in the absence of the appellant, came to the erroneous finding that the appellant was the successor-in-interest of the DVB. They then referred to the two applications made on behalf of the appellant i.e. one for impleadment and the second for recalling the order dated 23.03.2004 and pointed out that by its order dated 23.03.2004 the Learned Judge was pleased to recall his earlier order and held that the order dated 23.03.2004 would stand issued against the Delhi Power Company Ltd. i.e. the holding company and the appellant would stand relieved of the Mandamus issued. They referred to the Letters Patent Appeal filed by the Government of NCT and the Delhi Power Company Ltd. (DPCL) which was entertained by the High Court. It is obvious that in this LPA the appellant was impleaded as a party. The contention raised is that instead of deciding the whole controversy itself, the Division Bench should have remanded back the matter to the Single Judge giving the opportunity to the present appellant to raise all the questions, and in proceeding straightaway to decide the controversy involved, the Division Bench has caused injustice to the appellant. The Learned senior counsel pointed out that this was done in the absence of the pleadings inasmuch as, in the first instance, no written statement was filed by the three impleaded respondents while there was no question of filing the written submission on behalf of the present appellant who was not a party to the said Writ Petition. Again, it is pointed out that in the recall application, the respondents, namely, the Government of NCT of Delhi and the DPCL had not filed any reply whatsoever so also in LPA no opportunity was given to any of the parties to file pleadings with respect to the claims made against the appellant herein.

19. The Learned Counsel also relied on Rules I and I-A of the Delhi High Court rules for issue of various writs which require every application for the issue of a direction to set forth all facts on which the relief is sought and to file an affidavit in support thereof. Our attention was also invited to Rule 6 which requires filing of an answer to *rule nisi* and Rule 7 which provides for ordering the *rule nisi* to be served on any party to be affected by any order which the Court may make in the matter. It was pointed out that no such applications were filed by the Government of NCT and DPCL claiming relief against the appellant and the Division Bench had no jurisdiction to entertain the claim of both for the first time in their Letters Patent Appeal No.98/2005. They, therefore, demanded remand on that basis.

20. There can be no dispute that the procedure in this case was slightly unusual. There was no justification in the order of the Learned Single Judge accepting a statement to the effect that the appellant herein was the successor-in-interest of the DVB and then to fix the liability on the same without even hearing the appellant. That was certainly incorrect in law as well as in practice. However, once the recall application was made before the learned Single Judge, the Learned Single Judge recalled its order and proceeded to hold the DPCL responsible in place of the appellant, thereby exonerating the present appellant completely. Once a Letters Patent Appeal was filed against the order of the Learned Single Judge to that effect, it would have been in the fitness of things for the Division Bench to remand the matter back, perhaps issuing the direction that a *de novo* hearing should be done after impleading the NDPL in their initial pleadings. But that was not done. In stead, the Division Bench gave an opportunity to the appellant herein to file their written submissions. We find these written submissions on record. Very significantly, however, in the written submissions, the appellant herein has not insisted on remand on the technical issue of the absence of pleadings and the loss of opportunity to it. In stead, detailed submissions were filed

predominantly raising the question that the appellant-NDPL was not in any way liable to pay for the past liability of the retired employees who were not the employees on the date of transfer. In the said written submission, the appellant has taken a complete survey of the relevant provisions of DERA and the Transfer Scheme Rules, 2001 and every effort was made to show from the said proceedings that the NDPL could not be made liable for the dues, if any, of the retired employee who was not on the rolls on the date of transfer.

21. We have seen these submissions very carefully only to find that this question was not raised. The order of the Division Bench is also silent about any such procedural question having been raised by the appellant. Perhaps, had such question been raised, the Division Bench would have been justified in remanding the matter to the Learned Single Judge for deciding all the issues afresh after joining the NDPL as a party to the original petition. The question not having been raised before the High Court, cannot be considered at this stage of litigation when much water has flown under the bridge. Considering the submissions before the Division Bench which are *in extenso*, it is difficult to accept the contention that any prejudice was caused to the appellant. On the other hand, the question of liability seems to have been thrashed very minutely in the light of the provisions of the DERA, the Transfer Scheme, Rules, Tripartite Agreements and the other agreements including the bid documents. If all this is insufficient, we do not find this question to have been raised in the present appeal also. The contention raised is, therefore, rejected.

22. Shri Rao and Shri Patwalia then urged that the whole scheme of disinvestment brought in by the DERA, 2000 was based on the consent of the interested private parties. The Act had postulated joint venture companies with private investment and participation to take over the task of entire distribution of electricity. For that purpose, bids were invited and the terms of the transfer were settled by mutual consent taking note of the

Tripartite Agreements and the bid agreement and it was then that the scheme was notified in the shape of Rules under the Act. Under such circumstances, there can be no further amendment to the scheme involving additional liability which has to be essentially only with the consent of the partners of the joint venture.

23. We have absolutely no quarrel with this proposition. However, this could be true if there was no "additional liability" brought in. For the reasons which follow, we do not think that in clothing the NDPL with a liability regarding the personnel who were retired, compulsorily retired or otherwise dead, dismissed etc. could be termed as "additional lilability." In fact the reading of the Rules and, more particularly, Rule 6(8) would indicate that liability was innate and accepted by the DISCOMS.

24. Reliance was made on Sections 15 (1) and, more particularly, sub-Section (6) and (7) by Shri Rao. That Section deals with the subject of reorganisation of DVB and transfer of properties, functions and duties. Sub-rule (6) refers to the transfer scheme while sub-section (7) specifically provides that the obligations incurred by the Board or companies established under Section 14 or generating company or distribution company before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by, with or for the government or the transferee. Section 16 deals with the provisions relating to the transfer of personnel. Shri Rao tried to contend that, therefore, for resolution of the controversy, transfer scheme alone would have to be considered in the light of the provisions of the Act. He is, no doubt, correct. However, in order to show that the transfer scheme does not contemplate such liabilities as are in question, Shri Rao relied on Rule 3(1). In our opinion, Rule 3(1) has got nothing to do with such liabilities. That Rule is independent of Rule 3(2) which reads as under:

"Nothing in sub-rule (1) shall apply to rights, responsibilities

and obligations in respect of the personnel and personnel related matters, which have been dealt in the manner provided under Rule 6."

25. By necessary reference, therefore, Rule 4 would also be pushed to the background as that Rule specifically relates to the assets and liabilities and proceedings transferred to the Government under sub-Rule (1) of Rule 3. Therefore, Rule 4 (a) to (g) would have no application whatsoever when it comes to consideration of the liability in question of personnel and personnel related matters. For that matter, even Rule 5 would be of no consequence for such matters as it specifically provides that all the rights, responsibilities and obligations in respect of personnel and personnel related to matters have been dealt with in Rule 6 alone. The reliance of the learned counsel on Rules 4 and 5 is, therefore, uncalled for. The only relevant Rule which would have to be considered for this purpose is Rule 6 which is a complete code by itself in relation to personnel and personnel related matters. The words used in Rule 3(2), namely, personnel related matters are sufficiently broad to take into their sweep the matters regarding the retired, dismissed or dead personnel also. Rule 6(8) which we have already quoted but would repeat again for the ready reference is as under:

"(8) Subject to sub-rule (9) below, in respect of all statutory and other schemes and employment related matters, including the provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners, the relevant transferee shall stand substituted for the Board for all purposes and all the rights, powers and obligations of the board in relation to any and all such matters shall become those of such transferee and the services of the personnel shall be treated as having been continuous for the purpose of the application of this sub-rule."

26. The language is extremely clear. It not only specifies the employment related matters but also clarifies what those matters would be which include pension and any superannuation fund or special fund created or existing for the benefit of the personnel and the existing pensioners. The words 'existing pensioners' are extremely important. A plain reading of this Rule would leave no manner of doubt in respect of the liability having been transferred to transferee company and the NDPL is certainly the one. The language is broad enough to include all dismissed, dead, retired and compulsorily retired employees. As if that was not sufficient, sub-Rule (9) requires the Government to make appropriate arrangements in terms of the Tripartite Agreements in regard to the fund of terminal benefits to the extent it is unfunded on the date of transfer from the Board. Rule 9(a) and (b) are also very significant and are as under:

"9. The Government shall make appropriate arrangements as provided in the tri-partite agreements in regard to the funding of the terminal benefits to the extent it is unfunded on the date of transfer from the Board. Till such arrangements are made, the payment falling due to the existing pensioners shall be made by the TRANSCO, subject to appropriate adjustments with other transferees.

"For the purpose of this sub-rule, the term-

(a) "existing pensioners" mean all the persons eligible for the pension as on the date of the transfer from the Board and shall include family members of the personnel as per the applicable scheme; and

(b) "terminal benefits" mean the gratuity, pension, dearness and other terminal benefits to the personnel and existing pensioners."

27. A glance at these sub-rules is sufficient to come to the conclusion that the liabilities have undoubtedly been transferred to the DISCOMS which include both NDPL as well as the BSES. A feeble argument was raised that sub-rule (8) does not contemplate pension or any liability on account of the revised pay-scale or interpretation of respective scheme of promotion so far as existing pensioners or the erstwhile DVB are concerned to the DISCOMS. Considering the broad language of the Rule, we do not think that such contention is possible.

28. Again relying on Rule 2 (r) it was feebly tried to be suggested that the DISCOMS were not the only transferees but it was also the holding company, namely, the Delhi Power Company Ltd (DPCL). The argument is obviously incorrect as no employees were ever transferred to the DPCL. All transferees came only to the DISCOMS like the NDPL under the transfer scheme. The High Court has correctly interpreted these Rules and has correctly come to the conclusions that the liabilities would rest with the DISCOMS including NDPL and BSES.

29. The learned counsel next contended that the High Court had erred in interpretation of Rule 8(3) of the transfer scheme. It was urged that if the Rule is construed widely, it will be arbitrary and affect the foundation of the privatisation which is mutual agreement. We do not think so. On the other hand, the purpose of sub-Rule (3) is to cap any liability arising out of litigation, suits, claims etc. either pending on the date of transfer and/ or arising due to events prior to the date of transfer *to be borne by the relevant DISCOM 1, DISCOM 2 or DISCOM 3, respectively. However, it will be subject to a maximum of rupees one crore per annum and any amount above this shall be to the account of the holding company* and, even for any reason the Commission does not allow the amount to be included in the revenue requirements of the DISCOMS. The language is extremely clear. All that it obtains is capping of the liability. However, the nature of the liability and its being imposed on the DISCOMS alone is as clear as sunshine. To

that extent, there can be no doubt that it includes all the liabilities including the liabilities on account of the personnel. Unlike Rule 3, Rule 8 (3) does not make any difference between the liabilities arising out of the transfer under Rule 4 or the liabilities contemplated in Rule 6. The contention is clearly incorrect.

30. It was suggested that the *non obstante* clause in Rule 8(3) if widely construed, would render the clause unconstitutional. We do not think that the clause can be rendered unconstitutional in any manner. The language is clear, unambiguous and must be given its natural meaning. If such a meaning is given, we do not think that any other interpretation is possible except the one rendered by the High Court. Shri Rao and Shir Patwalia relied on paragraphs 28 and 29 of the reported judgment in *M. Rathinaswami & Ors. v. State of Tamil Nadu & Ors.* [2009 (5) SCC 625]. In the said paragraphs, it is reiterated that in order to save a statutory provision from the vice of unconstitutionality sometimes a restricted or extended interpretation of the statute has to be given. Since we don't agree that the clause can be rendered unconstitutional in any manner, in our opinion, the judgment is not apposite.

31. Similarly reliance was made by Shri Rao on *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Others* [2006 (10) SCC 452], *Ramdev Food Products (P) Ltd.v. Arvindbhai Rambhai Patel* [2006 (8) SCC 726], *Madan Mohan Pathak & Anr. v. Union Of India & Ors.* [1978 (2) SCC 50], *Venture Global Engineering v. Satyam Computer Services Ltd. & Anr.* [2008 (4) SCC 190] and *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. & Anr.* [2005 (7) SCC 234]. We have absolutely no quarrel with the principles in all these reported decisions. However, since the constitutionality of Rule 8(3) cannot be doubted under any circumstances, all these decisions do not apply to the present controversy. We must, however, point out that the capping of the liability of one crore of rupees was at the instance of the DISCOMS only. They were more aware of the language brought in. They were also aware of the liabilities

which arose, particularly, in view of Rule 6 (8) and they had open eyedly accepted Rule 8(3). They cannot now find fault with the constitutionality of the provisions.

32. It was tried to be suggested by Shri Rao, learned Senior Counsel that under Section 15(1) of the Act, any property, interest in property, rights and liabilities which immediately before the effective date belonged to the Board, stood vested in the Government with effect from the date on which the Transfer Scheme came into existence by way of its publication. It was also suggested that under sub-Section (2) of Section 15 of the Act, it was for the Government to transfer such property and interest in the property, rights and liabilities to any company established under Section 14 of the Act. It was then tried to be urged that such transfer of undertaking has been taken care of in Rule 5 of the Transfer Scheme Rules, 2001. It was then pointed out that as per the Schedules, the transfer was effected and in case of the present appellant, the transfer was effected as per Schedule 'F'. The learned Senior Counsel very earnestly suggested that this was all that was transferred and, therefore, a liability which was not covered under Schedule 'F' could not be said to have been transferred to the appellant. It was then pointed out by reference to Rule 2(t) that 'undertaking' includes "wherever the context so admits the personnel". It was, therefore, urged that the personnel transferred to the appellant company were only the ones who were included in the lists. It was also suggested that under Rule 2(r), the 'transferee' includes not only DISCOMS, like the present appellant, but also the Holding company like Delhi Power Company Limited. It was, therefore, urged that considering the provisions of Rule 5 read with Rule 2(r), 2(t), Schedules 'F' and 'G', was be all and end all of the matter. It was urged that in the absence of any liability allocated to DISCOM 3 in Schedule 'F' and in terms of para 2 of Schedule 'G', allocating of residuary liabilities to the Holding company, the liability in respect of existing pensioners would devolve on the Holding company, i.e. DPCL and not on the present

appellant. The argument is clearly incorrect. We have already pointed out that Schedule 'F' cannot be read as the exhaustive list of transfers as regards the assets and liabilities. This is because of the peculiar language of Rule 3(1) and Rule 3(2). Rule 3(2) very specifically provides that in the matter of personnel and personnel related matters, Rule 3(1) would be of no consequence. What is provided in Rule 4, on which the heavy reliance was being placed, is relatable to Rule 3(1) alone. Same logic applies to Rule 5, which provides for transfer of undertaking. It flows only from Rule 4. A reading of Rule 5 and, more particularly, Clauses (a) to (g) of Rule 5(1) correspond to Clauses (a) to (g) in Rule 4(1). Rule 4(1) is again specific and takes into sweep only sub Rule (1) of Rule 3. It is very clear that Rule 3(2) makes all the difference and in the clearest possible language, Rules 4 and 5 relate to the assets, liabilities and proceedings covered only under Rule 3(1). Rule 5 also has to be read in that context.

33. The transfer of personnel and all the principles, therefore, are governed by Rule 6 alone. As provided in Rule 6(2), there are lists wherein the personnel have been classified into five groups based on the principle of "as is where is", where a specific reference is to be found to GENCO, TRANSCO and three DISCOMS. Very significantly, there is no reference to DPCL. Thus, no employee was transferred to DPCL. This is in case of the existing employees. Sub Rule (8), however, takes into sweep not only the existing employees, who find the reference in the lists prepared under Rule 6(2), but also makes a reference to the employment related matters including provident fund, gratuity fund, pension and any superannuation fund or special fund created or existing for the benefit of personnel and the existing pensioners. There was no question of existing pensioners being covered under the lists prepared under Rule 6(2). By using the words "existing pensioners" and by providing that the relevant transferee would stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters,

the legislative intention is very clearly displayed to the effect that the existing pensioners on the day of transfer were also covered and stood transferred to the DISCOMS and not to DPCL and it is only the transferee DISCOM, who would substitute for the Board. Once these Rules are read in proper perspective, there is hardly any doubt about the liability of DISCOMS in respect of existing pensioners on the day of transfer. There can be no dispute that those who retired and those who were serving with the Board would stand transferred in respect of their liabilities etc. to the successor company, i.e. DISCOM-3. The High Court has correctly appreciated this position.

34. This takes us to the next contention of Shri Rao and Shri Patwalia that the decision given by the Government on such liability was without any authority or *non est* in the light of the provisions of the Act and the Rules. In that behalf, Shri Rao, Learned Senior Counsel invited our attention to Rule 12(1), whereunder a finality is given to the decision of the Government in respect of any doubt, dispute, difference or issue as regards the transfers under these Rules. The Rule provides that under any such eventuality, the decision of the Government shall be final subject to the provisions of the Act. Sub Rule (2) of Rule 12 provides that the Government may, by order, publish in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act, which provisions may appear to be necessary for removing the difficulties arising in implementing the transfers under these Rules. Section 57 of the Act is also clear and provides power to the Government to remove any difficulties. However, there is a rider to the effect that no such order to remove difficulties could be made by the Government after expiry of two years from the date of commencement of the Act. It is also provided by sub-Section (2) of Section 57 that every such order after it is made shall be laid before the Legislative Assembly. Heavily relying on Section 57, Shri Rao and Shri Patwalia, learned Senior Counsel contended that the Government's power to make any such order had already come to an end with the expiry of two years after the date of notification. This argument and the reliance of the Learned

Senior Counsel on Section 57 can be understood, as in this matter, the Government has issued the letter dated 21.01.2004 i.e. after more than two years of the relevant date. This letter is authored by one Shri Y.V.V.J. Rajashekhar, Deputy Secretary (Power) and is addressed to Delhi TRANSCO Ltd. which is a 100 per cent Government company. The subject thereof is removal of doubts, disputes and differences under the provisions of Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 and issue of clarificatory order of the Government under Rule 12. It is an answer to the letter received from Delhi TRANSCO Ltd. seeking clarifications from the Government with respect to the competent authority/new entity to deal with vigilance/ disciplinary/court cases in relation to the employees of erstwhile DVB who could not become part of any of the companies on 01.07.2002 in terms of the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001. In that, a reference was made in the second paragraph to Section 6 of the Act read with Section 15 and 16 of the DERA read with Rule 12 of the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001. It was then conveyed that being empowered by the directions issued vide No.11 (94)/2003/Power/103 dated 09.01.2004, it is clarified that the vigilance, disciplinary and Court cases in respect of the employees of the then DVB who could not become part of any of the companies, namely, DPCL, Delhi TRANSCO, Indraprastha Power Generation Co. Ltd., BSES Yamuna Power Ltd., BSES Rajdhani Power Ltd. and NDPL on 01.07.2002 i.e. on the date of restructuring due to retirement/ dismissal/ removal/compulsory retirement shall be processed and decided by such company which would have been the controlling authority of the employee but for their retirement/ dismissal/removal/compulsory retirement etc. as per Schedule 'B', 'C', 'D', 'E' and 'F' of the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001. It is absolutely clear that by this letter the whole liability was put on the head of the DISCOMS. The appellant is only one of the DISCOMS who would have been the controlling authority of the employees had those employees continued.

35. This position was, however, opposed by the Learned Senior Counsel for the appellants pointing out the two earlier letters i.e. a letter dated 17.09.2002 authored by one Shri Jagdish Sagar, Principal Secretary (Power) to DISCOM 1 and DISCOM 2 as also the subsequent Office Order dated 30.09.2002 issued by one G. Srinivas, Administrative Officer (G) of Delhi Power Supply Ltd. In the aforementioned letter dated 17.09.2002, Shri Jagdish Sagar, Principal Secretary (Power) had informed one Shri Chalasani, Chief Executive Officer, BSES Rajdhani Power Ltd. that a copy of the advice of the Law Department of the Delhi Government which had been accepted by the Government was enclosed with that letter. Amongst the other liabilities, Part II of this Government decision concerns the liabilities relating to distribution, business for the tasks undertaken in the period immediately before the date of transfer but payment against which would have been made after the date of transfer.

36. A question has been posed in the following form:

> "Whether the DISCOMS are under obligation to discharge liabilities in respect of any works completed or liabilities incurred in respect of staff pertaining to the period before 30.06.2002 on the basis that such payments are normally made in the month of July?"

Answer to this question is to be found to have been given in the negative. Learned Senior Counsel insists that the words in the question regarding the liabilities incurred in respect of staff pertaining to the period before 30.06.2002 would clearly show that the Government had taken a decision that such liabilities could not be put on the head of the DISCOMS and, therefore, it was clearly the liability of the holding company in terms of the answer given to this question. Learned counsel further pointed out that in pursuance of that, a further Office Order came to be issued under the signatures of one Shri G. Srinivas, Administrative Officer on 30.09.2002 in the following

manner:

> "Consequent upon unbundling of DVB, a doubt has been raised by Finance Department regarding payment of arrears of pay and allowance to retired employees to which company has to pay the same.
>
> It is now clarified that all such liabilities of erstwhile DVB have been transferred to the Holding Company as per Transfer Scheme Rule. Therefore, such payment of arrears pay and allowances to the retirees on account of revision of pay/court orders, etc. for the period up to 30.06.2002 i.e. prior to unbundling of DVB will be borne and paid by the Holding Company.
>
> All such claims will be prepared by APO(B) concerned and after duly auditing the same, will be forwarded to Holding Company for effecting the payment."

37. Now relying on this office order very heavily, Learned Senior Counsel pointed out that the liabilities would be only that of the holding company and not of the DISCOMS, like the appellant herein. In our opinion, the argument is clearly incorrect. Firstly, a query made and answered in the letter dated 17.09.2002 does not, in our opinion, pertain to the liability which is in question. The query is simple and it raises a question, whether, if any, work is completed or liabilities are incurred in respect of the staff pertaining to period before 30.06.2002, in which case the payments have to be made in the month of July, would the DISCOMS be under obligation to discharge such liability. The liability covered under second query, does not, in our opinion, take into its sweep the liabilities like the present liability. The answer which was provided when construed closely would bring about the following:

> "This interpretation is further supported by the provision in

Schedule 'G' by which all the receivables from sale of power to the consumer of the erstwhile Board other than to the extent specifically included in schedules D, E and F shall be to the account of the Holding Company. The Schedule 'G' further goes on to say that the DISCOMS will be authorized to release the receivable of the holding company and it is apparently for that reason they retain its 20 % share in such receivables as are collected, which are over and above the amounts included in Schedule D, E and F in respect of which no such share in the nature of collection charges is payable. It would not be reasonable to interpret the rules as assigning the liabilities for any period to the company which was not also entitled to the receivables pertaining to the same period, in the absence of any specific provision to the contrary. Therefore, my answer to the first question is in the negative."

In our opinion, therefore, the reliance on this would be uncalled for.

38. The office order dated 30.09.2002 is undoubtedly clear in support of the appellants. However, this office order does not show on what basis this was issued and under what authority. This seems to have been issued by an Administrative Officer of the DPCL. However, the last letter dated 21.01.2004 which has been issued by the Deputy Secretary (Power) very clearly spells out the liability and the said decision has the authority of Section 60 read with Section 15 and 16 read with Rule 12 of the Transfer Scheme Rules. It has superseded the earlier direction dated 09.01.2004. However, it has not been made available to us. Be that as it may, the clarification is more than clear which puts the responsibilities of the erstwhile staff on the DISCOMS.

39. It was tried to be argued that under Section 57 of the Act such decision could not be taken after two years of the transfer. This argument is clearly incorrect. Section 57 operates in entirely different sphere. It speaks about the power of the

Government to remove doubts. It is the power to make provisions for the smooth operation of the Act and the Rules which have to be brought into effect by passing orders which are required to be published in the Official Gazette and such orders would then be given effect by making provisions which are not inconsistent with the Act. It is for such kind of orders that the Rules apply. What is referred to in the aforementioned decision is in pursuance of the power of the Government to make rules under Section 60 pertaining to Section 15 and 16 of the Act. It was tried to be argued that even if Section 60 was referred to in the aforementioned order, such rules had to be notified.

40. It is then argued that Section 60 does not empower rule making by a letter. It was also suggested that the letter dated 21.01.2004, the purpose of which was mentioned as 'removal of doubts' which could not only be done by Section 15 of the Act and, therefore, that was not question of the letter being effective, particularly, because it has been passed after two years of the relevant date and would clearly be hit by provision of Section 57 which does not empower any rules to be made after two years of the date of transfer. Learned Senior Counsel, therefore, very heavily relied on this Section, which argument, in our opinion is incorrect. There is a clear reference made to Rule 12 which runs as under:

12. Decision of Government-Final:

(1) If any doubt, dispute, difference or issue shall arise in regard to the transfers under these rules, subject to the provisions of the Act, the decision of the government thereon, shall be final and binding on all parties.

(2) The government may by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of the Act, as may appear to be necessary for removing the difficulties

arising in implementing the transfers under these rules."

41. It must be said that the powers under sub-Rule (1) and (2) are of different kinds. The finality of the Government decision is writ large from the provisions of sub-Rule (1) of Rule 12, while under the provisions of sub-Rule (2), the Government has the power to make provisions by order published in the Official Gazette. Therefore, in our opinion, the position taken by the Government in the letter dated 21.01.2004 is clear and doubtless.

42. One feeble argument was made that the Government had already exhausted its power under Rule 12 (1) while taking the decision dated 17.09.2002 and, hence, it had lost the power to pass any fresh orders. The argument is clearly incorrect. There can be no finality in the matter of removal doubts or the removal difficulties and also taking the decisions under Rule 12(1). The argument that once the Government has exercised the powers under Rule 12(1), the power gets exhausted and the decision becomes final and binding on all the parties, including the Government, is clearly incorrect. The argument that there is no further power under Rule in the Government to issue any letter dated 21.01.2004, is also an incorrect argument. In our opinion, nothing stopped the Government from taking any decision and it has taken a clearest possible decision by letter dated 21.01.2004 which is binding on all the parties. This is apart from the fact that the Government has not dealt with the subject in its earlier decision dated 17.09.2002 as regards the controversy which has fallen for consideration in this matter. It was in respect of other liabilities which were covered by Schedules 'D', 'E', 'F' and 'G'. We have already clarified that those liabilities were different from the liabilities which arose on account of the employees who could not become the employees of the DISCOMS on the date of transfer due to their retirement, dismissal, death etc. In our opinion, therefore, the view taken by the Delhi High Court is the correct view. We have

already clarified about the so-called Office Order dated 30.09.2002 which is overridden by the final decision taken by the Government in its letter dated 21.01.2004.

43. On the overall consideration, we are of the clear opinion, that these appeals do not have any merits and must be dismissed. There shall be no order as to costs.

B.B.B. Appeals dismissed.

M/S M.R.F. LTD. ETC.
v.
MANOHAR PARRIKAR AND ORS.
(Civil Appeal No. 4220 of 2002 etc.)

MAY 3, 2010

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

Rules of Business of the Government of Goa:

rr. 3,6,7 and 9 – Decision taken by Minister of Power allowing rebate in electricity tariff – Matter not referred to Chief Minister or the Council of Ministers – Nor was the concurrence of Finance Department taken – HELD: Such a decision cannot be said to be the decision of the Government – Notifications giving effect to such decisions without complying with the Rules of Business framed under Article 166(3) of the Constitution, are non-est and void ab initio – High Court has rightly held the Rules of Business as mandatory – In the instant case, there is sufficient doubt with regard to the conduct of the Minister of Power in issuing the notifications – Therefore, suspicion of irregularity renders the doctrine of indoor management inapplicable – Constitution of India, 1950 – Articles 154 and 166 – Doctrine of indoor Management – Public Interest Litigation.

