EKNATH GANPAT AHER AND ORS.
v.
STATE OF MAHARASHTRA AND ORS.
(Criminal Appeal No. 173 of 2007)

MAY 7, 2010

[V.S. SIRPURKAR AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860: ss.302/149 – Previous enmity over land – Mob of 75-100 persons entered into clash with complainant party – Two persons belonging to complainant party died and about 9 persons received injuries – About 14 accused persons received injuries including some who suffered grievous injuries – Conviction of 35 accused persons by trial Court – High Court acquitted 21 and upheld conviction of 14 accused/appellants – On appeal, held: There was no evidence to specifically ascribe any definite role to any of the accused/appellants – Also there was no explanation regarding the injuries on accused persons – Appellants entitled to benefit of doubt and hence acquitted – Criminal trial – Benefit of doubt.

Prosecution case was that there was a dispute between the complainant party and the accused persons regarding certain land. On the fateful day, a mob of about 75-100 people gathered at the place of occurrence. In the clash, PWs 2, 5, 8 and 9 received injuries whereas the two others received grievous injuries resulting in their death in the hospital. A number of accused persons also received injuries including some having received grievous injuries.

Trial Court convicted 35 accused persons under ss.302/149 IPC while acquitting one. The High Court, on appeal, acquitted 21 of the 35 convicted accused

persons. Fourteen convicted accused persons filed the appeals.

Allowing the appeals, the Court

HELD: 1.1. Nine persons including four witnesses belonging to the complainant party received injuries whereas as many as 14 accused persons received injuries including some who even suffered grievous injuries. Admittedly, there was a mob of about 75-100 persons who descended from the hill side to the place of occurrence by pelting stones and a melee followed. Not even a single witness including the injured witnesses could specifically state as to who had caused what injury either to the deceased or to the injured witnesses or to the accused. A very general statement was made that the accused persons were armed with deadly weapons and caused injuries to the complainant party. In a situation where a mob of 75-100 persons entered into a clash with the complainant party it could not have been possible for any of the witnesses, who would naturally be concerned with their own safety and to save themselves from the assault, to see as to who had inflicted what type of injury either on the deceased or on the injured witnesses. In view of such omnibus and vague statements given by the witnesses, the Court below acquitted as many as 21 accused persons on the ground that there was no evidence on record to implicate them in the offences alleged. There being no other evidence to specifically ascribe any definite role to any of the 14 appellants, it was difficult to hold that any of the appellant had inflicted any particular injury on any of the deceased or the injured witnesses. Unless there is cogent and specific evidence attributing a specific role in the incident to the accused persons, who were themselves injured and there being no explanation forthcoming as to such injuries, it would be unsafe to pass an order recording conviction and sentence against the appellants, moreso when the

prosecution produced, in support of its case, witnesses who were inimical to the accused persons. It is crystal clear from the records that land of Gat No. 170 was the bone of contention between the complainant party and the accused. Civil cases with regard to the question of title and ownership to the said land were instituted by both the accused and the complainant party which are pending final adjudication. [Paras 19, 20] [586-E-G; 587-B-E]

1.2. It is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. In such situations, the Courts are called upon to be very cautious and sift the evidence with care. Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the Court with regard to the participation of any of those who were roped in, the Court would be obliged to give the benefit of doubt to them. It was an unfortunate incident in which two persons lost their precious lives. Not only the members of the complainant party received injuries, the members of the accused party were also injured during the course of the incident and some of the accused persons even sustained grievous injuries. A bare look at the injury report contained in the impugned judgment, would prove and establish the said fact. On appreciation of the entire evidence on record, the findings recorded by the High Court as also by the trial Court cannot be upheld. The said findings were against the basic canons of the Evidence Act and the penal law. The appellants are granted benefit of doubt and are acquitted. [Paras 21-23-24] [587-F, G, H; 588-A, B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 173 of 2007.

From the Judgment & Order dated 14.03.2006 of the High

Court of Bombay, Aurangabad Bench in Criminal Appeal No. 617 of 2004.

WITH

Criminal Appeal No. 174 of 2007.

U.R. Lalit, Shrikant Shivade (for Brij Bhusan) for the Appellants.

Sushil Karanjakar, Sanjay Kharde, Asha G. Nair, Uday B. Dube, Kuldip Singh for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. By this judgment and order, we propose to dispose of the two appeals filed by the fourteen accused persons who have been convicted and sentenced by the 2nd Ad-hoc Additional Sessions Judge, Ahmednagar by judgment and order dated 10.09.2004 which has been upheld by the High Court of Bombay, Aurangabad Bench.

2. Originally, there were altogether 38 accused persons, out of which two were juveniles. Consequently, the trial Court of the 2nd Ad-hoc Additional Sessions Judge, Ahmednagar tried 36 accused persons and by judgment and order dated 10.09.2004 convicted 35 accused persons of the offences under various sections of the Indian Penal Code [for short 'IPC'] including the offence punishable under Section 302 read with Section 149 IPC and the remaining one accused person was acquitted.

3. Being aggrieved by the aforesaid judgment and order of conviction and sentence passed by the trial Court, all the 35 accused persons filed an appeal being Criminal Appeal No. 617 of 2004 before the High Court of Bombay, Aurangabad Bench. By its judgment and order dated 14.03.2006, the High Court acquitted 21 out of the 35 convicted accused persons

while upholding the order of conviction and sentence of the remaining 14 accused persons.

4. Being aggrieved by the aforesaid order of conviction and sentence passed by the High Court, two appeals have been filed by the 14 convicted persons which we have heard together.

5. The counsel appearing for the parties have taken us through the judgments of the Courts below against which the present appeals are filed as also through the evidence on record.

6. Before we proceed to discuss the issues that arise for our consideration, it would be relevant and appropriate to recapitulate the facts out of which the present appeals arise.

7. Accused numbers 1 to 36 were charge-sheeted and sent for trial for committing offences including of being members of an unlawful assembly, for causing grievous hurt in prosecution of the common object of the unlawful assembly and also for committing murder. The said 36 accused persons were charge-sheeted under Sections 143, 147, 148, 149, 325/149, 326/149, 324/149, 504/149, 506/149, 337/149, 338/149, 341/149, 307/149 and 302/149 of the IPC. In addition to the aforesaid offences, the accused persons were sent for trial for possession of weapons in contravention of the provisions of the Arms Act and thereby committing offence under Section 4 read with Section 25 of the Arms Act.

8. A criminal case [FIR Crime No. 138/2003 – Exh.138] was registered on 12.09.2003 on the basis of the complaint of one Bajirao Bhaguji Zavare [PW2]. The said complaint was recorded by Mohan Bankar [PW-12], P.S.I. attached to the Police Station, Parner who has stated that prior to the recording of the aforesaid complaint of PW-2, information was received on telephone by the Parner Police Station from the Kotwali Police Station, Ahmednagar regarding the admission of injured

and the deceased in the hospital of Dr. Deshpande. On receipt of the said information, PW-12 immediately rushed to the said hospital. On reaching the hospital, he had drawn the inquest *panchnama* of the two dead bodies of deceased Balasaheb Rambhau Salunke and Vilas Rambhau Salunke, who had died in the meantime. In the said hospital, he also recorded the complaint of PW-2 and thereafter he returned to the Police Station whereafter the aforesaid FIR was registered.

9. It is also alleged that both the accused party as well as the complainant party were in dispute, although, they are residents of different villages. It has also come on record that some of the accused persons and the complainant are relatives. There is a temple of Khandoba situated at village Kamatwadi and the same was initially managed by Khandoba Deo Panch Committee constituted of the respectable villagers. Subsequently, Shri Khanderao Deosthan Trust was given the responsibility of managing the said temple. It is also alleged that Shri Khanderao Deosthan Trust, of which some of the accused persons are members, owns and holds several properties at village Kamatwadi including the lands Gat Nos. 166, 168 and 170, although, there is a serious dispute with regard to the title and possession of land, particularly, Gat No. 170. The deceased and the complainant party claims title in respect of 2/3rd of the land Gat No. 170 contending, *inter alia,* that the said land was previously owned by Bhosales from whom some members of the complainant party had purchased the said land. It is needless to state at this stage that there are civil suits instituted by both the parties and pending in respect of title and possession of the aforesaid land. An order of status quo was also passed by the trial Court in respect of the said land under its order dated 06.08.2003.

10. It is alleged that on 12.09.2003 at about 10.00 a.m. complainant Bajirao Bhaguji Zavare along with Balasaheb Rambhau, Vilas Rambhau, Ratanbai Sulbha, Kantabai, Pandurang Maruti Hingade and others went to the land Gat No.

170 for removing tomato plants and grass for cleaning the lands. At about 1.00 p.m., a mob of about 75-100 persons of Kamatwadi came on the top of north side hill situated adjacent to land Gant No. 170. It is alleged that the members of the said mob while scaling down the hill also pelted stones, upon which, the members of the complainant party started running to save their lives. They were chased by the accused persons and thereafter it is alleged that the accused persons beat up the members of the complainant party by sticks, iron rods and swords and thereby seriously injuring Balasaheb Rambhau Salunke, Vilas Rambhau Salunke and some other persons belonging to the complainant party. All the aforesaid injured persons were rushed to the hospital where Balasaheb Rambhau Salunke and Vilas Rambhau Salunke were pronounced dead whereas the rest of the injured persons were admitted as indoor patients. It is also to be noted that a number of accused persons, namely, A-7, A-10, A-12, A-13, A-20, A-23, A-25, A-27, A-28, A-31, A-33, A-34, A-35 & A-36 received different kinds of injuries including grievous injuries on the vital parts. It is also alleged that Bajirao Bhaguji Zavare [PW2], Pandurang Maruti Hingade [PW-5], Sulbha Vilas Salunke [PW-8] and Rathan w/o Balasaheb Salunke [PW-9] were eye-witnesses to the said occurrence. Apart from the aforesaid injured eye-witnesses, several other members of the complainant party namely, Janabai Hingade, Babaji Hingade, Uttam Hingade, Zumberbai Pandurang Hingade were also injured.

11. On completion of the investigation, police submitted chargesheet against 36 accused persons inasmuch as two of the 38 accused persons were found to be juvenile. On completion of the trial, the trial Court convicted 35 accused persons while acquitting the remaining one accused person. The High Court, on appeal, acquitted 21 of the 35 convicted accused persons. Hence, the remaining 14 convicted accused persons have filed the present two appeals.

