CHAIRMAN, ALL INDIA RAILWAY RECT. BOARD & ANR.
v.
K. SHYAM KUMAR & ORS.
(Civil Appeal Nos. 5675-5677 of 2007)

MAY 6, 2010

[AFTAB ALAM AND K.S. RADHAKRISHNAN, JJ.]

Service Law – Recruitment drive – Malpractice in the written examination came to notice after preparation of select list – Vigilance report revealed leakage of question papers, mass copying and impersonation of candidates – Matter also referred to CBI – Authorities directing re-test of candidates who had obtained minimum qualifying marks in the written test – Central Administrative Tribunal upheld the order for re-test – In writ petition, High Court applying principle of wednesbury, setting aside the order of re-test and directing appointment of all the candidates except those against whom there was allegation of impersonation – On appeal, held: The High Court wrongly applied the principle of Wednesbury and misdirected itself in rejecting the decision of re-test – Applying the test of wednesbury as well as proportionality test, decision of the authorities, in the facts of the case was fair, reasonable, balanced and harmonious – Candidates challenging the re-test have no legal right to appointment, as final merit list was not published – Doctrines / Principles – Doctrine of proportionality – Principle of wednesbury.

Administrative Law:

Judicial Review – Scope of – Held: The judicial review can be principally on the basis of illegality, procedural impropriety and irrationality.

Wednesbury principle of unreasonableness and Doctrine of proportionality – Applicability of – Discussed.

Principle of natural justice – Recruitment test – Vigilance report revealing irregularities like mass copying, impersonation and leakage of question paper – Cancellation of test and direction for re-test – Non-furnishing of vigilance report – Held: Non-supply of the report was not illegal as the question in the instant case was on a larger canvas – No action was proposed against individual candidate.

Practice and Procedure – Subsequent event – Consideration of – Held: Where larger public interest is involved, subsequent events can be looked into to examine validity of an order.

In a recruitment drive for filling up Group D posts, appellant selected 2690 candidates. At the time of verification of their original documents, it came to their notice that certain malpractices had taken place in the written examination. Several complaints were also received in this regard. The matter was referred to State Vigilance department. Vigilance report revealed leakage of question paper, mass copying and impersonation of candidates in the written examination. The report also indicated possibility of involvement of some employees of the department and outsiders in the malpractices detected. It recommended the matter to be referred to CBI.

The Railway Board after examining the vigilance report, by order dated 04.06.2004 directed a re-test for the candidates, who had obtained minimum qualifying marks in the written test.

Certain candidates, who had taken the first written test, filed application before Central Administrative Tribunal questioning the order to coduct re-test and sought declaration that they were eligible to be appointed to Group D posts pursuant to the selection already made. The Tribunal found no irregularity in the decision taken by the Board in re-conducting the test.

Writ petition was preferred against the order of the Tribunal. High Court rejected the contentions that the order was politically motivated and *mala fide* and applying *Wednesburry's* principle of unreasonableness, held that the decision of the Board was illegal, arbitrary and unreasonable. The Court directed the Board to finalize the selection on the basis of the first written test and to issue appointment orders to all the candidates except the 62 candidates against whom there were allegations of impersonation. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1.1. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the court is not much concerned with the merits of the decision but how the decision was reached. The basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of *bias*, the duty to act fairly, legitimate expectations, failure to give reasons etc. [Para 16] [307-G-H; 308-A-C]

1.2. To say that Wednesbury principle of unreasonableness has been replaced by doctrine of proportionality, would be an over-statement of the English Administrative Law. *Wednesbury* principle of

unreasonableness has not been replaced by the doctrine of *proportionality* though the proportionality test is being applied more and more when violation of human rights is alleged – *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. *Proportionality* as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to 'assess the balance or equation' struck by the decision maker. *Proportionality* test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. There has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that *Wednesbury* has met with its death knell is too tall a statement. The current trend seems to favour *proportionality* test but *Wednesbury* has not met with its judicial burial and a State burial, with full honours is surely not to happen in the near future. [Paras 27, 28 29 and 30] [312-G-H; 313-A-H; 314-A]

State of U.P. v. Sheo Shanker Lal Srivastava and Ors. **(2006) 3 SCC 276;** *Indian Airlines Ltd. v. Prabha D. Kanan* **(2006) 11 SCC 67;** *Jitendra Kumar and Ors. v. State of Haryana and Anr.* **(2008) 2 SCC 161;** *State of Madhya Pradesh* and *Ors. v. Hazarilal* **(2008) 3 SCC 273, dissented from.**

1.3. *Proportionality*, requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action

which could reasonably be followed. *Proportionality* is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review have to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere. [Para 31] [314-B-D]

1.4. Courts have to develop an indefeasible and principled approach to *proportionality* till that is done, there will always be an overlapping between the traditional grounds of review and the principle of *proportionality* and the cases would continue to be decided in the same manner whichever principle is adopted. *Proportionality* as the word indicates has reference to variables or comparison, it enables the court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker. [Para 33] [314-G-H; 314-A]

Union of India v. Tarun K. Singh, **(2003) 11 SCC 768;** *State of Maharashtra v. Prabhu* **(1994) 2 SCC 481***; K. Vijayalakshmi vs. Union of India* **(1998) 4 SCC 37***; Asha Kaul vs. State of Jammu and Kashmir (1993)* **2 SCC 573***; N.T. Davin Katti vs. Karnanataka Public Service Commission (1990)* **3 SCC 157***; Union of India vs. Rajesh P.U.* **(2003) 7 SCC 285***; Munna Roy vs. Union of India* **(2000) 9 SCC 283***; Babita Prasad vs. State of Bihar* **(1993) Suppl.3 SCC 268***; Onkar Lal Bajaj vs. Union of India* **(2003) 2 SCC 673, referred to.**

Associated Provincial Picture Houses Limited v. *Wednesbury Corporation* **(1947)2 All ER 680;** *R.* v. *Secretary of State for the Home Department ex parte Brind* **(1991) 1 All ER 720;** *R (Daly)* v. *Secretary of State for the Home Department* **(2001) 2 AC 532 ;** *Council of Civil Service Unions vs. Minister of State for Civil Service* **1984 (3) All ER 935;** *R. (Alconbury Development Limited)* v. *Secretary of State for the Environment, Transport and the Regions* **(2001) 2 All ER 929;** *R. (Association of British Civilian Internees: Far East Region)* v. *Secretary of State for Defence* **2003 QB 1397;** *Huang* v. *Secretary of State for the Home Department* **2007 (4) ALL ER 15 (HL) ;** *Huang* v. *Secretary of State for the Home Department* **(2005) 3 All ER 435;** *R.* v. *Secretary of State of the Home Department, ex parte Daly* **(2001) 3 All ER 433 (HL), referred to.**

Administrative Law by HWR Wade and CF Forsyth, **9th Edition. (2004) pages 371-372 and 10th Edition (2009)** *Textbook on Administrative Law* by *Leyland and Anthony,* **5th Edition OUP 2005 p. 331, referred to.**

2.1. Report of the Vigilance has *prima facie* established that the allegations of leakage of question papers, large scale impersonation of candidates, mass copying etc. was true. Possibility of the involvement of the staff of Railways and outsiders was also not ruled out by the Vigilance. In such circumstances, the High Court concluded that there is no illegality in going ahead with the recruitment process on the basis of the first written test. The Railway Board had three alternatives viz., (1) to cancel the entire written test, and to conduct a fresh written test inviting applications afresh; (2) to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test; and (3) to go ahead with the first written test (as suggested by the High Court), confining the investigation to 62 candidates against whom there were serious allegations of

impersonation. The High Court applying the *Wednesbury* principle accepted the last alternative by rejecting the decision by the Railway Board to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test. The High Court has wrongly applied the above principle and misdirected itself in directing the Board to accept the third alternative. [Paras 14 and 15] [307-B-G]

2.2. When the test of proportionality is applied and in view of the three alternatives, the decision maker has struck a correct balance in accepting the second alternative. First alternative was not accepted not only because such a process was time consuming and expensive, but nobody favoured that option, and even the candidates who had approached the court were more in favour of the second alternative. Applying the *proportionality* test also, the Board has struck the correct balance in adopting the second alternative which was well balanced and harmonious. Applying the test of *Wednesbury* unreasonableness as well as the *proportionality* test, the decision taken by the Board in the facts and circumstances of the instnat case was fair, reasonable, well balanced and harmonious. By accepting the third alternative, the High Court was perpetuating the illegality since there were serious allegations of leakage of question papers, large scale of impersonation by candidates, mass copying in the first written test. [Paras 36 and 37] [316-C-E]

2.3. The High Court was in error in holding that the materials available relating to leakage of question papers was limited and had no reasonable nexus to the alleged large scale irregularity. Even a minute leakage of question paper would be sufficient to besmirch the written test and to go for a re-test so as to achieve the ultimate object of fair selection. [Para 43] [319-C]

2.4. The respondents have also no legal right to insist that they should be appointed to Group 'D' posts. Final merit list was never published. No appointment orders were issued to the candidates. Even if a number of vacancies were notified for appointment and adequate number of candidates were found successful, they would not acquire any indefeasible right to be appointed against the existing vacancies. [Para 42] [318-H; 319-A]

Shankarsan Dash v. *Union of India* **(1991) 3 SCC 47;** *B. Ramanjini and Ors.* v. *State of A.P. and Ors.* **(2002) 5 SCC 533, relied on.**

3. The finding recorded by the High Court that non-supply of the copy of the Vigilance Report to the candidates was a legal infirmity, cannot be sustained. The reasoning of the High Court that the copy of the Vigilance Report should have been made available to the candidates at least when the matters came up for hearing was also wrong. Copy of the report, if at all to be served, need be served only if any action is proposed against the individual candidates in connection with the malpractices alleged. In the instant case the question here lies on a larger canvas as to whether the written test conducted was vitiated by serious irregularities like mass copying, impersonation and leakage of question paper, etc. and not against the conduct of few candidates. [Paras 40 and 41] [317-E-G; 318-G]

Bihar School Examination Board v. *Subhas Chandra Sinha and Ors.,* **1970 (1) SCC 648, relied on.**

4. The High Court has also committed a grave error in taking the view that the order of the Board could be judged only on the basis of the reasons stated in the impugned order based on the report of vigilance and not on the subsequent materials furnished by the CBI. The decision maker can always rely upon subsequent

materials to support the decision already taken, when larger public interest is involved. Where larger public interest is involved and in such situations, additional grounds can be looked into to examine the validity of an order. [Paras 38 and 39] [316-H; 317-A-D]

Madhyamic Shiksha Mandal, M.P. v. *Abhilash Shiksha Prasar Samiti and Ors.* **(1998) 9 SCC 236, relied on.**

Mohinder Singh Gill and Anr. vs. *The Chief Election Commissioner, New Delhi and Anr.* **(1978) 1 SCC 405, held inapplicable.**

Case Law Reference:

(2003) 11 SCC 768	**referred to**	**Para 10**
(1994) 2 SCC 481	**referred to**	**Para 10**
(1998) 4 SCC 37	**referred to**	**Para 11**
(1993) 2 SCC 573	**referred to**	**Para 11**
(1990) 3 SCC 157	**referred to**	**Para 11**
(2003) 7 SCC 285	**referred to**	**Para 11**
(2000) 9 SCC 283	**referred to**	**Para 11**
(1993) Suppl.3 SCC 268	**referred to**	**Para 11**
(2003) 2 SCC 673	**referred to**	**Para 11**
1984 (3) All ER 935	**referred to.**	**Para 16**
(1947)2 All ER 680	**referred to.**	**Para 17**
(1991) 1 All ER 720	**referred to.**	**Para 18**
(2001) 2 AC 532	**referred to.**	**Para 18**
(2001) 2 All ER 929	**referred to.**	**Para 20**
2003 QB 1397	**referred to.**	**Para 21**
2007 (4) ALL ER 15 (HL)	**referred to.**	**Para 23**
(2006) 3 SCC 276	**dissented.**	**Para 25**
(2005) 3 All ER 435	**referred to.**	**Para 25**
(2001) 3 All ER 433 (HL)	**referred to.**	**Para 25**
(2006) 11 SCC 67	**dissented.**	**Para 26**
(2008) 2 SCC 161	**dissented.**	**Para 26**
(2008) 3 SCC 273	**dissented.**	**Para 27**
(1978) 1 SCC 405	**held inapplicable.**	**Para 38**
(1998) 9 SCC 236	**relied on.**	**Para 39**
1970 (1) SCC 648	**relied on.**	**Para 40**
(1991) 3 SCC 47	**relied on.**	**Para 42**
(2002) 5 SCC 533	**relied on.**	**Para 42**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5675-5677 of 2007.

From the Judgment & Order dated 15.03.2005 of the High Court Judicature at Andhra Pradesh at Hyderabad Writ Petition No. 17144 of 2004, W.P.M.P. No. 2461 of 2005 and W.P. No. 19354 of 2004.

D.K. Thakur, Naresh Kaushik, Nishant Patil, A. K. Sharma, W.S.A. Quadri, B. Krishna Prasad for the Appellants.

O.P. Bhadani, Brij Bhusan, K. Sarada Devi, Anjani Aiyagari for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are in these cases concerned with the validity of an order dated 04.06.2004 issued by the Railway Board directing the Railway Recruitment Board (in short RRB) to conduct a re-test for recruitment to Group-D posts, for those candidates who had obtained minimum

qualifying marks in the first written examination against which large scale irregularities were noticed.

2. The RRB *vide* its employment notification 1/2003 dated 13.06.2003 invited applications for filling up Group 'D' posts in the South Central Railway Zone, Secunderabad. In response to the notification 10,02,909 applications were received by the RRB out of which 5,86,955 were found eligible and call letters were sent to them for appearing in the written test held at various centres from 09.11.2003 to 21.11.2003. 3,22,223 candidates appeared for the written test, out of which 2690 were selected to be called for Physical Efficiency Test (PET) held on 03.02.2004 to 12.02.2004. Candidates who qualified in the PET were called for verification of original certificates from 04.04.2004 to 12.02.2004. During verification it was noticed that certain malpractices had taken place in the written examination. Meanwhile, several complaints were also received by the RRB stating that certain candidates had indulged in mass copying in some centers, including leakage of question papers and impersonation of certain candidates. Since large scale irregularities and malpractices were noticed it was decided to refer the matter to the State Vigilance Department. The Vigilance Department conducted a preliminary enquiry and submitted its report which was placed before the Tribunal as well as before the High Court. Portions of the report extracted in the judgment of the High Court *prima facie* revealed leakage of question papers, mass copying and impersonation of candidates in the written test. Report also indicated the possibility of involvement of some employees of Railways and outsiders in the malpractices detected. Vigilance Department also recommended that the matter be referred to the Central Bureau of Investigation(CBI).

3. The vigilance report and the various complaints were examined by the Railway Board and the Board after discussing the matters with the RRB gave a direction vide its letter dated 04.06.2004 to conduct a re-test for those candidates who had

obtained minimum qualifying marks in the written examination. The operative portion of the order reads as follows:-

"Board have gone into complete details of the matter in view of the nature of malpractices / irregularities involved, it has been decided that candidates obtaining minimum qualifying marks may be subjected to another written examination by conducting the same in good educational institution under tight control and supervision. This would ensure the exclusion of those, who might have secured undue advantage in the earlier examination. Thereafter, candidates may be called for PET on the basis of fresh merit list irrespective of the fact whether some of them had appeared in the PET held on February 2004".

4. Railway Board also ordered that the cases of the candidates referred to GEQD including those found guilty during the course of investigation by the Vigilance or CBI be dealt with as per the extant rules at the time of preparation of the final panel or later stage. RRB was directed to take steps to conduct written examination and PET at the earliest. Railway Board vide its letter dated 1st September, 2004 directed the RRB to go ahead with the examination scheduled on 26.09.2004.

5. Aggrieved by the order dated 04.06.04 certain candidates who had taken the first written examination filed O.A. No.975/2004 before the Central Administrative Tribunal, Hyderabad questioning the decision to conduct re-test and also sought for a declaration that they are eligible to be appointed to Group 'D' posts in the South Central Railway Zone, Secunderabad pursuant to the selection held in the month of February, 2004. Alternatively it was contended that even if the Board had the power to conduct second stage written examination it should be confined only to 2690 candidates who had qualified in the earlier written examination. The stand of the Board was that, there was no illegality in ordering a re-test and para 18.1 of the selection procedure empowered the Board to do so. Referring to paragraph 18.4 of the employment notice

No.1/2003 it was contended that merely qualifying in the written and / or PET a candidate would not get any vested right for appointment, especially since no final list or panel was published. Reference was also made to the vigilance report and the report of the CBI which prima facie revealed serious malpractices including mass copying, leakage of question papers and impersonation in the written examination.

6. The Tribunal found no irregularity in the decision taken by the Board in conducting a re-test which was taken after referring to the vigilance report and other relevant materials. Further it was noticed that the majority of the candidates had not objected to that course and the applicants had approached the Tribunal only at the eve of the re-test. Further it was also noticed the final select list was never published, hence no legal rights of the applicants were infringed. O.A. No.975/2004 was, therefore dismissed on 02.09.2004. O.A. No.1008/2004 filed by few other candidates who had not taken the re-test claiming identical reliefs was also dismissed by the Tribunal on 23.09.2004.

7. Aggrieved by the orders passed by the Tribunal in OA No.975 of 2004 and OA No.1008 of 2004, Writ Petition No.17144 of 2004 and Writ Petition No.19354 of 2004 were preferred before the High Court of Andhra Pradesh. Before the High Court it was contended that the decision to cancel the written test was arbitrary, unreasonable and violative of Articles 14,16 and 21 of the constitution of India. Further it was also pointed out that even if the allegation of mass copying in certain centres was true, those candidates could have been identified and there was no justification to order a re-test for the other candidates, who had obtained minimum qualifying marks in the written test.

8. The High Court found no reasons to cancel the first written examination and to conduct a re-test for 2690 candidates who got minimum qualifying marks in the written test which included 62 candidates against whom there were serious

allegations of impersonation. Referring to the vigilance report, the High Court concluded that the controversy virtually boils down to identifying 62 candidates whose cases stood referred to CEQD/HYD for their certification and hence the process of recruitment could be proceeded with for the rest of the candidates. Further it was also held by the High Court that the materials available to support the complaint of leakage of question papers were limited and had no nexus to the large scale irregularities, noticed by the Railways. The High Court also noticed that when the order dated 04.06.2004 was passed only the vigilance report was available with the Board which was insufficient, to support that order and the materials collected by the CBI subsequently could not be relied upon to support that decision. Further it was also pointed out that no copy of the vigilance report was also made available to the petitioners and the decision taken to conduct a re-test was arbitrary, illegal and unreasonable.

9. The High Court rejected the contentions that the order was politically motivated and *mala fide* but applying *Wednesbury's* principle of unreasonableness the Court held that the decision of the Board was illegal, arbitrary and unreasonable and directed the Board to finalise the selection on the basis of the first written test and to issue appointment orders to all the candidates except the 62 candidates against whom there were allegations of impersonation.

10. Aggrieved by the above judgment the RRB has come up with these appeals. Shri D.K. Thakur, learned counsel appearing for the Board submitted that the High Court has committed a grave error in sustaining the first written test conducted by the Board in spite of large scale irregularities and illegalities detected during the course of the enquiry by the Vigilance Department and subsequently by the CBI. Learned counsel submitted in the facts and circumstances of the case the best option available to the Railway Board was to conduct a re-test for those candidates who had obtained minimum

qualifying marks in the first written test, since allegations of mass copying, leakage of question papers and impersonation were noticed. Learned counsel also stated that the petitioners themselves had pointed out before the Tribunal that if a re-test is conducted, the same be confined only to those 2690 candidates. Learned counsel also submitted that the High Court has wrongly applied the principle of *Wednesbury* unreasonableness. Learned counsel placed reliance on the judgments of this Court in *Union of India* v. *Tarun K. Singh,* (2003) 11 SCC 768; *B. Ramanjini* v. *State of A.P.* (2002) 5 SCC 533*; Bihar School Examination Board* v. *Subhas Chandra Sinha* (1970) 1 SCC 648; *State of Maharashtra* v. *Prabhu* (1994) 2 SCC 481*; Madhyamic Shiksha Mandal, M.P.* v. *Abhilash Shiksha Prasar Samiti* (1998) 9 SCC 236 in support of his various contentions.

11. Learned counsel appearing for the respondents tried to support the judgment of the High Court contending that the best course open to the Railways was to complete the recruitment process based on the first written test after ordering inquiry with respect to the 62 candidates against whom there were allegations of impersonation rather than conducting a re-test. Learned counsel also pointed out that the report of the Vigilance was not made available to the respondents and, therefore, the action of the Railway Board was illegal, arbitrary and violative of the principles of natural justice. In support of his contentions learned counsel placed reliance on various decisions of this Court viz., *K. Vijayalakshmi vs. Union of India (1998)* 4 SCC 37*; Asha Kaul vs. State of Jammu and Kashmir (1993)* 2 SCC 573*; N.T. Davin Katti vs. Karnanataka Public Service Commission (1990)* 3 SCC 157*; Union of India vs. Rajesh P.U. (2003) 7 SCC* 285*; Munna Roy vs. Union of India* (2000) 9 SCC 283*; Babita Prasad vs. State of Bihar* (1993) Suppl.3 SCC 268*; Onkar Lal Bajaj vs. Union of India (2003)* 2 SCC 673.

12. We heard learned counsel on either side at length and we have also gone through the extract of the vigilance report

which appears in para 15 of the judgment of the High Court. Report indicated that 100 to 200 candidates were suspected to have obtained answers for the questions three hours before the examination through some middleman who had arranged answers by accepting huge bribe. Apart from the serious allegations of impersonation in respect of 62 candidates it was stated on close scrutiny of the answer sheets at least six candidates had certainly adopted unfair means to secure qualifying marks in the written test. Report says that investigation *prima facie* established leakage of question papers to a sizable number of candidates for the examination held on 23.11.2003. Further, it was also noticed that leakage of question paper was pre-planned and widespread and the possibility of involvement of Railway / RRB staff and also outsiders could not be ruled out and hence, recommended that the matter be referred to CBI. The High Court also referred to the reports of the superintendent of Police PEI(A)/2004/ CBI, Hyderabad which suggested certain measures to be adopted by the Board to rule out such malpractices in future. Reports of the CBI of course, were not available with the Railway Board when they took the decision on 04.06.2004 to conduct a re-test but only the vigilance report and the complaints received.

13. We are, in this case, primarily concerned with the question whether the High Court was justified in interfering with the decision taken by the Board in conducting a re-test for those who had obtained minimum qualifying marks in the first written test and directing the Board to go ahead with the recruitment process on the basis of first written test against which there were serious allegations of irregularities and malpractices. When this matter came up for admission before this Court on 20.01.2006, this Court permitted the Board to declare the result of the second test and proceed to appoint the selected candidates, however, it was ordered that the appointments made be subject to the result of these appeals. We are informed that candidates who got qualified in the re-test were already appointed and have joined service.

14. We will first examine whether the High Court was justified in directing the Board to go ahead with the recruitment process based on the first written test in the wake of the report of the Vigilance and the materials collected by the CBI subsequently. Report of the Vigilance has prima facie established that the allegations of leakage of question papers, large scale impersonation of candidates, mass copying etc. was true. Possibility of the involvement of the staff of Railways and outsiders was also not ruled out by the Vigilance. In such circumstances, we fail to see how the High Court has concluded that there is no illegality in going ahead with the recruitment process on the basis of the first written test. We may indicate that the Railway Board had three alternatives viz., (1) to cancel the entire written test, and to conduct a fresh written test inviting applications afresh; (2) to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test; and (3) to go ahead with the first written test (as suggested by the High Court), confining the investigation to 62 candidates against whom there were serious allegations of impersonation.

15. The High Court applying the *Wednesbury's* principle accepted the last alternative by rejecting the decision by the Railway Board to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test. We are of the view that the High Court has wrongly applied the above principle and misdirected itself in directing the Board to accept the third alternative. We will examine the decision of the High Court by applying the principle of *Wednesbury* unreasonableness as well as the doctrine of *proportionality*. Before that let us examine both the concepts at some length.

16. Judicial review conventionally is concerned with the question of jurisdiction and natural justice and the Court is not much concerned with the merits of the decision but how the decision was reached. In *Council of Civil Service Unions* Vs. *Minister of State for Civil Service* (1984) 3 All ER 935 the

(GCHQ Case) the House of Lords rationalized the grounds of judicial review and ruled that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.

17. Ground of irrationality takes in *Wednesbury* unreasonableness propounded in *Associated Provincial Picture Houses Limited* v. *Wednesbury Corporation* (1947)2 All ER 680, *Lord Greene MR* alluded to the grounds of attack which could be made against the decision, citing unreasonableness as an 'umbrella concept' which covers the major heads of review and pointed out that the court can interfere with a decision if it is so absurd that no reasonable decision maker would in law come to it. In GCHQ Case (supra) Lord Diplock fashioned the principle of unreasonableness and preferred to use the term irrationality as follows:

> "By 'irrationality' I mean what can now be succinctly referred to as "*Wednesbury*'s unreasonableness", ……. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

18. In *R.* v. *Secretary of State for the Home Department ex parte Brind* (1991) 1 All ER 720, the House of Lords re-examined the reasonableness of the exercise of the Home

Secretary's discretion to issue a notice banning the transmission of speech by representatives of the Irish Republican Army and its political party, Sinn Fein. Court ruled that the exercise of the Home Secretary's power did not amount to an unreasonable exercise of discretion despite the issue involving a denial of freedom of expression. House of Lords however, stressed that in all cases raising a human rights issue *proportionality* is the appropriate standard of review. The House of Lords in *R (Daly)* v. *Secretary of State for the Home Department* (2001) 2 AC 532 demonstrated how the traditional test of *Wednesbury* unreasonableness has moved towards the doctrine of necessity and *proportionality*. *Lord Steyn* noted that the criteria of *proportionality* are more precise and more sophisticated than traditional grounds of review and went on to outline three concrete differences between the two:-

> (1) *Proportionality* may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.
>
> (2) *Proportionality* test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations.
>
> (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

19. *Lord Steyn* also felt most cases would be decided in the same way whatever approach is adopted, though conceded for human right cases *proportionality* is the appropriate test.

20. The question arose as to whether doctrine of *proportionality* applies only where fundamental human rights are in issue or whether it will come to provide all aspects of judicial review. *Lord Steyn* in *R. (Alconbury Development Limited)* v. *Secretary of State for the Environment, Transport and the*

Regions (2001) 2 All ER 929 stated as follows:-

> "I consider that even without reference to the Human Rights Act, 1998 the time has come to recognize that this principle (*proportionality*) is part of English administrative law not only when Judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and *proportionality* in separate compartments seems to me to be unnecessary and confusing".

21. *Lord Steyn* was of the opinion that the difference between both the principles was in practice much less than it was sometimes suggested and whatever principle was applied the result in the case was the same. Whether the *proportionality* will ultimately supersede the concept of reasonableness or rationality was also considered by *Dyson Lord Justice in R. (Association of British Civilian Internees: Far East Region)* v. *Secretary of State for Defence* [2003] QB 1397 and stated as follows:-

> "We have difficulty in seeing what justification there now is for retaining *Wednesbury* test ….. but we consider that it is not for this Court to perform burial rights. The continuing existence of the *Wednesbury* test has been acknowledged by House of Lords on more than one occasion. A survey of the various judgments of House of Lords, Court of Appeals, etc. would reveal for the time being both the tests continued to co-exist."

22. Position in English Administrative Law is that both the tests that is. *Wednesbury* and *proportionality* continue to co-exist and the *proportionality* test is more and more applied, when there is violation of human rights, and fundamental freedom and the *Wednesbury* finds its presence more on the domestic law when there is violations of citizens ordinary rights. *Proportionality* principle has not so far replaced the

Wednesbury principle and the time has not reached to say good bye to *Wednesbury* much less its burial.

23. In *Huang* case (2007) 4 All ER 15 (HL), the House of Lords was concerned with the question whether denial of asylum infringes Article 8 (Right to Respect Family Life) of the Human Rights Act, 1998. House of Lords ruled that it was the duty of the authorities when faced with individuals who did not qualify under the rules to consider whether the refusal of asylum status was unlawful on the ground that it violated the individual's right to family life. A structured *proportionality* test has emerged from that decision in the context of the violation of human rights. In *R (Daly)* (supra) the House of Lords considered both common law and Article 8 of the convention and ruled that the policy of excluding prisoners from their cells while prison officers conducted searches, which included scrutinizing privileged legal correspondence was unlawful.

24. Both the above-mentioned cases, mainly concerned with the violation of human rights under the Human Rights Act, 1998 but demonstrated the movement away from the traditional test of *Wednesbury* unreasonableness towards the test of *proportionality*. But it is not safe to conclude that the principle of *Wednesbury* unreasonableness has been replaced by the doctrine of *proportionality*.

25. Justice S.B. Sinha, as His Lordship then was, speaking for the Bench in *State of U.P.* v. *Sheo Shanker Lal Srivastava and Others* (2006) 3 SCC 276 after referring to the judgment of the Court of appeal in *Huang* v. *Secretary of State for the Home Department* (2005) 3 All ER 435, *R.* v. *Secretary of State of the Home Department, ex parte Daly* (2001) 3 All ER 433 (HL) opined that *Wednesbury* principle may not now be held to be applicable in view of the development in constitutional law and held as follows:-

"24. While saying so, we are not oblivious of the fact that

the doctrine of unreasonableness is giving way to the doctrine of *proportionality*.

25. It is interesting to note that the *Wednesbury* principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, Huang v. Secy. of State for the Home Deptt. wherein referring to R. v. Secy. of State of the Home Deptt., ex p Daly, it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than *Wednesbury*, but involves a full-blown merit judgment, which is yet more than ex p. Daly, requires on a judicial review where the court has to decide a *proportionality* issue."

26. *Sheo Shanker Lal Srivastava* case was later followed in *Indian Airlines Ltd.* v. *Prabha D. Kanan* (2006) 11 SCC 67. Following the above mentioned two judgments in *Jitendra Kumar And Others* v. *State of Haryana and Another* (2008) 2 SCC 161, the Bench has referred to a passage in *HWR Wade and CF Forsyth on Administrative Law,* 9th Edition. (2004), pages 371-372 with the caption "*Goodbye to Wednesbury*" and quoted from the book which reads as follows:-

"The *Wednesbury* doctrine is now in terminal decline but the *coup de grace* has not yet fallen, despite calls for it from very high authorities" and opined that in some jurisdictions the doctrine of unreasonableness is giving way to doctrine of *proportionality*."

27. *Indian Airlines Ltd.'s* case and *Sheo Shanker Lal Srivastava's* case (supra) were again followed in *State of Madhya Pradesh* and *Others* v. *Hazarilal,* (2008) 3 SCC 273 and the Bench opined as follows:-

"Furthermore the legal parameters of judicial review have undergone a change. *Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.".*

28. With due respect, we are unable to subscribe to that view, which is an overstatement of the English Administrative Law.

29. *Wednesbury* principle of unreasonableness as such has not been replaced by the doctrine of *proportionality* though that test is being applied more and more when violation of human rights is alleged. *H.W.R. Wade & C.F. Forsyth* in the 10th Edition of Administrative Law (2009), has omitted the passage quoted by this court in Jitender Kumar case and stated as follows:

> "Notwithstanding the apparent persuasiveness of these views the coup de grace has not yet fallen on *Wednesbury* unreasonableness. *Where a matter falls outside the ambit of 1998 Act, the doctrine is regularly relied upon by the courts. Reports of its imminent demise are perhaps exaggerated."* (emphasis applied).

30. *Wednesbury* and *Proportionality* - *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. *Proportionality* as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to 'assess the balance or equation' struck by the decision maker. *Proportionality* test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that *Wednesbury* has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour *proportionality* test but

Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.

31. *Proportionality*, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. *Proportionality* is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

32. *Leyland and Anthony* on Textbook on Administrative Law (5th edn. OUP, 2005) at p.331 has amply put as follows:

> "*Proportionality* works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision".

33. Courts have to develop an indefeasible and principled approach to *proportionality* till that is done there will always be an overlapping between the traditional grounds of review and the principle of *proportionality* and the cases would continue to be decided in the same manner whichever principle is adopted. *Proportionality* as the word indicates has reference to variables or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a

potentially deeper inquiry into the reasons, projected by the decision maker.

34. We shall now test the validity of the order impugned applying both the principles.

35. **Application of the principles**

We have already indicated the three alternatives available to the decision- maker (Board) when serious infirmities were pointed out in the conduct of the first written test. Let us examine which was the best alternative, the Board could have accepted applying the test of *Wednesbury* unreasonableness. Was the decision taken by the Board to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test so unreasonable that no reasonable authority could ever have decided so and whether the Board before reaching that conclusion had taken into account the matters which they ought not to have taken into account or had refused to take into account the matters that they ought to have taken into account and the decision taken by it was so unreasonable that no reasonable authority could ever have come to it? Judging the decision taken by the Board applying the standard laid down in the *Wednesbury* principle unreasonableness, the first alternative that is the decision to cancel the entire written test and to conduct a fresh written test would have been time consuming and expensive. Initially 10,02,909 applications were received when advertisement was issued by the Board out of which 5,86,955 were found to be eligible and call letters were sent to them for appearing in the written test held at various centres. 3,22,223 candidates appeared for the written test, out of which 2690 were selected. Further the candidates who had approached the Court had also not opted that course instead many of them wanted to conduct a re-test for 2690 candidates, the second alternative. The third alternative was to go ahead with the first written test confining the investigation to 62 candidates against whom there were serious allegations of impersonation. The Board felt in the wake of the vigilance report

and the reports of the CBI, it would not be the best option for the Railway Administration to accept the third alternative since there were serious allegations of malpractices against the test. From a reasonable man's point of view it was felt that the second option i.e. to conduct a re-test for those candidates who had obtained minimum qualifying marks in the first written test was the best alternative.

36. We will now apply the *proportionality* test to three alternatives suggested. Principle of *proportionality*, as we have already indicated, is more concerned with the aims of the decision maker and whether the decision maker has achieved the correct balance. The *proportionality* test may require the attention of the Court to be directed to the relative weight according to interest and considerations. When we apply that test and look at the three alternatives, we are of the view that the decision maker has struck a correct balance in accepting the second alternative. First alternative was not accepted not only because such a process was time consuming and expensive, but nobody favoured that option, and even the candidates who had approached the court was more in favour of the second alternative. Applying the *proportionality* test also in our view the Board has struck the correct balance in adopting the second alternative which was well balanced and harmonious.

37. We, therefore hold, applying the test of *Wednesbury* unreasonableness as well as the *proportionality* test, the decision taken by the Board in the facts and circumstances of this case was fair, reasonable, well balanced and harmonious. By accepting the third alternative, the High Court was perpetuating the illegality since there were serious allegations of leakage of question papers, large scale of impersonation by candidates, mass copying in the first written test.

38. We are also of the view that the High Court has committed a grave error in taking the view that the order of the Board could be judged only on the basis of the reasons stated

in the impugned order based on the report of vigilance and not on the subsequent materials furnished by the CBI. Possibly, the High Court had in mind the constitution bench judgment of this Court in *Mohinder Singh Gill and Anr.* Vs. *The Chief Election Commissioner, New Delhi and Anr.* (1978) 1 SCC 405

39. We are of the view that the decision maker can always rely upon subsequent materials to support the decision already taken when larger public interest is involved. This Court in *Madhyamic Shiksha Mandal, M.P.* v. *Abhilash Shiksha Prasar Samiti and Others*, (1998) 9 SCC 236 found no irregularity in placing reliance on a subsequent report to sustain the cancellation of the examination conducted where there were serious allegations of mass copying. The principle laid down in *Mohinder Singh Gill's* case is not applicable where larger public interest is involved and in such situations, additional grounds can be looked into to examine the validity of an order. Finding recorded by the High Court that the report of the CBI cannot be looked into to examine the validity of order dated 04.06.2004, cannot be sustained.

40. We also find it difficult to accept the reasoning of the High Court that the copy of the Vigilance report should have been made available to the candidates at least when the matters came up for hearing. Copy of the report, if at all to be served, need be served only if any action is proposed against the individual candidates in connection with the malpractices alleged. Question here lies on a larger canvas as to whether the written test conducted was vitiated by serious irregularities like mass copying, impersonation and leakage of question paper, etc not against the conduct of few candidates. In this connection reference may be made to the judgment of this Court in *Bihar School Examination Board* v. *Subhas Chandra Sinha and others,* 1970(1) SCC 648. That was a case where 36 students of S.S.H.E. School, Jagdishpur and H.E. School Malaur, District Shahbad, moved a Writ Petition before the Patna High Court against the order of the Board canceling

annual Secondary School Examination of 1969 in relation to Hanswadih Centre in Shahbad District. The High Court quashed the order of cancellation and directed the Board to publish the results. Against the judgment and order of the High Court the Board filed an appeal by way of special leave petition to this Court. This Court allowed the appeal and upheld the order of the Board cancelling the examination. On the complaint that no opportunity was given to the candidates to represent their case before cancellation, this Court observed as follows:-

> "This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as ineffective for the purpose it was held. Must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go."

41. Applying the above principle, we are of the view that the finding recorded by the High Court that non supply of the copy of the Vigilance report to the candidates was a legal infirmity, cannot be sustained.

42. Writ Petitioners, in our view, have also no legal right to insist that they should be appointed to Group 'D' posts. Final merit list was never published. No appointment orders were issued to the candidates. Even if a number of vacancies were

notified for appointment and adequate number of candidates were found successful, they would not acquire any indefeasible right to be appointed against the existing vacancies. This legal position has been settled by a catena of decisions of this Court. Reference can be made to the judgment of this Court in *Shankarsan Dash* v. *Union of India*, (1991) 3 SCC 47; *B. Ramanjini and Others* v. *State of A.P. and Others*, (2002) 5 SCC 533.

43. We are also of the view that the High Court was in error in holding that the materials available relating to leakage of question papers was limited and had no reasonable nexus to the alleged large scale irregularity. Even a minute leakage of question paper would be sufficient to besmirch the written test and to go for a re-test so as to achieve the ultimate object of fair selection.

44. We, therefore, find no infirmity in the decision taken by the Board in conducting the second written test for those who have obtained minimum qualifying marks in the first written test rather than going ahead with the first written test which was tainted by large scale irregularities and malpractices. The Board can now take further steps to regularize the results of the second test and the appointments of the selected candidates. Ordered accordingly. Appeals are accordingly allowed and the judgment of the High Court is set aside.

K.K.T. Appeals allowed.

KALLAKURICHI TALUK CO-OP HOUSING SOCIETY LTD.
v.
M. MARIA SOOSAI & ORS.
(Civil Appeal No. 4357 of 2010)

MAY 6, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Labour Laws – Reinstatement with back wages – Absence without leave – Deemed as resignation as per Bye-Laws and Rules – Reappointment on compassionate ground ordered – After re-appointment, employee again going on leave without permission – Absence again deemed as his resignation – Writ petition by employee seeking his re-instatement in compliance with order of re-appointment – Single Judge of High Court dismissing the petition holding that the employee concealed the fact of his re-appointment – Division Bench of High Court allowing the writ appeal, holding that despite the order of re-appointment by respondent No. 3, he was not employed and directed reinstatement with back wages – In compliance of Division Bench order, employee reinstated – Thereafter, again he failed to report for work – In departmental inquiry for misconduct found guilty – On appeal, held: The decision of High Court was based on erroneous facts – On facts, High Court order not sustainable so far as payment of back wages and other benefits are concerned – Interference with the order regarding reinstatement not called for in view of his having been found guilty in domestic inquiry – The order is modified to the extent that the employee is entitled to full back wages from the date of his joining duty on reinstatement in compliance of order of Division Bench till the date he failed to report for work – Tamil Nadu Co-operative Societies Rules, 1988 – r. 149(10)(1).

Respondent No. 1, appointed with the appellant-

Society, remained absent without leave from November, 1990. Appellant treated him to have resigned from service as per the Bye-Laws of the Society and r. 149(10)(1) of Tamil Nadu Co-operative Societies Rules, 1988. After a lapse of 5 years, respondent No. 1 raised industrial dispute. During pendency of the dispute, he was re-appointed by respondent No. 3, on compassionate ground on certain conditions *inter-alia* that the period of his absence from duty till the date of his joining duty after re-appointment, shall be treated as leave without pay. After his re-appointment, respondent No. 1 was asked to join another Society. After joining there, he again failed to report for work for about one year. That Society passed a resolution to send him back to his parent Society. He was once again deemed to have resigned from the services of the Society. After about 3 years of the passing of the resolution, he filed a writ petition seeking his appointment in appellant-Society in pursuance of the order of re-appointment passed by respondent No. 3. He also sought all the salaries and other benefits from November, 1990. The writ petition was dismissed by Single Judge of High Court on account of suppression of material facts. Writ appeal, against the same was allowed by Division Bench of High Court directing to reinstate respondent No. 1 with back wages from the date of his dismissal, till the date of his reinstatement, together with all other attendant benefits. Hence the present appeal.

During pendency of the case before Supreme Court, the appellant-Society reinstated the respondent in compliance of the impugned order passed by the Division Bench of High Court. The respondent, after joining, again failed to report for work. He was placed under suspension and domestic inquiry was initiated against him. Inquiry Officer held that charges against him were duly proved.

Disposing the appeal, the Court

HELD: 1. The decision of the Division Bench of the High Court impugned in the instant appeal, cannot be sustained at least as far as payment of back wages and other benefits are concerned. The conduct of the respondent No.1 does not justify the relief given to him by virtue of the impugned order. Despite the fact that the Single Judge pointed out that the prayer made in the Writ Petition could not be granted on account of suppression of material facts which ran counter to such prayer, the Division Bench appears to have lost sight of the same. As the facts reveal, the respondent No.1 unilaterally stopped coming to work without submitting any leave application or prior intimation and that too not for a day or two, but for months on end. The decision of the Appellant-Society to re-appoint the respondent No.1 on compassionate grounds leading to the order of respondent No. 3 permitting the Appellant-Society to re-appoint him, was in itself a concession made to the respondent No.1 which he misused subsequently. [Para 17] [331-C-G]

2. Even after he was released from the Vijayapuram Society on 24th February, 1997, the Respondent No.1 remained silent till 30th September, 2000, when he filed the writ petition for a direction to appoint him to a suitable post in the Appellant-Society or the Sankarapuram Taluk Co-operative Housing Society pursuant to the order passed by respondent No. 3. Despite the maximum latitude shown to him by allowing him to rejoin his duties in the Appellant-Society pursuant to the impugned order passed by Division Bench of High Court, the Respondent No.1 again failed to report for work, as a result he was placed under suspension and a domestic enquiry was conducted in which he was found to be guilty of the charges brought against him. [Para 18] [331-H; 332-A-C]

3. The Division Bench of the High Court does not appear to have considered the events which occurred after the respondent No.1 was reinstated in service pursuant to the order passed by respondent No. 3. The fact that thereafter, on account of his failure to report for duties for more than one year, the respondent No.1 was once again deemed to have resigned from the services of the Society u/r. 149(10)(1) of Tamil Nadu Co-operative Societies Rules, 1988 appears to have been overlooked by the High Court. The Division Bench of the High Court does not also appear to have taken into consideration the fact that the respondent No.1 remained silent for about three years, when he filed Writ Petition for a direction for his appointment. [Para 19] [332-D-G]

4. The events, prior to the date when the respondent No. 1 joined the service after the order passed by the respondent No. 3, and thereafter, were not seriously considered by the Division Bench of the High Court which proceeded on the basis that despite the order passed by the respondent No. 3, the Respondent No.1 had not been given appointment, which fact was entirely erroneous. [Para 20] [332-H; 333-A-B]

Novartis India Limited vs. State of West Bengal **(2009) 3 SCC 124, distinguished.**

5. In the circumstances of the case, the judgment and order of the Division Bench of the High Court cannot be sustained. However, having regard to the fact that a domestic inquiry was conducted against the respondent No.1, in which he was found guilty, interference with that part of the order impugned, directing reinstatement is not called for, but the Court is not inclined to maintain the order of the Division Bench of the High Court regarding payment of back wages. [Para 21] [333-D-E]

6. In the circumstances of the case, the Court is inclined to modify the part of the impugned order directing payment of back wages by directing that the Respondent No.1 will be entitled to full wages only for the period between the date when respondent No. 1 joined duty pursuant to impugned judgment and the date when he failed to join duty for which departmental inquiry was initiated, and other connected benefits, if any. As far as payment of full salary for the period under suspension undergone by the respondent No.1 during which period he was being paid subsistence allowance is concerned, the same will depend on the final order to be passed in the disciplinary proceedings already initiated against the respondent No.1. [Para 23] [334-A-C]

Case Law Reference:

(2009) 3 SCC 124 Distinguished. Para 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4357 of 2010.

From the Judgment & Order dated 27.06.2007 of the High Court of Judicature at Madras in W.A. No. 3748 of 2004.

N. Shoba, Sriram J. Thalapathy and Adhi Venkataraman for the appellant.

T. Harish Kumar and Anitha Shenoy for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This appeal is directed against the judgment and order passed by the Division Bench of the Madras High Court on 27th June, 2007, in Writ Appeal No.3748 of 2004, arising out of the judgment and order dated 9th January, 2003, in Writ Petition No.17237 of 2000. By the said order the Respondents in the Writ Petition were directed to reinstate the Respondent No.1

herein in service with back wages from the date of his dismissal from service till the date of reinstatement together with all attendant benefits, within eight weeks from the date of receipt of a copy of the order.

3. In order to appreciate the submissions made on behalf of the respective parties and the relief prayed for in the appeal, it is necessary to briefly set out the facts leading to the filing of the writ petition before the High Court.

4. There is no dispute that the Respondent No.1, M. Maria Soosai, was appointed as an Accountant in the Appellant Society on 9th March, 1984. From 22nd July, 1990, the Respondent No.1 failed to report for duty without permission and without submitting any leave application. Consequently, the said Respondent was treated to have resigned from service as per the Bye-laws of the Appellant Society and in accordance with Rule 149(10)(1) of the Tamil Nadu Co-operative Societies' Rules, 1988, hereinafter referred to as 'the 1988 Rules'. On 29th March, 1995, after a lapse of about 5 years, the Respondent No.1 raised a dispute before the Labour Court at Cuddalore, being I.D. No.44 of 1995, questioning the decision of the Appellant Society to treat him as having resigned from service since 1990.

5. While the proceedings were pending before the Labour Court, the Society sought permission of the Registrar (Housing) and the Deputy Registrar (Housing), Respondent Nos.2 and 3 herein, to re-appoint the Respondent No.1 on compassionate grounds. Accordingly, on 27th July, 1995, the Respondent No.2 permitted the Appellant Society to re-appoint the Respondent No.1 upon certain conditions, which are as follows :-

"1. He will not be paid from 22.7.90 till he joins duty and this period be treated as leave without pay.

2. The employee should withdraw the case pending before the Labour Court.

3. The employee shall be transferred to Sankarapuram Co-operative Housing Society as soon as the said Society is started.

4. He should join duty in the place appointed by the Special Officer and he should not claim seniority."

Certain other conditions were suggested by the Respondent No.3 for re-appointing the Respondent No.1, which are as under :-

"1. The period between 22.7.1990 and 7.5.95 shall be treated as leave without pay.

2. He should involve in society work and collect all the pending loans.

3. As soon as Sankarapuram Taluk Co-op Hsg. Society is started, he should go and work there."

6. On being reinstated in service by the order of the Respondent No.3 dated 7th September, 1995, the Respondent No.1 was relieved from his duties under the Appellant Society and was asked to join in the Vijayapuram Co-operative House Building Society. The Respondent No.1 thereupon joined the services of the Vijayapuram Co-operative House Building Society on 11th September, 1995, and worked there till 7th January, 1996. From 8th January, 1996, after having barely worked for about four months, the Respondent No.1 again failed to report for work with the Vijayapuram Co-operative House Building Society. Thereafter, on 24th February, 1997, a Resolution was adopted by the Board of Directors of the Vijayapuram Co-operative House Building Society, Chinna Salem, and by Resolution 7 it was resolved that the Respondent No.1 be sent back to his parent society on account of his failure to report for work from 8th January, 1996 to 24th February, 1997, without any prior intimation and without applying for leave. It was also noted that within a short tenure of four months service, the Respondent No.1 had obtained consumer loan of

Rs.20,990/- in respect whereof there were outstanding dues of Rs.19,900/-. Furthermore, he had also obtained Rs.1,500/- towards festival advance. The said Resolution was duly confirmed by the President of the Vijayapuram Co-operative House Building Society on 24th February, 1997.

7. On 30th September, 2000, the Respondent No.1 filed Writ Petition No.17237 of 2000 for a direction upon the Respondents therein to issue an order of appointment to him to a suitable post in the Appellant Society or Sankarapuram Taluk Co-operative Housing Society, pursuant to the order passed by the Registrar (Housing) on 27th September, 1995, and also the order of the Respondent No.3 dated 11th August, 1995, and for providing all salaries and other benefits from 2nd November, 1990. The said writ petition came to be dismissed on 9th January, 2003, on the ground that the Respondent No.1 in his writ petition suppressed the fact that he had joined his duties under the Vijayapuram Cooperative House Building Society pursuant to the order passed by the Respondent No.3 on 7th September, 1995.