Code of Civil Procedure, 1908:

s.11, O.2, r.2 – Res judicata – Withdrawal of electricity tariff rebate granted as per Notifications challenged in writ petitions – Upheld by High Court – But writ petitioners held entitled to the rebate for the periods indicated in the judgment – SLPs dismissed – Subsequent writ petition in public interest filed challenging validity and legality of the Notifications – HELD: In the earlier litigation, issue of validity or legality of the Notifications was never raised, nor the writ petitioner in the

subsequent writ petition was a party thereto – Merely because the State Government did not agitate legality or validity of the notifications in earlier round of litigation, it cannot be deemed to have accepted legality for the Notifications or waived its objection thereto – Therefore, the principles of res judicata and the doctrine of estoppel have no application – Since the issue that was decided by High Court in earlier round of litigation and the issue raised and considered in subsequent public interest writ petition are entirely different, doctrine of merger has also no bearing – Estoppel – Rules of Business of Government of Goa – Doctrine of merger.

The Government of Goa issued notification dated 30.9.1991 granting rebate of 25% in electricity tariff in respect of power supply to the low tension and high tension industrial consumers. The said notification was later rescinded by another Notification dated 31.3.1995. However, on 15.5.1996 another notification was issued amending the notification dated 30.9.1991 and substituting the words "high tension or low tension power supply" by words "high tension/extra high tension or low tension power supply". A further notification dated 1.8.1996 was issued restoring the facility of 25% rebate w.e.f. 1.8.1996. By an order dated 31.3.1998 issued by the Chief Electrical Engineer, the benefits of rebate granted under Notification dated 1.8.1996 were withdrawn. This led to a spate of litigation by the industrial units before the High Court. During the pendency of the writ petitions, the State Cabinet passed a resolution and, accordingly, by issuing the notification dated 24.7.1998 the State Government withdrew the benefit of 25% rebate. The High Court, by its order dated 21.1.1999, disposed of the writ petitions holding the circular/order dated 31.3.1998 as invalid and the notification dated 24.7.1998 as legal, valid and operative. However, the High Court held that all the petitioners were entitled to 25% rebate in power tariff for the periods as indicated in the judgment. The appeals

challenging the judgment of the High Court were dismissed by the Supreme Court by its order dated 13.2.2001. Respondent No. 1 (in CA No. 4220 of 2002) challenged the correctness of the notifications dated 15.5.1996 and 1.8.1996 by filing a writ petition under public interest and sought to declare the two notifications as null and void. It was stated that as the said notifications were issued only at the instance of the Minister of Power, the same could not be termed as decisions of the State Government; and if the said illegal notifications were allowed to stand, they will cause a loss of Rs.50 crores to the States Exchequer. The writ petition was contested on the ground that the High Court in its judgment dated 21.1.1999 having upheld the validity of the notifications dated 15.5.1996 and 1.8.1996 and the said judgment having been upheld by the Supreme Court by its order dated 13.2.2001, the writ petition was barred by the principle of *res judicata* and the doctrine of merger. The High Court by its judgment dated 19/24.4.2001 held that the notifications dated 15.5.1996 and 1.8.1996 having been issued without complying with the Rules of Business of the Government of Goa framed under Article 166(3) of the Constitution, were *non-est* and *void ab-initio.* Aggrieved, the various industrial units filed the appeals.

Dismissing the appeals, the Court

HELD: 1.1. The High Court rightly held that the Rules of Business of the Government of Goa framed under Article 166(3) of the Constitution of India, including Rules 3, 6, 7 and 9 thereof, are mandatory and not directory, and any decision taken by any individual Minister in violation thereof cannot be termed as the decision of the State Government. The said Rules must be strictly adhered to. Any decision by the Government in breach of these Rules will be a nullity in the eyes of law. The decisions of the State Government have to be in conformity with the

mandate of Articles 154 and 166 of the Constitution as also the Rules framed thereunder, otherwise they would not have the form of a Government decision and will be a nullity. The Rules of Business framed under Article 166(3) of the Constitution are for convenient transaction of the business of the Government, which has to be carried out in a just and fit manner in keeping with the Business Rules and as per the requirement of Articles 154 and 166 of the Constitution. [Para 54, 62-63] [1133-G-H; 1134-A; 1139-E-H; 1140-H; 1141-A]

State of Kerala vs. A. Lakshmikutty **(1987) 1 SCR 136 = (1986) 4 SCC 632;** *CBI vs. Ravi Shankar Srivastava*, **(2006) 4 Suppl. SCR 450 = (2006) 7 SCC 188;** *Punjab State Industrial Development Corpn. Ltd. vs. PNFC Karamchari Sangh* **2006 (3) SCR 751 = (2006) 4 SCC 367;** *State of Bihar vs. Kripalu Shankar,* **(1987) 3 SCR 1 = (1987) 3 SCC 34;** *Haridwar Singh vs. Bagun Sumbrui,* **(1973) 3 SCC 889;** *Gulabrao Keshavrao Patil vs. State of Gujarat*, **(1995) 6 Suppl. SCR 97 = (1996) 2 SCC 26;** *K.K. Bhalla vs. State of M.P.* **2006 (3) SCC 581 and** *State of U.P. vs. Neeraj Avasthi* **(2005) 5 Suppl. SCR 906 = 2006 (1) SCC 667, relied on.**

R. Chitralekha vs. State of Mysore **(1964) 6 SCR 368, held inapplicable.**

Dattatraya Moreshwar vs. State of Bombay **(1952) SCR 612;** *Bachhittar Singh vs. State of Punjab* **(1962) Supp 3 SCR 713 and** *State of Sikkim vs. Dorjee Tshering Bhutia* **(1991) 3 SCR 633 = (1991) 4 SCC 243, referred to.**

Bannari Amman Sugars Ltd. vs. Commercial Tax Office **(2004) 6 Suppl. SCR 264 = (2005) 1 SCC 625; and** *State of U.P. vs. Om Prakash Gupta* **(1969) 3 SCC 775, cited.**

Montreal Street Rely Co. vs. Normandin **– 1917 A.C. 170;** *R v Immigration Appeal Tribunal Ex parte Jeyeanthan* **1999**

(3) AER 231; *Attorney General's Reference* **(No 3 of 1999), 2001(1) AER 577 and** *R v Sekhon and others,* **2003(3) AER 508, referred to.**

Halsbury's Laws of England, **4th Edition Re issue Vol. 44(1), referred to.**

1.2. Clause (1) of Article 166 of the Constitution says that whenever an executive action is to be taken by way of an order or instrument, it shall be expressed to be taken in the name of the Governor in whom the executive power of the State is vested. Under Clause (2), the orders and instruments made and executed in the name of the Governor shall be authenticated in the manner specified in the rules. All matters, excepting those in which the Governor is required to act in his discretion, have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. [para 52] [1131-C-E]

1.3. Any decision taken by the State Government reflects the collective responsibility of the Council of Ministers and their participation in such decision making process. The Chief Minister as the Head of the Council of Ministers is answerable not only to the Legislature but also to the Governor of the State, who, as the Head of the State, acts with the aid and advice of the Council of Ministers headed by the Chief Minister. The Rules framed under Article 166 (3) of the Constitution are in aid to fulfill the constitutional mandate embodied in Chapter II of Part VI of the Constitution. The decision of the State Government must meet the requirement of these Rules also. Therefore, if the Council of Ministers or Chief Minister has not been a party to a decision taken by an individual Minister, that decision cannot be the decision of the State Government and it would be *non-est and void ab initio*. [para 61 and 62] [1139-A-C, G-H; 1140-A]

1.4. A decision to be the decision of the Government

must satisfy the requirements of the Business Rules framed by the State Government under the provisions of Article 166(3) of the Constitution. In the case on hand, the decisions leading to the notifications dated 15.5.1996 and 1.8.1996 do not comply with the requirements of Business Rules framed by the Government under the provisions of Article 166(3) of the Constitution, and the Notifications are the result of the decision taken by the Power Minister at his level. The decision of the individual Minister cannot be treated as the decision of the State Government and the Notifications issued as a result of such a decision, are in violation of the Business Rules and void *ab initio;* and all actions consequent thereto are null and void. The fact that the decisions taken by the Minister alone were acted upon by issuance of Notifications dated 15.5.1996 and 1.8.1996 will not render them decisions of the State Government even if it chose to remain silent for a sufficient period of time or the Secretary concerned did not take any action under Rule 46 of the Business Rules. [para 53 and 68] [1133-D-E; 1147-A-D]

1.5. Rule 7 (2) of the Business Rules states that a proposal which requires previous concurrence of Finance Department under the said Rule, but in which Finance Department has not concurred, may not be proceeded with, unless the Council of Ministers has taken a decision to that effect. From a combined reading of the provisions of Rules 7, 3 and 6 of the Business Rules, the conclusion would be irresistible that any proposal which is likely to be converted into a decision of the State Government involving expenditure or abandonment of revenue for which there is no provision made in the Appropriation Act or an issue which involves concession or otherwise has a financial implication on the State, is required to be processed only after the concurrence of the Finance Department and cannot be

finalized merely at the level of the Minister in charge. The procedure or process does not stop at this. After the concurrence of the Finance Department the proposal has to be placed before the Council of Ministers and/or the Chief Minister and only after a decision is taken in this regard, it will result in the decision of the State Government. [para 53] [1131-G-H; 1132-A, F-H; 1133-A-B]

1.6. In the instant case, the decisions impugned involve and concern not only the Department of Power but also the Departments of Industries and Finance and in view of the provisions of Rule 20, the decisions by Minister of Power to finalize the Notifications at his level without placing the proposal before the Chief Minister or the Council of Ministers fell out side the purview of the Power Minister. When the rescinding Notification dated 31.03.1995 was issued, the rebate of 25% was available only to Low Tension and High Tension consumers, and the Extra High Tension Consumers got deleted pursuant to the Notification dated 6.12.1993. A decision, therefore, to include a new category of consumers for grant of rebate which necessarily involved extra financial burden on the State's finances, more so, by creation of a new category, namely, Extra High Tension Consumers retrospectively, was required to be finalized only after it was placed before the Council of Ministers or the Chief Minister in addition to obtaining the previous concurrence of the Finance and Industries Departments. [para 59-60] [1136-H; 1137-A-B, G-H; 1138-A-B]

1.7. The Notification dated 15.5.1996, which was claimed by the appellants to be only clarificatory, imposed an additional burden on the State's Exchequer by introducing a new class of consumers for grant of rebate retrospectively and it was finalized by the Power Minister at his level. In law, the proposal for the decision leading to the Notification dated 15.5.1996 should have

been placed before the Council of Ministers or the Chief Minister and since the same has not been done it is in violation of the Business Rules and hence the decision is non-est. Even assuming that the Notification dated 15.5.1996 was clarificatory in nature, the same violates Rule 19 of the Business Rules and there is nothing on record to show that the department concerned attempted to seek ratification of the decision taken by the Power Minister before the Notification dated 15.5.1996 was issued. The Notification dated 1.8.1996 also cannot be treated as mere clarificatory. It is a notification issued purportedly in terms of a Government decision. It was a decision finalized at the level of the Minister of Power alone and was taken in violation of the Rules of Business framed under Article 166(3) of the Constitution. The decision cannot be called a government decision as understood under Article 154 of the Constitution. Having regard to the figures placed on record, which the High Court has noticed in its judgment, showing the liability likely to be brought on the State by Notification dated 1.8.1996, it cannot be said that the said Notification did not create any additional financial liability on the State Government warranting approval by the Cabinet or the compliance of the Business Rules before it was brought into effect. Therefore, the Notifications dated 15.5.1996 and 1.8.1996 are unsustainable and the High Court has rightly held the same as non-est and void ab initio. [para 60, 64, 69 and 75] [1138-B-E; 1142-B-C; 1147-E-G; 1152-D-E]

Royal British Bank v. Turquand, **[1856] 6 E. & B. 327, referred to.**

2. Suspicion of irregularity has been widely recognized as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and, therefore, invite inquiry.

Applying the exception to the instant matter, there is sufficient doubt with regard to the conduct of the Minister of Power in issuing the Notifications dated 15.5.1996 and 01.08.1996. Therefore, there is definite suspicion of irregularity which renders the doctrine of indoor management inapplicable to the instant case. [para 71 and 73] [1149-C-D; 1150-E-F]

B. Anand Behari Lal v. Dinshaw and Co. (Bankers) Ltd, **AIR 1942 Oudh 417;** *Abdul Rehman Khan & Anr. v. Muffasal Bank Ltd. and Ors*, **AIR 1926 All 497;** *Shrisht* Dhwan(Smt.) vs. Shaw Bros. **(1992) 1 SCC 534; and** *State of Karnataka vs. All India Manufacturer Organization and Others,* **(2006) 1 SCC 32, referred to.**

R. Chitralekha and Others vs. State of Mysore **1964 (6) SCR 368, held inapplicable.**

J.C Houghton& Co. v. Nothard, Lowe & Wills Ltd, **[1927] 1 KB 246 (CA) – referred to.**

3.1.The subject matter of earlier writ petitions was completely different and distinct from the public interest litigation filed by respondent no.1. In the earlier litigation, there was no challenge whatsoever to the Notifications dated 15.5.1996 and 1.8.1996 and the declaration sought in writ petition No. 316 of 1998 was not in issue in the earlier batch of petitions. Therefore, it cannot be said that the controversy in the earlier batch of writ petitions and the instant writ petition is the same. The issue regarding the validity or legality of the Notifications dated 15.5.1996 and 1.8.1996 was never raised in the earlier batch of writ petitions before the High Court, which never had an opportunity or occasion to look into, consider and pronounce upon the validity of the same with reference to the Business Rules framed under Article 166 (3) of the Constitution. The principles of *res judicata*, Doctrine of Estoppel and the principles embodied in Order II Rule 2

of the Code of Civil Procedure pressed into service by the appellants cannot operate against the State Government merely because the State did not agitate either before the High Court or this Court the legality or validity of these notification in the earlier round of litigation when it had an occasion to do so. The State Government cannot be deemed to have accepted the legality of the Notifications and waived its objection or challenge thereto. The doctrine of estoppel, therefore, has no application at all, more so, in view of the illegality the notifications dated 15.05.1996 and 01.08.1996 suffer from in view of the non-compliance with the provisions of the Business Rules. The fact that the State Government did not raise these objections in the earlier batch of writ petitions does not disentitle it to such a stand or prevent it from raising its objections based on legal provisions. Respondent No. 1 was not a party to the earlier batch of writ petitions before the High Court or this Court. Therefore, the principles of *res judicata* or for that matter even the doctrine of estoppel will not apply to or operate against him. [para 24, 28, 29 and 75] [1109-G-H; 1110-A-B; 1113-A; 1114-A-C; 1151-F-H; 1152-A-D]

Madhvi Amma Bhawani Amma and Ors. vs. Kunjikutty Pillai Meenakshi Pillai and Ors. **(2000) 3 SCR 752 = (2000) 6 SCC 301, referred to.**

3.2. As regards the objections raised on the basis of concept of merger, the High Court has held that though the appeals challenging the judgment of the High Court dated 21.1.1999 have been dismissed by this Court, and the findings of the High Court on the relevant issues have been impliedly confirmed, the concept of merger will not come in its way in deciding the issues involved in the instant petition for the reason that the said issues were not raised and, therefore, not required to be decided by the High Court in its earlier judgment dated 21.01.1999

inasmuch as legality of Notifications dated 15.5.1996 and 1.8.1996 was not examined therein. The principle of merger has no bearing, since, the issue that was decided by the High Court in the earlier batch of writ petitions and the issue that was raised and considered in the subsequent public interest litigation (W.P. No. 316 of 1998) are entirely different. [para 25, 27-28] [1110-C-F; 1112-F-H; 1113-A]

Shankar Ramachandra Abhyankar vs. Krishnaji Dattatreya Bapat **(1970) 1 SCR 322 = (AIR 1970 SC 1), referred to.**

4. The appellants have not been able to show any infirmity or illegality in the order of the High Court warranting interference. [para 77] [1152-G-H]

Case Law Reference:

1970) 1 SCR 322	**referred to**	**Para 27**
(2000) 3 SCR 752	**referred to**	**para 28**
(1952) SCR 612	**referred to**	**para 30**
1995 (6) Suppl. SCR 97	**relied on**	**para 31**
1964 (6) SCR 368	**held inapplicable**	**para 32**
(1973) 3 SCC 889	**relied on**	**para 33**
1917 A.C. 170	**referred to**	**Para 34**
1999 (3) AER 231	**referred to**	**Para 35**
2001(1) AER 577	**referred to**	**Para 36**
2003(3) AER 508	**referred to**	**Para 37**
(1987) 1 SCR 136	**relied on**	**para 40**
(2006) 4 Suppl. SCR 450	**relied on**	**para 41**
2006 (3) SCR 751	**relied on**	**para 42**
1987 (3) SCR 1	**relied on**	**para 43**

(1973) 3 S CC 889	**relied on**	**para 44**
1952 SCR 612	**cited**	**para 45**
(1962) Supp 3 SCR 713	**referred to**	**para 46**
1991) 3 SCR 633	**referred to**	**para 47**
1995 (6) Suppl. SCR 97	**relied on**	**para 48**
2004 (6) Suppl. SCR 264	**cited**	**para 49**
(1969) 3 SCC 775	**cited**	**para 49**
2006 (3) SCC 581	**relied on**	**para 55**
2005 (5) Suppl. SCR 906	**relied on**	**para 56**
(1992) 1 SCC 534	**referred to**	**para 70**
AIR 1942 Oudh 417	**referred to**	**para 73**
AIR 1926 All 497	**referred to**	**para 73**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4220 of 2002.

From the Judgment & Order dated 19/23.04.2001 & 24.04.2001 of the High Court of Bombay at Goa in Writ Petition No. 316 of 1998.

WITH

C.A. Nos. 4219, 4213, 4214, 4217 & 4218 of 2002.

F.S. Nariman, L.N. Rao, K.N. Bhat, Dr. Rajeev Dhawan, Shyam Diwan, Deeptakirth Verma, S. Karpe, Subash Sharma, Binu Tamta, Prashant Kumar, Triveni Poteker, I. Bimola Devi, Punit Jain, Chander Shekhar Ashri, Anu Mohla, A Subhashini, Mohit Abraham, Dhruv Mehta, T.S. Sabasish (for K.L. Mehta & Co.), Santosh Paul, M.J. Paul, K.K. Bhat, Arvind Gupta, Sriharsh N. Bundela, Kavin Gulati, Rohina Nath, Rohan Dhiman, Rashmi Singh, Sharuk Narang, Ashu Kansal, Umesh Kumar Khaitan for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. In Civil Appeal Nos. 4220 of 2002, 4213 of 2002 and 4218 of 2002, the appellants have called in question the correctness of the judgment and order in Writ Petition No. 316 of 1998 dated 19/24.4.2001, passed by the High Court of Bombay Panaji Bench, at Goa in a Writ Petition brought in public interest by one Manohar Parrikar, a Member of Legislative Assembly, Goa (who later on became the Chief Minister of the State of Goa) questioning the legality, validity and propriety of two notifications issued by Government of Goa dated 15.5.1996 and 01.8.1996 in respect of grant of 25% rebate to Low Tension, High Tension and Extra High Tension Industrial consumers of electricity as a policy of the State Government.

In Civil Appeal No. 4219 of 2002 (*M/s M.R.F. Ltd. & Anr. Vs. State of Goa & Anr.*), the appellant has called in question the judgment and order passed by the High Court of Bombay Panaji Bench, at Goa in Writ Petition No. 364 of 1999 dated 24.4.2001, partly allowing the writ petition filed by the appellant.

In Civil Appeal No. 4214 of 2002 (*Goa Glass Fibre Ltd. & Anr. Vs. The State of Goa & Anr.*), the appellant has called in question the correctness or otherwise of the judgment and order passed by the High Court of Bombay Panaji Bench, at Goa in Writ Petition No. 254 of 1999 dated 25.4.2001 dismissing the writ petition filed by the appellant.

In Civil Appeal No. 4217 of 2002 (*Alcon Cement Company Limited & Anr. Vs. The State of Goa & Anr.*), the appellant has called in question the correctness of the judgment and order passed by the High Court of Bombay Panaji Bench, at Goa in Writ Petition No. 277 of 1999 dated 24.4.2001 partly allowing the writ petition.

In Civil Appeal No. 4218 of 2008 (*Mauvin Godinho Vs. Manohar Parrikar & Ors.*), the appellant has called in question the correctness of the judgment and order passed by the High Court of Bombay Panaji Bench, at Goa in Writ Petition No. 316

of 1998 dated 19/24.4.2001

The material facts as pleaded by the Appellants in Civil Appeal Nos. 4220 of 2002, 4213 of 2002 and 4218 of 2002 are as under:

1. The Government of Goa, in purported exercise powers conferred upon them by Section 23 of the Indian Electricity Act, 1910 ('Electricity Act' for short) issued a Notification on 30.09.1991, granting rebate of 25% in Tariff in respect of the power supply to the Low Tension and High Tension Industrial Consumers/appellants who apply for availing High Tension or Low Tension Power Supply on or after the 1st of October, 1991 for bona fide industrial activities and certified by the Industries Department, Government of Goa as eligible for concessional tariffs for a period of five years from the date on which electricity supply is made available to such units.

2. This Notification was issued by the State Government in the name of the Governor of the State as per the Rules of Authentication framed under Article 166(2) of the Constitution of India by following the procedure prescribed by the Business Rules framed under the Provisions of Article 166(3) of the Constitution of India after the State Cabinet had approved it. Though the said Notification was in subsistence, except one Industrial Unit, none applied to the State Government for the grant of benefit of the Notification for a long period or at least till 31.03.1995. On 31.03.1995, the said Notification was rescinded by the State Government in purported exercise of power conferred on it under Section 21 of the General Clauses Act read with Sections 23 & 51-A of the Electricity Act with effect from 01.04.1995, by issuing a Notification dated 31.03.1995 strictly in accordance with the Business Rules and Rules of Authentication pursuant to the decision taken by the State Cabinet.

3. Though the Government rescinded the Notification dated 30.09.1991, number of industrial units approached the State

Government and claimed benefit of 25% rebate in terms of Notification dated 30.09.1991 for the period between the date of supply of electricity and 31.03.1995. Some applications were rejected by the Chief Electrical Engineer of State of Goa, on the ground, that, they being in the category of Extra High Tension did not fall within the category of consumers covered by the Notification dated 30.09.1991. On 29.06.1995, a Calling Attention Notice in Legislative Assembly was also brought in by Mr. Manohar Parrikar, seeking clarification from the State Government as to whether these industrial units were entitled for the benefits flowing from the Notification dated 30.09.1991 upto 31.03.1995. The Power Minister gave a reply to the said Notice which is reproduced in the judgment under appeal. In sum and substance the Minister stated, that, the Government was committed to honour the concession granted by the Notification dated 30.09.1991 to the eligible industrial units who apply for High Tension and low tension power on or after 01.10.1991 till the date of withdrawal, i.e. 01.04.1995.

4. The Under Secretary to Government of Goa, Department of Power issued a clarification dated 01.11.1995 to the Chief Electrical Engineer on the lines of the reply given by the Power Minister to the Calling Attention Motion and reiterated the same by a communication dated 12.12.1995. Later, as the Government being satisfied that there were certain difficulties in the matter of clearing cases of claim of rebate for the period upto 31.03.1995, issued certain clarifications. On 15.05.1996, however, the State Government issued another Notification in purported exercise of power conferred on it under Sections 23 & 51-A of the Electricity Act read with Section 21 of the General Clauses Act, to amend the Notification dated 30.09.1991 which had been rescinded as per Notification dated 31.03.1995. By the said Notification the Government substituted the words “High Tension or Low Tension power supply” by the words “High Tension/Extra High Tension or Low Tension power supply”. The State Government further issued another Notification dated 01.08.1996 restoring the facility of

giving 25% rebate to these three categories of Industrial consumers and made the said rebate available from 01.08.1996 to those who had either applied or availed the power supply as on that date.

5. By an order dated 31.03.1998, issued by the Chief Electrical Engineer of State of Goa, the benefits of rebate granted by the State Government were withdrawn, as it appears that the State Government did a re-thinking over its power to grant such rebate on the Tariff. This action of the State Government led to a spate of litigations by the Industrial Units in the High Court of Bombay Panaji Bench, at Goa, wherein they contended that the benefits granted by the State Government as a policy decision could not be withdrawn by the order dated 31.03.1998, which was merely an administrative order and that they were entitled to the benefits granted by the Notification dated 01.03.1996, as long as the said Notification was not withdrawn by due process of law.

6. During the pendency of these writ proceedings before the High Court, the State Cabinet after addressing itself to the issues raised by the industrial units in the writ proceedings, passed a resolution to withdraw the benefit of 25% rebate and accordingly issued a Notification dated 24.07.1998 and withdrew the rebate of 25% with effect from 01.08.1998. By an order dated 21.01.1999, the High Court disposed of the batch of writ petitions, inter alia holding that the Circular dated 31.03.1998 mentioned supra as invalid and inoperative and the Notification dated 24.07.1998 as legal, valid and operative, and that all petitioners therein were entitled to 25% rebate in power tariff for the periods as indicated in paragraph 56 of the said judgment etc.

7. The judgment of the High Court was taken up in appeal by both parties to this Court and this Court by an order dated 13.02.2001 declined to interfere with the said order of the High Court and rejected both sets of appeals.

8. Mr. Manohar Parrikar, the 1st respondent herein, in the meantime, had moved the High Court with a Misc. Civil Application No.637 of 1999, seeking withdrawal of his writ petition with liberty to challenge the legality or otherwise of the Notification after this Court decided the above mentioned civil appeals filed before it against the order of the High Court dated 21.01.1999. The High Court by its order dated 27.01.2000 rejected the said application. Mr. Manohar Parrikar had also moved the High Court to hear his petition along with earlier set of writ petitions disposed of by the High Court on 21.01.1999. Subsequently, the said prayer was also withdrawn.

9. Before the High Court, the 1st respondent herein challenged the correctness of the Notifications dated 15.05.1996 and 01.08.1996, and sought to declare the same as null and void. He also challenged the guidelines framed in the letter dated 12.12.1995 and sought to declare the said circular was illegal and to quash it to the extent it goes beyond the scope of Notification of 1991. He also prayed for certain other reliefs, including initiation of recovery of rebates paid by the State Government to the beneficiaries.

10. Though the petitioner had sought many reliefs in his writ petition, the High Court confined itself to the challenge made to the legality of the notifications dated 15.05.1996 and 01.08.1996. Before the High Court the 1st respondent herein contended as under:

- That the two notifications were not issued in compliance with the requirements of Article 154 read with Article 166 of the Constitution of India and the Business Rules of the Government of Goa framed by the Governor thereunder.
- That retrospective benefit of rebate in tariff given by these two notifications was not bona fide and is illegal.

- That there was no Budgetary Provisions made for these benefits to be extended during the relevant financial years.
- That the Notifications in question were not issued as is contemplated by and under Articles 154 and 166 of the Constitution of India and that they were issued only at the instance of the Minister of Power at the relevant point of time and, hence, Notifications could not be termed as the decisions of the State Government.
- That the amendment brought by the Notification dated 01.08.1996 has overridden the very scope of the Notification dated 30.09.1991 which is impermissible in law.
- That the Notification dated 15.05.1996 could not have been issued when the Notification dated 30.09.1991 was already rescinded by Notification dated 31.03.1995 and no life could have been infused into the said notification when it did not exist.
- Addition to the said notification of Extra High Tension consumers with retrospective effect from 01.10.1991 was beyond the scope of the Notification dated 30.09.1991.