12. Mr. U.R. Lalit, learned senior counsel appearing for the appellants submitted before us that the evidence against the 35 accused persons being similar in nature, the Courts below committed an error of law and facts in acquitting the 21 out of the said 35 accused persons while maintaining the conviction and sentence of the remaining 14 accused persons. He submitted that this was done despite the fact that there is no independent and specific evidence to prove and establish that the said convicted persons have played any independent and separate role in committing the aforesaid offences. It was also submitted by learned senior counsel that none of the eye-witnesses had named any of the accused ascribing to him any specific role in causing injuries to the deceased Balasaheb Rambhau Salunke and Vilas Rambhau Salunke or to any other injured witness.

13. Mr. Lalit, after drawing our attention to the evidence of the witnesses, submitted that there is an omnibus statement involving all the accused persons in the death of Balasaheb Rambhau Salunke and Vilas Rambhau Salunke as also for injury to some of the members of the complainant party and that there is no independent evidence to show the specific role played by each one of them in the incident. It was also submitted by him that there is total absence of any explanation in respect of the injuries sustained by the accused persons, some of whom had even sustained grievous injuries. Relying on the same, it was submitted by him that when a large mob of about 75-100 people descended to the place of occurrence and there were a number of people from the complainant side also present, it was not possible to see as to what really happened during the melee and therefore when 22 of the 35 accused persons were acquitted in view of lack of specific evidence, the remaining 14 persons should also have been acquitted.

14. In the light of the aforesaid submissions of the learned senior counsel appearing for the appellants, we have examined the records and also heard the learned counsel appearing for the State.

15. Admittedly, there is a dispute subsisting between the complainant party and the accused persons regarding the land of Gat No. 170. According to the accused persons, the said land belongs to the Trust whereas the complainant party alleges that a part of the said land had been purchased by some of them from Bhosale group and they therefore tried to enter into possession of the same by removing tomatoes planted by PW- 4 who was cultivating the said land. The incident happened at about 1.00 p.m. on the fateful date when a mob of about 75-100 people descended to the place of occurrence. In the melee that followed PWs 2, 5, 8 & 9 received injuries whereas Balasaheb Rambhau Salunke and Vilas Rambhau Salunke received grievous injuries and consequently they were declared dead at the hospital. A number of accused persons also received injuries including some having received grievous injuries but no explanation is forthcoming regarding the said injuries from the prosecution side.

16. The High Court based its order of conviction and sentence regarding the appellants on the ground that the accused had admitted that it was Balasaheb Rambhau Salunke and Vilas Rambhau Salunke who had received grievous injuries on account of assault by the mob and that the right of private defence of protecting the possession of the land Gat No. 170 was not available to the accused persons inasmuch as the accused had not been able to establish by unimpeccable evidence that Devasthan Trust or the accused who were injured were in possession of land Gat No. 170.

17. It was also held by the Courts below that the accused persons who had sustained injuries were members of the unlawful assembly which was formed with the common object of committing murder of both the deceased persons and it was in prosecution of the common object that the accused persons also caused injuries to the said eye-witnesses. The aforesaid findings were recorded by both the Courts below despite recording a finding that not even a single eye-witness was able

to categorically name the particular accused who had inflicted injuries to the deceased or to any of the injured witnesses and that only vague and omnibus statements were made.

18. The High Court disbelieved the statement of Rathan w/o Balasaheb Salunke [PW-9] with regard to identification of the assailants on various grounds, one of which was that her statement came to be recorded only on 18.11.2003, i.e., the date on which the charge-sheet against the accused persons came to be filed. Despite the fact that a number of accused persons had received injuries and also despite the fact that no reason was forthcoming from the prosecution in regard to the injuries suffered by the accused persons, the Courts below discarded the said injuries holding that the said injuries were extremely minor and that injured accused persons could not prove that they had been assaulted by the complainant party. The Courts below were of the opinion that stand taken by the accused persons was not enough to discard the credible evidence of the injured eye-witnesses.

19. In our considered opinion the aforesaid approach of the Courts below was incorrect. Nine persons including four witnesses belonging to the complainant party received injuries whereas as many as 14 accused persons received injuries including some who even suffered grievous injuries. Admittedly, there was a mob of about 75-100 persons who descended from the hill side to the place of occurrence by pelting stones and a melee followed. Not even a single witness including the injured witnesses could specifically state as to who had caused what injury either to the deceased or to the injured witnesses or to the accused. A very general statement has been made that the accused persons were armed with deadly weapons and caused injuries to the complainant party. In a situation where a mob of 75-100 persons entered into a clash with the complainant party it could not have been possible for any of the witnesses, who would naturally be concerned with their own safety and to save themselves from the assault, to see as to

who had inflicted what type of injury either on the deceased or on the injured witnesses.

20. In view of such omnibus and vague statements given by the witnesses, the Court below acquitted as many as 21 accused persons on the ground that there is no evidence on record to implicate them in the offences alleged. There being no other evidence to specifically ascribe any definite role to any of the 14 appellants herein, it is difficult to hold that any of the present appellant had inflicted any particular injury on any of the deceased or the injured witnesses. Unless there is cogent and specific evidence attributing a specific role in the incident to the accused persons, who have themselves been injured and there being no explanation forthcoming as to such injuries, it would be unsafe to pass an order recording conviction and sentence against the appellants, moreso when the prosecution has produced, in support of its case, witnesses who are inimical to the accused persons. It is crystal from the records that land of Gat No. 170 is the bone of contention between the complainant party and the accused. As noted above, civil cases with regard to the question of title and ownership to the said land have been instituted by both the accused and the complainant party which are pending final adjudication.

21. It is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. In such situations, the Courts are called upon to be very cautious and sift the evidence with care. Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the Court with regard to the participation of any of those who have been roped in, the Court would be obliged to give the benefit of doubt to them.

22. There is no doubt that the incident which happened on 12.09.2003 was an unfortunate incident in which two persons have lost their precious lives. Not only the members of the complainant party received injuries, the members of the

accused party were also injured during the course of the incident and some of the accused persons even sustained grievous injuries. A bare look at the injury report, which is contained in the impugned judgment, would prove and establish the said fact.

23. On appreciation of the entire evidence on record, we cannot uphold the findings recorded by the High Court as also by the learned trial Court. In our considered opinion, the aforesaid findings are against the basic canons of the Evidence Act and the penal law.

24. Consequently, we allow both the appeals and set aside the order of conviction and sentence passed against the appellants herein and acquit them giving them the benefit of doubt. The appellants accused shall be released forthwith unless they are required in some other case and those who are on bail, their bail bonds shall stand discharged.

D.G. Appeals allowed.

B.P. SINGHAL
v.
UNION OF INDIA AND ANR.
(Writ Petition (C) No. 296 of 2004)

MAY 7, 2010

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

Constitution of India, 1950:

Article 156 – Removal of Governor on withdrawal of President's pleasure – Judicial review – Scope – Limitations upon power of removal of Governors under Article 156(1) – Held: The President can remove the Governor from office at any time without assigning any reason and without giving any opportunity to show cause – However, power under Article 156(1) to be exercised in rare and exceptional circumstances for valid and compelling reasons – What would be compelling reasons would depend upon the facts and circumstances of each case – A Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre – Change in government at Centre is not a ground for removal of Governors holding office – As there is no need to assign reasons, any removal as a consequence of withdrawal of the pleasure will be assumed to be valid and will be open to only a limited judicial review – If the aggrieved person is able to demonstrate prima facie that his removal was either arbitrary, malafide, capricious or whimsical, the court will call upon the Union Government to disclose to the court, the material upon which the President had taken the decision to withdraw the pleasure – If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, whimsical, or malafide, the court will interfere –

However, the court will not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient.

Articles 154 and 155 – Position of Governor under the Constitution – Discussed.

Article 32 – Writ petition by way of PIL, to secure relief for Governors who had been removed from office – Maintainability of the writ petition – Locus of the Petitioner – Public Interest Litigation.

Doctrines – Doctrine of "pleasure" – Origin, scope and applicability of – Discussed – Constitution of India,1950 – Article 310 r/w Article 311.

The Governors of the States of Uttar Pradesh, Gujarat, Haryana and Goa on 2-7-2004 were removed by the President of India on the advice of the Union Council of Ministers.

In the wake of removal of the Governors, writ petition was filed before this Court, raising a question of public importance involving the interpretation of Article 156 of the Constitution.

The petitioner submitted that to ensure the independence and effective functioning of Governors, certain safeguards have to be read as limitations upon the power of removal of Governors under Article 156(1) [which provides that a Governor shall hold office during the pleasure of the President]; that there should be some certainty of tenure so that the Governor can discharge the duties and functions of his constitutional office effectively and independently; that certainty of tenure will be achieved by fixing the norms for removal, while recognizing an unfettered discretion will subject a Governor to a constant threat of removal and make him subservient to the Union Government, apart from

demoralizing him, and therefore, the removal should conform to the constitutional norms viz. i) removal of the Governor to be in rare and exceptional circumstances, for compelling reasons which make him unfit to continue in office; ii) the Governor to be apprised of the reasons for removal; and iii) the order of removal to be subject to judicial review.

The Attorney General appearing on behalf of the respondents raised a preliminary objection to the maintainability of the writ petition. He submitted that if the four Governors who were removed, do not wish to seek any relief and have accepted their removal without protest, no member of the public can bring a public interest litigation for grant of relief to them.

On merits, the Attorney General submitted that the removal should be for a reason, but such reason need not be communicated and also that removal by applying the doctrine of pleasure need not necessarily relate to any act or omission or fault on the part of the Governor. He submitted that in essence, the object of providing that the Governor shall hold office during the pleasure of the President was that if the President lost faith in the Governor or found him unfit for whatever reason, he can withdraw the presidential pleasure resulting in removal; that the pleasure doctrine cannot be denuded of its width, by restricting its applications to specific instances of fault or misbehaviour on the part of the Governor, or by implying an obligation to assign or communicate any reason for the removal. The Attorney General submitted that in a democracy, political parties are formed on shared beliefs and they contest election with a declared agenda; and if a party which comes to power with a particular social and economic agenda, finds that a Governor is out of sync with its policies, then it should be able to remove such a Governor. The Attorney General submitted that the Union Government has the

right to remove a Governor without attributing any fault to him, if the President loses confidence in a Governor or finds that the Governor is out of sync with democratic and electoral mandate.

The questions which thus arose for consideration were i) whether the writ petition was maintainable; ii) what is the scope of "doctrine of pleasure" ; iii) what is the position of a Governor under the Constitution; iv) whether there are any express or implied limitations/restrictions upon the power under Article 156(1) of the Constitution and v) whether the removal of Governors in exercise of the doctrine of pleasure is open to judicial review.