8. Writ Appeal No.3748 of 2004 was filed by the Respondent No.1 against the order of the learned Single Judge dismissing his Writ Petition. On 18th August, 2003, the said Writ Appeal was allowed with a direction to reinstate the Respondent No.1 in service with back wages from the date of his dismissal till the date of reinstatement, together with all other attendant benefits, within 8 weeks from the date of receipt of a copy of the order.

9. It is the said order which has been challenged in the present proceedings.

10. Appearing on behalf of the Appellant Society, Ms. N. Shobha, learned Advocate, submitted that having regard to the conduct of the Respondent No.1 from 1995 onwards, the learned Single Judge had quite rightly dismissed the writ petition filed by the Respondent No.1, *inter alia*, for issuance

of a writ in the nature of Mandamus to direct the Respondents to issue an order of appointment to a suitable post either in the Appellant Society or in the Sankarapuram Taluk Co-operative Housing Society which had since come into existence and was made Respondent No.4 in the writ petition and for a further direction to pay all his arrears and other benefits alleged to be due from 2nd November, 1990. Ms. Shobha submitted that in his order dated 9th January, 2003, the learned Single Judge, while dismissing Writ Petition No.17237 of 2000, noted the fact that after the Respondent No.1 was deemed to have resigned from service, he was re-appointed on 7th September, 1995, and that he joined his duties on 11th September, 1995, which meant that the Appellant had given due effect to the orders which were alleged not to have been given effect to in the writ petition. Without taking into consideration the said fact and the other facts as indicated hereinabove, including the fact that the Respondent No.1 had once again failed to report for work from 8th January, 1996 to 24th February, 1997, the Division Bench quite erroneously came to a finding that the Appellant Society had not passed orders appointing the Respondent No.1 despite the orders passed by the Deputy Registrar (Housing) on 10th March, 1997, directing the Appellant Society to do so.

11. Ms. Shobha submitted that it is soon thereafter on 10th March, 1997, that the Deputy Registrar (Housing) wrote to the Society requesting it to compassionately consider the request that the Respondent No.1 could be appointed in the Appellant Society, subject to the order of the Registrar (Housing).

12. Ms. Shobha indicated that the said order of the Deputy Registrar (Housing) was only a request and the fact remains that on his failure to report for duties for more than one year from 8th January, 1996, in addition to his earlier absence from duties between 1990 and 1995, the Vijayapuram Cooperative House Building Society resolved that Respondent No.1 be sent back to his parent Society, the Appellant herein. Ms. Shobha

frankly stated that in view of his conduct, the Appellant had rightly not passed any order of reinstatement pursuant to the impugned order of the Division Bench of the High Court since the Respondent No.1 was, once again, deemed to have resigned from service under Rule 149(10)(1) of the 1988 Rules. Ms. Shobha urged that the question of reinstatement with full back wages from the date of dismissal, namely, 10th October, 1990, till the date of his reinstatement, which would mean a period of about 20 years, despite the fact that the Respondent No.1 had been re-appointed in July, 1995, on certain terms and conditions and had himself stayed away from his duties, even thereafter, was unjust and inequitable, besides being erroneous, and could not be sustained.

13. Ms. Shobha submitted that one of the conditions for the re-appointment of the Respondent No.1 was that he would not be paid from 22nd July, 1990, till he rejoined service and the said period would be treated as leave without pay, but if the order of the Division Bench in the Writ Appeal No.3749 of 2004, is to be accepted as it is, it would mean that payment of salaries and other emoluments would have to be made for the said period as well.

14. Ms. Shobha submitted that during the pendency of the Special Leave Petition, one G. Anbalagan was appointed as Special Officer of the Appellant Society. By his letter dated 24th November, 2007, the Special Officer reinstated the Respondent No.1 in the service of the Society without prejudice to its rights and contentions in the pending Special Leave Petition. Pursuant thereto, the Respondent No.1 rejoined duty on 6th December, 2007, but, once again, he failed to report for work from 16th February, 2009 and committed other acts of misconduct. As a result, the Respondent No.1 was again placed under suspension on 4th March, 2009, and a charge memo dated 13th April, 2009, was issued to him. Thereafter, a domestic inquiry was conducted by the Appellant Society in respect of the charge memo and by his report dated 19th

October, 2009, the Inquiry Officer held that the charges against the Respondent No.1 had been duly proved. In the affidavit filed by the Special Officer, it has also been indicated that the copy of the Inquiry Report had been duly sent to the Respondent No.1 seeking his comments and that on receipt of the same, the proceedings would be conducted against the Respondent No.1 in accordance with law. Ms. Shobha submitted that during this period, the Respondent No.1 was being paid subsistence allowance as per the rules and in the said circumstances, the direction to reinstate the Respondent No.1 in service with back wages during the pendency of the inquiry, was not only wrong, but improper and the same was liable to be quashed.

15. On the other hand, Ms. Anitha Shenoy, learned Advocate appearing for the Respondent No.1, submitted that although an attempt has been made on behalf of the Appellant Society to blame the Respondent No.1 for his alleged lapses, it was the Appellant Society which had not acted in terms of the conditions imposed by the Registrar (Housing) in his order dated 27th July, 1995, indicating that the Respondent No.1 would be transferred to the Sankarapuram Taluk Co-operative Housing Society as soon as the said Society was started. Ms. Shenoy urged that the Sankarapuram Taluk Co-operative Housing Society was started on 26th June, 1998, but pursuant to the order passed by the Division Bench of the Madras High Court on 27th June, 2007, the Respondent No.1 was reinstated in service not in the Sankarapuram Housing Society as agreed upon, but in the Appellant Society.

16. Countering the submission made on behalf of the Appellant society that the Respondent No.1 must be deemed to have resigned from service as per the bye-laws of the Appellant Society and Rule 149(10)(i) of the 1986 Rules, Ms. Shenoy submitted that even when an employee is deemed to have abandoned his service, the employer was under a duty to conduct a departmental enquiry before dispensing with his services. In this regard reference was made to the decision of

this Court in *Novartis India Limited vs. State of West Bengal,* [(2009) 3 SCC 124], wherein the dismissal of an employee for not joining the place to which he had been transferred, fell for consideration and it was held that the same was hit by the principles of natural justice and such dismissal could only be effected after holding a domestic enquiry/ disciplinary proceeding. Mr. Shenoy urged that if not from 1990, the respondent No.1 was certainly entitled to back wages from February, 1997, when he was sent back from the Vijayapuram Co-operative House Building Society to the Appellant Society.

17. Having carefully considered the submissions made on behalf of the respective parties, we are inclined to agree with Ms. Shobha that the decision of the Division Bench of the High Court in Writ Appeal No.3748 of 2004, impugned in the instant appeal, cannot be sustained at least as far as payment of back wages and other benefits are concerned. The conduct of the Respondent No.1 does not justify the relief given to him by virtue of the impugned order. Despite the fact that the learned Single Judge pointed out that the prayer made in the Writ Petition could not be granted on account of suppression of material facts which ran counter to such prayer, the Division Bench appears to have lost sight of the same. As the facts reveal, the Respondent No.1 unilaterally stopped coming to work without submitting any leave application or prior intimation and that too not for a day or two, but for months on end. It is, in fact, surprising as to why a decision was taken to consider his case on a compassionate basis, despite laches of his own making. The decision of the Appellant Society to re-appoint the Respondent No.1 on compassionate grounds leading to the order of the Registrar (Housing) dated 27th July, 1995, permitting the Appellant Society to re-appoint him, was in itself a concession made to the Respondent No.1 which he misused subsequently.

18. Even after he was released from the Vijayapuram Society on 24th February, 1997, the Respondent No.1

remained silent till 30th September, 2000, when he filed Writ Petition No.17237 of 2000 for a direction upon the Respondents therein to appoint him to a suitable post in the Appellant Society or the Sankarapuram Taluk Co-operative Housing Society pursuant to the order passed by the Registrar (Housing) on 27th September, 1995. Despite the maximum latitude shown to him by allowing him to rejoin his duties in the Appellant Society on 6th December, 2007, the Respondent No.1 again failed to report for work from 16th February, 2009, as a result he was placed under suspension and a domestic enquiry was conducted in which he was found to be guilty of the charges brought against him.

19. The Division Bench of the High Court does not appear to have considered the events which occurred after the Respondent No.1 was reinstated in service on 7th September, 1995, to the effect that the Respondent No.1 had again failed to report for work from 8th January, 1996 till 24th February, 1997, when a direction was given by the Division Bench to the Registrar (Housing) to consider the appointment of the Respondent No.1 in the Appellant Society. The fact that thereafter, on account of his failure to report for duties for more than one year from 8th January, 1996, the Respondent No.1 was once again deemed to have resigned from the services of the Society under Rule 149(10)(1) of the 1988 Rules, appears to have been overlooked by the High Court. The Division Bench of the High Court does not also appear to have taken into consideration the fact that the Respondent No.1 remained silent till 30th September, 2000, when he filed Writ Petition No.17237 of 2000 for a direction for his appointment and that despite being allowed to rejoin his duties in the Appellant Society on 6th December, 2007, the Respondent No.1 again failed to report for work from 16th February, 2009, as a result of which he was placed under suspension and a domestic inquiry was conducted.

20. The events, prior to 11th September, 1995, and

thereafter, were not seriously considered by the Division Bench of the High Court which proceeded on the basis that despite the order passed by the Deputy Registrar (Housing) on 27th September, 1995, the Respondent No.1 had not been given appointment, which fact was entirely erroneous, as would be evident from what has been mentioned hereinbefore. The decision of this Court in *Novartis India Limited's* case (supra) cited by Ms. Shenoy is not of any help to the case of the Respondent No.1 since in the said case the order of dismissal of the employee was passed as he did not join the post to which he had been transferred. In the instant case, the Respondent No.1 joined the post to which he had been transferred, but, thereafter, stopped reporting for work without any application for leave or prior intimation.

21. In such circumstances, the judgment and order of the Division Bench of the High Court impugned in this appeal cannot be sustained and must necessarily be set aside. However, having regard to the fact that a domestic inquiry was conducted against the Respondent No.1, in which he was found guilty, we do not propose to interfere with that part of the order impugned directing reinstatement, but we are not inclined to maintain the order of the Division Bench of the High Court regarding payment of back wages. Ever since his appointment on 9th March, 1984, as an Accountant in the Appellant Society, the Respondent No.1 has shown lack of interest in his duties under the Appellant Society and stopped attending his duties as and when he felt like without permission and without submitting any leave application. This habit did not show any signs of improvement on his re-appointment in service on 27th July, 1995, or the subsequent order by which he was allowed to rejoin his duties in the Appellant Society on 6th December, 2007.

22. In these circumstances, while not interfering with the order of reinstatement passed by the Division Bench of the High Court, which was duly acted upon, we are inclined to modify that part of the said order directing payment of back wages.

23. In the circumstances, we allow the appeal in part and modify the order of the Division Bench of the High Court in Writ Appeal No.3748 of 2004, by directing that the Respondent No.1 will be entitled to full wages only for the period between 6th December, 2007 and 15th February, 2009, and other connected benefits, if any. As far as payment of full salary for the period under suspension undergone by the Respondent No.1 during which period he was being paid subsistence allowance is concerned, the same will depend on the final order to be passed in the disciplinary proceedings already initiated against the Respondent No.1.

24. The appeal is disposed of in the above terms. There will, however, be no order as to costs.

K.K.T. Appeal disposed of.

A.K. BEHERA
v.
UNION OF INDIA & ANR.
(W. P. (C) No. 261 of 2007) ETC.

MAY 6, 2010

[K.G. BALAKRISHNAN, CJI, DALVEER BHANDARI AND J.M. PANCHAL, JJ.]

Administrative Tribunals Act, 1985 – Administrative Tribunals (Amendment) Act, 2006:

Central Administrative Tribunal – Abolition of post of Vice-Chairman by the Amendment Act – Constitutionality of – Held: Cannot be regarded as unconstitutional – By abolition of post of Vice-Chairman no anomalous situation is sought to be introduced in the structure as well as functioning and administration of the Tribunals – Post of Vice-Chairman in Tribunal had created an avoidable three tier institution and resulted in anomalies in qualifications, age of retirement, service conditions – By the amending Act all Members of Central Administrative Tribunal have been elevated to the status of a High Court Judge – Amended qualifications for Member of Tribunal are nearly the same as Vice-Chairman of Tribunal.

s. 6(2) (as amended) – Modification in the qualification for appointment as Administrative Member in Tribunal – Challenge to, on the ground that except for an IAS officer no other civil servant would become eligible for appointment – Held: s. 6(2) not arbitrary and unsustainable – Officers belonging to All India Services have been made eligible to be appointed as Administrative Member subject to fulfillment of qualifications – Higher qualifications have been prescribed for better discharge of functions by Members of Tribunals and cannot be regarded as arbitrary or unreasonable.

s. 10A – Total tenure of Member of Administrative Tribunal restricted to 10 years – Held: Cannot be regarded as unconstitutional – Concept of security of tenure does not apply to such appointments.

s. 10A – Prescribing different conditions of service for Members of Central Administrative Tribunal on basis of their appointment under unamended Rules and amended Rules – Requiring Members of Tribunal appointed before the coming into force of Amendment Act to seek fresh appointment by Selection Committee – Held: Is not arbitrary – Eligibility conditions of Members appointed prior to and after February 19, 2007 are different – Members of Administrative Tribunals appointed prior to February 19, 2007 form a different class from those appointed or to be appointed after February 19, 2007 – Over a period of time, anomaly, if any, would get cleared itself and after a period of 4-5 years all Members of Tribunal would be equal in status – Extension in service by Member appointed cannot be claimed as matter of right and would always be subject to fulfillment of qualifications and conditions stipulated in the Amended Act – Aggrieved petitioner cannot claim, as a matter of right, automatic re-appointment as Judicial Member of State Administrative Tribunal after his first term of five years was over.

s. 12(2) – Enabling the appropriate Government to designate one of the members to be Vice Chairman to exercise the financial and administrative powers – Constitutional validity of – Held: Is constitutionally valid and cannot be regarded as impinging upon the independence of judiciary.

Certain amendments were carried out in the Administrative Tribunals Act, 1985 by the Administrative Tribunal (Amendment) Act, 2006. By the Amendment Act, the post of Vice Chairman in the Central Administrative Tribunal was abolished; that the newly inserted s. 10A of the Act prescribed different conditions of service for the

Members of the Central Administrative Tribunal on the basis of their appointment under the unamended Rules and under the amended Rules and that the members of the Administrative Tribunal, who were duly appointed as members prior to the commencement of the Amendment Act, i.e. 19.02.2007, were to be considered for reappointment by Selection Committee; that s. 10A stipulated that the total term of office of the member of the Central Administrative Tribunal shall not exceed 10 years though by the said amendment the age of superannuation for a member is raised from 62 to 65 years; that the newly inserted s. 6(2) modified the qualifications for appointment as administrative members; that the newly added s. 12(2) authorised the appropriate Government to designate one or more members to be the Vice Chairman for exercise of financial and administrative powers as impinging upon the independence of judiciary; and that the Members of the Administrative Tribunal appointed before the coming into force of the Amendment Act were to seek fresh appointment in accordance with the selection procedure laid down for such appointments. The present petitioners are aggrieved by the said amendments carried out in the Administrative Tribunal Act, 1985. Hence the writ petitions.

Dismissing the writ petitions, the Court

HELD: ***Per Panchal J (For himself and Balakrishnan, CJI):***

1.1. It cannot be accepted that the abolition of the post of Vice-Chairman, which was in existence since inception of the Administrative Tribunals, is unconstitutional because it would create anomalous situation in the structure as well as administration of the Tribunals if any High Court Judge is appointed as Member of the Tribunal. The post of Vice-Chairman in the Tribunal had created an avoidable three tier institution and resulted in anomalies in qualifications, age of retirement, service conditions etc. The Members of the Tribunal had claimed equality with the Judges of the High Court or even the Vice-chairman of the Tribunal, in the matter of pay and superannuation. The Parliament, in exercise of powers under Article 323A of the Constitution, has amended the Administrative Tribunals Act, 1985 and equated its Members with Judges of High Court for the purposes of pay and superannuation. The Parliament, by enacting a law, has right to change the conditions of service of Members of the Administrative Tribunals. [Para 13] [367-F-H; 368-A-D]

M.B. Majumdar vs. Union of India **(1990) 4 SCC 501, referred to.**

1.2. While upgrading the conditions of service of the Members, the conditions of service of a Judicial Member are not changed to his detriment. By the amending Act all the Members of the Central Administrative Tribunal have been elevated to the status of a High Court Judge. The service conditions of the Members of the Tribunal have been upgraded to that of a High Court Judge, which cannot be regarded as illegal or unconstitutional. The qualifications of the Vice-chairman provided in Section 6(2)(a), 6(2)(b) and 6(2)(bb) in the unamended Act were also to a large extent qualifications prescribed for appointment of a person as an Administrative Member. The only addition made by the Amending Act is that now the Secretary to the Government of India, in the Department of Legal Affairs or the Legislative Department including Member-Secretary, Law Commission of India or a person who has held a post of Additional Secretary to the Government of India in the Department of Legal Affairs and Legislative Department at least for a period of five years, are made eligible for appointment as a Judicial Member. Though under the unamended Act, it was not specifically provided but he was eligible to be appointed

as Administrative Member in view of the qualifications which were laid down for a person to be appointed as Administrative Member. However, by the Amendment, such a person is declared to be eligible for being appointed as Judicial Member having regard to his experience and opportunity to deal with legal issues in his respective department. Section 6(3) and 6(3)(a) of the earlier Act provided a much lower qualification for a Member of the Tribunal. The amended qualifications for a Member of the Tribunal are nearly the same as Vice-Chairman of the Tribunal, which clearly reflects the intention of the Government to upgrade the post of an Administrative Member. In such circumstances the need for having a Vice-Chairman was obviated and the Government, therefore, abolished the post of Vice-Chairman by the impugned enactment. [Para 13] [368-D-H; 369-A-D]

1.3. By abolition of the post of the Vice-Chairman no anomalous situation is sought to be introduced in the structure as well as functioning and administration of the Tribunals. A retired High Court Judge would be eligible for appointment as Member of the Tribunal and on such appointment would be eligible to all the facilities as a Judge of the High Court. The Chairman of the Tribunal is normally a retired Chief Justice of the High Court and very rarely a retired Judge is appointed as Chairman of the Tribunal. In any event the Chairman would be senior to a retired Judge, who is appointed as a Member of the Tribunal. [Para 13] [369-E-F]

1.4. The petitioner could not establish before the Court that by upgrading the status of the Administrative Member of the Tribunal to that of a High Court Judge a particular provision of the Constitution is infringed. The plea that abolition of post of Vice-Chairman will discourage a sitting or retired High Court Judge from joining the Tribunal cannot be appreciated. The

composition of the Tribunal, after amendment of the Act, is such that there would be a Vice-Chairman if required as under Section 12, a Judicial Member and another member to be appointed from civil services. A High Court Judge, who opts for the post of judicial Member in the Tribunal, would not be lowering his status after the amendment because all the service conditions applicable to him as a High Court Judge have been saved. [Para 13] [369-G-H; 370-A-C]

2.1. A reasonable reading of sub-Section (2) of Section 6 of the Act makes it very clear that by no stretch of imagination it can be said that the qualifications for appointment as Administrative Member of the Tribunal are laid down in such a manner that except an IAS officer no other civil servant would become eligible for such appointment. The newly amended provision requires that a person shall not be qualified for appointment as an Administrative Member unless he has held for at least two years the post of Secretary to the Government of India or any other post in the Central or State Government and carrying the scale of pay, which is not less than that of a Secretary to the Government of India for at least two years or held post of Additional Secretary to the Government of India for at least five years or any other post under the Central or State Government carrying the scale of pay which is not less than that of an Additional Secretary to the Government at least for a period of five years. The proviso to sub-Section (2) of Section 6 of the Act, stipulates that the officers belonging to All India Services, who were or are on Central deputation to a lower post shall be deemed to have held the post of Secretary or Additional Secretary as the case may be, from the date such officers were granted proforma promotion or actual promotion whichever is earlier, to the level of Secretary or Additional Secretary, as the case may be, and the period spent on Central deputation after such

date shall count for qualifying service for the purposes of this clause. [Para 14] [371-B; 370-D-H; 371-A]

2.2. It is necessary to notice that officers belonging to All India services have been made eligible to be appointed as Administrative Member subject to the fulfillment of qualifications stipulated in Section 6 of the Act. It is wrong to contend that All India Services comprise only of the IAS officers. All India Services comprise IAS, IFS, IRS, etc. Merely because higher qualifications have been prescribed one need not conclude that except an IAS servant, no other civil servant would be eligible for appointment as a Member. The higher qualifications have been prescribed for the benefit and interest of uniformity of the two level cadres contemplated by the amended provisions. There is no manner of doubt that Government of India took a policy decision to prescribe higher qualification for better discharge of functions by the Members constituting the Tribunals and the said policy decision cannot be regarded as arbitrary or unreasonable. The qualifications of the Vice-Chairman were provided in ss. 6(2)(a), 6(2)(b), 6(2)(bb) and 6(2)(c) of the unamended Act. To a large extent, the qualifications laid down in the unamended Act are almost the same as are laid down in the amended provisions. [Para 14] [371-B-F]

3.1. The plea that section 10A, which restricts the total term of the Member of the Administrative Tribunal to ten years should be regarded as unconstitutional, has also no substance at all. The age of retirement of a Government servant has been raised from 58 years to 60 years. Initially under the unamended provisions of the Act a retired Government servant had a tenure of only two years as a Member of the Tribunal and it was noticed that he was not able to contribute much while performing duties as a Member of the Tribunal. It was felt necessary that every Member of the Tribunal should have a tenure

of five years. Therefore, the provisions relating to term of office incorporated in section 8 of the Act were amended in the year 1987 and provision was made fixing term of office of Chairman, Vice-chairman and Members at five years period. Now provision is made for extension of term of office by a further period of five years. Thus the Government has decided to provide for extension in term of office by five years of a Member so that he can effectively contribute to speedy disposal of cases, on merits after gaining expertise in the service jurisprudence and having good grip over the subject. Under the unamended provisions of the Act also the term of Vice-Chairman and Member was extendable by a further period of five years and under the unamended provisions also a Member of the Bar, who was appointed as Judicial Member of the Tribunal, had maximum tenure of ten years. It is not the case of the petitioners that the unamended provisions of the Act, which prescribed total tenure of ten years for a Member of the Bar was/is unconstitutional. The provisions of Section 8 fixing maximum term of office of the chairman at sixty eight years and of a Member of the Tribunal at 10 years, cannot be regarded as unconstitutional because concept of security of tenure does not apply to such appointments. Said provision cannot be assailed as arbitrary having effect of jeopardising security of tenure. [Paras 15] [371-G-H; 372-A-C; E-H; 373-A-B]

S.P. Sampath Kumar vs. Union of India and others **(1987) 1 SCC 124;** *Durgadas Purkyastha vs. Union of India & others* **(2002) 6 SCC 242, referred to.**

3.2. An Advocate practising at the Bar is eligible to be appointed as Member of Tribunal subject to his fulfilling required qualifications. In all, such a Member would have term of office for ten years. On ceasing to hold office, a Member, subject to the other provisions of the Act, is eligible for appointment as the Chairman of the

Tribunal or as the Chairman, Vice-chairman or other Member of any other Tribunal and is also eligible to appear, act or plead before any Tribunal except before the Tribunal of which he was Member. Under the circumstances, it cannot be appreciated as to how the amended provisions restricting the total tenure of a Member of the Tribunal to ten years would be unconstitutional. The unamended s. 6 of the 1985 Act, indicated that the Chairman, Vice-Chairman and other Members, held respective offices in one capacity or the other, had reasonably spent sufficient number of years of service in those posts before they were appointed in the Tribunal and, therefore, the concept of security of tenure of service in respect of those whose term was reduced was not regarded as appropriate. An option is reserved to the Government to re-appoint a Member on the expiry of the first term beyond five years. The outer limit for the Member is that he should be within the age of 65 years. Thus, it would not be in every case that the Government would put an end to the term of the office at the end of five years because such Chairman or Member is eligible for appointment for another period of five years after consideration of his case by a committee headed by a Judge of the Supreme Court to be nominated by the Chief Justice of India and two other Members, one of whom will be the Chairman of the Tribunal. [Para 15] [373-A-H]

4. The plea that s.10A of the Act requiring a sitting Member of the Tribunal, who seeks extension for second term to possess the qualifications laid down by the amended Act and get himself selected through Selection Committee is arbitrary, is devoid of merits. The selections to be made as an Administrative Member after February 19, 2007 are made applicable uniformly to those who would be appointed as Administrative Member after February 19, 2007. A Member, who was appointed prior

to February 19, 2007, cannot claim that he has vested right of extension of his term for a further period of five years as per the qualifications laid down in the unamended Act and that qualifications prescribed by the amending Act should be ignored in his case while considering his case for extension of term for a further period of five years. Over a period of time the anomaly, if any, would get cleared itself and after a period of 4-5 years all the Members of the Tribunal would be equal in status and that every Member to be appointed will have to qualify himself as per the qualifications laid down in the Amended Act and will have to get himself selected through Selection Committee. The eligibility conditions of the Members appointed prior to and after February 19, 2007 are different. Since the Members of the Administrative Tribunals appointed prior to February 19, 2007 form a different class from those appointed or to be appointed after February 19, 2007. Article 14 would stand violated if they are treated differently in the matter of appointment or extension of service as a Member after February 19, 2007. Extension in service by a Member cannot be claimed as matter of right and would always be subject to fulfillment of qualifications and conditions stipulated in the Amended Act. The petitioner in second writ petition could not have claimed, as a matter of right, automatic re-appointment as Judicial Member of the State Administrative Tribunal after his first term of five years was over. As is provided in the Amending Act, under the old provisions also a Member of the Administrative Tribunal was eligible to be re-appointed, which was considered to be a fresh appointment for all the practical purposes. Under the provisions of unamended Act, at the end of five years, the Chairman, Vice-chairman and other Members were eligible for reappointment for another period of five years after consideration by a Committee headed by a Judge of the Supreme Court and two other members, one of whom was Chairman of the Tribunal.

The petitioner can only be considered for appointment as a Member as per the fresh selection procedure provided by the Amended Act. The Selection Committee has to choose the best candidate available for the post. It is not the requirement of the law that the Selection Committee should inform the petitioner the reasons for not recommending his name. Merely, because there is a vacancy in the post of Member (Judicial) in the Maharashtra Administrative Tribunal, the petitioner cannot claim a right to be appointed to the said post irrespective of the provisions of the amended Act. The petitioner can be appointed only if Selection Committee recommends his appointment and the recommendation is accepted by the President, after the consultation with the Governor of the State. [Para 16] [374-B-H; 375-A-E]

5.1. The submission that s. 12(2) of the amended Act enabling the appropriate Government to nominate one of the Members of the Tribunal to perform financial and administrative functions destroys independence of the Tribunal which is a Judicial Forum and, therefore, the said provision should be regarded as unconstitutional, is devoid of merits. It is clear from the provisions of s. 12 of the Amended Act, that the Chairman of the Tribunal has to exercise all financial and administrative powers over the Benches. Essentially the provision for delegating financial and administrative powers to one of the Members of a Bench is made, to lessen administrative burden lying on the shoulders of the Chairman who normally sits at Delhi and for effective and better administration of the Benches of the Tribunal located in different and far flung States of the country. It is not difficult to visualise the problems, complications, obstacles, delay, etc., faced by the Chairman, while exercising financial and administrative powers over the Benches. The decentralisation of financial and administrative powers to tackle local needs and

problems, in favour of a Member of Tribunal, for effective administration of the Tribunals, cannot be regarded as destroying the basic feature of the Constitution, namely independence of judiciary. [Para 17] [375-F-H; 376-A-C]

5.2. The designation of the Vice-Chairman by the Central Government u/s. 12(2) of the Act would obviously be in concurrence with the Chairman. Further, the Vice-Chairman would discharge such functions of the Chairman as the Chairman may so direct. It is absolutely, completely and entirely for the Chairman to recommend to the Government as to designate which Member of the Tribunal as Vice-Chairman. The said provision is an enabling provision, which is clear from the use of the expression "may" in the said provision. If the Chairman of the Tribunal feels that no Member should be designated as Vice-Chairman, the Government suo motu cannot and would not be in a position to make designation contemplated by the said provision. The designation as Vice-Chairman would not entitle the Member so designated to any special benefits in service conditions. The only purpose of the said provision is to help the Chairman in discharge of his administrative functions as the Benches of the Tribunal are situated in different parts of the country. Section 12(2) of the Act, which enables the appropriate Government to designate one or more Members as Vice-Chairman and entitles the Members so designated to exercise such powers and perform such functions of the Chairman as may be delegated to him by the Chairman by general or special order in writing cannot be regarded as destroying the principle independence of judiciary or of the Administrative Tribunals. It cannot be understood as to how the appropriate Government would be able to destroy the independence of Tribunals by designating one or more Members to be the Vice-Chairman for the purposes of performing the functions of the Chairman to

be delegated to him by the Chairman. The jurisdiction, powers and authority of the Central Administrative Tribunal are defined in the Act and, more particularly, in ss. 14, 15, 16, 17 and 18 of the Act. The petitioners have failed to demonstrate that by authorizing appropriate Government to designate one or more Members to be the Vice-Chairman for the purpose of performing financial and administrative powers of the Chairman, the independence of the Tribunals secured by the provisions is in any manner eroded. [Para 17] [376-C-H; 377-A-C]

Per Bhandari, J (Dissenting) :

1. There is no anathema in the Tribunal exercising jurisdiction of High Court and in that sense being supplemental or additional to the High Court but, at the same time, it is our bounden duty to ensure that the Tribunal must inspire the same confidence and trust in the public mind. This can only be achieved by appointing the deserving candidates with legal background and judicial approach and objectivity. [Para 54] [400-F]

S.P. Sampat Kumar v. *Union of India and Ors.* **(1987) 1 SCC 124;** *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* **(1980) 3 SCC 625;** *L. Chandra Kumar v. Union of India and Ors.* **(1997) 3 SCC 261, relied on.**

R.K. Jain v. Union of India **(1993) 4 SCC 119;** *Bidi Supply Co. v. Union of India and Ors.* **1956 SCR 267;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* **(1973) 4 SCC 225;** *M.L. Sachdev v. Union of India and Anr.* **(1991) 1 SCC 605, referred to.**

2.1. In view of the constitutional principles in the Equal Remuneration Act, 1976 and Directive Principles of State Policy under the Constitution and the statutory and mandatory provisions of overriding the 1976 Act, the following principles are evolved for fixing the governmental pay policy, whether executive or legislative

on the recommendation of the Pay Commissions, Pay Committees by Executive Governments: (i) the governmental pay policy, whether executive or legislative, cannot run contrary to constitutional principles of constitutional law; (ii) the governmental pay policy, whether executive or legislative, cannot run contrary to the overriding provisions of the 1976 Act; (iii) the governmental pay policy must conform to the overriding statutory command under ss. 13 and 14 read with s. 1(2) of the 1976 Act which supports for uniformity between the pay policy of the State Governments and the Central Government in the whole of India and such uniformity in the pay policy of the State Governments and the Central Government in the whole of India. Where all things are equal that is, where all relevant considerations are same, persons holding identical posts may not be treated differentially of their pay. [Para 66] [406-D-H; 407-A]

2.2. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. [Para 84] [412-H; 413-A]

2.3. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive. The classification must not be arbitrary but must be rational. It should be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation.

In order to pass the test, two conditions must be fulfilled, namely, that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and that differentia must have a rational relation to the object sought to be achieved by the Act. [Paras 85 and 86] [413-B-D]

2.4. In the instant case, one fails to comprehend and understand why the respondents are perpetuating discrimination even for a period of four to five years. [Para 88] [413-G]

2.5. The High Court Judges are appointed from two streams-2/3rd from the Bar and 1/3rd from the Subordinate Judicial Service. After appointment, they are assigned the task of discharging judicial functions. The direct and inevitable impact of the amendment is to dissuade and discourage both the members of the Bar and Judiciary from becoming members of the Tribunal. The Tribunal is discharging purely judicial work which were earlier discharged by the judges of the High Courts. The people's faith and confidence in the functioning of the Tribunal would be considerably eroded if both the members of the Bar and judiciary are discouraged from joining the Tribunal. In a democratic country governed by rule of law, both the lawyers and judges cannot be legitimately discouraged and dissuaded from manning the Tribunal discharging only judicial work.[Para 89] [413-H; 414-A-C]

Randhir Singh v. Union of India and Ors. **(1982) 1 SCC 618;** *State of West Bengal* v. *Anwar Ali Sarkar* **(1952) SCR 284;** *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and Ors.* **(1959) 1 SCR 279;** *The State of Jammu & Kashmir* v. *Triloki Nath Khosa and Ors.* **(1974) 1 SCC 19;** *Indira Nehru Gandhi v. Raj Narain and Anr.* **(1975) Supp. SCC 1;** *Maneka Gandhi v. Union of India and Anr.* **(1978) 1 SCC 248;** *Surinder Singh and Anr.* v. *Engineer-in-Chief, CPWD and Ors.* **(1986)**

1 SCC 639; *Mackinnon Mackenzie & Co. Ltd.* v. *Audrey D' Costa and Anr.* **(1987) 2 SCC 469;** *Bhagwan Dass and Ors.* v. *State of Haryana and Ors.* **(1987) 4 SCC 634;** *Inder Singh and Ors.* v. *Vyas Muni Mishra and Ors.* **1987 (Supp) SCC 257;** *Haryana State Adhyapak Sangh and Ors.* v. *State of Haryana and Ors.* **(1988) 4 SCC 571;** *U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd.* v. *Workmen* **1989 Supp (2) SCC 424;** *Sita Devi and Ors.* v. *State of Haryana and Ors.* **(1996) 10 SCC 1;** *Sube Singh & Ors. v. State of Haryana and Ors.* **(2001) 7 SCC 545;** *John Vallamattom and Anr.* v. *Union of India* **(2003) 6 SCC 611;** *State of Mizoram and Anr. v. Mizoram Engineering Service Association and Anr.* **(2004) 6 SCC 218;** *Union of India v. Dineshan K.K.* **(2008) 1 SCC 586, referred to.**

3.1. There is no rationale or justification in providing different conditions of service for the members of the Tribunal on the basis of their appointment under the amended and the unamended rules, when even according to the respondents it is nowhere denied that both the categories of members are not discharging the same duties, obligations and responsibilities. [Para 94] [414-H; 415-A]

3.2. Section 10A of the amended Act is declared discriminatory, unconstitutional and *ultra vires* of the Constitution so far as it does not provide uniform pay scales and service conditions on the basis of amended and unamended rules. Consequently, all the members of the Tribunal would be entitled to get the same pay scales and service conditions from June 2010. [Para 95] [415-B-C]

3.3. Section 10A of the amended Act is also declared discriminatory because the direct and inevitable impact of insertion of s. 10A is to prescribe different age of retirement for the judicial and other members. On the one hand, the age of superannuation of the members has

been increased from 62 to 65 years and according to the amended Act, the administrative members would now retire at the age of 65 years. The members can now get maximum of two terms of 5 years each. A lawyer appointed at the age of 45 years will have to retire at the age of 55 years. Therefore, by this amendment, administrative member would retire at the age of 65 whereas judicial member may retire even at the age of 55. This is clearly discriminatory and violative of the fundamental principle of equality. Consequently, s. 10A of the amended Act is declared discriminatory and violative of Article 14 of the Constitution and is declared *ultra vires* of the Constitution, to the extent that it places embargo of two terms of five years each leading to different ages of retirements of the members of the Tribunal. Consequently, henceforth, all the members of the Tribunal shall function till the age of 65 years. There would be a uniform age of retirement for all the members of the Tribunal. [Para 96] [415-D-G]

4.1. There is no logic, rationale or justification in abolishing the post of Vice-Chairman in the Central Administrative Tribunal. No reason for such abolition has been spelt out by the respondents even at the time of introducing the Bill. Before the amendment, ordinarily, the retired judges of the High Courts used to be appointed to the post of Vice-Chairman. It used to be in consonance with the status and positions of the retired judges. In the larger public interest the post of Vice-Chairman is restored and the procedure for appointment would be in accordance with the unamended rules of the Act. [Paras 98 and 102] [416-B-C; 417-B]

4.2. One fails to comprehend that on the one hand, the post of Vice-Chairman has been abolished and on the other hand under the newly inserted s. 12(2), the power to designate Vice-Chairman has been given to the appropriate government. This is per se untenable and

unsustainable. The executive has usurped the judicial functions by inserting s. 12(2). The direct and inevitable consequence of the amendment would affect the independence of judiciary. [Para 99] [416-D-E]

4.3. In the race of becoming the Vice-Chairman there would be erosion of independence of judiciary. A judicial member who is looking forward to promotion to the post of Vice-Chairman would have to depend on the goodwill and favourable instance of the executive and that would directly affect independence and impartiality of the members of the Tribunal impinging upon the independence of judiciary. [Para 100] [416-F-G]

S.P. Sampat Kumar v. *Union of India and Ors.* **(1987) 1 SCC 124, referred to.**

4.4. The judicial work which the members of the Tribunal discharge is one, which was earlier discharged by the Judges of the High Court. The work is totally judicial in nature, therefore, dispensation of justice should be left primarily to the members of the Bar and Judges who have, by long experience and training acquired judicial discipline, understanding of the principles of law, art of interpreting laws, rules and regulations, legal acumen, detachment and objectivity. Unless extreme care is taken in the matter of appointments of the members of Tribunal, the justice delivery system may not command confidence, credibility, acceptability and trust of the people. [Para 103] [417-C-D]

4.5. Under s. 12(2) of the amended Act, the entire power of designating Vice-Chairman has been usurped by the appropriate government. The amendment also has the potentiality of disturbing the separation of powers. The power pertaining to judicial functioning of the Tribunal which was earlier exercised by the judiciary has been usurped by the executive. Thus, the newly inserted s. 12(2) is per se untenable and is declared null and void.

[Para 101] [416-G-H; 417-A]

5.1. All the members of the Tribunal appointed either by amended or unamended rules would be entitled to get uniform pay scales and service conditions from 01.06.2010. However, they would not be entitled to claim any arrears on account of different pay scales and service conditions. [Para 104] [417-F]

5.2. All the members of the Tribunal would have uniform age of retirement from 01.06.2010, meaning thereby that all members of the Tribunal shall be permitted to function until they attain the age of superannuation of 65 years. Hence, s. 10A is quashed and set aside. [Para 104] [417-G-H; 418-A]

5.3. The post of Vice-Chairman in the Central Administrative Tribunal is restored from 01.06.2010. However, the Vice-Chairmen, if already designated by the Government is not disturbed, and permit them to continue in their respect posts till they attain the age of superannuation. Thereafter, the Vice-Chairman shall be appointed in accordance with the unamended rules. Consequently, the newly inserted s. 12(2) of the amended Act is also quashed and set aside. [Para 104] [418-B-C]

Indira Nehru Gandhi v. Raj Narain and Anr. **(1975) Supp. SCC 1;** *I.R. Coelho (dead) by Lrs. v. State of Tamil Nadu and Ors.* **(2007) 2 SCC;** *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* **(1980) 3 SCC 625;** *Ashoka Kumar Thakur and Ors. v. Union of India and Ors.* **(2008) 6 SCC 1;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* **(1973) 4 SCC 225;** *Subhash Sharma and Ors.* v. *Union of India* **1991 Sup (1) 574;** *Pareena Swarup* v. *Union of India* **(2008) 14 SCC 107, referred to.**

Case Law Reference:

In the judgment of Panchal J:

(1990) 4 SCC 501	**Referred to.**	**Para 13**

(1987) 1 SCC 124	**Referred to.**	**Para 15**
(2002) 6 SCC 242	**Referred to.**	**Para 15**

In the judgment of Bhandari J:

(1987) 1 SCC 124	**Relied on.**	**Para 21, 30, 32, 33, 35, 36, 37, 39, 52, 100**
(1980) 3 SCC 625	**Relied on.**	**Para 34, 52, 58, 62**
(1997) 3 SCC 261	**Relied on.**	**Para 42, 46**
(1993) 4 SCC 119	**Referred to.**	**Para 43**
1956 SCR 267	**Referred to.**	**Para 44**
(1973) 4 SCC 225	**Referred to.**	**Para 45, 61**
(1991) 1 SCC 605	**Referred to.**	**Para 50**
(1975) Supp. SCC 1	**Referred to.**	**Para 56, 70**
(2007) 2 SCC 1	**Referred to.**	**Para 57**
(2008) 6 SCC 1	**Referred to.**	**Para 59**
1991 Sup (1) 574	**Referred to.**	**Para 63**
(2008) 14 SCC 107	**Referred to.**	**Para 64**
(1982) 1 SCC 618	**Referred to.**	**Para 66, 72**
(1952) SCR 284	**Referred to.**	**Para 67**
(1959) 1 SCR 279	**Referred to.**	**Para 68**
(1974) 1 SCC 19	**Referred to.**	**Para 69**
(1978) 1 SCC 248	**Referred to.**	**Para 71**
(1986) 1 SCC 639	**Referred to.**	**Para 73**
(1987) 2 SCC 469	**Referred to.**	**Para 74**
(1987) 4 SCC 634	**Referred to.**	**Para 75**

1987 (Supp) SCC 257	**Referred to.**	**Para 76**
(1988) 4 SCC 571	**Referred to.**	**Para 77**
1989 Supp (2) SCC 424	**Referred to.**	**Para 78**
(1996) 10 SCC 1	**Referred to.**	**Para 79**
(2001) 7 SCC 545	**Referred to.**	**Para 80**
(2003) 6 SCC 611	**Referred to.**	**Para 81**
(2004) 6 SCC 218	**Referred to.**	**Para 82**
(2008) 1 SCC 586	**Referred to.**	**Para 83**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 261 of 2007.

Under Article 32 of the Constitution of India.

WITH

W.P. (C) No. 539 of 2007.

A.Saran, ASG, Raju Ramachandran, A.K. Behra, Lalit M. Harichandan, Saurabh Suman Sinha (for Satya Mitra Garg), Nitin S. Tambwekar, B.S. Sai. K. Rajeev, S. Wasim A. Qadri, P, Parmeswaran, B. Krishna Prasad, Sanjay V. Kharde, Asha G. Nair, Advocates with them for appearing parties.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. In the Writ Petition (C) No. 261 of 2007, the petitioner, who is a practicing lawyer and Honorary Secretary of the Central Administrative Tribunal, Principal Bench, Bar Association, prays (1) to quash the decision of the respondents to abolish the post of Vice Chairman in the Central Administrative Tribunal as reflected in the Administrative Tribunal (Amendment) Act, 2006 and to direct the respondents to restore the said post in the Central Administrative Tribunal, (2) to declare that the newly inserted Section 10A of the Administrative

Tribunals Act, 1985 to the extent it prescribes different conditions of service for the Members of the Central Administrative Tribunal on the basis of their appointment under the unamended Rules and under the amended Rules, as unconstitutional, arbitrary and not legally sustainable, (3) to direct the respondents to accord all conditions of service as applicable to the Judges of High Court to all the members of the Central Administrative Tribunal irrespective of their appointment under the unamended or amended Rules, (4) to declare that the newly inserted Section 10A of the Administrative Tribunals Act, 1985 as unconstitutional to the extent it stipulates that the total term of office of the member of the Central Administrative Tribunal shall not exceed 10 years, (5) to direct the respondents to continue all the members appointed under the unamended or amended Rules till they attain the age of superannuation of 65 years, (6) to declare, the newly inserted qualifications for appointment as administrative members as reflected in the amended Section 6(2), as arbitrary and unsustainable, and (7) to quash the newly added Section 12(2) of the Administrative Tribunals Act, 1985 authorising the appropriate Government to designate one or more members to be the Vice Chairman for exercise of financial and administrative powers as impinging upon the independence of judiciary.

2. Writ Petition (C) No. 539 of 2007 is filed by a judicial member of Maharashtra Administrative Tribunal and he prays to set aside the decision of the respondents requiring Members of the Administrative Tribunal appointed before the coming into force of Administrative Tribunals (Amendment) Act, 2006 to seek fresh appointment in accordance with the selection procedure laid down for such appointments as being arbitrary and violative of Articles 14 and 16 of the Constitution. He also prays to declare that newly introduced Section 10A, so far as it relates to consideration of members of the Administrative Tribunal for reappointment by Selection Committee, is not applicable to those, who were duly appointed as members prior

to February 19, 2007. Another prayer made by him is to direct the respondents to restore his continuance as Member of Maharashtra Administrative Tribunal till he attains the age of superannuation of 65 years and to direct the respondents to accord all conditions of service, as applicable to the Judges of the High Court, to him.

3. Article 323A of the Constitution, stipulates that Parliament may by law, provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and the conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation owned or controlled by the Government. The establishment of Administrative Tribunals under the aforesaid provisions of the Constitution had become necessary since the large number of cases relating to service matters were pending before the various courts. It was expected that the setting up of such Administrative Tribunals to deal exclusively with service matters would go a long way in not only reducing the burden of various courts and thereby giving them more time to deal with other cases expeditiously but would also provide to the persons coming under the jurisdiction of Administrative Tribunals, speedy relief in respect of their grievances. Therefore, a Bill was introduced in the Parliament for setting up the Central Administrative Tribunal. The Bill sought to give effect to Article 323A by providing for the establishment of an Administrative Tribunal for the Union and a separate Administrative Tribunal for a State or a joint Administrative Tribunal for two or more States. The Bill inter alia provided for – (a) the jurisdiction, powers and authority to be exercised by each Tribunal, (b) the procedure to be followed by the State Tribunals, (c) exclusion of the jurisdiction of all courts, except that of the Supreme Court under Article 136 of the Constitution relating to service matters, and (d) the transfer to each Administrative Tribunal of any suit or

other proceedings pending before any court or other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal the causes of action on which such suits or proceedings were based had arisen after such establishment.

4. The Parliament, thereafter enacted The Administrative Tribunals Act, 1985. It received the assent of the President on February 27, 1985.

5. The Central Administrative Tribunal with five Benches was established on November 1, 1985 in pursuance of the provisions of the Administrative Tribunals Act, 1985. Prior to its establishment, writ petitions were filed in various High Courts as well as in the Supreme Court challenging the constitutional validity of Article 323A of the Constitution and the provisions of the Administrative Tribunals Act. The main contention in the writ petitions was that the writ jurisdiction of the Supreme Court under Article 32 of the Constitution as well as that of the High Courts under Article 226 of the Constitution could not have been taken away even by an amendment of the Constitution. Although the Supreme Court, by an interim order stayed the transfer of writ petitions filed in the Supreme Court under Article 32 of the Constitution to the Central Administrative Tribunal, it did not stay transfer of writ petitions under Article 226 of the Constitution subject to the condition that the Government would make certain amendments in the Act. One of the amendments suggested by the Supreme Court was that each case in the Tribunal must be heard by a Bench consisting of one judicial member and one non-judicial member and the appointment of judicial members should be done in consultation with the Chief Justice of India. An undertaking was given to the Supreme Court that a Bill to make suitable amendments in the Act would be brought before the Parliament as early as possible. The Central Administrative Tribunal had also started functioning in Benches in accordance with the above directions of the Supreme Court. As the writ petitions referred to above were

to come up for hearing in January, 1986, the President promulgated the Administrative Tribunals (Amendment) Ordinance, 1986 on January 22, 1986 so as to give effect to the assurance given to the Supreme Court and to make some other amendments found necessary in the administration of the Act. The Ordinance inter alia provided for the following matters, namely: -

(a) The concept of Judicial Member and Administrative Member was introduced in the Act. The Bench of Administrative Tribunal was to consist of one Judicial Member and one Administrative Member instead of three members Bench to be presided over by the Chairman or by the Vice Chairman. It was also provided that the appointment of a Judicial Member would be made after consultation with the Chief Justice of India.

(b) The jurisdiction of the Supreme Court in service matters under Article 32 of the Constitution was preserved. The Principal Act had intended to confer this jurisdiction also on the Tribunals.

(c) A provision was included to designate, with the concurrence of any State Government, all or any of the members of the Bench or Benches of the State Administrative Tribunal established for that State as Members of the Bench or Benches of the Central Administrative Tribunal in respect of that State.

(d) The jurisdiction of the Tribunal was also extended to persons, who were governed by the provisions of the Industrial Disputes Act, 1947 without affecting the rights of such persons under the Act.

Subsequent to the promulgation of the Ordinance, few doubts were expressed in respect of some of the provisions of the Act and the Ordinance. It was, therefore, proposed to include in the

Bill a few clarificatory amendments, to make certain provisions included in the Ordinance retrospective from the date of establishment of the Central Administrative Tribunal and to validate certain actions taken by the said Tribunal. The amendments included in the Bill were explained in the memorandum attached to the Bill. Accordingly, the Act of 1985 was amended by Act 19 of 1986 which was deemed to have come into force on January 22, 1986. By the amendment in the Act of 1985 it was proposed (1) to exclude from the jurisdiction of an Administrative Tribunal the powers to adjudicate disputes with respect to officers and employees of the subordinate courts and to make a provision for transfer of cases pending in the Administrative Tribunals to the Courts concerned; (2) that the appointment of the Chairman, Vice-Chairman and other Members of the Administrative Tribunals would be made in consultation with the Chief Justice of India. The Act, before its amendment, provided for consultation with the Chief Justice of India only in respect of Judicial Members; (3) that the Chairman, Vice-Chairman and other Members of the Administrative Tribunals would be eligible for re-appointment for a second term of office; (4) that the Central Government and the appropriate Government should be empowered to frame rules relating to salary, allowances and conditions of service of the Chairman and other Members of the Tribunals and their officers, etc.