11. The said writ petition was contested by the 2nd respondent, who was the power Minister at the relevant point of time. He mainly contended that there was no illegality in the said Notifications which have been issued by following the prescribed procedure in the normal course of business of the Government with a view to promote industrial growth of the State so as to generate more employment opportunities and, therefore, there was nothing improper or illegal about it. It was also contended by the 2nd respondent therein that even if the

said notifications were held to be contrary to the provisions of Article 166 of the Constitution, the said Rules are only directory and failure to comply with them did not vitiate the Notifications and in any event, if it was realized by the State Government that these Notifications were issued contrary to the Provisions of Article 166 nothing prevented the State Government from withdrawing them and the fact that no such action was taken by the State Government for almost two years itself indicated that the State Government was satisfied with the legality of the Notifications. The respondent also raised a preliminary objection regarding the maintainability of the Writ Proceedings on the ground, that, once the Notifications impugned have been authenticated as per the Business Rules, they are immune from any challenge and there cannot be a situation where respondent No.1, who at the relevant point of time, was the Chief Minister of Goa, would be contesting against the action of the State Government. It was also contended that the petition lacked bona fides and was moved only to settle political scores and to gain political mileage. The fact that contradictory stands were taken by the State Government by filing two affidavits of the Chief Electrical Engineer itself showed that the State Government walked into the shoes of the 1st respondent herein and that the Government cannot support the challenge to the Notifications issued by it and even if the petition was pro bono when filed, it ceased to be so after the respondent No.1 herein took over as the Chief Minister of the State of Goa. The further contention advanced was that the High Court, having conclusively upheld the validity of these two notifications in its judgment dated 21.01.1999, cannot re-examine the same, more so, in view of confirmation of the said judgment by this Court in its Order dated 13.01.2001. The 2nd respondent therefore sought dismissal of the Writ Petition. A number of judgments were cited and relied upon by the 2nd respondent in support of his case before the High Court. The other parties including the interveners also supported the 2nd respondent therein, on the issue of maintainability and further addressed arguments based on the principles of *res judicata* and the concept of merger of

the judgment of the High Court dated 21.01.1999 with the judgment of this Court dated 13.01.2001. On these premise the respondents sought dismissal of the Writ Petition. It appears from the pleadings before us, that, the High Court had permitted certain Companies including the M.R.F Ltd, to come on record as interveners and oppose the reliefs sought in the Writ Petition.

12. The High Court by its judgment dated 19/24.04.2001 impugned herein allowed the writ petition in part by holding that the Notifications dated 15.05.1996 & 01.08.1996 could not be termed as Notifications issued by the State Government on account of Non Compliance of the Rules of Business framed under Article 166 (3) of the Constitution of India and therefore non-est and void-ab-initio and that the consequential actions based on these two notifications are null and void.

13. Aggrieved by the said judgment of the High Court, the Appellant [M.R.F. Ltd.] and others are before us in Civil Appeal Nos. 4220 of 2002, 4213 of 2002 and 4218 of 2002.

14. In Civil Appeal Nos. 4219 of 2002, 4214 of 2002 and 4217 of 2002, the appellants – M/s M.R.F. Limited, Goa Glass Fibre Limited and Alcon Cement Company Limited are questioning the correctness of judgment of the High Court in partly allowing the Writ Petition Nos. 364 of 1999 and 277 of 1999 and dismissing the Writ Petition No. 254 of 1999 respectively.

15. The facts in Civil Appeal No. 4219 of 2002 are :– Appellant applied for power supply connection for setting up a factory in the State of Goa on 03.10.1991. On 02.09.1992, appellant was supplied electricity for the first time. Sometime in October 1996, the Executive Engineer had acknowledged that the appellant is entitled for 25% rebate as provided in the notification. The amount of rebate was computed at Rs. 1,04,70,762 for the period from 02.09.1992 to 01.09.1996 and it was further stated that the amount of arrears be credited in

60 installments w.e.f. September, 1996 and each installment was of Rs. 1,74,513. The respondent had adjusted an amount of Rs. 53,78,594 as against the bills from September, 1996 to August, 1997 and further adjustment of Rs. 31,41,234 was also done subsequently thus leaving a balance of Rs. 73,29,528. The benefit of rebate was denied to the appellant for the remaining period on the basis of the notification dated 31.3.1998, whereby the extension of rebate in tariff was suspended. Pursuant to the judgment dated 21.1.1999, the appellant raised a fresh demand for rebate before the respondent no. 2 and as they failed to succeed, they approached the High Court for directions to seek implementation of the said judgment.

16. The present appeal is filed against the High Court's order dated 24.04.2001 and the letter issued on 25.05.2001 by the Department of Power to the appellant herein asking for refund of the rebate of Rs. 1,11,35,738 in one installment on or before 15.6.2001 pursuant to the order dated 24.4.2001.

17. The facts in Civil Appeal No.4214 of 2002 are :- The appellant – Goa Glass Fibre Ltd. - has set up a manufacturing plant at Colvale, Bardez Goa and it had applied for electric power connection on 18.7.1994. Pursuant to the agreement signed on 7.12.1995 between the appellant and the respondent no. 2, the appellant's factory was given power supply for the first time on 16.3.1996. The appellant made a representation to respondent no. 2 on or about 3.7.1996 for the benefit of 25% rebate in tariff and another reminder was sent in that regard on 27.11.1996. The claim for rebate was made on the basis of the government notification dated 30.09.1991, 15.05.1996 and 01.08.1996. Pursuant to the Notification dated 01.08.1996, 25% rebate to this industry was granted w.e.f. February, 1997 along with the arrears of installment @ Rs. 1,24,520. Such rebate was adjusted in the monthly bill. This rebate was withdrawn by issuing a circular dated 31.3.1998. This circular was challenged in the High Court. The High Court in its

judgment dated 21.01.1999, held the circular dated 31.3.1998 as invalid and inoperative. The appellant filed a Writ Petition No. 254 of 1999 in the High Court praying for the restoration of the 25% rebate.

18. The facts in Civil Appeal No.4217 of 2002 are :- The Alcon Cement Company Limited applied for power supply on 17.9.1992 and entered into an agreement with the respondent no.2 for supply of power on 29.9.1993. The appellant's factory at Surla in the State of Goa was given electricity supply for the first time on 1.3.1994. Sometime in October 1996, the Executive Engineer acknowledged the entitlement of 25% rebate and rebate in energy consumption was granted. The appellant was given adjustment of 13 installments quantified in sum of Rs. 2,90,342/- leaving a balance of 47 installments. In addition, the balance of subsidy for the months of March 1998 to July 1998 was worked out at the rate of Rs.4,24,671 thus making a total sum of Rs. 14,74,755. The benefit of rebate was denied to the appellant for the remaining period on the basis of the notification dated 31.3.1998, whereby the extension of rebate in tariff was suspended. Pursuant to the judgment dated 21.1.1999, the appellant raised a fresh demand for rebate before the respondent no. 2 and as they failed to succeed, they approached the High Court seeking directions to implement the said judgment.

19. Before us the appellants urged various contentions and supported them with various grounds and the case laws. The questions of law according to the appellants are as under:

- Whether there is any breach of judicial discipline by the High Court in not following it's own Judgment rendered by a Full Bench in the Case of Kharkanis wherein the Business Rules framed under Article 166 (3) were held to be directory in nature, but in holding that the Rules of Business are mandatory?

- Whether the High Court by the judgment impugned

herein has set at naught the judgment dated 21.01.1999 rendered by the other Division Bench with reference to the same notifications impugned in Writ Petition No. 316 of 1999, the former of which has been affirmed by this Court by its order dated 13.02.2001 in Civil Appeal No. 3206-07 of 1999 and others?

. Whether the appellants as consumers of power seeking rebate in terms of the Notifications issued in the name of the Governor which have been duly gazetted, can be estopped from seeking relief of rebate under them on the ground that the said Notifications were void ab initio as they were not issued in compliance of Business Rules?

. Whether the High Court, in the writ petition filed by Manohar Parrikar, on the basis of the files produced before it by the State Government with Manohar Parrikar as the Chief Minister of the State at the time of such production, erred in concluding that the impugned notifications are non-est on the basis of such files which had also been examined by the earlier Division bench of the High Court?

. Whether the High Court by issuing directions to effect recovery of rebate granted on the basis of Notifications in issue has over ruled the decision of the earlier Division Bench which had held that relief under the notifications would be granted up to the date of rescission of the Notification by the Gazette dated 27.07.1998?

. Whether the High Court erred in allowing the Writ Petition of Manohar Parrikar based on the changed stance of the State Government contained in its affidavit dated 12.04.2001 which was different from that which was taken by the State in the Court

before the 1st respondent herein became the Chief Minister of the State of Goa?

. Whether the High Court was justified in allowing the Writ Petition of Manohar Parrikar on the ground of Notifications being null and void for want of compliance with the Business Rules while its stand before the High Court in the present writ petition and earlier batch of writ petitions was that the notifications impugned had been rescinded due to financial crunch and in public interest which was upheld by the High Court and by this Court?

. Whether the judgment impugned has been rendered in a case where the petitioner on his becoming Chief Minister of the State drew support of the State Government through his own Advocate General to settle scores with his political rival the 3rd respondent herein?

. Is there any judicial indiscipline in the High Court in not following the judgment of this Court dated 13.02.2001 confirming the High Court judgment dated 21.01.1999, more so in view of the consistent stand taken by the State Government in Parrikar's case that the judgment of the High Court, dated 21.01.1999 covered the issues therein and that the High Court should await the order of this Court in Appeals pending and which was eventually disposed by order dated 13.02.2001?

. Did the High Court erred in not permitting Manohar Parrikar [1st respondent herein] to withdraw his writ petition, when he himself had submitted that the issues in his writ petition were covered by the judgment of the High Court dated 21.01.1999 and that the appeals there against were pending in this Court?

20. These civil appeals are opposed by the State Government by filing a detailed Counter Affidavit. The contentions of the State Government in support of the impugned judgment can be summarized as under:

- That the State has a vital interest in the outcome of the proceedings before this Court which have a bearing on the State's Finances as an order of this Court setting aside the judgment impugned will result in a loss of Rs. 50 Crores to the State's Exchequer.

- That the State has already paid an amount of about 16 crores as rebate and it cannot afford to pay any more on account of financial crunch faced by it and also on account of the Notifications not being Government decision in the eyes of law, in as much as the matter was neither placed before the State Cabinet in terms of the Business Rules nor was the mandatory concurrence of the Finance Department under the Business Rules obtained and the High Court has rightly held that the Notifications cannot be termed as State Government's decisions for want of non-compliance of mandatory Business Rules and the decision and actions based on the notification are therefore non-est.

- That there is no truth in the contention that the State Government has taken stand which is inconsistent with and contradictory to the one taken in the earlier affidavits filed in the proceedings.

- That the earlier affidavits for and on behalf of the State were filed by Chief Electrical Engineer Nagarajan in virtual support of the Notifications impugned. However, the said Nagarajan himself was party to the entire matter including moving of the file, initiating the process and that his

appointment was on ad-hoc basis overlooking the just and reasonable claims of various other senior, eligible and qualified candidates and that he had given benefit of rebate to an applicant whose application had been rejected by his predecessor.

- That investigation on a police complaint lodged by the petitioner in W.P 316 of 1999 disclosed that there was a conspiracy hatched between the said Nagarajan and the then Power Minister at whose instance the Notifications impugned were issued and that a charge sheet was laid before the Special Court set up under the Prevention of Corruption Act for offences under Section 120B of the Indian Penal Code and other provisions of the Prevention of Corruption Act and the said Nagarajan who filed the earlier affidavits was an accused in the said proceedings.

- That when it comes to the involvement of public revenue and the effect on the State's Exchequer to the tune of Rs.50 Crores, one has to be bold enough to place the correct facts and law before the Court and the earlier affidavits filed on behalf of the State Government did not place before the Court correct facts of the matter and that the affidavit of Nagarajan which did not reflect correct position of law and did not place correct facts before the Court should be discarded and the one filed subsequently should not be considered as contradictory or inconsistent as correct facts borne out from the Government files were placed before the Court by the said affidavits. The said affidavits also reflected the fact that there was neither financial sanction nor was there a budgetary provision nor was there a Cabinet approval as mandatorily required under the provisions of Article 166 (3) of the Constitution and

the said Notifications therefore could not be said to be the decision of the State Government in the eye of law. The affidavit dated 12.04.2001 was filed before the High Court after the State re-examined the entire matter at the highest level and after examining the legal aspects and as it was found that certain matters which go to the root of the matter and as the earlier affidavits filed before the High Court did not place all the facts emanating from Government files and records. The said affidavit was filed explaining the severe financial implications which the said Notifications incurred on the State in the form of rebate which could not be borne by the State's interest and which was detrimental to the State's Interest, more so in view of lack or absence of legal sanctity for the said notification. The affidavit was filed further to disclose that there was breach of mandatory Business Rules and to show that neither cabinet approval for the decision as required under law was obtained nor any budgetary allocation made for the rebate. The affidavit was filed to explain that the State Government could not bear liability of such magnitude.

21. The counter-affidavit of the respondent - State herein further reiterates the position of law flowing from various provisions of the Constitution and the Business Rules made there under and states that the impugned notifications did not comply with the requirements of the Business Rule 7 and were therefore totally vitiated and did not have any binding effect on the State Government. The decision contained in the said Notifications could not be the decision of the State Government in the strict and true sense of law. With these contentions the State Government seeks to support and sustain the judgment of the High Court against which appeal is filed in this Court.

22. A rejoinder is filed by the appellant - M.R.F Ltd. to counter various statements made by the State Government' in its Counter Affidavit filed in the appeal.

23. We have heard Shri F.S. Nariman, Dr. Rajeev Dhavan, Shri L. Nageshwar Rao, Shri K.N. Bhatt and Shri Shyam Divan, the learned senior counsel for the parties who have advanced elaborate arguments in support of the issues respectively raised by them in the pleadings.

24. The High Court by its judgment impugned herein has elaborately dealt with each of the contentions of the parties before it. Before the High Court the Writ Petition filed in public interest was opposed on various grounds. It was preliminarily objected to and opposed on the ground of maintainability which was dealt with by the High Court holding as under:-

" We have no hesitation to hold that the Petition is not required to be dismissed on the ground of merger of the earlier decision dated 21st January, 1999 with the order of the Apex court or on the ground of *res judicata*. There is no dispute that the illegality of these Notifications were not challenged in the Petitions which came to be decided on 21st January, 1999 and, in fact, the said challenge could not have been raised for the simple reason that the Petitioners' claim was entirely based on the existence of these two Notifications. When the Petitioner moved Miscellaneous Civil Application No.637 of 1999 with the prayer to allow him to withdraw the Petition for the reasons stated therein, this court while rejecting the said application by order dated 27th January, 2000, gave the following reasoning:-

"It appears that at one stage the applicant had prayed for taking up the Writ Petition No. 316/98 along with the other batch of Writ Petitions, but the said prayer was withdrawn. In the said batch of Writ Petitions, challenge had been thrown to the decision of government of Goa

communicated by the Chief Electrical Engineer vide Circular dated 31st March, 1998 to suspend the release of 25% rebate of power tariff to the industrial consumers. There was no challenge whatsoever to Notification dated 15th May, 1996, or Notification dated 1st August, 1996, or that the said Notifications were null and void and to nullify any effect given to them in the earlier batch of Writ Petitions which declaration is now sought by the Writ Petition No. 316/98. There was also no challenge to the guidelines framed by letter dated 12th December, 1995, which is sought to be challenged in the Writ Petition No. 316/98 on the ground that it is illegal to the extent it goes beyond the scope of 1991 Notification. No direction had been sought in the earlier batch of Writ Petitions for investigation into the grant of rebate, or for initiation of recovery proceedings against those units to whom 25% rebate had actually been paid, or adjusted, or to fix accountability of the concerned public servant, or authorities for causing loss to the State exchequer. After taking us through the Judgment, learned advocate for the applicant himself admitted that none of the declarations or directions claimed in Writ Petition No.316/98 had been sought in the earlier batch of Writ Petitions. Therefore, it cannot prima facie be said that the controversy in the earlier batch of Writ Petitions and the Writ Petition in question is the same.

In the circumstances, in our opinion, there is no case made out for permitting the applicant to withdraw the Writ Petition No.316/98. Accordingly, the application is hereby dismissed."

There was no challenge whatsoever to the Notifications dated 15th May, 1996 and 1st August, 1996 and the declaration now sought in the instant Writ Petition was not in issue in the earlier batch of Petitions. After taking us through the judgment, the learned senior counsel admitted that none of the

declarations or directions in Writ Petition No.316/98 had been sought in the earlier batch of Writ Petitions. Therefore, it cannot be said that the controversy in the earlier batch of Writ Petitions and the present Writ Petition in question are the same. This Order dated 17th January, 2000 has now become final, though it was an interlocutory order rejecting Miscellaneous Civil Application No. 637 of 1999. This Court was more than convinced that the challenge raised in Writ Petition No. 316 of 1998 was not an issue for consideration before it while handing down the judgment dated 21st January, 1999, It is for these reasons, the principle of *res judicata* will not be applicable in the instant case.

25. As regards the objections raised by the respondents on the basis of concept of merger, the High Court has held that though the appeals challenging the judgment of the High Court dated 21.01.1999 have been dismissed by this Court, and the findings of the High Court on the relevant issues have been impliedly confirmed and though the principle laid down by this Court in the case of *Kunhayammed Vs. State of Kerala,* [(2000) 6 SCC 359], is squarely applicable on the issue of merger and the judgment dated 21.01.1999 of the High Court merged with the order of this Court dated 13.02.2001, the concept of merger will not come in its way in deciding the issues involved in this petition for the reasons, that, these issues were not raised and therefore not required to be decided by the High Court in its earlier judgment dated 21.01.1999 as was clear from the order passed by it on 27.01.2000 in Misc. Civil Application No. 637 of 1999. The High Court held, that, it had no occasion to address itself on the challenge raised to the notification impugned in the Writ Petition of Manohar Parrikar and the earlier batch of Writ Petitions proceeded solely against the order dated 31.03.1998, and subsequent Notification issued by the State Government on 24.07.1998. It is observed by the High Court, that, the State Government opposed those Writ Petitions without examining the legality of the Notifications dated 15.05.1996 and 01.08.1996 and it had contended that

the benefit of rebate was withdrawn as the State Government was facing financial crunch and that the said benefit had been introduced as a policy of the State Government and when it was realized by the State that it was facing financial difficulties in extending the benefit of rebate it decided to withdraw the same which has been upheld by the High Court in the earlier batch of writ proceedings. The High Court therefore has concluded that it cannot now be said that State Government cannot take a stand that the Notifications impugned were issued without following the mandatory provisions of Rules of Business or that they were not Notifications issued by the State Government in the eyes of law. The High Court has also observed, that if the State had no occasion to address itself on the legality of these Notifications, it is not estopped either from raising a challenge or supporting the challenge at an appropriate time. It is also held by the High Court that as the 1st respondent herein was not a party to the earlier batch of Writ Petitions before the High Court and as his application for hearing his petition with that batch of petitions was withdrawn, he is not estopped from continuing with his challenge against the Notifications dated 15.05.1996 and 01.08.1996.

26. Arguments were also advanced to the effect that the State Government should not be allowed to take contradictory stand as the stand taken by the State Government in its two affidavits filed through the Chief Electrical Engineer in the earlier batch of writ petitions was conflicting with each other. The said contention was sought to be raised by the respondents in view of the change of the Government during the intervening period and the 1st respondent herein was the Chief Minister at the relevant point of time. The High Court has repelled these contentions by stating that the challenge to the notifications impugned before by the 1st respondent herein in his petition cannot be decided on the touch stone of affidavits filed even if they are contradictory in nature and the challenge had to be decided on its own merits, on the basis of records and the Constitutional Mandate. The High Court has observed that in

a democratic set up the decisions of the Governments decide the destiny of the people and therefore the validity of such decisions should be decided not on the basis of affidavits filed by the Officers of the Governments or on incomplete or inadequate information made available by them, but on the basis of Constitutional provisions and Business Rules framed thereunder. The High Court further felt that it was duty bound to examine the records to reassure itself that the decisions purported to have been taken by the Government are, in fact and in law, the decision of the Government and they are in conformity with the mandate of the Constitution. Thus the High Court has rejected the preliminary objection as to the maintainability of the Writ Petition and proceeded to decide the challenge made to the above mentioned two notifications on its merits.

27. In our view, the principle of merger essentially refers to the merging of the orders passed by the superior courts with that of the orders passed by a subordinate court. This Court in the case of *Shankar Ramachandra Abhyankar Vs. Krishnaji Dattatreya Bapat* (AIR 1970 SC 1) has laid down the condition as to when there can be a merger of the orders of the superior court with that of the orders passed by the lower court. This Court stated, that, if any judgment pronounced by the superior court in the exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties, then it would replace the judgment of the lower court. Thus, constituting the judgment of the superior court the only final judgment to be executed in accordance with law by the Court below. The merger is essentially of the operative part of the order and the principle of merger of the order of the subordinate Court with the order of the superior Court cannot be applied when there is no order made by the superior Court on merits and the controversy between the parties has not been looked into by the superior Court.

28. The issue of merger has no bearing in the facts and

circumstances of the present petitions, since, the issue that was decided by the High Court in the earlier batch of Writ Petitions and the issue that was raised and considered in the subsequent public interest litigation is entirely different. Secondly, in our view, the principles of *res judicata* is also not attracted since the issue raised and considered in the subsequent public interest litigation had not been raised and considered in the earlier round of litigation. It would be worthwhile to recall the observations made by this Court in the case of *Madhvi Amma Bhawani Amma and Ors. Vs. Kunjikutty Pillai Meenakshi Pillai and Ors.* (2000) 6 SCC 301, wherein the Court has observed that in order to apply general principle of *res judicata*, Court must find, whether an issue in a subsequent suit, was directly and substantially in issue in the earlier suit or proceedings, was it between the same parties, and was it decided by such Court. Thus, there should be an issue raised and decided, not merely a finding on any incidental question for reaching such a decision. So, if such issue is not raised and if on any other issue, if, incidentally any finding is recorded, it would not come within the periphery of principle of *res judicata*. However, Shri K.N. Bhatt, learned Senior Counsel appearing for the former Power Minister, would submit that the principles of *res judicata* and constructive *res judicata* bars the exercise of jurisdiction by the High Court as there is a bar not only on issues directly raised in a previous lis but the issue that ought to have been raised. It is further submitted that the record of decision culminating in notification dated 24.03.1998 was available and produced before the High Court in previous writ petitions and the same Finance Secretary who had opined in his cabinet note that Rules of Business stood violated due to non-consultation with Finance department had filed affidavit in previous Writ Petitions on the decision to issue notification dated 24.07.1998. Therefore, the learned senior counsel would contend that the High Court has erred in deciding this issue against this respondent. In aid of this submission, the learned senior counsel has pressed into service the observations made by this Court in the case of *State of Karnataka vs. All India*

Manufacturer Organization and Others, [(2006) 1 SCC 32].

29. We are not impressed by the submission of the learned senior counsel Shri K.N. Bhatt. In our view, the subject matter of earlier Writ Petitions was completely different and distinct from the public interest litigation filed by Mr. Manohar Parrikar. In the earlier Writ Petitions, the challenge was against notification and the circulars issued by the State Government and in the present Writ Petitions the High Court was primarily concerned with validity or otherwise of the notifications dated 15.5.1996 and 01.08.1996. Therefore, we are of the view that the reasoning and conclusions reached by the High Court, on the aforesaid issue is in accordance with law and in accordance with the principles laid down by this Court. Therefore, we agree with the conclusion reached by the High Court.

30. The appellants herein have raised an issue with regard to the nature of Business Rules framed by the Government of Goa i.e. whether these Rules are directory or mandatory. Indeed it is their principal contention. Before the High Court also, their contention was that the Rules of Business of the State of Goa were directory and not mandatory and failure to comply with such Rules will not nullify the decision taken by the State Government. Shri F.S. Nariman, learned senior counsel submitted that it is now settled law, that, violation of conduct of Business Rules does not vitiate the decision or order, since the Rules of Business are only directory and not mandatory. The learned senior counsel has invited our attention to the decision of this court in the case of *Dattatreya Moreshwar Pangarkar vs. State of Bombay* – [(1952) SCR 612]. In the said decision, the court has observed :

> "It is well settled that generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts

done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done. The considerations which weighed with Their Lordships of the Federal Court in the case referred to above in the matter of interpretation of Section 40(1)of the 9th Schedule to the Government of India Act, 1935, appear to me to apply with equal cogency to Article 166 of the Constitution. The fact that the old provisions have been split up into two clauses in Article 166 does not appear to me to make any difference in the meaning of the article. Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself. The position, therefore, is that while the Preventive Detention Act requires an executive decision, call it an order or an executive action, for the confirmation of an order of detention under Section 11(1) that Act does not itself prescribe any particular form of expression of that executive decision. Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity.

31. Reference is also made to the decision of this Court in *Gulabrao Keshavrao Patil and Ors. Vs. State of Gujarat* (1996) 2 SCC 26. It was noted as follows:

"Article 166(1) and (2) expressly envisage authentication of all the executive action and shall be expressed to be taken in the name of the Governor and shall be

authenticated in such manner specified in the rules made by the Governor. Under Article 166(3), the Governor is authorised to make the rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not a business with respect to which the Governor is by or under the Constitution required to act in his discretion. In other words, except in cases when the Governor in his individual discretion exercises his constitutional functions, the other business of the Government is required to be conveniently transacted as per the Business Rules made by Article 166(3) of the Constitution. If the action of the Government and the order is duly authenticated as per Article 166(2) and the Business Rule 12, it is conclusive and irrebuttable presumption arises that decision was duly taken according to Rules."

32. Mr. F.S. Nariman next relied upon the decision of this Court in *R. Chitralekha and Others vs. State of Mysore,* [1964 (6) SCR 368], wherein this Court has stated that it is "settled law" that provisions of Article 166 of the Constitution are only directory and not mandatory in character. And if they are not complied with it can be established as a question of fact that the impugned order was in fact issued by the Governor."

33. In *Haridwar Singh Vs. Bagun Sumburui,* [(1973) 3 SCC 889], it was noted as follows.

"Several tests have been propounded in decided cases for determining the question whether a provision in a statute, or a rule is mandatory or directory. No universal rule can be laid down on this matter. In each case one must look to the subject-matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. Prohibitive or negative words can rarely be directory and are indicative of the intent that the provision is to be mandatory.

Where a prescription relates to performance of a public duty and to invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have to control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed."

34. In *Montreal Street Rely Co. vs. Normandin* – 1917 A.C. 170, it is held :

"The statutes contain no enactment as to what is to be the consequence of nonobservance of these provisions. It is contended for the appellants that the consequence is that the trial was coram non judice and must be treated as a nullity.

It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed. P. 596 and following pages. *When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable not effecting the validity of the acts done."*

(emphasis supplied)

35. In *R v Immigration Appeal Tribunal Ex parte Jeyeanthan* 1999 (3) AER 231, it is observed :

"The issue is of general importance and has implications for the failure to observe procedural requirements outside the field of immigration. The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as 'shall' or 'must' is used.