Disposing of the writ petition and the transfer petition, the Court

HELD: i) <u>Maintainability of the writ petition</u>

1. The petitioner has no locus to maintain the petition in regard to the prayers claiming relief for the benefit of the individual Governors. At all events, such prayers no longer survive on account of passage of time. However, with regard to the general question of public importance referred to the Constitution Bench, touching upon the scope of Article 156 (1) and the limitations upon the doctrine of pleasure, the petitioner has necessary locus. [Para 11] [617-D]

Ranji Thomas v. Union of India **- 2000 (2) SCC 81, relied on.**

S.P. Gupta vs. Union of India – **1981 (Supp) SCC 87, referred to.**

(ii) <u>Scope of doctrine of pleasure</u>

2.1. The Pleasure Doctrine has its origin in English law, with reference to the tenure of public servants under the Crown. [Para 12] [617-F]

2.2. There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good. [Para 13] [620-D-F]

2.3. The 'Doctrine of Pleasure' in its absolute unrestricted application does not exist in India. The said doctrine is severely curtailed in the case of government employment, as evident from clause (2) of Article 310 and clauses (1) and (2) of Article 311. Even in regard to cases falling within the proviso to clause (2) of Article 311, the application of the doctrine is not unrestricted, but moderately restricted in the sense that the circumstances mentioned therein should exist for its operation. Article 310 read with Article 311 provide an example of the application of 'at pleasure' doctrine subject to restrictions. Clause (1) of Article 310 relates to tenure of office of persons serving the Union or a State, being subject to doctrine of pleasure. However, clause (2) of Article 310 and Article 311 restricts the operation of the 'at pleasure' doctrine contained in Article 310(1). [Paras 15 and 19] [621-G; 623-D]

2.4. The Constitution of India provides for three different types of tenure: (i) Those who hold office during the pleasure of the President (or Governor); (ii) Those who hold office during the pleasure of the President (or Governor), subject to restrictions; (iii) Those who hold office for specified terms with immunity against removal, except by impeachment, who are not subject to the doctrine of pleasure. Constitutional Assembly debates

clearly show that after elaborate discussions, varying levels of protection against removal were adopted in relation to different kinds of offices viz. (i) Offices to which the doctrine of pleasure applied absolutely without any restrictions (Ministers, Governors, Attorney General and Advocate General); (ii) Offices to which doctrine of pleasure applied with restrictions (Members of defence service, Members of civil service of the Union, Member of All-India service, holders of posts connected with defence or any civil post under the Union, Member of a civil service of a State and holders of civil posts under the State); and (iii) Offices to which the doctrine of pleasure does not apply at all (President, Judges of Supreme Court, Comptroller & Auditor General of India, Judges of the High Court, and Election Commissioners). Having regard to the constitutional scheme, it is not possible to mix up or extend the type of protection against removal, granted to one category of offices, to another category. [Para 21] [625-D-H; 626-A]

2.5. The doctrine of pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The degree of need for reason may vary. The degree of scrutiny during judicial review may vary. But the need for reason exists. As a result when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however necessarily be read as being subject to the "fundamentals of constitutionalism". Therefore in a constitutional set up, when an office is held during the pleasure of any Authority, and if no limitations or

restrictions are placed on the "at pleasure" doctrine, it means that the holder of the office can be removed by the authority at whose pleasure he holds office, at any time, without notice and without assigning any cause. The doctrine of pleasure, however, is not a licence to act with unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure. In other words, "at pleasure" doctrine enables the removal of a person holding office at the pleasure of an Authority, summarily, without any obligation to give any notice or hearing to the person removed, and without any obligation to assign any reasons or disclose any cause for the removal, or withdrawal of pleasure. However, the withdrawal of pleasure cannot be at the sweet will, whim and fancy of the Authority, but can only be for valid reasons. [Para 22] [626-B-G]

State of Bihar v. Abdul Majid, **1954 SCR 786;** *P.L. Dhingra v. Union of India* - **AIR 1958 SC 36 and** *Moti Ram v. N.E. Frontier Railway* **AIR 1964 SC 600, relied on.**

Union of India v. Tulsiram Patel **(1985) 3 SCC 398, referred to.**

Dunn v. Queen **- 1896 (1) QB 116;** *Shenton v. Smith,***1895 AC 229 and** *Well v. Newfound land* **[1999 (177) DL (4th) 73(SCC)], referred to.**

'Constitutional law of India' **(4th Ed., Vol. 3, pp.2989-90) by H.M. Seervai;** *Black's Dictionary* and *Administrative Law* **by HWR Wade & CF Forsyth (9th Ed.; pp.354-355), referred to.**

(iii) <u>Position of a Governor under the Constitution</u>

3.1. The Governor constitutes an integral part of the legislature of a State. He is vested with the legislative power to promulgate ordinances while the Houses of the

legislature are not in session. The executive power of the State is vested in him and every executive action of the Government is taken in his name. He exercises the sovereign power to grant pardons, reprieves, respites or remissions of punishment. He is vested with the power to summon each House of the Legislature or to prorogue either House or to dissolve the legislative assembly. No Bill passed by the Houses of the Legislature can become law unless it is assented to by him. He has to make a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. He thus occupies a high constitutional office with important constitutional functions and duties. [Para 23] [626-H; 627-A-C]

3.2. It is evident that a Governor has a dual role. The first is that of a constitutional Head of the State, bound by the advice of his Council of Ministers. The second is to function as a vital link between the Union Government and the State Government. In certain special/emergent situations, he may also act as a special representative of the Union Government. He is required to discharge the functions related to his different roles harmoniously, assessing the scope and ambit of each role properly. He is not an employee of the Union Government, nor the agent of the party in power nor required to act under the dictates of political parties. There may be occasions when he may have to be an impartial or neutral Umpire where the views of the Union Government and State Governments are in conflict. His peculiar position arises from the fact that the Indian Constitution is quasi-federal in character. [Para 25] [630-F-H; 631-A]

3.3. In the early days of Indian democracy, the same political party was in power both at the Centre and the States. The position has changed with passage of time. Now different political parties, some national and some regional, are in power in the States. Further one single

party may not be in power either in the Centre or in the State. Different parties with distinct ideologies may constitute a front, to form a Government. On account of emergence of coalition politics, many regional parties have started sharing power in the Centre. Many a time there may not even be a common programme, manifesto or agenda among the parties sharing power. As a result, the agenda or ideology of a political party in power in the State may not be in sync with the agenda or ideology of the political parties in the ruling coalition at the Centre, or may not be in sync with the agenda or ideology of some of the political parties in the ruling coalition at the Centre, but may be in sync with some other political parties forming part of the ruling coalition at the Centre. Further the compulsions of coalition politics may require the parties sharing power, to frequently change their policies and agendas. In such a scenario of myriad policies, ideologies, agendas in the shifting sands of political coalitions, there is no question of the Union Government having Governors who are in sync with its mandate and policies. Governors are not expected or required to implement the policies of the government or popular mandates. Their constitutional role is clearly defined and bears very limited political overtones. The Governor is not the agent or the employee of the Union Government. As the constitutional head of the State, many a time he may be expressing views of the State Government, which may be neither his own nor that of the Centre (for example, when he delivers the special address under Article 176 of the Constitution). Reputed elder statesmen, able administrators and eminent personalities, with maturity and experience are expected to be appointed as Governors. While some of them may come from a political background, once they are appointed as Governors, they owe their allegiance and loyalty to the Constitution and not to any political party and are required to preserve, protect and defend the

Constitution (reference may be made to the terms of oath or affirmation by the Governor, under Article 159 of the Constitution). Like the President, Governors are expected to be apolitical, discharging purely constitutional functions, irrespective of their earlier political background. Governors cannot be politically active. This Court therefore rejects the contention of the respondents that Governors should be in "sync" with the policies of the Union Government or should subscribe to the ideology of the party in power at the Centre. As the Governor is neither the employee nor the agent of the Union Government, this Court also rejects the contention that a Governor can be removed if the Union Government or party in power loses 'confidence' in him. [Para 26] [631-E-H; 632-A-G]

State of Rajasthan vs. Union of India, **1977 (3) SCC 592;** *State of Karnataka v. Union of India,***1977 (4) SCC 608 and** *Hargovind Pant v. Raghukul Tilak* (Dr.), **1979 (3) SCC 458, followed.**

Rameshwar Prasad (VI) vs. Union of India, **2006 (2) SCC 1, relied on.**

'Constitutional Law of India' **[4th Ed., Vol.II, at p.2065] by H. M. Seervai and** *Constituent Assembly Debates*, **(Volume III pages 455 and 469) – referred to.**

(iv) Limitations/restrictions upon the power under Article 156(1) of the Constitution

4.1. A plain reading of Article 156 shows that when a Governor is appointed, he holds the office during the pleasure of the President, which means that the Governor can be removed from office at any time without notice and without assigning any cause. It is also open to the Governor to resign from office at any time. If the President does not remove him from office and if the Governor does not resign, the term of the Governor will come to an end

on the expiry of five years from the date on which he enters office. Clause (3) of Article 156 is not intended to be a restriction or limitation upon the power to remove the Governor at any time, under clause (1) of Article 156. Clause (3) of Article 156 only indicates the tenure which is subjected to the President's pleasure. In contrast, in case of Articles 310 and 311 the doctrine of pleasure is clearly and indisputably subjected to restriction. Clause (1) of Article 310 provides that a person serving the Union Government holds office during the pleasure of the President and a person serving a state government holds office during the pleasure of the Governor. The 'doctrine of pleasure' is subjected to a restriction in Article 310(2) and the restrictions in Article 311(1) and (2). The most significant restriction is contained in clause (2) of Article 311 which provides that no such employee shall be dismissed or removed from service except after an inquiry in which he has been informed of the charges levelled against him and given a reasonable opportunity of being heard in respect of those charges. Clause (1) of Article 310 begins with the words "Except as expressly provided by the Constitution". Therefore, Article 310 itself makes it clear that though a person serves the Union or a State during the pleasure of the President/Governor, the power of removal at pleasure is subject to the other express provisions of the Constitution; and Article 311 contains such express provision which places limitations upon the power of removal at pleasure. By contrast, clause (1) of Article 156 is not made subject to any other provision of the Constitution nor subjected to any exception. Clause (3) prescribing a tenure of five years for the office of a Governor, is made subject to clause (1) which provides that the Governor shall hold office during the pleasure of the President. Therefore, it is not possible to accept the contention that clause (1) of Article 156 is subjected to an express restriction or limitation under Clause (3) of Article 156. [Para 30] [634-E-H; 635-A-E]