6. It may be mentioned that a writ petition under Article 32 of the Constitution was filed by a member of the Central Administrative Tribunal, contending that the decision in *S.P. Sampath Kumar vs. Union of India and others* [(1987) 1 SCC 124], equated the Central Administrative Tribunal with the High Court and, therefore, its Chairman should be equated with the Chief Justice of a High Court and the Vice-Chairman and Members must be equated with the sitting Judges of the High Court in all respects. It was also contended that while the Vice-Chairmen have been equated with sitting Judges of the High Courts, the Members have not been so equated in their pay and other conditions of service and that a distinction was made

in the conditions of service, particularly, the pay and age of superannuation between the Vice-Chairmen and the Members, which was arbitrary, as a result of which the Members also should be given the same pay as that of the Vice-Chairmen and their age of superannuation should also be the same, i.e., 65 years as that of the Vice-Chairmen. On interpretation of Article 323A of the Constitution, this Court took the view that Administrative Tribunals constituted thereunder are distinct from the High Courts and dismissed the writ petition.

7. The Administrative Tribunals Act, 1985 came to be amended by the Administrative Tribunals (Amendment) Act, 2006. By the said amendment the post of Vice-Chairman in the Administrative Tribunal is abolished. A new provision, i.e., Section 6(2) is introduced which modifies the qualifications for appointment as Administrative Member in the Tribunal. Section 10A is inserted in the main Act, which provides that the conditions of services of the Judges of the High Court would be applicable only to the Members appointed after February 19, 2007. The newly inserted Section 10A restricts the total term of the Members of the Administrative Tribunals to ten years though by the said amendment the age of superannuation for a Members is raised from 62 to 65 years. Further, Section 10A postulates consideration of a case of a Member for re-appointment by Selection Committee after February 19, 2007. Section 12(2) of the Administrative Tribunals Act, 1985 is amended and power is conferred on the appropriate Government to designate a Vice-Chairman for the purpose of performing certain duties and functions of the Chairman.

8. The case of the petitioner is that the post of Vice-Chairman was in existence in the Administrative Tribunals since its inception which enabled the Judges of various High Courts to opt for the Central Administrative Tribunal and provided an opportunity, in the nature of promotion to the Members of the Administrative Tribunals to the post of Vice-Chairman. According to the petitioner, the abolition of the said post now

would create anomalous situation in the structure as well as administration of the Tribunals, if any High Court Judge is to be appointed only as a Member and, therefore, the abolition of the post of the Vice-Chairman is unconstitutional. The petitioners have mentioned that the newly introduced Section 6(2) of the Administrative Tribunals Act, 1985 modifies the qualifications for appointment as Administrative Member in the Tribunal in such a manner that except the IAS officers no other civil servant would ever become eligible for such appointment and as zone of consideration for appointment of Administrative Members has been confined to only IAS officers by colourable exercise of power, the said provision should be regarded as unconstitutional. What is asserted by the petitioner is that Section 10A does not extend the benefit of the conditions of service applicable to the Judges of the High Court, to all the Members of the Tribunals appointed prior to the appointed date, which is February 19, 2007, but confines the same to the Members, who would be appointed in future, i.e., after February 19, 2007 as Members of the Tribunals and as the Members appointed before February 19, 2007 would also be discharging the same duties and responsibilities, the provision stipulating that the conditions of service of the Judges of the High Court would be applicable only to the Members to be appointed after February 19, 2007 has no rational basis or nexus with any defined objective and, therefore, should be declared to be ultra vires. It is contended that Section 10A restricting the total term of the Members of the Administrative Tribunals to ten years is arbitrary because the said provision has no objective nor any rational basis nor any nexus with defined objective of the Act. According to the petitioner a number of Judicial Members in the Tribunals have been appointed from the Bar at the age of 45 years or so, but now their tenure is sought to be curtailed only to ten years, which would discourage the members of the Bar from joining the Tribunals as a Member. What is claimed is that the Judicial Members appointed from the Bar since inception, have played a pivotal role in the judicial administration of the Tribunals and, therefore, the newly inserted

Section 10A restricting the total term of the Members of the Administrative Tribunals to ten years should be struck down as arbitrary, unconstitutional and legally not sustainable.

9. The grievance by the petitioner in writ petition No. 539 of 2007 is that the decision of the respondents to subject a Member to a fresh selection procedure is arbitrary and violative of Articles 14 and 16 of the Constitution because, according to him, the provision requiring consideration of his case for re-appointment as Member of the Administrative Tribunal by Selection Committee should not have been made applicable to those, who were duly appointed as Members prior to February 19, 2007. The petitioner also claims that introduction of Section 12(2) in the Administrative Tribunals Act, 1985, which empowers the State Government to designate a Member as a Vice-Chairman for performing financial and administrative powers destroys the judicial independence of the Tribunals and as uncontrolled, unguided and unregulated power has been conferred on the Government to nominate a Member of the Tribunal as Vice-Chairman for performing those functions, the said provision should also be struck down. Under these circumstances the petitioners have filed above numbered petitions and claimed reliefs to which reference is made earlier.

10. On service of notice, counter affidavit has been filed on behalf of the respondents by Ms. Manju Pandey, Under Secretary in the Ministry of Personnel, Government of India. In the counter affidavit it is stated that the Administrative Tribunals (Amendment) Act, 2006 was intended to achieve the following objects: -

(i) To abolish the post of Vice-Chairman in the Tribunals as it was creating an avoidable three tier institution and resulting in anomalies in qualifications, age of retirement, service conditions, etc. The Act was passed so that all the Members of the Central Administrative Tribunal can be elevated to the same status as of a High Court

Judge and, therefore, the service conditions of the Members of the Tribunals were upgraded to that of a Judge of the High Court, i.e., the same as was of a Vice-Chairman under the unamended Act.

(ii) Only for discharging certain administrative functions, some of the Members in different Benches are to be designated as Vice-Chairmen, but the said designation is not to confer any special benefit to the Member so designated.

(iii) Since the age of retirement of a Government servant was raised from 58 years to 60 years, a retired Government servant had a tenure of only two years as a Member of the Tribunal and he was not able to contribute much to the disposal of the cases. Therefore, it was felt that every member of the Tribunal should have tenure of five years. Though it was not mentioned in the Statement of Objects and Reasons, it was also understood that since retired High Court Judges would be considered for appointment as Members of the Central Administrative Tribunal, the age of retirement should be increased to 65 years and correspondingly the age of retirement of the Chairman should be increased to 68 years so that the Chairman of the Tribunal could have a full term of five years.

(iv) The post of Vice-Chairman under the Amended Act is only an executive designation for discharging administrative powers and though the Government has been given the power to nominate one of the members as Vice-Chairman of the Tribunal, said designation would obviously be made with the concurrence of the Chairman of the Tribunal.

After emphasizing the intended objects sought to be achieved by the Amending Act, it is stated in the reply that the post of

Vice-Chairman of the Tribunal resulted in three different levels of functionaries in the Tribunal and, therefore, the Government of India took a policy decision that it would be beneficial and in the interest of uniformity of service that the hierarchy be reduced to just two posts, i.e., the Chairman and the Members of the Tribunal, which cannot be said to be either discriminatory or arbitrary or illegal. It is further mentioned in the counter affidavit that Section 8 of the unamended Act provided that the maximum tenure of the Chairman, Vice-Chairmen or a member of the Administrative Tribunal would be ten years subject to the age of retirement, which was 65 years in the case of Chairman or Vice-Chairman and 62 years in the case of any other Member and it is not correct to say that Section 10A inserted by the Amending Act, for the first time restricts the term of the Members of the Tribunal to ten years. It is explained in the counter affidavit that the reason for raising the retirement age from 62 to 65 years was because the retirement age of Government servants had been increased from 58 years to 60 years and a retired Government servant had a tenure of only two years as a Member of the Tribunal as a result of which he was not able to contribute much while being Member of the Tribunal. As per the counter affidavit the qualifications required for being selected as Administrative Member were the same as required for being chosen as Vice-Chairman of the Tribunal in the pre-amended Act and as no change by the amendment is effected so far as selection of a Member is concerned, the new provision should not be regarded as unconstitutional. What is asserted in the counter affidavit is that as per Section 12 of the Amended Act, the Chairman of the Tribunal would have all financial and administrative powers over the Benches, but the Vice-Chairman can be designated by the Central Government, obviously with concurrence of the Chairman, and a Member so designated would discharge such functions of the Chairman as the Chairman may direct and, therefore, it is wrong to contend that by introduction of Section 12(2) of the Act, the independence of judiciary and independence of Tribunal is sought to be curtailed by the Executive. It is explained in the

counter affidavit that earlier the post of Vice-Chairman was not a promotional post for a Member of the Tribunal and the qualifications of the Vice-Chairman were different from a Member of the Tribunal, but, by amendment the qualifications of Members of the Tribunal have been raised to that of the Vice-Chairman and this change in qualifications neither affects the status of a retired High Court Judge nor confers arbitrary benefits on the non-Judicial Members and, therefore, the said provision is perfectly legal. It is further pointed out in the counter affidavit that except the change in the nomenclature, a retired High Court Judge would get exactly the same facilities, if he is appointed today as Member of the Tribunal instead of designating him as Vice-Chairman of the Tribunal under the unamended Act and, therefore, it is wrong to contend that the amendments are violative of the provisions of the Constitution. It is explained in the reply that in the parent Act also the Members were eligible for re-appointment for a second term of five years and not further whereas in the Amended Act, appointment of a Member is for a period of five years extendable by one more term of five years provided he has not attained the age of 65 years, and this provision does not infringe any of the rights of the Members of a Tribunal, who seek extension for a second term. It is stated in the counter that the qualifications for appointment as an Administrative Member of the Tribunal, prior to its amendment were on the lower side and a need was felt that persons, who were appointed as Administrative Members, should have sufficient experience of high posts so as to enable them to understand the complexities of service jurisprudence and, therefore, certain additional qualifications have been prescribed, which cannot be termed as affecting the independence of the Tribunals. What is stated in the counter affidavit is that as a matter of policy it is now provided that all officers, who are in the pay-scale of Secretary or Additional Secretary, would be eligible for appointment and the Selection Committee would invariably choose the most eligible person for the said post. It is pointed out that the Amended Act substantially changes the qualifications for

appointment as a Member of the Tribunal and now the post of a Member of the Tribunal is equivalent to the post of the Vice-Chairman as it existed prior to the amendment and, therefore, in terms of status and service conditions the Members appointed after February 19, 2007 have been granted the status available to a Vice-Chairman before the amendment. What is stressed is that though the present Members and Members to be appointed in future would discharge similar functions, there is a marked distinction between the eligibility criteria and, therefore, it is wrong to contend that the two form one class and the provisions are arbitrary.

11. Similarly, on service of notice in Writ Petition (C) No. 539 of 2007, affidavit in reply has been filed on behalf of respondent Nos. 1 and 2 by Ms. Manju Pandey, Director in the Ministry of Personnel, Government of India. In the said petition affidavit in reply on behalf of Government of Maharashtra is filed by Mr. Vijay Dattatraya Shinde, Under Secretary, General Administration Deptt., State of Maharashtra. It may be mentioned that in both the above referred to two replies it is stated that a member appointed prior to February 19, 2007 and seeking extension for second term has to fulfill qualifications prescribed by the Amended Act, which cannot be termed as arbitrary or unconstitutional.

12. This Court has heard the learned counsel for the parties at length and in great detail.

13. The contention that the abolition of the post of Vice-Chairman, which was in existence since inception of the Administrative Tribunals, is unconstitutional because it would create anomalous situation in the structure as well as administration of the Tribunals if any High Court Judge is appointed as Member of the Tribunal, cannot be accepted. As explained in the reply affidavit the post of Vice-Chairman in the Tribunal had created an avoidable three tier institution and resulted in anomalies in qualifications, age of retirement,

service conditions etc. It is worth noticing that Members of the Tribunal had claimed equality with the Judges of the High Court or even the Vice-chairman of the Tribunal, in the matter of pay and superannuation. That claim was rejected by this Court in *M.B. Majumdar v. Union of India* [(1990) 4 SCC 501] with an observation that it is for the Parliament to enact a law for equating Members of the Tribunal with Judges of High Court for the purposes of pay and superannuation. The Parliament, in exercise of powers under Article 323A of the Constitution, has amended the Administrative Tribunals Act, 1985 and equated its Members with Judges of High Court for the purposes of pay and superannuation. The Parliament, by enacting a law, has right to change the conditions of service of Members of the Administrative Tribunals. While upgrading the conditions of service of the Members, the conditions of service of a Judicial Member are not changed to his detriment. By the amending Act all the Members of the Central Administrative Tribunal have been elevated to the status of a High Court Judge. The service conditions of the Members of the Tribunal have been upgraded to that of a High Court Judge, which cannot be regarded as illegal or unconstitutional. The qualifications of the Vice-chairman provided in Section 6(2)(a), 6(2)(b) and 6(2)(bb) in the unamended Act were also to a large extent qualifications prescribed for appointment of a person as an Administrative Member. The only addition made by the Amending Act is that now the Secretary to the Government of India, in the Department of Legal Affairs or the Legislative Department including Member-Secretary, Law Commission of India or a person who has held a post of Additional Secretary to the Government of India in the Department of Legal Affairs and Legislative Department at least for a period of five years, are made eligible for appointment as a Judicial Member. It is to be noted that though under the unamended Act, it was not specifically provided that person who held the post of a Secretary to the Government of India in the Department of Legal Affairs or the Legislative Department including Member-Secretary, Law Commission of India for at least two years or persons who held

post of Additional Secretary to the Government of India in the Department of Legal Affairs and Legislative Department at least for a period of five years, was eligible to be appointed as an Administrative Member, but he was eligible to be appointed as Administrative Member in view of the qualifications which were laid down for a person to be appointed as Administrative Member. However, by the Amendment, such a person is declared to be eligible for being appointed as Judicial Member having regard to his experience and opportunity to deal with legal issues in his respective department. Section 6(3) and 6(3)(a) of the earlier Act provided a much lower qualification for a Member of the Tribunal. The amended qualifications for a Member of the Tribunal are nearly the same as Vice-Chairman of the Tribunal, which clearly reflects the intention of the Government to upgrade the post of an Administrative Member. In such circumstances the need for having a Vice-Chairman was obviated and the Government, therefore, abolished the post of Vice-Chairman by the impugned enactment. By abolition of the post of the Vice-Chairman no anomalous situation is sought to be introduced in the structure as well as functioning and administration of the Tribunals. A retired High Court Judge would be eligible for appointment as Member of the Tribunal and on such appointment would be eligible to all the facilities as a Judge of the High Court. The Chairman of the Tribunal is normally a retired Chief Justice of the High Court and very rarely a retired Judge is appointed as Chairman of the Tribunal. In any event the Chairman would be senior to a retired Judge, who is appointed as a Member of the Tribunal. Therefore, this Court finds that no anomaly, as contended by the petitioners, would take place at all on the abolition of the post of Vice-Chairman. The petitioner could not establish before the Court that by upgrading the status of the Administrative Member of the Tribunal to that of a High Court Judge a particular provision of the Constitution is infringed. The plea that abolition of post of Vice-Chairman will discourage a sitting or retired High Court Judge from joining the Tribunal cannot be appreciated. The

composition of the Tribunal, after amendment of the Act, is such that there would be a Vice-Chairman if required as under Section 12, a Judicial Member and another member to be appointed from civil services. A High Court Judge, who opts for the post of judicial Member in the Tribunal, would not be lowering his status after the amendment because all the service conditions applicable to him as a High Court Judge have been saved. Therefore, the first contention that abolition of the post of Vice-Chairman except for the purposes of Section 12 of the Act would create anomalous situation in the structure as well as administration of the Tribunal, if any High Court Judge is appointed as a Member has no substance and is hereby rejected.

14. The argument that Section 6(2) of the Administrative Tribunals Act, 1985 modifies the qualifications for appointment as an Administrative Member of the Tribunal in such a manner that except the IAS officers no other civil servant would ever become eligible for such appointment is without any factual basis. The newly amended provision requires that a person shall not be qualified for appointment as an Administrative Member unless he has held for at least two years the post of Secretary to the Government of India or any other post in the Central or State Government and carrying the scale of pay, which is not less than that of a Secretary to the Government of India for at least two years or held post of Additional Secretary to the Government of India for at least five years or any other post under the Central or State Government carrying the scale of pay which is not less that that of an Additional Secretary to the Government at least for a period of five years. What is relevant to notice is the proviso to sub-Section (2) of Section 6 of the Act, which stipulates that the officers belonging to All India Services, who were or are on Central deputation to a lower post shall be deemed to have held the post of Secretary or Additional Secretary as the case may be, from the date such officers were granted proforma promotion or actual promotion whichever is earlier, to the level of Secretary or Additional

Secretary, as the case may be, and the period spent on Central deputation after such date shall count for qualifying service for the purposes of this clause. A reasonable reading of sub-Section (2) of Section 6 of the Act makes it very clear that by no stretch of imagination it can be said that the qualifications for appointment as Administrative Member of the Tribunal are laid down in such a manner that except an IAS officer no other civil servant would become eligible for such appointment. It is necessary to notice that officers belonging to All India services have been made eligible to be appointed as Administrative Member subject to the fulfillment of qualifications stipulated in Section 6 of the Act. It is wrong to contend that All India Services comprise only of the IAS officers. All India Services comprise IAS, IFS, IRS, etc. Merely because higher qualifications have been prescribed one need not conclude that except an IAS servant, no other civil servant would be eligible for appointment as a Member. The higher qualifications have been prescribed for the benefit and interest of uniformity of the two level cadres contemplated by the amended provisions. There is no manner of doubt that Government of India took a policy decision to prescribe higher qualification for better discharge of functions by the Members constituting the Tribunals and the said policy decision cannot be regarded as arbitrary or unreasonable. The qualifications of the Vice-Chairman were provided in Sections 6(2)(a), 6(2)(b), 6(2)(bb) and 6(2)(c) of the unamended Act. To a large extent, the qualifications laid down in the unamended Act are almost the same as are laid down in the amended provisions. Therefore, the contention that the amended provisions lay down qualifications for appointment as Administrative Member in such a manner that except IAS officers no other civil servant would ever become eligible for such appointment cannot be accepted.

15. The plea that Section 10A, which restricts the total term of the Member of the Administrative Tribunal to ten years should be regarded as unconstitutional has also no substance at all. The age of retirement of a Government servant has been raised

from 58 years to 60 years. Initially under the unamended provisions of the Act a retired Government servant had a tenure of only two years as a Member of the Tribunal and it was noticed that he was not able to contribute much while performing duties as a Member of the Tribunal. It was felt necessary that every Member of the Tribunal should have a tenure of five years. Therefore, the provisions relating to term of office incorporated in Section 8 of the Act were amended in the year 1987 and provision was made fixing term of office of Chairman, Vice-chairman and Members at five years period. This Court, in *S.P. Sampath Kumar vs. Union of India and others* [(1987) 1 SCC 124], expressed the view that the term of five years, for holding the posts mentioned in Section 8 of the Act was so short that it was neither convenient to the person selected for the job nor expedient to the scheme. This Court found that it became a disincentive for well qualified people as after five years, they had no scope to return to the place from where they had come. The constitutional validity of the provisions of Section 8, fixing term of office of Chairman, Vice-chairman and Members of the Tribunal at five years period was upheld by this Court in *Durgadas Purkyastha vs. Union of India & others* [(2002) 6 SCC 242]. Therefore, now provision is made for extension of term of office by a further period of five years. Thus the Government has decided to provide for extension in term of office by five years of a Member so that he can effectively contribute to speedy disposal of cases, on merits after gaining expertise in the service jurisprudence and having good grip over the subject. Under the unamended provisions of the Act also the term of Vice-Chairman and Member was extendable by a further period of five years and under the unamended provisions also a Member of the Bar, who was appointed as Judicial Member of the Tribunal, had maximum tenure of ten years. It is not the case of the petitioners that the unamended provisions of the Act, which prescribed total tenure of ten years for a Member of the Bar was/is unconstitutional. The provisions of Section 8 fixing maximum term of office of the chairman at sixty eight years and of a Member of the

Tribunal at 10 years, cannot be regarded as unconstitutional because concept of security of tenure does not apply to such appointments. Said provision cannot be assailed as arbitrary having effect of jeopardising security of tenure. An Advocate practising at the Bar is eligible to be appointed as Member of Tribunal subject to his fulfilling required qualifications. In all, such a Member would have term of office for ten years. On ceasing to hold office, a Member, subject to the other provisions of the Act, is eligible for appointment as the Chairman of the Tribunal or as the Chairman, Vice-chairman or other Member of any other Tribunal and is also eligible to appear, act or plead before any Tribunal except before the Tribunal of which he was Member. Under the circumstances, this Court fails to appreciate as to how the amended provisions restricting the total tenure of a Member of the Tribunal to ten years would be unconstitutional. The unamended Section 6 of the Administrative Tribunals Act, 1985 indicated that the Chairman, Vice-Chairman and other Members, held respective offices in one capacity or the other, had reasonably spent sufficient number of years of service in those posts before they were appointed in the Tribunal and, therefore, the concept of security of tenure of service in respect of those whose term was reduced was not regarded as appropriate. The impugned provision, therefore, cannot be assailed on the ground of arbitrariness having the effect of jeopardizing the security of tenure of Members of the Bar beyond reasonable limits. An option is reserved to the Government to re-appoint a Member on the expiry of the first term beyond five years. The outer limit for the Member is that he should be within the age of 65 years. Thus, it would not be in every case that the Government would put an end to the term of the office at the end of five years because such Chairman or Member is eligible for appointment for another period of five years after consideration of his case by a committee headed by a Judge of the Supreme Court to be nominated by the Chief Justice of India and two other Members, one of whom will be the Chairman of the Tribunal. Under the circumstances, it is difficult to conclude that the

provision restricting the total tenure of a Member to ten years is either arbitrary or illegal.

16. The plea that Section 10A of the Act requiring a sitting Member of the Tribunal, who seeks extension for second term to possess the qualifications laid down by the amended Act and get himself selected through Selection Committee is arbitrary, is devoid of merits. The selections to be made as an Administrative Member after February 19, 2007 are made applicable uniformly to those who would be appointed as Administrative Member after February 19, 2007. A Member, who was appointed prior to February 19, 2007, cannot claim that he has vested right of extension of his term for a further period of five years as per the qualifications laid down in the unamended Act and that qualifications prescribed by the amending Act should be ignored in his case while considering his case for extension of term for a further period of five years. Over a period of time the anomaly, if any, would get cleared itself and after a period of 4-5 years all the Members of the Tribunal would be equal in status and that every Member to be appointed will have to qualify himself as per the qualifications laid down in the Amended Act and will have to get himself selected through Selection Committee. The eligibility conditions of the Members appointed prior to and after February 19, 2007 are different. Since the Members of the Administrative Tribunals appointed prior to February 19, 2007 form a different class from those appointed or to be appointed after February 19, 2007. Article 14 of the Constitution would stand violated if they are treated differently in the matter of appointment or extension of service as a Member after February 19, 2007. Extension in service by a Member cannot be claimed as matter of right and would always be subject to fulfillment of qualifications and conditions stipulated in the Amended Act. As observed earlier, the petitioner in Writ Petition (C) 539 of 2007 could not have claimed, as a matter of right, automatic re-appointment as Judicial Member of the State Administrative Tribunal after his first term of five years was over. As is provided in the Amending

Act, under the old provisions also a Member of the Administrative Tribunal was eligible to be re-appointed, which was considered to be a fresh appointment for all the practical purposes. Under the provisions of unamended Act, at the end of five years, the Chairman, Vice-chairman and other Members were eligible for reappointment for another period of five years after consideration by a Committee headed by a Judge of the Supreme Court and two other members, one of whom was Chairman of the Tribunal. The petitioner can only be considered for appointment as a Member as per the fresh selection procedure provided by the Amended Act. The Selection Committee has to choose the best candidate available for the post. It is not the requirement of the law that the Selection Committee should inform the petitioner the reasons for not recommending his name. Merely, because there is a vacancy in the post of Member (Judicial) in the Maharashtra Administrative Tribunal, the petitioner cannot claim a right to be appointed to the said post irrespective of the provisions of the amended Act. The petitioner can be appointed only if Selection Committee recommends his appointment and the recommendation is accepted by the President, after the consultation with the Governor of the State. In view of this position of law emerging from the provisions of the unamended and amended Act, the Writ Petition (C) No. 539 of 2007 filed by the petitioner will have to be rejected.

17. The argument that Section 12(2) of the amended Act enabling the appropriate Government to nominate one of the Members of the Tribunal to perform financial and administrative functions destroys independence of the Tribunal which is a Judicial Forum and, therefore, the said provision should be regarded as unconstitutional, is devoid of merits. As is clear from the provisions of Section 12 of the Amended Act, the Chairman of the Tribunal has to exercise all financial and administrative powers over the Benches. Essentially the provision for delegating financial and administrative powers to one of the Members of a Bench is made, to lessen

administrative burden lying on the shoulders of the Chairman who normally sits at Delhi and for effective and better administration of the Benches of the Tribunal located in different and far flung States of the country. It is not difficult to visualise the problems, complications, obstacles, delay, etc., faced by the Chairman, while exercising financial and administrative powers over the Benches. The decentralisation of financial and administrative powers to tackle local needs and problems, in favour of a Member of Tribunal, for effective administration of the Tribunals, cannot be regarded as destroying the basic feature of the Constitution, namely independence of judiciary. The designation of the Vice-Chairman by the Central Government under Section 12(2) of the Act would obviously be in concurrence with the Chairman. Further, the Vice-Chairman would discharge such functions of the Chairman as the Chairman may so direct. It is absolutely, completely and entirely for the Chairman to recommend to the Government as to designate which Member of the Tribunal as Vice-Chairman. The said provision is an enabling provision, which is clear from the use of the expression “may” in the said provision. If the Chairman of the Tribunal feels that no Member should be designated as Vice-Chairman, the Government suo motu cannot and would not be in a position to make designation contemplated by the said provision. The designation as Vice-Chairman would not entitle the Member so designated to any special benefits in service conditions. The only purpose of the said provision is to help the Chairman in discharge of his administrative functions as the Benches of the Tribunal are situated in different parts of the country. Section 12(2) of the Act, which enables the appropriate Government to designate one or more Members as Vice-Chairman and entitles the Members so designated to exercise such powers and perform such functions of the Chairman as may be delegated to him by the Chairman by general or special order in writing cannot be regarded as destroying the principle independence of judiciary or of the Administrative Tribunals. This Court fails to understand as to how the appropriate Government would be

able to destroy the independence of Tribunals by designating one or more Members to be the Vice-Chairman for the purposes of performing the functions of the Chairman to be delegated to him by the Chairman. The jurisdiction, powers and authority of the Central Administrative Tribunal are defined in the Act and, more particularly, in Sections 14, 15, 16, 17 and 18 of the Act. The petitioners have failed to demonstrate that by authorizing appropriate Government to designate one or more Members to be the Vice-Chairman for the purpose of performing financial and administrative powers of the Chairman, the independence of the Tribunals secured by the above referred to provisions is in any manner eroded. The challenge to the constitutional validity of Section 12(2) of the Act to say the least is misconceived and without any basis and, therefore, must fail.

18. For the reasons stated in the Judgment, this Court does not find any merits in any of the abovementioned writ petitions and they are liable to be dismissed. Accordingly, both the writ petitions fail and are dismissed. There shall be no order as to costs.

DALVEER BHANDARI, J. 1. I have had the benefit of going through the judgment of my Brother Hon'ble Mr. Justice J.M. Panchal. Though Hon'ble Mr. Justice K.G. Balakrishnan, Chief Justice of India has agreed with his decision, however, I express my inability to agree with him, therefore, I am writing a separate judgment.

2. Writ Petition No. 261 of 2007 under Article 32 has been filed by a practicing Advocate and the President of the Central Administrative Tribunal, Principal Bench, Bar Association, New Delhi. The connected Writ Petition No. 539 of 2007 under Article 32 has been filed by a Member (Judicial) in the Maharashtra Administrative Tribunal, Maharashtra. Most of the issues involved in both the petitions are identical, therefore, both these petitions are being disposed of by this common judgment.

3. The petitioners are aggrieved by certain amendments carried out in the Administrative Tribunal Act, 1985 (for short, 'the Act').

4. The petitioners are particularly aggrieved by the abolition of the post of Vice-Chairman in the Central Administrative Tribunal by the Administrative Tribunal (Amendment) Act 2006 (for short, 'Amendment Act') which came into force by Act No.1/2007 dated 19.2.2007. According to the petitioners, the said Amendment Act is constitutionally and legally untenable and unsustainable because no reason for such abolition has been spelt out by the respondents at any point of time while introducing the said Amendment Bill.

5. The petitioners are also aggrieved by the newly inserted Section 10A of the Act which creates a hostile discrimination in the matter of conditions of service between the members of the Tribunal appointed before and after 19.2.2007 inasmuch as "conditions of service" of a High Court Judge have been granted to members appointed after 19.2.2007 while the same have been denied to other members appointed before 19.2.2007.

6. According to the petitioners, the newly inserted section 10A is discriminatory and arbitrary inasmuch as, on the one hand, vide section 8(2) of the Amendment Act, the age of retirement for members has been increased from 62 years to 65 years and, on the other hand, by the newly inserted Section 10A, the total tenure of members of the Administrative Tribunals has been restricted to ten years (two terms), in other words, compelling them to retire at the age of fifty five years is wholly irrational and discriminatory and has been designed to discourage promising and otherwise deserving, competent and successful members of the Bar from joining the Tribunal. The age of appointment as a judicial member of the Tribunal is 45 years and any member who is appointed at that age necessarily has to retire at the age of 50 or 55 years, whereas other members retire at the age of 65 years. Insertion of section 10A would seriously discourage, deter and dissuade deserving

members of the Bar from joining the Tribunal because it would totally frustrate their career planning. The member after demitting the office is debarred from practicing before any Bench of the Tribunal.

7. The petitioners also submitted that the judicial members appointed from the Bar since the inception of the Tribunal have played a pivotal role in the judicial functioning of the Tribunal. They have been in fact the backbone of the Tribunal. Thus the present amendment would greatly affect the efficiency, efficacy and credibility of the Tribunal. No reason, rationale or logic has been spelt out as to why the ceiling of ten years has been imposed particularly when the age of superannuation has been increased from 62 years to 65 years for other members.

8. The petitioners submitted that the amended section 12(2) of the Act amounts to interference of executive in the affairs of the judiciary by which the power to designate one or more members as "Vice-Chairman" to exercise certain powers and perform certain functions of the Chairman in the outlying Benches of the Tribunal has been conferred upon the Government whereas, previously such powers were vested with the Chairman of the Tribunal.

9. The petitioners further submitted that the Amendment Act has abolished the post of "Vice-Chairman" in the Administrative Tribunals. The post of Vice-Chairman had been in existence in the Administrative Tribunal since its inception in 1985. The said post enabled the retired or retiring judges of various High Courts to join the Central Administrative Tribunal. Besides, it also provided an opportunity in the nature of promotion for the members of Administrative Tribunals. By abolition of the post of Vice-Chairman, the retired High Court judges would not find it attractive to join the Tribunal and, consequently, the judicial character of the Tribunal would suffer a serious setback.

10. It was also submitted that the newly introduced section

6(2) of the Administrative Tribunals Act, 1985 modifies the qualifications for appointment as Administrative Members in the Tribunal in such a manner that for all practical purposes, except for the officers of the Indian Administrative Service (for short, 'IAS'), hardly any other civil servant would ever become eligible for such appointment. Earlier, even the Income Tax, Postal and Customs Officers etc. used to become members of the Tribunal. Now, after the amendment, they would hardly have any chance of becoming members of the Tribunal. In other words, by the 2006 Amendment, the zone of consideration for appointment of Administrative Members has been essentially confined only to IAS officers by a colourable exercise of power by depriving all other categories of civil servants for such appointment. The petitioners have not placed sufficient material on record to decide this controversy, therefore, I refrain from commenting on this grievance of the petitioners. However, I direct the respondents to look into the grievance of members of other services and if any merit is found in the grievance then take appropriate remedial steps so that members of other services may get proper representation.

11. The petitioners further submitted that by introducing section 12(2) in the Act, the power to designate a "Vice-Chairman" in the Benches for the purposes of certain duties and functions of the Chairman has been usurped by the government. Previously such powers were vested with the Chairman of the Tribunal. Such a provision has the potentiality of destroying the judicial independence of the Tribunal particularly when such uncontrolled, unguided and unregulated powers have now been given to the Government.

12. In order to properly comprehend the controversy involved in the case, relevant newly inserted sections 10A and 12(2) along with unamended section 12 are reproduced as under:-

Newly Inserted Section 10A of the Amended Act

"10A. *Saving terms and conditions of service of Vice-Chairman.* – The Chairman, Vice-Chairman and Members of a Tribunal appointed before the commencement of the Administrative Tribunals (Amendment) Act, 2006 shall continue to be governed by the provisions of the Act, and the rules made thereunder as if the Administrative Tribunals (Amendment) Act, 2006 had not come into force:

Provided that, however, such Chairman and the Members appointed before the coming into force of Administrative Tribunals (Amendment) Act, 2006, may on completion of their term or attainment of the age of sixty-five or sixty-two years, as the case may be, whichever is earlier may, if eligible in terms of section 8 as amended by the Administrative Tribunals (Amendment) Act, 2006 be considered for a fresh appointment in accordance with the selection procedure laid down for such appointments subject to the condition that the total term in office of the Chairman shall not exceed five years and that of the Members, ten years."

SECTION 12 (BEFORE AMENDMENT)	**SECTION 12 (2)** (AFTER AMENDMENT)
"12.Financial and administrative powers of the Chairman.- The Chairman shall exercise such financial and administrative powers over the Benches as may be vested in him under the rules made by the appropriate Government: Provided that the Chairman shall have authority to delegate such of his financial and administrative powers as he may think fit to the Vice-Chairman or any officer of the Tribunal, subject to the condition that the Vice-Chairman or such officer shall, while exercising such delegated powers, continue to act under the direction, control and supervision of the Chairman."	12. Financial and administrative powers of the Chairman.- (1) The Chairman shall exercise such financial and administrative powers over the Benches as may be vested in him under the rules made by the appropriate Government. (2)The appropriate Government may designate one or more Members to be the Vice-Chairman or, as the case may be, Vice-Chairman thereof and the Members so designated shall exercise such of the powers and perform such of the functions of the Chairman as may be delegated to him by the Chairman by a general or special order in writing.

13. In pursuance to the show cause notice issued by this Court, the respondents, through the Under Secretary in the Ministry of Personnel, Government of India, have filed counter affidavit incorporating therein that abolishing the post of Vice-Chairman in the Tribunal was intended as it was creating an avoidable three tier-system resulting in anomalies in qualifications, age of retirement, service conditions etc. It is further incorporated in the counter affidavit that the abolition of the post of Vice-Chairman and upgrading the post of members or increase of retirement age do not in any manner impinge upon the working of the Tribunal.

14. It is also incorporated in the counter affidavit that the post of Vice-Chairman under the amended Act is only an executive designation for discharging the administrative powers. Though the Government has been given the power to nominate one of the members as Vice-Chairman of the Tribunal, it is obvious that the said designation of a member as Vice-Chairman would obviously be made with the

concurrence of the Chairman of the Tribunal.

15. In the counter affidavit, it is also stated that a retired High Court judge would be eligible for appointment as member of the Tribunal. Usually a retired Chief Justice of the High Court is appointed as the Chairman of the Tribunal and very rarely, a retired judge may also be appointed as the Chairman of the Tribunal. In any event, the Chairman would be a senior retired judge who is appointed as a member of the Tribunal. Hence, there is no anomaly.

16. In the counter affidavit, it is specifically admitted that there is some substance in the contention of the petitioners that members appointed prior to 19.2.2007 would be at disadvantage in terms of their service conditions inasmuch as they would not get the same benefits as the High Court judge. However, this is a temporary anomaly. Over a period of time, the same anomaly would correct itself and after a period of 4-5 years, all the members of the Tribunal would be treated in an equal manner.

17. In the counter affidavit it is denied that ceiling on the terms has the effect of stopping members of the Bar from being appointed for the post of Vice-Chairman. In the counter affidavit it is also incorporated that the tenure of ten years was prescribed way back in the year 1985.

18. The petitioners have also filed the rejoinder affidavit. It is reiterated that under the un-amended Act, members of the Tribunal were eligible for multiple terms and it was not restricted to two terms. In fact, a number of members were given multiple extensions under the unamended Act. Thus the restriction of ten years has been imposed for the first time under the amended Act.

19. In the rejoinder affidavit, it is reiterated that the discriminatory treatment being given to the members of Administrative Tribunal appointed prior to 19.2.2007 is

untenable and unsustainable. Law does not allow temporary discrimination even for a few years. It is clearly violative of Articles 14 and 16 of the Constitution.

20. In the rejoinder, it is further asserted that under the unamended Act the High Court Judges were being appointed as Vice-Chairman and, therefore, they enjoyed higher status than that of the members. Thus, when a Bench was being constituted consisting of a High Court Judge as Vice-Chairman and other members, the High Court Judge used to preside over the Bench as the Vice-Chairman. Now under the Amended Act the posts of Vice-Chairman having been abolished, the High Court Judges are also appointed as Member (Judicial) and the seniority among members has to be on the basis of date of appointment as a member. In such an eventuality, many High Court Judges who would be appointed as Member (Judicial) could be lower in the seniority creating an anomalous situation for the constitution of Benches in the Tribunal. Besides, if for any reason a retired High Court Judge presides over the Bench as the Vice-Chairman, even though he may have joined as a member much later, it would create a lot of heart-burning amongst all previously appointed members as the class of members has now been made one.

21. It is also incorporated in the rejoinder that the amendment has placed the members of the Bar in a totally disadvantageous position as previously the members of the Bar were being selected as Member (Judicial), but with the amendment now the retiring and retired High Court Judges are competing for the post of Member (Judicial) thereby the members of the Bar are totally ignored. Theoretically, the members of the Bar are eligible for appointment as Member (Judicial), practically competent and otherwise deserving lawyers have been eliminated from the scene. The Tribunal which is discharging judicial powers which were earlier exercised by the High Courts should be predominantly manned by the members of the Bar and Judiciary but after the

amendment till date only two members have been appointed from the Bar in so many years. This is the direct and inevitable impact of the amendment. This goes against the letter and spirit of the law declared in the case of *S.P. Sampat Kumar v. Union of India & Others* (1987) 1 SCC 124.

22. The petitioners further submitted in the rejoinder that the designation of Vice-Chairman is still in existence under Amended Act also but the power of nomination for the said post in all additional Benches under the amended Act has been given to the appropriate Government which is not a healthy development and thus needs to be quashed.

23. The petitioners submitted that the effort of the Central Government to increase the age of retirement of the members of Tribunal from 62 to 65 years is undoubtedly a welcome step. However, by this effort every member of Tribunal will not have a tenure of 5 years as asserted by the respondents. The High Court Judges retire at the age of 62 years. Under the amended Act members of the Tribunal retire at the age of 65 years thereby effectively serving the Tribunal only for a maximum period of three years. The increase in the age of retirement will give a minimum tenure of 5 years to the Administrative Members but not to the retired High Court Judges who are appointed as Judicial Members. They would get maximum of three years only.

24. The petitioners also made grievance that as to why it became imperative to snatch the powers of the Chairman to delegate his financial and administrative powers to any Vice-Chairman/Member. In the rejoinder, it is submitted that the respondents have clearly admitted that the discriminatory treatment is being given to the members of the Administrative Tribunal appointed prior to 19.2.2007.

25. The respondents have nowhere denied that both the categories of members are not discharging the same duties, obligations and responsibilities, therefore, the conditions of

service for both of them are different. This is a clear discrimination and violation of Articles 14 & 16 of the Constitution of India. Thus, even on the basis of reply given by the respondents it is proved beyond any shadow of doubt that section 10A of the amended Act is clearly discriminatory and unsustainable.

26. The contention of the respondents that the 'temporary anomaly' would not make the provision unconstitutional is clearly wrong and is denied. Discrimination even for a temporary period of 4 to 5 years is also violative of Articles 14 and 16 of the Constitution of India. There is no law under which a temporary discrimination can be saved.

27. It is also stated that because of this discriminatory provision anomalous situation has already arisen in the Central Administrative Tribunal. The petitioners have given an example that under the unamended Act, only the Secretaries and the Additional Secretaries to the Government of India were eligible for appointment as Member (Administrative). Under the said unamended provisions, a number of former Secretaries to Government of India were appointed as Member (Administrative). They have been continuing as such till date and have acquired experience of a number of years. They are till now continuing under the old conditions of service. Now under the amended provisions, selection has already been held and a number of retired judges and officers at the level of the Additional Secretaries to Government of India have been selected and appointed as members under the new conditions of service. Thus, while retired Judges and Secretaries to the Government of India now working as members are not given the benefit of the 'conditions of service' of a High Court Judge but subsequently appointed retired Additional Secretaries to the Government of India now appointed as Member (Administrative) are given service conditions of a High Court Judge. The Administrative Members, though junior both while in the government service as well as an Administrative Member are

entitled to get service conditions of a High Court Judge.

28. The situation is becoming more and more acute with more and more newly selected Members (Administrative) joining the Tribunal. Similar situation is prevailing amongst Member (Judicial) also. While persons appointed as Member (Judicial) and senior to some newly appointed Member (Judicial) would not get the benefit of the service conditions of a High Court Judge and the later appointees would get service conditions of a High Court Judge.

29. The petitioners are aggrieved by the newly inserted section 10A of the Act to the extent it postulates different conditions of service for the members of the Central Administrative Tribunal on the basis of their dates of appointments under the amended and the unamended Rules as unconstitutional, arbitrary and legally unsustainable.

30. A Constitution Bench of this Court in *Sampath Kumar's* case (supra) has clearly laid down that the Central Administrative Tribunal has been created in substitution of the High Court. This Court in para 15 of the judgment observed as under:

> "……… As the pendency in the High Courts increased and soon became the pressing problem of backlog, the nation's attention came to be bestowed on this aspect. Ways and means to relieve the High Courts of the load began to engage the attention of the Government at the centre as also in the various States. As early as 1969, a Committee was set up by the Central Government under the chairmanship of Mr. Justice Shah of this Court to make recommendations suggesting ways and means for effective, expeditious and satisfactory disposal of matters relating to service disputes of Government servants as it was found that a sizable portion of pending litigations related to this category. The Committee recommended the setting up of an independent Tribunal to handle the pending cases before this Court and the High Courts. While this report was still engaging the attention of Government, the Administrative Reforms Commission also took note of the situation and recommended the setting up of Civil Services Tribunals to deal with appeals of Government servants against disciplinary action……."

31. The judicial work which is now being dealt with by the members of the Tribunal was earlier discharged by the judges of the High Court before the Tribunal was established. In most of the High Courts, a large number of cases had got piled up awaiting adjudication. The High Courts were taking years and in some cases decades in deciding these cases. The Union of India had an option either to suitably increase the strength of the High Courts or to create a separate Tribunal for expeditious disposal of these cases. The Union of India decided to create a separate Tribunal. Once the Tribunal is discharging the functions of the judiciary, then both judges and members of the Bar have to be an integral part of the Tribunal. The functioning of the Tribunal may become difficult in case Members of Judiciary and Bar have no incentive to join the Tribunal or they are deliberately discouraged and dissuaded from joining the Tribunal because of newly inserted amendments in the Act. The non-descript and otherwise non-deserving candidates would always be available but in order to have public trust and confidence in the functioning of the Tribunal, it is absolutely imperative that the respondents must endeavour to attract really deserving, competent and promising members of the Bar with high caliber and integrity to join the Tribunal. In order to attract such talent, the service conditions have to be improved and made attractive because these members are discharging the functions of the High Court.

32. In *Sampath Kumar's* case (supra), the Constitution Bench has dealt with this aspect of the matter in some detail. This Court in para 21 observed as under:

> "……So far as the Chairman is concerned, we are of the

view that ordinarily a retiring or retired Chief Justice of a High Court or when such a person is not available, a Senior Judge of proved ability either in office or retired should be appointed. That office should for all practical purposes be equated with the office of Chief Justice of a High Court. We must immediately point out that we have no bias, in any manner, against members of the Service. Some of them do exhibit great candour, wisdom, capacity to deal with intricate problems with understanding, detachment and objectiveness but judicial discipline generated by experience and training in an adequate dose is, in our opinion, a necessary qualification for the post of Chairman….."

Similarly, other members also discharge the same judicial functions. In order to preserve public confidence, acceptability and trust, members of the Bar and Judiciary must be encouraged to man the Tribunal. Discouraging or killing the incentive of members of the Bar and Judiciary to accept the appointment of the Tribunal would have serious repercussions about the credibility, confidence, trust and acceptability of the Tribunal particularly when according to *Sampath Kumar's* case (supra), the High Court is being supplanted by the Administrative Tribunal. In a democratic country governed by the rule of law no institution discharging judicial functions can properly survive without public confidence, credibility, trust and acceptability.

33. The Constitution Bench in *Sampath Kumar's* case (supra) observed that what we really need is the judicial Tribunal. The judicial functions which, before setting up of the Central Administrative Tribunal, were discharged by the judges of the High Courts, would now be discharged by the members of the Tribunal, therefore, it is imperative that the judicial work of the Tribunal should be handled by talented and competent members who have legal background and judicial experience. Any amendment of the Statute which discourages the members

of the Bar and Judiciary from joining the Administrative Tribunal deserves to be discarded.

34. The Tribunal has the power of judicial review. It is now well settled by this Court in the case of *Minerva Mills Ltd. & Ors. v. Union of India & Ors.* (1980) 3 SCC 625 that judicial review is a basic and essential feature of the Constitution and no law passed by the Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away, the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State and every authority under the Constitution derives its power and authority from the Constitution and has to act within the limits of such powers.

35. In *Sampath Kumar's* case (supra) the court observed as under:

"3 ....The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of Government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the rule of law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged

by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government or laws and the rule of law would become a teasing illusion and a promise of unreality….."

36. Bhagwati, CJ in a concurring judgment in *Sampath Kumar's* case (supra) observed as under:

> "3. ……..The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanism or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the rule of law. Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court."

Justice Bhagwati, in the said judgment, effectively reminded us that the Administrative Tribunal is to carry out the functions of the High Court. In order to inspire confidence in the public mind it is essential that it should be manned by people who have judicial and/or legal background, approach and objectivity. This court in *Sampath Kumar (supra)* further observed as under:

> "5. We cannot afford to forget that it is the High Court which is being supplanted by the Administrative Tribunal and it must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. Of course, I must make it clear that when I say this, I do not wish to cast any reflection on the members of the Civil Services because fortunately we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience…"

37. Justice Bhagwati, in his judgment in *Sampath Kumar's* case has also cautioned that in service matters, the Government is always the main contesting or opposite party, therefore, it would not be conducive to judicial independence to leave unfettered and unrestricted discretion to the executive in the matter of appointments of Chairman, Vice-Chairman and Administrative Members. The court observed as under:

> "7. …. Now it may be noted that almost all cases in regard to service matters which come before the Administrative Tribunal would be against the Government or any of its officers and it would not at all be conducive to judicial independence to leave unfettered and unrestricted discretion in the executive to appoint the Chairman, Vice-Chairmen and administrative members; if a judicial member or an administrative member is looking forward to promotion as Vice-Chairman or Chairman, he would have to depend on the goodwill and favourable stance of the executive and that would be likely to affect the independence and impartiality of the members of the Tribunal. The same would be the position vis-à-vis promotion to the office of Chairman of the Administrative Tribunal. The administrative members would also be likely

to carry a sense of obligation to the executive for having been appointed members of the Administrative Tribunal and that would have a tendency to impair the independence and objectivity of the members of the Tribunal. There can be no doubt that the power of appointment and promotion vested in the executive can have prejudicial effect on the independence of the Chairman, Vice-Chairmen and members of the Administrative Tribunal, if such power is absolute and unfettered. If the members have to look to the executive for advancement, it may tend, directly or indirectly, to influence their decision-making process particularly since the Government would be a litigant in most of the cases coming before the Administrative Tribunal and it is the action of the Government which would be challenged in such cases…"

38. In order to inspire public confidence, it is imperative that the deserving persons with competence, objectivity, impartiality and integrity with judicial and/or legal background are appointed as members of the Tribunal.

39. Ranganath Misra, J. who wrote the main judgment of the Constitution Bench in *Sampath Kumar (supra)* observed as under:

"18. The High Courts have been functioning over a century and a quarter and until the Federal Court was established under the Government of India Act, 1935, used to be the highest courts within their respective jurisdiction subject to an appeal to the Privy Council in a limited category of cases. In this long period of about six scores of years, the High Courts have played their role effectively, efficiently as also satisfactorily. The litigant in this country has seasoned himself to look up to the High Court as the unfailing protector of his person, property and honour. The institution has served its purpose very well and the common man has thus come to repose great confidence therein. Disciplined, independent and trained Judges well-versed in law and working with all openness in an unattached and objective manner have ensured dispensation of justice over the years. Aggrieved people approach the Court— the social mechanism to act as the arbiter—not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the Court. It is, therefore, of paramount importance that the substitute institution—the Tribunal—must be a worthy successor of the High Court in all respects. That is exactly what this Court intended to convey when it spoke of an alternative mechanism in *Minerva Mills'* case."