A requirement to use a form is more likely to be treated as a mandatory requirement where the form contains a notice designed to ensure that a member of the public is informed of his or her rights, such as a notice of a right to appeal. In the case of a right to appeal, if, notwithstanding the absence of the notice, the member of the public exercises his or her right of appeal, the failure to use the form usually ceases to be of any significance irrespective of the outcome of the appeal. This can confidently be said to accord with the intention of the author of the requirement.

There are cases where it has been held that even if there has been no prejudice to the recipient because, for example, the recipient was aware of the right of appeal but did not do so, the non-compliance is still fatal. The explanation for these decisions is that the draconian consequence is imposed as a deterrent against not observing the requirement. However even where this is the situation the consequences may differ if this would not be in the interests of the person who was to be informed of his rights.

Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances (see *Brayhead (Ascot) Ltd.* v *Berkshire* CC [1964] 1 All ER 149, [1964] 2 QB 303 applied by the House of Lords in *London and a Clydesidc Estates Ltd.* v. *Aberdeen* DC [1979] 3 All ER 876, [1980] lWLR 182).

By contrast, a requirement may be clearly directory because it lays down a time limit but a tribunal is given an express power to extend the time for compliance. If the tribunal grants or refuses an extension of time the position is clear. If the time limit is extended the requirement is of no Significance. If an extension is refused the requirement becomes critical. It may, for example, deprive a member of the public of a right to appeal which if exercised in time

would have been bound to succeed. In the latter situation a directory requirement has consequences which are as significant as any mandatory requirement.

A far from straightforward situation is where there is a need for permission to appeal to a tribunal but this is not appreciated at the time. The requirement is mandatory in the sense that the tribunal or the party against whom the appeal was being brought would have been entitled to object to the appeal proceeding without the permission and if they had done so the appeal would not have been accepted. However, what is the position if because they were unaware of the existence of the requirement no objection is made and the appeal is heard and allowed? Is the appellant, when the mistake is learnt of, to be deprived of the benefits of the appeal? If the answer is Yes the result could be very unjust. This would be especially so, if in fact the tribunal in error had told the appellant that permission is not needed and he would have been in time to make the application if he had not been misinformed. Could it have been the intention of the author of the requirement that the requirement should have the effect of depriving the appellant of the benefit of his appeal? Clearly not. In such a situation the non-compliance would almost inevitably be regarded as being without significance. It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable reservation."

36. In Attorney General's Reference (No 3 of 1999), 2001(1) AER 577, it is held :

"My Lords, I acknowledge at once that reasonable minds may differ as to the correct interpretation of a subsection which has no parallel in the 1984 Act or any other statute. Nevertheless, there do seem to be secure footholds which

may lead to a tolerably clear answer. It is not along the route adopted by the prosecution of asking whether the relevant provision is mandatory or directory. In *London and Clydeside Estates Ltd. vs. Aberdeen DC [1979] 3 All ER 876 at 882-884, [1980] 1 WLR 182* at 188-190, Lord Hailsham of St Marylebone L.C. considered this dichotomy and warned against the approach 'of fitting a particular case into one or other of mutually exclusive and starkly contrasted compartments'. In R v *Immigration Appeal Tribunal, ex p Jeycanthan* [1999J 3 All ER 231 at 237, [2000] 1 WLR 354 at 360, Lord Woolf MR, now Lord Chief Justice, echoed this warning and held that it is 'Much more important ... to focus on the consequences of non-compliance'. This is how I will approach the matter."

37. In *R v Sekhon and others,* 2003(3) AER 508, it is observed :

"25. There is no doubt that difficulties for courts exist in applying the distinction between mandatory requirements on the one hand, and directory requirements on the other. Even if the terms `directory' and `mandatory' are not used the problem remains of answering the question : what is the effect of non-compliance with procedural requirements? What is necessary as indicated by Lord Campbell LC in Liverpool Borough Bank v. Turner (1861) 30 LJ Ch 379 at 381, 45 ER 715 at 718, is `to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed."

38. Reference can be made to certain passages from HALSBURY'S Laws of England, 4th Edition Re issue Vol. 44(1) at para 1237 and 1238 :

1237. Substantive and procedural enactments. A distinction is drawn between enactments that have substantive effect and those that are merely procedural. Here 'substantive' means having to do with the substance

of the law, in particular the nature and existence of legal rights, powers or duties, whereas procedure is concerned with formalities and technicalities, rather than substance. A procedural change is expected to improve matters for everyone concerned (or at least to improve matters for some, without inflicting detriment on anyone else who uses ordinary care, vigilance and promptness).

The distinction governs such questions as whether a statutory requirement is mandatory or merely directory", whether the effect of an enactment is retrospective' and when a limitation period begins to run.

The question may be whether, on the facts of the instant case, the enactment is substantive or merely procedural, bearing in mind that an enactment may be substantive in the light of some facts but merely procedural on others. Another use of the term 'substantive' is to indicate a 'permanent' provision of an Act, in contrast to merely temporary or transitional provisions.

1238. Mandatory and directory enactments. The distinction between mandatory and directory enactments concerns statutory requirements and may have to be drawn where the consequence off ailing to implement the requirement is not spelt out in the legislation. The requirement may arise in one of two ways. A duty to implement it may be imposed directly on a person; or legislation may govern the doing of an act or the carrying on of an activity, and compel the person doing the act or carrying on the activity to implement the requirement as part of a specified procedure. The requirement may be imposed merely by implication.

To remedy the deficiency of the legislature in failing to specify the intended legal consequence of non-compliance with such a requirement, it has been necessary for the courts to devise rules. These lay down that it must be

decided from the wording of the relevant enactment whether the requirement is intended to be mandatory or merely directory. The same requirement may be mandatory as to some aspects and directory as to the rest. The court will be more willing to hold that a statutory requirement is merely directory if any breach of the requirement is necessarily followed by an opportunity to exercise some judicial or official discretion in a way which can adequately compensate for that breach. Provisions relating to the steps to be taken by the parties to legal proceedings (using the term in the widest sense) are often construed as mandatory. Where, however, a requirement, even if in mandatory terms, is purely procedural and is imposed for the benefit of one party alone, that party can waive the requirement. Provisions requiring a public authority to comply with formalities in order to render a private individual liable to a levy have generally been held to be mandatory.

Requirements are construed as directory if they relate to the performance of a public duty, and the case is such that to hold void acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature. This is illustrated by many decisions relating to the performance of public functions out of time, and by many relating to the failure of public officers to comply with formal requirements. On the other hand, the view that provisions conferring private rights have been generally treated as mandatory is less easy to support; the decisions on provisions of this type appear, in fact, to show no really marked leaning either way.

If the requirement is found to be mandatory, then in a case where a duty to implement it is imposed directly on a person, non-compliance will normally constitute the tort of

breach of statutory duty, while in a case where it is to be implemented as a part of a specified procedure, non-compliance will normally render the act done invalid. If the requirement is found to be directory only then in either case the non-compliance will be without direct legal effect, though there might be indirect consequences such as an award of costs against the offender. It has been said that mandatory provisions must be fulfilled exactly, whereas it is sufficient if directory provisions are substantially fulfilled.

Where the requirement is complied with at the relevant time, the act done is not vitiated by later developments which, had they occurred before that time, would have meant that the duty should have been performed in a different way."

39. Per contra, Dr. Rajeev Dhavan and Shri Shyam Divan, learned Senior Counsel for respondents, apart from others, submitted that there can be no universal rule with regard to the violation of the Rules of Business and each case must be decided on facts; where the Rules of Business contain prohibitive or negative words, they are indicative of the intent that the provision is mandatory; in matters concerning revenue or finance rigorous observance of the rules is essential; when the cabinet alone is competent to take a decision or where the finance department has conveyed its disagreement or where there is no prior consultation with the finance department, the decision of the individual minister is liable to be quashed; where the Rules of Business have not been complied with, then the decision/communication cannot be termed as a Government decision; and an individual functionary cannot by-pass the Rules of Business and the requirement for certain matters to be placed before the Council of Ministers. It is further submitted that the decision on which reliance is placed by learned senior counsel Shri F.S. Nariman does not specifically answer the issue whether the Rules of Business framed under Article 166(3) of the Constitution is mandatory or directory and in fact

all those decisions are rendered in the context of Article 166(1) and (2) of the Constitution and the Courts have held that, the form of expression and authentication are only directory, and not mandatory. In aid of their submission, the learned senior counsel relies on the observations made in the following decisions : -

40. In *State of Kerala vs. A. Lakshmikutty,* [(1986) 4 SCC 632], it is held :

> "It must therefore follow that unless and until the decision taken by the Council of Ministers on January 30, 1985 was translated into action by the issue of a notification expressed in the name of the Governor as required by Article 166(1), it could not be said to be an order of the State Government. Until then, the earlier decision of the Council of Ministers was only a tentative one and it was therefore fully competent for the High Court (*sic* State Government) to reconsider the matter and come to a fresh decision." (pr. 41, pp. 659)

41. In *CBI vs. Ravi Shankar Srivastava,* [(2006) 7 SCC 188], it is observed :

> "13…..has been rightly submitted by learned counsel for the appellant, there is no notification revoking the earlier notification. The letter on which great emphasis has been laid by Respondent 1 and highlighted by the High Court, the authority to write the letter has not been indicated. It has also not been established that the person was authorised to take a decision. In any event, the same does not meet the requirements of Article 166 of the Constitution. The letter is not even conceptually a notification. The High Court was, therefore, not justified in holding that there was a notification rescinding the earlier notification." (pr. 13, pp. 200)

42. In *Punjab State Industrial Development Corpn. Ltd.*

vs. PNFC Karamchari Sangh, [(2006) 4 SCC 367], it is held :

> **"11.** Reliance was placed on the so-called order of the Chief Minister permitting PSIDC to raise funds in order to meet the liability of PNFC towards salary of its workers for at least six months. We have carefully perused the note of the Chief Minister dated 25-8-2001. The said note cannot be said to be an order of the State Government and therefore is not binding on PSIDC. The orders of the State Government are issued in a prescribed manner and the note dated 25-8-2001 cannot be treated as one." (pr.11, pp. 371)

43. In *State of Bihar vs. Kripalu Shankar,* [(1987) 3 SCC 34], it is stated :

> **"15.** Article 166(1) requires that all executive action of the State Government shall be expressed to be taken in the name of the Governor. This clause relates to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Noting by an official in the departmental file will not, therefore, come within this article nor even noting by a Minister. Every executive decision need not be as laid down under Article 166(1) but when it takes the form of an order it has to comply with Article 166(1). Article 166(2) states that orders and other instruments made and executed under Article 166(1), shall be authenticated in the manner prescribed. While clause (1) relates to the mode of expression, clause (2) lays down the manner in which the order is to be authenticated and clause (3) relates to the making of the rules by the Governor for the more convenient transaction of the business of the Government. A study of this article, therefore, makes it clear that the notings in a file get culminated into an order affecting right of parties only when it reaches the head of the department and is expressed in the name of the Governor, authenticated in the manner

provided in Article 166(2)." (pr. 15, pp. 43)

44. In *Haridwar Singh vs. Bagun Sumbrui,* [(1973) 3 SCC 889], Rule 10 had been formulated under Article 166(3), it is observed :

"16**.** In this case, we think that a power has been given to the Minister in charge of the Forest Department to do an act which concerns the revenue of the State and also the rights of individuals. The negative or prohibitive language of rule 10(1) is a strong indication of the intent to make the Rule mandatory. Further, rule 10(2) makes it clear that where prior consultation with the Finance Department is required for a proposal, and the department on consultation, does not agree to the proposal, the department originating the proposal can take no further action on the proposal. The cabinet alone would be competent to take a decision. When we see that the disagreement of the Finance Department with a proposal on consultation, deprives the department originating the proposal of the power to take further action on it, the only conclusion possible is that prior consultation is an essential pre-requisite to the exercise of the power." (pr. 16, pp. 896)

45. In *Dattatraya Moreshwar vs. State of Bombay,* [1952 SCR 612] at pp. 624-65, per Das, J. :

"The fact that the old provisions have been split up into two clauses in Article 166 does not appear to me to make any difference in the meaning of the article. Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself. The position, therefore, is that while the Preventive Detention Act requires

an executive decision, call it an order or an executive action, for the confirmation of an order of detention under Section 11(1) that Act does not itself prescribe any particular form of expression of that executive decision. Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under Section 11(1). That such a decision has been in fact taken by the appropriate Government is amply proved on the record."

Evidence can be led to show that these actions are attributable to the government. But Article 166(3) is not verificatory and has to be followed.

Even in this case at pp. 632-633, as per Mukherjea, J., it is held :

"I agree with the learned Attorney General that non-compliance with the provisions of either of the clauses would lead to this result that the order in question would lose the protection which it would otherwise enjoy, had the proper mode for expression and authentication been adopted."

46. In *Bachhittar Singh vs. State of Punjab,* [1962 Supp (3) SCR 713] :

"Rules of business under Article 166(3) required Revenue Minister to make the order against the petitioner, but the same was done by the Chief Minister. The said order of the CM was rescued by another rule of business which allowed him to call any fine before him. No mention of Article 166(3) being directory or mandatory."

47. In *State of Sikkim vs. Dorjee Tshering Bhutia,* [(1991) 4 SCC 243], it is observed :

> "14…..The government business is conducted under Article 166(3) of the Constitution in accordance with the Rules of Business made by the Governor. Under the said Rules the government business is divided amongst the ministers and specific functions are allocated to different ministries. Each ministry can, therefore, issue orders or notifications in respect of the functions which have been allocated to it under the Rules of Business."

48. In *Gulabrao Keshavrao Patil vs. State of Gujarat,* [(1996) 2 SCC 26], it is held :

> "14….It would, therefore, be clear that the decision of a Minister under the Business Rules is not final or conclusive until the requirements in terms of clauses (1) and (2) of Article 166 are complied with. Before the action or the decision is expressed in the name of the Governor in the manner prescribed under the Business Rules and communicated to the party concerned it would always be open by necessary implication, to the Chief Minister to send for the file and have it examined by himself and to take a decision, though the subject was allotted to a particular Minister for convenient transaction of the business of the Government. The subject, though exclusively allotted to the Minister, by reason of the responsibility of the Chief Minister to the Governor and accountability to the people, has implied power to call for the file relating to a decision taken by a Minister. The object of allotment of the subject to a Minister is for the convenient transaction of the business at various levels through designated officers." (pr. 14, pp.35)

49. Dr. Rajeev Dhavan, learned senior counsel fairly submits, that, even if Article 166(3) were to be held directory, substantial compliance of the same would be required. In

support of this contention, the learned senior counsel relies on the following decisions of this Court :

- *Bannari Amman Sugars Ltd. vs. Commercial Tax Office* (2005) 1 SCC 625.
- *R. Chitralekha vs. State of Mysore* (1964) 6 SCR 368
- *State of U.P. vs. Om Prakash Gupta* (1969) 3 SCC 775
- *Dattatraya Moreshwar vs. State of Bombay* 1952 SCR 612

50. The summary of the arguments canvassed by learned senior counsel Shri F.S. Nariman is that, the Rules of Business framed under Article 166(3) of the Constitution is only directory and by no stretch of imagination, it can be said to be mandatory and, therefore, non compliance of the Rules of Business cannot be declared as illegal or void ab-initio. In justification of the judgment of the Bombay High Court, it is the stand of Dr. Rajeev Dhawan, learned senior counsel that at-least some of the provisions of Rules of Business framed by Govt. of Goa are mandatory and non-observation of the same would vitiate the circulars/orders/notifications etc.

51. In order to appreciate the rival contentions canvassed by learned senior counsels, it would be appropriate, to extract Article 166 of the Constitution of India and the same is as under:

> *"Article 166 Conduct of business of the Government of a State* - (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.
>
> (2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the

Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made on executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under this Constitution to act in his discretion."

52. Clause (1) of Article 166 of the Constitution says, that, whenever executive action is to be taken by way of an order or instrument, it shall be expressed to be taken in the name of the Governor in whom the executive power of the State is vested. Under Clause (2), the orders and instruments made and executed in the name of the Governor shall be authenticated in the manner specified in the rules. Under Clause (3) of Article 166 of the Constitution, the Governor is authorized to make rules for the more convenient transaction of business of the Government of the State and for the allocation among its Ministers of the business of Government. All matters excepting those in which the Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business amongst Ministers, the Governor can also make rules on the advice of the Council of Ministers for more convenient transaction of business.

53. In the case on hand, we are required to examine the contentions of the appellants on this issue with reference to the Business Rules framed by Governor of Goa under Article 166 (3) of the Constitution of India. Rule 7 (2) of the Business Rules of the Government of Goa states, that, no proposal which requires previous concurrence of Finance Department under the said Rule, but in which Finance Department has not concurred, may not be proceeded with, unless the Council of

Ministers has taken a decision to that effect. The wordings of this Rule are different from the provisions of Rule 9 of the Business Rules of Maharashtra and have to be read in context with the provisions of Rule 3 of the Business Rules of Government of Goa which states that the business of the Government shall be transacted in accordance with the Business Rules. Under Rule 7 (2) thereof, the concurrence of the Finance Department is a condition precedent. Likewise Rule 6 of the Business Rules states, that, the Council of Minister shall be collectively responsible for all executive orders passed by any Department in the name of the Governor or contract made in exercise of the power conferred on the Governor or any other officer subordinate to him in accordance with the Rules, whether such orders or contracts are authorized by an individual minister on a matter pertaining to the Department under his charge or as the result of discussion at a meeting of the Council of Minister or otherwise. This Rule requires that an executive order issued from any department in the name of the Governor of the State should be known to the Council of Ministers so as to fulfill the collective responsibility of the Council of Ministers. Further Rule 7 of the Business Rules requires that no Department shall without the concurrence of the Finance Department issue any order which may involve any abandonment of revenue or involve expenditure for which no provisions have been made in the Appropriation Act or involve any grant of land or assignment of revenue or concession, grant, lease or licence in respect of minerals or forest rights or rights to water, power or any easement or privilege or otherwise have a financial implications whether involving expenditure or not. From a combined reading of the provisions of Rules 7, 3 and 6 of the Business Rules of the Government of Goa the conclusion would be irresistible that any proposal which is likely to be converted into a decision of the State Government involving expenditure or abandonment of revenue for which there is no provision made in the Appropriation Act or an issue which involves concession or otherwise has a financial implication on the State is required to be processed only after

the concurrence of the Finance Department and cannot be finalized merely at the level of the Minister in charge. The procedure or process does not stop at this. After the concurrence of the Finance Department the proposal has to be placed before the Council of Ministers and/or the Chief Minister and only after a decision is taken in this regard that it will result in the Decision of the State Government. Therefore the High Court has rightly rejected the arguments of the appellants herein based on the judgment of the Full Bench of the High Court. The High Court has observed, that the Rules of Business are framed in such a manner that the mandate of the provisions of Articles 154, 163 and 166 of the Constitution are fulfilled. Therefore, if it is held that the noncompliance of these Rules does not vitiate the decisions taken by an individual Minister concerned alone the result would be disastrous. In a democratic set up the decision of the State Government must reflect the collective wisdom of the Council of Ministers or at least that of the Chief Minister who heads the Council. The fact that the decisions taken by the Minister alone were acted upon by issuance of Notification will not render them decisions of the State Government even if the State Government chose to remain silent for a sufficient period of time or the Secretary concerned to the State Government did not take any action under Rule 46 of the Business Rules. If every decision of an individual Minister taken in breach of Rules are treated to be those of the State Government within the meaning of Article 154 of the Constitution, the result would be chaotic. The Chief Minister would remain a mere figure head and every Minister will be free to act on his own by keeping the Business Rules at bay. Further it would make it impossible to discharge the Constitutional responsibility of the Chief Minister of advising the Governor under Article 163. Therefore, it is difficult to accept the contentions of the appellants that Business Rules are directory.

54. We also subscribe to and uphold the view of the High Court that the Business Rules 3,6,7 and 9 are Mandatory and not Directory and any decision taken by any individual Minister

in violation of them cannot be termed as the decision of the State Government.

55. We are fortified in our view by several decisions of this Court. In *K.K. Bhalla vs. State of M.P.,* [2006 (3) SCC 581], the facts were that the State of M.P. had allotted certain land under the Jabalpur Development Authority (JDA) to a person at concessional rates to set up a newspaper printing press, though the land was earmarked for commercial use. The Court held :

> "The purported policy decision adopted by the State as regards allotment of land to the newspaper industries or other societies was not a decision taken by the appropriate Ministry. *If a direction was to be issued by the State to the JDA, it was necessary to be done on proper application of mind by the cabinet, the concerned Minister or by an authority who is empowered in that behalf in terms of the Rules of the Executive Business framed under Article 166 of the Constitution of India. Such a direction could not have been issued at the instance of the Chief Minister or at the instance of any other officer alone unless it is shown that they had such authority in terms of the Rules of the Executive Business of the State.* We have not been shown that the Chief Minister was the appropriate authority to take a decision in this behalf."
>
> (emphasis supplied)

56. In *State of U.P. vs. Neeraj Avasthi,* [2006 (1) SCC 667], this Court held that the power of the State Government was confined to issuing directions to State Agricultural Produce Market Board on the question of policy and observed :

> "Such a decision on the part of the State Government must be taken in terms of the Constitutional scheme, i.e., upon compliance of the requirement of Article 162 read with Article 166 of the Constitution of India. In the instant case,

the directions were purported to have been issued by an officer of the State. Such directions were not shown to have been issued pursuant to any decision taken by a competent authority in terms of the Rules of Executive Business of the State framed under Article 166 of the Constitution of India. …. We are therefore of the opinion that the direction by the State was not strictly in accordance with law."

57. In *Gulabrao Keshavrao Patil* (supra), this Court held that a decision of a Minister was not an order of the Government in view of non-compliance with Article 166.

58. The decision of the Constitution Bench in *Chitralekha* has been misinterpreted. In that case this Court was considering a controversy in regard to an order which was not expressed in the name of the Governor in terms of Article 166(1) and (2). In that context, this Court observed that it is a settled law that the provisions of Article 166 of the Constitution are only directory and not mandatory in character. The context clearly shows that the observation that the provisions of Article 166 of the Constitution are only directory and not mandatory, referred only to clauses (1) and (2) of Article 166 and did not refer to clause (3) which was not under consideration at all. *Chitralekha*, therefore, cannot be relied upon to support the contention that Business Rules made under clause (3) of Article 166 are directory. We have earlier referred to all the decisions on which reliance was placed by learned senior counsel Shri F.S. Nariman. In our view, those decisions would not assist the appellant, since they were all rendered in the context of interpretation of Article 166(1) and (2) of the Constitution.

59. It is appropriate to further consider some of the Business Rules to deal with the issue brought before us. Though the High Court in the judgment impugned has referred to various Rules, we deem it necessary to refer to only those which are relevant for our purpose. Rule 10 of the Business Rule requires submission of all cases referred to in the Schedule to

the Chief Minister after consideration by the Minister in charge so as to obtain the Chief Ministers' orders for circulation of the case or to bring it up for consideration at a meeting of the Council of Ministers. Rule 13 provides that when it is decided to bring the case before the Council, the department concerned should, unless otherwise directed by the Chief Minister, prepare a memorandum indicating precisely the salient facts of the case and points for decision and copies thereof circulated to the Council by the Secretary. Rule 14 requires in a case which involves or concerns more than one Department, the Minister by previous discussion to arrive at an agreement and if such agreement is reached the memorandum referred to in Rule 13 supra should contain the joint recommendations of the Ministers and if no agreement is reached the points of differences and views of each of the Minister should be stated in the memorandum. Items No.5,9 & 30 in the Schedule to the Rules relate to proposal which have a bearing on the Finances of the State and which do not have the concurrence or consent of the Finance Minister's proposal involving important change in the policy and practice; proposals to vary or reverse a decision previously taken by the Council. Under Rule 16 the decisions of the Council in each case should be recorded and placed with the records of the case after their approval by the Chief Minister. Extracts of the decision should be sent to the Secretary of the Department who should take necessary action thereon. Rule 17 enables a Minister in Charge of a Department on the basis of standing orders to give such directions as he thinks fit for disposal of cases in his department and further requires the Secretary of the Department concerned to simultaneously submit to the Chief Minister and the Governor the statement showing the particulars of any important cases disposed of by the Minister. Rule 20 stipulates, that, when the subject involves or relates to more than one Department, no order should be issued or the case be laid before the council until the case has been considered by all the departments involved or concerned, unless the case is one of extreme urgency. In the case on hand, the decisions impugned involve

and concern not only the department of power but also the departments of Industries and Finance and in view of the provisions of Rule 20, the decisions to finalize the Notifications at his level without placing the proposal before the Chief Minister or the Council of Minister fell out side the purview of the Power Minister.

60. The State Government in exercise of its power conferred on it under Section 23 read with Section 51-A of the Electricity Act issued a Notification dated 29.06.1993, published in the Official Gazette dated 30.06.1993, framing the revised electricity tariff for the State as specified in the Schedule appended to the Notification. By another Notification dated 6.12.1993, the State Government for the first time created a new and separate category viz. Extra High Tension Supply Consumers and was included as item No. 10 in the revised tariff framed under Notification dated 29.06.1993. Pursuant to the Notification dated 6.12.1993, the power department took a stand that as the Notification dated 30.09.1991 had covered only the Low Tension and High Tension Consumers of electricity and not the Extra High Tension Consumers and the claims of the Extra High tension consumers were rejected by specific orders passed in October 1995 i.e. after the Notification dated 31.03.1995, rescinding Notification dated 30.09.1991 was issued and the orders rejecting their claims had become final having not been challenged by the units. The State Government therefore felt a need to issue certain clarifications to process the claims of the units for grant of rebate of 25% for the period between 1.10.1991 to 31.03.1995. While issuing such clarification involving additional financial burden on the exchequer, the Government was required to process them in keeping with the requirements of the Business Rules. When the Rescinding Notification dated 31.03.1995 was issued the rebate of 25% was available only to Low Tension and High Tension consumers and the Extra High Tension Consumers got deleted pursuant to the Notification dated 6.12.1993. A decision, therefore, to include a new category of consumers for

grant of rebate which necessarily involved extra financial burden on the State's finances more so by creation of a new category retrospectively was required to be finalized only after it was placed before the Council of Ministers or the Chief Minister in addition to obtaining the previous concurrence of the Finance and Industries Departments. The Notification dated 15.5.1996 which was argued by the appellants herein to be only clarificatory had imposed an additional burden on the State's Exchequer by introducing a new class of consumers for grant of rebate retrospectively and it was finalized by the Power Minister at his level. In law the proposal for the decision leading to the Notification dated 15.5.1996 should have been placed before the Council of Ministers or the Chief Minister and since the same has not been done it is in violation of the Business Rules and hence the decision is non est. Even for the sake of arguments if it is assumed that the Notification dated 15.5.1996 was c1arificatory in nature the same violates Rule 19 of the Business Rules and there is nothing on record, as observed by the High Court to show that the department concerned attempted to seek ratification of the decision taken by the Power Minister before the Notification dated 15.5.1996 was issued.