4.2. The petitioner relied upon the Report of the Sarkaria Commission on Centre-State Relations and the Report of the National Commission to Review the working of the Constitution in support of his contention that removal of a Governor should be by an order disclosing reasons, that the Governor should be given an opportunity to explain his position and that the removal should be only for compelling reasons, thereby stressing the need to provide security of tenure for the Governors. In this regard the Petitioner also placed reliance upon the Consultation Paper on "Institution of Governor under the Constitution" published by the National Commission to Review the Working of the Constitution. The recommendations made in the said Reports/Consultation Paper, howsoever logical, or deserving consideration and acceptance, remain recommendations. They cannot override the express provisions of the Constitution as they stand. Nor can they assist in interpreting Article 156. The very fact that such recommendations are made, shows that the position under the existing Constitutional provisions is otherwise. They are suggestions to be considered by those who can amend the Constitution. They do not assist in interpreting the existing provisions of the Constitution. [Para 31, 33 and 34] [635-F-G; 639-A; 640-F-H]

4.3. The Constituent Assembly Debates show that several alternatives were considered and ultimately Article 156 in its present form was adopted. The debates disclose that (i) the intention of the founding fathers was to adopt the route of Doctrine of Pleasure, instead of impeachment or enquiry, with regard to removal of Governors; and that (ii) it was assumed that withdrawal of pleasure resulting in removal of the Governor will be on valid grounds but there was no need to enumerate them in the Article. [Para 37] [645-D-G]

4.4. The provision for removal at the pleasure of an authority without any restriction applies to Ministers as also the Attorney General apart from Governors. Persons of calibre, experience, and distinction are chosen to fill these posts. Such persons are chosen not to enable them to earn their livelihood but to serve the society. It is wrong to assume that such persons having been chosen on account of their stature, maturity and experience will be demoralized or be in constant fear of removal, unless there is security of tenure. They know when they accept these offices that they will be holding the office during the pleasure of the President. [Para 39] [646-E-G]

4.5. There is a consensus between the petitioner and the respondent to the extent that a Governor can be removed only for a valid reason, and that physical and mental incapacity, corruption and behaviour unbecoming of a Governor are valid grounds for removal. There is however disagreement as to what else can be grounds for removal. This Court is of the view that there can be other grounds also. It is not possible to put the reasons under any specific heads. The only limitation on the exercise of the power is that it should be for valid reasons. What constitute valid reasons would depend upon the facts and circumstances of each case. [Para 40] [647-D, E]

4.6. A Governor cannot be removed on the ground that he is not sync or refuses to act as an agent of the party in power at the Centre. Though the Governors, Ministers and Attorney General, all hold office during the pleasure of the President, there is an intrinsic difference between the office of a Governor and the offices of Ministers and Attorney General. Governor is the Constitutional Head of the State. He is not an employee or an agent of the Union Government nor a part of any political team. On the other hand, a Minister is hand-

picked member of the Prime Minister's team. The relationship between the Prime Minister and a Minister is purely political. Though the Attorney General holds a public office, there is an element of lawyer-client relationship between the Union Government and the Attorney General. Loss of confidence will therefore be very relevant criterion for withdrawal of pleasure, in the case of a Minister or the Attorney General, but not a relevant ground in the case of a Governor. [Para 41] [647-F-H; 648-A]

Gompers vs. United States, **233 US 603, referred to.**

Constitutional Law of India **(4th Ed.,Vol.2, page 2066) by H.M. Seervai;** *Report of the Sarkaria Commission on Centre-State Relations; Report of the National Commission to Review the working of the Constitution; Consultation Paper on "Institution of Governor under the Constitution", by the National Commission to Review the Working of the Constitution* and *Constituent Assembly Debates*, **referred to.**

(v) <u>Judicial review of withdrawal of President's pleasure</u>

5.1. When a Governor holds office during the pleasure of the Government and the power to remove at the pleasure of the President is not circumscribed by any conditions or restrictions, it follows that the power is exercisable at any time, without assigning any cause. However, there is a distinction between the need for a cause for the removal, and the need to disclose the cause for removal. While the President need not disclose or inform the cause for his removal to the Governor, it is imperative that a cause must exist. If one does not proceed on that premise, it would mean that the President on the advice of the Council of Ministers, may make any order which may be manifestly arbitrary or whimsical or *malafide*. Therefore, while no cause or reason be disclosed or assigned for removal by exercise of such

prerogative power, some valid cause should exist for the removal. Therefore, while the contention that an order under Article 156 is not justiciable cannot be accepted, the contention that no reason need be assigned and no cause need be shown and no notice need be issued to the Governor before removing a Governor is acceptable. [Para 42] [648-C-E]

5.2. Exercise of power under Article 156(1) is an executive power exercised on the advice tendered by the Council of Ministers. Though clause (2) of Article 74 provides that the question whether any, and if so what, advice was tendered, shall not be enquired into by any court; the bar contained in Article 74(2) will not come in the way of the court inquiring whether there was any material on the basis of which such advice was given, whether such material was relevant for such advice and whether the material was such that a reasonable man could have come to the conclusion which was under challenge. Therefore, though the sufficiency of the material could not be questioned, legitimacy of the inference drawn from such material was open to judicial review. [Para 47] [653-E-H; 654-A-B]

5.3. The extent and depth of judicial review will depend upon and vary with reference to the matter under review. In law, context is everything, and intensity of review will depend on the subject-matter of review. For example, judicial review is permissible in regard to administrative action, legislations and constitutional amendments. But the extent or scope of judicial review for one will be different from the scope of judicial review for other. *Malafides* may be a ground for judicial review of administrative action but is not a ground for judicial review of legislations or constitutional amendments. For withdrawal of pleasure in the case of a Minister or an Attorney General, loss of confidence may be a relevant

ground. The ideology of the Minister or Attorney General being out of sync with the policies or ideologies of the Government may also be a ground. On the other hand, for withdrawal of pleasure in the case of a Governor, loss of confidence or the Governor's views being out of sync with that the Union Government will not be grounds for withdrawal of the pleasure. The reasons for withdrawal are wider in the case of Ministers and Attorney-General, when compared to Governors. As a result, the judicial review of withdrawal of pleasure, is limited in the case of a Governor whereas virtually nil in the case of a Minister or an Attorney General. [Para 48] [654-C-G]

5.4. Even though under Article 156(1), the removal is at the pleasure of the President, the exercise of such pleasure is restricted by the requirement that it should be on the advice of the Council of Ministers. What Article 156(1) dispenses with is the need to assign reasons or the need to give notice but the need to act fairly and reasonably cannot be dispensed with by Article 156(1). The President in exercising power under Article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable. In the event of challenge of withdrawal of the pleasure, the court will necessarily assume that it is for compelling reasons. Consequently, where the aggrieved person is not able to establish a *prima facie* instance of arbitrariness or *malafides*, in his removal, the court will refuse to interfere. However, where a *prima facie* case of arbitrariness or *malafides* is made out, the Court can require the Union Government to produce records/ materials to satisfy itself that the withdrawal of pleasure was for good and compelling reasons. What will constitute good and compelling reasons would depend upon the facts of the case. The position, therefore, is that the decision is open to judicial review but in a very limited extent. [Para 49] [654-H; 655-A-E]

S.R. Bommai v. Union of India **[1994 (3) SCC 1], relied on.**

State of Rajasthan v. Union of India **1977 (3) SCC 592;** *Kihota Hollohon v. Zachilhu* **1992 [Supp. (2) SCC 651];** *R.C. Poudyal v. Union of India* **[1994 Supp (1) SCC 324];** *Maru Ram v. Union of India* **[1981 (1) SCC 107];** *Kehar Singh v. Union of India* **[1989 (1) SCC 204] etc.] and** *Epuru Sudhakar v. Government of Andhra Pradesh* **[2006 (8) SCC 161], referred to.**

Council of Civil Service Unions v. Minister for the Civil Service **- 1985 AC 374;** *R (Bancoult) vs. Foreign Secretary* **– 2009 (1) AC 453);** *Baker v. Carr*, **369 US 186;** *Powell v. McCormack*, **395 US 486 and** *Ex parte Daly*, **2001 (3) All ER 433 – referred to.**

De Smith's Judicial Review **(6th Ed. 2007 Page 15), referred to.**

vi) <u>Conclusions</u>

6.1. Under Article 156(1), the Governor holds office during the pleasure of the President. Therefore, the President can remove the Governor from office at any time without assigning any reason and without giving any opportunity to show cause. [Para 50] [655-F]

6.2. Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power under Article 156(1) cannot be exercised in an arbitrary, capricious or unreasonable manner. The power will have to be exercised in rare and exceptional circumstances for valid and compelling reasons. The compelling reasons are not restricted to those enumerated by the petitioner (that is physical/mental disability, corruption and behaviour unbecoming of a Governor) but are of a wider amplitude. What would be compelling reasons would depend upon the facts and

circumstances of each case. [Para 50] [655-H; 656-A]

6.3. A Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre. Nor can he be removed on the ground that the Union Government has lost confidence in him. It follows therefore that change in government at Centre is not a ground for removal of Governors holding office to make way for others favoured by the new government. [Para 50] [656-B, C]

6.4. As there is no need to assign reasons, any removal as a consequence of withdrawal of the pleasure will be assumed to be valid and will be open to only a limited judicial review. If the aggrieved person is able to demonstrate *prima facie* that his removal was either arbitrary, malafide, capricious or whimsical, the court will call upon the Union Government to disclose to the court, the material upon which the President had taken the decision to withdraw the pleasure. If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, whimsical, or malafide, the court will interfere. However, the court will not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient. [Para 50] [656-D-F]

Case Law Reference:

1981 (Supp) SCC 87	**referred to**	**Para 10**
2000 (2) SCC 81	**relied on**	**Para 10**
1896 (1) QB 116	**referred to**	**Para 12**
1895 AC 229	**referred to**	**Para 12.1**
(1985) 3 SCC 398	**referred to**	**Para 12.2**

1954 SCR 786	**relied on**	**Para 12.3**
1999 (177) DL (4th) 73(SCC)	**referred to**	**Para 15**
AIR 1958 SC 36	**relied on**	**Para 19**
AIR 1964 SC 600	**relied on**	**Para 19**
1977 (3) SCC 592	**followed**	**Para 24**
1977 (4) SCC 608	**followed**	**Para 24**
1979 (3) SCC 458	**followed**	**Para 24**
2006 (2) SCC 1	**relied on**	**Para 24**
233 US 603	**referred to**	**Para 28**
1985 AC 374	**referred to**	**Para 43**
2009 (1) AC 453	**referred to**	**Para 43**
1977 (3) SCC 592	**referred to**	**Para 44**
1992 [Supp. (2) SCC 651	**referred to**	**Para 44**
1994 Supp (1) SCC 324	**referred to**	**Para 45**
369 US 186	**referred to**	**Para 45**
395 US 486	**referred to**	**Para 45**
1981 (1) SCC 107	**referred to**	**Para 46**
1989 (1) SCC 204	**referred to**	**Para 46**
2006 (8) SCC 161	**referred to**	**Para 46**
1994 (3) SCC 1	**relied on**	**Para 47**
2001 (3) All ER 433	**referred to**	**Para 48**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 296 of 2004.