40. In the later part of the judgment, while clarifying that this court has no bias against the members of service, the court observed as under:

"21. ….We must immediately point out that we have no bias, in any manner, against members of the Service. Some of them do exhibit great candour, wisdom, capacity to deal with intricate problems with understanding, detachment and objectiveness but judicial discipline generated by experience and training in an adequate dose is, in our opinion, a necessary qualification for the post of Chairman…"

41. While commenting on section 8, the court further observed as under:

"22. Section 8 of the Act prescribes the term of office and provides that the term for Chairman, Vice-Chairman or members shall be of five years from the date on which he enters upon his office or until he attains the age of 65 in the case of Chairman or Vice-Chairman and 62 in the case of member, whichever is earlier. The retiring age of 62 or 65 for the different categories is in accord with the pattern and fits into the scheme in comparable situations. We would, however, like to indicate that appointment for a term

A of five years may occasionally operate as a disincentive for well qualified people to accept the offer to join the Tribunal. There may be competent people belonging to younger age groups who would have more than five years to reach the prevailing age of retirement. The fact that such B people would be required to go out on completing the five year period but long before the superannuation age is reached is bound to operate as a deterrent…"

42. In *L. Chandra Kumar v. Union of India & Others* (1997) 3 SCC 261, the Court dealt with the origin of judicial review. C The origin of the power of judicial review of legislative action may well be traced to the classic enunciation of the principle by Chief Justice John Marshall of the US Supreme Court in *Marbury v. Madison.* (But the origins of the power of judicial review of legislative action have not been attributed to one D source alone). So when the framers of our Constitution set out their monumental task, they were well aware that the principle that courts possess the power to invalidate duly-enacted legislations had already acquired a history of nearly a century and a half.

E 43. In *R.K. Jain v. Union of India* (1993) 4 SCC 119 (para 8) the court observed as under:-

"…(T)he time is ripe for taking stock of the working of the various Tribunals set up in the country after the insertion F of Articles 323A and 323B in the Constitution. A sound justice delivery system is a sine qua non for the efficient governance of a country wedded to the rule of law. An independent and impartial justice delivery system in which the litigating public has faith and confidence alone can G deliver the goods…"

44. In *Bidi Supply Co. v. Union of India & Ors.* 1956 SCR 267, the Court observed as under:

"The heart and core of democracy lies in the judicial H

A process, and that means independent and fearless judges free from executive control brought up in judicial traditions and trained to judicial ways of working and thinking. The main bulwarks of liberty of freedom lie there and it is clear to me that uncontrolled powers of discrimination in matters B that seriously affect the lives and properties of people cannot be left to executive or quasi executive bodies even if they exercise quasi judicial functions because they are then invested with an authority that even Parliament does not possess. Under the Constitution, Acts of Parliament C are subject to judicial review particularly when they are said to infringe fundamental rights, therefore, if under the Constitution Parliament itself has not uncontrolled freedom, of action, it is evident that it cannot invest lesser authorities with that power."

D 45. In *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.* (1973) 4 SCC 225, Khanna, J. (at para 1529 at page 818) observed as under:

"…The power of judicial review is, however, confined not E merely to deciding whether in making the impugned laws the Central or State Legislatures have acted within the four corners of the legislative lists earmarked for them; *the courts also deal with the question as to whether the laws are made in conformity with and not in violation of the* F *other provisions of the Constitution.* ……..As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened… *Judicial review has* G *thus become an integral part of our constitutional system and a power has been vested in the High Courts and the Supreme Court to decide about the constitutional validity of provisions of statutes.* If the provisions of the statute are found to be violative of any article of the Constitution, which H is touchstone for the validity of all laws, the Supreme Court

and the High Courts are empowered to strike down the said provisions."

46. In *L. Chandra Kumar's* case (supra), the Court observed as under:

"81. If the power under Article 32 of the Constitution, which has been described as the "heart" and "soul" of the Constitution, can be additionally conferred upon "any other court", there is no reason why the same situation cannot subsist in respect of the jurisdiction conferred upon the High Courts under Article 226 of the Constitution. So long as the jurisdiction of the High Courts under Articles 226/227 and that of this Court under Article 32 is retained, there is no reason why the power to test the validity of legislations against the provisions of the Constitution cannot be conferred upon Administrative Tribunals created under the Act or upon Tribunals created under Article 323-B of the Constitution. It is to be remembered that, apart from the authorization that flows from Articles 323-A and 323-B, both Parliament and the State Legislatures possess legislative competence to effect changes in the original jurisdiction of the Supreme Court and the High Courts…"

47. The Report of the Arrears Committee (1989-90) popularly known as the Malimath Committee Report, in Chapter VIII of the second volume under the heading "Alternative Modes and Forums for Dispute Resolution" dealt with the functioning of the Tribunals in the following words:

"*Functioning of Tribunals*

8.63. Several tribunals are functioning in the country. *Not all of them, however, have inspired confidence in the public mind.* The reasons are not far to seek. *The foremost is the lack of competence, objectivity and judicial approach. The next is their constitution, the power and method of appointment of personnel thereto, the inferior status and the casual method of working. The last is their actual composition; men of caliber are not willing to be appointed as presiding officers in view of the uncertainty of tenure, unsatisfactory conditions of service, executive subordination in matters of administration and political interference in judicial functioning.* For these and other reasons, the quality of justice is stated to have suffered and the cause of expedition is not found to have been served by the establishment of such tribunals."

48. The Tribunals were established to inspire confidence in the public mind for providing speedy and quality justice to the litigants. The Tribunals were set up to reduce the increasing burden of the High Courts. The High Courts' judicial work was in fact entrusted to these Tribunals. The judicial work should be adjudicated by legally trained minds with judicial experience or at least by a legally trained mind. The public has faith and confidence in the judiciary and they approach the judiciary for just and fair decisions. Therefore, to maintain the trust and confidence in the judicial system, the government should ensure that the person adjudicating the disputes is a person having legal expertise, modicum of legal training and knowledge of law apart from an impeccable integrity and ability. The persons who have no legal expertise and modicum of legal training may find it difficult to deal with complicated and complex questions of law which at times even baffle the minds of well trained lawyers and judges. Therefore, dispensation of justice should be left primarily to the members of the Bar and the Judges who have by long judicial and legal training and experience have acquired understanding, objectivity and acumen. Unless we take utmost care in the matter of appointments in the Tribunal, our justice delivery system may not command credibility, confidence and the trust of the people of this country.

49. In all constitutional matters where amendments of certain legislations have been challenged, the approach of this

Court has always been to examine the constitutional scheme of every enactment of the State. It is clear that the Court had never tried to pick holes or searched for defects of drafting but has sustained the enactments if found fit on the anvil of truth and has struck down the enactments only whenever an enactment was found wholly unsustainable. The Courts have always been very conscious of the demarked functions of the three organs of the State. The Courts have also recognized the concept of checks and balances under the Constitution.

50. The Courts constitute an inbuilt mechanism within the framework of the Constitution for purposes of social audit and to ensure compliance of the Rule of Law. This Court seeks only to ensure that the majesty of this great institution may not be lowered and the functional utility of the constitutional edifice may not be rendered ineffective. This principle was articulated by this Court in the case of *M.L. Sachdev v. Union of India & Another* (1991) 1 SCC 605.

51. There are plethora of cases where challenges have been made to various enactments of the State constituting expert bodies/Tribunals on the ground that in such Tribunals the positions required to be occupied by the persons of judicial background are being filled in by those who are bureaucrats and others who are not having judicial expertise and objectivity. In such cases, it has been a ground of challenge that the bodies/Tribunals being judicial forums having adjudicatory powers on the questions of importance and legalistic in nature and in the background of the doctrine of separation of powers recognized by the Indian Constitution, the head of the judiciary should always be consulted for such appointments and the main substance behind such challenge has been that the persons who are appointed to such bodies should belong to the judiciary because those members have to discharge judicial functions.

52. In *Sampath Kumar's* case (supra), Bhagwati, C.J. relying on *Minerva Mills'* case declared that it was well settled

that judicial review was a basic and essential feature of the Constitution. If the power of judicial review is taken away, the Constitution would cease to be what it is. The court further declared that if a law made under Article 323-A(1) were to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an efficient alternative institutional mechanism or arrangement for judicial review, it would violate the basic structure and hence outside the constituent power of Parliament.

53. The Parliament was motivated to create new adjudicatory fora to provide new, inexpensive and fast-track adjudicatory systems and permitting them to function by tearing of the conventional shackles of strict rule of pleadings, strict rule of evidence, tardy trials, three/four-tier appeals, endless revisions and reviews - creating hurdles in fast flow of stream of justice. The Administrative Tribunals as established under Article 323-A and the Administrative Tribunals Act, 1985 are an alternative institutional mechanism or authority, designed to be not less effective than the High Court, consistently with the amended constitutional scheme but at the same time not to negate judicial review jurisdiction of the constitutional courts.

54. I am, therefore, clearly of the opinion that there is no anathema in the Tribunal exercising jurisdiction of High Court and in that sense being supplemental or additional to the High Court but, at the same time, it is our bounden duty to ensure that the Tribunal must inspire the same confidence and trust in the public mind. This can only be achieved by appointing the deserving candidates with legal background and judicial approach and objectivity.

55. I deem it appropriate to briefly discuss the theory of basic structure and separation of power in the Constitution to properly comprehend the controversy involved in this case.

EQUALITY AND BASIC STRUCTURE

56. Initially when the doctrine of basic structure was laid down there was no specific observation with respect to whether Article 14 forms part of basic structure or not. In fact the confusion was to such an extent as to whether fundamental rights as a whole form part of basic structure or not? It was in this light that *Khanna, J.,* had to clarify in his subsequent decision in *Indira Nehru Gandhi v. Raj Narain & Anr.* (1975) Supp. SCC 1 in the following words:-

> "…….What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution…..The above observations clearly militate against the contention that according to my judgment fundamental rights are not a part of the basic structure of the Constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution". **[Paras 251-252]**

Further, though not directly quoting Article 14 of the constitution Chandrachud, J. in the above mentioned case held that,

> "I consider it beyond the pale of reasonable controversy that if there be any unamendable features of the Constitution on the score that they form a part of the basic structure of the Constitution, they are that: (*i*) Indian sovereign democratic republic; (*ii*) Equality of status and opportunity shall be secured to all its citizens; (*iii*) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and that (*iv*) the nation will be governed by a Government of laws, not of men. These, in my opinion, are the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution." **[Para 664]**

57. Thus, from the above observations it is very clear that at no point of time there was the intention to exclude the mandate of equality from the basic structure. The *I.R. Coelho (dead) by Lrs. v. State of Tamil Nadu & Others* (2007) 2 SCC 1 rightly observed that in *Indira Gandhi's* case, Chandrachud, J. posits that equality embodied in Article 14 is part of the basic structure of the constitution and, therefore, cannot be abrogated by observing that the provisions impugned in that case are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our constitution **[Para 108]**

58. In the above case relying on the observations in the ***Minerva mills's case*** the question of Article 14 coming under the purview of Basic structure has been brought at rest. Since it has been a settled question *per* the judgment of ***I.R. Coelho*** that the arbitrariness of a legislation, Rules, Policies and amendment would be subject to the test of reasonableness, rule of law and broad principle of equality as per Article 14.

59. In *Ashoka Kumar Thakur & Ors. v. Union of India & Ors.* (2008) 6 SCC 1, Balakrishnan, CJ. observed that,

> "118. Equality is a multicolored concept incapable of a single definition as is also the fundamental right under Article 19(1)(*g*). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in

the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity."

SEPARATION OF POWERS

60. The Constitution has very carefully separated the powers of executive, judiciary and legislature and maintained a very fine balance.

61. Sikri, C.J. in *Kesavananda Bharati's* case (supra) stated that separation of powers between the legislature, executive and the judiciary is basic structure of the constitution. The learned judge further observed that,

"The above structure is built on the basic foundation i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed." (Para 293)

"The above foundation and the above basic features are easily discernible not only from the preamble but the whole scheme of the Constitution, which I have already discussed." [Para 294]

62. In *Minerva Mills Ltd.* (supra), the court observed thus:-

"87……every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. But then the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded. Now there are three main departments of the State amongst which the powers of

government are divided; the executive, the legislature and the judiciary. Under our Constitution we have no rigid separation of powers as in the United States of America, but there is a broad demarcation, though, having regard to the complex nature of governmental functions, certain degree of overlapping is inevitable. The reason for this broad separation of powers is that "the concentration of powers in any one organ may" to quote the words of Chandrachud, J., (as he then was) in *Indira Gandhi case* (supra) "by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged".

63. This court in *Subhash Sharma & Ors. v. Union of India* 1991 Sup (1) 574 observed as under:-

"…….The constitutional phraseology would require to be read and expounded in the context of the constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence." **[Para 31]**

64. In *Pareena Swarup v. Union of India* (2008) 14 SCC 107 the court observed as under:-

"9. It is necessary that the court may draw a line which the executive may not cross in their misguided desire to take over bit by bit and (*sic*) judicial functions and powers of the State exercised by the duly constituted courts. While creating new avenue of judicial forums, it is the duty of the Government to see that they are not in breach of basic constitutional scheme of separation of powers and independence of the judicial function."

In the said case, it was also observed as under:-

"10…………….The Constitution guarantees free and independent judiciary and the constitutional scheme of separation of powers can be easily and seriously

undermined, if the legislatures were to divest the regular courts of their jurisdiction in all matters, and entrust the same to the newly created Tribunals which are not entitled to protection similar to the constitutional protection afforded to the regular courts. The independence and impartiality which are to be secured not only for the court but also for Tribunals and their members, though they do not belong to the "judicial service" but are entrusted with judicial powers. The safeguards which ensure independence and impartiality are not for promoting personal prestige of the functionary but for preserving and protecting the rights of the citizens and other persons who are subject to the jurisdiction of the Tribunal and for ensuring that such Tribunal will be able to command the confidence of the public. Freedom from control and potential domination of the executive are necessary preconditions for the independence and impartiality of Judges. To make it clear that a judiciary free from control by the executive and legislature is essential if there is a right to have claims decided by Judges who are free from potential domination by other branches of Government. With this background, let us consider the defects pointed out by the petitioner and amended/proposed provisions of the Act and the Rules."

EQUAL PAY FOR EQUAL WORK

65. The Equal Remuneration Act, 1976 and in particular its preamble declares the Act to provide for payment of equal remuneration and prevention of any kind of discrimination on the ground of sex or otherwise in the matter of employment. The Equal Remuneration Act, 1976 extends to the whole of India by virtue of Section 1(2) and there cannot be different pay scales for different employees carrying out exactly same work. Section 4(3) states that "where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the

same work or work of a similar nature are different only on the ground of sex, then the higher (in cases where there are only two rates), or, as the case may be, the highest (in cases where there are more than two rates), of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers."

66. In view of the above constitutional principles and Directive Principles of State Policy under the Constitution and the statutory and mandatory provisions of overriding Equal Remuneration Act, 1976, the following principles are evolved for fixing the governmental pay policy, whether executive or legislative on the recommendation of the Pay Commissions, Pay Committees by Executive Governments, which are broadly stated as under:-

(1) The governmental pay policy, whether executive or legislative, cannot run contrary to constitutional principles of constitutional law;

(2) The governmental pay policy, whether executive or legislative, cannot run contrary to the overriding provisions of Equal Remuneration Act, 1976.

xxx xxx xxx

(12) The governmental pay policy must conform to the overriding statutory command under Sections 13 and 14 read with Section 1(2) of the Equal Remuneration Act, 1976, which supports for uniformity between the pay policy of the State Governments and the Central Government in the whole of India and such uniformity in the pay policy of the State Governments and the Central Government in the whole of India has already found further support from the Judgment of this Court in the case of *Randhir Singh v. Union of India & Others* (1982) 1 SCC 618. I must hasten to say that where all things are equal that is, where all relevant considerations are same, persons holding

identical posts may not be treated differentially of their pay.

67. As early as in 1952, in a celebrated case decided by this court in *State of West Bengal v. Anwar Ali Sarkar v.* (1952) SCR 284, this court laid down that in order to pass the test, two conditions must be fulfilled, namely, that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and that said differentia must have a rational relation to the object sought to be achieved by the Act. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them.

68. In 1959, in a celebrated case of *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & Others* (1959) 1 SCR 279 at p.296, this Court observed as under:

> "………It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question………"

69. In *The State of Jammu & Kashmir v. Triloki Nath Khosa and Ors.* (1974) 1 SCC 19, this court observed as under:-

> "……..Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis…..."

70. In *Indira Nehru Gandhi (supra),* the court observed as under:-

> "This Court, at least since the days of *Anwar Ali Sarkar's* case, has consistently taken the view that the classification must be founded on an intelligible differentia which distinguishes those who are grouped together from those who are left out and that the differentia must have a *rational relation to the object sought to be achieved by the particular law*. The first test may be assumed to be satisfied since there is no gainsaying that in our system of Government, the Prime Minister occupies a unique position. But what is the nexus of that uniqueness with the law which provides that the election of the Prime Minister and the Speaker to the Parliament will be above all laws, that the election will be governed by no norms or standards applicable to all others who contest that election and that a election declared to be void by a High Court judgment shall be deemed to be valid, the judgment and its findings being themselves required to be deemed to be void? Such is not the doctrine of classification and no facet of that doctrine can support the favoured treatment accorded by the 39th Amendment to two high personages. It is the common man's sense of justice which sustains democracies and there is a fear that the 39th Amendment, by its impugned part, may outrage that sense of justice. Different rules may apply to different conditions and classes of men and even a single individual may, by his uniqueness, form a class by himself. But in the absence of a differentia reasonably related to the object of the law, justice must be administered with an even hand to all.

71. In *Maneka Gandhi v. Union of India & Anr.* (1978) 1 SCC 248 it was observed as follows:

> "….Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits…. Article 14 strikes at arbitrariness in state action and ensures fairness and quality of treatment. The principle of reasonableness, which

legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

72. In *Randhir Singh* (supra), it was held as under:

"8. ……..Article 39(*d*) of the Constitution proclaims "equal pay for equal work for both men and women" as a directive principle of State Policy. "Equal pay for equal work for both men and women" means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this Court have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State………Construing Articles 14 and 16 in the light of the Preamble and Article 39(d) we are of the view that the principle 'Equal pay for Equal work' is 'deducible from those Article and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though these drawing the different scales of pay do identical work under the same employer."

73. In *Surinder Singh & Anr. v. Engineer-in-Chief, CPWD & Others* (1986) 1 SCC 639 it was observed that the Central Government like all organs of State is committed to the Directive Principles of State Policy and Article 39 enshrines the principle of equal pay for equal work.

74. In *Mackinnon Mackenzie & Co. Ltd. v. Audrey D' Costa & Another* (1987) 2 SCC 469 it was observed that the term "same work" or "work of similar nature" under Section 2(h) of the Act that "whether a particular work is same or similar in nature as another work can be determined on the three

considerations. In deciding whether the work is same or broadly similar, the authority should take broad view; next in ascertaining whether any differences are of practical importance, the authority should take an equally broad approach for the very concept of similar work implies differences in detail, but these should not defeat a claim for equality on trivial grounds. It should look at the duties actually performed, not those theoretically possible. In making comparison the authority should look at the duties generally performed by men and women."

75. In *Bhagwan Dass & Others v. State of Haryana & Others* (1987) 4 SCC 634 this court held that the mode of selection and period of appointment is irrelevant and immaterial for the applicability of equal pay for equal work once it is shown that the nature of duties and functions discharged and work done is similar.

76. In *Inder Singh & Others v. Vyas Muni Mishra & Others* 1987 (Supp) SCC 257 this court also held the view that when two groups of persons are in the same or similar posts performing same kind of work, either in the same or in the different departments, the court may in suitable cases, direct equal pay by way of removing unreasonable discrimination and treating the two groups, similarly situated, equally.

77. In *Haryana State Adhyapak Sangh & Others v. State of Haryana & Ors.* (1988) 4 SCC 571 this court enforced the principle of equal pay for equal work for Aided School teachers at par with government school teachers and held that the teachers of Aided Schools must be paid same pay scale and dearness allowance as teachers of the government schools.

78. In *U.P. Rajya Sahakari Bhoomi Vikas Bank Ltd. v. Workmen* 1989 Supp (2) SCC 424, this court observed as under:-

"The Tribunal's finding that both the groups were doing the

same type of work has rightly not been challenged by the employer Bank as it is a pure finding of fact. If irrespective of classification of junior and senior groups, the same work was done by both, the principle of equal pay for equal work is definitely attracted and on the finding of fact the Tribunal was justified in applying the principle to give the same benefit to those who had been left out."

79. In the case of *Sita Devi & Others v. State of Haryana & Others* (1996) 10 SCC 1 this court held: "The doctrine of "equal pay for equal work" is recognized by this Court as a facet of the equality clause contained in Article 14 of the Constitution."

80. In *Sube Singh & Ors. v. State of Haryana & Ors.* (2001) 7 SCC 545 (para 10), this court observed as under:-

> "….whether the classification is reasonable having an intelligible differentia and a rational basis germane to the purpose, the classification has to be held arbitrary and discriminatory".

81. In *John Vallamattom & Another v. Union of India* (2003) 6 SCC 611, the constitutionality of Section 118 of the Indian Succession Act, 1925 was challenged. Section 118 was declared unconstitutional and violative of Article 14 of the Constitution. In that case, this court observed thus:-

> "Although Indian Christians form a class by themselves but there is no justifiable reason to hold that the classification made is either based on intelligible differentia or the same has any nexus with the object sought to be achieved. The underlying purpose of the impugned provision having adequately been taken care of by Section 51, the purport and object of that provision must be held to be non-existent."

82. In *State of Mizoram & Another. v. Mizoram Engineering Service Association & Another* (2004) 6 SCC 218 while dealing with case of this nature, this court observed as under:-

> "The fact that the revised pay scale was being allowed to Mr Robula in tune with the recommendations of the Fourth Central Pay Commission, shows that the State Government had duly accepted the recommendations of the Fourth Central Pay Commission. Having done so, it cannot be permitted to discriminate between individuals and not allow the same to the rest."

In this case, this Court clearly stated that the State cannot be permitted to discriminate similarly placed persons.

83. This court in *Union of India v. Dineshan K.K.* (2008) 1 SCC 586 at page 591 (para 12) observed as under:-

> "The principle of "equal pay for equal work" has been considered, explained and applied in a catena of decisions of this Court. The doctrine of "equal pay for equal work" was originally propounded as part of the directive principles of the State policy in Article 39(*d*) of the Constitution. In *Randhir Singh* v. *Union of India* a Bench of three learned Judges of this Court had observed that principle of equal pay for equal work is not a mere demagogic slogan but a constitutional goal, capable of being attained through constitutional remedies and held that this principle had to be read under Articles 14 and 16 of the Constitution. This decision was affirmed by a Constitution Bench of this Court in *D.S. Nakara* v. *Union of India*. Thus, having regard to the constitutional mandate of equality and inhibition against discrimination in Articles 14 and 16, in service jurisprudence, the doctrine of "equal pay for equal work" has assumed status of a fundamental right."

84. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences

of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed.

85. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive.

86. The classification must not be arbitrary but must be rational, that is to say, it should be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

87. In the instant case, in the counter-affidavit the respondents admitted clear discrimination, but I fail to comprehend why the respondents are perpetuating discrimination. I deem it proper to quote the relevant portion from the counter affidavit as under:

> "However this is a temporary anomaly. Over a period of time, the said anomaly would correct itself and after a period of 4-5 years all the members of the Tribunal would be treated in an equal manner."

88. One fails to comprehend and understand why the respondents are perpetuating discrimination even for a period of four to five years.

89. The High Court Judges are appointed from two streams – 2/3rd from the Bar and 1/3rd from the Subordinate Judicial Service. After appointment, they are assigned the task

of discharging judicial functions. The direct and inevitable impact of the amendment is to dissuade and discourage both the members of the Bar and Judiciary from becoming members of the Tribunal. The Tribunal is discharging purely judicial work which were earlier discharged by the judges of the High Courts. The people's faith and confidence in the functioning of the Tribunal would be considerably eroded if both the members of the Bar and judiciary are discouraged from joining the Tribunal. In a democratic country governed by rule of law, both the lawyers and judges cannot be legitimately discouraged and dissuaded from manning the Tribunal discharging only judicial work.

90. The petitioners are aggrieved by the decision of the respondents to abolish the post of Vice-Chairman in the Central Administrative Tribunal and pray that it should be restored.

91. The petitioners are further aggrieved by the newly inserted Section 10A of the Administrative Tribunal Act, 1985 to the extent that it postulates different pay scales and conditions of service for the members of the Central Administrative Tribunal on the basis of their appointment under the amended and the unamended rules and pray that uniform conditions of service be made applicable to all members.

92. The petitioners are also aggrieved by the newly inserted Section 10A that it is unconstitutional to the extent that it stipulates that the total term of the office of the members of the Tribunal shall not exceed 10 years. They pray that this embargo be removed.

93. The petitioners further pray that all members be permitted to function till they attain the age of superannuation of 65 years.

NEWLY INSERTED SECTION 10A

94. I see no rationale or justification in providing different conditions of service for the members of the Tribunal on the basis of their appointment under the amended and the

unamended rules, particularly when even according to the respondents it is nowhere denied that both the categories of members are not discharging the same duties, obligations and responsibilities.

95. Amended Section 10A is clearly discriminatory and violative of basic principles of equality. Section 10A of the amended Act is declared discriminatory, unconstitutional and *ultra vires* of the Constitution so far as it does not provide uniform pay scales and service conditions on the basis of amended and unamended rules. Consequently, all the members of the Tribunal would be entitled to get the same pay scales and service conditions from June 2010.

96. Section 10A of the amended Act is also declared discriminatory because the direct and inevitable impact of insertion of Section 10A is to prescribe different age of retirement for the judicial and other members. On the one hand, the age of superannuation of the members has been increased from 62 to 65 years and according to the amended Act, the administrative members would now retire at the age of 65 years. The members can now get maximum of two terms of 5 years each. A lawyer appointed at the age of 45 years will have to retire at the age of 55 years. Therefore, by this amendment, administrative member would retire at the age of 65 whereas judicial member may retire even at the age of 55. This is clearly discriminatory and violative of the fundamental principle of equality. Consequently, section 10A of the amended Act is declared discriminatory and violative of Article 14 of the Constitution and is declared *ultra vires* of the Constitution, to the extent that it places embargo of two terms of five years each leading to different ages of retirements of the members of the Tribunal. Consequently, henceforth, all the members of the Tribunal shall function till the age of 65 years. In other words, there would be a uniform age of retirement for all the members of the Tribunal.

97. The petitioners pray that the newly added Section 12(2)

be quashed as it impinges upon the independence of judiciary.

NEWLY INSERTED SECTION 12(2)

98. I see no logic, rationale or justification in abolishing the post of Vice-Chairman in the Central Administrative Tribunal. No reason for such abolition has been spelt out by the respondents even at the time of introducing the Bill. Before the amendment, ordinarily, the retired judges of the High Courts used to be appointed to the post of Vice-Chairman. It used to be in consonance with the status and positions of the retired judges.

99. There seems to be no basis or rational explanation of abolishing the post of Vice-Chairman. I fail to comprehend that on the one hand, the post of Vice-Chairman has been abolished and on the other hand under the newly inserted section 12(2) the power to designate Vice-Chairman has been given to the appropriate government. This is per se untenable and unsustainable. The executive has usurped the judicial functions by inserting section 12(2). The direct and inevitable consequence of the amendment would affect the independence of judiciary.

100. In the race of becoming the Vice-Chairman there would be erosion of independence of judiciary. As aptly observed in *Sampath Kumar's* case (supra) that a judicial member who is looking forward to promotion to the post of Vice-Chairman would have to depend on the goodwill and favourable instance of the executive and that would directly affect independence and impartiality of the members of the Tribunal impinging upon the independence of judiciary.

101. Now, under section 12(2) of the amended Act, the entire power of designating Vice-Chairman has been usurped by the appropriate government. This amendment also has the potentiality of disturbing the separation of powers. The power pertaining to judicial functioning of the Tribunal which was

earlier exercised by the judiciary has been usurped by the executive. On the aforesaid considerations, the newly inserted section 12(2) is per se untenable and consequently declared null and void.

102. In the larger public interest the post of Vice-Chairman is restored and the procedure for appointment would be in accordance with the unamended rules of the Act.

103. It must be clearly understood by all concerned that the judicial work which the members of the Tribunal discharge is one, which was earlier discharged by the Judges of the High Court. The work is totally judicial in nature, therefore, dispensation of justice should be left primarily to the members of the Bar and Judges who have, by long experience and training acquired judicial discipline, understanding of the principles of law, art of interpreting laws, rules and regulations, legal acumen, detachment and objectivity. Unless extreme care is taken in the matter of appointments of the members of Tribunal, our justice delivery system may not command confidence, credibility, acceptability and trust of the people.

104. I deem it appropriate to reiterate the impact of conclusions of my judgment:

(i) All the members of the Tribunal appointed either by amended or unamended rules would be entitled to get uniform pay scales and service conditions from 01.06.2010. However, in the facts of this case, they would not be entitled to claim any arrears on account of different pay scales and service conditions.

(ii) All the members of the Tribunal would have uniform age of retirement from 01.06.2010, meaning thereby that all members of the Tribunal shall be permitted to function until they attain the age of superannuation of 65 years. Hence, Section 10A is quashed and set aside.

(iii) The post of Vice-Chairman in the Central Administrative Tribunal is restored from 01.06.2010. However, I do not want to disturb the Vice-Chairmen, if already designated by the Government, and permit them to continue in their respect posts till they attain the age of superannuation. Thereafter, the Vice-Chairman shall be appointed in accordance with the unamended rules. Consequently, the newly inserted section 12(2) of the amended Act is also quashed and set aside.

105. The Writ Petitions are accordingly allowed in aforementioned terms and disposed of, leaving the parties to bear their own costs.

N.J. Writ Petitions dismissed.

KANPUR ELECTRICITY SUPPLY CO. LTD. & ANR.
v.
M/S. L.M.L. LIMITED & ORS.
(SLP (Civil) No. 33984 of 2009)

MAY 7, 2010

[ALTAMAS KABIR, CYRIAC JOSEPH AND C.K. PRASAD, JJ.]

U. P. Electricity Supply Code, 2005 – Clause 4.41 read with clause 4.49 – Reduction in contracted load – Deteriorating market conditions – Application for reduction of contracted load from 8 MVA to 1.25 MVA with effect from 01.04.2006, by a public limited company – Meeting between two companies to reduce the same subject to certain condition – Load reduction approved by Electricity Regulatory Commission – Company declared 'Relief undertaking' as also 'Sick unit' – Electricity Supply Company-KESCO raising monthly bills based on 8 MVA load thereafter – KESCO asking the company to submit Bank Guarantee for arrears of amount as per the amended clause 4.49 – Load not reduced since Bond and affidavits submitted by company did not secure the outstanding dues – Direction by BIFR to KESCO to continue to accept Rs.5 lakhs p.m. against arrear dues together with current dues on basis of actual consumption – Strict adherence by company to the said order – However, issuance of disconnection notice – Writ petition by company seeking direction upon KESCO that load stood reduced from 01.04.2006 – Allowed by High Court – Interference with – Held: Not called for – KESCO, instead of helping the company to come out of its financial crisis, prevented it from doing so by refusing to lower the load from 8 MVA to 1.25 MVA, as agreed upon – In fact, company had been declared a 'Relief Undertaking' and a 'Sick Company' – When decision was taken to reduce the contract load, unamended Clause 4.49 was in existence which provided for submission of either

a Bank Guarantee or a Bond or any other instrument to the satisfaction of the licensee of the equal amount of pending dues – After amendment, Bond was excluded from the provision – Continued insistence of KESCO that Bank Guarantee should be provided by the company in respect of its outstanding dues, had the effect of negating the decisions to revive the Company – Electricity Act, 2003 – s. 5.

Respondent no.1 is a public limited company engaged in the manufacture and sale of two-wheelers. Due to market fluctuations it had to stop its manufacturing activities. The respondent company was declared a "Relief Undertaking" u/s. 3(1) of the U.P. Industrial Undertaking (Special Provisions for Prevention of Unemployment) Act, 1966. The respondent no.1-company applied to the petitioner-State Electricity Supply Company for reduction of the contracted load from 8 MVA to 1.25 MVA from 1st April, 2006. The decision was taken by two companies to reduce the load with certain conditions. The Electricity Regulatory Commission approved the reduction of the load. However, electricity bill was raised for the month of May, 2006 on basis of 8 MVA load. The respondent paid the bill on basis of 1.25 MVA load. The respondent company was also declared a "Sick Company" under Sick Industrial Companies (Special Provisions) Act, 1985. The load was not reduced since the outstanding dues of the respondent company were 8.42 crores as on 31st March, 2006. The petitioner wrote to the respondent to submit a Bank Guarantee for arrears of the amount as per the amended clause 4.49 of the U.P. Electricity Supply Code, 2005 so that action could be taken to reduce the load from 8 MVA to 1.25 MVA. Thereafter, the respondent company restarted its manufacturing activities and sought increase of the load from 1.25 MVA to 2.25 MVA. The petitioner rejected the same since the respondent did not submit the Bank Guarantee for the balance amount. The respondent

company submitted a Bond stating that the Company was agreeable to make payment of the arrears, if any, to petitioner upon the directions of the court and the amount as was decided by the courts. However, since the two affidavits and the Bond did not secure the outstanding dues of the petitioners and were also not to its satisfaction, the load was not reduced. The BIFR then directed the petitioners to continue to accept Rs.5 lakhs p.m. against the arrear dues together with the current dues on the basis of the actual consumption and not to adopt coercive measures to disconnect the supply of electricity. However, the petitioner issued a disconnection notice. The respondent company filed a writ petition seeking direction that the load of the respondent company stood reduced from 8 MVA to 1.25 MVA pursuant to the then prevalent provisions of Clause 4.41(b) of the 2005 Code, with effect from 1st April, 2006, 2.25 MVA with effect from April, 2007 and 2.50 MVA with effect from August, 2007. The High Court held that the decision with regard to the reduction of the load of the respondent company stood approved on 19th April, 2006, and, accordingly, the effective date of such reduction would have to be reckoned from 1.5.2006. Hence, the Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1.1. What is difficult to comprehend is the inscrutable manner in which decisions arrived at in common are sought to be negated on account of bureaucratic lethargy. An order was passed by BIFR u/ s. 22(3) of SICA on 22nd October, 2007, *inter alia*, directing that KESCO would continue to accept Rs.5 lakhs per month against the arrear dues together with the current dues on the basis of the actual consumption. What is of significance is that despite compliance by the respondent no.1-company with the said order the

petitioners continued to raise bills on the respondent-company on the basis of 8 MVA load, although, it had agreed to reduce the same from 8 MVA to 1.25 MVA with effect from 1st April, 2006.[Para 24] [439-B-H; 440-A-B]

1.2. This case is an example of how a positive decision taken to help a struggling industry to find its feet can be scuttled by legalese, although, an agreement had been reached between the parties regarding payment of the arrears in installments along with the dues, and despite the same being duly followed by one of the parties to the agreement. The threat to yet again disrupt its manufacturing operations looms large on the horizon on account of the inability of the respondent No.1-company to comply with the provisions of Clause 4.41 read with Clause 4.49 of the U.P. Electricity Code, 2005. On 31st March, 2006, the outstanding dues of the respondent-company was Rs.8.42 crores and when Clause 4.49 was amended, the respondent-company was asked to submit a Bank Guarantee/Bond to secure the amount of Rs.10.24 crores outstanding as arrears on that date. In compliance thereof, the respondent-company duly furnished a Bond on 17th June, 2007, which was not accepted by the petitioners on the ground that it did not secure the outstanding dues of the petitioner No.1 and were not to its satisfaction. Although, the petitioners were fully aware of the precarious financial condition of the respondent-company and having agreed to reduce the contract load from 8 MVA to 1.25 MVA, it refused to do so on the ground that the Bond provided did not secure the outstanding dues, resulting in a vicious circle of events. On the one hand, the high MVA load continued to contribute to the raising of high electricity bills, which the respondent-company was not able to pay, and, on the other hand, the respondent-company continued to suffer further financial losses on account thereof. [Para 25] [440-B-G]

1.3. In the amended provisions of Clause 4.49 the furnishing of a Bond by way of security was excluded. However, the discretion not to accept such Bond always lay with the petitioners, giving them the discretion not to accept the Bond furnished by the respondent-company. That is exactly what happened in the instant case. While agreeing to give the respondent-company the benefit of a reduced MVA, the petitioners had prevented the respondent-company from accessing such privilege by continuing to raise bills on the basis of the high MVA which the respondent-company apparently was unable to bear on account of its financial conditions. As a result, instead of helping the respondent-company to come out of its financial crisis, the petitioners prevented the Company from doing so by refusing to lower the load from 8 MVA to 1.25 MVA, as agreed upon. It is not the case of the petitioners that the agreement which had been arrived at between the Managing Director of the petitioners and the Executive Director of the respondent-company, had been breached by the respondent-company. On the other hand, it has been categorically contended by the company that it had scrupulously given effect to the said agreement as also the order of the BIFR dated 22nd October, 2007 upon the respondent No.1-company being declared a Sick Industrial Company under section 3(1)(o) of SICA on 8th May, 2007. [Para 26] [441-A-F]

1.4. While passing the impugned order, the High Court lost sight of the order of the BIFR and confined itself to the provisions of Clauses 4.41 and 4.49 of the U.P. Electricity Supply Code, 2005 framed under Section 50 of the Electricity Code, 2003. If the respondent No.1-company is to revive, and, thereafter, survive, a certain amount of consideration has to be shown, which was fully realized by the petitioners themselves, but they allowed themselves to be tied up in knots over

compliance with the provisions of Clauses 4.41 and 4.49 which are Rules framed for application in special cases in order to help industries which had fallen on difficult days, to recoup its losses and to bring its finances on an even keel. [Para 27] [441-G-H; 442-A-B]

1.5. There is no dispute that pursuant to an application made on 31st March, 2006 by the respondent no.1-company, praying for the reduction of the contract load from 8 MVA to 1.25 MVA with effect from 1st April, 2006, a Meeting had been held between the Managing Director of KESCO and the representatives of the respondent-company in which a decision was taken for reduction of the load with certain conditions. On the said date itself KESCO conveyed its agreement for reduction of load to the U.P. Electricity Regulatory Commission and sought its formal approval and that no objection was raised by the Commission with regard to the said decision except to indicate that the said decision would have to be implemented strictly in accordance with the Electricity Supply Code, 2005. When the decision was taken on 19th April, 2006 to reduce the contract load, the unamended version of Clause 4.49 of the Code was in existence and that the same provided for submission of either a Bank Guarantee or a Bond or any other instrument to the satisfaction of the licensee of the equal amount of pending dues. The only problem which has arisen is KESCO's decision not to accept the Bond given by the respondent-company on the ground that it did not provide sufficient security for the outstanding dues. In the totality of the existing circumstances, of which KESCO was fully aware, the decision not to accept the Bond was not in accordance with the decision arrived at on 19th April, 2006 to reduce the contract load from 8 MVA to 1.25 MVA. In fact, the respondent-company had been declared to be a Relief Undertaking by the State Government on an application dated 24th June, 2004.

Furthermore, soon after the decision was arrived at to lower the contract load, the respondent-company was also declared as a Sick Company on 8th May, 2007 and the BIFR, while considering the revival of the respondent-company by its order dated 22nd April, 2007, directed KESCO to continue to accept Rs.5 lakhs per month against the arrears apart from payment of the current electricity bills on actual consumption basis and also not to adopt coercive measures to disconnect the supply of electricity of the respondent-company. The result of the continued insistence of KESCO that a Bank Guarantee should be provided by the respondent no.1-company in respect of its outstanding dues, had the effect of negating the decisions to revive the Company. [Para 28] [442-B-H; 443-A-C]

1.6. No interference is called for with the impugned order of the High Court. The petitioner-Company will not be prevented from taking appropriate steps against the respondent-Company in the event the latter Company commits default in paying the instalments as directed by the BIFR towards the arrears or in respect of the current electricity bills. [Para 29] [443-D]

Modern Syntax (I) Ltd. vs. Debts Recovery Tribunal, Jaipur **AIR (2001) Raj 170;** *Doburg Lager Breweries Pvt. Ltd. vs. Dhariwal Bottle Trading Co.* **(1986) 2 SCC 382, referred to.**

Case Law Reference:

AIR (2001) Raj. 170	**Referred to.**	**Para 18**
(1986) 2 SCC 382	**Referred to.**	**Para 18**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 33984 of 2009.

From the Judgment & Order dated 18.09.2009 of the High Court of Judicature at Allahabad in CWMP No. 24900 of 2009.

Parag Tripathy, ASG, Pradeep Misra, Daleep Kumar, D.P. Pandey and Manoj K. Sharma for the Petitioners.

M.L. Lahoty, Pabank Sharma, Mahesh Aggarwal, Pabam K. Sharma and E.C. Agrawala for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Respondent No.1 is a Public Limited Company engaged in the manufacture and sale of two-wheelers, scooters and motorcycles, having its registered office at Panaki Industrial Area in Kanpur, U.P. The Company obtained power load from the Kanpur Electricity Supply Administration, hereinafter referred to as “KESA”, which was extended from time to time. In the year 2006, the sanctioned load of the Company was 8 MVA from 132 KV line.

2. On account of a decreasing market the Company apprehended that its work force would be directly affected and, accordingly, made a representation to the State Government for declaring the Respondent-Company as a “Relief Undertaking” under Section 3(1) of the U.P. Industrial Undertaking (Special Provisions for Prevention of Unemployment) Act, 1966. A Notification was issued by the State Government on 24th June, 2004, suspending all contracts, agreements and other instruments in force under any law, for a period of one year which resulted in a strike disrupting the operations of the company. Consequently, all manufacturing activities of the Respondent-Company came to a halt, ultimately leading to the declaration of a lockout on 7th March, 2006. As a result, on 31st March, 2006, the Respondent-Company applied to the Kanpur Electricity Supply Company, hereinafter referred to as “KESCO”, for reduction of the contract load from 8 MVA to 1.25 MVA with effect from 1st April, 2006. On 19th April, 2006, a meeting took place between the officers of KESCO and the Respondent-Company in which a decision was taken for reduction of the load with certain conditions. On the said date itself KESCO conveyed its agreement for

reduction of load to the U.P. Electricity Regulatory Commission and sought its formal approval.

3. The Commission did not raise any objection regarding the decision to reduce the load but it observed that the agreement which had been reached between the parties was internal to the parties and the same had to be implemented strictly in accordance with the Electricity Supply Code, 2005. Thereafter, the Respondent wrote to KESCO on 17th May, 2006, to reduce the load with effect from 1st April, 2006. However, the electricity bill for the month of May, 2006 based on 8 MVA load was presented to the Respondent on 7th June, 2006. The Respondent immediately sent a letter of protest indicating that the bill amount ought to have been raised on the basis of the agreed load of 1.25 MVA. The respondent paid the bill on the basis of 1.25 MVA load and also invoked the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, hereinafter referred to as the "SICA". The said reference was registered as Case No.80 of 2006 on 15th September, 2006 and, thereafter, on 8th May, 2007, the Respondent-Company was declared as a sick industrial company under section 6(3)(o) of the 1985 Act and the IDBI Bank was appointed as the Operating Agency. On 4th October, 2006, KESCO wrote to the Respondent-Company for submitting a Bank Guarantee for the arrears of the amount as per Clause 4.49 of the U.P. Supply Code, 2005 so that action could be taken to reduce the load from 8 MVA to 1.25 MVA. In response, the Respondent No.1-Company wrote to KESCO indicating that once the normal work of the factory was restored, the payment of arrears of electricity dues would be finalized.

4. On 11th March, 2007, the Respondent-Company restarted its manufacturing activities and requested KESCO to increase the load from 1.25 MVA to 2.25 MVA. KESCO, however, responded on 20th March, 2007, informing the Petitioners that the load reduction could not be considered owing to non-submission of the Bank Guarantee by the

Respondent-Company for the balance amount of the bill raised for the month of May, 2006. On 3rd August, 2007, a settlement was arrived at with regard to the payment of arrears. As the respondent was registered as a Sick Unit with the Board for Industrial and Financial Reconstruction, hereinafter referred as the "BIFR", the said Board by its order dated 22nd October, 2007 directed KESCO to continue to accept Rs.5 lakhs per month against their arrears, besides payment of current electricity bills on actual consumption basis, and not to adopt coercive measures to disconnect the supply of electricity. However, on 6th April, 2009, a disconnection notice was issued by KESCO against which the Respondent-Company filed Writ Petition No.20499 of 2009 in which an interim order was passed by the Allahabad High Court on 22nd April, 2009, directing that in case the Respondent-Company continued to pay the amount as directed by the BIFR, its electricity supply would not be disconnected. The said writ petition is still pending disposal. However, since, in the meantime, the claim of the Respondent-Company for reduction of the load from 8 MVA to 1.25 MVA with effect from 1st April, 2006, was not decided or implemented, the Respondent-Company filed Writ Petition No.20499 of 2009, *inter alia*, for an appropriate writ or direction to the effect that the load of the Respondent-Company stood reduced from 8 MVA to 1.25 MVA pursuant to the then prevalent provisions of Clause 4.41(b) of the 2005 Code, with effect from 1st April, 2006, 2.25 MVA with effect from April, 2007 and 2.50 MVA with effect from August, 2007.

5. Interpreting the provisions of Clauses 4.41 and 4.49 of the U.P. Electricity Code, 2005, the High Court came to the conclusion that the decision with regard to the reduction of the load of the Respondent-Company stood approved on 19th April, 2006, and, accordingly, the effective date of such reduction would have to be reckoned from the first day of the following month, namely, from 1.5.2006, in terms of Clause 4.41(e) of the Code. The writ petition was, accordingly, allowed

and it is against such order of the writ court, that the present Special Leave Petition has been filed.

6. From what has been indicated hereinabove, it will be clear that the question required to be answered in the present Petition involves the interpretation of Clause 4.41 read with Clause 4.49 of the U.P. Electricity Supply Code, 2005, framed under Section 50 of the Electricity Act, 2003. In order to appreciate the issue raised, the provisions of Clause 4.41 are reproduced hereinbelow :

"4.41 Reduction in Contracted load.

(a) Every application for reduction of contracted load shall be made in duplicate to the concerned officer on prescribed form (Annex-4.10) along with the prescribed processing fee and charges for reduction of load alongwith the following documents:

(i) Work completion certificate and test report from the licensed electrical contractor where alteration of the installation is involved.

(ii) Maximum demand recorded in the last two billing cycles if the meter has the facility to record maximum demand and the electricity bill of the previous two billing cycles.

(iii) Letter of approval from the Electric-Inspector, wherever applicable (or as per rules when framed under Section 53).

(iv) Copy of the latest paid electricity bill. If matter related to dues is pending in court, the procedure as per Clause 4.49 may be followed.

(b) The designated authority of the Licensee shall communicate to the consumer the decision on his

application within thirty days of receipt of the duly completed application.

(c) A fresh agreement for reduced load shall be executed for 2 years but the period of compulsory agreement 2 years for the purpose of payment of MCG shall be counted from the date of original agreement for the purpose of P.D.

(d) No refund shall be allowed for the deposited cost of the line and substation. However, if the security deposited earlier is in excess of the requirement for the reduced load, the excess of the requirement for the reduced load, the excess shall be adjusted in future bills.

(e) The effective date of such reduction shall be reckoned from the first day of the following month in which the application has been sanctioned by the licensee.

(f) ………………"

7. Clause 4.49 was amended with effect from 14th September, 2006. Accordingly, both the unamended provisions of Clause 4.49 and the amended provisions are set out hereinbelow :

Unamended version :

"4.49. Release of Connection/Load where arrears disputed are stayed by Court/other forums :

Where there is stay order by any Court, Forum, Tribunal, or by Commission, staying the recovery of any dues by licensee, and during the operating period of any such order:

(i) If a consumer sells a premises and an application for release of new connection is made by the purchaser.

Or

(ii) If any application for enhancement or reduction of load is made by a consumer.

the licensee shall release the new connection to such consumer and also permit reduction or enhancement of loads,

Subject to

- Submission either of Bank Guarantee, or Bonds, or any instruments to the satisfaction of licensee of equivalent amount of pending dues, by the applicant, and,
- Agreement with licensee on terms of extension/ invoking of guarantee, and,
- Levy of surcharge amount on pending dues,

And the application of such consumers shall not be kept pending by the licensee."

<u>Amended version :</u>

"4.49. Permanent disconnection/ release of Connection/ Enhancement and Reduction of Load where arrears disputed are stayed by Court/other forums :-

Where there is a stay order by any Court, Forum, Tribunal, or by Commission, staying the recovery of any dues by licensee, and during the operating period of any such order –

(i) If a consumer sells a premises and an application for release of new connection is made by the purchaser; or

(ii) If any application for new connection, reconnection, en-hancement or reduction of load is made by a consumer; or

(iii) If any application for permanent disconnection is made by a consumer the licensee shall release the new connection to such consumer and also permit reconnection reduction or enhancement of Loads, as well as allow permanent disconnection.

Subject to

- Submission of Bank Guarantee to the satisfaction of licensee, of equivalent amount of pending dues, by the applicant or owner, and,
- Agreement with licensee on terms of extension/ invoking of guarantee, and
- Levy of surcharge amount on pending dues,

and the application of such consumers shall not be kept pending by the licensee."