61. At this stage, we find it necessary to refer to some of the Constitutional provisions to deal with the issue raised by the appellants. Under Article 154 of the Constitution of India, the Governor is vested with the Executive Power of the State and he shall exercise them either directly or through Officers subordinate to him in accordance with the provisions of the Constitution. The Governor is advised by the Council of Ministers with the Chief Minister at its head in exercise of his functions except those specifically stated in discharge of his functions as the head of the State. The Council of Minister is collectively responsible to the Legislative Assembly of the State. The Rules of business framed under Article 166(3) of the Constitution are for convenient transaction of the business of the Government and for allocation of the business among the

Ministers. Article 166(2) of the Constitution requires the decision of the State Government to be authenticated as per the Rules framed thereunder. Any decision taken by the State Government therefore, reflects the collective responsibility of the Council of Ministers and their participation in such decision making process. The Chief Minister as the Head of the Council of Ministers is answerable not only to the Legislature but also to the Governor of the State. The Governor of the State as the Head of the State acts with the aid and advice of the Council of Ministers headed by the Chief Minister. The Rules framed under Article 166 (3) of the Constitution are in aid to fulfill the Constitutional Mandate embodied in Chapter II, Part III of the Constitution. Therefore, the decision of the State Government must meet the requirement of these Rules also.

62. Before the High Court as also before us it was contended by the appellants herein, that, the Rules framed under Article 166(3) are only directory in character and failure to comply with them does not vitiate the decision taken by the State Government. The High Court after considering the various judgments cited before it has repelled the said contention to hold that the said Rules are mandatory and non-compliance thereof would be disastrous. The reasoning adopted by the High Court to arrive at such a conclusion is sound and in accordance with the constitutional mandate. The decisions of the State Government have to be in conformity with the mandate of Article 154 an 166 of the Constitution as also the Rules framed thereunder as otherwise such decision would not have the form of a Government decision and will be a nullity. The Rules of Business framed under Article 166(3) of the Constitution are for convenient transaction of the business of the Government and the said business has to be transacted in a just and fit manner in keeping with the said Business Rules and as per the requirement of Article 154 of the Constitution. Therefore, if the Council of Ministers or Chief Minister has not been a party to a decision taken by an Individual Minister, that decision cannot be the decision of the State Government and

it would be non-est and void ab initio. This conclusion draws support from the Judgment of this Court in the case of *Haridwar Singh Vs. Bagun Sambrui & ors* (1973) 3 SCC 889. This Court in the said case was dealing with the Business Rules of the State Of Bihar framed under Article 166 (3) of the Constitution of India and the observations of this Court on the issue apply to the case on hand in all force. This Court observed:

> " 14. Where a prescription relates to performance of a public duty and invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed.
>
> 15. Where however, a power of authority is conferred with a direction that certain regulation or formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority.
>
> 16. Further, Rule 10(2) makes it clear that where prior consultation with the Finance Department is required for a proposal, and the department on consultation does not agree to the proposal, the department originating the proposal can take no further action on the proposal. The Cabinet alone would be competent to take a decision. When we see that the disagreement of the Finance Department with a proposal on consultation, deprives the Department originating the proposal of the power to take further action on it, the only conclusion possible is that prior consultation is an essential prerequisite to the exercise of power".

63. As observed by us earlier, these observations apply equally to the case on hand and in light of this view, we have no difficulty in holding that the Business Rules framed under the

Provisions of Article 166 (3) of the Constitution are mandatory and must be strictly adhered. Any decision by the Government in breach of these Rules will be a nullity in the eyes of law.

64. It is in this legal background that the issues raised before us have to be dealt with. The High Court has examined the files placed before it by the State Government and noted the facts reflected by the said records. As recorded by the High Court, the rebate of 25% in power tariff was sought to be withdrawn by the State Government with effect from 1.4.1995 pursuant to a Cabinet meeting held on 21.07.1994 and a Notification dated 31.03.1995 was issued therefor. The 1st respondent's motion in the State Assembly for a Calling Attention Notice evidently moved the State Government to evolve a Scheme for grant of rebate of 25% for the period between 1.10.1991 to 31.03.1995. The Power Minister therefore, on 08.07.1995 called upon the Chief Electrical Engineer to formulate such a scheme who prepared accordingly a note regarding the proposed scheme. Since the earlier Notification was rescinded by the Notification dated 31.03.1995, a clarification was sought from the Law Department on the extension of the period of rebate of 25%. On 25.08.1995, a note was put up by the Law Department indicating that the 25% rebate would be available only for the period between 01.10.1991 to 31.03.1995 and industrial units supplied with power on/or after 31.03.1995 would not be entitled for the same. On 14.02.1996, the Chief Electrical Engineer submitted a note containing a proposal to amend the rebate notification requesting to extend the benefit of the rebate of 25% to Extra High Tension consumers and sought approval thereof. The said draft when referred to the Law Department for its opinion, it was opined thereon that it was legally impermissible to give retrospective effect to the proposed Notification. However, though the said amendment was approved by the then power minister, the same was not given effect to in view of the elections scheduled on 02.05.1996. On 03.05.1996, the Power Minister passed an order to issue the

amendment Notification as by then the elections were over and the notification dated 15.05.1996 was accordingly issued, though the subject matter was never placed before the Council of Ministers or the Chief Minister. The Notification was issued solely on the directions of the Power Minister despite the opinion of the Law Secretary that retrospective effect to the proposed amendment could not be given as it involved additional class of consumers of power, which is in violation of the Business Rules of Government of Goa. Therefore the said Notification is unsustainable and the High Court has rightly held it be non-est and as void ab initio.

65. The Power Department once again took up the subject of reintroduction of 25% of rebate in power tariff at the instance of the Industries Department and in view of the continued demands from the Industrial Units for such a rebate. This was considered by the Power department and proposal therefor was called from the Chief Electrical Engineer. A query was also raised regarding the role of the Industries and Electricity Departments in issuing the eligibility certificates. A note dated 25.07.1996 submitted by the Chief Electrical Engineer indicated that such certificates shall be issued by the Electricity Department as it was that Department which was giving the subsidy. Thereafter the Commissioner and Secretary (Power) submitted a detailed note on 30.07.1996 to the Minister of Power and the latter conveyed his approval with the substitution of words "all industrial units who apply for availing power on or after 1.10.1991" with the words "all industrial units who apply or avail on or after 10.01.1991" and the rebate was to be given on the energy charges on the prevailing tariff from time to time as against the earlier Notification where the rebate of 25% was to be given on tariff as per Notification dated 27.06.1988. As per the decision/approval of the Power Minister, the Notification dated 1.08.1996 came to be issued without there being any consultation with the Council of Ministers or without the proposal being placed before it or the Chief Minister or without the consultation with the Finance Department, though the draft

of the notification was referred to the Law Department before its issuance.

66. It is also to be noted that by the Notification dated 01.08.1996 the State Government intended to re-introduce the benefit of 25% rebate in power tariff. If the State Government as a policy decision desired to reintroduce the said rebate, it was imperative that the said decision complied with the requirement of a Government decision and that it did not remain a Departmental Order or Instruction. The High Court has recorded after verifying the notes on record that the re-introduction of rebate was initiated at the instance of Industries Department and that the proposal for re-introduction attracted the provisions of Rules 9 & 10 of the Business Rules and it did not seek the concurrence of the Finance Department. From the file produced before it the High Court has found that the decision was finalized by the Power Minister at his level without any reference to the Council of Ministers or the Chief Minister. The High Court has also referred to the Statement in writing given by the Chief Minister to the Investigating Officer during the course of investigation launched pursuant to the complaint given by the 1st respondent, that the Power Minister at no point of time had placed the proposal regarding decisions dated 15.5.1996 and 1.8.1996. This apart, from the records the High Court finds that the agency to certify the eligibility of industrial units for concessional tariff was yet to be identified and the issue whether the rebate for the period between 01.10.1991 to 31.03.1995 was to be made available as per the Notification dated 27.6.1988 or with reference to the tariff prevailing from time to time. The Note dated 8.7.1996 is referred to by the High Court. The High Court also refers to the reply of the Electrical Engineer dated 10.7.1996 wherein it was clarified that only the prospective industrial consumers who has applied and availed power supply on or after 1.10.1991 were eligible for concession. From the note of the Commissioner and Secretary, Department of Power dated 30.7.1996 the High Court records that the certification/ verification of the industrial units could be

done by the Electricity Department as the concession was to be extended by the said department to the consumers. The said note refers to the meetings held in the chamber of Minister of Power. The Note also mentions about a constitution of a Screening Committee consisting of the Secretary of Ministry of Power, the Chief Electrical Engineer, Director of Industries and Joint Secretary, Finance, to ensure that only genuine and bona fide claims are entertained and paid the rebate and also examine and verify all doubtful claims. The Note also refers to a decision taken in one of such meetings to the effect that rebate should be given to units on energy charges only as per the prevailing tariff in force from time to time on which they are billed for a period of five years on the recommendations made by the Chief Electrical Engineer. The recommendations and/ *or* the decisions did have bearing on the finances of the State Government and also amounted to change in policy decisions. Even then neither did the Minister of Power think it is proper and appropriate to place the proposals before the Council of Ministers or the Chief Minister, nor did the Secretary concerned deemed it appropriate to do so. The proposals were finalized by the Power Minister at his level as per the modifications suggested by him on 30.7.1996 which in our opinion are in violation of the Business Rules.

67. The High Court has perused the files relating to the issue and from them it has noticed that the file was forwarded to the Development Commissioner on or about 17.03.1998 as they were required for preparation of reply to a question in the Assembly and the Commissioner on 25.03.1998 submitted a note referring to the complaint filed by 1st respondent herein alleging illegalities and corruption in the matter of grant of rebate. The complaint of the 1st respondent was about the amendment of the Notification dated 31.09.1991 which had been rescinded by the Notification dated 31.3.1995 and he had alleged that the amendment was made with a mala fide intention of including a specific category of consumer and the amending notification had led to manipulation of records to the

extent that some people had attempted to become beneficiaries of the Scheme within the notified period of 01.10.1991 and 31.03.1995. The note of the Commissioner raised certain issues relating to grant of rebate to industrial units after 31.03.1995. As per the objections raised in the note the cases of units which had applied for power but could not be supplied with power by 31.03.1995 were to be referred to the State Government. However, it was later decided to leave it to the Chief Electrical Engineer to allow release of said subsidy to all such units. The Note of the Commissioner had also raised an issue touching upon the number of industrial units entitled to subsidy and the liability per month on that count and fixed the same at Rs 80 lakhs per month and opined that the total amount of the subsidy by way of adjustment of bills would be in excess of Rs. 50 Crores. Having regard to these aspects the note suggested suspension of the rebate scheme immediately until the legal issues were sorted out. On 03.04.1998, the Joint Law Secretary gave his clarification after examining the matter in the light of the provisions of the Electricity Act and opined that a Cabinet Decision was necessary for suspension of the rebate scheme and that before the notification dated 01.08.1996 was issued it required a decision of the cabinet and the concurrence of the Finance Department as it fell within the meaning of a policy decision involving financial implications. The note in conclusion said that the Notification dated 01.08.1996 was not in accordance with law and this conclusion was agreed to by the Law Secretary. The Development Commissioner further felt that the in view of this lacuna in the Notification dated 1.08.1996, the matter required a review by the Cabinet and that it should be taken to the Cabinet for its ratification or otherwise. The note of the Commissioner was placed before the Power Minister as the Chief Secretary was away on tour and the Power Minister directed the matter to be placed before the Cabinet and also directed the files of the Finance & Industries Department on the subject to be placed before the Chief Minister for his perusal. The file was placed before the Chief Minister on 27.05.1998

for his perusal who thereafter called for the opinion of the Finance Department and on the same day the Finance Secretary submitted the opinion of the Finance Department and the next day the matter was placed before the Cabinet. Ultimately the State Government took a decision to withdraw the benefit of rebate and issued the Notification dated 24.07.1998. This apart the material placed by the 1st respondent herein also indicated that there was an attempt to ratify the notification date 1.08.1996 and the same could have been done but for the legal hurdle and the State Government realized the legal hurdles in continuing with the rebate scheme on the basis of the Notification dated 01.08.1996. We fail to understand as to why the State Government did not bring these facts before this Court or the High Court in the earlier round of litigation where its power to withdraw the subsidy in exercise of its power under Section 21 of the General Clauses Act was upheld. Instead it chose to plead financial crunch faced by the State Government as the reason for withdrawal of rebate. It is further to be noted with regard to the Notification dated 01.08.1996, that it re-introduced the benefit of rebate on tariff and made it available to units on the prevailing tariff in force from time to time at which the units were billed for a period of five years from the date of supply of power was made available to them and who had applied or availed power supply on or after 01.10.1991. The notification dated 30.09.1991 on the other hand made available the rebate on the basis of tariff set out in the Notification dated 27.06.19888 and to Low and High Tension Power consumers who had applied for supply of power and were given power supply on or after 01.10.1991. The Notification dated 01.08.1996, it is seen, extended the scope of benefit of rebate as compared to the Notification dated 30.09.1991 which had been rescinded by the Notification dated 31.03.1995. It is on record and we notice from the judgment of the High Court that the State Government had paid as a result of the Notification dated 01.08.1996 a sum or Rs. 8 crores in excess as compared to the benefit available under the Notification of 1991 and the total amount of rebate would have

been more than 30 crores had the benefit as made available by the 1996 Notification been continued.

68. Thus from the foregoing, it is clear that a decision to be the decision of the Government must satisfy the requirements of the Business Rules framed by the State Government under the provisions of Article 166(3) of the Constitution of India. In the case on hand, as have been noticed by us and the High Court, the decisions leading to the notifications do not comply with the requirements of Business Rules framed by the Government of Goa under the provisions of Article 166(3) of the Constitution and the Notifications are the result of the decision taken by the Power Minister at his level. The decision of the individual Minister cannot be treated as the decision of the State Government and the Notifications issued as a result of the decision of the individual Minister which are in violation of the Business Rules are void ab initio and all actions consequent thereto are null and void.

69. The appellants contended before this court that another Division Bench of the High Court in its earlier judgment of 21.1.1999 had held that the Notification dated 1.8.1996 was clarificatory and that it did not create any extra financial liability on the State Government requiring approval of the Cabinet in compliance with the Business Rules before it was brought into force. In our opinion the said Notification cannot be treated as mere clarificatory. It is a notification issued purportedly in terms of a Government decision. It was a decision finalized at the level of the Minister of Power alone and was taken in violation of the Rules of Business framed under Article 166(3) of the Constitution of India. The decision cannot be called a government decision as understood under Article 154 of the Constitution, though it may satisfy the requirements of authentication. Nevertheless mere authentication as required under Article 166(2) of the Constitution did not make it a government decision in law nor would it validate a decision which is void ab initio. The validity of the notification will have to be tested with reference to the constitutional provisions and

Business rules and not by their form or substance. Therefore, this contention of the appellants is liable to be rejected.

70. The learned senior counsel Shri F.S. Nariman submitted that the doctrine of indoor management drawn from private law would apply analogously in the facts and circumstances of this case. In response to this submission, the learned senior counsel Dr. Rajeev Dhavan would submit that the concept of private law is not readily applicable in public law. It is further submitted that often private law and public law concepts are similar in name and text but needs to be differentiated. Reference is made to the observations of this Court in *Shrisht Dhawan (Smt.) Vs. Shaw Bros.* (1992) 1 SCC 534, wherein it is observed:

> **"20**…..But fraud in public law is not the same as fraud in private law. Nor can the ingredients which establish fraud in commercial transaction be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in *Khawaja* that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation to statutory law."

71. The doctrine of indoor management is also known as the Turquand rule after the case of *Royal British Bank v. Turquand,* [1856] 6 E. & B. 327. In this case, the directors of a company had issued a bond to Turquand. They had the power under the articles to issue such bond provided they were authorized by a resolution passed by the shareholders at a general meeting of the company. But no such resolution was passed by the company. It was held that Turquand could recover the amount of the bond from the company on the ground that he was entitled to assume that the resolution was passed. The doctrine of indoor management is in direct contrast to the doctrine or rule of constructive notice, which is essentially a presumption operating in favour of the company against the outsider. It prevents the outsider from alleging that he did not know that the constitution of the company rendered a particular

act or a particular delegation of authority ultra vires. The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in memorandum and articles have been properly observed. Therefore doctrine of indoor management protects outsiders dealing or contracting with a company, whereas doctrine of constructive notice protects the insiders of a company or corporation against dealings with the outsiders. However suspicion of irregularity has been widely recognized as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and therefore invite inquiry.

72. This exception was highlighted in the English case of *J.C Houghton& Co. v. Nothard, Lowe & Wills Ltd,* [1927] 1 KB 246 (CA) where the case involved an agreement between fruit brokers and fruit importing company. There was an allegation that the agreement was entered into by the company's directors without authority. It was held that the nature of transaction was found to have been such as to put the plaintiffs on inquiry. To this effect Lord Justice Sargant held:-

> "Cases where the question has been as to the exact formalities observed when the seal of a company has been affixed, such as *Royal British Bank v. Turquand,* 6 E. & B. 327, or the *County of Gloucester Blank v. Rudry Merthyr, &c., Co.*, [1895] 1 Ch 629, are quite distinguishable from the present case. In re Fireproof Doors, Ltd., sup., tends rather against than in favour of the plaintiffs, since if a single director has as towards third parties the authority now contended for, the whole of the elaborate investigation of the facts in that case was entirely unnecessary. Perhaps the nearest approach to the present case is to be found in *Biggerstaff v. Rowlatt's Wharf,*

> [1896] 2 Ch. 93. But there the agent whose authority was relied on had been acting to the knowledge of the company as a managing director, and the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs. It is, I think, clear that the transaction there would not have been supported had it not been in this ordinary course or had the agent been acting merely as one of the ordinary directors of the company. I know of no case in which an ordinary director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the Board to make the contract. A limitation of the right to make such an assumption is expressed in Buckley on the Companies Acts, 10th Edition, at p. 175, in the following concise words: — And the principle does not apply to the case where an agent of the company has done something beyond any authority which was given to him, or which he was held out as having."

73. This exception to the doctrine of indoor management has been subsequently adopted in many Indian cases. They are *B. Anand Behari Lal v. Dinshaw and Co. (Bankers) Ltd,* AIR 1942 Oudh 417 and *Abdul Rehman Khan & Anr. v. Muffasal Bank Ltd. and Ors,* AIR 1926 All 497. Applying the exception to the present scenario, there is sufficient doubt with regard to the conduct of the Power Minister in issuing the Notifications dated 15.5.1996 and 01.08.1996. Therefore there is definite suspicion of irregularity which renders the doctrine of indoor management inapplicable to the present case.

74. It was also argued by the learned senior counsel for the appellant, that the Notification dated 01.08.1996 was rescinded by Notification dated 24.07.1998 and, therefore, there was no need for the High Court to adjudicate upon the impugned Notification dated 01.08.1996 and, should have dismissed the writ petition filed by way of public interest as

having become infructuous. This issue need not detain us for long in view of our answer to the issue of "Doctrine of Merger" canvassed by learned senior counsel.

75. Arguments have been advanced before us based on the principles of *res judicata*, Doctrine of Estoppel and the principles underlining the provisions of Order II Rule 2 of the Code of Civil Procedure that the High Court in earlier batch of writ petitions has gone into and given findings with regard to the Notifications dated 30.9.1991; 31.3.1995; 15.5.1996; 1.8.1996 and 24.7.1998 and the judgment of the High Court dated 21.1.1999 rendered therein had merged with the order of the Supreme Court dated 13.2.2001 and the Notifications questioned in the present round of litigation are Notifications dated 15.5.1996 and 1.8.1996 and the State at no point of time before any Court having raised the issue of these two Notifications being void ab initio for want of compliance with the provisions of the Business Rules framed under Article 166(3) of the Constitution of India, the High Court ought to have rejected the plea of the State Government that the Notifications were illegal or were in violation of the Rules of Business and dismissed the Writ Petition on the principles of *res judicata*, Doctrine of Estoppel and the principles embodied in Order II Rule 2 of the Code of Civil Procedure. It was urged that the State not having raised this at any point of time before any court should not be allowed to do so. We do not find any merit in these contentions. As noticed by us earlier in the judgment, the issue regarding the validity or legality of the Notifications dated 15.5.1996 and 1.8.1996 was never raised in the earlier batch of writ petitions before the High Court and the High Court never had an opportunity or occasion to look into, consider and pronounce upon the validity of the same with reference to the Business Rules framed under Article 166 (3) of the Constitution. These principles pressed into service by the appellants cannot operate against the State Government merely because the State did not agitate either before the High Court or this Court the legality or validity of these notification in the earlier round

of litigation when it had an occasion to do so and the State Government cannot be deemed to have accepted the legality of the Notification and waived its objection or challenge thereto. The Doctrine of Estoppel therefore has no application at all more so, in view of the illegality the notifications dated 15.05.1996 and 01.08.1996 suffer from in view of their non-compliance with the provisions of the Business Rules. In our opinion the fact that the State Government did not raise these objections in the earlier batch of Writ Ptitions does not disentitle it to such a stand or prevents it from raising its objections based on legal provisions. This contention of the appellants requires to be turned down for yet another reason in that the 1st respondent herein was not a party to the earlier batch of Writ Petitions before the High Court or this Court. Therefore the principles of *res judicata* or for that matter even the Doctrine of Estoppel will not apply to or operate against him. Further the contention that the Notification dated 1.8.1996 did not create any additional financial liability on the State Government warranting approval by the Cabinet or the compliance of the Business Rules before it was brought into effect deserves to be rejected having regard to the figures placed on record which the High Court has noticed in its judgment. These figures of additional liability likely to be brought on the State by Notification dated 1.8.1996 falsify the statement of the appellants. Therefore the same deserves to be rejected.

76. Before parting with these appeals, we make it clear that the observations made by us in the course of our judgment is only for the purpose of disposing of these appeals and shall not be treated as an expression on the conduct of the then the Power Minister.

77. The Appellants have not been able to show any infirmity or illegality in the order of the High Court warranting our interference. In the result, civil appeals are dismissed. Parties are directed to bear their own costs.

R.P. Appeals dismissed.

KRISHNA KUMAR VARIAR
v.
SHARE SHOPPE
(Criminal Appeal Nos. 961-962 of 2010)

MAY 3, 2010

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

Code of Criminal Procedure, 1973:

s.482 – Summoning order challenged by accused on the ground of lack of territorial jurisdiction of trial court – Petition rejected by High Court – HELD: In such cases where the accused or any other person raises an objection that the trial court has no jurisdiction in the matter, the said person, instead of rushing to higher court, should file an application before the trial court making this averment and giving the relevant facts – Whether a court has jurisdiction to try/ entertain a case will, at least in part, depend upon the facts of the case – The trial court should after hearing both the sides and recording evidence, if necessary, decide the question of jurisdiction before proceeding further with the case – Impugned order set aside – Appellant, if so advised, may approach the trial court with a suitable application in this regard.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No(s). 961-62 of 2010.

From the Judgment & Order dated 14.05.2009 of the High Court of Delhi at New Delhi in Criminal Misc. No. 1487 of 2009 and Criminal M.A. No. 5400 of 2009.

Vineet Bhagat, K.G. Bhagat, Manju Bhagat, Monohar Singh Bakshi, Varun Kumar for the Appellant.

Sonal Jain, Gautam Laha, Pravir Kumar Jain for the Respondent.

The following order of the Court was delivered

ORDER

Heard learned counsel for the parties.

2. Leave granted.

3. This appeal has been filed against the impugned judgment and order dated 14.05.2009 of the High Court of Delhi whereby the petition filed under Section 482 Cr.P.C. by the petitioner herein has been dismissed.

4. The appellant herein is an accused under Sections 415/ 420 IPC in which summons have been issued to him by a Court at Delhi. He challenged the summoning order on the ground that it is only the Court at Bombay which has jurisdiction to try and entertain the complaint. His petition under Section 482 Cr.P.C. Challenging the summoning order has been rejected by the High Court by the impugned order. Hence he is before us in this appeal.

5. In our opinion, in such cases where the accused or any other person raises an objection that the Trial court has no jurisdiction in the matter, the said person should filed an application before the Trial Court making this averment and giving the relevant facts. Whether a court has Jurisdiction to try/ entertain a case will, at least in part, depend upon the facts of the case. Hence, instead of rushing to the higher Court against the summoning order, the concerned person should approach the Trial court with a suitable application for this purpose and the Trial court should after hearing both the sides and recording evidence, if necessary, decide the question of jurisdiction before proceeding further with the case.

6. For the reason stated herein above, the impugned

judgment and order is set aside and the appeal is allowed. The appellant, if so advised, may approach the Trial Court with a suitable application in this connection and, if such an application is filed, the Trial Court shall after hearing both the sides and after recording evidence on the question on jurisdiction, shall decide the question of jurisdiction before further proceeding with the Trial.

R.P. Appeal allowed.

RABINDRA NATH SINGH

v.

RAJESH RANJAN @ PAPPU YADAV & ANR.

(Criminal Appeal Nos. 959 of 2010) etc.

MAY 3, 2010

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

Bail:

Grant of bail to accused by High Court despite the directions by Supreme Court to the contrary – HELD: The Court expresses its regret that bail has been granted by High Court for no good reason except by saying that the appeal was not likely to be heard in six months – Such a view cannot be approved of when a large number of applications had already been rejected earlier both by High Court and Supreme Court – Despite the clear direction of Supreme Court not to entertain any further application of the accused for bail, the order of the High Court granting bail amounts to contempt of the order of the Supreme Court – When it was not found a fit case for bail before conviction, it is even less a fit case for bail after conviction – Impugned order of High Court set aside and accused directed to be taken into custody – Contempt of Court.*

***Rajesh Ranjan Yadav Alias Pappu Yadav vs. CBI through its Director* (2006) 9 Suppl. SCR 40 = (2007) 1 SCC 70, referred to.**

Contempt of Court:

Tactics of Bench hopping – During the course of hearing of the appeal against order of High Court granting bail to the accused whose application for bail had been rejected a large number of times by High Court and Supreme Court earlier, counsel for accused handing over to the Bench a letter written

by accused that his case should be heard by the Bench of which the Judge named therein was not a member – HELD: Conduct of the respondent-accused is contemptuous – However, the Court restrained itself from issuing a notice for contempt of the Court against respondent-accused for sending such a letter – Bail.

Case Law Reference:

(2006) 9 Suppl. SCR 40 referred to para 6

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 959 of 2010.

From the Judgment & Order dated 18.02.2009 of the High Court of Judicature at Patna in CR. APP. (DB) No. 418 of 2008.

WITH

C.A. No. 960 of 2010.

H.P. Rawal, ASG, A. Saran, Amit Pawan, V.K. Biju, C.D. Singh, J.M. Abraham, B. Krishna Prasad, Rakesh Kumar Singh, Vijay Pratap Singh, Prem Prakash, Arvind Kumar Sharma for the Appearing Parties.

The following Order of the Court was delivered

ORDER

1. Heard learned counsel for the parties.

2. Leave granted in both the petitions.

3. These appeals have been filed against the impugned judgment and order dated 18.02.2009 of the High Court of Judicature at Patna whereby the respondent Rajesh Ranjan @ Pappu Yadav has been granted bail in Sessions Trial No. 976 of 1999.

4. Learned counsel for respondent-accused handed over to us a letter dated 1.5.2010 written by the respondent-accused to his counsel wherein it is stated that the present case should be heard by a Bench of which one of (Markandey Katju, J.) is

not a member. The said letter is taken on record.

5. Having perused the letter, we were inclined to issue notice for contempt of Court against respondent-accused for sending such a letter but we have restrained ourselves although it is clear that the conduct of the respondent-accused is contemptuous. We make it clear that this court will not tolerate the tactics of Bench hopping by an accused or any other person.

6. We have considered the entire facts and circumstances of the case and also noted the fact that earlier two bail applications of the respondent-accused have been rejected. Apart from that, in the case of this very accused. reported as *Rajesh Ranjan Yadav Alias Pappu Yadav Vs. CBI Through Its Director* (2007) 1 SCC 70, this Court has observed in para 24 as under.