Under Article 32 of the Constitution of India.

WITH

T.P. (C) No. 663 of 2004

G.E. Vahanvati, AG, Indira Jaisingh, ASG, Soli J. Sorabjee, K.V. Viswanathan, H.P. Sharma, Vivek Bhati, Ranjeet V. Sangle (for K.S. Rana), Devdatt Kamat, Chinmoy Pradip Sharma. T.A. Khan, Rohit Sharma, Mihir Chatterji, Nishant Patil (for Sushma Suri, Anil Katiyar, P. Parmeswaran), B. Raghunath, Abhishek K. (for K.V. Venkataraman) for the appearing parties

The Judgment of the Court was delivered by

R. V. RAVEENDRAN, J. 1. This writ petition under Article 32 of the Constitution of India, raising a question of public importance involving the interpretation of Article 156 of the Constitution, has been referred to the Constitution Bench, by a two Judge Bench of this Court on 24.1.2005.

2. The writ petition is filed as a public interest litigation in the wake of the removal of the Governors of the States of Uttar Pradesh, Gujarat, Haryana and Goa on 2.7.2004 by the President of India on the advice of the Union Council of Ministers. The petitioner sought : (a) a direction to the Union of India to produce the entire files, documents and facts which formed the basis of the order dated 2.7.2004 of the President of India; (b) a writ of certiorari, quashing the removal of the four Governors; and (c) a writ of mandamus to respondents to allow the said four Governors to complete their remaining term of five years.

The relevant constitutional provisions

3. Article 153 of the Constitution provides that there shall be a Governor for each State. Article 154 vests the executive power of the state in the Governor. Article 155 provides that the Governor of a State shall be appointed by the President,

by warrant under his hand and seal. Article 156 relates to term of office of Governor and is extracted below:

> *"156. Term of office of Governor.—(1) The Governor shall hold office during the pleasure of the President.*
>
> (2) The Governor may, by writing under his hand addressed to the President, resign his office.
>
> *(3) Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office:*
>
> Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office."
>
> (emphasis supplied)

Submissions of Petitioner

4. The petitioner submits that a Governor, as the Head of the State, holds a high constitutional office which carries with it important constitutional functions and duties; that the fact that the Governor is appointed by the President and that he holds office during the pleasure of the President does not make the Governor an employee or a servant or agent of the Union Government; and that his independent constitutional office is not subordinate or subservient to the Union Government and he is not accountable to them for the manner in which he carries out his functions and duties as Governor. It is contended that a Governor should ordinarily be permitted to continue in office for the full term of five years; and though he holds office during the pleasure of the President, he could be removed before the expiry of the term of five years, only in rare and exceptional circumstances, by observing the following constitutional norms and requirements :

(a) The withdrawal of presidential pleasure under Article

156, cannot be an unfettered discretion, nor can it be arbitrary, capricious, unreasonable or malafide. The power of removal should be used only if there is material to demonstrate misbehaviour, impropriety or incapacity. In other words, that removal should be only on existence of grounds which are similar to those prescribed for impeachment in the case of other constitutional functionaries.

(b) Before a Governor is removed in exercise of power under clause (1) of Article 156, principles of natural justice will have to be followed. He should be issued a show cause notice setting out the reasons for the proposed removal and be given an opportunity of being heard in respect of those reasons.

(c) The removal should be by a speaking order so as to apprise him and the public, of the reasons for considering him unfit to be continued as a Governor.

It is also contended that the withdrawal of presidential pleasure resulting in removal of a Governor is justiciable, by way of judicial review.

5. During the hearing, the petitioner slightly shifted his stand. Mr. Soli J. Sorabjee, learned senior counsel appearing on behalf of the petitioner, submitted that to ensure the independence and effective functioning of Governors, certain safeguards will have to be read as limitations upon the power of removal of Governors under Article 156(1) having regard to the basic structure of the Constitution. He clarified that the petitioner's submission is not that a Governor has a fixed irremovable tenure of five years, but that there should be some certainty of tenure so that he can discharge the duties and functions of his constitutional office effectively and independently. Certainty of tenure will be achieved by fixing the norms for removal. On the other hand, recognizing an unfettered discretion will subject a Governor to a constant threat of removal

and make him subservient to the Union Government, apart from demoralizing him. Therefore, the removal should conform to the following constitutional norms :

Norm 1 – Removal of Governor to be in rare and exceptional circumstances, for compelling reasons which make him unfit to continue in office: The tenure of a Governor is five years under clause (3) of Article 156. But clause (3) is subject to clause (1) of Article 156 which provides that a Governor holds office during the pleasure of the President. This only means that he could be removed any time during the said period of five years, for compelling reasons which are germane to, and having a nexus with, the nature of his office and functions performed by him, as for example, (a) physical or mental disability; (b) corruption; (c) violation of Constitution; and (d) misbehaviour or behaviour unbecoming of a Governor rendering him unfit to hold the office (that is indulging in active politics or regularly addressing political rallies, or having links with anti-national or subversive elements, etc.). The removal of a Governor under Article 156 cannot be with reference to the ideology or personal preferences of the Governor. Nor can such removal be with any ulterior motives, as for example, to make place for another person who is perceived to be more amenable to the central government's wishes and directions, or to make room for a politician who could not be accommodated or continued in the Council of Ministers.

Norm 2 – A Governor should be apprised of the reasons for removal : Though there is no need for a formal show cause notice or an enquiry, principles of fair play requires that when a high constitutional functionary like the Governor is sought to be removed, he should be apprised of the reasons therefor.

Norm 3 – The order of removal is subject to judicial review: In a democracy based on Rule of Law, no authority has any unfettered and unreviewable discretion. All powers vested in all public authorities, are intended to be used only for public

good. Therefore, any order of premature removal of a Governor will be open to judicial review.

Submissions of respondents

6. The respondents in their counter affidavit have contended that the power of the President to remove a Governor under Article 156(1) is absolute and unfettered. The term of five years provided in Article 156(3) is subject to the doctrine of pleasure contained in Article 156(1). The Constitution does not place any restrictions or limitations upon the doctrine of pleasure. Therefore, it is impermissible to read any kind of limitations into the power under Article 156(1). The power of removal is exercised by the President on the advice of the Council of Ministers. The advice tendered by the Council of Ministers cannot be inquired into by any court, having regard to the bar contained in Article 74(2). It was therefore urged that on both these grounds, the removal of Governor is not justiciable.

7. The learned Attorney General appearing on behalf of the respondents raised a preliminary objection to the maintainability of the writ petition. He submitted that if the four Governors who were removed, do not wish to seek any relief and have accepted their removal without protest, no member of the public can bring a public interest litigation for grant of relief to them. On merits, he submitted that the provision that the Governor shall hold office during the pleasure of the Government meant that the President's pleasure can be withdrawn at any time resulting in the removal of the Governor, without assigning any reason. He submitted that the founding fathers had specifically provided that Governors will hold office during the pleasure of the President, so as to provide to the Union Government, the flexibility of removal if it lost confidence in a Governor or if he was unfit to continue as Governor. He shifted from the stand in the counter that the power under Article 156(1) is an unfettered discretion. He submitted that a provision that the Governor shall hold office during the pleasure

of the President, is not a licence to act arbitrarily, whimsically or capriciously. The Union Government did not claim any right to do what it pleases, as Constitution abhors arbitrariness and unfettered discretion. He stated that the removal should be for a reason, but such reason need not be communicated. He also submitted that removal by applying the doctrine of pleasure need not necessarily relate to any act or omission or fault on the part of the Governor. He submitted that in essence, the object of providing that the Governor shall hold office during the pleasure of the President was that if the President lost faith in the Governor or found him unfit for whatever reason, he can withdraw the presidential pleasure resulting in removal. He submitted that the pleasure doctrine cannot be denuded of its width, by restricting its applications to specific instances of fault or misbehaviour on the part of the Governor, or by implying an obligation to assign or communicate any reason for the removal.

8. The learned Attorney General submitted that in a democracy, political parties are formed on shared beliefs and they contest election with a declared agenda. If a party which comes to power with a particular social and economic agenda, finds that a Governor is out of sync with its policies, then it should be able to remove such a Governor. The learned Attorney General was categorical in his submission that the Union Government will have the right to remove a Governor without attributing any fault to him, if the President loses confidence in a Governor or finds that the Governor is out of sync with democratic and electoral mandate.

Questions for consideration

9. The contentions raised give rise to the following questions:

(i) Whether the petition is maintainable?

(ii) What is the scope of "doctrine of pleasure"?

(iii) What is the position of a Governor under the Constitution?

(iv) Whether there are any express or implied limitations/restrictions upon the power under Article 156(1) of the Constitution of India?

(v) Whether the removal of Governors in exercise of the doctrine of pleasure is open to judicial review?

We will consider each of these issues separately.

(i) Maintainability of the writ petition

10. The respondents submitted that a writ petition by way of PIL, to secure relief for the Governors who have been removed from office, is not maintainable as none of the aggrieved persons had approached the court for relief and the writ petitioner has no locus to maintain a petition seeking relief on their behalf. It is pointed out that Governors do not belong to a helpless section of society which by reason of poverty, ignorance, disability or other disadvantage, is not capable of seeking relief. Reliance is placed on the following observations of this Court in *S.P. Gupta vs. Union of India* – 1981 (Supp) SCC 87 :

> " …..cases may arise where there is undoubtedly public injury by the act or omission of the State or a public authority but such act or omission also causes a specific legal injury to an individual or to a specific class or group of individuals. In such cases, a member of the public having sufficient interest can certainly maintain an action challenging the legality of such act or omission, but if the person on specific class or group of persons who are primarily injured as a result of such act or omission, do not wish to claim any relief and accept such act or omission willingly and without protect, the member of the public who complains of a secondary public injury cannot maintain the action, for the effect of entertaining the action at the instance of such member of the public would be to foist a

relief on the person or specific class or group of persons primarily injured, which they do not want."