8. As will be seen from the above, if any application for reduction of load is made by a consumer, such reduction could be permitted subject to :

"Submission either of Bank Guarantee, or Bonds, or any instruments to the satisfaction of the licensee of equivalent amount of pending dues by the applicant."

9. The said condition was replaced in the amended provisions by the following condition :

"Subject to submission of Bank Guarantee to the satisfaction of the licensee, of equivalent amount of pending dues, by the applicant or owner."

10. It is the difference between the said two provisions, whereby the submission of a Bond had been excluded from the amended provisions, which has given rise to the disputes in the present case.

11. It appears that the outstanding dues of the Respondent-Company were 8.42 crores as on 31st March, 2006 and hence the load was not reduced. In the meantime, after the amendment of Clause 4.49 of the Code, a letter was sent to the Respondent-Company on 4th October, 2006, asking it to submit a Bank Guarantee/Bond securing the amount of Rs.10.24 crores outstanding as arrears on that date. The Respondent-Company, accordingly, by its letter dated 17th June, 2007, submitted a Bond stating therein that the Company was agreeable to make payment of the arrears, if any, to KESCO upon the directions of the Court and the amount as was decided by the Courts. However, since the two affidavits and the Bond did not secure the outstanding dues of the Petitioners and were also not to its satisfaction, the load was not reduced. As indicated hereinabove, the Respondent-Company, thereafter, filed Civil Misc. Writ Petition No.24900 of 2009 before the Allahabad High Court.

12. Learned ASG, Mr. Parag Tripathy, appearing for the Petitioners, submitted that since neither the two affidavits nor the Bond filed by the Respondent-Company were acceptable to the Petitioners, the load was not reduced from 8 MVA to 1.25 MVA, as requested, since securing the outstanding balance was one of the pre-conditions for such reduction. The learned ASG urged that since securing the amount payable was involved, neither the affidavits nor the Bond could guarantee recovery of the arrear dues in case of breach. It was further urged that even the unamended version of clause 4.49, on which the Respondent-Company relies, makes it very clear that either release of a new connection or the reduction or enhancement of loads would be subject to submission of either a Bank guarantee or Bond or any instrument *to the satisfaction of the licensee* (emphasis added). The learned Additional Solicitor General submitted that the High Court appears to have lost sight of the said condition and that the Petitioner-Company could not be compelled to accept the affidavits or Bond as security/guarantee for the arrears due.

13. The learned ASG then submitted that while the Respondent-Company had relied upon Annexure 6.5 to the U.P. Electricity Supply Code, 2005, the same only provides relief to Sick Industrial Companies and Relief Undertakings falling under Clause 6.16 of the said Code, which provides as follows :-

> "*6.16. Disconnected Industrial Units seeking revival :* For industries lying disconnected over six months and seeking to revive, the Commission order dated 12th July, 2005 given in Annexure 6.5, shall apply to the extent specified in the order, and if not contrary to any G.O., or any court order."

Mr. Tripathy urged that the said clause would not apply to the case of the Respondent-Company since it was not the case of a disconnected industrial unit seeking revival and hence no reliance could be placed on Annexure 6.5 to the above Code. It was also pointed out that although the load had not been reduced, as requested by the Respondent-Company, on 13th July, 2007, another request was made for increase of the load from 1.25 MVA to 2.25 MVA, which action was not permissible.

14. The learned ASG submitted that till such time the provisions of Clause 4.49 were not complied with by the Respondent-Company, the question of reduction of the contracted load from 8 MVA to 1.25 MVA did not arise and the further request to increase the same to 2.25 MVA was also not maintainable. The learned ASG submitted that the approach of the High Court to the problem was completely wrong and cannot, therefore, be sustained.

15. On the other hand, appearing for the Respondent-Company, Mr. M.L. Lahoty, Advocate, reiterated the submissions made before the High Court that on account of the deteriorating financial health of the Company and apprehending a further adverse effect on its work force, the State Government on 24th June, 2004, upon exercise of its power under Section 3 of the U.P. Industrial Undertakings (Special Provisions for

Prevention of Unemployment) Act, 1966, issued a notification granting the Respondent-Company the status of a "Relief Undertaking". The notification, which was initially issued for a period of one year, was subsequently extended for two consecutive periods of one year each on 14th June, 2005 and 23rd June, 2006, respectively. The consequence of the same was that all contracts, agreements, etc. stood suspended for a period of one year and all proceedings pending before any Court, Tribunal, Authority, etc. stood stayed.

16. On account of the deteriorating market conditions and suspension of most of its manufacturing activities, the Respondent-Company applied for reduction of load from 8 MVA to 1.25 MVA and made a formal application to KESCO to reduce its load in the manner indicated above with effect from 1st April, 2006. The said application was in the prescribed proforma under Clause 4.41 of the U.P. Supply Code, 2005.

17. In order to prevent a stalemate, the Respondent-Company sought the intervention of the Member Secretary (Energy), U.P., regarding reduction of the contracted load from 8 MVA to 1.25 MVA on account of the market conditions. According to Mr. Lahoty, this led to a meeting between the Managing Director of KESCO and the Executive Director of LML on 19th April, 2006, in which a decision was taken to reduce the load from 8 MVA to 1.25 MVA, as requested by the Respondent-Company, with effect from 1st April, 2006. The said decision of load reduction was, of course, subject to the condition that (i) LML would pay its monthly electricity dues, (ii) both LML and KESCO would accept the decision on dues pending in the Courts and (iii) the decision on load reduction would be sent for approval to the Regulatory Commission (UPERC), which would be acceptable to both the parties. Mr. Lahoty contended that once a decision had been arrived at between the Managing Director of KESCO and the Executive Director of the Respondent-Company, KESCO ought not to have raised inflated bills based on 8 MVA load thereafter.

18. Mr. Lahoty urged that while the aforesaid controversy was continuing, on 8th May, 2007, the Respondent-Company was declared to be a "Sick Industrial Company" under Section 3(1)(o) of SICA. In addition to the above, the BIFR also invoked its jurisdiction under Section 22(3) of SICA on 22.10.2007 directing that (i) against arrears, KESCO would continue to accept Rs.5 lakhs per month, (ii) current bills would be paid on actual consumption basis and (iii) KESCO would not resort to any coercive measures such as disconnection of supply. According to Mr. Lahoty, the Respondent- Company has been strictly adhering to the said order of the BIFR and has in the process already liquidated about Rs.3.09 crores of the outstanding dues. Mr. Lahoty reiterated that although the Respondent-Company had complied with the provisions of the Supply Code and also complied with the payment schedule as per the agreement dated 3rd August, 2007, and the order dated 22nd October, 2007, passed by the BIFR in the light of Annexure 6.5 to the Supply Code, KESCO went on raising monthly electricity bills on the basis of 8 MVA which compelled the Respondent-Company to file Writ Petition (C) No.24900 of 2009 before the Allahabad High Court, inter alia, for a direction upon the Petitioner-Company that the load stood reduced from 1st April, 2006. It was submitted that all the submissions made on behalf of KESCO relating to the application for load reduction, were not in accordance with the provisions of the Code and in the absence of any stay order by any Court or Forum in respect of arrears, the provisions of Clause 4.49 was not fulfilled. However, all the issues raised by KESCO were negated by the Division Bench of the High Court in its impugned judgment. Mr. Lahoty submitted that having regard to the decision of the Rajasthan High Court in *Modern Syntax (I) Ltd. Vs. Debts Recovery Tribunal, Jaipur* [AIR (2001) Raj. 170) which in its turn is based on the judgment of this Court in *Doburg Lager Breweries Pvt. Ltd. Vs. Dhariwal Bottle Trading Co.* [(1986) 2 SCC 382], wherein it was held by this Court that the object of a Relief Undertaking Act is to sub-serve the public

interest and to prevent unemployment in particular, the relevant provisions are to be given a liberal interpretation.

19. Mr. Lahoty also submitted that in clause 4.49 of the Code prior to its amendment, there was an option of furnishing a Bond and filing an instrument in the nature of a Bond, apart from furnishing a Bank Guarantee and no fault could, therefore, be found with the affidavits and the Bond submitted on behalf of the Respondent-Company. It was submitted that since no shortcoming or illegality was mentioned in the decision taken by the Managing Director of KESCO and the Executive Director of LML and since the load reduction application was to be considered as per the unamended Code, nothing further was required to be done by the Respondent-Company after the said decision was taken on 19th April, 2006. It was urged that it was in the said context that the Division Bench observed that KESCO's stand in raising the monthly bills on the basis of 8 MVA contracted load was wholly unjust and unfair, more particularly when the Respondent No.1 Company was on its part complying with the conditions of payment of the monthly bills based on actual consumption and instalments towards the arrears.

20. Referring to the exercise of power by the UPERC under Section 23 of the Electricity Supply Act, 2003 and Clause 9.5 of the Supply Code, it was submitted that the same was a separate regime in the larger public interest with the sole object of preventing unemployment and loss of production in order to serve a social cause. It is in that context that it was recorded that only current dues were to be realized from a "Relief Undertaking" or a "Sick Industry" from whom only current dues would be realized and as far as the past dues are concerned, the same would be recovered in equal monthly instalments. As far as late payment sur-charge are concerned, the same would be subject to the orders of the BIFR under the SICA or the State Government under the 1966 Act. It was submitted that the said provisions of paragraph 8(c) and (d) of Annexure 6.5 to the

Code squarely applied to the case of the Respondent No.1 Company after it was declared as a "Relief Undertaking" on 24th June, 2004, and as a "Sick Industry" by BIFR on 8th May, 2007, but with effect from 31st August, 2006.

21. It was then submitted that even though KESCO was fully aware of the pendency of arrears, it decided to enter into an arrangement for load reduction as it was satisfied that the said decision was in the interest of both KESCO and LML and was warranted by the circumstances then existing. Since the arrangement was to the full satisfaction of KESCO it itself recommended to the Regulatory Body that KESCO's decision to reduce the load from 8 MVA to 1.25 MVA may be approved, notwithstanding the pendency of arrears. Mr. Lahoty submitted that being a public undertaking it did not lie in the mouth of KESCO to try to wriggle out of a conclusive decision which had been acted upon for at least four years.

22. A further submission was made by Mr. Lahoty to the extent that Respondent No.1 Company had secured KESCO by an amount of Rs.64 lakhs approx. which was deposited by the Respondent No.1 Company as per Clause 4.20 of the Supply Code, and the same could be utilized by KESCO in any eventuality. When against the excess security deposit an amount of Rs.65 lakhs approximately was found to be surplus, the Respondent-Company permitted KESCO to adjust the total amount of Rs.84 lakhs as late as in October, 2009, which would show the bonafides of the Respondent No.1 Company.

23. Mr. Lahoty concluded his submissions by submitting that because of the financial hardship under which the Respondent No.1 Company was functioning, both the State Government as well as the BIFR had shown a great deal of concern and that the Respondent-Company is continuing to pay Rs.5 lakhs in monthly instalments towards arrears, along with the current dues, and that it was in no position to provide any Bank Guarantee as demanded by the Petitioners. Mr. Lahoty submitted that a public authority should not be allowed to exert

pressure when the Respondent-Company was complying with its commitments and the order passed under Section 22(3) of SICA by BIFR. Mr. Lahoty submitted that the Special Leave Petition was without any merit and was liable to be dismissed.

24. The facts of this case are relatively simple and straightforward. What is difficult to comprehend is the inscrutable manner in which decisions arrived at in common are sought to be negated on account of bureaucratic lethargy. The case of the Respondent-Company, which is not denied on behalf of the Petitioners, is that owing to market fluctuations the Respondent-Company had to put a halt to its manufacturing activities and to make a representation to the State Government for declaring it to be a “Relief Undertaking” under the relevant provisions of the U.P. Industrial Undertaking (Special Provisions for Prevention of Unemployment) Act, 1966. Responding to the said representation, the State Government issued a notification on 24th June, 2004, suspending all contracts, agreements and other instruments in force for a period of one year leading to strikes and complete disruption of the work of the Respondent No.1-Company, impelling the Respondent-Company to apply to the Petitioners for reduction of the contracted load from 8 MVA to 1.25 MVA from 1st April, 2006. The materials on record indicate that as a result of such representation a meeting took place between the Managing Director of KESCO and the Executive Director of the Respondent-Company on 19th April, 2006, wherein a decision was taken to reduce the load as requested by the Respondent-Company with effect from 1st April, 2006, on certain terms and conditions, which have been set out hereinabove in paragraph 18. Apart from the above, the Respondent-Company was also declared as a “Sick Company” under SICA on 8th May, 2007, and an order was passed by BIFR under Section 22(3) of SICA on 22nd October, 2007, *inter alia*, directing that KESCO would continue to accept Rs.5 lakhs per month against the arrear dues together with the current dues on the basis of the actual consumption. What is of significance is that despite compliance

by the Respondent No.1-Company with the said order the Petitioners continued to raise bills on the Respondent-Company on the basis of 8 MVA load, although, it had agreed to reduce the same from 8 MVA to 1.25 MVA with effect from 1st April, 2006.

25. This case is an example of how a positive decision taken to help a struggling industry to find its feet can be scuttled by legalese, although, an agreement had been reached between the parties regarding payment of the arrears in instalments along with the dues, and despite the same being duly followed by one of the parties to the agreement. The threat to yet again disrupt its manufacturing operations looms large on the horizon on account of the inability of the Respondent No.1-Company to comply with the provisions of Clause 4.41 read with Clause 4.49 of the U.P. Electricity Code, 2005. On 31st March, 2006, the outstanding dues of the Respondent-Company was Rs.8.42 crores and when Clause 4.49 was amended, the Respondent-Company was asked to submit a Bank Guarantee/Bond to secure the amount of Rs.10.24 crores outstanding as arrears on that date. In compliance thereof, the Respondent-Company duly furnished a Bond on 17th June, 2007, which was not accepted by the Petitioners on the ground that it did not secure the outstanding dues of the Petitioner No.1 and were not to its satisfaction. As a result of the above, although, the Petitioners were fully aware of the precarious financial condition of the Respondent-Company and having agreed to reduce the contract load from 8 MVA to 1.25 MVA, it refused to do so on the ground that the Bond provided did not secure the outstanding dues, resulting in a vicious circle of events. On the one hand, the high MVA load continued to contribute to the raising of high electricity bills, which the Respondent-Company was not able to pay, and, on the other hand, the Respondent-Company continued to suffer further financial losses on account thereof.

26. An argument had been advanced on behalf of the

Petitioners that in the unamended provisions of Clause 4.49, provision had been made for the defaulting Company to furnish a Bond and as an alternative, to furnish a Bank Guarantee, apparently to assuage the aggravated economic conditions. In the amended provisions of Clause 4.49 the furnishing of a Bond by way of security was excluded. However, the discretion not to accept such Bond always lay with the Petitioners, giving them the discretion not to accept the Bond furnished by the Respondent-Company. That is exactly what has happened in the instant case. While agreeing to give the Respondent-Company the benefit of a reduced MVA, the Petitioners had prevented the Respondent-Company from accessing such privilege by continuing to raise bills on the basis of the high MVA which the Respondent-Company apparently was unable to bear on account of its financial conditions. As a result, instead of helping the Respondent-Company to come out of its financial crisis, the Petitioners have prevented the Company from doing so by refusing to lower the load from 8 MVA to 1.25 MVA, as agreed upon. It is not the case of the Petitioners that the agreement which had been arrived at between the Managing Director of the Petitioners and the Executive Director of the Respondent-Company, had been breached by the Respondent-Company. On the other hand, it has been categorically contended by the Company that it had scrupulously given effect to the said agreement as also the order of the BIFR dated 22nd October, 2007 upon the Respondent No.1-Company being declared a Sick Industrial Company under Section 3(1)(o) of SICA on 8th May, 2007.

27. It is apparent that while passing the impugned order, the High Court lost sight of the said order of the BIFR and confined itself to the provisions of Clauses 4.41 and 4.49 of the U.P. Electricity Supply Code, 2005 framed under Section 50 of the Electricity Code, 2003. If the Respondent No.1-Company is to revive, and, thereafter, survive, a certain amount of consideration has to be shown, which was fully realized by the Petitioners themselves, but they allowed themselves to be

tied up in knots over compliance with the provisions of Clauses 4.41 and 4.49 which are Rules framed for application in special cases in order to help industries which had fallen on difficult days, to recoup its losses and to bring its finances on an even keel.

28. There is no dispute that pursuant to an application made on 31st March, 2006 by the Respondent No.1-Company, praying for the reduction of the contract load from 8 MVA to 1.25 MVA with effect from 1st April, 2006, a Meeting had been held between the Managing Director of KESCO and the representatives of the Respondent-Company in which a decision was taken for reduction of the load with certain conditions. There is also no dispute that on the said date itself KESCO conveyed its agreement for reduction of load to the U.P. Electricity Regulatory Commission and sought its formal approval and that no objection was raised by the Commission with regard to the said decision except to indicate that the said decision would have to be implemented strictly in accordance with the Electricity Supply Code, 2005. There is also no dispute that when the decision was taken on 19th April, 2006 to reduce the contract load, the unamended version of Clause 4.49 of the Code was in existence and that the same provided for submission of either a Bank Guarantee or a Bond or any other instrument to the satisfaction of the licensee of the equal amount of pending dues. The only problem which has arisen is KESCO's decision not to accept the Bond given by the Respondent-Company on the ground that it did not provide sufficient security for the outstanding dues. In the totality of the existing circumstances, of which KESCO was fully aware, the decision not to accept the Bond was not in accordance with the decision arrived at on 19th April, 2006 to reduce the contract load from 8 MVA to 1.25 MVA. In fact, the Respondent-Company had been declared to be a Relief Undertaking by the State Government on an application dated 24th June, 2004. Furthermore, soon after the decision was arrived at to lower the contract load, the Respondent-Company was also declared

as a Sick Company on 8th May, 2007 and the BIFR, while considering the revival of the Respondent-Company by its order dated 22nd April, 2007, directed KESCO to continue to accept Rs.5 lakhs per month against the arrears apart from payment of the current electricity bills on actual consumption basis and also not to adopt coercive measures to disconnect the supply of electricity of the Respondent-Company. As indicated hereinabove, the result of the continued insistence of KESCO that a Bank Guarantee should be provided by the Respondent No.1-Company in respect of its outstanding dues, had the effect of negating the decisions to revive the Company.

29. We are, therefore, of the view that no interference is called for in this petition in regard to the impugned order of the High Court. The Special Leave Petition is, accordingly, dismissed, but this will not prevent the Petitioner-Company from taking appropriate steps against the Respondent-Company in the event the latter Company commits default in paying the instalments as directed by the BIFR towards the arrears or in respect of the current electricity bills.

30. There will be no order as to costs.

N.J. Special Leave Petition dismissed.

INCABLE NET (ANDHRA) LIMITED & ORS.
v.
AP AKSH BROADBAND LTD. & ORS.
(SLP (Civil) No. 9110 of 2008)

MAY 7, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Companies Act, 1956 – ss. 397, 398, 402 and 403 – Companies forming joint venture company for a project – Companies entering into Share-holder agreement – Majority share-holder company granted turnkey contract – At the relevant time Managing Director of the minority share-holder company was at the helm of affairs of the joint venture company – Company petition by minority share-holder company against majority share-holder company – Alleging oppression and mismanagement – Dismissed by Company Law Board – Appeal u/s.10F dismissed by High Court – Special Leave Petition – Held: No case of oppression or mismanagement made out – The lapse alleged against the majority share-holder company would not constitute the ingredients of complaint u/ss.397, 398, 402 and 403 – Such breach at the most would amount to breach of contract u/s. 73 of Contract Act – Contract Act, 1872 – s. 73.

Words and Phrases – 'oppression' – Meaning of in the context of ss. 397, 398 and 402 of Companies Act, 1956.

A consortium of Companies (respondent No.1) was formed which included petitioner No. 1 and respondent No. 5 for a special purpose to undertake and complete a project. Respondent No. 5-Company was the majority share-holder of the respondent No. 1-Company. Respondent No. 1 granted Engineering, Procurement and Construction (EPC) Contract to respondent No. 5.

Petitioner No. 1 filed a petition before Company Law Board u/ss. 397, 398, 402 and 403 of Companies Act, 1956, alleging that respondent No. 5 company (EPC Contractor) had mismanaged the funds and operations of the respondent No. 1-company and oppressed petitioner No.1-company. Company Law Board dismissed the petition. Appeal u/s. 10F of the Act was also dismissed by High Court. Hence the present Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1. On an overall analysis of the facts involved and the part played by the petitioner No.2 (the Director on the Board of petitioner No. 1), in the affairs of the respondent No. 1 Company at the relevant time, the Court is not inclined to interfere with the orders of the High Court or the Company Law Board, since the Court is not satisfied that any act of oppression or mismanagement within the meaning of Sections 397, 398, 402 and 403 of the Companies Act, 1956, has been made out by the petitioners against the majority shareholders of the respondent No.1 Company which would justify the making of a winding up order on the ground that it would be just and equitable to do so and to pass appropriate orders to bring to an end the matters complained of. [Para 40] [465-C-E]

2. Admittedly, respondent No. 5 is a majority shareholder in respondent No.1 Company and at the same time the EPC Contract has also been given by respondent No.1 Company to respondent No.5, to which transaction petitioner No.2 was also a party in his capacity as Vice-Chairman of respondent No.1 Company. Besides being a party to the decision to give the EPC Contract to the respondent No.5, petitioner No.2 was also instrumental in payment of large sums of money being made to respondent No.5 which stops him from alleging

that respondent No.2 Company had been siphoning off the funds of respondent No.1 Company without diligently performing its part of the contract. The EPC Contract given to respondent No.5 by respondent No.1 was a commercial contract and stands outside the ambit of Sections 397 and 398 of the Companies Act. Failure to act in terms of the contract cannot be said to have amounted to either oppression or mismanagement by respondent No.1. At best it can be said that respondent No.1 had been used as a tool or mechanism by respondent No.5 to acquire benefits for itself, which in the instant case, does not appear to be so, having regard to the fact that one of the petitioners in the Company Petition was himself responsible for such payments being made. [Para 33] [462-B-F]

3. From the facts as revealed, the only conclusion that can be arrived at is that respondent No.5 had committed a breach of contract in regard to supply of materials to respondent No.1 Company in terms of the EPC contract. Such lapse, would not constitute the ingredients of a complaint under Section 397, 398, 402 and 403 of the Companies Act, 1956. Such breach could give rise to an action of breach of contract u/s. 73 of the Contract Act, 1872. [Para 37] [464-B-C]

4. Nothing concrete has been established by appellants in regard to either oppression or mismanagement by respondent No.5 as far as the petitioners are concerned. On the other hand, the conduct of petitioner No.2 provides a different picture since at the relevant point of time he was at the helm of affairs of respondent No.1 Company, despite being a Director on the Board of petitioner No.1 Company. [Para 39] [464-F-G]

V.S. Krishnan and Ors. vs. Westfort Hi-Tech Hospital Ltd. and Ors. **(2008) 3 SCC 363, distinguished.**

Needle Industries (India) Ltd. and Ors. vs. Needle Industries Newey (India) Holding Ltd. and Ors. **1981 (3) SCC 333, held inapplicable.**

Sangramsinh P. Gaekwad vs. Shantadevi P. Gaekwad **2005 (11) SCC 314;** *Dale and Carrington Invt. (P) Ltd.& Anr. vs. P.K. Prathapan and Ors.* **(2005) 1 SCC 212, referred to.**

Case Law Reference:

2005 (11) SCC 314	**referred to.**	**Para 13**
2005 (1) SCC 212	**referred to.**	**Para 26**
1981 (3) SCC 333	**held inapplicable.**	**Para 38**
2008 (3) SCC 363	**Distinguished.**	**Para 39**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 9110 of 2008.

From the Judgment & Order dated 18.03.2008 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Company Appeal No. 3 of 2008.

Jaidep Gupta, S. Ravi, Rana Mukherejee, Sunaina Kumar, Goodwill Indeevar for the Petitioners.

K.G. Raghavan, Dharmendra Kumar Sinha, Kamal Budhiraja, Sidharth Bawa (for Dua Associates), Dr. Manish Singhvi, Devanshu Kr. Devesh, T. Mahipal, Victor Moses & Associates for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Petitioners herein filed Company Petition No.69 of 2006 before the Additional Principal Bench of the Company Law Board at Chennai under Sections 397, 398, 402 and 403 of the Companies Act, 1956, alleging mismanagement and oppression by the majority

shareholders of the first respondent Company. Various reliefs, including reconstitution of the Board of Directors of the said Company, were prayed for. By its order dated 17th December, 2007, the Company Law Board, hereinafter referred to as "CLB", dismissed the Company Petition against which the above-mentioned Company Appeal was filed before the High Court under Section 10F of the aforesaid Act. The said appeal was dismissed by the High Court as being misconceived upon the finding that the CLB had considered all the materials, applied the law and recorded its findings correctly and no question of law arose from the said order. This Special Leave Petition arises out of the said order of the High Court.

2. In order to appreciate the submissions made on behalf of the respective parties, the facts leading to the filing of the Company Petition before the CLB are set out hereinbelow.

3. With the intention of providing broadband network connectivity to all Government offices across the State of Andhra Pradesh, to connect the State capital with the Districts, Mandals, Blocks and Gram Panchayats, the State Government with the help of Andhra Pradesh Technology Services, hereinafter referred to as "APTS", identified a consortium of Companies, led by the Respondent No.5 to form a Joint Venture Company under the name of M/s AP AKSH Broadband Limited, the Respondent No.1 herein. M/s AP AKSH Broadband Limited, hereinafter referred to as "APAKSH", was contemplated as a Special Purpose Vehicle to undertake and complete the project.

4. The Petitioner No.1 was one of the companies forming the consortium which entered into a Share Holders Agreement with the Respondent No.5, Aksh Broadband Ltd. (since merged with Aksh Optifibre Limited), hereinafter referred to as 'AKSH'. The Petitioner No.1 is the Company and the Petitioner No.2 is its Managing Director. The Respondents Nos. 2 to 4 are Directors of APAKSH. The Respondent No.5 holds 57% of the fully paid up equity shares and in addition it was allotted

12,41,62,500 partly paid shares, giving the said Company a complete majority control over the affairs of the Respondent No.1 Company.

5. In terms of the Share Holders Agreement the Petitioner No.1 was to acquire 21.10% of equity capital, AKSH was to acquire 64.80% equity capital and the balance 14.30% was to be allotted to APTS. On 29.5.2006 the Board of Directors of APAKSH passed a Resolution to call upon the share-holders of the partly paid shares to pay the balance of the call money of Rs.2/- per share on or before 28.2.2006 (Date to be confirmed). A second and final notice was issued by the Respondent No.1 for payment of the call money, but on the request of the Petitioner No.2 the time was extended. Ultimately, on 25.11.2006, yet another notice was issued by the Respondent No.1 for payment of the balance call money of Rs.2/- per share on the partly paid shares.

6. The overall estimated cost of the project was Rs.395 crores, out of which equity participation by the three constituent partners was Rs.175 crores. The balance Rs.220 crores was to be mobilized as loan by the Respondent No.1 Company, and, in the event the Respondent No.1 failed to do so, the deficiency was to be met by further equity contribution by the partners.

7. As mentioned hereinbefore, APAKSH was established as a Special Purpose Vehicle with the sole object of implementing the connectivity project in accordance with the contract awarded by APTS on 21st April, 2003, apart from which no other business was to be undertaken by it. On 10th May, 2005, the Respondent No.1 gave a turnkey contract to the Respondent No.5 which is one of the principal shareholders having a controlling interest in the Respondent No.1 Company. The said Engineering, Procurement and Construction contract, hereinafter referred to as the 'EPC' contract, envisaged the completion of the infrastructural facilities within a period of 65 weeks at a fixed cost of Rs.370 crores upto the stage of commission and implementation of the project.

8. Appearing for the Petitioners, Mr. Jaideep Gupta, learned Senior Advocate, submitted that the Schedule of work in the Agreement entered into between APTS and APAKSH provided that the project was to be completed and commissioned within 65 weeks, which was to end on 31st December, 2006. It also stipulated that connectivity upto the district and all mandal levels was to be completed in a phased manner within a period of seven months from the date of execution of the contract. Mr. Gupta submitted that towards that end the Respondent No.1 placed orders for supply of optic fibre cables on its sister concern, AKSH Broadband Limited, the Respondent No.5, which subsequently merged with AKSH Optifibre Limited, the substituted Respondent No.5, represented by the Respondents Nos. 2 to 4, for completion of the project. Mr. Gupta submitted that despite the fact that over a crore of rupees had been contributed by the Respondent No.1 to the Respondent No.5 towards the execution of the EPC contract, it had not achieved connectivity in any of the 23 districts of the State in terms of the Agreement dated 21st April, 2005, executed by APTS. Mr. Gupta submitted that AKSH Broadband Limited had used its sister concern, AKSH Optifibre Limited, prior to its merger, to dump useless and defective cable and to store them as part of the stores of AKSH Broadband Limited and siphoned out the monies from APAKSH Broadband Limited, purportedly for execution of the EPC contract, but without any tangible benefit to the Respondent No.1.

9. Mr. Gupta urged that the Petitioner had been lured by the Respondents Nos. 2 to 4 to procure finance for the purpose of investment in the Respondent No.1 Company from Elegant Capitals Private Limited, the Respondent No.6 herein, which had promised to advance a loan of Rs.33 crores to the Petitioners towards capital contribution in the Respondent No.1 Company. Mr. Gupta submitted that taking advantage of their stranglehold over the Company and its officers, the Respondent Nos. 2 to 5 had by a series of acts mismanaged

the affairs of the Respondent No.1 Company and rendered the Petitioners completely ineffective inspite of their investment, thereby attracting the provisions of Sections 402 and 403 of the Companies Act, 1956.

10. Mr. Gupta urged that the Respondent No.5 was involved with the turnkey project in two capacities. On the one hand, it is the principal shareholder of the Respondent No.1 Company, holding and controlling more than 64% equity of the Respondent No.1 and, on the other, it is the EPC contractor who is responsible for delivering goods and services in accordance with the Agreement executed between itself and the Respondent No.1 Company on 10th May, 2005. Mr. Gupta submitted that it was in this context that it was necessary for the Company Law Board and the High Court to have inquired into the conduct of the Respondent No.5 in the matter of execution of the turnkey project. Mr. Gupta submitted that such omission has resulted in grave miscarriage of justice in so far as the Petitioners were concerned.

11. Mr. Gupta submitted that since the Petitioners had not been permitted to adduce oral evidence involving events which had occurred during the pendency of the appeal, the only course left open to rectify the injustice caused to the Petitioners was to remit the matter to the Company Law Board for a proper inquiry into the various allegations made by the Petitioners regarding the gross misconduct of the Respondent No.5 in executing the turnkey project which was the very substratum of the existence of APAKSH Broadband Limited, the Respondent No.1 company. Mr. Gupta submitted that the aforesaid acts of the Respondent No.1 Company through the Respondent No.5 herein, taking advantage of its complete control over the management and affairs of the Respondent No.1 already established that the Company's affairs are being conducted in a manner oppressive to the Petitioners and the facts justified the making of a winding-up order on the ground that it was just and equitable that the Company be wound up.

12. Mr. Gupta also submitted that after holding that they lacked jurisdiction under Sections 397 and 398 and 10-F of the Companies Act, neither the Company Law Board nor the High Court should have commented on the merits of the matter which has prejudiced the interests of the Petitioners. It was urged that it is in this context that the complaint made about the failure of the principles of natural justice before the Company Law Board assumes significance. Referring to the decision of this Court in *Needle Industries (India) Ltd. & Ors. vs. Needle Industries Newey (India) Holding Ltd. & Ors.* [(1981) 3 SCC 333], Mr. Gupta submitted that in the said decision it had been held as follows :-

> "**63.** We appreciate that it is generally unsatisfactory to record a finding involving grave consequences to a person on the basis of affidavits and documents without asking that person to submit to cross-examination. It is true that men may lie but documents will not and often, documents speak louder than words. But a total reliance on the written word, when probity and fairness of conduct are in issue, involves the risk that the person accused of wrongful conduct is denied an opportunity to controvert the inferences said to arise from the documents………..".

In the said judgment, this Court also observed that many decisions had been cited in support of the contention that issues of mala fides and abuse of fiduciary powers are almost always decided not on the basis of facts but on oral evidence.

13. Mr. Gupta also referred to the decision of this Court in *Sangramsinh P. Gaekwad vs. Shantadevi P. Gaekwad* [(2005) 11 SCC 314], in which the question of oppression for the purposes of Section 397 and 398 of the Companies Act has been dealt with in some detail. Their Lordships held that the remedy under Section 397 of the Companies Act is not an ordinary one. The cause of oppression had to be burdensome, harsh and wrongful and an isolated incident may not be enough for grant of relief and continuous course of oppressive conduct

on the part of majority shareholders was, therefore, necessary to be proved. It was also observed that the jurisdiction of the Court to grant appropriate relief under Section 397 was of wide aptitude and in exercise of its powers the Court was not bound by the directions contained in Section 402 of the Companies Act if in a particular fact situation further relief or reliefs were warranted. At the same time, a word of caution was introduced and it was also held that it had to be borne in mind that when a complaint is made as regards violation of statutory or contractual rights, the shareholders may initiate proceedings in a Civil Court or in a proceeding under Section 397 of the Act which would be maintainable only when an extra-ordinary situation is brought to the notice of the Court keeping in view the wide and far reaching power of the Court in relation to the affairs of the Company.

14. Mr. Gupta pointed out that several letters had been written on behalf of the Petitioner-Company objecting to the manner in which the funds of the Company were being siphoned off by the Engineering Procurement and Construction Contractor, hereinafter referred to as "the EPC Contractor", without any progress in the project work. In the first of such letters dated 22nd August, 2006, addressed by Shri R.V.R. Chowdary, Chairman and Managing Director of the Petitioner Company, to the Chairman of the Respondent No.1 Company, the financial indiscipline on account of payment of commission to the EPC contractor was objected to as the same ought to have been spent in proportion to the funds earmarked for each category of expenditure. The next letter referred to by Mr. Gupta was the one dated 1st November, 2006, addressed by the Vice-Chairman of the Respondent No.1 Company to the Respondent No.5 complaining of the fact that despite all the support received by the Respondent No.5 as the EPC contractor and payment of about Rs.100 crores, connectivity had not been completed even in one district nor in the State Secretariat which was the central hub of the project. Various other shortcomings of the Respondent No.5 were also pointed

out and it was also stated that A.P. Broadband Project had been used by the Respondent No.5 to enrich itself using the free right of way granted by the Government of Andhra Pradesh. It was also mentioned that no further infusion of funds was necessary and the EPC contractor would have to make immediate measures to make triple play completely operational in at least 4 to 5 districts.

15. Yet another letter dated 29th September, 2006, addressed to Mr. V.K. Dhir, the Chief Executive Officer of the Respondent No.5 was referred to by Mr. Gupta from which it would be evident that the work had not been completed nor had the timelines indicated been followed. A letter on similar lines addressed by the Department of Information Technology and Communication, Government of Andhra Pradesh, to Dr. Kailash Chowdary, Managing Director of the Respondent No.5, expressing serious concern with regard to the progress made, was also brought to the notice of the Court.

16. Mr. Gupta submitted that it is only too obvious that the Respondent No.5 had misused its control over the Respondent No.1 Company in not only securing the contract for the project which was nothing but the modus operandi of the Respondent No.5 in collusion with Respondent No.1 to siphon off the funds of the Company, after having induced the Petitioners to invest large sums of money in the Respondent No.1 Company and rendering the holding of the petitioners in the Respondent No.1 Company of little or no value. As against the investment of Rs.112 crores by the Petitioner Company, no connectivity had been achieved even in Hyderabad, let alone in the 23 districts and all the mandals and villages of the State or even in at least one district.

17. Mr. Gupta submitted that this was a classic example of oppression by majority shareholders having a controlling interest, confined to unjust enrichment at the expense of minority shareholders of the Company. Mr. Gupta submitted that unless appropriate orders were passed on the Petitioners' application

under Sections 397, 398, 402 and 403 of the Companies Act, 1956, the Petitioner Company would completely lose its investment in the Respondent No.1 Company and would also be made to face continuous litigation and harassment at the hands of the Respondents Nos.2 to 6.

18. Appearing for the Respondent Nos.1, 3, 4 and 5, Mr. K.G. Raghavan, learned Senior Advocate, submitted that the conduct of the Respondent No.5 as EPC contractor and a shareholder in Incable Net has been cited by the Petitioners in their application under Sections 397 and 398 of the Companies Act, as acts of oppression on the Petitioner Company. Referring to the various allegations made against the Respondent No.5 and its purported control of the Respondent No.1, Mr. Raghavan pointed out that the Petitioners had deliberately suppressed the fact that the payments made to the Respondent No.5 had been done under the signature of the Petitioner No.2. Mr. Raghavan submitted that having himself participated in the Board meetings as Director of the Respondent No.1 Company and having chaired eight Board Meetings between 14.2.2005 and 4.3.2006 and having been a signatory to the minutes of the meeting dated 21st April, 2005, in which the EPC contract had been awarded in favour of the Respondent No.5, it did not lie in the mouth of the Petitioner No.2 to attribute acts of oppression by the Respondent No.1 as far as the Petitioners are concerned. Mr. Raghavan submitted that apart from the above, the Petitioner No.2 was also a member of the Managing Committee and Audit Committee of the Respondent No.1 Company and had also signed the Audit Report and its Balance Sheet for the year 2005-06.

19. Mr. Raghavan submitted that during this period, when the Petitioner No.2 was not only participating in the affairs of the Company, but was taking an active role in its management, no allegation as to oppression or even mis-management was raised. It was only after the call money for the balance price of

the partly paid shares was repeatedly demanded from the Petitioners and the Petitioners failed to pay the said amount, that all these allegations began to surface for the first time after 1st November, 2006. Mr. Raghavan submitted that between 2003 and 2006, ten Board Meetings were chaired by the Petitioner No.2 as Chairman. Special reference was made to the meeting held on 21st April, 2005, which was chaired by the Petitioner No.2, and wherein the EPC contract to be given to the Respondent No.5, was approved. Mr. Raghavan submitted that at no point of time was any demand made for cancellation of the EPC Agreement and even in the Company Petition before the CLB no such prayer was made.

20. Mr. Raghavan submitted that the Director of the Company stands in a fiduciary capacity to the Company, but the same cannot be equated with his duties towards the shareholders which stood on a different footing and in case of conflict between the two interests, the Company's interests had to be protected. A Director has to act in the paramount interest of the Company. He has no statutory obligation as far as individual shareholders are concerned. Accordingly, the duty of the Petitioner No.2 as a Director of the Respondent No.1 Company was to the Company before his combined interest as a Director in the Petitioner No.1 Company, which was a shareholder in the Respondent No.1 Company. Mr. Raghavan urged that the Company Law Board had quite correctly disallowed the claims of the Petitioners and left it to the collective wisdom of the Directors of the Respondent No.1 Company to take such action as was deemed fit and proper in the course of management of the day-to-day affairs of the Company, particularly with reference to evaluation of the quantum of work completed by AKSH and the investments made by it towards the share capital of the Company, realization of the final call money from the shareholders, recovery of the security deposits from the Petitioner No.1,, settlement of the pending bills of the Directors, audit of the accounts of the Company, etc. which were within the lawful

domain of the Board of Directors.

21. In this regard, Mr. Raghavan referred to the decision of this Court in *Sangramsinh P. Gaekwad* (supra), which had also been referred to by Mr. Gupta, in support of his contention that the duties of a Director to the Company and to the shareholders stand on different levels, but while a Director stands in a fiduciary capacity to the Company, he does not have such a duty towards shareholders.

22. As far as denial by the CLB as well as the High Court to the adducing of oral evidence is concerned, Mr. Raghavan submitted that Section 10E(5) of the Companies Act, 1956, indicates the manner in which the Company Law Board has to exercise its powers and to discharge its functions under the Act.

For the sake of reference, Section 10E(5) is set out hereinbelow :

> *"10E. Constitution of Board of Company Law Administration.-*
>
> (1) ……………………
>
> (2) ……………………
>
> (3) ……………………
>
> (4) ……………………
>
> (5) Without prejudice to the provisions of sub-sections (4C) and (4D), the Company Law Board shall in the exercise of its powers and the discharge of its functions under this Act or any other law be guided by the principles of natural justice and shall act in its discretion."

23. Mr. Raghavan submitted that there was no compulsion on the Company Law Board to record oral evidence, when all that the Petitioners had to say had already been said by them on affidavit. The Company Law Board, therefore, did not

commit any illegality in disallowing the Petitioners' prayer for adducing oral evidence. Mr. Raghavan also referred to the relevant portions of the decision of this Court in *Needle Industries (India) Ltd.* (supra), where an argument had been advanced that under the Company Court Rules framed by this Court, the provisions of the Civil Procedure Code were made applicable to proceedings before the Company Law Board under Section 397 of the Act. Mr. Raghavan pointed out that in paragraph 63 of the judgment this Court had observed that, although, it had to be appreciated that it is generally unsatisfactory to record a finding involving grave consequences towards a person on the basis of affidavits and documents, without asking that person to submit to cross-examination, but a total reliance on the written word, when probity and fairness of conduct are in issue, involved the risk that the person accused of wrongful conduct is denied an opportunity to controvert the inferences said to have arisen from the documents. The said submission was ultimately not acted upon on the ground that such a submission was a belated attempt to avoid an inquiry into the conduct and motives of one of the Directors of the Company.

24. Mr. Raghavan reiterated his submissions that where there was a conflicting interest between the Company and the shareholders, the Director's duties would at first always be for the benefit of the Company and that in the context of Sections 397 and 398 of the Companies Act, the Legislature in its wisdom had left the procedure to be adopted in these matters to the Company Law Board itself, with special emphasis on due compliance with the principles of natural justice.

25. Mr. Raghavan placed reliance on the decision of this Court in *V.S. Krishnan & Ors. vs. Westfort Hi-Tech Hospital Ltd. & Ors.* [(2008) 3 SCC 363], wherein, while considering the scope of the expression "oppression" within the meaning of Sections 397, 398 and 402 of the Companies Act, it was held that in order to establish "oppression" it would have to be shown

that the conduct of the majority shareholders towards the minority shareholders was harsh, burdensome and wrong and that such conduct was mala fide and was for a collateral purpose where although the ultimate objective might be in the interest of the Company, the immediate purpose would result in an advantage for some shareholders over others. It was also observed that the action of the majority shareholders was against probity and good conduct. Once the conduct was found to be oppressive under Sections 397 and 398, the discretionary power given to the Company Law Board under Section 402 to set right, remedy or put to an end such an oppression, is very wide.

26. Mr. Raghavan submitted that even in the decision of this Court in *Dale & Carrington Invt. (P) Ltd.& Anr. vs. P.K. Prathapan & Ors.* [(2005) 1 SCC 212], this Court had held that when a majority shareholder was reduced to a minority shareholder by a mala fide act of the Company or its Board of Directors, such act would amount to "oppression" against the minority shareholders.

It was also submitted that it is only in such circumstances that a decision was taken by the Respondent No.1 Company to consider the question of forfeiture of the partly paid shares held by the Petitioner No.1. He also submitted that the call money amounting to Rs.24,83,25,000/- had already been deposited by the Respondent Nos.3 to 5.

27. Except to submit that the project had been undertaken by the State Government to abridge the digital divide which existed within the State, Dr. Manish Singhvi, learned Advocate appearing for the Respondent No.2, had little else to add.

28. In reply to the submissions made on behalf of the respondents, Mr. Jaideep Gupta submitted that the High Court had not decided the question of jurisdiction under Sections 397 and 398 of the Companies Act. The findings of misconduct by the High Court against the Petitioners was not only on the

question of contractual obligation between the Respondent No.1 and Respondent No.6, but also with regard to the mala fide manner in which the Petitioners were placed on account of the close proximity between the Respondent No.1 and the Respondent No.5. Mr. Gupta also submitted that the participation of the Petitioner No.2 as a Director in the affairs of the respondent No.1 Company was prior to the implementation of the project.

29. It was lastly urged that "oppression" is a mixed question of law and fact as was held in the *Needle Industries (India) Ltd.'s* case (supra) and the views expressed by this Court in the said case, in fact, applies to the case of the Petitioners necessitating the setting aside of the orders of the Company Law Board as well as the High Court.

30. On the allegations contained in the Company Petition filed by the Petitioners under Sections 397, 398, 402 and 403 of the Companies Act, 1956, the reliefs prayed for are as follows :-

"(i) To direct the 1st respondent company to incorporate the Shareholders Agreement dated 04.06.2005 in the Memorandum and Articles of Association of the 1st respondent company;

(ii) To reconstitute the Board of Directors of the 1st respondent company and provide that all policy decisions, and all decisions on key matters be decided by a Board of directors at a meeting where at only one nominee from each of the groups viz., 5th respondent, 1st petitioner apart from APTS nominee are present;

(iii) Appoint a Chartered Accountant to investigate into the investments made by the 5th respondent towards the share capital especially keeping in mind the source of funds for investments in share

capital of the 1st respondent company;

(iv) Appoint a team of Chartered Accountants/ Chartered Engineers to evaluate the quantum of work done by the 5th respondent company, and declare that the investment of the 5th respondent company over and above the said quantum of work to have been issued without consideration and consequently annul the said shares and direct the modification of the shareholding of the 1st respondent company;

(v) Vest the day-to-day administration of the 1st respondent company in a Committee of Directors comprising of a nominee from each group viz., petitioners, APTS and 5th respondent; and pass such other order(s) as the Hon'ble Board deems fit and proper in the circumstances of the case."

31. The allegation on the basis of which such reliefs have been prayed for basically is that the EPC Contractor AKSH, the Respondent No.5, which is also the majority shareholder in the Respondent No.1 Company, had mismanaged the funds and operations of the Company and the work on the project was delayed on account of the various acts of omission and commission on the part of AKSH. The reliefs prayed for have been opposed on behalf of the Respondents contending that the contractual obligations under the EPC Contract did not fall within the scope of Sections 397 and 398 of the above Act and the right of the Petitioners as shareholders was in no way affected, particularly, when the Petitioner No.2 was a Director and Vice-Chairman and a member of the Managing Committee constituted to monitor the implementation of work of the project and at no point of time had he made any grievance with regard to the EPC Contract. That apart, he had chaired the meetings of the Board and operated the bank accounts and payments made to AKSH by the Respondent No.1 Company had in most cases been done by him on behalf of the Company.

32. It is on the said foundation that a case of oppression and mismanagement has been attempted to be made out by the Petitioners. However, in the facts of the case it becomes difficult to take a different view as has been expressed both by the CLB as also by the High Court.

33. Admittedly, the Respondent No.5 is a majority shareholder in the Respondent No.1 Company and at the same time the EPC Contract has also been given by the Respondent No.1 Company to the Respondent No.5, to which transaction the Petitioner No.2, Shri R.V.R. Chowdary, was also a party in his capacity as Vice-Chairman of the Respondent No.1 Company. Besides being a party to the decision to give the EPC Contract to the Respondent No.5, the Petitioner No.2 was also instrumental in payment of large sums of money being made to the Respondent No.5 which estops him from alleging that the Respondent No.2 Company had been siphoning off the funds of the Respondent No.1 Company without diligently performing its part of the contract. There is substance in Mr. Raghavan's submissions that the EPC Contract given to the Respondent No.5 by the Respondent No.1 was a commercial contract and stands outside the ambit of Sections 397 and 398 of the Companies Act. Failure to act in terms of the contract cannot be said to have amounted to either oppression or mismanagement by the Respondent No.1. At best it can be said that the Respondent No.1 had been used as a tool or mechanism by the Respondent No.5 to acquire benefits for itself, which in the instant case, does not appear to be so, having regard to the fact that one of the Petitioners in the Company Petition was himself responsible for such payments being made.

34. Both the parties have placed reliance on the decision of this Court in *Needle Industries (India) Ltd.* (supra). Mr. Gupta relied on the said decision in support of his submission that by denying an opportunity to the Petitioners to adduce oral evidence, the CLB had shut out vital evidence which would have

strengthened the case of the Petitioners. The views expressed in paragraph 63 of the said decision is the expression of a general principle of law and only confirms the principle of adducing evidence, but does not lay down a hard and fast rule that in all cases the Court or the CLB is bound to allow oral evidence to be led as otherwise there is a risk that the person accused of wrongful conduct is denied an opportunity to controvert the inference said to have been arrived at from the evidence produced before the Court alone. As a proposition of law there can be no disagreement with the same, but the question is as to whether the same is required to be applied in the facts of the instant case.

35. From the submissions made on behalf of the respective parties and the materials on record, the point which falls for consideration in this appeal is as to whether a case of oppression and mismanagement by the majority shareholders against the minority shareholders had been established or not.

36. Whether there is any truth in Mr. Gupta's submissions as to the siphoning of funds by the Respondent No.5 Company from the Respondent No.1 Company, which had been set up as a Special Purpose Vehicle and in which the Respondent No.5 was a majority shareholder, holding about 60% of the equity shares has not been properly established. On the other hand, the materials on record indicate that the Petitioner No.2, who is a Director of the Petitioner No.1 Company, which is also a shareholder in the Respondent No.1 Company, had functioned as a Vice President of the Respondent No.1 Company and had also chaired 8 of its Meetings including the Meeting held on 21st April, 2005, in which the decision was taken to award the EPC Contract to the Respondent No.5 Company. Further more, the Petitioner No.2 had signed most of the cheques by which payments were made to the Respondent No.5 Company for supply of materials under the EPC contract. It does not lie in the mouth of the Petitioner to

now contend that the funds of the Respondent No.1 Company had been siphoned by the Respondent No.5.