> "24. On the facts and circumstances of the case, we find no merit in this appeal. The appeal is accordingly dismissed. We, however, make it clear that no further application for bail will be considered in this case by any court, as already a large number of bail applications have been rejected earlier, both by the High Court and this Court."

We are surprised that despite the aforesaid clear direction of this court, the High Court has granted bail to the respondent-accused. In fact, such an order of the High Court amounts to contempt of order of this Court since this Court has observed that no further bail application of the accused shall be entertained.

8. Learned counsel for the respondent submitted that the aforesaid decision was given rejecting bail pending the trial, whereas now bail was applied in appeal after conviction by the Trial Court. In our opinion, when it was not found a fit cased for

bail before conviction, it is even less a fit case for bail after conviction.

9. There are very serious allegations against the respondent but we are not going into the same here because we do not wish to prejudice the appellate court. However, we do wish to express our regret that bail was granted by the High Court for no good reason except by saying that the appeal is not likely to be heard in six months. If bail is granted on such a ground then bail will have to be granted in almost every case, even when the offence is heinous. We cannot approve of such a view.

10. For the reasons given, we set aside the impunged judgment and order dated 18.02.2009 and allow these appeals. It is directed that the respondent-accused Rajesh Ranjan alias Pappu Yadav shall be taken into custody forthwith.

R.P. Appeals allowed.

STATE OF ORISSA

v.

STATE OF ANDHRA PRADESH

Original Suit No. 11 of 1968

MAY 5, 2010

[K.G. BALAKRISHNAN, CJI., R.V. RAVEENDRAN AND DALVEER BHANDARI, JJ.]

Constitution of India, 1950:

Article 131 – Suit under – For a declaration that the disputed area was under administrative jurisdiction of plaintiff-State – Plea that at the time of the creation of the plaintiff-State, the estate of which the disputed area was part of, was transferred to it – Held: Plaintiff-State failed to establish that it had ever exercised administrative control over the disputed area after its creation in 1936 – Defendant-State has established its and its predecessor States having administrative jurisdiction over the disputed area – Government of India (Constitution of Orissa) Order, 1936 – Section 3(2) and I Schedule Part-II.

Article 131 – Suit under – Between States – Plea of adverse possession, waiver and acquiescence – Held: Procedural provisions applicable to ordinary civil suits are not applicable to suits between States – Therefore, the pleas need not be considered.

Articles 131, 1(2) r/w Entry 10 VII Schedule and Article 3 – Suit between States – For a declaration that the disputed area was under administrative jurisdiction of plaintiff-State – Maintainability of the suit whether barred by Articles 1(2) r/w Entry 10 VII Schedule and 3 – Held: Maintainability of the suit is not barred because the plaintiff has not sought for increase, alteration or diminishing of any area but only for declaration that it had administrative control over the disputed area –

Entertaining the suit would not amount to encroachment on the powers of parliament to alter State boundaries.

Article 131 and its proviso – Letter by Madras Government to Orissa Government listing the names of the villages which fell under the respective jurisdictions of the States – Held: The letter cannot be described as the expression 'Other Similar Instruments' as occurring in proviso to Article 131 – It was not issued under the authority of a legislation or subordinate legislation nor was it a document of formal character made under constitutional or statutory authority – Thus original jurisdiction of Supreme Court is not barred with reference to proviso of Article 131.

Article 131 – Suit under – Applicability of provisions of CPC and Limitation Act – Held: the procedural provisions regulating the admissibility of the civil suits are not applicable to suits under Article 131 in strict sense – Hence plea that suit was barred by time and not maintainable for want of notice under Section 80 CPC not tenable – Code of Civil Procedure, 1908 – Section 80 – Limitation Act, 1963.

Government of India (Constitution of Orissa) Order 1936 – Section 3(2), (3) – Dispute between States arising post-independence – Suit under Article 131 – Plea that the suit was barred under the provisions of the Order – Held: The exclusion of judicial scrutiny in the Order which was notified in the pre-independence period cannot be mechanically carried forward to the post-independence period – Supreme Court jurisdiction to entertain the suit under Article 131 not barred – Constitution of India, 1950 – Article 131.

The plaintiff-State filed the present suit under Article 131 of the Constitution of India against the defendant-State for a declaration that the Borra Group of villages was part of the plaintiff-State and for declaration that the plaintiff- State has the right to possess the disputed area in exclusion of the defendant. The plaintiff averred in its plaint that the disputed area formed part of Jeypore

(Impartible) Estate at the time of creation of province of Orissa in 1936 by way of Government of India (Constitution of India) Order 1936 and after abolition of zamindari, the estate became part of State of Orissa; that the Province of Orissa, at the time of its creation, had included the disputed area as contemplated in the First Schedule, Part I, clause 2 (iv) r/w Section 3 (1) of the Orissa Order; that the disputed area had remained within its administrative jurisdiction when the Province of Orissa was created and later on when the Constitution was enforced; that the former province of Madras had admitted that the disputed area fell within the administrative jurisdiction of the State of Orissa; and that since the creation of the State of Andhra (in 1953) and later on after the creation of the State of Andhra Pradesh in 1956, the defendant-State has enforced its own administration over the disputed area.

The defendant-State took the preliminary objection regarding maintainability of the suit. It contended that the suit was not maintainable under Article 131 of the Constitution on the grounds that as the jurisdiction under Article 131 is subject to other provisions of the Constitution, the Supreme Court is barred from adjudicating issues relating to State boundaries because Article 1(2) r/w Entry 10 of the First Schedule to the Constitution exclusively addresses this aspect; and that as per Article 3 only Parliament is competent to increase, diminish or alter the boundaries of any State; that the suit was barred under the Proviso to Article 131 as the letter No. 829 dated 02.06.1936 exchanged between the Secretary to the Government of Madras and the Chief Secretary of the Government of Orissa comes within the expression 'other similar document' as occurring in the Proviso to Article 131; that the maintainability of the suit was barred in view of Section 3 (2) and (3) of the Government of India (Constitution of Orissa) Order, 1936

because under the provision, Governor General was contemplated as the final authority to decide any question with respect to an agency, taluk, village, estate, forest or any area in relation to the delimitation of the boundary of the Province of Orissa; and that the suit was also not maintainable in the absence of notice u/s. 80 CPC and non-observance of law of limitation. On merit the defendant- State *interalia* contended that in view of the First Schedule to the Constitution the disputed area fell in the erstwhile Province of Madras, the relevant district of which is now an integral part of the State of Andhra Pradesh; that the original Zamindari of Jeypore (Impartible) Estate had been included in the Schedule to the Madras Impartible Estate Act II of 1904 and the disputed area was a subsequent acquisition which was surrounded by another Zamindari and it formed a separate enclave; that the plaintiff-State had never exercised administrative jurisdiction over the disputed area even before the formation of the State of Andhra in 1953; that the defendant-State has acquired the right to administer the disputed area by adverse possession; and that the suit is barred because of waiver or acquiescence on the part of the plaintiff-State as it did not raise any such dispute u/s. 3(3) of the Order under which the Province of Orissa was constituted.

Dismissing the suit, the Court

HELD: 1.1. Since plaintiff-State has not sought any increase, alteration or diminishing of any area but only a declaration that the disputed area comes under the administrative jurisdiction of the plaintiff-State, Article 131 of the Constitution itself does not put fetters on Supreme Court to decide the suit and there would be no encroachment on the constitutionally sanctioned power of the Parliament to alter State boundaries. [Para 8] [1178-G-H; 1179-A]

1.2. The original jurisdiction of Supreme Court is not barred with reference to the proviso of Article 131 of the Constitution. The letter exchanged between the Secretary to the Government of Madras and the Chief Secretary of the Government of Orissa (Letter No. 829) dated 02.06.1936 cannot be described as an 'other similar instrument' in the legal sense, the letter simply listed the names of the villages which would fall under the jurisdiction of the Araku police station (which after the creation of the Province of Orissa, remained under the Chintalapalli circle of Vizagapatam district in the erstwhile Madras Presidency), and those which would fall under the jurisdiction of the then Government of Orissa. It merely communicated the intentions of the Madras Government at that point of time and it was not issued under the authority of a legislation or subordinate legislation. Neither can it be described as 'a document of a formal character which was made under constitutional or statutory authority'. [Paras 9 and 10] [1179-B-C; 1181-A-D]

Sree Mohan Chowdhury v. The Chief Commissioner, Union Territory of Tripura **1964 (3) SCR 442, relied on.**

Law Lexicon **by P. Ramanatha Aiyar*, 2nd edn.,* referred to.**

2. The maintainability of the suit is not barred even in view of Section 3(2) and (3) of the Government of India (Constitution of Orissa) Order, 1936. The dispute between both the States germinated in 1957, which was well after independence and at that time the position of the Governor General had become obsolete and the Parliament was the supreme law making body in the country. The exclusion of judicial scrutiny in the Orissa Order which was notified in the pre-independence period cannot be mechanically carried forward to the post-independence period. Therefore, it is futile to invoke the

authority of the Governor General as contemplated under the Orissa Order. [Paras 5 and 12] [1174-B; 1182-C-D]

3. The procedural provisions which regulate the admissibility of civil suits before ordinary civil courts do not apply in the strict sense when the Supreme Court exercises its original jurisdiction to decide suits between the States. Thus, the suit is maintainable even in the absence of notice u/s. 80 CPC and non-observance of law of limitation. [Paras 5 and 13] [1174-B; 1184-F]

State of Rajasthan v. Union of India **(1977) 3 SCC 592;** *State of Karnataka v. Union of India* **(1977) 4 SCC 608, relied on.**

4.1. An interpretation that the whole of the Jeypore (Impartible) Estate had been transferred to the then newly formed province of Orissa and that no part of the same had been left in the territories that are now part of the State of Andhra Pradesh, would be overlooking Section 3(2) of the Orissa order as well as Part II of the First Schedule to the same. Section 3(2) contemplates how to define the land boundaries of Orissa. Those boundaries are described in part II of the First schedule to the Orissa Order. As contemplated by Section 3(2) and part II of the first schedule, a map was prepared by the Government of India as also by the erstwhile Presidency of Madras. A look at the map establishes that the villages in dispute are not territorially contiguous with the bounds of the State of Orissa. They are situated at some distance from the inter-State boundary and it would be quite untenable to declare them as coming within the plaintiff State's territory. [Para 15] [1186-B-F]

4.2. The plaintiff relying on Letter No. 829, dated 02-06-1936 sent by the Secretary of the Government of Madras to the Chief Secretary of the Government of Orissa took the plea that the Orissa Order did not exclude or preclude the inclusion of any territory not having a

contiguous land connection with the main territory. The letter stated that the villages mentioned in List B (Prepared by Government of Madras) would fall within the administrative jurisdiction of the province of Orissa. However, the defendant has strongly refuted this claim by submitting that the above-mentioned letter was eclipsed and substituted by Government Order Modification [G.O.M.) No. 2751 issued by the Home (A) Department, Dated 17-10-1936, by which the State of Madras had endorsed the contents of another Letter No. 2752, dated 14-10-1936 which declared that the Borra group of villages (shown as item 7 in List B in Letter No. 829, dated 02-06-1936) would remain in the State of Madras. The defendant has strongly urged that in view of Letter No. 2753, dated 14-10-1936, all the villages shown in List B (except Chatuva) had remained in the State of Madras and subsequently became part of the State of Andhra in 1953 and the successor State of Andhra Pradesh in 1956. [Para 17] [1187-E-H; 1188-A]

4.3. The plaintiff-State had admitted in Letter No. 1671, dated 07-07-1962, sent by the Chief Secretary, Government of Orissa to the Secretary, Ministry of Home Affairs, Government of India (Exh.1) that the disputed area was outside the external land boundary of the State of Orissa. The Government of India acted on this letter and wrote a letter to the Government of Andhra Pradesh, vide Letter No. F. 38/4/62- SR-RI (dated 16-8-1962), to which the Government of Andhra Pradesh sent a reply, vide Letter No. 2504-J/62.8 (dated 30-03-1963), (Exh. 3) wherein it was stated that ever since 1936 this area has been under the continuous management and administration successively of Madras, Andhra and Andhra Pradesh Governments and the Orissa Government has never in the past exercised any jurisdiction or control over the area. Exh. 3 also cited the order of the Andhra Pradesh High Court in a writ petition, wherein it had been declared

that a map was prepared at the time of the promulgation of the Orissa Order, which clearly indicated that the disputed area fell within the territory of the erstwhile Madras Presidency. Subsequently, the Government of India, vide its Letter No. 38/4/62-SR(R), [Exh. 2] sent a reply to the Government of Orissa after taking into account the contents of the letter sent by the Government of Andhra Pradesh, wherein it was stated that the letter shows that the area claimed by the Orissa Government being well within the adjoining State could not have been intended to form part of Orissa and that the intention is borne out by the description of external land boundaries of Orissa in part II of the First Schedule read with para 3(2) of the Government of India (Constitution of Orissa) Order, 1936. [Para 18] [1188-B; 1188-G-H; 1189-A-E]

4.4. After examining Section 3 of the Orissa Order along with the First Schedule to the same, and perusing the correspondence exchanged between Government of Orissa, Government of India and Government of Andhra Pradesh, it is found that the disputed area did not form a part of the Province of Orissa as constituted by the Orissa Order; that the former Province of Madras and subsequently the State of Madras did not admit that the disputed area formed part of the plaintiff-State; that the disputed area did not remain under the administration of the Province of Orissa when the said Province was formed and thereafter the State of Orissa; and that on the basis of the letter dated 7.7.1962 by the Government of Orissa addressed to the Government of India (Annexure "D" to the Plaint),the plaintiff-State cannot lay any claim at all to the disputed area after 1950. [Paras 5 and 18] [1174-D-H; 1189-F]

5. In view of the above finding it is clear that the disputed area was not within the territories of the plaintiff-State as constituted under the Constitution of India.

[Paras 5 and 19] [1174-C-D]

6. The plaintiff has failed to establish that it had governed the disputed area prior to the constitution of the State of Andhra in 1953, especially in the light of the fact that the disputed area is located at a considerable distance from the inter-State boundary. The documents relied upon by the plaintiff-State do not show that the plaintiff-State had exercised administrative jurisdiction over the disputed area, since the same is surrounded by villages that have undeniably been under the administrative control of the State of Andhra Pradesh. In fact, the plaintiff has admitted that till the abolition of the Jeypore Estate, it was not the State of Orissa but the Zamindari which had collected land revenue from the disputed area. A plain reading of Part I and II of the Orissa Order along with the First Schedule to the same, shows that the Order-in-Council did not intend to include the disputed area within the administrative control of the State of Orissa. Thus it is held that the disputed area did not form a part of the Jeypore (Impartible) Estate originally and subsequently it does not form part of the province of Orissa; that the expression the Jeypore (Impartible) Estate means the Estate as included in the Schedule to Madras Impartible Estate since the latter includes subsequent acquisitions of various properties situated outside the original Estate and in different Districts and Provinces; and that the defendant or its predecessor State or Province has always exercised administrative control over the disputed area and the said area was at all material times treated as if it formed part of the defendant's State. [Paras 5 and 22] [1191-G-H; 1192-A-B; 1175-A-C]

7. Since the proceedings in an original suit under Article 131 of the Constitution are entirely distinguishable from ordinary civil suits, the issues viz. whether the defendant has acquired the right to administer the area

by adverse possession, and whether the suit is barred either because of waiver or acquiescence on the part of the plaintiff as it did not raise any such dispute u/s. 3(3) of the Order under which the Province of Orissa was constituted, need not be answered. [Paras 5 and 23] [1192-C-D; 1175-C-D]

State of Karnataka v. Union of India **(1977) 4 SCC 608, relied on.**

8.1. The plaintiff has failed to establish that it had exercised administrative control over the disputed area after the creation of Orissa in 1936. The defendant has produced documents which entail that it is the defendant-State and its predecessor States which have been exercising the administrative jurisdiction over the disputed area. The defendant has also demonstrated that all the villages that are part of the Borra Group, lie within the Ananthagiri Mandal of the present-day Vishakhapatnam District (Exhibits. E; K/1; Q; R). [Paras 25] [1193-A-C]

8.2. The Orissa Order of 1936 did not intend to allocate the disputed area to the State of Orissa, even though it had been acquired by the Zamindar of the Jeypore (Impartible) Estate at a certain stage. After the formation of the province of Orissa, the disputed area was part of the Vizagapatam District of the erstwhile Madras Presidency and despite the contrary claims of the plaintiff-State, the disputed area was notified as part of the Srungavarapukota assembly constituency in the defendant-State. The plaintiff-State also could not establish that the inhabitants of the disputed area recognize Oriya as their first language. [Para 26] [1193-G-H; 1194-A-B]

Case Law Reference:

1964 (3) SCR 442	**Relied on.**	**Para 9**
(1977) 3 SCC 592	**Relied on.**	**Para 13**
(1977) 4 SCC 608	**Relied on.**	**Paras 13 and 23**

CIVIL ORIGINAL JURISDICTION : Original Suit No. 11 of 1968.

Under Article 131 of the Constitution of India.

B.A. Mohanti, H.S. Gururaja, Raj Kumar Mehta, Suman Kukrety, Mamta Tripathi, Mayuri Vats, Shobhit Jain, Manoj Saxena, Rajnish Kr. Singh, T.V. George, Rahul Shukla for the appearing parties.

The Judgment of the Court was delivered by

K. G. BALAKRISHNAN, CJI. 1. This is a suit filed under Article 131 of the Constitution of India by the State of Orissa (plaintiff) against the State of Andhra Pradesh (defendant) for a declaration that the Borra Group of villages, also referred to as 'Borra Mutha', form part of the State of Orissa. Admittedly, the group of villages is located within the geographical limits of the State of Andhra Pradesh.

2. The State of Orissa in its plaint has averred that Borra Mutha [hereinafter 'disputed area') formed part of the Jeypore (Impartible) Estate at the time of the creation of the province of Orissa in 1936 by way of Government of India (Constitution of Orissa) Order, 1936 [hereinafter 'Orissa Order'] and that the said Estate subsequently became part of the modern-day State of Orissa after the abolition of the Zamindari system. The plaintiff has submitted that the Province of Orissa, at the time of its creation, had included the disputed area as contemplated in the First Schedule, Part I, clause 2 (iv) read with Section 3 (1) of the Orissa Order. Albeit, the disputed area is not territorially contiguous with the State of Orissa, yet the plaintiff state claims that it had remained within its administrative jurisdiction when the Province of Orissa was created and later

on when the Constitution was enforced. It was also averred in the plaint that the former province of Madras had admitted that the disputed area fell within the administrative jurisdiction of the State of Orissa. The plaintiff has also alleged that since the creation of the State of Andhra (in 1953) and later on after the creation of the State of Andhra Pradesh in 1956, the defendant state has enforced its own administration over the disputed area. The plaint then narrates as to how the defendant's combative approach had compelled the State of Orissa to write a letter (No. 16715, Ref. dated 7-7-1962) to the Central Government so that the latter could persuade the State of Andhra Pradesh to vacate the disputed area. The State of Andhra Pradesh in its reply to the Central Government vide its letter (No. 2504- J/62.8) dated 30-3-1963, expressed its inability to vacate the disputed area by urging that the disputed area legitimately belonged to the State of Andhra Pradesh as per the order of the Andhra Pradesh High Court in Writ Petition No. 539/1957. Accordingly, the Central Government intimated the State of Orissa that it was not in a position to intervene in the matter relating to the disputed area, vide its letter [No. 38 / 4/ 62-SR (R)] dated 24-1-1964. According to the plaintiff state, its territorial integrity has been violated by the defendant state which has committed acts of trespass on account of its refusal to vacate the disputed area, thereby impelling the plaintiff to approach this Court under Article 131 of the Constitution. The plaintiff has averred that the cause of action arose after the formation of the State of Andhra (under Andhra State Act, 1953).

3. As stated earlier, the State of Orissa has filed the present suit under Article 131 of the Constitution seeking relief in the form of a declaration that the State of Andhra Pradesh has committed trespass on its land by interfering in the administration of some of its villages. The plaintiff's prayer is reproduced below:

> "(i) A declaration that the area as shown in Annexure "B" including therein the main village Borra with 12 hamlets (Borra Mutha) is a part of the plaintiff's territory and the plaintiff has the right to possess and administer the disputed area in exclusion of the defendant.
>
> (ii) A declaration that the defendant is liable to vacate the disputed area.
>
> (iii) A decree for eviction of the defendant from all and/or any part of the disputed area as are under illegal possession and administrative control of the defendant and further directing the defendant to vacate the disputed area and return the area to the uninterrupted possession, control and administration of the plaintiff.
>
> (iv) The cost of the suit and such further relief which may seem just and proper to this Hon'ble Court and to which the plaintiff may be found entitled in the circumstances of the case and in the interest of justice."

4. The defendant (State of Andhra Pradesh) in its written statement has taken the preliminary objection that the prayer sought by the plaintiff does not fall within the scope of the original jurisdiction of this Court as contemplated in Article 131, since that provision limits the jurisdiction by expressly stating that the latter is 'subject to the other provisions of the Constitution'. In this regard, attention has been drawn to Article 1(2) of the Constitution which provides that the territories of States shall be as specified in the First Schedule to the Constitution. In view of this provision, it has been urged that the territories comprising the State of Orissa have already been specified in Entry No. 10 of the First Schedule to the Constitution and therefore this suit is not maintainable. The defendant has taken the stand that the province of Orissa was constituted under the Orissa Order, issued on 3-03-1936 by His Majesty in exercise of the powers conferred by Section 289 (ii) of the Government of India Act, 1935. Section 3(2) of the Orissa Order had provided that if a boundary dispute arose in respect of the specified territories, then the decision of the Governor

General would be final. Therefore, it was contended that since the plaintiff state had not claimed administrative jurisdiction over the disputed area and neither did it assert its claim before the Governor General, no relatable question can be raised after the enforcement of Article 1(2) of the Constitution. Furthermore, it was reasoned that the territories of all the States had been specified in the First Schedule to the Constitution, which made it amply clear that the disputed area fell in the erstwhile Province of Madras, the relevant district of which is now an integral part of the State of Andhra Pradesh. In response to the plaint, it has been reasoned that even if this Court's original jurisdiction under Article 131 were to be assumed, reference must be made to Section 3(2) of the Orissa Order which controls the operation of Section 3(1) of the same which defines and delimits the area to be included in the Province. As a natural corollary to this, if a particular area is outside the external land boundary as described in Part I of the First Schedule to the Orissa Order, it cannot form part of the State of Orissa. It has been contended that the reference to Jeypore (Impartible) Estate must be construed in view of the fact that the original Zamindari had been included in the Schedule to the Madras Impartible Estate Act II of 1904. The holder of the Estate made subsequent acquisitions which were geographically situated outside the original Zamindari and the holders might not have intended the inclusion of those acquisitions in the original Zamindari. It has also been averred by the defendant that it firmly believes that the disputed area was a subsequent acquisition which was surrounded by another Zamindari and it formed a separate enclave. The defendant has further submitted that its administration of the disputed area has always been lawful and that the plaintiff had never exercised administrative jurisdiction over the disputed area, even before the formation of the State of Andhra in 1953.

5. Based on the pleadings of the parties, the following issues have been framed for adjudication:

Preliminary Issues

(1) Whether the suit is maintainable under Article 131?

(2) Whether the suit is maintainable in view of Section 3 (2) and (3) of the Government of India (Constitution of Orissa) Order, 1936?

(3) Whether the suit is maintainable in the absence of notice under Section 80 CPC?

(4) Whether the suit is within limitation prescribed by law?

On Merits

(5) Whether the Disputed Area was within the territories of the Plaintiff state as constituted under the Constitution of India?

(6) Did the Disputed Area form a part of the Province of Orissa as constituted by the Government of India (Constitution of Orissa) Order, 1936?

(7) Did the disputed area form a part of the Jeypore (Impartible) Estate originally and subsequently and does it form part of the province of Orissa?

(8) Did the former Province of Madras and subsequently the State of Madras admit that the disputed area formed part of the plaintiff state?

(9) Whether the disputed area remained under the administration of the Province of Orissa when the said Province was formed and thereafter the State of Orissa?

(10) In view of the letter dated 7.7.1962 by the Government of Orissa addressed to the Government of India (Annexure "D" to the Plaint), can the Plaintiff lay any claim at all to the said area after 1950?

(11) Whether the expression the Jeypore (Impartible) Estate means the Estate as included in the Schedule to Madras Impartible Estate since the latter includes subsequent acquisitions of various properties situated outside the original Estate and in different Districts and Provinces?

(12) Whether the defendant or its predecessor State or Province has always exercised administrative control over the disputed area and whether the said area was at all material times treated as if it formed part of the defendant's State?

(13) Whether in any event the Defendant has acquired the right to administer the area by adverse possession?

(14) Whether the suit is barred either because of waiver or acquiescence on the part of the plaintiff as it did not raise any such dispute under Section 3(3) of the Order under which the Province of Orissa was constituted?

(15) Whether the plaintiff is entitled to any relief and if so to what relief?

Re: Issue I

6. As noted earlier, the State of Orissa was constituted under the Orissa Order, which came into effect on 1.4.1936. The Borra Group of Villages (i.e. Borra and twelve hamlets) admittedly are not territorially contiguous with the main land of Orissa. The interstate boundary is 11 kilometers away (aerial distance) from Borra and its surrounding villages. This group of villages is situated within the geographical limits of the State of Andhra Pradesh which earlier formed part of Jeypore (Impartible) Estate, a Zamindari, before the creation of State of Orissa. Part II of the Orissa Order provided the following:

PART II

Definition of Orissa and Date of Separation

3. (1) The Province of Orissa (hereafter in this Order

referred to as "Orissa") shall consist of the areas specified in Part I of the First Schedule to this Order, and accordingly as from the date of the coming into operation of the provisions of sub section (1) of section two hundred and eighty-nine of the Act relating to the formation of the Province of Bihar and Orissa, those areas shall cease to form part of the Province of Bihar and Orissa, the Presidency of Madras and the Central Provinces respectively.

3. (2) The external land boundaries of Orissa shall be as described in Part II of the said schedule.

3. (3) If any question arises with respect to the boundaries as existing at the date of this Order, of any district, Agency, taluk, village, estate, forest or other area referred to in the said Schedule or otherwise with respect to the delimitation of the boundary of Orissa, that question shall be referred to the Governor- General, whose decision thereon shall be final.

———

The first schedule to the Orissa Order described the areas which would constitute the Province of Orissa. The relevant provisions are reproduced below:

First Schedule

Part – I

Areas comprised in the province of Orissa

1. That portion of the Province of Bihar and Orissa which is at the date of this Order known as Orissa division thereof.

2. Areas transferred from the presidency of Madras:-

(i) The Ganjam Agency Tracts;

(ii) the following areas in the non- Agency portion of the Ganjam district viz., the taluks of Ghumsur, Aska, Surda, Kodala and Chatrapur and so much of the taluks of Ichapur and Berhampur as lies to the north and west of the line described in part II of this schedule;

(iii) So much of the Parlakimedi Estate as lies to the north and east of the said line; and

(iv) The following areas in the Vizagapatam district, that is to say, the Jeypore (Impartible) Estate and so much of the Pottangi Taluk as is not included in that estate.