The petitioner, by way of reply, merely pointed out another observation in *S.P. Gupta :*

"But there may be cases where the State or a public authority may act in violation of a constitutional or statutory obligation or fail to carry out such obligation, resulting in injury to public interest or what may conveniently be termed as public injury as distinguished from private injury. Who would have standing to complain against such act or omission of the State or public authority? Can any member of the public sue for judicial redress? Or is the standing limited only to a certain class of persons? Or there is no one who can complain and the public injury must go unredressed……..

If the State or any public authority acts beyond the scope of its power and thereby causes a specific legal injury to a person or to a determinate class or group of persons, it would be a case of private injury actionable in the manner discussed in the preceding paragraphs. So also if the duty is owed by the State or any public authority to a person or to a determinate class or group of persons, it would give rise to a corresponding right in such person or determinate class or group of persons and they would be entitled to maintain an action for judicial redress. But if no specific legal injury is caused to a person or to a determinate class or group of persons by the act or omission of the State or any public authority and the injury is caused only to public interest, the question arises as to who can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of the public duty. If no one can maintain an action for redress of such public wrong or public injury, it would be disastrous for the rule of law, for it would be open to the State or a public authority to act with impunity beyond the scope of its power

or in breach of a public duty owed by it. The Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened. The view has therefore been taken by the Courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding."

11. A similar public interest litigation came up before a Constitution Bench of this Court in *Ranji Thomas v. Union of India* - 2000 (2) SCC 81, seeking intervention of this court to restrain the President of India from "forcibly" extracting resignations from various Governors and Lt. Governors. Prayer (a) therein sought quashing of the resignations of certain Governors and Lt. Governors and prayer (b) sought a direction restraining the President from accepting the "involuntary and forced" resignation of Governors and Lt. Governors. Prayer (c) was a general prayer for a declaration that communication of the President seeking the resignation of Governors and Lt. Governors was ultra vires the Constitution. Dealing with the contention that such a petition was not maintainable this Court observed:

"The learned Attorney General appearing for the Union of India submits that this public interest litigation is not maintainable at the instance of the petitioner, since none of the Governors or Lt. Governors have approached this

Court or protested against their being asked to resign and that the petitioner cannot challenge an act which the party affected does not wish to nor intend to challenge. He relies upon the observations made by this Court in the case of *S.P. Gupta v. Union of India* [1981 (Supp) SCC 87].

Insofar as prayers (a) and (b) in the writ petition are concerned, we find force in the submission of the learned Attorney General. But, insofar as prayer (c) of the writ petition is concerned, it raises an important public issue and involves the interpretation of Article 156 of the Constitution of India. As at present advised, we do not think that we can deny locus to the petitioner for raising that issue."

The petitioner has no locus to maintain the petition in regard to the prayers claiming relief for the benefit of the individual Governors. At all events, such prayers no longer survive on account of passage of time. However, with regard to the general question of public importance referred to the Constitution Bench, touching upon the scope of Article 156 (1) and the limitations upon the doctrine of pleasure, the petitioner has necessary locus.

(ii) Scope of doctrine of pleasure

12. The Pleasure Doctrine has its origin in English law, with reference to the tenure of public servants under the Crown. In *Dunn v. Queen* - 1896 (1) QB 116, the Court of Appeal referred to the old common law rule that a public servant under the British Crown had no tenure but held his position at the absolute discretion of the Crown. It was observed:

"I take it that persons employed as the petitioner was in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment *at the pleasure of the Crown*. So I think that

there must be imported into the contract for the employment of the petitioner, the term which is applicable to civil servants in general, namely, *that the Crown may put an end to the employment at its pleasure. It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown*. The cases cited show that, such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restrictions should be imposed on the power of the Crown to dismiss its servants."

(emphasis supplied)

(12.1) In *Shenton v. Smith* [1895 AC 229], the Privy Council explained that the pleasure doctrine was a necessity because, the difficulty of dismissing those servants whose continuance in office was detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury (or court) be such, as to seriously impede the working of the public service.

(12.2) A Constitution Bench of this Court in *Union of India v. Tulsiram Patel* - (1985) 3 SCC 398 explained the origin of the doctrine thus:

"In England, except where otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown or *durante bene placito* ("during good pleasure" or "during the pleasure of the appointor") as opposed to an office held *dum bene se gesserit* ("during good conduct"), also called *quadiu se bene gesserit* ("as long as he shall behave himself well"). *When a person holds office during the pleasure of the Crown, his appointment can be*

terminated at any time without assigning cause. The exercise of pleasure by the Crown can, however, be restricted by legislation enacted by Parliament because in the United Kingdom Parliament is sovereign. ……"

(emphasis supplied)

(12.3) In *State of Bihar v. Abdul Majid* – 1954 SCR 786, another Constitution Bench explained the doctrine of pleasure thus:

"The rule that a civil servant holds office at the pleasure of the Crown has its origin in the latin phrase "*durante bene placito*" ("during pleasure") meaning that the tenure of office of a civil servant, except where it is otherwise provided by statute, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, that they cannot claim damages for premature termination of their services."

(12.4) H.M. Seervai, in his treatise 'Constitutional law of India' (4th Ed., Vol. 3, pp.2989-90) explains this English Crown's power to dismiss at pleasure in the following terms:

"In a contract for service under the Crown, civil as well as military, there is, except in certain cases where it is otherwise provided by law, imported into the contract a condition that the Crown has the power to dismiss at pleasure….Where the general rule prevails, the Crown is not bound to show good cause for dismissal, and if a servant has a grievance that he has been dismissed unjustly, his remedy is not by a law suit but by an appeal of an official or political kind……If any authority representing the Crown were to exclude the power of the

Crown to dismiss at pleasure by express stipulation, that would be a violation of public policy and the stipulation cannot derogate from the power of the Crown to dismiss at pleasure, and this would apply to a stipulation that the service was to be terminated by a notice of a specified period of time. Where, however, the law authorizes the making of a fixed term contract, or subjects the pleasure of the Crown to certain restrictions, the pleasure is pro tanto curtailed and effect must be given to such law."

(12.5) Black's Dictionary defines 'Pleasure Appointment' as the assignment of someone to employment that can be taken away at any time, with no requirement for notice or hearing.

13. There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governed by rule of law. In a nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by Rule of Law, where arbitrariness in any form is eschewed, no Government or Authority has the right to do what it pleases. The doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for public good.

14. The following classic statement from Administrative Law (*HWR Wade & CF Forsyth* – 9th Ed. – Pages 354-355) is relevant in this context :

"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have

intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered government discretion is a contradiction in terms. *The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.*

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or where the law permits, to evict a tenant, regardless of his motive. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest…… The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

(emphasis supplied)

15. It is of some relevance to note that the 'Doctrine of Pleasure' in its absolute unrestricted application does not exist in India. The said doctrine is severely curtailed in the case of government employment, as will be evident from clause (2) of Article 310 and clauses (1) and (2) of Article 311. Even in regard to cases falling within the proviso to clause (2) of Article 311, the application of the doctrine is not unrestricted, but moderately restricted in the sense that the circumstances mentioned therein should exist for its operation. The Canadian

Supreme Court in *Wells v. Newfound land* [1999 (177) DL (4th) 73(SCC)] has concluded that "at pleasure" doctrine is no longer justifiable in the context of modern employment relationship.

16. In *Abdul Majid* (supra), this Court considered the scope of the doctrine of pleasure, when examining whether the rule of English Law that a civil servant cannot maintain a suit against the State or against the Crown for the recovery of arrears of salary as he held office during the pleasure of the crown, applied in India. This Court held that the English principle did not apply in India. This Court observed :

"It was suggested that the true view to take is that when the statute says that the office is to be held at pleasure, it means "at pleasure", and no rules or regulations can alter or modify that; nor can section 60 of the Code of Civil Procedure, enacted by a subordinate legislature be used to construe an Act of a superior legislature. It was further suggested that some meaning must be given to the words "holds office during His Majesty's pleasure" as these words cannot be ignored and that they bear the meaning given to them by the Privy Council in I.M. Lall's case. [75 I.A.225]

In our judgment, these suggestions are based on a misconception of the scope of this expression. *The expression concerns itself with the tenure of office of the civil servant* and it is not implicit in it that a civil servant serves the Crown *ex gratia* or that his salary is in the nature of a bounty. It has again no relation or connection with the question whether an action can be filed to recover arrears of salary against the Crown. The origin of the two rules is different and they operate on two different fields."

[emphasis supplied]

17. This shows the 'absoluteness' attached to the words 'at pleasure' is in regard to tenure of the office and does not

affect any constitutional or statutory restrictions/limitations which may apply.

18. The Constitution refers to offices held during the pleasure of the President (without restrictions), offices held during the pleasure of the President (with restrictions) and also appointments to which the said doctrine is not applicable. The Articles in the Constitution of India which refer to the holding of office during the pleasure of the President without any restrictions or limitations are Article 75(2) relating to ministers, Article 76 (4) relating to Attorney General and Article 156(1) relating to Governors. Similarly Article 164(1) and 165(3) provides that the Ministers (in the States) and Advocate General for the State shall hold office during the pleasure of the Governor.

19. Article 310 read with Article 311 provide an example of the application of 'at pleasure' doctrine subject to restrictions. Clause (1) of Article 310 relates to tenure of office of persons serving the Union or a State, being subject to doctrine of pleasure. However, clause (2) of Article 310 and Article 311 restricts the operation of the 'at pleasure' doctrine contained in Article 310(1). For convenience, we extract below clause (1) of Article 310 referring to pleasure doctrine and clause (2) of Article 311 containing the restriction on the pleasure doctrine :

> *"310. Tenure of office of persons serving the Union or a State* – (1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.
>
> xxxxxx

> 311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State : -
>
> (1) xxxxxxx
>
> (2) - No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."

This Court in *P.L. Dhingra v. Union of India* - AIR 1958 SC 36, referred to the qualifications on the pleasure doctrine under Article 310:

> "Subject to these exceptions our Constitution, by Art. 310(1), has adopted the English Common Law rule that public servants hold office during the pleasure of the President or Governor, as the case may be and has, by Art. 311, imposed two qualifications on the exercise of such pleasure. Though the two qualifications are set out in a separate Article, they quite clearly restrict the operation of the rule embodied in Art. 310(1). In other words the provisions of Art. 311 operate as a proviso to Art. 310(1)."