37. From the facts as revealed, the only conclusion that can be arrived at is that the Respondent No.5 had committed a breach of contract in regard to supply of materials to the Respondent No.1 Company in terms of the EPC contract. Such lapse, in our view, would not constitute the ingredients of a complaint under Section 397, 398, 402 and 403 of the Companies Act, 1956. Such breach could give rise to an action of breach of contract under Section 73 of the Indian Contract Act, 1872.

38. The decisions cited on behalf of the respective parties and in particular, the decision in *Needle Industries (India) Ltd.* (supra), in support of the claim of the Petitioners for being allowed to lead oral evidence, does not really come to the aid of the Petitioners, since from the materials on record itself it has been established that at best the Respondent No.5 had failed to abide by its commitments in the EPC contract executed in its favour by the Respondent No.1 Company.

39. We are unable to understand as to how the decisions in the above case are of any help to the Petitioners, since nothing concrete has been established by them in regard to either oppression or mismanagement by the Respondent No.5 as far as the Petitioners are concerned. On the other hand, the conduct of the Petitioner No.2 provides a different picture since at the relevant point of time he was at the helm of affairs of the Respondent No.1 Company, despite being a Director on the Board of the Petitioner No.1 Company. The decision in *V.S. Krishnan's* case (supra) is more apposite to the facts of the case. Quoting Halsbury, this Court observed that the expression "oppression" within the meaning of the Sections 398, 399 and 402 of the Companies Act had been interpreted to mean that the conduct of the majority shareholders towards the minority shareholders was harsh, burdensome and wrong and that such conduct was mala fide and was for a collateral purpose which

would result in an advantage for some shareholders over others, although, the ultimate object might be in the interest of the Company. However, the facts disclosed in this case do not establish such conduct on the part of the Respondent No.5. Until the conduct of the majority shareholders was found to be oppressive in terms of the above description, under Sections 397 and 398 of the Companies Act, 1956, the Company Law Board was not competent to invoke its jurisdiction under Section 402 of the said Act to set right, or put an end to such oppression.

40. On an overall analysis of the facts involved and the part played by the Petitioner No.2 in the affairs of the Company at the relevant time, we are not inclined to interfere with the orders of the High Court or the Company Law Board, since we are not satisfied that any act of oppression or mismanagement within the meaning of Sections 397, 398, 402 and 403 of the Companies Act, 1956, has been made out by the Petitioners against the majority shareholders of the Respondent No.1 Company which would justify the making of a winding up order on the ground that it would be just and equitable to do so and to pass appropriate orders to bring to an end the matters complained of.

41. The Special Leave Petition is, accordingly, dismissed.

42. There will, however, be no order as to costs.

K.K.T. Special Leave Petition dismissed.

HARISH MAGANLAL BAIJAL
v.
STATE OF MAHARASHTRA & ORS.
(SLP (C) No. 6556 of 2008)

MAY 7, 2010

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Service Law:

Maharashtra Civil Services (Regulation and Seniority) Rules, 1982 – Rule 4(2) – Seniority of recruits selected in one batch – 22 posts of DSP – First 14 meant for candidates from open stream and remaining 8 for reserved candidates – Petitioner unable to qualify in the exam and placed after the list of successful candidates – Petitioner appointed as Sales Tax Officer which was his second preference – Out of the original selected candidates, three found ineligible for the post – Appointment of petitioner to the post of DSP – Publication of provisional gradation/seniority list – Seniority list, challenged by petitioner – Claim of seniority over candidates who had been selected at the initial stage – Rejected by tribunal as also High Court – Interference with – Held: Not called for – Selection of petitioner along with two other candidates as substituted candidates in place of the ineligible candidates, was under fortuitous circumstances – Petitioner was brought in as a replacement candidate, not from any waiting list, but from the list of successful candidates in the examination held as per marks obtained by them, on basis of the representation made by him – Thus, Rule 4(2) not applicable and petitioner's seniority to be reckoned only from the date of his joining his duties as DSP – Maharashtra State Service (Main), Examination, 1990.

The Maharashtra State Service (Main), Examination, 1990 was held for the filling up of 22 posts of Deputy

Superintendent of Police/Assistant Commissioner of Police. Out of the said posts, the first 14 posts were for candidates from the open category and 8 posts were reserved for candidates from SC, ST and OBC categories. The petitioner appeared for the exam. He scored 604 marks and could not qualify for one of the 14 vacancies in the open category and was placed immediately after the list of successful candidates. The petitioner was appointed as Sales Tax Officer, which was his second preference. Out of the candidates selected in the post of DSP, 3 candidates were found to be physically unfit for the post. On representation by the petitioner, he was appointed to the post of DSP as a replacement candidate. Thereafter, the provisional gradation/seniority list was published. The petitioner was placed at serial no. 238 which was below the last candidate out of the 22 selected candidates. T, though scored lower marks than the petitioner was placed above the petitioner. K who had joined the service along with the petitioner was given seniority with effect from 15th July, 1992, along with the other batch mates of 1990. The petitioner made a representation to the State Public Service Commission challenging the seniority list. The representation was rejected. The petitioner filed an application, and the tribunal dismissed the same. The High Court upheld the order. Hence, the Special Leave Petition.

Dismissing the Special Leave Petition, the Court

HELD: 1.1. There is no reason to interfere with the order of the tribunal as upheld by the High Court. Admittedly, out of all the 22 vacant posts, the first 14 posts were to be filled up by candidates from the open category and the remaining 8 vacancies were reserved for Scheduled Caste and Scheduled Tribes candidates. The last candidate to be included in the first 14 vacancies had obtained 610 marks, whereas the petitioner had obtained 604 marks. In between the last candidate and the petitioner there were 3 other candidates who had obtained 608, 607 and 605 marks, respectively, so that, in any event, even if the 3 ineligible candidates had been excluded from the very beginning, the petitioner still could not have been included among the first 14 candidates, particularly when one of the ineligible candidates was from the Scheduled Caste and Scheduled Tribes category. [Para 16] [475-H; 476-A-C]

1.2. The selection of the petitioner along with two other candidates as substituted candidates in place of the three ineligible candidates, was under fortuitous circumstances since the original selection had already been made and in keeping with the marks obtained by him and his second preference, the petitioner had been appointed as Sales Tax Officer, Class-I and he, in fact, joined in the said post on 22nd April, 1992. The petitioner‘s contention that since both K and he had joined the post of DSP on 15th September, 1993, their seniority should have been reckoned from the same day was rightly rejected both by the tribunal and the High Court, having regard to the fact that while K had been included in the first select list and his appointment was also deferred on account of verification of his Caste Certificate, the appointment of the petitioner who had already been appointed and was functioning as Sales Tax Officer, Class-I, in the post of DSP, was accidental in view of the ineligibility of three candidates who had been included in the initial list of selected candidates. His claim for seniority could, therefore, be reckoned only from the date of his joining his duties as DSP. [Para 17] [476-D-G]

1.3. K had been initially selected for one of the reserved posts from the Scheduled Castes and Scheduled Tribes category and his appointment had only been deferred for verification of his Caste Certificate. In

the case of the petitioner it was different, in that, he was never included in the initial selection list as a result whereof he was appointed as Sales Tax Officer, Class-I, on account of the marks obtained by him and his position in the list of candidates who were successful in the examination conducted by the Maharashtra Public Service Commission in 1990. [Para 18] [476-H; 477-A-C]

1.4. The petitioner's contention that he should have been placed above T also lacks merit, since T was included in the original list from the Schedule Castes category and he was, therefore, entitled to be placed before the petitioner in the gradation list from the date of his joining as DSP. [Para 19] [477-C-D]

1.5. Rule 4 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982, deals with the general principles of seniority. Sub-Rule (2) of Rule 4 deals with *inter se* seniority of direct recruits selected in one batch for appointment to any post, cadre or service. In the petitioner's case, he was not so selected, but was brought in as a replacement candidate, not from any waiting list, but from the list of successful candidates in the examination held as per the marks obtained by them on the basis of the representation made by him to the Home Minister on 21st June, 1992. The said Rule, therefore, has no application in the petitioner's case despite the fact that the successful candidates as well as the petitioner were from the same batch. [Paras 19 and 20] [477-D-E; 478-G-H; 478-A]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 6556 of 2008.

From the Judgment & Order dated 08.01.2008 of the High Court of Judicature at Bombay in W.P. N o. 6930 of 2007.

Srenik Singhvi, Susmita Lal, Vineet Dhanda, J.P. Dhanda,

Raj Rani Dhanda, Amrendra Kr. Singh, Arun R. Pednekar, Sanjay V. Kharde and Asha Gopalan Nair for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The petitioner appeared in the Maharashtra State Service (Main), Examination, 1990, which was held for the filling up of 22 posts of Deputy Superintendent of Police/Assistant Commissioner of Police, Class-I. In his application, the Petitioner gave his first preference for appointment to the post of Deputy Superintendent of Police (DSP)/ Assistant Commissioner of Police, Class-I, and his second preference for the post of Sales Tax Officer, Class-I. Having secured 604 marks, the Petitioner did not qualify for one of the 14 vacancies in the open category and was placed immediately after the list of successful candidates. Out of the 22 vacant posts, the first 14 posts were for candidates from the open category and 8 posts were reserved for candidates from the Scheduled Caste and Scheduled Tribes and Other Backward Classes categories.

2. Since there were only 14 vacancies in the open category for the post of DSP, the Petitioner in keeping with his second preference, was appointed as Sales Tax Officer, Class-I, and he joined his duties in the said post on 22nd April, 1992.

3. Of the 14 candidates selected in the open category in the post of DSP, 3 candidates, 2 from the open category and one from the reserved category, were found to be physically unfit for the said post. On coming to learn of the above, the petitioner made a representation to the Minister of Home Affairs on 21st June, 1992, asking that the Maharashtra Public Service Commission be directed to recommend names from the 1990 batch according to the merit list, to fill up the vacancies caused. The Petitioner and two others were thereupon recommended by the Commission by its letter dated 6th November, 1992, and called upon by the State Government to join duty as DSP/

Assistant Commissioner of Police, Class-I, as replacement candidates, and although the formalities for appointment were completed in December, 1992, appointment letter was issued to the Petitioner only on 30th August, 1993, and the Petitioner joined his duties in the post of DSP on 15th September, 1993. In the letter of recommendation written by the Maharashtra Public Service Commission on 6th November, 1992, it was categorically mentioned that the replacement candidates were to be placed after the respondent No.8, Madhukar Shankar Talpade, despite the fact that the petitioner had obtained higher marks than Shri Talpade in the examination. The said fact came to the petitioner's knowledge after the publication of the provisional gradation/seniority list.

4. The provisional gradation/seniority list of the cadre of DSP/Assistant Commissioner of Police (Unarmed) came to be published by the Secretary, Home Department, Maharashtra State, in which the Petitioner was placed at serial No.238 and the Respondent Nos.5, 6, 7 and 8, who were from the same batch as the Petitioner, were shown at serial nos.200, 201, 202 and 203, respectively. From the said seniority list, it further transpired that candidates from serial Nos.188 to 202 were all from the same batch of direct recruits appointed in the year 1992. However, although the Respondent No.7 (Mr. Kumbhare) had joined the service on 15th September, 1993, along with the Petitioner, he was given seniority with effect from 15th July, 1992, along with the other batch mates of 1990 on the basis of contemporaneous merit/rank position prepared by the Maharashtra Public Service Commission, the Respondent No.4 herein. According to the Petitioner, if the same yardstick, as was applied in Mr. Kumbhare's case, had been applied to the Petitioner, his name would have appeared after Sanjay Devidas Baviskar, who had secured 605 marks and was placed at serial No.199 and before Sanjay Yashwant Gaikawad Aparati, the Respondent No.5, who having obtained 603 marks was placed at serial No.200. It is the Petitioner's case that having obtained higher marks than the Respondent No.5, he should have been

placed at serial No.200 of the gradation list instead of the Respondent No.5.

5. Aggrieved by the above, the Petitioner made a representation to the Maharashtra Public Service Commission, but the same was rejected in June, 2003, on the ground that the seniority position assigned to the Petitioner was in keeping with the recommendation made by the Secretary, Home Department, Maharashtra State and could not, therefore, be changed.

6. Being dissatisfied with the manner in which his representation had been rejected, the Petitioner filed an application before the Maharashtra Administrative Tribunal, Aurangabad, being Original Application No.556 of 2003. The said application was subsequently transferred to the Maharashtra Administrative Tribunal, Mumbai, and renumbered as O.A. No.78 of 2004. A similar application being O.A. No.867 of 2003 was filed by one Mahesh R. Ghurye. By a common judgment and order dated 16th September, 2004, the Maharashtra Administrative Tribunal, Mumbai Bench, rejected the Petitioner's Application. The writ petition filed by the Petitioner before the Bombay High Court in this regard was rejected by an order dated 8th January, 2008, which has been impugned in the instant Special Leave Petition.

7. Appearing in support of the Special Leave Petition, Mr. Srenik Singhvi, learned Advocate, urged that under Rule 4(2) of the Maharashtra Civil Services (Regulation and Seniority) Rules, 1982, the Petitioner was entitled to be placed in the seniority list in accordance with the marks obtained by him in the 1990 examination. Therefore, the direction given by the Maharashtra Public Service Commission to place the Petitioner below the last candidate out of the 22 candidates selected was not only erroneous, but arbitrary and in violation of the above-mentioned Rule. Mr. Singhvi submitted that the learned Tribunal had erred in dismissing the Petitioner's Original Application.

8. As far as the High Court is concerned, Mr. Singhvi submitted that it had proceeded on the erroneous basis that the Petitioner had been selected from the waiting list of candidates, whereas the Petitioner was one of the originally selected candidates, but could not be appointed on account of the number of vacancies. Learned counsel submitted that the gradation list prepared by the Respondent No.2 was, therefore, liable to be set aside with a direction to place the name of the Petitioner at serial no.200 instead of serial No.238. It was submitted that since Mr. Kumbhare's appointment was withheld on account of the discrepancy in his caste certificate, he could not have been given seniority over the Petitioner who joined his duties as Sales Tax Officer, Class-I, on 22nd April, 1992, and was, thereafter, issued appointment letter in the post of DSP on 30th August, 1993. Mr. Singhvi submitted that had the disqualification of the three candidates been taken into consideration at the time of preparation of the select list, the Petitioner would have been within the first 14 candidates from the open category on account of the marks obtained by him in the examination conducted in 1990 for filling up the 22 vacant posts. Instead, a direction was given by the Respondent No.2 to place him below Mr. Kumbhare, who had obtained lower marks than the Petitioner.

9. Mr. Singhvi also submitted that although Mr. Kumbhare had joined as D.S.P. on 15th September, 1993, along with the Petitioner, he had been given seniority with effect from 15th July, 1992, along with his other batch mates while the Petitioner was given seniority from the date of his appointment as D.S.P.

10. In support of his submissions, Mr. Singhvi referred to and relied on the decision of this Court in *P.M. Latha vs. State of Kerala* [(2003) 3 SCC 541], in which the equitable relief granted to certain candidates holding a higher qualification than was required was deprecated by this Court and such appointments were set aside upon it being observed that equity and law are twin brothers and law should be applied and

interpreted equitably, but equity cannot override written or settled law.

11. Mr. Singhvi submitted that the order passed by the Secretary, Home Department, Maharashtra State, which was later confirmed by the Administrative Tribunal and the High Court, was liable to be set aside along with the order passed by the Tribunal and the High Court.

12. As against Mr. Singhvi's submissions, Mr. Vineet Dhanda, learned counsel, who appeared for the respondent Nos.5 to 8, submitted that as would be evident from the seniority list of DSPs and ACP Police Officers (Unarmed) published on 1st February, 2001, that candidates who had been selected for the first 14 posts, which were reserved for candidates from the open category, had obtained higher marks than the petitioner. It is thereafter that the remaining posts, which were reserved for candidates from the Scheduled Castes and Scheduled Tribes categories, were filled up with candidates from the reserved category who had obtained less marks than was obtained by the petitioner. Mr. Dhanda submitted that from the said seniority list it would be clear that Shri Madhukar Shankar Talpade was the last Scheduled Caste candidate to be appointed, whose marks were less than that obtained by the petitioner. However, the said eventuality was on account of the fact that of the 22 vacancies, the first 14 were meant for candidates from the open stream, whereas the next 8 posts were reserved for candidates from the Scheduled Castes and Scheduled Tribes categories.

13. It was submitted that not having been selected for the post of DSP, the petitioner had been appointed to the post of Sales Tax Officer, Class-I, which was his second preference. It is only on account of fortuitous circumstances, when three of the original candidates selected, two from the open category and one from the reserved category, were found to be ineligible for appointment, that the petitioner and two others were recommended by the Maharashtra Public Service Commission

for appointment to the post of DSP. Mr. Dhanda submitted that not having been initially selected, the petitioner could not claim seniority over those candidates who had been selected at the initial stage.

14. Similar submissions were advanced on behalf of the State of Maharashtra by Mr. Arun R. Pednekar and, in addition, it was pointed out that even if the three disqualified candidates had not been considered initially, the petitioner would still not have been included among the first 14 candidates since there were others before him from the open category who had obtained higher marks than him. It was urged that the last recommended candidate for the post of DSP/ACP in the open category had secured 610 marks and there were three other candidates from the open category above the petitioner who had obtained higher marks than the petitioner, so that even if the candidates who had been subsequently found ineligible had been considered at the first instance, the petitioner would not have found a place within the first 14 candidates who were to be appointed from the open category.

15. It was lastly contended that having regard to the submissions advanced on behalf of the petitioner vis-à-vis his appointment as DSP along with the respondent No.7 Mr. Kumbhare, the petitioner had, no doubt, joined his duties on the same day as Mr. Kumbhare, but Mr. Kumbhare was a candidate from the Scheduled Caste category and had, therefore, been included in the select list for appointment subject to verification of his Caste Certificate. It was submitted that Mr. Kumbhare's case stood on a different footing from that of the petitioner and the contention of the petitioner in this regard had been rightly rejected both by the Tribunal as well as the High Court.

16. Having carefully considered the submissions made on behalf of the parties, we see no reason to interfere with the order of the Tribunal as affirmed by the High Court. Admittedly, out of all the 22 vacant posts, the first 14 posts were to be filled

up by candidates from the open category and the remaining 8 vacancies were reserved for Scheduled Caste and Scheduled Tribes candidates. The last candidate to be included in the first 14 vacancies had obtained 610 marks, whereas the petitioner had obtained 604 marks. In between the last candidate and the petitioner there were 3 other candidates who had obtained 608, 607 and 605 marks, respectively, so that, in any event, even if the 3 ineligible candidates had been excluded from the very beginning, the petitioner still could not have been included among the first 14 candidates, particularly when one of the ineligible candidates was from the Scheduled Caste and Scheduled Tribes category.

17. Apart from the above, the selection of the petitioner along with two other candidates as substituted candidates in place of the three ineligible candidates, was under fortuitous circumstances since the original selection had already been made and in keeping with the marks obtained by him and his second preference, the petitioner had been appointed as Sales Tax Officer, Class-I and he, in fact, joined in the said post on 22nd April, 1992. The petitioner's contention that since both Mr. Kumbhare and he had joined the post of DSP on 15th September, 1993, their seniority should have been reckoned from the same day was rightly rejected both by the Tribunal and the High Court, having regard to the fact that while Mr. Kumbhare had been included in the first select list and his appointment was also deferred on account of verification of his Caste Certificate, the appointment of the petitioner who had already been appointed and was functioning as Sales Tax Officer, Class-I, in the post of DSP, was accidental in view of the ineligibility of three candidates who had been included in the initial list of selected candidates. His claim for seniority could, therefore, be reckoned only from the date of his joining his duties as D.S.P.

18. It is also to be kept in mind that Mr. Kumbhare had been initially selected for one of the reserved posts from the

Scheduled Castes and Scheduled Tribes category and his appointment had only been deferred for verification of his Caste Certificate. In the case of the petitioner it was different, in that, he was never included in the initial selection list as a result whereof he was appointed as Sales Tax Officer, Class-I, on account of the marks obtained by him and his position in the list of candidates who were successful in the examination conducted by the Maharashtra Public Service Commission in 1990. In our view, the view taken by the Tribunal as well as the High Court in this regard is the correct view and needs no interference.

19. Even the petitioner's contention that he should have been placed above Mr. Talpade lacks merit, since Mr. Talpade was included in the original list from the Schedule Castes category and he was, therefore, entitled to be placed before the petitioner in the gradation list from the date of his joining as D.S.P. The reference made by Mr. Singhvi to Rule 4(2) of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982, does not also help the petitioner's case. Rule 4 of the said Rules deals with the general principles of seniority. Sub-Rule (2) of Rule 4, which deals with inter se serniority of direct recruits selected in one batch for appointment to any post, cadre or service, reads as follows :

"4. *General principles of seniority :*

(1) ……

(2) Notwithstanding anything contained in sub-rule (1),-

(a) the inter se seniority of direct recruits selected in one batch for appointment to any post, cadre or service, shall be determined according to their ranks in the order of preference arranged by the Commission, Selection Board or in the case of recruitment by nomination directly made by the competent authority, the said authority, as the case

may be, if the appointment is taken up by the person recruited within thirty days from the date of issue of the order of appointment or within such extended period as the competent authority may in its discretion allow;

(b) The inter se seniority of Government servants promoted from a Select List shall be in the same order in which their names appear in such Select List. If the Select List is prepared in two parts, the first part containing the names of those selected unconditionally and the second part containing the names of those selected provisionally. All persons included in the first part shall rank above those included in the second part:

Provided that, if the order in which the names are arranged in the select List is changed following a subsequent review of it, the seniority of the Government servants involved shall be rearranged and determined afresh in conformity with their revised ranks;

(C) The seniority of a transferred Government servant vis-à-vis the Government servants in the posts, cadre or service to which he is transferred shall be determined by the competent authority with due regard to the class and pay-scale of the post, cadre or service from which he is transferred, the length of his service therein and the circumstances leading to his transfer."

20. From the aforesaid provisions, it will be apparent that the same refer to the seniority of recruits selected in one batch. In the petitioner's case, he was not so selected, but was brought in as a replacement candidate, not from any waiting list, but from the list of successful candidates in the examination held as per the marks obtained by them on the basis of the

representation made by him to the Home Minister on 21st June, 1992. The aforesaid Rule, therefore, has no application in the petitioner's case despite the fact that the successful candidates as well as the petitioner were from the same batch.

21. For the aforesaid reasons, the Special Leave Petition must fail and is, accordingly, dismissed. There will, however, be no order as to costs.

N.J. Special Leave Petition dismissed.

ANIL KUMAR
v.
B.S. NEELKANTA & ORS.
(Arbitration Petition No. 7 of 2008)

MAY 7, 2010

[D.K. JAIN, J.]

Arbitration and Conciliation Act, 1996:

ss. 2 (1)(f) and 11(5) and (6) – International commercial arbitration – Appointment of arbitrator – HELD: In order to set into motion the arbitral procedure, the Chief Justice or his designate has to examine and record his satisfaction (i) regarding territorial jurisdiction, (ii) that an arbitration agreement exists between the parties and (iii) that in respect of the agreement a live issue, to be decided between the parties, still exists – On being so satisfied, he may allow the application and appoint an arbitral tribunal or a sole arbitrator, as the case may be – In the instant case, from the material placed on record by the parties, it appears that (i) there are disputes between the parties on the issues/claim raised by the petitioner and countered by the respondents, including whether the claim still subsists or has been extinguished as alleged by the respondents, which cannot be resolved without evidence; (ii) there is an arbitration agreement in Clause 41 of agreement dated 19th January 2004, to which the petitioner is a party along with the respondents – The arbitration agreement is in clear terms and brings within its ambit the disputes sought to be raised by the petitioner: whether there was a breach of the terms of agreement dated 19th January 2004, which would be a matter in the realm of arbitration and this Court cannot go into that question; (iii) the issues/claim raised by the petitioner, on a mere assertion cannot be said to be a dead one without evidence to be produced by the parties in support of and rebuttal thereto, on their respective

stands, regarding rights and obligations of the parties under agreements dated 19th January 2004 and 23rd January 2004, on allotment of 74% of equity in favour of IICL and petitioner's right to nominate or being himself on the Board of Directors of Varsha; and (iv) the arbitrator is competent u/s 16 of the Act to rule on its own jurisdiction, including to rule on any objections with respect to existence or validity of the arbitration agreement, on a plea being raised before him that he has no jurisdiction – Application allowed – The sole Arbitrator appointed to adjudicate upon the claims/disputes raised by the petitioner. [Para 14-16]

Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya & Anr. **(2003) 3 SCR 558 = (2003) 5 SCC 531;** *SBP & Co. Vs. Patel Engineering Ltd. & Anr.* **(2005) 4 Suppl. SCR 688 = (2005) 8 SCC 618, referred to.**

Case Law Reference:

(2003) 3 SCR 558	**referred to**	**para 10**
(2005) 4 Suppl. SCR 688	**referred to**	**para 10**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 7 of 2008.

Under Section 11 (5) & (6) of the Arbitration and Conciliation Act, 1996.

Rajiv Sawhney, Jyoti Mendiratta, Vineet Jhanji for the Appellant.

C.A. Sundaram, Ritu Bhalla, Dhruv Dewan, Monark Gehlot, Anandh Kannan, Roshini Musa (for Suresh A. Shroff & Co.) for the Respondents.

The Order of the Court was delivered by

ORDER

D.K. JAIN, J. 1. This is a petition under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of an Arbitrator for adjudication of the disputes which are stated to have arisen between the parties to this petition.

2. Since the case has had a chequered history, it would be appropriate to narrate the background facts, giving rise to this petition, in detail:

On 13th April 1998, the Andhra Pradesh Tourism Development Corporation Ltd. (hereinafter referred to as the "Corporation"), a statutory body owned and controlled by the State of Andhra Pradesh, awarded a lease in favour of one M/s Goldstone Engineering Ltd., presently known as Goldstone Teleservices Ltd. (hereinafter referred to as the "Goldstone") for a piece of land for development of the existing Hotel Ritz as a "Heritage Grand" category hotel, as notified by the Department of Tourism, Government of India.

On 8th November 1999, Goldstone entered into an agreement with respondents No.1, 2 and 3 (hereinafter referred to as the "BSN Group") by which they agreed to execute the said project through a new company known as M/s Varsha Hill Fort Resorts Pvt. Ltd. (for short "Varsha"), respondent No.4 in this petition. As per the said agreement BSN Group agreed to acquire 74% of equity in Varsha whilst Goldstone agreed to retain 26% of equity in the said Company. On 17th May 2001, the Corporation executed a lease deed for the said site in favour of Varsha. The lease provided in extenso the rights and obligations of the parties with respect to the project. Clause 12(u) of the lease deed provided that there would be no change in the constitution of the Lessee viz. Varsha, without the prior consent of the Corporation and clause 21 thereof — the non-assignability clause, provided that neither of the parties to the lease deed shall directly or indirectly sell, transfer, assign or

otherwise part with the whole or part of their respective interest and/or benefits or obligations under the lease deed in any manner whatsoever to any other person or party without obtaining the prior written consent of the Corporation. On 29th November 2002, Goldstone and BSN Group entered into yet another agreement whereby the latter agreed to take over the entire stake of Goldstone in Varsha. The Corporation felt that agreements dated 8th November 1999 and 29th November 2002 were in breach of the terms of the lease deed dated 17th May 2001 as no written consent of the Corporation had been sought prior to the purported change of shareholding in Varsha, on 4th August 2003, a notice for termination of the lease deed was issued to Varsha. According to the petitioner, in order to prevent the Corporation from resuming possession of the hotel site, on 22nd November 2003 the shareholders of Varsha, i.e. Goldstone and BSN Group, invited the petitioner to take over shareholding of Varsha, subject to the prior approval of the Corporation. A meeting of the Board of Directors of Varsha was held on 22nd November 2003, where, according to the petitioner, three Directors, namely, B.S. Neelkanta (respondent No.1), Mr. P. Rameshbabu and Mrs. B. Renuka (respondent No.2) were present. Minutes of the meeting were duly drawn wherein it was recorded that the petitioner shall be investing funds to the tune of Rs.15 to 18 crores in the form of equity in Varsha. It was also resolved that the proposal approved by the Board shall be subject to the approval by the Corporation and the execution of the relevant documents. In furtherance of the said Resolution, Varsha requested the Corporation to accord permission for change in the shareholding pattern in favour of M/s Anil Kumar & Associates (hereinafter referred to as "AKA"). The Corporation granted the permission vide their letter dated 10th December 2003.

Pursuant to Corporation's approval, an agreement dated 19th January 2004 was entered into between AKA, BSN Group comprising Mr. B.S. Neelkanta, Mrs. B. Renuka, Amogh Hotels Ltd. and Varsha respectively as parties of the first, second and third part, whereunder BSN Group agreed to transfer 19,68,300 shares in Varsha to AKA under the terms and conditions of the said agreement. The said agreement was signed on behalf of AKA by Anil Kumar, the petitioner herein and a resident of great Britain, Mr. B.S. Neelkanta (Respondent No.1) and Mrs. B. Renuka (Respondent No.2). The agreement contained the following arbitration clause:

> "41. Any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this agreement between the parties and so notified in writing by either party to the other (the Dispute) in the first instance shall be attempted to be resolved amicably by them. If the parties are unable to do so, such dispute shall be referred to arbitration by a sole Arbitrator mutually agreed by the parties to the dispute. In the event the parties are unable to agree on an Arbitrator with 15 days, then the arbitrator shall be nominated by Managing Director of APTDCL on the request of any party. The arbitration shall be governed by the provisions of Arbitration and Conciliation Act, 1996 and the venue of arbitration shall be at Hyderabad, and shall be conducted in English Language. Any decision or award resulting from arbitration shall be final and binding upon the parties."

The said agreement was followed up by another agreement dated 23rd January 2004 between AKA represented by Mr. Anil Kumar, Goldstone, BSN Group represented by Mr. B.S. Neelkanta, respondent No.1 in this petition, and Varsha, represented again by Mr. B.S. Neelkanta, as its Director. Under the said agreement, AKA agreed to purchase 1,00,000 equity shares of Varsha held by Goldstone for a consideration of Rs.10 lacs. As a result of the aforesaid two agreements, AKA became entitled to acquire 74% equity stake in Varsha whilst the equity shareholding of BSN Group stood reduced to 26%. As per agreement dated 23rd January 2004, upon transfer of shares of Goldstone to AKA, all

Directors of Varsha, representing Goldstone were to resign from the Board of Directors of Varsha and AKA was entitled to nominate its directors on the Board of Varsha.

The Corporation withdrew its order cancelling lease deed and signed a supplemental lease deed dated 21st February 2004 with Varsha. The supplemental lease deed recorded the shareholding pattern of Varsha as on that date as Anil Kumar & Associates holding 74% equity shares and Mr. B.S. Neelkanta holding 26% of the equity share capital of Varsha. The said supplemental agreement was signed by the petitioner on behalf of Varsha as its director. The stand of the petitioner is that in furtherance of the said arrangement, he engaged the services of an architect in London to prepare the plans for construction of the Ritz hotel and on 14th March 2004, executed two contracts, being a management agreement and a technical services agreement with Meridien S.A. It appears that as per the understanding between AKA, Varsha and Goldstone, the shares of Varsha, which were to be acquired by AKA under agreements dated 19th January 2004 and 23rd January 2004 were actually subscribed by a Company known as M/s India International Construction Private Ltd. (for short "IICL"), purportedly belonging to a group called the "Progressive Group".

On 31st August 2005, the petitioner received an email from one Mr. Ashish Kumar attaching a copy of letter dated 22nd August 2005 addressed by Varsha to the petitioner, advising the petitioner that Varsha was contemplating to issue a public notice for the information of the general public that petitioner's association with the hotel project had been terminated and that promoter group, including the BSN Group did not require petitioner's support and association with the hotel project. It was alleged that the petitioner had not invested a single rupee in the project, thus hampering the progress of the hotel project and that the promoter group viz. the BSN group, was forced to mobilize the requisite resources in the form of

debt and equity. The petitioner was also informed that he was no longer representing Varsha as its director. A separate email dated 5th September 2005 addressed by Mr. B.S. Neelkanta (respondent No.1), purportedly on behalf of Varsha, was sent to Le Meridien, informing them that their agreement with Varsha regarding the hotel project had been terminated.

As expected, vide his advocate's letter dated 23rd September 2005, the petitioner objected to the termination of his association with Varsha, as conveyed to him vide respondent No.1's letter dated 22nd August 2005 and asserted that he, through his nominee and associate IICL is a stake holder of 74% equity in Varsha and would take steps to seek registration of the said shareholding in his own name. The relevant portion of the reply is extracted below:

> "My client has fully honored his obligations under the Agreement and has through his nominee made substantial investments into the Company. My client is the approved investor in the Company and pursuant to his assurances given to the Andhra Pradesh Tourism Development Corporation Ltd., that Corporation signed the Supplementary Lease Deed dated 21st February, 2004. The said Supplementary Lease is signed by my client as the Director of the Company. As you are fully aware the Andhra Pradesh Tourism Development Corporation Ltd. was holding the Company in breach of the Lease Agreement and had issued a notice terminating the Lease Deed. The notice of cancellation was withdrawn and a Supplemental Lease executed in favour of the Company pursuant to the request and representations made by any client. Further the Corporation has approved my client holding 74% of the Capital and my client has the first preemptive right and option to purchase the 26% shares held by the BSN Group as defined in the Agreement of 19th January, 2004. The BSN Group is obliged to first offer the sale of those shares to my client and is further obliged

not to sell those shares to any other party. My client accordingly exercises his rights to purchase the said 26% shares held by the BSN Group directly in his own name."

On 1st October 2005, the petitioner received a letter from the Corporation seeking certain clarifications of documents attached with the letter on the change in shareholding pattern of Varsha. According to the petitioner, it was only on receipt of this letter from the Corporation that he came to know that BSN Group and Varsha were trying to create rights in the so-called "progressive group", the said group having acquired shares in Varsha. Thereafter, some correspondence ensued between the Corporation and the petitioner with which I am not directly concerned.

3. On 22nd November 2005, the petitioner filed a petition under Section 9 of the Act before the City Civil Court at Hyderabad seeking certain interim reliefs including a direction to Varsha to maintain status quo in connection with the terms and conditions of lease agreement dated 17th May 2001, as amended by supplemental lease deed dated 21st February 2004. Eventually, on 17th December 2005, the petitioner through his Advocate sent a letter to Varsha and the BSN Group calling upon them to confirm the appointment of an Arbitrator within 15 days of the said letter, in terms of the arbitration agreement. Since no reply to the said notice was received, vide his letter dated 30th January 2006, the petitioner approached the Corporation requesting them to nominate an Arbitral Tribunal as per the arbitration agreement dated 19th January 2004. The respondents as also the Corporation having failed to appoint an Arbitrator, the petitioner filed a petition under Section 11(6) of the Act before Hon'ble the Chief Justice of High Court of Andhra Pradesh for appointment of an Arbitrator. Vide order dated 6th February 2007, rejecting the objections raised by the respondents, the learned Single Judge of the High Court allowed the petition and appointed a former Judge of this Court as the sole Arbitrator.

4. Aggrieved by order dated 6th February 2007, respondent No.4 in this petition, filed a Special Leave Petition (C) No.5493 of 2007. This Special Leave Petition was subsequently amended with the permission of this Court, incorporating the objection of the respondent with regard to the jurisdiction of the High Court to entertain the petition under Section 11(6) for appointment of an Arbitrator. The stand of the said respondent was that the dispute, if any, involved International Commercial Arbitration and, therefore, the jurisdiction to appoint an Arbitrator vested in the Chief Justice of India alone. On 23rd November 2007, leave to appeal was granted to the respondents.

5. On 22nd January 2008, the petitioner filed the present petition under Sections 11(5) and 11(6) of the Act seeking appointment of an Arbitrator in terms of the Arbitration Agreement dated 19th January 2004.

6. A common affidavit has been filed on behalf of the respondents resisting the petition. By way of preliminary submissions, it is pleaded that: (a) the petitioner has no *locus standi* to file the present petition inasmuch as the Arbitration Agreement dated 19th January 2004 was between the BSN Group, Varsha and a business concern known as M/s Anil Kumar & Associates. Therefore, the petitioner in his individual capacity has no *locus standi* to file the present petition without specific plea that it was being filed for and on behalf of Anil Kumar & Associates, allegedly a distinct entity and claiming shareholding in his individual capacity; (b) the shares in Varsha were to be acquired by M/s Anil Kumar & Associates under agreements dated 19th January 2004 and 23rd January 2004 which were actually subscribed by yet another company known as IICL, in the assumed name of the "Progressive Group" – an undertaking of AKA and some others, who have not invoked the arbitration clause and, therefore, the present petition is liable to be dismissed as the petitioner has not brought any documentary record to show that he was authorised by IICL to

file the present petition and (c) in the absence of IICL and other associate companies of IICL, holding shares in Varsha, in the arbitration proceedings no declaration can be made by the Arbitral Tribunal to the effect that the petitioner is entitled to 74% shareholding in Varsha. The plea of the petitioner with regard to the minutes dated 22nd November 2003 has also been disputed. Needless to say, at the outset, that all these questions are within the competence of the Arbitrator as under Section 16 of the Act, it is for him to rule on his own jurisdiction, including the question about existence or validity of the Arbitration Agreement.

7. At this juncture, it may be relevant to note that since in the Special Leave Petitions, filed against the orders passed by the Andhra Pradesh High Court including the order appointing the Arbitrator, leave had been granted by this Court vide order dated 23rd November 2007, the hearing in the present petition on 25th August 2008 was deferred with a view to await the decision in those appeals (Civil Appeal Nos.5645-5647 of 2007 and 5642-5644 of 2007), which were disposed of on 22nd May 2009 as the withdrawal of the original application under Section 11(6) of the Act filed by the petitioner before the High Court was allowed. The effect of the said order is that the order passed by the High Court on petitioner's application under Section 11(6) has been set at naught.

8. I have heard learned counsel for the parties.

9. Mr. Rajiv Sawhney, learned Senior Counsel appearing for the petitioner, strenuously urged that in terms of agreement dated 19th January 2004, it was agreed that the petitioner and his associates would acquire 74% of equity in Varsha, they having fulfilled their part of the obligation under the said agreement by contributing towards 74% of the equity, respondent No.1, in breach of the said agreement, has by notice dated 22nd August 2005 sought to unilaterally terminate petitioner's association with Varsha for no rhyme or reason. It was argued that not only the dispute with regard to the validity

of the said notice is a live issue, even the genuineness of the minutes dated 22nd November 2003, forwarded by Varsha to the Corporation and agreement dated 23rd January 2004, creating rights in a Group of Companies viz., the "Progressive Group" has been seriously contested by the petitioner, which matters can be resolved only through the medium of arbitration, as stipulated in Arbitration Agreement dated 19th January 2004. It was, thus, submitted that either the Arbitrator appointed by the High Court may be permitted to re-enter the reference or a new Arbitrator be appointed to adjudicate upon the disputes between the parties.

10. Mr. C.A. Sundaram, learned Senior Counsel appearing on behalf of the respondents, on the other hand, vehemently contended that the present petition is utterly misconceived inasmuch as the controversy regarding termination of relationship between the petitioner and Varsha in terms of letter dated 22nd August 2005 is not connected with agreement dated 19th January 2004 as after allotment of 74% of equity in Varsha to the associates of the petitioner, the agreement dated 19th January 2004 worked itself out and, therefore, there is no subsisting dispute between the parties to the agreement. It was asserted that the agreement was only for transfer of shares of Varsha to Anil Kumar & Associates and with transfer of 74% of equity in favour of the associates of Anil Kumar, the petitioner, no cause of action to file the present petition survived. It was also contended that the disputes now sought to be raised necessarily involve the companies forming the "Progressive Group", who were neither parties to the Arbitration Agreement nor are before me in these proceedings. In support of the proposition that any matter which lies outside the Arbitration Agreement and is also between some of the parties who were not parties to the Arbitration Agreement, there is no question of reference to Arbitration under Section 11(6) of the Act, reliance is placed on a decision of this Court in *Sukanya Holdings (P) Ltd. Vs. Jayesh H.*

Pandya & Anr[1]. Reference was also made to the decision of a Bench of seven Judges of this Court in *SBP & Co. Vs. Patel Engineering Ltd. & Anr.,*[2] to contend that the question of subsistence of an arbitrable dispute between the parties is to be demonstrated by the party requesting for arbitration and is required to be decided by me in these proceedings.

11. It is manifest from the pleadings that the parties are *ad idem* that there is an Arbitration Agreement between them vide Clause 41 of agreement dated 19th January 2004, but the contention of the respondents is that there is no live issue requiring resolution by arbitration.

12. Thus, the question that falls for consideration before me is whether the dispute regarding termination of relationship between Varsha and the petitioner is dead one in the sense that on alleged allotment of equity in favour of an associate of the petitioner, agreement dated 19th January 2004 has worked itself out and no live issue in terms of the said agreement subsists?

13. The controversy in regard to the nature of function to be performed by the Chief Justice or his designate under Section 11 of the Act has been set at rest by a Bench of seven Judges of this Court in ***SBP** case (supra)*. It has been held, per majority, that the function performed by the Chief Justice or his nominee under the said Section is a judicial function. Defining as to what the Chief Justice or his designate is required to determine while dealing with an application under Section 11 of the Act, P.K. Balasubramanyan, J., speaking for the majority said: (Para 39, SCC)

> "It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making

1. (2003) 5 SCC 531.
2. (2005) 8 SCC 618.

> the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

14. It is clear from the above extracted paragraph that in order to set into motion the arbitral procedure, the Chief Justice or his designate has to decide the issues, if raised, regarding: (i) territorial jurisdiction; (ii) existence of an Arbitration Agreement between the parties and (iii) whether the claim made by the applicant was a dead one in the sense that the parties have already concluded the transaction by recording satisfaction of their mutual rights and obligations or have recorded satisfaction regarding their financial claims.

Nevertheless, the Court made it clear that at that stage it may not be possible to decide whether a live claim made, is one which comes within the purview of the arbitration clause and this question should be left to be decided by the Arbitral Tribunal on taking evidence. It is, therefore, plain that purely for the purpose of deciding whether the arbitral procedure is to be set into motion or not, the Chief Justice or his designate has to examine and record his satisfaction that an Arbitration Agreement exists between the parties and that in respect of the agreement a live issue, to be decided between the parties, still exists. On being so satisfied, he may allow the application and appoint an Arbitral Tribunal or a sole Arbitrator, as the case may be. However, if he finds and is convinced that the claim is a dead one or is patently barred by time or that he lacks territorial jurisdiction, he may hold so and decline the request for appointment of an Arbitrator.

15. Having examined the whole matter in the light of afore-noted principles, I am of the opinion that the petition deserves to be allowed. From the material placed on record by the parties, it appears to me that: (i) there are disputes between the parties on the issues/claim raised by the petitioner and countered by the respondents, including whether the claim still subsists or has been extinguished as alleged by the respondents, which cannot be resolved without evidence; (ii) there is an Arbitration Agreement in Clause 41 of agreement dated 19th January 2004, to which the petitioner is a party along with the respondents. The Arbitration Agreement is in clear terms and brings within its ambit the disputes sought to be raised by the petitioner: whether there was a breach of the terms of agreement dated 19th January 2004, in as much as the petitioner failed to pump in the requisite funds in Varsha either by way of equity or otherwise, as alleged, in Varsha's letter dated 22nd August 2005, would be a matter in the realm of arbitration and this Court cannot go into that question; (iii) the issues/claim raised by the petitioner, on a mere assertion cannot be said to be a dead one without evidence to be

produced by the parties in support of and rebuttal thereto, on their respective stands, regarding rights and obligations of the parties under agreements dated 19th January 2004 and 23rd January 2004, on allotment of 74% of equity in favour of IICL and petitioner's right to nominate or being himself on the Board of Directors of Varsha; and (iv) the Arbitrator is competent under Section 16 of the Act to rule on its own jurisdiction, including rule on any objections with respect to existence or validity of the Arbitration Agreement, on a plea being raised before him that he has no jurisdiction.

16. For the foregoing reasons, the petition is allowed and Mr. Justice M. Jagannadha Rao, a former Judge of this Court is appointed as the sole Arbitrator to adjudicate upon the claims/disputes raised by the petitioner, subject to his consent and such terms as he may deem fit and proper. It goes without saying that the learned Arbitrator shall deal with the matter uninfluenced by the observations made by the High Court of Andhra Pradesh in its order dated 6th February 2007 or in this order, on the rival stands of the parties.

17. The Registry is directed to communicate this order to the learned Arbitrator to enable him to enter upon the reference and give his Award as expeditiously as practicable. The petition stands disposed of with no order as to costs.

R.P. Arbitration Petition disposed of.

UTPAL DAS & ANR.
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 800 of 2007)

MAY 07, 2010

[B. SUDERSHAN REDDY AND AFTAB ALAM, JJ.]

Penal Code, 1860: ss.376/34 – Conviction under – Held: Evidence of eye-witness supporting prosecution case – There was no material contradiction in the evidence of prosecutrix and eye-witness in order to disbelieve them – Prosecutrix was a grown up lady with 2 children and in such circumstance absence of injuries on her private parts would not in any manner support the case of defence – Plea of consensual sex, raised for the first time before Supreme Court, thus not sustainable – Crime against women – Rape.

Code of Criminal Procedure, 1973: s.164 – FIR and s.164 statement – Evidentiary value of, when attention of witness not drawn to the contents thereof.

Prosecution case was that on the fateful night at about 8 p.m., the prosecutrix-victim (PW-14) was travelling in a rickshaw. The appellants-accused and other accused persons surrounded the rickshaw and told PW-6, the rickshawpuller to divert the destination. Thereafter they forcibly took PW-14 inside a house under construction and committed rape on her one after another. They also threatened to kill her if she raised voice. Thereafter, victim was taken to a nearby tea stall and locked in it. After some time PW-1, PW-2 and others came there and rescued her. Trial court acquitted all the accused on the ground that prosecution had failed to prove its case beyond reasonable doubt. The High Court upon re-appreciation of the evidence and the totality of

circumstances held that the trial court had extended benefit of doubt to the appellants under misconception of facts and wrong appreciation of evidence and held the appellants guilty of the offence punishable under Section 376/34 IPC. However, the High Court confirmed the acquittal of the other accused. The order of acquittal of those accused attained its finality since there was no appeal preferred by the State.

In appeal to this Court, it was contended for the appellants that the prosecutrix made improvements in her statement about certain facts which were not mentioned in the FIR; that there was no acceptable evidence of the appellants committing any rape as the Medical Officer who examined the victim did not find any injuries on her person as were likely to be found had she been subjected to forced sexual intercourse; that the medical evidence and the reports of the chemical examination would at the most suggest that the victim was a party to a sexual intercourse in recent time; and in alternate it was contended that there was no evidence to suggest that the intercourse was without her consent or against her will or that she had been forcibly violated by any person.

Dismissing the appeal, the Court

HELD: 1. The FIR does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case the previous statement cannot be used unless the attention of witness was first drawn to those parts by which it was proposed to contradict the witness. In this case, the attention of the witness (PW-14) was not drawn to those parts of the FIR which according to appellants were not in conformity with her evidence. Likewise statement recorded under Section 164 Cr.P.C. could never be used

as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness was false. It can be used to impeach the credibility of the prosecution witness. In the present case it was for the defence to invite the victim's attention as to what she stated in the FIR and the statement made under Section 164 Cr.P.C. for the purposes of bringing out the contradictions, if any, in her evidence. In the absence of the same the court cannot read Section 164 statement and compare the same with her evidence. [Para 13] [503-D-H]

2.1. There was no reason to disbelieve the evidence of Prosecutrix who meticulously narrated the sequence of events as to what transpired on that fateful day from 8.00 p.m. onwards till about her lodging the FIR on the next day. There was nothing on record to disbelieve her evidence. The only suggestion made to her was that she was tutored by the police at the *thana* and she had set up a false story to implicate the appellants in the case. No reasons were suggested for such false implication. There was nothing to disbelieve the version given by PW-1 which supported the prosecution's case. The evidence of PW-6 who was the rickshaw puller was also very crucial. There was no reason whatsoever to disbelieve his statement as he was totally an uninterested witness. [Paras 14-16] [504-A-B, E; 505-A-B]

2.2. The evidence of PW-14 and PW-6 showed that there were no material contradictions so as to disbelieve their evidence. The version given by PW-14 received complete corroboration from the evidence of PW-6. The High Court rightly expressed its indignation as to the manner in which the trial court completely misread the vital medical evidence. PW-8 examined the victim a day

after incident. On examination, he opined that the victim was habituated to sexual intercourse and therefore he could not express his firm opinion in his report about the commission of rape at the time of medical examination. But in the evidence, he clearly stated after considering the report of FSL regarding stains on victim's clothing, that there was sufficient proof of recent sexual intercourse. This cannot in any manner support the case of the defence. [Paras 17, 18] [505-B-G]

2.3. The mere fact that no injuries were found on private parts of her body cannot be the ground to hold that she was not subjected to any sexual assault. Victim was a married grown up lady with two children and in such circumstances the absence of injuries on her private parts was not of much significance. The proposition canvassed for the first time across the bar regarding the consensual sexual intercourse was absolutely untenable and unsustainable. There was not even a suggestion made to the victim that she had consented to sexual intercourse. The sequence of events clearly apparent from the evidence of PW-1, PW-6 and PW-14, leading to the sexual assault completely ruled out the possibility of consensual sex. The High Court rightly observed that the victim made no mistake in identifying the two appellants, and that, based on the evidence of PW-1, PW-6 and the victim (PW-14) herself, it is satisfactorily proved that the two appellants were actually the persons who committed rape on the victim. [Paras 19 and 20] [505-G-H; 506-A, C-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 800 of 2007.