After the enforcement of the Constitution of India, the territorial extent of the State of Orissa was specified in Entry No. 10 of the First Schedule to the Constitution. The State of Orissa has prayed for a declaration that the main village Borra along with 12 hamlets (Borra Mutha) is a part and parcel of the plaintiff's territory and that the plaintiff has the right to possess and administer the disputed area to the exclusion of the defendant.

7. The defendant, in light of Article 131 and the proviso to the same Article has contended that this Court lacks jurisdiction and the suit is liable to be dismissed on the ground of lack of jurisdiction. Article 131 provides the following:

"131. Original Jurisdiction of the Supreme Court. – Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute-

(a) …

(b) …

(c) between two or more States,

If and in so far the dispute involves any question (whether

of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of the Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute."

(emphasis supplied)

8. The defendant's objection to the maintainability of the suit under Article 131 is on two grounds. The first objection is that the exercise of original jurisdiction under Article 131 is subject to the other provisions of Constitution, and therefore this Court is barred from adjudicating delicate issues relating to state boundaries since Article 1(2) read with Entry 10 of the First Schedule to the Constitution conclusively addresses this aspect. The second strand of the objection is that as per Article 3 of the Constitution, only the Union Parliament is competent to increase, diminish or alter the boundaries of any State in the manner provided. In response to this reasoning, the plaintiff has pointed to the contents of the prayer to assert that there is no intention to seek an alteration of boundaries but instead, the prayer simply seeks a declaration from this Court that the disputed area comes within the plaintiff State as contemplated in Entry 10 of Schedule I to the Constitution and that the plaintiff has the right to possess and administer the disputed area to the exclusion of the defendant. The plaintiff has also prayed for a declaration that the defendant is liable to vacate the disputed area. Since plaintiff has not sought any increase, alteration or diminishing of any area but only a declaration that the disputed area comes under the administrative jurisdiction of the plaintiff state, we are inclined to agree with the view that Article 131 itself does not put fetters on this Court to decide this original

suit and there would be no encroachment on the constitutionally sanctioned power of the Parliament to alter state boundaries.

9. In order to decide whether this suit is barred under the proviso to Article 131, we will have to ascertain the basis of the plaintiff's claim and the documents which have been produced in support of the contentions. The plaintiff state, in order to fortify its claim, has relied on a letter exchanged between the Secretary to the Government of Madras and the Chief Secretary of the Government of Orissa (Letter No. 829) dated 02.06.1936 (Referred to in Para 5 of the Plaint, Exhibit 60). The letter was written to communicate to the Government of Orissa that the Araku police station and the villages mentioned in List A (prepared by Government of erstwhile Presidency of Madras) would from that point of time come under the jurisdiction of the Chintapalli circle of the Vizagapatam district in the erstwhile Madras Presidency. In distinction from this, the letter further stated that the villages enumerated in List B (prepared by Government of Madras) would fall under the jurisdiction of the Government of Orissa and accordingly under any police station which the Orissa government deemed fit. In respect of the correspondence by way of this letter, the operative question for us is whether the said letter comes within the expression 'other similar instrument' which appears in the Proviso to Article 131 of the Constitution. If the correspondence does indeed come within the said expression, this Court cannot decide the present suit on merits. For guidance on how to interpret this expression, we can refer to the observations of this Court in *Sree Mohan Chowdhury v. The Chief Commissioner, Union Territory of Tripura,* [1964] 3 SCR 442, (B.P. Sinha, C.J., at p. 454):

> "Is the President's Order in question an "instrument" within the meaning of the section? The General Clauses Act does not define the expression "instrument". Therefore, the expression must be taken to have been used in the sense in which it is generally understood in legal parlance. In

Stroud's Judicial Dictionary of Words and Phrases (Third Edition, Volume 2, page 1472), "instrument" is described as follows:

> "An 'instrument' is writing, and generally imports a document of a formal legal kind. *Semble*, the word may include an Act of Parliament... (11) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s.2 (xiii), 'instrument' includes deed, will, inclosure, award and Act of Parliament…"

The expression is also used to signify a deed interpartes or a charter or a record or other writing of a formal nature. But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an Order made under a statute or subordinate legislation or any document of a formal character made under constitutional or statutory authority…"

In *P. Ramanatha Aiyar, Law Lexicon, 2nd edn.* (Wadhwa & Co., 1997) at p. 957, the word "instrument" has been defined as:

> "a writing as the means of giving formal expression to some act, contract, process, or proceeding as a deed, contract, writ etc. 'A writing given as the means of creating, securing modifying, or terminating a right or affording evidence; a deed of conveyance, a grant, a patent, an indenture etc. A formal legal writing e.g. a record deed or written instrument. 'Anything reduced to writing; written instrument, or instrument of writing; more particularly, a document of formal or solemn character.' *Instrument* is a word most frequently used to denote something reduced to writing, as a means of evidence, and writing as the means of giving formal expression to some act; a writing expressive of some act, contract, process or proceeding; a writing containing any contract or order."

10. In respect of the letter exchanged between the Secretary to the Government of Madras and the Chief Secretary to the Government of Orissa, it must be noted that the letter simply listed the names of the villages which would fall under the jurisdiction of the Araku police station (which after the creation of the Province of Orissa, remained under the Chintalapalli circle of Vizagapatam district in the erstwhile Madras Presidency), and those which would fall under the jurisdiction of the then Government of Orissa. After scrutinizing the contents of this letter, we find that it cannot be described as an 'other similar instrument' in the legal sense. The letter merely communicated the intentions of the Madras Government at that point of time and it was not issued under the authority of a legislation or subordinate legislation. Neither can it be described as 'a document of a formal character which was made under constitutional or statutory authority'. In the light of this finding, we hold that the original jurisdiction of this Court is not barred with reference to the proviso of Article 131 of the Constitution. We, therefore, hold this issue of maintainability to be in favour of the plaintiff.

Re: Issue 2

11. With respect to this issue, the defendant has averred in the written statement that under the Orissa Order, the Governor General was contemplated as the final authority to decide any question with respect to an agency, taluk, village, estate, forest or any area in relation to the delimitation of the boundary of the Province Orissa. In view of the same, it was asserted that this Court will not have jurisdiction to entertain the present suit. On the contrary, the plaintiff avers that after the formation of the Province of Orissa in 1936, it was the Government of Orissa which had exercised jurisdiction over the disputed area since there was no dispute with the erstwhile Madras Presidency. It was further stated that after the abolition of the Jeypore (Impartible) Estate under the Orissa Estates Abolition Act, 1952, it was the Government of Orissa which

collected land revenue from these villages. In fact, the plaintiff State has averred that when the Constitution was enforced in 1950, it had control over the disputed area but the situation changed after the formation of the State of Andhra in 1953 which subsequently became part of the State of Andhra Pradesh in 1956. From the viewpoint of the plaintiff State, the defendant state then began transgressing into its legal rights by interfering in the disputed area.

12. The dispute between both the states germinated in 1957, which was well after independence and at that time the position of the Governor General had become obsolete and the Union Parliament was the supreme law making body in the country. The exclusion of judicial scrutiny in the Orissa Order which was notified in the pre-independence period cannot be mechanically carried forward to the post-independence period. Therefore, it is futile to invoke the authority of the Governor General as contemplated under the Orissa Order. Accordingly, Issue 2 will have to be answered in favour of the plaintiff.

Re: Issues 3 & 4

13. These issues can be addressed together since they both pertain to procedural considerations vis-a-vis the maintainability of this original suit before this Court. The defendant has averred that the suit is liable to be dismissed on two procedural grounds, firstly, that no notice was served upon the defendant by the plaintiff as required under section 80 of the Code of Civil Procedure, 1908 [hereinafter 'CPC'] and secondly, that the period of limitation prescribed for obtaining the nature of relief sought by the plaintiff is only three years from the date of accrual of the right, as per Article 58 of the Limitation Act, 1963. The right, if any, accrued to the plaintiff on 01-04-1936, i.e., when the Province of Orissa was constituted. In interpreting the scope of Article 131 of the Constitution in *State of Rajasthan v. Union of India* (1977) 3 SCC 592, Chandrachud, J. [As his Lordship then was] held that the requirement for entertaining a suit under Article 131 is that

the suit must involve a question, whether of law or fact, on which the existence or extent of a legal right depends. The purpose of Article 131 is to afford a forum for the resolution of disputes which depend for their decision on the existence or extent of a legal right. In *State of Karnataka v. Union of India* (1977) 4 SCC 608, Chandrachud, J. [as his Lordship then was] held:

> "162. The jurisdiction conferred on the Supreme Court by Article 131 of the Constitution should not be tested on the anvil of banal rules which are applied under the Code of Civil Procedure for determining whether a suit is maintainable. Article 131 undoubtedly confers 'original jurisdiction' on the Supreme Court and the commonest form of a legal proceeding which is tried by a Court in the exercise of its original jurisdiction is a suit. But a constitutional provision, which confers exclusive jurisdiction on this Court to entertain disputes of a certain nature in the exercise of original jurisdiction cannot be equated with a provision conferring a right on a Civil Court to entertain a common suit so as to apply to an original proceeding under Article 131 the canons of a suit which is ordinarily triable under Section 15 of Code of Civil Procedure by the court of the lowest grade competent to try it. Advisedly, the Constitution does not describe the proceeding which may be brought under Article 131 as a 'suit' and significantly, Article 131 uses words and phrases not commonly employed for determining the jurisdiction of a Court of first instance to entertain and try a suit. It does not speak of a 'cause of action', an expression of known and definite legal import in the word of witness actions. Instead, it employs the word 'dispute', which is no part of the elliptical jargon of law. But above all, Article 131 which in a manner of speaking is a self-contained code on matters falling within its purview provides expressly for the condition subject to which an action can lie under it. That condition is expressed by the clause: "if and in so far as the dispute involves any question (whether of law or fact) on which the existence of or extent of a legal right depends." By the very terms of the article, therefore, the sole condition which is required to be satisfied for invoking the original jurisdiction of this Court is that the dispute between the parties referred to in clauses (a) to (c) must involve a question on which the existence or extent of a legal right depends."

Chandrachud J. further had categorically stated:

> "163 …I consider that the Constitution has purposefully conferred on this Court a jurisdiction which is untrammelled by considerations which fetter the jurisdiction of a court of first instance, which entertains and tries suits of a civil nature. The very nature of the dispute arising under Article 131 is different, both in form and substance, from the nature of claims which require adjudication in ordinary suits."

In support of the same view, P.N. Bhagwati J. [as his Lordship then was] had observed:

> "165. A proceeding under Article 131 stands in sharp contrast with an ordinary civil suit. The competition in such a proceeding is between two or more governments- either the one or the other possesses the constitutional power to act."

In the light of the aforesaid observations, it is evident that the procedural provisions which regulate the admissibility of civil suits before ordinary civil courts do not apply in the strict sense when this Court exercises its original jurisdiction to decide suits between States. Accordingly, Issue 3 and 4 will have to be answered in favour of the plaintiff.

Re: Issues 6, 8, 9 & 10

14. These four issues are taken together since they are interconnected and the fate of the suit largely depends upon the answer to the aforesaid issues. The erstwhile Zamindar of

Jeypore was the holder of the Impartible estate of Jeypore as well as the Impartible estates of Madugula and Pachipenta. There is no doubt that all of these estates fell within the territory of the erstwhile Presidency of Madras till 01-04-1936. However, under Section 289(iii) of the Government of India Act, 1935, His Majesty the King Emperor had passed the Orissa Order in 1936 which led to the carving out of the province of Orissa. The Orissa Order had contemplated that the areas constituting the Jeypore estate were to be transferred to the province of Orissa. His Majesty's Council had at the same day (i.e. 3-03-1936) issued the Government of India (Excluded and partially Excluded areas) Order 1936 [hereinafter 'Order-in-Council'] acting under Section 91(1) of the Government of India Act, 1935. Part II of the schedule to the latter Order included the areas that were to be transferred to Orissa from the Vizagapatam Agency in the erstwhile Madras presidency. The effect of this order was the transfer of Jeypore which included within its ambit the village of Borra, Gatevalsa etc. As noted earlier, the Jeypore estate that was contemplated as part of the State of Orissa was subsequently abolished in accordance with the Orissa Estate Abolition Act, 1952.

15. The plaintiff has submitted that the Order-in-Council had specifically included the whole of the estate of Jeypore in the province of Orissa and that no part of it was intended to be retained in the erstwhile Madras presidency. In support of this contention, reliance has been placed on the words of Section 3 read with Part I of the First Schedule to the Orissa Order. The relevant section provides:-

> "(I) The province of Orissa (hereinafter in this Order referred to as (Orissa) shall consist of the areas specified in Part I of the First Schedule to this order, and accordingly as from the date of coming into operation of the provisions of Sub-Section (1) of section two hundred and eighty-nine of the Act relating to the formation of the province of Bihar and Orissa, those areas shall case to form part of the province

> of Bihar and Orissa, the Presidency of Madras and the Central Provinces respectively."

Now it must be noted that Part I of the First Schedule to the Orissa Order defines the area which constituted the province of Orissa. Clause 2 (iv) of this part states that the following areas in the Vizagapatnam district, that is to say, the Jeypore (Impartible) Estate and so much of the Pottangi taluk as is not included in that estate, are comprised in the province of Orissa. On the basis of the language extracted above, it was asserted that the whole of the Jeypore (Impartible) Estate had been transferred to the then newly formed province of Orissa and that no part of the same had been left in the territories that are now part of the State of Andhra Pradesh. However, such an interpretation would be overlooking Section 3(2) of the Orissa order as well as Part II of the First Schedule to the same. Section 3(2) contemplates how to define the land boundaries of Orissa. Those boundaries are described in part II of the First schedule to the Orissa Order. As contemplated by Section 3(2) and part II of the first schedule, a map was prepared by the Government of India as also by the erstwhile Presidency of Madras. Undoubtedly, a look at the map establishes that the villages in dispute are not territorially contiguous with the bounds of the State of Orissa. They are situated at some distance from the inter-state boundary and it would be quite untenable to declare them as coming within the plaintiff state's territory.

16. However, the plaintiff has relied on two cases to argue that a departure can be made from the norm of territorial continuity. Reference has been made to the examples of the Sankara Tract, which is an enclave of the State of Madhya Pradesh that is physically located within the State of Orissa as well as the Union Territory of Pondicherry which includes a few enclaves that are located at a considerable physical distance from each other. However, these two examples relate to some specific historical considerations and these cannot be equated

with the dispute before us. The example of Sankara Tract is distinguishable from the present case since this tract was earlier part of Sarangarh, an erstwhile Princely State which acceded to the Union of India on 1-1-1948. The absorption of the Sankara Tract in the State of Madhya Pradesh can hence be traced back to an instrument of accession, which is a circumstance inviting considerations that are entirely different from those before us in the present suit. Furthermore, it must be noted that the Union Territory of Pondicherry comprises of areas which were earlier governed by the French government and under a special agreement with the French Government, Pondicherry was merged with the Union of India. This Court therefore cannot examine the validity of such an agreement in view of the proviso to Article 131, primarily because the same was an outcome of political negotiations. The general rule is that the extent of a province should be based on the principle of territorial continuity.

17. The plaintiff has denied the averment of the defendant on this point by asserting that the Orissa Order did not exclude or preclude the inclusion of any territory not having a contiguous land connection with the main territory. In support of this contention, the plaintiff has relied on Letter No. 829, dated 02-06-1936 sent by the Secretary of the Government of Madras to the Chief Secretary of the Government of Orissa, which stated that the villages mentioned in List B (Prepared by Government of Madras) would fall within the administrative jurisdiction of the province of Orissa. However, the defendant has strongly refuted this claim by submitting that the above-mentioned letter was eclipsed and substituted by Government Order Modification [G.O.M.) No. 2751 issued by the Home (A) Department, Dated 17-10-1936, by which the State of Madras had endorsed the contents of another Letter No. 2752, dated 14-10-1936 which declared that the Borra group of villages (shown as item 7 in List B in Letter No. 829, dated 02-06-1936) would remain in the State of Madras. The defendant has strongly urged that in view of Letter No. 2753, dated 14-10-

1936, all the villages shown in List B (except Chatuva) had remained in the State of Madras and subsequently became part of the State of Andhra in 1953 and the successor State of Andhra Pradesh in 1956.

18. We should give due importance to the fact that the plaintiff State had admitted in Letter No. 1671, dated 07-07-1962, sent by the Chief Secretary, Government of Orissa to the Secretary, Ministry of Home Affairs, Government of India (Exh.1) that the disputed area was outside the external land boundary of the State of Orissa. The letter stated:

> "…But the external boundary of the Orissa province as defined in the First Schedule of the order being inconsistent with the enumeration of the areas indicated in Part- II, the resultant effect was that the "Borra Mutha" which was a part of the Impartible estate of Jeypore, remained in Madras province (now in Andhra Pradesh) and continues to be administered as part of it right up to date…"

Furthermore, while taking into account the operation of the Orissa Order of 1936, the letter had stated:

> "…this Government feels that the mere fact that in the map of Orissa prepared in pursuance of the above order, this area was not shown by mistake, cannot take away the legal claim of this State, and therefore the Government of India are requested to advice the Andhra Pradesh Government to restore the 'Borra Muttah' to Government of Orissa sine it forms a part of Orissa in accordance with the Constitution of Orissa Order, 1936…"

As noted earlier, the Government of India acted on this letter and wrote a letter to the Government of Andhra Pradesh, vide Letter No. F. 38/4/62- SR-RI (dated 16-8-1962), to which the Government of Andhra Pradesh sent a reply, vide Letter No. 2504-J/62.8 (dated 30-03-1963), (Exh. 3) wherein it was stated:

> "Ever since 1936 this area has been under the continuous management and administration successively of Madras, Andhra and Andhra Pradesh Govts. and the Orissa Government has never in the past exercised any jurisdiction or control over the area."

Exh. 3 also cited the order of the Andhra Pradesh High Court in W.P. No. 539/1957, wherein it had been declared that a map was prepared at the time of the promulgation of the Orissa Order, which clearly indicated that the disputed area fell within the territory of the erstwhile Madras Presidency. Subsequently, the Government of India, vide its Letter No. 38/4/62-SR(R), [Exh. 2] sent a reply to the Government of Orissa after taking into account the contents of the letter sent by the Government of Andhra Pradesh, the relevant extracts of which are as follows:

> "The letter shows that the area claimed by the Orissa Government being well within the adjoining state could not have been intended to form part of Orissa and that the intention is borne out by the description of external land boundaries of Orissa in part II of the First Schedule read with para 3 (2) of the Government of India (Constitution of Orissa) Order, 1936. In view of this, the Government of India regret their inability to advise the Andhra Pradesh Government to transfer the Borra Muttah area to Orissa."

After examining Section 3 of the Orissa Order along with the First Schedule to the same and perusing the correspondence exchanged between Government of Orissa, Government of India and Government of Andhra Pradesh, we find the contentious issues to be in favour of the defendant.

Re: Issue 5

19. In view of what has been stated by us while answering Issues 6, 8, 9 and 10, this issue does not need any further consideration and this issue is accordingly answered in favour of the defendant.

Re: Issues 7, 11 and 12

20. These issues have to be answered on the basis of the assertions made in the plaint, written statement as well as the rejoinder to the written statement. The defendant has averred that the reference to the Jeypore (Impartible) Estate as mentioned in the First Schedule to the Orissa Order should be construed as one to the ancient Zamindari which had been included in the Schedule to the Madras Impartible Estate Act II of 1904. The defendant has submitted that the holders of the Jeypore (Impartible) Estate had made subsequent acquisitions of various properties including land and buildings whose locations were at some distance from the original Zamindari. Some of these subsequent acquisitions were in different districts and provinces and therefore it cannot be said with certainty that the holder intended to integrate such acquisitions with the original Zamindari. According to the defendant, there is reasonable cause to believe that the disputed area was one such subsequent acquisition. The disputed area had earlier formed an enclave which was surrounded by another Zamindari. Proceeding with this reasoning, the defendant has submitted that the Order-in-Council had only intended that the original Zamindari of Jeypore (Impartible) Estate would fall under the administrative control of the State of Orissa. The intent of the Order-in-Council, as maintained by the defendant at that time, was accepted by both the governments, i.e. State of Orissa as well as the erstwhile Presidency of Madras. The defendant has further made the case that the plaintiff had never exercised any type of jurisdiction over the disputed area and that the available records demonstrate that the disputed area had been part of a taluk which was in turn a part of the erstwhile Madras Presidency and therefore, at the time of the enforcement of the Constitution, the disputed area did not fall within the territories of the State of Orissa as contemplated in Entry 10 of Schedule I to the Constitution. Hence, it was urged that when the State of Andhra was formed in 1953, the disputed area became part of the same.

21. On the other hand, the plaintiff in rejoinder has contended that the disputed area formed part of the Jeypore (Impartible) Estate as contemplated in the Schedule to the Madras Impartible Estate Act (II of 1904). The plaintiff has denied that the disputed area was a subsequent acquisition by the holder of the said Estate. The plaintiff has also asserted that it had never considered the disputed area to be under the jurisdiction of the Madras Presidency. In support of this contention, it was submitted that the disputed area had remained under the revenue jurisdiction of the Jeypore (Impartible) Estate till the abolition of the Estate by way of a State legislation in 1952. The plaintiff has also relied on a report compiled by the East India Company in 1784 in which it was noted that the disputed area came within the Zamindari and that the Zamindar of Jeypore used to collect annual revenue of 25 rupees from the disputed area. It was further stated that in 1893, the Maharaja of Jeypore had gifted the Borra village to the Pujari of Borra. The plaintiff has thus argued that the claims of the defendant are contrary to the documents which are in its possession and knowledge.

22. It is of course the refusal of the defendant to concede the disputed area to the plaintiff which gave rise to the cause of action in the present suit. The plaintiff seeks administrative control over the disputed area since it alleges that the defendant has committed trespass by interfering with the administration of the disputed area after 1953 and more particularly after 1957. The fact that the disputed area was part of the Jeypore (Impartible) Estate before the notification of the Orissa Order has not been contested by the defendant. However, the plaintiff has failed to establish that it had governed the disputed area prior to the constitution of the State of Andhra in 1953, especially in light of the fact that the disputed area is located at a considerable distance from the inter-state boundary. The documents relied upon by the plaintiff do not convince us that the plaintiff had exercised administrative jurisdiction over the disputed area, since the same is

surrounded by villages that have undeniably been under the administrative control of the State of Andhra Pradesh. In fact, the plaintiff has admitted that till the abolition of the Jeypore Estate, it was not the State of Orissa but the Zamindari which had collected land revenue from the disputed area. A plain reading of Part I and II of the Orissa Order along with the First Schedule to the same, leads us to conclude that the Order-in-Council did not intend to include the disputed area within the administrative control of the State of Orissa. The three issues are answered accordingly.

Re: Issues 13 and 14

23. The aforesaid issues need not be answered in detail since we have already resolved that the proceedings in an original suit under Article 131 of the Constitution are entirely distinguishable from ordinary civil suits. An observation of Y.V. Chandrachud J., [As His Lordship then was] in *State of Karnataka v. Union of India* (1977) 4 SCC 608, may amply clarify the position:

> "165. In a civil suit the plaintiff has to succeed on the strength of his own title, not on the weakness of his adversary because the defendant may be a rank trespasser and yet he can lawfully hold on to his possession against the whole world except the true owner. If the plaintiff is not the true owner, his suit must fail. A proceeding under Article 131 stands in sharp contrast with an ordinary civil suit. The competition in such a proceeding is between two or more governments - either the one or the other possesses the constitutional power to act."

The issues are answered accordingly.

Re: Issue 15

24. After examining the averments and contentions advanced on behalf of both the parties, we do not deem it fit

to grant the declaration sought by the plaintiff. Consequently the prayer of the plaintiff is unsustainable and liable to be dismissed without any other relief.

25. The plaintiff has failed to establish before us that it had exercised administrative control over the disputed area after the creation of Orissa in 1936. The defendant has produced documents before us which entail that it is the State of Andhra Pradesh and its predecessor states which have been exercising the administrative jurisdiction over the disputed area. The defendant has also demonstrated that all the villages that are part of the Borra Group, lie within the Ananthagiri Mandal of the present-day Vishakhapatnam District (Exhibits. E; K/1; Q; R). The villages which comprise the disputed area are listed below:

1. Borra- Getuvalasa
2. Ninimamidi
3. Pedduru
4. Pooluguda
5. Bitrabeda
6. Dekkapuram
7. Kuntiyasimidi
8. Eguvamamidi valsa
9. Koyitiguda
10. Liddangi
11. Jeerugedda
12. Bisiaguda
13. Bodilibodi

26. The Orissa Order of 1936 did not intend to allocate the disputed area to the State of Orissa, even though it had been acquired by the Zamindar of the Jeypore (Impartible)

Estate at a certain stage. After the formation of the province of Orissa, the disputed area was part of the Vizagapatam District of the erstwhile Madras Presidency and despite the contrary claims of the plaintiff, the disputed area was notified as part of the Srungavarapukota assembly constituency in the State of Andhra Pradesh. It is also pertinent to note that the plaintiff could not establish that the inhabitants of the disputed area recognize Oriya as their first language.

27. Therefore, in the light of these findings and considerations, we reject the prayer of plaintiff and the suit is dismissed accordingly. There will be no order as to costs.

K.K.T. Original Suit dismissed.

DEVENDER KUMAR & ANR. ETC.
v.
STATE OF HARYANA & ORS. ETC.
(Criminal Appeal Nos. 988-989 of 2010)

MAY 5, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Code of Criminal Procedure, 1973 – s. 167(1) – Remand to police custody – Accused arrested and produced before Magistrate – Dismissal of application for police remand – Accused remanded to judicial custody – Subsequently, second application for police remand for three days also dismissed – Accused released on bail – Prayer for cancellation of bail and for grant of police remand – Allowed by High Court – On appeal, held: High Court not justified in cancelling the order of bail and directing the arrest of accused on the ground that since disclosures were made by accused, his police custody was necessary for recovery of the same – Police remand can only be made during the first 15 days period of remand after arrest and production before the magistrate, but not after the expiry of the said period – Thus, order of High Court set aside – Penal Code, 1860 – ss. 498-A, 406, 506, 323/34.

FIR was registered against the appellant u/ss. 498-A, 406, 506, 323 rw. s. 34 IPC. The appellant was arrested and produced before the Magistrate. The Assistant-Sub-Inspector filed an application praying for police remand. The application was dismissed and the appellant was remanded to judicial custody. Subsequently, the SHO filed application for grant of police remand of the appellant for three days, on the ground that custodial interrogation of the accused was necessary for recovery of the dowry articles. The application was dismissed and the appellant was granted bail. Respondent no. 4 filed

application for cancellation of bail and for quashing the order rejecting the application for remand of the appellant no. 1. The High Court cancelled the bail granted to the appellant and allowed the application praying for police remand of the appellant. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1.1. Bail had been granted to the appellants by the Magistrate, on 10th October, 2008, and there is no allegation that the same had been misused or that any attempt had been made after the appellants were granted bail to recover the articles alleged to have been given to the appellant no.1 at the time of marriage with the complainant. The reason given by the High Court for cancellation of the orders granting bail and directing the arrest of the appellants on the ground that disclosures have been made by the appellants and that their police custody was necessary for recovery of the same, is not sufficient for the purpose of cancellation of bail granted earlier. [Para 9] [1200-E-H]

1.2. It is clear that police remand can only be made during the first period of remand after arrest and production before the Magistrate, but not after the expiry of the said period. It cannot be said that the second application for police remand is not maintainable even if made during the first 15 days period after arrest. Within the first 15 days of arrest the Magistrate may remand the accused either to judicial custody or police custody for a given number of days, but once the period of 15 days expires, the Magistrate cannot pass orders for police remand. [Para 10] [1201-A-C]

1.3. Having regard to the facts of the case, the impugned order directing cancellation of bail and re-arrest passed by the High Court is set aside and that of

the Magistrate granting bail to the appellants, passed on 10th October, 2008 is restored. [Para 11] [1201-D]

Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni **1992 (3) SCC 141, relied on.**

Case Law Reference:

1992 (3) SCC 141	**Relied on.**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No(s). 988-989 of 2010.