Again, in *Moti Ram v. N.E. Frontier Railway* - AIR 1964 SC 600, this Court referred to the qualifications to which pleasure doctrine was subjected in the case of government servants, as follows :

> "The rule of English law pithily expressed in the latin phrase '*durante bene placito* ("during pleasure") has not been fully adopted either by S. 240 of the Government of India Act, 1935 or by Art. 310(1) of the Constitution. The pleasure of the President is clearly controlled by the provisions of Art. 311, and so, the field that is covered by Art. 311 on a fair and reasonable construction of the relevant words used in that article, would be excluded from

the operation of the absolute doctrine of pleasure. The pleasure of the President would still be there, but it has to be exercised in accordance with the requirements of Art. 311."

20. The Constitution of India also refers to other offices whose holders do not hold office during the pleasure of the President or any other authority. They are: President under Article 56; Judges of the Supreme Court under Article 124; Comptroller & Auditor General of India under Article 148; High Court Judges under Article 218; and Election Commissioners under Article 324 of the Constitution of India. In the case of these constitutional functionaries, it is specifically provided that they shall not be removed from office except by impeachment, as provided in the respective provisions.

21. Constitution of India thus provides for three different types of tenure: (i) Those who hold office during the pleasure of the President (or Governor); (ii) Those who hold office during the pleasure of the President (or Governor), subject to restrictions; (iii) Those who hold office for specified terms with immunity against removal, except by impeachment, who are not subject to the doctrine of pleasure. Constitutional Assembly debates clearly show that after elaborate discussions, varying levels of protection against removal were adopted in relation to different kinds of offices. We may conveniently enumerate them: (i) Offices to which the doctrine of pleasure applied absolutely without any restrictions (Ministers, Governors, Attorney General and Advocate General); (ii) Offices to which doctrine of pleasure applied with restrictions (Members of defence service, Members of civil service of the Union, Member of an All-India service, holders of posts connected with defence or any civil post under the Union, Member of a civil service of a State and holders of civil posts under the State); and (iii) Offices to which the doctrine of pleasure does not apply at all (President, Judges of Supreme Court, Comptroller & Auditor General of India, Judges of the High Court, and Election Commissioners). Having regard to the constitutional scheme,

it is not possible to mix up or extend the type of protection against removal, granted to one category of offices, to another category.

22. The doctrine of pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The degree of need for reason may vary. The degree of scrutiny during judicial review may vary. But the need for reason exists. As a result when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however necessarily be read as being subject to the "fundamentals of constitutionalism". Therefore in a constitutional set up, when an office is held during the pleasure of any Authority, and if no limitations or restrictions are placed on the "at pleasure" doctrine, it means that the holder of the office can be removed by the authority at whose pleasure he holds office, at any time, without notice and without assigning any cause. The doctrine of pleasure, however, is not a licence to act with unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure. In other words, "at pleasure" doctrine enables the removal of a person holding office at the pleasure of an Authority, summarily, without any obligation to give any notice or hearing to the person removed, and without any obligation to assign any reasons or disclose any cause for the removal, or withdrawal of pleasure. The withdrawal of pleasure cannot be at the sweet will, whim and fancy of the Authority, but can only be for valid reasons.

(iii) Position of a Governor under the Constitution

23. The Governor constitutes an integral part of the legislature of a State. He is vested with the legislative power

to promulgate ordinances while the Houses of the legislature are not in session. The executive power of the State is vested in him and every executive action of the Government is taken in his name. He exercises the sovereign power to grant pardons, reprieves, respites or remissions of punishment. He is vested with the power to summon each House of the Legislature or to prorogue either House or to dissolve the legislative assembly. No Bill passed by the Houses of the Legislature can become law unless it is assented to by him. He has to make a report where he finds that a situation has arisen in which the Government of the State cannot be carried on in accordance with the Constitution. He thus occupies a high constitutional office with important constitutional functions and duties.

24. In *State of Rajasthan vs. Union of India* – 1977 (3) SCC 592, a Constitution Bench of this Court described the position of Governor thus:

> "67. *The position of the Governor as the Constitutional head of State as a unit of the Indian Union as well as the formal channel of communication between the Union and the State Government, who is appointed under Article 155 of the Constitution "by the President by Warrant under his hand and seal*," was also touched in the course of arguments before us. On the one hand, as the Constitutional head of the State, he is ordinarily bound, by reason of a constitutional convention, by the advice of his Council of Ministers conveyed to him through the Chief Minister barring very exceptional circumstances among which may be as pointed out by my learned brothers Bhagwati and Iyer, JJ., in Shamsher Singh's case, (1974 (2) SCC 31), a situation in which an appeal to the electorate by a dissolution is called for. On the other hand, as the defender of "the Constitution and the law" and the watch-dog of the interests of the whole country and well-being of the people of his State in particular, the Governor

> is vested with certain discretionary powers in the exercise of which he can act independently. One of his independent functions is the making of the report to the Union Government on the strength of which Presidential power under Article 356(1) of the Constitution could be exercised. In so far as he acts in the larger interests of the people, appointed by the President "to defend the constitution and the Law" he acts as an observer on behalf of the Union and has to keep a watch on how the administrative machinery and each organ of constitutional government is working in the state. Unless he keeps such a watch over all governmental activities and the state of public feelings about them, he cannot satisfactorily discharge his function of making the report which may form the basis of the Presidential satisfaction under Article 356(1) of the Constitution."
>
> (emphasis supplied)

In *State of Karnataka v. Union of India* [1977 (4) SCC 608], a seven-Judge Bench of this Court held :

> "The Governor of a State is appointed by the President and holds office at his pleasure. Only in some matters he has got a discretionary power but in all others the State administration is carried on by him or in his name by or with the aid and advice of the Ministers. Every action, even of an individual Minister, is the action of the whole Council and is governed by the theory of joint and collective responsibility. But the Governor is there, as the head of the State, the Executive and the Legislature, to report to the Centre about the administration of the State."

Another Constitution Bench of this Court in *Hargovind Pant vs. Raghukul Tilak* (Dr.) – 1979 (3) SCC 458], explained the status of the Governor thus:

> "It will be seen from this enumeration of the constitutional

powers and functions of the Governor that *he is not an employee or servant in any sense of the term*. It is no doubt true that the Governor is appointed by the President which means in effect and substance the Government of India, but that is only a mode of appointment and it does not make the Governor an employee or servant of the Government of India. Every person appointed by the President is not necessarily an employee of the Government of India. *So also it is not material that the Governor holds office during the pleasure of the President : it is a constitutional provision for determination of the term of office of the Governor and it does not make the Government of India an employer of the Governor. The Governor is the head of the State and holds a high constitutional office which carries with it important constitutional functions and duties and he cannot, therefore, even by stretching the language to a breaking point, be regarded as an employee or servant of the Government of India*. He is not amenable to the directions of the Government of India, nor is he accountable for them for the manner in which he carries out his functions and duties. He is an independent constitutional office which is not subject to the control of the Government of India. He is constitutionally the head of the State in whom is vested the executive power of the State and without whose assent there can be no legislation in exercise of the legislative power of the State. There can, therefore, be no doubt that the office of Governor is not an employment under the Government of India and it does not come within the prohibition of clause (d) of Article 319. …….it is impossible to hold that the Governor is under the control of the Government of India. His office is not sub-ordinate or subservient to the Government of India. He is not amenable to the directions of the Government of India, nor is he accountable to them for the manner in which he carries out his functions and duties."

(emphasis supplied)

In *Rameshwar Prasad (VI) vs. Union of India* – 2006 (2) SCC 1 this Court reiterated the status of Governor as explained in *Hargovind Pant,* and also noted the remark of Sri G.S. Pathak, a former Vice-President that "in the sphere which is bound by the advice of the Council of Ministers, for obvious reasons, *the Governor must be independent of the centre" as there may be cases "where the advice of the centre may clash with advice of the State Council of Ministers*" and that "in such cases the Governor must ignore the centre's 'advice' and act on the advice of his Council of Ministers." We may also refer to the following observations of H. M. Seervai, in his treatise 'Constitutional Law of India' [4th Ed., Vol.II, at p.2065]

> *"It is clear from our Constitution that the Governor is not the agent of the President*, because when it was intended to make the Governor an agent of the President it was expressly provided – as in Para 18(2), Schedule VI (repealed in 1972). It is equally clear from our Constitution that the Governor is entrusted with the discharge of his constitutional duties. *In matters on which he must act on the advice of his Ministers – and they constitute an overwhelming part of his executive power – the question of his being the President's agent cannot arise."*

25. It is thus evident that a Governor has a dual role. The first is that of a constitutional Head of the State, bound by the advice of his Council of Ministers. The second is to function as a vital link between the Union Government and the State Government. In certain special/emergent situations, he may also act as a special representative of the Union Government. He is required to discharge the functions related to his different roles harmoniously, assessing the scope and ambit of each role properly. He is not an employee of the Union Government, nor the agent of the party in power nor required to act under the dictates of political parties. There may be occasions when he may have to be an impartial or neutral Umpire where the views of the Union Government and State Governments are in conflict.

His peculiar position arises from the fact that the Indian Constitution is quasi-federal in character. In *State of Karnataka (supra)*, this Court observed :

> "Strictly speaking, our Constitution is not of a federal character where separate, independent and sovereign States could be said to have joined to form a nation as in the United States of America or as may be the position in some other countries of the world. It is because of that reason that sometimes it has been characterized as quasi-federal in nature. Leaving the functions of the judiciary apart, by and large the legislative and the executive functions of the Centre and the States have been defined and distributed, but, even so, through it all runs an overall thread or rein in the hands of the Centre in both the fields."

In *S.R.Bommai v. Union of India* [1994 (3) SCC 1], a nine-Judge Bench of this Court described the Constitution of India as quasi-federal, being a mixture of federal and unitary elements leaning more towards the latter.