From the Judgment & Order dated 26.02.2007 of the High Court at Calcutta in G.A. No. 25 of 1989.

Chanchal Kumar Ganguli, Debesh Panda for the Appellants.

Tara Chandra Sharma, Neelam Sharma for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal by special leave is directed against the judgment of the Calcutta High Court setting aside the acquittal of the appellants herein under Section 376 IPC and sentencing them to suffer rigorous imprisonment for five years and to pay a fine of Rs. 2,000/-, in default of payment of fine to further undergo two months rigorous imprisonment.

2. The prosecution story, briefly stated, is that on 28.4.1984 at about 8.00 p.m. one Sitarani Jha (PW-14) got down from a train at Burdwan Railway Station alone and hired a rickshaw to go to the Badamtola bus stand as she had to take a bus for Satgachia. On reaching at Badamtola bus stand she learnt that the last bus for Satgachia had already left. She then told the rickshaw puller, Bipul Samaddar (PW-6) to take her to a girl of her village who lived at nearby place, Kalna Gate. It is alleged that when the victim was about to leave Badamtala bus stand she was intercepted by four or five persons who forcibly took her to a house under construction and thereafter two of them forcibly committed rape on her one after another against her will. One of them had a knife in his hands. The victim further alleged that after commission of rape she was taken to a nearby tea stall and locked there in a small room by the appellants. After sometime one Parimal Babu (PW-2), Probal Babu (PW-1) and Bipul Samaddar (PW-6) and some other people rescued her from that shop, to whom she narrated the whole incident. Thereafter the victim took shelter for night in the house of one Joydeb Prajapati (PW-4) a distant relative of her. It is further alleged that on the following morning i.e. 29.4.1984 local people brought Utpal Das (appellant no. 1 herein), Haradhan @ Bhalta Sutradar (appellant no.2 herein) and one Banshidhar Dawn before the victim and she identified Utpal

and Haradhan @ Bhalta Sutradhar as the persons who committed rape on her and at that time Haradhan @ Bhalta managed to flee away. This, in fact, is the story given out by the prosecutrix – Sitarani Jha while she lodged the FIR (Ex. 9) with Burdwan (Sadar) Police Station at 10.45 a.m. on 29.4.1984.

3. Based on the report (Ex.9) the Police Station Burdwan registered a case under Sections 366, 368 and 376 read with Section 34 of the IPC against the appellants.

4. During the course of investigation, site was inspected, the seizure list was prepared, the prosecutrix and the appellants were got medically examined and the medical examination reports of the prosecutrix (Ex.P-2) as well as Ex. P-3 and Ex. P-4 of the appellant nos. 1 and 2 respectively were obtained.

5. After completion of the investigation, the police filed charge sheet against the appellants under Sections 366, 368 and 376 read with Section 34 of the IPC. The prosecution altogether examined 17 witnesses (PW-1 to PW-17) and 09 documents were got marked (Ex. P-1 to P-09). The statements under Section 313 Cr.P.C. of the appellants were recorded in which they pleaded their false implication.

6. The learned Additional Sessions Judge upon consideration of the evidence and material available on record held that prosecution has failed to prove its case beyond reasonable doubt and accordingly acquitted all the accused of the charges framed against them.

7. Aggrieved by the order of acquittal, the State of West Bengal preferred an appeal before the High Court. The High Court upon reappreciation of the evidence and the totality of circumstances held that the trial court has extended benefit of doubt to the appellants under misconception of facts and wrong appreciation of evidence and accordingly came to the

conclusion that the appellants are guilty of the offence punishable under Section 376/34 of the IPC. However, the High Court confirmed the acquittal of the other accused. The order of acquittal of those accused has attained its finality since there is no appeal preferred by the State. Hence, the appellants are before us in this appeal challenging their conviction and award of sentence by the High Court under Section 376/34 of the IPC.

8. We have heard the learned counsel appearing for the appellants as well as for the State and perused the material available on record.

9. Shri Chanchal Kumar Ganguli, learned counsel appearing on behalf of the appellants submitted that the High Court failed to appreciate that there was no acceptable evidence of the appellants committing any rape as the Medical Officer who examined the victim did not find any injuries on her person as are likely to be found had she been subjected to forced sexual intercourse. The medical evidence and the reports of the chemical examination may at the most suggest that the victim was a party to a sexual intercourse in recent time. But there is no evidence to suggest that the intercourse was without her consent or against her will or that she had been forcibly violated by any person. The counsel thus submitted that essential ingredients of the offence of rape under Section 376 IPC are not present in the case. It was also submitted that the evidence of prosecutrix suffers from material contradictions. Her version was not supported by any of the prosecution witnesses. She is not a truthful witness and it may be unsafe to rely upon her evidence and convict the appellants for the offence punishable under Section 376 IPC. An attempt was also made by the learned counsel for the appellants to read the statement of the victim recorded under Section 164 Cr.P.C and to compare the same with her evidence. It was also submitted that PW-2, PW-3, PW-4 and PW-5, were declared hostile by the prosecution and the prosecution is left with no evidence other than the statements of Rikshaw Puller (PW-6) and the victim who contradict each other.

10. Learned counsel for the State submitted that evidence of the victim (PW-14) itself is sufficient to convict the appellants and at any rate, her version is completely supported by the evidence of PW-6, whose evidence cannot be rejected for whatsoever reasons. It was further submitted that there is nothing in the medical evidence which supports the case of the appellants as contended by the appellants.

11. In order to consider as to whether the prosecution established the case against the appellants beyond reasonable doubt, we are required to critically scrutinize the evidence of the prosecutrix and Probal Babu (PW-1), Bipul Samaddar (PW-6) and also the evidence of Dr. A. Chakravorty (PW-8) as the entire case turns upon their evidence.

12. In exhibit P-9 (report) the prosecutrix (PW-14) alleged that on 28.4.1984, at about 8.00 p.m when she was going in a rickshaw towards Kalna Gate all of a sudden the appellants and other accused surrounded the rickshaw and told the rickshaw puller to divert the destination and they forcibly took her to a nearby house under construction and tried to rape her. She made an attempt to save herself and requested them to free her. The appellants did not heed to her request but forcibly committed rape on her one after another. She was prevented from raising her voice as they threatened her to kill. One of them was holding a knife. Thereafter, the accused took her to a nearby tea stall and locked her inside it. That after about 15/20 minutes one Asok Babu, Parimal Babu (PW-2) and Probal Babu (PW-1) and many others came there and rescued her from that shop after unlocking the door. She narrated the entire episode before them. Thereafter all of them took her away to the house of Joydeb Projapati where she took shelter in the night. Next day morning PW-1, PW-2 and others who rescued her came along with the accused where she identified the appellants as the one who committed rape on her. She also stated that she experienced pain in her private parts and all over her body.

13. The Prosecutrix more or less reiterated the same facts in her evidence. In the cross examination she stated that one of the miscreants "jumped" on the rickshaw and threatened her at the point of knife that she would be killed if she raises any hue and cry. She identified appellant No.2 in the court as the one who threatened her with the knife. Relying on this part of the statement in the cross examination, learned counsel submitted that this part of the story of appellant no.2 'jumping on the rickshaw and threatening her at the point of knife etc. was not stated by her in the first information report given to the police. This one circumstance according to the learned counsel for the appellants belies the evidence of the Prosecutrix as she went on making improvements. We find no merit in this submission for the simple reason that the contents of the first information report were never put to the victim. It is needless to restate that the First Information Report does not constitute substantive evidence. It can, however, only be used as a previous statement for the purposes of either corroborating its maker or for contradicting him and in such a case the previous statement cannot be used unless the attention of witness has first been drawn to those parts by which it is proposed to contradict the witness. In this case the attention of the witness (PW-14) has not been drawn to those parts of the FIR which according to appellants are not in conformity with her evidence. Likewise statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 Cr.P.C. can be used to cross examine the maker of it and the result may be to show that the evidence of the witness is false. It can be used to impeach the credibility of the prosecution witness. In the present case it was for the defence to invite the victim's attention as to what she stated in the first information report and statement made under Section 164 Cr.P.C. for the purposes of bringing out the contradictions, if any, in her evidence. In the absence of the same the court cannot read 164 statement and compare the same with her evidence.

14. We do not find any reason whatsoever to disbelieve the evidence of Prosecutrix who meticulously narrated the sequence of events as to what transpired on that fateful day from 8.00 p.m. onwards till about her lodging the first information report on the next day. There is nothing on record to disbelieve her evidence. The only suggestion made to her is that she was tutored by the police at the *thana* and she had set up a false story to implicate the appellants in the case. What are the reasons suggested for such false implication? None.

15. Probal Chakarborty (PW-1), in his evidence narrated as to what PW-6, told him on that fateful night about the incident. The rickshaw puller told him that he was carrying a woman passenger in his rickshaw to proceed towards Kalna Gate and on the way 4-5 young men at the point of knife directed him to divert his rickshaw and that one of them sat by the side of the girl in the rickshaw. Upon reaching near a house under construction he was asked by those men to leave the girl with them. This incident PW-6, narrated to PW-1, within a short time after the incident. That all of them searched for the girl and ultimately found the girl in a nearby tea stall where she was locked inside. There is nothing to disbelieve the version given by PW-1 which supports the prosecution's case.

16. Bipul Samaddar (PW-6) is none other than the rickshaw puller whose evidence is very crucial. He in his evidence clearly stated that on the fateful day at about 8.00 p.m. one woman hired his rickshaw to Badamtola bus stand. He took his rickshaw to Badamtola bus stand but on finding that she missed her bus took her towards Kalna Gate on her instructions. It is at that time 4-5 young men appeared there and "forcibly got her down from the rickshaw and took her away. Out of fear he rushed towards para" (Mohalla) and reported the matter to PW-1 and others. Thereafter he along with PW-1 and others went on searching for the woman and ultimately found her in a tea stall of one Punjabee from where she was rescued. Thereafter he along with others took her to one of her relative's house. It

is also in his evidence that two of the miscreants (appellants) forcibly took that woman away on that night and he identified them in the court. There is practically nothing suggested to this witness in the cross examination. We do not find any reason whatsoever to disbelieve the statement of PW-6 who is totally an uninterested witness.

17. On consideration of the evidence of PW-14 and PW-6, we are of the opinion that there are no material contradictions in their evidence so as to disbelieve their evidence. The version given by PW-14, (victim) receives complete corroboration from the evidence of PW-6. It is not even suggested to PW-6, that such an incident has not taken place on that fateful day. We see no reason whatsoever to disbelieve his evidence.

18. One more aspect that requires our consideration is as to whether the medical evidence does not support the prosecution's case? The High Court rightly expressed its indignation as to the manner in which the trial court completely misread the vital medical evidence. Dr. A. Chakroborty, (PW-8) examined the victim on 29.4.1984. On examination he opined that the victim is habituated to sexual intercourse and therefore could not express his firm opinion in his report about the commission of rape at the time of medical examination. But in the evidence he clearly stated after considering the report of FSL regarding stains on victim's clothing, that there is sufficient proof of recent sexual intercourse. The vaginal swab and smear were sent to Chemical Examiner. Based on the FSL report and the report of Serologist (Ex. 7) he found that the semen was present in the vaginal swab of the victim. We fail to appreciate as to how and in what manner the medical evidence supports the case of the defence.

19. The learned counsel for the appellants however, submitted that the medical examination report of the victim shows that no injuries were found on her private parts or on any

part of her body. We are required to note that victim Sita Rani Jha is a married grown up lady and blessed with two children and in such circumstances the absence of injuries on her private parts is not of much significance. The mere fact that no injuries were found on private parts of her body cannot be the ground to hold that she was not subjected to any sexual assault. The entire prosecution story cannot be disbelieved based on that singular assertion of the learned counsel. In this regard another submission was made by the learned counsel for the appellants that the sexual intercourse, if any, was with the consent of the victim. According to him it was consensual sexual intercourse. This proposition canvassed for the first time across the bar is absolutely untenable and unsustainable. There is not even a suggestion made to the victim that she has consented to sexual intercourse. The sequence of events clearly apparent from the evidence of PW-1, PW-6 and PW-14, leading to the sexual assault completely rules out the possibility of consensual sex. We have no hesitation to reject the submission.

20. The High Court rightly observed that the victim made no mistake in identifying the two appellants, and that, based on the evidence of PW-1, PW-6 and the victim (PW-14) herself, it is satisfactorily proved that the two appellants were actually the persons who committed rape on the victim on that fateful day on 28.4.1984.

21. For all the aforesaid reasons, we find no merit in this appeal and the same is accordingly dismissed.

D.G. Appeal dismissed.

RANGAPPA
v.
SRI MOHAN
(Criminal Appeal No. 1020 of 2010)

MAY 07, 2010

[K.G. BALAKRISHNAN, CJI., P. SATHASIVAM AND J.M. PANCHAL, JJ.]

Negotiable Instruments Act, 1881:

ss. 139 and 138 – Presumption in favour of holder – Manner of rebuttal of statutory presumption – Held: Presumption mandated by s. 139 includes existence of legally enforceable debt or liability – It is in nature of rebuttable presumption – Accused can raise a defence wherein existence of legally enforceable debt or liability can be contested – However, initial presumption favours the complainant – Reverse onus clause is included and the same is guided by the test of proportionality – Accused cannot be expected to discharge an unduly high standard of proof – Standard of proof for rebutting presumption is of 'preponderance of probabilities' – If accused is able to raise a probable defence which creates doubts about the existence of legally enforceable debt or liability, prosecution can fail – On facts, dishonour of cheque on account of 'stop payment' instructions sent by accused – Complaint u/s. 138 – Acquittal by trial court in view of discrepancies in the complainant's version – Conviction by High Court since accused did not raise a probable defence to rebut the statutory presumption, does not call for interference – Complaint disclosed prima facie existence of a legally enforceable debt or liability – Accused failed to reply to the statutory notice u/s.138.

s. 138 – Applicability of – Held: s. 138 is applicable when cheque is dishonoured on account of 'stop payment'

instructions sent by accused to his bank in respect of post-dated cheque, irrespective of insufficiency of funds.

The appellant engaged the services of the respondent-engineer for supervising the construction of his house. The appellant requested the respondent for a hand loan to meet the construction expenses. In view of the acquaintance, the respondent paid the same by way of cash. The appellant issued a cheque for repayment of the said amount. The respondent presented the cheque for encashment. The bank issued a return memo stating that the payment had been stopped by the drawer. Thereafter, the appellant did not honour the cheque within the statutorily prescribed period and also did not reply to the notice u/s. 138 of the Negotiable Instruments Act, 1881. The respondent filed a complaint against the appellant for offence punishable u/s.138 of the Act. The trial court acquitted the appellant u/s.138 in view of some discrepancies in the complainant's version. The High Court holding that the appellant did not raise a probable defence to rebut the statutory presumption, convicted the appellant for commission of offence u/s. 138 of the Act and directed to pay fine of Rs. 75,000/-. Hence the present appeal.

Disposing of the appeal, the Court

HELD: 1. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in s.138 of the Negotiable Instruments Act, 1881 have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by s.139 of the Act. With respect to the facts of the instant case, it must be clarified that contrary to the trial court's finding, s.138 of the Act can indeed be attracted when a cheque is dishonoured on account of 'stop payment' instructions sent by the accused to his

bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. [Para 9] [518-D-F]

Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza **(2003) 3 SCC 232, referred to.**

2.1. The presumption mandated by s.139 of the Act does indeed include the existence of a legally enforceable debt or liability. This is in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While s.138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption u/s. 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by s.138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/ defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. When an accused has to rebut the presumption under s.139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own. [Para 14] [525-G; 526-A-G]

2.2. The High Court's view that the accused did not raise a probable defence is accepted. The defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. The instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice u/s.138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by

the complainant. Thus, there is no reason to interfere with the final order of the High Court which recorded a finding of conviction against the appellant. [Paras 15 and 16] [526-H; 257-A-G]

Krishna Janardhan Bhat v. Dattatraya G. Hegde **(2008) 4 SCC 54;** *Hiten P. Dalal v. Bratindranath Banerjee* **(2001) 6 SCC 16;** *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm and Ors.* **2008 (8) SCALE 680;** *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal* **(1993) 3 SCC 35;** *M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd.* **(2002) 1 SCC 234, referred to.**

Case Law Reference:

2003 (3) SCC 232	**Referred to.**	**Para 9**
(2008) 4 SCC 54	**Referred to.**	**Para 10**
(2001) 6 SCC 16	**Referred to.**	**Para 11**
2008 (8) SCALE 680	**Referred to.**	**Para 12**
1993 (3) SCC 35	**Referred to.**	**Para 12**
(2002) 1 SCC 234	**Referred to.**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1020 of 2010.

From the Judgment & Order dated 26.10.2005 of the High Court of Karnataka, Bangalore in Criminal Appeal No. 1367 of 2005.

Girish Ananthamurthy, P.P. Singh for the Appellant.

Basava Prabhu S. Patil, B. Subrahmanya Prasad, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

K.G. BALAKRISHNAN, CJI. 1. Leave granted.

2. In the present case, the trial court had acquitted the appellant-accused in a case related to the dishonour of a cheque under Section 138 of the Negotiable Instruments Act, 1881 [Hereinafter 'Act']. This finding of acquittal had been made by the Addl. JMFC at Ranebennur, Karnataka in Criminal Case No. 993/2001, by way of a judgment dated 30-5-2005. On appeal by the respondent-complainant, the High Court had reversed the trial court's decision and recorded a finding of conviction while directing that the appellant-accused should pay a fine of Rs. 75,000, failing which he would have to undergo three months simple imprisonment (S.I.). Aggrieved by this final order passed by the High Court of Karnataka [in Criminal Appeal No. 1367/2005] dated 26-10-2005, the appellant-accused has approached this Court by way of a petition seeking special leave to appeal. The legal question before us pertains to the proper interpretation of Section 139 of the Act which shifts the burden of proof on to the accused in respect of cheque bouncing cases. More specifically, we have been asked to clarify the manner in which this statutory presumption can be rebutted.

3. Before addressing the legal question, it would be apt to survey the facts leading up to the present litigation. Admittedly, both the appellant-accused and the respondent-claimant are residents of Ranebennur, Karnataka. The appellant-accused is a mechanic who had engaged the services of the respondent-complainant who is a Civil Engineer, for the purpose of supervising the construction of his house in Ranebennur. The said construction was completed on 20-10-1998 and this indicates that the parties were well acquainted with each other.

4. As per the respondent-complainant, the chain of facts unfolded in the following manner. In October 1998, the accused had requested him for a hand loan of Rs. 45,000 in order to meet the construction expenses. In view of their acquaintance,

the complainant had paid Rs. 45,000 by way of cash. On receiving this amount, the appellant-accused had initially assured repayment by October 1999 but on the failure to do so, he sought more time till December 2000. The accused had then issued a cheque bearing No. 0886322, post-dated for 8-2-2001 for Rs. 45,000 drawn on Syndicate Bank, Kudremukh Branch. Consequently, on 8-2-2001, the complainant had presented this cheque through Karnataka Bank, Ranebennur for encashment. However, on 16-2-2001 the said Bank issued a return memo stating that the 'Payment has been stopped by the drawer' and this memo was handed over to the complainant on 21-2-2001. The complainant had then issued notice to the accused in this regard on 26-2-2001. On receiving the same, the accused failed to honour the cheque within the statutorily prescribed period and also did not reply to the notice sent in the manner contemplated under Section 138 of the Act. Following these developments, the complainant had filed a complaint (under Section 200 of the Code of Criminal Procedure) against the accused for the offence punishable under Section 138 of the Act.

5. The appellant-accused had raised the defence that the cheque in question was a blank cheque bearing his signature which had been lost and that it had come into the hands of the complainant who had then tried to misuse it. The accused's case was that there was no legally enforceable debt or liability between the parties since he had not asked for a hand loan as alleged by the complainant.

6. The trial judge found in favour of the accused by taking note of some discrepancies in the complainant's version. As per the trial judge, in the course of the cross-examination the complainant was not certain as to when the accused had actually issued the cheque. It was noted that while the complaint stated that the cheque had been issued in December 2000, at a later point it was conceded that the cheque had been handed over when the accused had met the complainant to obtain the

work completion certificate for his house in March 2001. Later, it was stated that the cheque had been with the complainant about 15-20 days prior to the presentation of the same for encashment, which would place the date of handing over of the cheque in January 2001. Furthermore, the trial judge noted that in the complaint it had been submitted that the complainant had paid Rs. 45,000 in cash as a hand loan to the accused, whereas during the cross-examination it appeared that the complainant had spent this amount during the construction of the accused's house from time to time and that the complainant had realised the extent of the liability after auditing the costs on completion of the construction. Apart from these discrepancies on part of the complainant, the trial judge also noted that the accused used to pay the complainant a monthly salary in lieu of his services as a building supervisor apart from periodically handing over money which was used for the construction of the house. In light of these regular payments, the trial judge found it unlikely that the complainant would have spent his own money on the construction work. With regard to these observations, the trial judge held that there was no material to substantiate that the accused had issued the cheque in relation to a legally enforceable debt. It was observed that the accused's failure to reply to the notice sent by the complainant did not attract the presumption under Section 139 of the Act since the complainant had failed to prove that he had given a hand loan to the accused and that the accused had issued a cheque as alleged. Furthermore, the trial judge erroneously decided that the offence made punishable by Section 138 of the Act had not been committed in this case since the alleged dishonour of cheque was not on account of insufficiency of funds since the accused had instructed his bank to stop payment. Accordingly, the trial judge had recorded a finding of acquittal.

7. However, on appeal against acquittal, the High Court reversed the findings and convicted the appellant-accused. The High Court in its order noted that in the course of the trial proceedings, the accused had admitted that the signature on

the impugned cheque (No. 886322, dated 8-2-2001) was indeed his own. Once this fact has been acknowledged, Section 139 of the Act mandates a presumption that the cheque pertained to a legally enforceable debt or liability. This presumption is of a rebuttal nature and the onus is then on the accused to raise a probable defence. With regard to the present facts, the High Court found that the defence raised by the accused was not probable. In respect of the accused's stand that he had lost a blank cheque bearing his signature, the High Court noted that in the instructions sent by the accused to his Bank for stopping payment, there is a reference to cheque No. 0886322, dated 20-7-1999. This is in conflict with the complainant's version wherein the accused had given instructions for stopping payment in respect of the same cheque, albeit one which was dated 8-2-2001. The High Court also noted that if the accused had indeed lost a blank cheque bearing his signature, the question of his mentioning the date of the cheque as 20-7-1999 could not arise. At a later point in the order, it has been noted that the instructions sent by the accused to his bank for stopping payment on the cheque do not mention that the same had been lost. However, the correspondence does refer to the cheque being dated 20-7-1999. Furthermore, during the cross-examination of the complainant, it was suggested on behalf of the accused that the complainant had the custody of the cheque since 1998. This suggestion indicates that the accused was aware of the fact that the complainant had the cheque, thereby weakening his claim of having lost a blank cheque. Furthermore, a perusal of the record shows that the accused had belatedly taken up the defence of having lost a blank cheque at the time of his examination during trial. Prior to the filing of the complaint, the accused had not even replied to the notice sent by the complainant since that would have afforded an opportunity to raise the defence at an earlier stage. All of these circumstances led the High Court to conclude that the accused had not raised a probable defence to rebut the statutory presumption. It was held that:

> '6. Once the cheque relates to the account of the accused and he accepts and admits the signatures on the said cheque, then initial presumption as contemplated under Section 139 of the Negotiable Instruments Act has to be raised by the Court in favour of the complainant. The presumption referred to in Section 139 of the N.I. Act is a mandatory presumption and not a general presumption, but the accused is entitled to rebut the said presumption. What is required to be established by the accused in order to rebut the presumption is different from each case under given circumstances. But the fact remains that a mere plausible explanation is not expected from the accused and it must be more than a plausible explanation by way of rebuttal evidence. In other words, the defence raised by way of rebuttal evidence must be probable and capable of being accepted by the Court. The defence raised by the accused was that a blank cheque was lost by him, which was made use of by the complainant. Unless this barrier is crossed by the accused, the other defence raised by him whether the cheque was issued towards the hand loan or towards the amount spent by the complainant need not be considered. …'

Hence, the High Court concluded that the alleged discrepancies on part of the complainant which had been noted by the trial court were not material since the accused had failed to raise a probable defence to rebut the presumption placed on him by Section 139 of the Act. Accordingly, the High Court recorded a finding of conviction.

8. In the course of the proceedings before this Court, the contentions related to the proper interpretation of Sections 118(a), 138 and 139 of the Act. Before addressing them, it would be useful to quote the language of the relevant provisions:

> *118. Presumptions as to negotiable instruments.* – Until the contrary is proved, the following presumptions shall be made:

(a) of consideration: that every negotiable instrument was made or drawn for consideration, and that every such instrument when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration;

…

138. Dishonour of cheque for insufficiency, etc., of funds in the account. – Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. – For the purposes of this section, 'debt or other liability' means a legally enforceable debt or other liability.

139. Presumption in favour of holder.- It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt, or other liability.

9. Ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in Section 138 of the Act have been met and if so, whether the accused was able to rebut the statutory presumption contemplated by Section 139 of the Act. With respect to the facts of the present case, it must be clarified that contrary to the trial court's finding, Section 138 of the Act can indeed be attracted when a cheque is dishonoured on account of 'stop payment' instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds in the account. This position was clarified by this Court in *Goa Plast (Pvt.) Ltd. v. Chico Ursula D'Souza,* (2003) 3 SCC 232, wherein it was held:

"Chapter XVII containing Sections 138 to 142 was introduced in the Act by Act 66 of 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions. These provisions were intended to discourage people from not honouring their commitments by way of payment through cheques. The court should lean in favour of an interpretation which serves the object of the

statute. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. In view of Section 139, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act leads to the conclusion that by countermanding payment of a post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138. A contrary view would render S. 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. ..."

10. It has been contended on behalf of the appellant-accused that the presumption mandated by Section 139 of the Act does not extend to the existence of a legally enforceable debt or liability and that the same stood rebutted in this case, keeping in mind the discrepancies in the complainant's version. It was reasoned that it is open to the accused to rely on the materials produced by the complainant for disproving the existence of a legally enforceable debt or liability. It has been contended that since the complainant did not conclusively show whether a debt was owed to him in respect of a hand loan or in relation to expenditure incurred during the construction of the accused's house, the existence of a legally enforceable debt or liability had not been shown, thereby creating a probable defence for the accused. Counsel appearing for the appellant-accused has relied on a decision given by a division bench of

this Court in *Krishna Janardhan Bhat v. Dattatraya G. Hegde,* (2008) 4 SCC 54, the operative observations from which are reproduced below (S.B. Sinha, J. at Paras. 29-32, 34 and 45):

"29. Section 138 of the Act has three ingredients viz.:

(i) that there is a legally enforceable debt

(ii) that the cheque was drawn from the account of bank for discharge in whole or in part of any debt or other liability which presupposes a legally enforceable debt; and

(iii) that the cheque so issued had been returned due to insufficiency of funds.

30. The proviso appended to the said section provides for compliance with legal requirements before a complaint petition can be acted upon by a court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. *Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.*

31. The courts below, as noticed hereinbefore, proceeded on the basis that Section 139 raises a presumption in regard to existence of a debt also. The courts below, in our opinion, committed a serious error in proceeding on the basis that for proving the defence the accused is required to step into the witness box and unless he does so he would not be discharging his burden. Such an approach on the part of the courts, we feel, is not correct.

32. An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on record. An accused has a constitutional

right to maintain silence. Standard of proof on the part of the accused and that of the prosecution in a criminal case is different.

...

34. *Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."*

(emphasis supplied)

Specifically in relation to the nature of the presumption contemplated by Section 139 of the Act, it was observed;

"45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This however, shall not mean that the courts shall put a blind eye to the ground realities. *Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by Section 139 should be delicately balanced.* Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same."

(emphasis supplied)

11. With respect to the decision cited above, counsel appearing for the respondent-claimant has submitted that the observations to the effect that the 'existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act' and that 'it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability' [See Para. 30 in *Krishna Janardhan Bhat* (supra)] are in conflict with the statutory provisions as well as an established line of precedents of this Court. It will thus be necessary to examine some of the extracts cited by the respondent-claimant. For instance, in *Hiten P. Dalal v. Bratindranath Banerjee,* (2001) 6 SCC 16, it was held (Ruma Pal, J. at Paras. 22-23):

"22. Because both Sections 138 and 139 require that the Court 'shall presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, …, it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused (…). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court may presume a certain state of affairs. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. *The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable probability of the non-existence of the presumed fact.*

23. In other words, provided the facts required to form the

basis of a presumption of law exists, the discretion is left with the Court to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man."

(emphasis supplied)

12. The respondent-claimant has also referred to the decision reported as *Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm & Ors.,* 2008 (8) SCALE 680, wherein it was observed:

"Under Section 118(a) of the Negotiable Instruments Act, the court is obliged to presume, until the contrary is proved, that the promissory note was made for consideration. It is also a settled position that the initial burden in this regard lies on the defendant to prove the non-existence of consideration by bringing on record such facts and circumstances which would lead the Court to believe the non-existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal. …"

This decision then proceeded to cite an extract from the earlier decision in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal,* (1993) 3 SCC 35 (Para. 12):

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. *If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbably or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies.* In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. *The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the*

circumstances of the case, act upon the plea that it did not exist."

(emphasis supplied)

Interestingly, the very same extract has also been approvingly cited in *Krishna Janardhan Bhat* (supra).

13. With regard to the facts in the present case, we can also refer to the following observations in *M.M.T.C. Ltd. and Anr. v. Medchl Chemicals & Pharma (P) Ltd.,* (2002) 1 SCC 234 (Para. 19):

"… The authority shows that even when the cheque is dishonoured by reason of stop payment instruction, by virtue of Section 139 the Court has to presume that the cheque was received by the holder for the discharge in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the 'stop payment' instructions were not issued because of insufficiency or paucity of funds. *If the accused shows that in his account there was sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out.* The important thing is that the burden of so proving would be on the accused. …"

(emphasis supplied)

14. In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in *Krishna Janardhan Bhat* (supra) may not be correct. However, this does not in any way cast doubt on the

correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

15. Coming back to the facts in the present case, we are in agreement with the High Court's view that the accused did

not raise a probable defence. As noted earlier, the defence of the loss of a blank cheque was taken up belatedly and the accused had mentioned a different date in the 'stop payment' instructions to his bank. Furthermore, the instructions to 'stop payment' had not even mentioned that the cheque had been lost. A perusal of the trial record also shows that the accused appeared to be aware of the fact that the cheque was with the complainant. Furthermore, the very fact that the accused had failed to reply to the statutory notice under Section 138 of the Act leads to the inference that there was merit in the complainant's version. Apart from not raising a probable defence, the appellant-accused was not able to contest the existence of a legally enforceable debt or liability. The fact that the accused had made regular payments to the complainant in relation to the construction of his house does not preclude the possibility of the complainant having spent his own money for the same purpose. As per the record of the case, there was a slight discrepancy in the complainant's version, in so far as it was not clear whether the accused had asked for a hand loan to meet the construction-related expenses or whether the complainant had incurred the said expenditure over a period of time. Either way, the complaint discloses the prima facie existence of a legally enforceable debt or liability since the complainant has maintained that his money was used for the construction-expenses. Since the accused did admit that the signature on the cheque was his, the statutory presumption comes into play and the same has not been rebutted even with regard to the materials submitted by the complainant.

16. In conclusion, we find no reason to interfere with the final order of the High Court, dated 26-10-2005, which recorded a finding of conviction against the appellant. The present appeal is disposed of accordingly.

N.J. Appeal disposed of.

SAMIR CHANDRA DAS
v.
BIBHAS CHANDRA DAS & ORS.
(Civil Appeal No. 4345 of 2010)

MAY 7, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Succession Act, 1925 – s. 230 – Renunciation of executorship – Form and effect of – Held: s. 230 lays down as to how executor renounces his character as an executor – It should not be given purposive interpretation – There cannot be a deemed renunciation – Language of Section is clear and cannot be tinkered with – There has to be a scrupulous adherence to the section before executor is refused probate u/s. 230 – On facts, property sold was to go under the Will to daughters and wife of testator, with rights to wife to sell the property for welfare of unmarried daughters – Executor of Will putting his signatures as a witness to sale deed of the property covered by Will – It cannot be said that executor had taken a hostile stance against testator – There was no trace of renunciation or deemed renunciation on part of the executor – Order of High Court that probate could not be granted in favour of executor since there was renunciation on part of executor, set aside – Also issue regarding renunciation not argued before trial court nor raised by way of written statement nor in memo of appeal before High Court – Matter remanded back for decision on merits regarding the valid execution or attestation of Will.

JS died leaving behind his wife, four sons and three daughters. He executed a Will and named his wife and appellant-son as executors. The respondent-son of the testator was not given any share. The testator had purchased certain land in the name of his wife and

daughter J. The said property was given to the widow for life and thereafter to the three sons with a condition to maintain and bear marriage expenses of the two unmarried daughters. The wife was given the right to sell the property during her life time for maintenance and marriage expenses of her two unmarried daughters. The widow and J executed sale deeds and the same were signed by JS and the appellant. Thereafter, the widow and the appellant filed application for probate. During pendency of the probate proceedings, JS expired. The widow and the daughter J sold the remaining land by sale deed. The appellant signed the deed as a witness. The sale proceeds were used for running the gas dealership for daughter J and S. The respondent opposed the probate application. The trial court held that the Will was genuine and was validly executed and attested, and ordered for grant of probate. The respondent filed an appeal and the same was allowed holding that no probate could be granted in favour of the appellant. The appellate court held that the appellant having put his signatures as a witness along with his mother on the sale deed in effect renunciated his position as an executor. Hence the appeal.

Allowing the appeal, the Court

HELD: 1.1. The appellate court, did not consider the matter on merits as is clear in the penultimate paragraph of the judgment. The Court, however, wrote a finding that the appellant having put his signatures as a witness along with his mother on the sale deed dated 12.2.1988 in effect renunciated his position as an executor. The appellate Court also wrote a finding that both the executors having espoused an interest over the subject matter of the Will which was adverse to the interest of the testator, no probate could be granted in their favour since by their conduct they had renounced the executorship.

The appellate court also made a reference to ss. 222, 223 and 230 of the Succession Act, 1925 and came to the conclusion that though the appellant had not expressly renounced the executorship, yet he had asserted title which is hostile to that of the testator and/or acted contrary to the directions contained in the Will and/or had supported such claim or act or has even orally asserted before the Court any right adverse to that of the testator and supported such claim and such conduct of the executor amounted to 'implied renunciation' of the executorship. It went on to further allege that if any such document signed by the executor as is proved before the probate court having been knowingly signed by the executor, the probate court will presume renunciation of the executorship and will refuse to grant probate to such executor. The appeal was thus allowed and the suit was dismissed. [Para 9] [537-E-H; 538-A-B]

1.2. The appellate court should not have allowed the question whether the appellant had, in any manner, acquired any disability or had, in any manner, renunciated the executorship, to be argued as there was no plea raised in the written statement in support of the theory of renunciation by widow and the present executor-SC. This question was not argued before the trial court nor was it raised by way of a written statement nor was it raised even in the memo of appeal before the High Court. Therefore, the High Court should not have entertained such a question. [Para 13] [540-A-B]

1.3. It was the case of respondent that in the three sale deeds, two of which were executed before the death of the testator and one after his demise during the pendency of the probate proceedings the properties were claimed to be the self acquired properties of the widow and the second daughter; therefore, the widow who was an executor was claiming that this property never

belonged to the testator; and that since the surviving executor-appellant had put his signatures as a witness to the sale deeds, he also must be deemed to have accepted the recitals in the sale deeds to the effect that it was a self acquired property of the widow and the second daughter thereby disputing the title of the testator. The argument is absolutely incorrect, because at the time of first two sale deeds, even the testator had put his signatures as a witness and as he was alive on that day, the Will was irrelevant. Therefore, those two sale deeds will naturally go out of consideration. Probably realizing this, the High Court made a stray remark in the judgment to the effect that "one of it was executed during the pendency of the probate application". Now, if the earlier two sale deeds which were dated 10.10.1983 and were executed during the lifetime of the testator and he himself had acted as a witness, there was no question of any rival or hostile title being set up by the widow and further by the instant appellant who put his signatures as a witness along with his father, the testator on the sale deeds dated 10.10.1983. It cannot be presumed that there was any idea of setting up a hostile title. The remaining property which was sold on 12.02.1988 i.e. during the pendency of the probate application was admittedly a part of the aforementioned property, part of which was sold on 10.10.1983 by two sale deeds. Basically, on 10.10.1983, the Will had never become effective as the testator was alive. Therefore, the deduction of the High Court that the widow and the appellant had taken a stance against the testator is clearly faulty. On that day, this position was absolutely not available. This is apart from the fact that on that day, on those two sale deeds dated 10.10.1983, even the testator had signed as a witness. Insofar as the subsequent sale deed dated 12.02.1988 is concerned, also there will be no question of taking any hostile stance against the testator because the property which was sold

was clearly given away in the Will in favour of the widow and her daughters, and she also was given the right to sell the property for the maintenance and marriage expenses of her two unmarried daughters. Therefore, at least on that day, when the sale deed was executed, widow and her two daughters had inherited the property under the Will, which they sold and they were undoubtedly the owners of the properties. Therefore, the High Court erred in taking the stand that the executor had taken a hostile stance against the testator. Once this position on facts is obtained, there is no question of further considering the correctness of the probate holding that there was an "implied renunciation" by the appellant. [Paras 14 and 15] [540-C-H; 541-A-F]

1.4. The High Court completely misguided itself in stretching the theory of renunciation to its illogical end. The provision of s.230 lays down specifically as to how the executor renounces his character as an executor. That is certainly not to be found here and when the law requires a thing to be done in a particular manner, it cannot be done in any other manner. There cannot be any concept of deemed renunciation. However, it cannot be said that the concerned court has no power to deny the probate for good and valid reasons. However, in this case, the opinion expressed by the High Court that there was a renunciation on the part of the appellant, cannot be accepted. In a proper case, the Court considering the probate application may, for good reasons, find it not possible to grant the probate to executor, but in the instant case that has not happened. Instead, the High Court wrote a finding that the executor had renounced himself and he is deemed to have renounced on account of the so-called hostile stand taken by him. It cannot be accepted that there was any hostile stand and also that there was any such renunciation or deemed renunciation. [Para 18] [543-F-H; 544-A-C]

1.5. It cannot be accepted that a purposive interpretation must be given to section 230, so as to find that there can be a deemed renunciation in terms of that Section. The language o the Section is too clear to be tinkered with. There has to be a scrupulous adherence to the Section before an executor is refused the probate under Section 230. The order of the appellate court is set aside and the matter is remanded back to the appellate Court for decision on merits regarding the valid execution or attestation of the Will. [Paras 19] [544-D-E; 545-B]

Crystal Developers vs. Asha Lata Ghosh (Smt.) (Dead) through L.Rs. and Ors. **2005 (9) SCC 375***; Krishna Kumar Birla Vs. Rajendra Singh Lodha and Ors*. **2008 (4) SCC 300***; Anil Kak Vs. Kumari Sharada Raje and Ors.* **2008 (7) SCC 695, distinguished.**

Thoppai Venkataramier v. A Govindarayalier **AIR 1926 Mad. 605;** *In the goods of Manick Lal Seal* **(1908) 35 Cal. 156***; Sarojini Dasi Vs. Rajalakshmi Dasi* **AIR 1920 Cal. 874;** *Smt. Sailabala Dasi Vs. Baidya Nath Rakshit* **1932 CWN 729, referred to.**

Case Law Reference:

AIR 1926 Mad. 605	**Referred to.**	**Para 17**
(1908) 35 Cal. 156	**Referred to.**	**Para 17**
AIR 1920 Cal. 874	**Referred to.**	**Para 17**
1932 CWN 729	**Referred to.**	**Para 17**
2005 (9) SCC 375	**Distinguished**	**Para 19**
2008 (4) SCC 300	**Distinguished**	**Para 19**
2008 (7) SCC 695	**Distinguished**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4345 of 2010.

From the Judgment & Order dated 04.11.2008 of the High Court at Calcutta in F.A. No. 292 of 2004.

Jaideep Gupta, Vikramjit Banerjee, Amit Chakrabarti, Rishi Maheshwari, Shally Bhasin Maheshwari, for the Appellant.

Pradip Kr. Ghosh, Rauf Rahim, Y. Bansal for the Respondents.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

2. Challenge in this appeal is to the Division Bench Judgment of the Calcutta High Court wherein the appeal filed by respondent herein, namely, Bibhas Chandra Das was allowed holding that no probate could be granted in favour of the present appellant, namely, Samir Chandra Das.

3. Following factual panorama would clarify the controversy herein:

One Jogesh Chandra Das was the testator. He expired on 13.01.1984 leaving his widow Parul Bala Das and four sons Samir Chandra Das, Subhash Chandra Das, Bibhas Chandra Das and Anjan Das. He had three daughters also, namely, Dipti, Jayanti and Sashwati. In his Will dated 14.08.1983, he named his widow Parul Bala Das and Samir Chandra Das as the executors. By this Will, however, Bibhas Chandra Das was not given any share. The house property at Harish Mukherjee Road was to go to his wife Parul Bala Das with life interest without any right to sell, mortgage etc., and after her death, to his three sons, namely, Samir Chandra Das, Subhash Chandra Das and Anjan Das. He had also desired that the right of residence would be available to his two unmarried daughters, namely, Jayanti and Sashwati. It was also mentioned in the Will that the testator had purchased a piece of land in the name of his wife and second daughter who was polio affected. This

property was given to the widow for life and thereafter to the three sons of the testator excluding Bibhas Chandra Das on the condition that the three sons would bear the maintenance and marriage expenses of the two unmarried daughters for which the wife Parul Bala Das had specific authority to sell the land even during her life time to meet the expenses of maintenance and marriage of the two daughters, if the three sons did not bear the same.

4. Two sale deeds were executed by Parul Bala Das and Jayanti whereby 5 cottahs of land out of 7 cottahs purchased earlier by the testator in the 'benami' of Parul Bala Das and Jayanti was sold on 10.10.1983. It is to be mentioned that these sale deeds were countersigned by Jogesh Chandra Das as also Samir Chandra Das. The remaining two cottahs of land was sold by Parul and Jayanti by sale deed dated 12.02.1988. The sale proceeds are alleged to have been used for running the Indian Oil Corporation Gas Dealership for Jayanti and Sashwati. On 17.07.1984 an application came to be made for probate by Samir Chandra Das and Parul Bala Das. However, during the pendency of the probate proceedings, Parul Bala Das expired on 18.01.1990. This probate application was supported by all excepting Bibhas Chandra Das, the respondent herein. Since the probate became contentious, the application for probate was refiled on 22.01.1986 and the proceedings were renumbered as Original Suit No. 6 of 1986.

5. As has been stated earlier, all the legatees supported the probate application. However, Bibhas Chandra Das opposed the same. During the pendency, as has already been stated, on 12.02.1988, Parul Bala Das along with her second daughter Jayanti had sold the remaining two cottahs approximately of the earlier mentioned land. On this, the appellant Samir Chandra Das had signed as a witness. Smt. Parul Bala Das died on 18.01.1990. The respondent herein opposed the grant of probate by filing a written statement dated 05.04.1990. The evidence was led and the Will was got proved.

6. In the written statement, respondent Bibhas Chandra Das mainly opposed the probate application on the grounds that the suit was not maintainable, Will was not genuine, Will was not legally executed and attested, Jogesh Chandra Das did not execute the Will out of his free will, it was brought about by undue influence and lastly that Bibhas Chandra Das had good relations with his father Jogesh Chandra Das and, therefore, it was unthinkable that he would be disinherited by Jogesh Chandra Das in his Will. It was also alleged that since the executer Samir Chandra Das was on inimical terms with Bibhas Chandra Das, he had exercised undue influence on his father. By amendment it was further alleged that the Will was not out of the free will of Jogesh Chandra Das who was very affectionate with defendant Bibhas Chandra Das and he was not the prodigal son. In short, the defendant never raised the plea regarding any acquired disability by renunciation as executor on the part of Samir Chandra Das to apply for probate. After the evidence was led, the trial Court framed the following six issues:

1. Is the application for probate maintainable in law and proper form?
2. Had the testator sound disposing state of mind to execute the Will i.e. whether the testator was physically fit and mentally sound and alert to execute the will.
3. Whether the will in question was validly executed and attested in accordance with law?
4. Whether the petitioner Samir Kumar Das obtained the alleged Will by exercising undue influence over the testator?
5. Whether the petitioner/plaintiff is entitled to an order of probate over the Will in question?

6. What other reliefs, if any is the petitioner entitled to?"

7. After the evidence, the trial Court came to the conclusion that the Will was genuine and the testator had the sound disposing state of mind to execute the same since he was physically fit and mentally sound and alert. It was also held that the Will in question was validly executed and attested. It was found that the Will was free from any undue influence much less from Samir Chandra Das. In that view, the Court ordered grant of probate.

8. An appeal was filed on various grounds. We scanned the grounds in appeal very carefully which mainly pertained to the grounds raised in the written statement. In the grounds raised in the appeal, we do not find a single ground to the effect that the executor Samir Chandra Das had, in any manner, acquired any disability or had, in any manner, renunciated the executorship.

9. The appellate Court, however, did not consider the matter on merits as is clear in the penultimate paragraph of the judgment. The Court, however, wrote a finding that the appellant herein having put his signatures as a witness along with his mother on the sale deed dated 12.2.1988 in effect renunciated his position as an executor. The appellate Court also wrote a finding that both the executors having espoused an interest over the subject matter of the Will which was adverse to the interest of the testator, no probate could be granted in their favour since by their conduct they had renounced the executorship. The appellate Court also made a reference to Sections 222, 223 and 230 of the Indian Succession Act and came to the conclusion that though Samir Chandra Das had not expressly renounced the executorship, yet he had asserted title which is hostile to that of the testator and/or acted contrary to the directions contained in the Will and/or had supported such claim or act or has even orally asserted before the Court any right adverse to that of the testator and supported such

claim and such conduct of the executor amounted to *"implied renunciation"* of the executorship. It went on to further allege that if any such document signed by the executor as is proved before the probate Court having been knowingly signed by the executor, the probate Court will presume renunciation of the executorship and will refuse to grant probate to such executor. The appeal was thus allowed and the suit was dismissed.

10. It is this judgment which has fallen for our consideration in this appeal. Shri Jaydeep Gupta, Learned Senior Advocate questions the correctness of this judgment on various grounds. He firstly pointed out that this was not at all a case of renunciation. Learned Counsel pointed out that the renunciation can be only under Section 230 of the Act and such renunciation if made orally in the presence of a Judge, it may amount to a renunciation. As such the Learned Counsel pointed out that such renunciation has to be in writing duly signed by the person renouncing. Under these two conditions, the person renouncing is precluded from applying for probate of the Will in which he is appointed as an executor. He argued that the concept of "*implied renunciation*" is not known to the law or is not to be found anywhere in the Indian Succession Act. Learned counsel, therefore, argued that when the statute mandates through a specific provision the manner and the conditions for the renunciation, the Court could not have found out a different way of renunciation. Learned counsel argued that when the statute provides for the manner and the conditions for renunciation then the renunciation could be ordered only on the fulfillment of the conditions and not in any other manner. Learned counsel further argued that even on the facts the Court erred in holding that in putting the signatures as a witness to the sale deed of the property covered by the Will it can be said that the executor had acted hostile to the testator or had acted contrary to the directions contained in the Will. According to him, ultimately that property which was sold was to go under the Will to the daughters and the wife of the legatee Parul Bala, with rights to sell the property for the welfare of the two unmarried daughters.

It was pointed out by learned counsel that in the two sale deeds dated 10.10.1983 even the testator had put his signatures along with the present executor Samir Chandra Das, though the Will had already come into existence on that date. According to the learned counsel, those two sale deeds, therefore, were absolutely innocuous. In so far as the third sale is concerned, the property was to go to Parul Bala and her daughters and further, Parul Bala had the authority under the Will to dispose of the property for the welfare and maintenance of the two daughters. Learned counsel was at pains to point out that the gas dealership of the IOC was arranged from the consideration in the name of the two unmarried daughters. He pointed out that, therefore, there was no question of the executor having acted hostile to the interests of the testator or even for that matter the other legatees who had no concern with such property. Learned counsel, therefore, argued that even on merits there was no question of such a finding.

11. As against this, Shri Pradip Kumar Ghosh, learned Senior Advocate and Shri Rauf Rahim, learned advocate argued that the judgment was correct. Three decisions were relied upon by Shri Ghosh, being *Crystal Developers Vs. Asha Lata Ghosh (Smt.) (Dead) through L.Rs. & Ors.* [2005 (9) SCC 375], *Krishna Kumar Birla Vs. Rajendra Singh Lodha & Ors.* [2008 (4) SCC 300] and *Anil Kak Vs. Kumari Sharada Raje & Ors.* [2008 (7) SCC 695]. Shri Ghosh also argued that we must give purposive interpretation to Section 230 of the Indian Succession Act. He also argued that though Section 223 specifically provides for the disqualification of the persons to whom the probate could be granted, we must read that Section along with Section 230 to hold that there could be a deemed renunciation and the Court could under the circumstances deny the probate to such an executor who had in fact impliedly renounced his character as an executor.