From the Judgment & Order dated 19.03.2010 of the High Court of Punjab & Haryana at Chandigarh in Crinimal Misc. No. M-28847 of 2008 and Criminal Misc. No. M-28849 of 2008.

Siddarth Luthra, Aditya Chaudhary, Dharmendra Kumar Sinha for the Appellants.

Manjit Singh, AAG, P.R. Agarwal, Pramod Dayal, Nikunj Dayal, Ajay K. Jain Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by.

ALTAMAS KABIR, J. 1. Leave granted.

2. These Appeals arise out of the judgment and order passed by the Punjab & Haryana High Court on 19th March, 2010, in Crl.M. Nos.28847 and 28849 of 2008, allowing the application filed by the Station House Officer, Hodal Police Station, praying for police remand of the accused, Devender Kumar, for three days.

3. It appears that when the Appellant No.1, Devender Kumar, was produced before the Judicial Magistrate, Palwal on 8th October, 2008, in connection with case FIR No.333 dated 18th September, 2008, registered at Hodal Police Station, District Faridabad under Sections 498-A, 406, 506,

323 read with Section 34 IPC, an application was made for police remand by an officer of the rank of Assistant Sub-Inspector, which was rejected vide an order dated 8.10.2008, as the said application was contrary to the provisions of Section 167(1) Cr.P.C. which provide that an application for police remand can be made only by an officer not below the rank of Sub-Inspector. Accordingly, the Appellant No.1 was remanded to judicial custody and was directed to be produced on 22nd October, 2008. Subsequently, however, the position was rectified and as indicated hereinabove, an application was made by the S.H.O., Hodal, on 9th October, 2008, praying for grant of police remand of the accused/appellant Devender Kumar for a period of three days. It was mentioned therein that custodial interrogation of the accused was necessary for recovery of the dowry articles. The said application was dismissed by the learned Judicial Magistrate on 10th October, 2008. The learned Magistrate granted bail to Appellant No.1 by another order dated 10th October, 2008. The Respondent No.4, Kavita alias Shama, filed Criminal Misc. No.28847-M and 28849-M of 2008 in the High Court of Punjab and Haryana praying for cancellation of the bail granted to the appellants. She also prayed for quashing of the orders dated 8.10.2008 and 10.10.2008 by which the application for remand of Appellant No.1 had been rejected. By the impugned order dated 19th March, 2010, the High Court allowed the Criminal Misc. Petitions and quashed the orders dated 8.10.2008 and 10.10.2008 upon holding that Devender Kumar, the Appellant No.1 herein, had made a disclosure statement that dowry articles had been given to him and those articles were lying in his house at Delhi, which could be identified and recovered. Aggrieved by the order dated 19.3.2010 passed by the High Court in Criminal Misc. Nos. 28847-M and 28849-M of 2008, the appellants have filed this appeal.

4. Appearing for the Appellants, Mr. Siddharth Luthra, learned Senior Advocate, urged that the order of the High Court impugned in these proceedings, directing cancellation of bail

granted to the Appellants and further allowing the application for police remand filed on behalf of the Investigating Authorities and directing the arrest of the Appellants herein and committing them to police custody, was not only contrary to the established principles relating to cancellation of bail, but also violated the provisions of Section 167(1) Cr.P.C. Mr. Luthra contended that once a disclosure statement was made, there was no further need for custodial interrogation as sought for by the investigating agency. He also submitted that there was no allegation that the Appellants had either misused the privilege of bail and had interfered with the investigation or had resorted to tampering with the evidence of witnesses or threatened them so as to disrupt the smooth process of investigation.

5. There is no allegation either that the Appellants had made themselves unavailable to the investigating agency after being released on bail. It was urged that despite the above, the High Court allowed the prayer for police remand simply upon observing that the Appellant No.1 made disclosures during investigation that the dowry articles which were given to him were lying in his house at Delhi which could be identified and recovered. A further contention was raised by Mr. Luthra that after an application for police remand had been dismissed when the Appellants were initially arrested and produced before the learned Magistrate, a second application for police remand was not maintainable and that the order of the High Court cancelling the grant of bail to the Appellants was also bad on such ground.

6. Mr. P.R. Agarwal, learned Advocate appearing for the Respondent No.4-Complainant, however, submitted that the order of the High Court did not require any interference, since a large number of articles given by way of dowry and which were admitted to have been received by the Appellants, were yet to be recovered and such recovery could be made only under custodial interrogation. The same view was expressed by Mr. Manjit Singh, learned Additional Advocate General

appearing for the State of Haryana.

7. As to the second branch of Mr. Luthra's submissions that a second application for police remand was not maintainable after the dismissal of the first, reference was made to a decision of this Court in *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi vs. Anupam J. Kulkarni* [(1992) 3 SCC 141], wherein the provisions of Section 167 Cr.P.c. were gone into in some detail and the very question which is now before us was also considered and it was held that within the first 15 days period of remand, the Magistrate could direct police custody other than judicial custody, but if the investigation was not completed within the first 15 days' period of remand, no further police remand could be made. It was emphasized that police remand would only be made during the first 15 days after arrest and production before the magistrate and not otherwise, although, judicial remand could extend to 60 days from the date of arrest and in special cases, to within 90 days.

8. We have carefully considered the submissions made on behalf of the respective parties and we are of the view that the order of the High Court requires intervention on the two points argued by Mr. Luthra.

9. Bail had been granted to the Appellants by the learned Magistrate, Palwal, on 10th October, 2008, and as indicated hereinbefore, there is no allegation that the same had been misused or that any attempt had been made after the Appellants were granted bail to recover the articles alleged to have been given to the Appellant No.1 at the time of marriage with the complainant. The reason given by the High Court for cancellation of the orders granting bail and directing the arrest of the Appellants on the ground that disclosures have been made by the Appellants and that their police custody was necessary for recovery of the same, is, in our view, not sufficient for the purpose of cancellation of bail granted earlier.

10. With regard to the second point which was urged by Mr. Luthra, the same was considered in depth and was settled in the case of *Anupam J. Kulkarni's* case (supra) referred to hereinabove. What is clear is the fact that police remand can only be made during the first period of remand after arrest and production before the Magistrate, but not after the expiry of the said period. Of course, we do not agree with the submissions made by Mr. Luthra that the second application for police remand is not maintainable even if made during the first 15 days period after arrest. The said point has also been considered and decided in the above case. Within the first 15 days of arrest the Magistrate may remand the accused either to judicial custody or police custody for a given number of days, but once the period of 15 days expires, the Magistrate cannot pass orders for police remand.

11. Having regard to the facts of the case, we allow these appeals and set aside the impugned order directing cancellation of bail and re-arrest passed by the High Court dated 19th March, 2010, and restore that of the learned Magistrate passed on 10th October, 2008.

N.J. Appeals allowed.

MUNNAWAR AND ORS.
v.
STATE OF U.P. ETC.
(Criminal Appeal Nos. 1680-1682 of 2007)

MAY 5, 2010

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

Penal Code, 1860: ss.302/149 – Fire shot at victim – Death of victim after 5 days – Dying declaration recorded by magistrate duly endorsed by doctor – Trial court convicted the accused u/s.307 but acquitted them u/s.302 on the ground that it was negligence on the part of doctor which led to septicemia and finally the death of victim – However, High Court convicted accused u/s.302/149 – On appeal, held: Injuries on the person of victim were grievous and sufficient to cause death as they were on sensitive parts of the body – Promptness in recording of FIR would belie the doubt as to the presence of eyewitness-informant at the place of incident – There were no suspicious circumstances with regard to the dying declaration and no reasons spelt out as to why the two officers (magistrate and doctor) would falsely implicate accused – Order of conviction not interfered with.

Prosecution case was that the deceased, alongwith PW-1 and PW-2 was on way to court to attend a case. Appellants armed with a pistol fired a shot at the deceased and thereafter ran away from the spot. The incident took place at 11.15 A.M. The deceased was seriously injured and was taken to hospital and examined by the Doctor PW-4 at 11.35 A.M. FIR was lodged at 12 noon. PW-11, the police officer recorded statement of the deceased. Next day, statement of the deceased was recorded by Magistrate. After 5 days of the incident, deceased succumbed to injuries. Case was converted from one under Section 307 IPC to Section 302 IPC. Trial Court

acquitted the appellants of offence under Section 302 IPC but convicted them under Section 307 IPC. Appellants filed appeals against conviction and the State filed appeal against acquittal of appellant of offence under Section 302. High Court convicted appellants for offence under Section 302/149 IPC. Hence the appeals.

Dismissing the appeals, the Court

HELD: 1. The dying declaration recorded by the Executive Magistrate gave full details as to the identity of the assailants, the weapons used, the site of the injury and the fact that he was brought to the hospital by a neighbour and his elder brother who were accompanying him at the time of incident. The doctor, (PW 6) who was looking after the deceased when the dying declaration was recorded gave a certificate that he was fully conscious and lucid at the time of its recording. The Magistrate also deposed that the deceased was fully conscious when the dying declaration was recorded by him. The submission that the injuries on the person of the deceased were so serious that the evidence of the Executive Magistrate endorsed by the Doctor with regard to the fitness of the deceased was a matter of suspicion, was without basis. There were no suspicious circumstances whatsoever with regard to the dying declaration recorded by the Magistrate and endorsed by the doctor and no substantial reasons were spelt out as to why these officers would favour the prosecution. The fact that the deceased died several days later, of septicemia brought about by the gunshot injury clearly showed that his condition was not overly critical or precarious when the dying declaration was recorded. [Paras 4, 5] [1209-A-E; 1210-E-F]

Balak Ram v. State of U.P. **1975(3) SCC 219;** *K.*

Ramachandra Reddy & Anr. v. The Public Prosecutor **1976(3) SCC 618, referred to.**

2. Prima facie, some delay had occurred for the delivery of the special report, but that by itself would not be of any consequence more particularly as the incident, as at that time, had not led to the death of the victim and case under Section 307 of the IPC was registered. The evidence of Doctor (PW-4) was that the injured was admitted to the hospital by his son, PW-1. The promptness of the FIR is a clear reflection of the fact that the two eye witnesses were present at the time of incident. It is also the admitted position that the deceased and party were on their way to attend a court hearing when they were attacked. Those who are involved in serious criminal litigation seldom go alone to attend court hearings, and are invariably accompanied by other persons as per the dictates of tradition and prudence in rural North India. Therefore, the presence of the two eye witnesses is accepted. [Paras 6, 7] [1211-B-D; 1212-A-D]

3. The injuries seemed to have been caused from a very close range as tattooing was present. The doctor also pointed that some of the injuries were grievous and were fatal to life and all the injuries were sufficient to cause death as they were on sensitive parts of the body and that the injured was under severe shock, and had been given three units of blood at the time of his admission to hospital. In the light of such evidence, the trial court erred in concluding that it was the negligence on the part of the doctor which had led to septicemia and finally the death of the patient. [Para 9] [1214-A-C]

Case Law Reference:

1975(3) SCC 219	**referred to**	**Para 2**
1976(3) SCC 618	**referred to**	**Para 2**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.(s). 1680-1682 of 2007.

From the Judgment & Order dated 08.08.2007 of the High Court of Judicature at Allahabad in Government Appeal No. 4195 of 2002 & Criminal Revision No. 953 of 2002 & Criminal Appeal No. 2154 of 2002.

Sushil Kumar, Manoj Prasad, Aditya Kumar for the Appellants.

T.N. Singh, Rajiv Dubey, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. The facts leading to the filing of these appeals are as under:

1. On the 20th May 2000, Fateh Mohammad deceased, Mohammad Shamoon PW-1 and his elder brother Wali Mohammad PW-2 were on their way to Court for appearing in a case. They got down from the bus at about 11.15 a.m. at Mawana Bus Stand, Meerut and moved on towards the Courts and as they reached near the office of the Bus Union, Yaqoob and Manabbar and Qasim sons of Khuda Bux, Qasim son of Sanabbar and Zuber son of Manabbar, all residents of village Bisola, Police Station Evoli, armed with country made pistols, started firing at Fateh Mohammad. Mohammad Shamoon and Wali Mohammad ran towards the Sardhana Bus Stand to save their lives and in the meanwhile the assailants ran away from the spot. Fateh Mohammad, seriously injured, was admitted to Jaswant Rai Speciality Hospital, Saket, Meerut by Mohammad Shamoon and was examined by Dr. Anil Kapoor PW.4 at 11.35 a.m. Mohammad Shamoon thereafter lodged a report at about 12 noon at Police Station, Civil Lines, Meerut at a distance of two furlongs from the place of incident. Sub-Inspector Dhani Ram Arya PW.11 also visited the hospital and recorded the

statement of the injured and the other witnesses including Wali Mohammad. He also moved an application for recording the dying declaration of Fateh Mohammad which was duly recorded on the 21st May 2000 at 8.15 p.m. by Shri Rajdev Singh, Additional City Magistrate, Meerut in the presence of Dr. Narender Trivedi PW.6. The Sub Inspector also visited the place of incident and made the necessary enquiries. Fateh Mohammad succumbed to his injuries on the 25th May 2000 and on receiving this information Sub-Inspector Subhash Chaudhary PW.5 reached the hospital, drew up the inquest proceedings and sent the dead body for its post-mortem examination. The case was also converted from one under Section 307 to 302 of the IPC. On the completion of the investigation, a charge-sheet was filed with respect to Manabbar, Qasim and Zuber as Yaqoob had, in the meanwhile, absconded. The prosecution placed primary reliance on the evidence of the two eye witnesses, Mohammad Shamoon PW 1 and Wali Mohammad PW 2. Dr. Anil Kapoor PW 4, who had examined Fateh Mohammad on 25th May 2000 at 11:30 a.m., Dr. N. Trivedi PW-6, who had certified Fateh Mohammad as being fit at the time of the reading of the dying declaration, Shri Rajdev Singh PW-10 aforementioned, Dhani Ram Arya PW 11 the police officer who had recorded the first dying declaration of Fateh Mohammad as a statement under Section 161 of the Cr.P.C. in the case diary, Dr. N.K. Gupta PW 3, who had conducted the autopsy on the dead body and had opined that death had been caused due to Septicemia and shock as a result of ante-mortem injuries and Sub-Inspector J.S.Pundhir PW 9, who had investigated the case under Section 302 of the IPC and had recovered two country made pistols at the instance of Qasim and Zuber accused. The accused in their statements under Section 313 of the Cr.P.C. denied all allegations and pleaded false implication. They also produced some witnesses in defence and in particular DW1 V. Roy a Ballistic expert, who deposed that if a bullet was left embedded in the body it could result in Septicemia. The trial court relying on the aforesaid

evidence convicted the accused for an offence under Section 307 of the IPC and sentenced them to rigorous imprisonment for 4 years and fine of Rs.5,000/- each but acquitted them of the offence under Section 302 of the IPC. Two appeals were filed in the High Court, one by the accused-appellants and the other by the State Government challenging the acquittal of the accused for the offence under Section 302 of the IPC. The High Court by the impugned judgment dated 8th August 2007 dismissed the appeal filed by the accused but allowed the State appeal and convicted the accused-appellants for the offence punishable under Section 302/149 of the IPC and sentenced them to undergo imprisonment for life. It is in this background that the matter is before us at the instance of the accused.

2. Mr. Sushil Kumar, the learned senior counsel for the appellants has raised four arguments in the course of the hearing. It has first been submitted that the first dying declaration recorded by PW Dhani Ram Arya of Police Station, Civil Lines, Meerut in the Jaswant Rai Specialty Hospital did not bear the signature of the deceased or the endorsement of a Doctor as to the fitness of the injured and no credence could thus be attached to it. It has also been submitted that the second dying declaration recorded in the hospital by Shri Rajdev Singh, Additional City Magistrate, Meerut on the 21st May 2000 had not been properly endorsed by the Magistrate and did not satisfy the tests or instructions laid down relating to the recording of dying declaration and as the endorsement of the Doctor did not reveal the medical condition of the injured, this too was unreliable and could not be relied upon. For these assertions, the learned counsel has placed reliance on *Balak Ram vs. State of U.P.* 1975(3) SCC 219 and *K. Ramachandra Reddy & Anr. vs. The Public Prosecutor* 1976(3) SCC 618. It has, in addition, been submitted that as per the evidence on record the victim Fateh Mohammad had been admitted in the hospital not by Mohammad Shamoon PW 1 but by J.S. Pundhir PW 9 a Police Officer as per the statement of Sub-Inspector Subhash Chaudhary PW 5 and this by itself made it apparent

that the two eye witnesses had not been present at the spot and had been called long after the incident. It has finally been submitted that from the medical and the other evidence it was clear that the appellants were, if at all, guilty for the offence under Section 307 of the IPC, as held by the trial court and not under Section 302 of the IPC, as held by the High Court, and for this additional reason the appeal was liable to succeed.

3. The learned State counsel has, however, controverted the stand taken by Mr. Sushil Kumar. It has been submitted that even assuming that there was some flaw in the recording of the first dying declaration by D.R. Arya, no serious objection could be raised with regard to the second dying declaration recorded by the Executive Magistrate. It has, further been submitted that the very promptness in the recording the FIR belied the argument that the eye witness had been brought to the scene long after the event. It has also been argued that the evidence of Dr. N.K. Gupta PW3 would indicate that the injuries suffered by Fateh Mohammad were the immediate and proximate cause of death and merely because there was a time lag between the injury and death would not make any difference in so far as culpability of the appellants for the murder was concerned.

4. We have considered the arguments advanced by the learned counsel for the parties very carefully. It is true, as contended by Mr. Sushil Kumar, that PW Dhani Ram Arya the Police Officer had recorded the statement of Fateh Mohammad in the case diary as being one under Section 161 of the Cr.P.C. It is also true that this statement had not been recorded in the manner provided by the Police Regulations with regard to the recording of dying declarations by Police Officers. Left at this stage perhaps, the judgment of the Supreme Court in Balak Ram's case (supra) would apply and the accused would be entitled to submit that this dying declaration could not be relied upon, but we notice that a second dying declaration had also been recorded by the Executive Magistrate PW Rajdev Singh

and that this statement was in substance identical with the statement recorded by Dhani Ram. The second dying declaration recorded at 8.15 p.m. in the Jaswant Rai Specialty Hospital gives full details as to the identity of the assailants, the weapons they were using, the site of the injury and the fact that he had been brought to hospital by a neighbour and his elder brother who were accompanying him at the time of incident. We also find that Dr. N.K. Trivedi PW 6 who was looking after Fateh Mohammad when the dying declaration was recorded gave a certificate that he had been fully conscious and lucid at the time of its recording. PW Raj Dev Singh also deposed that Fateh Mohammad was fully conscious when the dying declaration had been recorded by him. It has been submitted by Mr. Sushil Kumar that the injuries on the person of the deceased were so serious that the evidence of the Executive Magistrate endorsed by the Doctor with regard to the fitness of Fateh Mohammad, was a matter of suspicion. We see no basis for this submission for the simple reason that Fateh Mohammad had died long after he had sustained the injuries and we have no reason to disbelieve the statement of the Executive Magistrate or the attending Doctor. In Balak Ram's case this Court dealt with two dying declarations, one recorded by the investigating officer in the case diary which was held to be unreliable and the other by the Executive Magistrate which was held to be reliable notwithstanding the fact that the injured, when taken to the hospital, was in a very critical condition. This Court observed that though there may be some suspicion with regard to the statement recorded by the Police Officer, the same could not be said of the second dying declaration. It was observed thus:

> "The circumstances surrounding the dying declaration, though uninspiring, are not strong enough to justify the view that officers as high in the hierarchy as the Sub-Divisional Magistrate, the Civil Surgeon and the District Magistrate hatched a conspiracy to bring a false document into existence. The Civil Services have no platform to controvert allegations, howsoever grave and

> unfounded. It is, therefore, necessary that charges calculated to impair their career and character ought not to be accepted except on the clearest proof. We are not prepared to hold that the dying declaration is a fabrication."

5. The aforequoted paragraph fully supports the view that (save for very good reasons) a dying declaration recorded by a Magistrate duly endorsed by a Doctor should not be discarded. In *K. Ramachandra Reddy's* case (supra), this Court again, on an appreciation of the circumstances leading to the recording of the dying declaration, held that it could not be relied upon. It is, therefore, obvious that the fact as to whether a dying declaration is reliable or not would depend upon the facts of the case and the evidence produced by the prosecution and no hard and fast rule by way of precedent can ever be adopted. As already observed by us, there are no suspicious circumstances whatsoever with regard to the dying declaration recorded by Rajdev Singh and endorsed by Dr. Trivedi and no substantial reason has been spelt out by Mr. Sushil Kumar as to why these officers would be a party in favour of the prosecution. It is also extremely relevant that in both the cited cases, the primary argument was based on the physical condition of the maker of the dying declaration i.e. deceased. In the present case, however, the fact that the deceased had remained alive for a long period of time after the incident and died several days later of septicemia brought about by the gunshot injury clearly shows that his condition was not overly critical or precarious when the dying declaration had been recorded.

6. Mr. Sushil Kumar has also argued that the two eye witnesses were not present and the story that they had admitted the injured Fateh Mohammad to hospital was incorrect, more particularly as per the evidence of Sub-Inspector Subhash Chaudhary PW5, Fateh Mohammad had been admitted by J.S. Pundhir PW to the hospital. It has, accordingly, been submitted that the duo had been brought to the place of incident after the

incident had taken place and had been put up as eye witnesses. It has been submitted that though it appeared that the incident had happened at 11.15 a.m. on the 20th May 2000 and the FIR had been recorded 45 minutes later but the facts indicated that it had been recorded much later and ante-time so as to make it possible for the eye witnesses to be brought to the spot and this plea was strengthened by the admitted position and that the special report had been delivered to the Magistrate on the 23rd May 2000 and no explanation had been tendered as to why the delay had occurred. Prima facie, it appears that some delay had occurred for the delivery of the special report, but that by itself can be no consequence more particularly as the incident, as at that time, had not led to the death of the victim and case under Section 307 of the IPC had been registered. We see from the evidence of PW Dr. Anil Kapoor, that Fateh Mohammad had been admitted to the Jaswant Rai Speciality Hospital at 11.35 a.m. on 20th May 2000 by PW Shamoon his son and that the injured was irritable but was mentally conscious at the relevant time. When cross-examined as to whether J.S. Pundhir had admitted the injured to the hospital on the basis of the Memo 13-A/T8, the Doctor explained that he was the Doctor In Charge and the Bed Head Ticket had been recorded by him on the admission sheet. It is, therefore, obvious that the prosecution story that Mohammad Shamoon had admitted Fateh Mohammad to the hospital finds full support of an independent witness, i.e. Dr. Anil Kapoor. Mr. Sushil Kumar has, however, referred us to the cross-examination of Sub-Inspector Subhash Chaudhary PW who had entered into the investigation after the death Fateh Mohammad that as per the memo receipt after the death of Fateh Mohammad, it was Sub-Inspector J.S.Pundhir who had admitted Fateh Mohammad to the hospital. We are of the opinion that this memo cannot be relied upon in the face of the statement made by Dr. Anil Kapoor and by J.S. Pundhir PW himself very emphatically testified that he had not admitted Fateh Mohammad to the hospital. Any doubt as to the suspicion with regard to the promptness of the FIR or the ante-

timing of the FIR on account of the delivery of the special report under Section 157 of the Cr.P.C. is, therefore, clearly dispelled.

7. We, therefore, find that the promptness of the FIR is a clear reflection of the fact that the two eye witnesses had been present at the time of incident. It must also be borne in mind that as per the evidence, Fateh Mohammad and family were involved in several criminal and civil litigations with other persons. It is also the admitted position that Fateh Mohammad and party were on their way to attend a court hearing when they had been attacked. We must also observe that those who are involved in serious criminal litigation seldom go alone to attend court hearings, and are invariably accompanied by other persons as per the dictates of tradition and prudence in rural North India. We must, therefore, accept the presence of the two eye witnesses PW's Shamoon and Wali Mohammad.

8. Mr. Sushil Kumar has also pointed out that the Sessions Judge had, in his judgment, acquitted the accused-appellants for the offence punishable under Section 302 of the IPC but had convicted them under Section 307 of the IPC and that in any case this was the proper order to be made in the peculiar facts of the case. It has been submitted that the injuries had been suffered by Fateh Mohammad on the 20th May 2000 but he had died on the 25th May 2000 and that as per the statement of PW Dr. N.K. Gupta, who had conducted the post-mortem of the dead body, the death was due to septicemia on account of the infection caused by the injuries and that had Fateh Mohammad been given proper treatment, he may have survived. It has been pleaded that from the evidence of PW Dr. Anil Kapoor, who had initially treated the injured at the Jaswant Rai Specialty Hospital, it was apparent that the infection had set in on account of the lack of proper treatment and that in the light of this medical opinion the appellants were entitled to claim the benefit of doubt and plead that, if at all, a case under Section 307 of the IPC was spelt out. We are of the opinion, however, that the trial court has ignored some basic issues. We have gone

through the statement of the Dr. Anil Kapoor who had noticed the following injuries on the person of the Fateh Mohammad at the time of his admission to hospital:

1. Lacerated wound size of wound 2.9. x 1.0 cms fresh bleeding present. Depth not probed, with inverted margins present at right side of chest 08.0 cms from right nipple at 2.00 o'clock position. Tattooing present in an area of 17.0 x 4.5 cms area.

2. Tattooing without any wound present over right side of neck obliquely vertical in an area of 9.0 cms x 3.0 cms upper end starting at the level of mastoid process, 04.0 cms posterior to mastoid process.

3. Lacerated wound with inverted margins present over left side of face 5.0 x 2.0 cms x depth not probed. 2.0 cms below left eye. Tattooing present around the wound in an area of 6.0 x 5.0 cms. Fresh bleeding present.

4. Lacerated wound with inverted margins present over back of left hand 13.0 cms below left oleranon process size 3.0 cms x 1.0 cm x depth not probed, fresh bleeding present. Tattooing present in an area of 4.0 x 3.0 cms around wound.

5. Lacerated wound with everted margins present over antero-lateral size of left forearm size 1.0 x 1.0 cms x depth not probed fresh bleeding present.

6. Lacerated wound with everted margins 4 x 2 cms x depth not probed present over right scapular rg.7.0 cms from post. Axillary line fresh bleeding present.

7. Lacerated wound with everted margins 1.0 x 1.0 cms x depth not probed present over left scapular rg.6.0 from mid line, fresh bleeding present.

9. We see from the injuries that they had been caused from a very close range as tattooing was present. Dr. Anil Kapoor also pointed that injury Nos.1, 3, 6 and 7 were grievous and were fatal to life and all the injuries were sufficient to cause death as they were on sensitive parts of the body and that the injured was under severe shock, and had been given three units of blood at the time of his admission to hospital. In the light of this evidence, we are unable to comprehend as to how the trial court could have concluded that it was the negligence on the part of Dr. Anil Kapoor which had led to septicemia and finally to the death of the patient.

We, therefore find no merit in these appeals. Dismissed.

D.G. Appeals dismissed.