12. On these rival contentions, it has to be seen whether the judgment is correct.

13. In the first place, we must observe that the appellate Court should not have allowed this question to be argued as there was no plea raised in the written statement in support of the theory of renunciation by widow Parul Bala and the present executor Samir Chandra Das. This question was not argued before the Trial Court nor was it raised by way of a written statement nor was it raised even in the memo of appeal before the High Court. In our opinion, therefore, the High Court should not have entertained such a question.

14. On merits, it was the case of respondent herein that in the three sale deeds, two of which were executed before the death of the testator and one after his demise during the pendency of the probate proceedings the properties were claimed to be the self acquired properties of the widow and the second daughter. It was argued that, therefore, the widow who was an executor was claiming that this property never belonged to the testator. The further case was that since the surviving executor Samir Chandra Das had put his signatures as a witness to the sale deeds, he also must be deemed to have accepted the recitals in the sale deeds to the effect that it was a self acquired property of the widow and the second daughter thereby disputing the title of the testator.

15. The argument is absolutely incorrect, firstly, for the simple reason that at the time of first two sale deeds, even the testator had put his signatures as a witness and as he was alive on that day, the Will was irrelevant. Therefore, those two sale deeds will naturally go out of consideration. Probably realizing this, the High Court made a stray remark in the judgment to the effect that "one of it was executed during the pendency of the probate application". Now, if the earlier two sale deeds which were dated 10.10.1983 and were executed during the lifetime of the testator and he himself had acted as a witness, there was no question of any rival or hostile title being set up by Parul Bala and further by the present appellant who put his signatures as a witness along with his father, the testator on the sale deeds

dated 10.10.1983. It cannot be presumed that there was any idea of setting up a hostile title. The remaining property which was sold on 12.02.1988 i.e. during the pendency of the probate application was admittedly a part of the aforementioned property, part of which was sold on 10.10.1983 by two sale deeds. Basically, on 10.10.1983, the Will had never become effective as the testator was alive. Therefore, the deduction of the High Court that Parul Bala Das and Samir Chandra Das had taken a stance against the testator is clearly faulty. On that day, this position was absolutely not available. This is apart from the fact that on that day, on those two sale deeds dated 10.10.1983, even the testator had signed as a witness. Insofar as the subsequent sale deed dated 12.02.1988 is concerned, also there will be no question of taking any hostile stance against the testator because the property which was sold was clearly given away in the Will in favour of Parul Bala Das and her daughters, and Parul Bala Das also was given the right to sell the property for the maintenance and marriage expenses of her two unmarried daughters. Therefore, at least on that day, when the sale deed was executed, Parul Bala Das and her two daughters had inherited the property under the Will, which they sold and they were undoubtedly the owners of the properties. We must, therefore, hold that the High Court erred in taking the stand that the executor had taken a hostile stance against the testator. Once this position on facts is obtained, there is no question of further considering the correctness of the probate holding that there was an *"implied renunciation"* by the appellant herein.

16. However, since there is no authoritative pronouncement, we are proceeding to test the judgment.

17. Our attention was invited by Shri Jaideep Gupta, Learned Senior Counsel appearing on behalf of the appellant, firstly to a decision of the Madras High Court in *(Thoppai) Venkataramier Vs. A Govindarayalier* [AIR 1926 Mad. 605]. In that case, the District Judge had refused to grant the probate

to the appellant. The appellant was one of the two executors. The Will was found to be genuine and it was found that prior to the probate proceedings, the appellant had indulged in wild statements that the Will was a forgery and he was never appointed as executor and that testator had never signed the Will. The appellant had also stated that his (appellant's) attestation on the Will itself was obtained by fraud. Relying on a decision in *In the goods of Manick Lal Seal* [(1908) 35 Cal. 156], the Madras High Court observed that it was open to the executor to openly assert outside the Court that he was renouncing his executorship, but it was by his statement in the Court that he will stand or fall. It was further observed that the appellant's statement in the Court that he did not admit the execution and validation of the Will or that it was a spurious document or that he never put his signatures to the Will and his attestation thereto was obtained by fraud, would be of no consequence in view of his end statement that if the Court considered the Will genuine and was prepared to grant probate, he was willing to act as the executor. The Court did not consider whether such a statement would amount to renunciation. The Court further observed that it was quite open to the executor to take a position taken by the appellant. Further relying on a reported decision in *Sarojini Dasi Vs. Rajalakshmi Dasi* [AIR 1920 Cal. 874], the statements of the appellant were held not to be the renunciation. The other decision relied upon by the Learned Senior Counsel was *Smt. Sailabala Dasi Vs. Baidya Nath Rakshit* [1932 CWN 729], where the Calcutta High Court specifically held that:-

> "disputing the Will by an executor is no ground for which the Court is authorized to refuse grant of probate to such executor when, later, he asks for it."

In this decision also, the appellant was joined as the opposite party as she, though was a named executor, did not apply for probate. She also filed a petition, but she did not admit the Will or the proper execution and attestation thereof.

However, she had stated that if the Will was proved to have been properly executed and attested, she was willing and claimed to get the probate as executrix. The question regarding due execution of the Will was fought out. Even in her evidence, the appellant had disputed the genuineness of the Will. However, the Will was held to be a valid, duly executed and attested Will. On this ground, she was refused the probate. Even the appellate Court had taken a view that she had renounced her executorship. It was held by the appellate Court that after repudiating the Will, the person could not turn around and say that he was entitled to probate. Referring to Section 230 of the Indian Succession Act, it was held that even under these circumstances, Section 230 was not applicable and the said Section was bound to be read alongwith Section 229 and reading the two together, unless the executor has renounced his executorship, the probate cannot be refused to him/her. It was clarified that Section 230 refers to the manner of renunciation in such a case. It was held that even under the circumstances of the case, the appellant was entitled for probate. When we consider the position obtained in the present case, one thing is clear that the situation here was nowhere comparable to the one obtained in the above two decisions. In fact, there was not even a trace of renunciation on the part of the appellant herein, not even remotely.

18. We have already explained the factual situation and in our opinion, the High Court completely misguided itself in stretching the theory of renunciation to its illogical end. The provision of Section 230 lays down specifically as to how the executor renounces his character as an executor. That is certainly not to be found here and when the law requires a thing to be done in a particular manner, it cannot be done in any other manner. The concept of deemed renunciation, as found by the High Court, does not appeal to us, much less on the factual background of the present case. There cannot be a deemed renunciation. However, we must hasten to add that we

do not even for a moment say that the concerned Court has no power to deny the probate for good and valid reasons. However, in this case, we cannot subscribe to the opinion expressed by the High Court that there was a renunciation on the part of the appellant. In a proper case, the Court considering the probate application may, for good reasons, find it not possible to grant the probate to executor, but in this case that has not happened. Instead, the High Court wrote a finding that the executor had renounced himself and he is deemed to have renounced on account of the so-called hostile stand taken by him. We do not agree that there was any hostile stand. We do not further agree that there was any such renunciation or deemed renunciation. We further do not agree that there can be any concept of deemed renunciation.

19. Shri Pradip Kumar Ghosh, learned Senior Advocate and Shri Rauf Rahim, learned advocate urged that we must give a purposive interpretation to Section 230, so as to find that there can be a deemed renunciation in terms of that Section. We do not agree. The language of the Section is too clear to be tinkered with. There has to be a scrupulous adherence to the Section before an executor is refused the probate under Section 230. The Learned Advocates then tried to rely on a decision in *Crystal Developers Vs. Asha Lata Ghosh (Smt.) (Dead) through L.Rs. & Ors.* [2005 (9) SCC 375]. This case was entirely different on facts. It pertains to the subject of revocation of probate. The second decision in *Krishna Kumar Birla Vs. Rajendra Singh Lodha & Ors.* [2008 (4) SCC 300] is also of no consequence. It is basically regarding the subject of caveatable interest and mainly turns on the fact as to why the appellant could not be said to have a caveatable interest. It does not help the appellant in the present controversy in any manner. The third decision relied on by the learned Advocates was *Anil Kak Vs. Kumari Sharada Raje & Ors.* [2008 (7) SCC 695] to which one of us (Hon'ble Sirpurkar, J.) was a party. That was again the decision rejecting the two applications for grant

of probate and letter of administration. We do not think that the controversy involved in the present appeal is even distantly touched by this case.

20. In the result, the appeal succeeds. The order of the appellate Court is set aside and the matter is remanded back to the appellate Court for decision on merits regarding the valid execution or attestation of the Will. The appeal succeeds with the costs of Rs.25,000/-.

N.J. Appeal allowed.

M/S. JEEVAN DIESELS & ELECTRICALS LTD.
v.
M/S JASBIR SINGH CHADHA (HUF) & ANR.
(Civil Appeal No. 4344 of 2010)

MAY 7, 2010

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

Code of Civil Procedure, 1908 – Or. 12 r. 6 – Judgment on admission – Held: There should be a clear and unequivocal admission of the case of the plaintiff by the defendant – It is essentially a question of fact and depends on the facts of the case – On facts, in suit for possession by landlord against tenant, there is no clear admission of the case of landlord about termination of tenancy by tenant in its written statement or in its reply to the petition of landlord u/ Or. 12 r. 6 – Thus, order of trial court and High Court, set aside – Matter remanded to trial court for disposal of the suit.

The respondent-landlord filed suit against the appellant-tenant for recovery of possession and mesne profits on the ground that the lease deed had expired by efflux of time and notice to that effect was sent to the appellant but the appellant failed to vacate the suit property. The appellant filed written statement. The respondent did not file any rejoinder. They filed an application under Order 12 Rule 6 CPC. The trial court decreed the suit in favour of the respondent. The High Court upheld the order of the trial court holding that the case of ejectment was made out against the appellant on the basis of admission of the case of the respondent in the written statement filed by the appellant. Hence, the appeal.

Allowing the appeal, the Court

HELD: 1.1. The principles of Order 12 Rule 6 CPC, can be followed only if there is a clear and unequivocal admission of the case of the plaintiff by the appellant. Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. This question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. [Paras 12 and 13] [552-G-H; 553-A-B]

1.2. In the instant case, the respondent filed an application under Order 12 Rule 6 CPC for passing a judgment on admission. In the said petition, the respondents-plaintiffs averred that in view of the admission on existence of relationship of landlord and tenant and thereafter, service of the termination notice, the only question left for adjudication for the purpose of possession is "whether the termination of the tenancy has been validly terminated?" To that application the appellant gave a reply, again denying that there was any admission by them about termination or determination of tenancy. It was stated that in the suit issues are still to be framed and the case be tried in accordance with CPC as there is no admission by the appellant and the respondents-plaintiffs had to prove its case with legally admissible evidence. As such prayer was made to dismiss the application of the respondents-plaintiffs under Order 12 Rule 6 CPC. [Paras 8, 10 and 11] [551-E; 552-A-E]

1.3. It cannot be said that there is a clear admission of the case of the respondents-plaintiffs about termination of tenancy by the appellant in its written statement or in its reply to the petition of the respondents-plaintiffs under Order 12 Rule 6. The parties have confined their case of admission to their pleading only. The counsel for the respondents-plaintiffs fairly stated

before this Court that he is not invoking the case of admission 'otherwise than on pleading'. Thus, in the pleadings of the appellant there is no clear admission of the case of respondents-plaintiffs. [Paras 14 and 15] [553-D-G]

1.4. In view of the facts of the instant case, the judgment of the High Court as well as of the Additional District Judge cannot be upheld and are set aside. The matter is remanded to the trial court for expeditious disposal of the suit as early as possible [Paras 22 and 23] [555-E-F]

Karam Kapahi and Ors. vs. M/s. Lal Chand Public Charitable Trust and Anr. **2010 (3) SCALE 569, distinguished.**

Uttam Singh Duggal and Co. Ltd. vs. United Bank of India and Ors. **(2000) 7 SCC 120;** *Koramall Ramballav vs. Mongilal Dalimchand 23 Calcutta Weekly Notes* **(1918-19) 1017;** *J.C. Galstaun vs. E.D. Sassoon & Co., Ltd. 27 Calcutta Weekly Notes* **(1922-23) 783;** *Abdul Rahman and brothers vs. Parbati Devi* **AIR 1933 Lahore 403, referred to.**

Gilbert vs. Smith **1875-76 (2) Chancery Division 686;** *Hughes vs. London, Edinburgh, and Glasgow Assurance Company* **(Limited) Times Law Reports 1891-92 Volume 8 pg 81;** *Landergan vs. Feast* **Law Times Reports 1886-87 Volume 85 pg 42;** *Ellis vs. Allen* **(1914) 1 Ch. D. 904, referred to.**

Case Law Reference:

2010 (3) SCALE 569	**Distinguished.**	**Para 13**
(2000) 7 SCC 120	**Referred to.**	**Para 14**
1875-76 (2)		
Chancery Division 686	**Referred to.**	**Para 16**
Times Law Reports		

1891-92 Volume 8 pg 81	**Referred to.**	**Para 17**
Law Times Reports 1886-87		
Volume 85 pg 42	**Referred to.**	**Para 18**
23 Calcutta Weekly Notes		
(1918-19) 1017	**Referred to.**	**Para 19**
27 Calcutta Weekly Notes		
(1922-23) 783	**Referred to.**	**Para 20**
(1914) 1 Ch. D. 904	**Referred to.**	**Para 20**
AIR 1933 Lahore 403	**Referred to.**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4344 of 2010.

From the Judgment & Order dated 28.11.2008 of the High Court of Delhi at New Delhi in RFA No. 465 of 2008.

Shiv Kumar Suri for the Appellant.

K.V. Viswanathan, Arunima Dwivedi, Anil Kaushik, Gopal Sigh Chauhan, Neha S. Verma and Shiv Prakash Pandey for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 28.11.2008 passed by the High Court of Delhi in Regular First Appeal No.465 of 2008. In the impugned judgment upon admission the High Court came to a finding that a case of ejectment was made out against the appellant on the basis of admission of the case of the plaintiff-landlord in the written statement filed by appellant. In passing the said judgment the High Court affirmed the judgment and decree of dispossession

passed by the Additional District Judge, Delhi on 23.09.2008 against the appellant.

3. The material facts of the case are that the respondents-plaintiffs, claiming to be the landlords/owners of the premises bearing Flat No.205, (2nd Floor), Arunachal Building, 19, Barakhambha Road, New Delhi-110001 having area of 581 sq. ft., (super area) (hereinafter, 'the suit premises') filed a suit against the appellant for recovery of possession and mesne profit. The case of the plaintiff-landlord in the plaint is that the appellant was inducted as a tenant vide lease deed dated 07.07.2003 at a monthly rent of Rs.23,200/- for a period of three years with effect from 07.07.2003. According to the respondents-plaintiffs the said lease dated 07.07.2003 was initially for a period of three years and which was to be renewed for a further period of three years as per the mutual consent of both the parties with 20% increase in the monthly rent. The main case of the plaintiff-landlord is that the said lease deed had expired by efflux of time and notice to that effect was sent to appellant which was enclosed with the plaint. In paragraph 6 of the plaint further averment is that the appellant, despite determination of its tenancy of the suit property, has failed to vacate the suit property, and handover the possession thereof to the respondents-plaintiffs.

4. The stand of the respondents-plaintiffs before the Civil Court and also the High Court and before this Court also was that the case of termination of tenancy has been admitted by the appellant in its written statement.

5. In order to appreciate this controversy it will be proper to set out the relevant averments in the plaint and written statement of the parties.

6. Paragraphs 5 and 6 of the plaint on which the respondents-plaintiffs rely are as follows:-

"5. That the tenancy has expired by efflux of time but for the precautionary measure, the Plaintiffs vide notice dated July 15, 2006 terminated the tenancy of the Defendant,

which was sent via Regd. Ad. & UPC. The aforesaid notice dated July 15, 2006 was duly served upon the defendant. The copy of said notice is annexed herewith as Annexure A-3. The registration receipt, UPC and acknowledgement card are annexed herewith as Annexure A-4 to A-6 respectively.

6. That the defendant, despite, the determination of its tenancy of the said suit property has failed to vacate the suit property and handover the possession thereof to the Plaintiffs".

7. In the written statement, which was filed by the appellant, paragraphs 5 and 6 of the plaint have been dealt with in paragraphs 5 and 6 of the written statement respectively. Those two paragraphs are set out below:-

"5. That the contents of para 5 of the plaint are a matter of record. It is submitted that tenancy has neither expired by efflux of time nor it has been terminated.

6. That in reply to the contents of para 6 of the plaint, it is submitted that defendant is in possession of the premises. There has been no determination of tenancy.

8. It is clear from a perusal of the aforesaid averments in the written statement that the appellant has disputed (a) the fact of expiry of tenancy by efflux of time; (b) the appellant has also disputed that there has been a determination of tenancy. So far as receipt of notice referred to in paragraph 5 of the plaint is concerned, there has been no denial by the appellant.

9. Learned counsel for the appellant also argued before us that the lease deed cannot be terminated in view of certain clauses contained in the lease. The said argument was opposed by the learned counsel for the respondents-plaintiffs. But in the facts of this case and in view of the nature of the judgment we propose to pass we need not decide those contentions at all.

10. It may be noted herein that to the written statement filed by the appellant, the respondents-plaintiffs did not file any rejoinder. They filed an application under Order 12 Rule 6 of the Code of Civil Procedure for passing a judgment on admission. In the said petition in paragraph 4, the respondents-plaintiffs also averred as follows:-

"4. That in view of the admission (i) On existence of relationship of landlord and tenant and there after (ii) service of the termination notice, the only question left for adjudication for the purpose of possession is "whether the termination of the tenancy has been validly terminated?"

11. To that application the appellant had given a reply. In paragraph 2 of the reply it was again denied by the appellant that there was any admission by them about termination or determination of tenancy. In the said reply it has been stated that in the suit issues are still to be framed and the case be tried in accordance with the Civil Procedure Code as there is no admission by the appellant and the respondents-plaintiffs have to prove its case with legally admissible evidence. As such prayer was made to dismiss the application of the respondents-plaintiffs under Order 12 Rule 6.

12. Learned counsel for the respondents-plaintiffs relied on a judgment of this Court in *Karam Kapahi & Others vs. M/s. Lal Chand Public Charitable Trust & Another* reported in 2010 (3) SCALE 569 and contended that in view of the principles laid down in that case, this Court may affirm the judgment of the High Court in the instant case. This Court is unable to accept the aforesaid contention. In *Karam Kapahi* (supra) a Bench of this Court analyzed the principles of Order 12 Rule 6 of the Code and held that in the facts of that case there was clear admission on the part of the lessee about non-payment of lease rent. The said admission was made by the lessee in several proceedings apart from its pleading in the suit. In view of such clear admission, the Court applied the principles of Order 12 Rule 6 in the case of *Karam Kapahi* (supra). The principles of law laid down in *Karam Kapahi*

(supra) can be followed in this case only if there is a clear and unequivocal admission of the case of the plaintiff by the appellant.

13. Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question depends on the facts of the case. This question, namely, whether there is a clear admission or not cannot be decided on the basis of a judicial precedent. Therefore, even though the principles in *Karam Kapahi* (supra) may be unexceptionable they cannot be applied in the instant case in view of totally different fact situation.

14. In *Uttam Singh Duggal & Co. Ltd. Vs. United Bank of India and others* reported in (2000) 7 SCC 120 the provision of Order 12 Rule 6 came up for consideration before this Court. This Court on a detailed consideration of the provisions of Order 12 Rule 6 made it clear "wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed" the principle will apply. In the instant case it cannot be said that there is a clear admission of the case of the respondents-plaintiffs about termination of tenancy by the appellant in its written statement or in its reply to the petition of the respondents-plaintiffs under Order 12 Rule 6.

15. It may be noted here that in this case parties have confined their case of admission to their pleading only. The learned counsel for the respondents-plaintiffs fairly stated before this Court that he is not invoking the case of admission 'otherwise than on pleading'. That being the position this Court finds that in the pleadings of the appellant there is no clear admission of the case of respondents-plaintiffs.

16. In this connection reference may be made to an old decision of the Court of Appeal between *Gilbert vs. Smith* reported in 1875-76 (2) Chancery Division 686. Dealing with the principles of Order XL, Rule 11, which was a similar

provision in English Law, Lord Justice James held, "if there was anything *clearly admitted* upon which something ought to be done, the plaintiff might come to the Court at once to have that thing done, without any further delay or expense" (see page 687). Lord Justice Mellish expressing the same opinion made the position further clear by saying, "it must, however, be such an admission of facts as would shew that the plaintiff is clearly entitled to the order asked for". The learned Judge made it further clear by holding, "the rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleading which *clearly* entitles the plaintiff to an order, then the intention was that he should not have to wait but might at once obtain any order" (see page 689).

17. In another old decision of the Court of Appeal in the case of *Hughes vs. London, Edinburgh, and Glasgow Assurance Company (Limited)* reported in The Times Law Reports 1891-92 Volume 8 at page 81, similar principles were laid down by Lord Justice Lopes, wherein His Lordship held "judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal". Both Lord Justice Esher and Lord Justice Fry concurred with the opinion of Lord Justice Lopes.

18. In yet another decision of the Court of Appeal in *Landergan vs. Feast* reported in The Law Times Reports 1886-87 Volume 85 at page 42, in an appeal from Chancery Division, Lord Justice Lindley and Lord Justice Lopes held that party is not entitled to apply under the aforesaid rule unless there is a clear admission that the money is due and recoverable in the action in which the admission is made.

19. The decision in *Landergan* (supra) was followed by the Division Bench of Calcutta High Court in *Koramall Ramballav vs. Mongilal Dalimchand* reported in 23 Calcutta Weekly Notes (1918-19) 1017. Chief Justice Sanderson, speaking for the Bench, accepted the formulation of Lord Justice Lopes and

held that admission in Order 12, Rule 6 must be a “clear admission”.

20. In the case of *J.C. Galstaun vs. E.D. Sassoon & Co., Ltd.,* reported in 27 Calcutta Weekly Notes (1922-23) 783, a Bench of Calcutta High Court presided over by Hon’ble Justice Sir Asutosh Mookerjee sitting with Justice Rankin while construing the provisions of Order 12, Rule 6 of the Code followed the aforesaid decision in *Hughes* (supra) and also the view of Lord Justice Lopes in *Landergan* (supra) and held that these provisions are attracted “where the other party has made a plain admission entitling the former to succeed. This rule applies where there is a clear admission of the facts on the face of which it is impossible for the party making it to succeed”. In saying so His Lordship quoted the observation of Justice Sargent in *Ellis vs. Allen* [(1914) 1 Ch. D. 904] {See page 787}.

21. Similar view has been expressed by Chief Justice Broadway in the case of *Abdul Rahman and brothers vs. Parbati Devi* reported in AIR 1933 Lahore 403. The learned Chief Justice held that before a Court can act under order 12, Rule 6, the admission must be clear and unambiguous.

22. For the reasons discussed above and in view of the facts of this case this Court cannot uphold the judgment of the High Court as well as of the Additional District Judge. Both the judgments of the High Court and of the Additional District Judge are set aside.

23. The matter is remanded to the trial Court for expeditious disposal of the suit as early as possible, preferably within a period of six months from the date of service of this order on the learned trial Court. It is made clear that this Court has not made any observation on the merits of the case.

24. The appeal is allowed. There will be no order as to costs.

N.J. Appeal allowed.

SECRETARY, CANNANORE DISTRICT MUSLIM EDUCATIONAL ASSOCIATION

v.

STATE OF KERALA AND ORS.

(Civil Appeal No. 4346 of 2010)

MAY 7, 2010

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

Education/Educational institutions: Minority institution – Government decided to grant permission to run High School and Higher Secondary School to the appellant, a minority institution – Change in government policy – Decision for sanction of Higher Secondary School not implemented – Writ of mandamus seeking direction to government to sanction Higher Secondary School – Held: Maintainable – Appellant has right to get permission to hold Higher Secondary School as government committed itself to give the appellant the said sanction – Kerela Education Rules, 1959 – r.2(2) – G.O.(P)No.107/07/G.Edn dated 13.6.2007 – Administrative law – Legitimate expectation.

Appellant minority institution established a college for imparting degree courses with some pre-degree courses in various streams. Respondent-State Government took a policy decision to abolish the Pre-degree Courses conducted in the colleges. Subsequently, the respondents decided that those colleges which were running classes up to High School may be allowed to add classes up to the 12th standard in place of pre-degree courses. Those colleges which did not have any classes till the High school level were to be allowed to run High Schools and were also to be allowed Higher Secondary courses. By notification dated 2.04.1997, applications were invited from the management of schools, both government as well as private, and from

colleges for the academic year 1997-1998. Appellant had been applying for Higher Secondary courses ever since 1996. However, its applications were not considered by the respondents in the light of policy that the Government was allowing only those applicants who already had existing High Schools. Since many of the managements did not have High Schools to start higher secondary courses, the Government issued a preliminary notification on 25.06.1998 for starting High Schools at a certain number of designated places as per Chapter V Rule(2) Sub-rule(2) of the Kerela Education Rules, 1959. The ward to which the Appellant belonged was also included in the earlier notification dated 13.06.2000 but it was excluded subsequently as the Government received some objections. A petition was filed by the Government wherein the High Court directed the respondent to consider the case of the appellant. Pursuant to this direction, appellant was given an assurance that it would be given the High School as and when the financial position of the Government would improve.

Then by an order dated 31.05.2003, ten schools were given the sanction to open aided High Schools but the appellant was denied the same facility. After repeated representations before the respondents, the appellant was sanctioned a High School and a Higher Secondary School in its ward after a decision to that effect was taken in a meeting of the Council of Ministers on 08.10.2003. But the said decision for sanction of Higher Secondary classes was not implemented in the light of the decision of the High Court in a writ petition.

Subsequently, in partial implementation of the order of 08.10.2003, it started a High School from 9.8.2004 and the classes commenced during the academic year 2004-05 and the School became a complete High School during the academic year 2006-07. But appellant was not

sanctioned Higher Secondary Courses inspite of several representations. Appellant approached High Court for issuance of writ of mandamus to the respondents for sanctioning an aided Higher Secondary school as it was done in the case of other aided college managements. It was alleged that other managements were granted High Schools and Higher Secondary Schools simultaneously or immediately, one after the other. It also prayed for implementation of the order of 08.10.2003 by which the Government had already granted Higher Secondary courses to the appellant.

The question before the High Court was whether the Higher Secondary school was to be sanctioned to the appellant as per the old policy and the subsequent orders or in view of the new policy as per the G.O.(P)No.107/07/G.Edn dated 13.6.2007. High Court while dismissing the writ petition held that the earlier orders governing grant of Higher Secondary Schools was no longer valid and was replaced by the new order dated 13.6.2007 and the appellant did not have any statutory right to get the sanction of running Higher Secondary classes and the sanction of this course, was a Government function on which a Court cannot step in. It also upheld the right of government to change its policy. Hence the appeal.

Allowing the appeal, the Court

HELD: 1. So far as the right of the government to change its policy is concerned, the High Court's conclusion was correct. The High Court was equally right in holding that the government cannot be tied down to any policy. But unfortunately, the High Court did not examine the impact of the government policy on the admitted facts and circumstances of the case. High Court especially the writ court cannot take a mechanical or

strait jacket approach in such matter. [Para 23] [566-G-H; 567-A]

2. The appellant was a religious minority. As a religious minority, it has a fundamental right to establish and administer educational institutions of its choice in view of the clear mandate of Article 30 of the Constitution. Apart from the fundamental right of the appellant to establish and administer an educational institution, the right of the appellant to get the sanction of running a Class XII School was also accepted by the government to the extent that the government applied to the High Court for its permission to seek an order for implementation of its decisions dated 08.10.2003 and 13.10.2005 whereby sanction was given to the appellant to run Higher Secondary Courses. Those decisions of the government to sanction higher secondary courses in favour of the appellant could not be implemented in view of the order of the High Court dated 05.04.2006 to the effect that the High Court wanted the aggrieved persons to approach the Court. In the background of these facts, the writ petition was filed and during the pendency of the writ petition came the revised policy of the government. In that policy, it was made very clear that there was no need to sanction or upgrade government or aided schools in the normal course. The High Court should have appreciated the facts of the case and come to the conclusion that the appellant's case did not come under the normal course. But the High Court refused to do so and took a mechanical approach. [Paras 24, 26] [567-B-G]

3. The facts of this case clearly show that appellant was entitled to get the sanction of holding higher secondary classes. In fact the Government committed itself to give the appellant the said facility. The Government's said order could not be implemented in view of the court proceedings. Before the procedural wrangle in the court could be cleared, came the change of policy. So it cannot be denied that the appellant has a right or at least a legitimate expectation to get the permission to hold Higher Secondary classes. The appellant is a minority institution. It is therefore really a case of issuance of mandamus in the appellant's favour. [Paras 51-53] [575-C-G]

4. The respondent State is directed to sanction Higher Secondary course in the appellant's institution from the next academic session with this rider that the appellant must follow the extant statutory procedures for the appointment of teachers in the Higher Secondary section. [Para 54] [576-A-B]

State of H.P. and another v. Umed Ram Sharma **1986) 2 SCC 68;** *Dwarka Nath v. Income Tax Officer, Special Circle, D. Ward, Kanpur and another* **AIR 1966 SC 81;** *J.R. Raghupathy etc. v. State of A.P. and Ors.* **AIR 1988 SC 1681;** *Life Insurance Corporation of India v. Escorts Limited and other* **(1986) 1 SCC 264;** *The Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S. Jagannathan and another* **AIR 1987 SC 537;** *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. v. V.R. Rudani and Ors.* **AIR 1989 SC 1607, referred to.**

R. v. Cambridge Health Authority ex p B **(1995) 2 All ER 129;** *R. v. Blooer* **(1760) 2 Burr;** *Rex v. The Justices of Denbighshire* **(1803) 4 East, 142;** *The King v. The Revising Barrister etc.* **(1912) 3 King's Bench 518, referred to.**

Case Law Reference:

(1986) 2 SCC 68	**referred to**	**Para 19**
(1995) 2 All ER 129	**referred to**	**Paras 19, 26, 28**
1760 2 Burr	**referred to**	**Para 40**

(1803) 4 East, 142	**referred to**	**Para 41**
(1912) 3 King's Bench 518	**referred to**	**Para 41**
AIR 1966 SC 81	**referred to**	**Para 43**
AIR 1988 SC 1681	**referred to**	**Para 46**
(1986) 1 SCC 264	**referred to**	**Para 47**
AIR 1987 SC 537	**referred to**	**Para 48**
AIR 1989 SC 1607	**referred to**	**Para 50**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4346 of 2010.

From the Judgment & Order dated 11.10.2008 of the High Court of Kerala at Ernakulam in W.P. (C) No. 11167 of 2006.

L. Negeswara, E.M.S. Anam and Fazlin Anam for the Appellant.

T.L.V. Iyer, P.V. Dinesh and Atishi Dipankar for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The appellant is the Secretary of Cannanore District Muslim Educational Association, Karimbam (hereinafter referred to as the 'Appellant'), which is a Society registered under the Societies Registration Act (Central Act 21/1860). The Appellant had established Sir Syed College in 1967 and it was imparting degree courses along with some pre-degree courses in various streams constituting 11 batches of a total of 80 students in each batch.

3. The Respondents, took a policy decision to abolish the Pre-degree Courses conducted in the colleges and enacted the Pre-degree Courses (Abolition) Act, 1997.

4. Subsequently, the respondents decided that those colleges which were running classes up to High School may be allowed to add classes up to the 12th standard in place of pre-degree courses. Those colleges which did not have any classes till the High school level were to be allowed to run High Schools and were also to be allowed Higher Secondary courses. Notice inviting applications from the management of schools, both government as well as private, and from colleges were issued for the first time for the academic year 1997-1998 vide notification dated 2.04.97.

5. The policy decision of the Government in this regard was upheld by the High Court by judgment dated 29.8.2002 in W.A.No.2716/2000.

6. The mode of implementation of this policy was the subject matter of a series of litigations where the Respondents were accused of discrimination. The Appellant before us has a similar grievance.

7. Writ Petition(C) No. 11167 OF 2006 was filed by the appellant challenging the non-sanctioning of the Higher secondary courses to its school. The other connected Writ Petitions which were disposed of by the impugned judgment were filed by the management or the teachers of the neighbouring schools, challenging the grant of a High school to the Appellant.

8. The Appellant had been applying for Higher Secondary courses ever since 1996. However, its applications were not considered by the respondents in light of the policy that the Government was allowing only those applicants who already had existing High Schools. Since many of the managements did not have High Schools to start higher secondary courses, the Government issued a preliminary notification on 25.06.1998 for starting High Schools at a certain number of designated places as per Chapter V Rule(2) Sub-rule(2)of the Kerela

Education Rules, 1959. The ward to which the Appellant belonged i.e. ward No. 15 of Taliparamba Municipality was also included in the earlier notification dated 13.06.2000 but it was excluded subsequently as the Government received some objections. An O.P. No. 29989/99 was filed by the Government wherein the High Court directed that the case of the Appellant be considered. Pursuant to this direction, the Appellants were given an assurance that they will be given the High School as and when the financial position of the Government improves.

9. Then by an order dated 31.05.2003, ten schools were given the sanction to open aided High Schools but the appellant was denied the same facility.

10. After repeated representations before the respondents, the appellant was sanctioned a High School and a Higher Secondary School in ward No. 15 of Taliparamba Municipality after a decision to that effect was taken in a meeting dated 08.10.03 of the Council of Ministers, as a special case.

11. But the said decision for sanction of Higher Secondary classes was not implemented in the light of the decision of the High Court in W.P.(C). No. 29124/03 wherein the High Court had directed the Respondents that newer Higher Secondary schools were not to be sanctioned by them without further orders from the Court.

12. Subsequently, in partial implementation of the order of 08.10.03, it started a High School from 9.8.2004 pursuant to the said order and the classes commenced during the academic year 2004-05 and the School became a complete High School during the academic year 2006-07.

13. In view of repeated representations of the appellant Association, the State Cabinet on 13.10.2005 decided to grant three batches of Higher Secondary courses to the appellant in the aided sector, subject to getting the permission of this Court.

For this purpose, the Government filed I.A. No.1816/06 in W.P.(C) No.22532/04 and connected cases. But, High Court dismissed the said application, on the ground that the aggrieved persons may approach the Court.

14. Thereupon a Writ Petition was filed by the appellant seeking mainly the relief that the High Court may issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondents to sanction an aided Higher Secondary school to the appellant herein, as was done in the case of other aided college managements, so that the higher secondary school can commence functioning during the academic year 2006-07 itself.

15. Alleging discrimination in general, it was the specific contention of the Appellant in the Writ Petition that while other managements were being granted High Schools and Higher Secondary Schools simultaneously or immediately, one after the other, the appellant herein was not sanctioned Higher Secondary School after the sanction of the High School. It also prayed that the order of 08.10.03 by which the Government had already granted Higher Secondary courses to the appellant may be implemented.

16. The question before the High Court was whether the Higher Secondary school was to be sanctioned to the Appellant as per the old policy and the subsequent orders or in view of the new policy as per the G.O.(P)No.107/07/G.Edn dated 13.6.2007, which was produced by the Respondents before the High Court along with a memo, containing the norms for sanctioning new schools, courses etc. Respondents in their Counter Affidavit had contended before the High Court that in view of the various allegations of discriminations against it, it is planning to review the entire matter afresh by appointing a Committee. It was urged before the High Court in its affidavit that vide the order dated 19.8.2006, it had formed a Committee to look into the allegations of irregularities in the sanctioning

of the High Schools and Higher secondary schools. It was also urged that by the order dated 22.8.2006, the Government was to set up a Committee to review the irregularity in the sanctioning or the upgradation of several schools in the aided sector in violation of the procedure prescribed in the Kerela Education Rules after the period of 1.1.2003. It further contended that in view of the above, the old sanction for a Higher Secondary school given to the appellant did not hold good anymore and the respondents contended that the appellant's case would be considered afresh after it would formulate new norms as per the findings of the above appointed Committees. Thus, it subsequently passed the new G.O. dated 13.6.2007.

17. The Hon'ble High Court while dismissing the appellants' Writ Petition held that the earlier orders governing grant of Higher Secondary Schools was no longer valid and has been replaced by the new order G.O.(P) No.107/07/G.Edn dated 13.6.2007 and the Appellant does not have any statutory right to get the sanction of running Higher Secondary classes.

18. It also held that the Government did not owe a corresponding duty to the appellant to sanction the school as per the previous order and that "…the Government cannot be tied down to a policy permanently. It should be conceded freedom to change it from time to time".

19. The High Court shared the apprehension that if it orders the Government to sanction a Higher Secondary School to the appellant herein, it may impinge upon the budgetary allotment of Government funds. This, it held that sanction of this course, was a Government function on which a Court cannot step in. In coming to this finding the Hon'ble High Court relied on a decision of the Court of Appeal in *R. v. Cambridge Health Authority, ex p B* [(1995)2 All ER 129] where the Court of Appeal refused to interfere with the validity of a decision of the Health Authority of not alloting funds for the treatment of a child.

High Court also referred to the decision in the case of *State of H.P. and another v. Umed Ram Sharma* [(1986) 2 SCC 68].

20. The respondent No. 4 before this Court moved an application for impleadment as a necessary party in the W.P.(C) No. 11167 OF 2006 before the High Court and which was allowed by the High Court. In its Counter Affidavit, the Respondent No. 4 had challenged the Writ Petition on the ground that the sanctioning of the High School to the Appellant itself is illegal and has been made in violation of the Rules in Chapter V of the Kerela Education Rules. It was also contended that the sanction of the Higher Secondary school to the Appellant would prejudice other schools in the nearby area and would also not be necessary as the number of existing schools are enough for that area. This issue was heard with the other connected Writ Petitions.

21. In the connected writ petitions, the main challenge was with respect to the sanction of a High School to the Appellant on the ground that it was done in violation of the Rule 2A of Chapter V of the Kerela Education Rules. These writ petitions were filed either by the managers or the teachers of the schools. They contended that in case of an already existing statutory provision governing a particular field, the implementation of a new scheme under the provision can only be done by amending the existing provision; in this case, Rule 2, Chapter V of the Kerela Education Rules.

22. The High Court while rejecting the Writ Petition upheld the government's right to change its policy and also opined that the government cannot be tied to any policy. After coming to this conclusion, the High Court held that in the context of the changed policy of the government, it is not proper for the Court to interfere.

23. This Court is of the opinion that so far as the right of the government to change its policy is concerned, the High Court's conclusion is correct. The High Court is equally right in

holding that the government cannot be tied down to any policy. But unfortunately, the High Court did not examine the impact of the government policy on the admitted facts and circumstances of the case. This Court is of the opinion that High Court especially the Writ Court cannot take a mechanical or strait jacket approach in this matter.

24. It appears that the appellant is a religious minority. As a religious minority, it has a fundamental right to establish and administer educational institutions of its choice in view of the clear mandate of Article 30. Apart from the fundamental right of the appellant to establish and administer an educational institution, the right of the appellant to get the sanction of running a Class XII School was also accepted by the government to the extent that the government applied to the High Court for its permission to seek an order for implementation of its decisions dated 08.10.03 and 13.10.05 whereby sanction was given to the appellant to run Higher Secondary Courses. Those decisions of the government to sanction higher secondary courses in favour of the appellant could not be implemented in view of the order of the High Court dated 05.04.06 to the effect that the High Court wanted the aggrieved persons to approach the Court. In the background of these facts, the writ petition was filed and during the pendency of the writ petition came the revised policy of the government. In that policy, it has been made very clear that there is no need to sanction or upgrade government or aided schools in the normal course.

25. The High Court should have appreciated the facts of the case and come to the conclusion that the appellant's case does not come under the normal course. But the High Court refused to do so and took, as noted above, a mechanical approach.

26. The High Court in support of its decision relied on the judgment of the Court of Appeal in *Cambridge Health Authority*

(supra). That was a case of refusal to allocate funds for the treatment of a minor girl who was 10½ years old. The child was suffering from non-Hodgkins Lynphona with common acute Lymphoblastic Leukaenia. It was thought that no further treatment was possible except giving the child palliative drugs. The child's father sought further medical opinion and experts advised a second bone marrow transplant, which could only be administered privately and not in a National Health Service hospital, and that too with 10 to 20% chances of success. In the background of these facts the child's father requested the health authority to allocate funds amounting to £75,000 for the proposed treatment which the health authority refused. The father of the child applied for a judicial review of the decision of the health authorities. The question was what the Court should do in such a situation?

27. The learned single judge quashed the decision of the health authority and directed it to reconsider its decision. Then on appeal against the decision of the learned single judge, the Court of Appeal allowed the appeal. Sir Thomas Bingham, Master of Roll, presiding over the Court of Appeal held that the learned Single judge failed to recognize the realities of the situation. Considering the constraints of budget on the health authority, the Master of Roll held:-

> "Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court" (See at page 137, placitum 'F')

28. But the facts of this case do not have even a remote resemblance to the facts in *Cambridge Health Authority* (supra). In this case the government was willing to sanction the higher secondary classes to the appellant-institution and to the

effect applied to the High Court for getting the necessary permission and that application of the government was disposed of by the Court in the manner indicated above. In between came the change of policy but financial crunch was never the reason for denying the prayer of the appellant to run the higher secondary course.

29. While dismissing the Writ Petition, the High Court also relied on the decision of this Court in the case of *Umed Ram* (supra).

30. In *Umed Ram* (supra), the Respondents, who were poor harijans in the State of Himachal Pradesh wrote a letter to the High Court of Himachal Pradesh complaining about the incomplete construction of the road and also complained of the fact that such construction has been stopped in collusion with the authorities causing immense hardship to the poor people and that is why the Court's intervention was prayed for. The Court treated the said letter as a writ petition and directed the superintending engineer of PWD to complete the work in the course of the financial year.

31. The superintending engineer before the High Court gave an estimate that for the purposes of the widening of the road, Rs. 95,000/- was required but only Rs. 40,000/- was available in the course of the current financial year. Before this Court, Government challenged those directions of the High Court questioning the High Court's jurisdiction under Article 226 of the Constitution to direct the State Government to allot particular funds for expenditure in addition to the funds already allotted and thus regulate the residual financial matters of the State.

32. The Government raised questions on the basis of Articles 202-207 of the Constitution pointing out the Government's exclusive domain in financial matters as indicated in those articles. The three judge bench of this court considered the matter in detail and ultimately upheld the High

Court's directions as not transgressing the limit, in view of the provisions of Articles 38, 19 and 21 of the Constitution. [See para 39, pg. 82-83]

33. Therefore, this decision does not support the conclusion reached by the High Court in this case. On the other hand, the decision in *Umed Ram* (supra) upheld the power of the Court to act in public interest in order to advance the constitutional goal of ushering a new social order in which justice, social, economic and political must inform all institutions of public life as contemplated under Article 38 of the Constitution.

34. Paragraph 21 of the judgment in *Umed Ram* (supra) which has been quoted by the High Court does not constitute its ratio. The High Court, therefore, with great respect, failed to appreciate the ratio in *Umed Ram* (supra) in its correct perspective.

35. While dismissing the writ petition the Hon'ble High Court with respect, had taken a rather restricted view of the writ of Mandamus. The writ of Mandamus was originally a common law remedy, based on Royal Authority. In England, the writ is widely used in public law to prevent failure of justice in a wide variety of cases.

36. In England this writ was and still remains a prerogative writ. In America it is a writ of right. (Law of Mandamus by S.S. Merrill, Chicago, T.H. Flood and Company, 1892, para 62, page 71).

37. About this writ, SA de Smith in '*Judicial Review of Administrative Action'*, 2nd edn., pp 378 & 379 said that this writ was devised to prevent disorder from a failure of justice and defect of police and was used to compel the performance of a specific duty.

38. About this writ in 1762 Lord Mansfield observed that

'within the past century it had been liberally interposed for the benefit of the subject and advancement of justice'.

39. The exact observations of Lord Mansfield about this writ has been quoted in Wade's '*Administrative Law*, Tenth Edition' and those observations are still relevant in understanding the scope of Mandamus. Those observations are quoted below:-

> "It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.....The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied. Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers & c., to restore an alderman to precedency, an attorney to practice in an inferior court,& c." (H.W.R. Wade & C.F. Forsyth: Administrative Law, 10th Edition, page 522-23).

40. De Smith in *Judicial Review*, Sixth Edition has also acknowledged the contribution of Lord Mansfield which led to the development of law on Writ of Mandamus. The speech of Lord Mansfield in *R Vs. Blooer,* (1760) 2 Burr, runs as under:

> "a prerogative writ flowing from the King himself, sitting in his court, superintending the police and preserving the peace of this country".(See De Smith's Judicial Review 6th Edition, Sweet and Maxwell page 795 para 15-036.

41. Almost a century ago, Darling J quoted the observations in *Rex Vs. The Justices of Denbighshire,* (1803) 4 East, 142, in *The King Vs. The Revising Barrister etc.* {(1912) 3 King's Bench 518} which explains the wide sweep

of Mandamus. The relevant observations are:

> "..Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable...."
>
> (See page 529)

42. At page 531 of the report, Channell, J said about Mandamus:

> "It is most useful jurisdiction which enables this Court to set right mistakes".

43. In *Dwarka Nath Vs. Income Tax Officer, Special Circle, D. Ward, Kanpur and another* – AIR 1966 SC 81, a three-judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this Article is deliberately couched in comprehensive language so that it confers wide power on High Court to 'reach injustice wherever it is found'.

44. Delivering the judgment Justice Subba Rao (as His Lordship then was) held that the Constitution designedly used such wide language in describing the nature of the power. The learned Judge further held that the High court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writs in India has been widened by the use of the expression "nature".

45. Learned Judge made it very clear that the said expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. The learned Judge then clarifies the entire position as follows:

> "..It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country.

Any attempt to equate the scope of the power of the High Court under Article 226 of the Constituion with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself…."

(See para 4, page 85)

46. Same view was also expressed subsequently by this Court in *J.R. Raghupathy etc. Vs. State of A.P. and Ors.* – AIR 1988 SC 1681. Speaking for the Bench, Justice A.P. Sen, after an exhaustive analysis of the trend of Administrative Law in England, gave His Lordship's opinion in paragraph (29) at page 1697 thus:

"29. Much of the above discussion is of little or academic interest as the jurisdiction of the High Court to grant an appropriate writ, direction or order under Article 226 of the Constitution is not subject to the archaic constraints on which prerogative writs were issued in England. Most of the cases in which the English courts had earlier enunciated their limited power to pass on the legality of the exercise of the prerogative were decided at a time when the Courts took a generally rather circumscribed view of their ability to review Ministerial statutory discretion. The decision of the House of Lords in Padfield's case (1968 AC 997) marks the emergence of the interventionist judicial attitude that has characterized many recent judgments."

47. In the Constitution Bench judgment of this Court in *Life Insurance Corporation of India vs. Escorts Limited and others,* [(1986) 1 SCC 264], this Court expressed the same opinion that in Constitution and Administrative Law, law in India forged ahead of the law in England (para 101, page 344).

48. This Court has also taken a very broad view of the writ of Mandamus in several decisions. In the case of *The Comptroller and Auditor General of India, Gian Prakash, New Delhi and another Vs. K.S. Jagannathan and another* – (AIR 1987 SC 537), a three-Judge Bench of this Court referred to Halsbury's Laws of England, Fourth Edition, Volume I paragraph 89 to illustrate the range of this remedy and quoted with approval the following passage from Halsbury about the efficacy of Mandamus:

"..is to remedy defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient beneficial and effectual." (See para 19, page 546 of the report)

49. In paragraph 20, in the same page of the report, this Court further held:

"…and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it property and lawfully exercised its discretion"

50. In a subsequent judgment also in *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and Ors. Vs. V.R. Rudani and Ors.* – AIR 1989 SC 1607, this Court examined the development of the law of Mandamus and held as under:

"21. ……….mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed

by statute. It may be sufficient for the duty to have been imposed by charter common law, custom or even contract." (Judicial Review of Administrative Act 4th Ed. P. 540). *We share this view.* The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition." (See page 1613 para 21).

51. The facts of this case clearly show that appellant is entitled to get the sanction of holding higher secondary classes. In fact the Government committed itself to give the appellant the said facility. The Government's said order could not be implemented in view of the court proceedings. Before the procedural wrangle in the court could be cleared, came the change of policy. So it cannot be denied that the appellant has a right or at least a legitimate expectation to get the permission to hold Higher Secondary classes.

52. The appellant is a minority institution and its fundamental right as a religious minority institution under Article 30 also has to be kept in view.

53. It is therefore really a case of issuance of mandamus in the appellant's favour. Merrill on Mandamus has observed that it would be a monstrous absurdity if in a well-organized government no remedy is provided to a person who has a clear and undeniable right. It has been also observed where a man has a *jus ad rem* (a right to a thing) it will be 'absurd, ridiculous and shame to the law, if Courts have no remedy and the only remedy he can have is by mandamus.' [See para 11, pages 4-5]

54. For the reasons aforesaid this court cannot uphold the judgment passed by High Court in W.P. No.11167 of 2006. The judgment is set aside and this court directs the respondent state to sanction Higher Secondary course in the appellant's institution from the next academic session with this rider that the appellant must follow the extant statutory procedures for the appointment of teachers in the Higher Secondary section.

55. The appeal is allowed. Parties are left to bear their own costs.

D.G. Appeal allowed.