26. In the early days of Indian democracy, the same political party was in power both at the Centre and the States. The position has changed with passage of time. Now different political parties, some national and some regional, are in power in the States. Further one single party may not be in power either in the Centre or in the State. Different parties with distinct ideologies may constitute a front, to form a Government. On account of emergence of coalition politics, many regional parties have started sharing power in the Centre. Many a time there may not even be a common programme, manifesto or agenda among the parties sharing power. As a result, the agenda or ideology of a political party in power in the State may not be in sync with the agenda or ideology of the political parties in the ruling coalition at the Centre, or may not be in sync with the agenda or ideology of some of the political parties in the ruling coalition at the Centre, but may be in sync with some other political parties forming part of the ruling coalition at the

Centre. Further the compulsions of coalition politics may require the parties sharing power, to frequently change their policies and agendas. In such a scenario of myriad policies, ideologies, agendas in the shifting sands of political coalitions, there is no question of the Union Government having Governors who are in sync with its mandate and policies. Governors are not expected or required to implement the policies of the government or popular mandates. Their constitutional role is clearly defined and bears very limited political overtones. We have already noted that the Governor is not the agent or the employee of the Union Government. As the constitutional head of the State, many a time he may be expressing views of the State Government, which may be neither his own nor that of the Centre (for example, when he delivers the special address under Article 176 of the Constitution). Reputed elder statesmen, able administrators and eminent personalities, with maturity and experience are expected to be appointed as Governors. While some of them may come from a political background, once they are appointed as Governors, they owe their allegiance and loyalty to the Constitution and not to any political party and are required to preserve, protect and defend the Constitution (see the terms of oath or affirmation by the Governor, under Article 159 of the Constitution). Like the President, Governors are expected to be apolitical, discharging purely constitutional functions, irrespective of their earlier political background. Governors cannot be politically active. We therefore reject the contention of the respondents that Governors should be in "sync" with the policies of the Union Government or should subscribe to the ideology of the party in power at the Centre. As the Governor is neither the employee nor the agent of the Union Government, we also reject the contention that a Governor can be removed if the Union Government or party in power loses 'confidence' in him.

27. We may conclude this issue by referring to the vision of Sri Jawaharlal Nehru and Dr. B. R. Ambedkar expressed during the Constituent Assembly Debates, in regard to the

office of Governor (Volume III Pages 455 and 469). Sri Nehru said :

> "But on the whole it probably would be desirable to have people from outside – eminent people, sometimes people who have not taken too great a part in politics …… he would nevertheless represent before the public someone slightly above the party and thereby, in fact, help that government more than if he was considered as part of the party machine."

Dr. B. R. Ambedkar stated :

> "If the Constitution remains in principle the same as we intend that it should be, that the Governor should be a purely constitutional Governor, with no power of interference in the administration of the province……"

(iv) Limitations/restrictions upon the power under Article 156(1) of the Constitution of India

28. We may now examine whether there are any express or implied limitations or restrictions on the power of removal of Governors under Article 156(1). We do so keeping in mind the following words of Justice Holmes : "the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions….. The significance is vital, nor formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth" (see : *Gompers vs. United States* – 233 US 603).

Effect of clause (3) of Article 156

29. It was submitted on behalf of the petitioners that the doctrine of pleasure under Article 156(1) is subject to the express restriction under clause (3) of Article 156. It was submitted that there is a significant difference between Articles 75(2) and 76 (4) which provide for an unrestricted application

of the doctrine, and Article 156(1) which provided for application of the doctrine subject to a restriction under Article 156(3). It is pointed out that in the case of Ministers and the Attorney General, Articles 75 and 76 do not provide any period of tenure, whereas clause (3) of Article 156 provides that in the case of Governors, the term of office will be five years. It is submitted that Clause (1) of Article 156 providing that the Governor shall hold office during the pleasure of the President, should be read in consonance with Clause (3) of Article 156 which provides that subject to clause (1) and subject to the Governor's right to resign from his office, a Governor shall hold office for a term of five years from the date on which he enters office. The petitioner interprets these two clauses of Article 156 thus: The tenure of office of the Governor is five years. However, before the expiry of that period the Governor may resign from office, or the President may, for good and valid reasons relating to his physical/mental inability, integrity, and behaviour, withdraw his pleasure thereby removing him from office.

30. A plain reading of Article 156 shows that when a Governor is appointed, he holds the office during the pleasure of the President, which means that the Governor can be removed from office at any time without notice and without assigning any cause. It is also open to the Governor to resign from office at any time. If the President does not remove him from office and if the Governor does not resign, the term of the Governor will come to an end on the expiry of five years from the date on which he enters office. Clause (3) is not intended to be a restriction or limitation upon the power to remove the Governor at any time, under clause (1) of Article 156. Clause (3) of Article 156 only indicates the tenure which is subjected to the President's pleasure. In contrast, we can refer to Articles 310 and 311 where the doctrine of pleasure is clearly and indisputably subjected to restriction. Clause (1) of Article 310 provides that a person serving the Union Government holds office during the pleasure of the President and a person serving a state government holds office during the pleasure of the

Governor. The 'doctrine of pleasure' is subjected to a restriction in Article 310(2) and the restrictions in Article 311(1) and (2). The most significant restriction is contained in clause (2) of Article 311 which provides that no such employee shall be dismissed or removed from service except after an inquiry in which he has been informed of the charges levelled against him and given a reasonable opportunity of being heard in respect of those charges. Clause (1) of Article 310 begins with the words "Except as expressly provided by the Constitution". Therefore, Article 310 itself makes it clear that though a person serves the Union or a State during the pleasure of the President/Governor, the power of removal at pleasure is subject to the other express provisions of the Constitution; and Article 311 contains such express provision which places limitations upon the power of removal at pleasure. By contrast, clause (1) of Article 156 is not made subject to any other provision of the Constitution nor subjected to any exception. Clause (3) prescribing a tenure of five years for the office of a Governor, is made subject to clause (1) which provides that the Governor shall hold office during the pleasure of the President. Therefore, it is not possible to accept the contention that clause (1) of Article 156 is subjected to an express restriction or limitation under Clause (3) of Article 156.

Reports of Commissions

31. The petitioner relied upon the *Report of the Sarkaria Commission on Centre-State Relations* and *the Report of the National Commission to Review the working of the Constitution* in support of his contention that removal of a Governor should be by an order disclosing reasons, that the Governor should be given an opportunity to explain his position and that the removal should be only for compelling reasons, thereby stressing the need to provide security of tenure for the Governors.

32. The Report of the *Sarkaria Commission on Centre State Relations* (Vol.1 Chapter IV) dealt with the role of a

Governor and made the following recommendations with regard to his term of office:

> "4.7.08……. We recommend that the Governors tenure of office of five years in a State should not be disturbed except very rarely and that too for some extremely compelling reason. It is indeed very necessary to assure a measure of security of tenure to the Governor's office."

The reason assigned by the Commission for the said recommendation was as follows:

> "Further, the ever-present possibility of the tenure being terminated before the full term of 5 years, can create considerable insecurity in the mind of the Governor and impair his capacity to withstand pressures, resist extraneous influences and act impartially in the discharge of his discretionary functions. Repeated shifting of Governors from one State to another can lower the prestige of this office to the detriment of both the Union and the State concerned. As a few State Governments have pointed out. Governors should not be shifted or transferred from one State to another by the Union as if they were civil servants. The five year term of Governor's office prescribed by the Constitution in that case loses much of its significance."

The Commission also noted the following suggestions received in favour of and against the suggestion for providing security of tenure (para 4.8.01):

> Suggestions for security of tenure
> Suggestions against security of tenure
>
> (i) A Governor should have a guaranteed tenure so that he can function impartially. The different procedures suggested for Governor's removal, are—
>
> (a) The same procedure as for a Supreme Court Judge.

(b) An investigation into the Governor's conduct by a parliamentary Committee.

(c) Impeachment by the State Legislature.

(d) Inquiry by the Supreme Court.

(e) Written request from the Chief Minister, followed by a resolution of the Legislative Assembly.

(f) Recommendation of the Inter-State Council.

(ii) Tenures should not be guaranteed to a Governor because—

(a) the nature of his duties and functions and the manner of their performance are fundamentally different from those of a Judge. The former has a multi-faceted role and his duties are mainly non-judicial, while those of a Judge are entirely judicial to be discharged in his own independent judgment;

(b) it will be difficult to remove a Governor who is not of the requisite ability and impartiality, or who is not able to function smoothly with the Chief Minister or who does not function in coordination with the Union.

The Commission after considering the matter in detail, made the following recommendations regarding security of tenure:

> "4.8.07. While it is not advisable to give the same security of tenure to a Governor as has been assured to a Judge of the Supreme Court, some safeguard has to be devised against arbitrary withdrawal of President's pleasure, putting a premature end to the Governor's tenure. The intention of the Constitution makers in prescribing a five-year term for this office appears to be that the President's pleasure on which the Governor's tenure is dependent, will not be withdrawn without cause shown. Any other inference would render clause (3) of Article 156 largely otiose. It will be but

> fair that the Governor's removal is based on procedure which affords him an opportunity of explaining his conduct in question and ensures fair consideration of his explanation, if any.
>
> 4.8.08. Save where the President is satisfied that, in the interest of the security of the State, is it not expedient to do so, as a matter of healthy practice, whenever it is proposed to terminate the tenure of a Governor before the expiry of the normal terms of five years, he should be informally apprised of the grounds of the proposed action and afforded a reasonable opportunity for showing cause against it. It is desirable that the President (which, in effect, means the Union Council of Ministers) should get the explanation, if any, submitted by the Governor against his proposed removal from office, examined by an Advisory Group consisting of the Vice-President of India and the Speaker of the Lok Sabha or a retired Chief Justice of India. After receiving the recommendations of this Group, the President may pass such orders in the case as he may deem fit.
>
> 4.8.09. We recommend that when a Governor, before the expiry of the normal term of five years, resigns or is appointed Governor in another State, or his tenure is terminated, the Union Government may lay a statement before both Houses of Parliament explaining the circumstances leading to the ending of his tenure. Where a Governor has been given an opportunity to show cause against the premature termination of his tenure, the statement may also include the explanation given by him in reply. This procedure would strengthen the control of Parliament and the Union Executive's accountability to it."

The Inter State Council accepted the said recommendation of the *Sarkaria Commission*. It is stated that the matter is thereafter pending consideration before the Central Government.

33. Reference was next made to a Consultation Paper on "Institution of Governor under the Constitution" published by the *National Commission to Review the Working of the Constitution*, to elicit public opinion and generate public debate. The recommendations proposed were as under :

> "Accordingly, we recommend that Articles 155 and 156 of the Constitution be amended to provide for the following:
>
> (a) the appointment of the Governor should be entrusted to a committee comprising the Prime Minister of India, Union Minister for Home affairs, the Speaker of the Lok Sabha and the Chief Minister of the concerned State. (Of course, the composition of the committee is a matter of detail which can always be settled once the principal idea is accepted;
>
> (b) the term of office, viz., five years, should be made a fixed tenure;
>
> (c) the provision that the Governor holds office "during the pleasure of the President' be deleted:
>
> (d) provision be made for the impeachment of the Governor by the State Legislature on the same lines as the impeachment of the President by the Parliament. (The procedure for impeachment of the President is set out in Article 61). Of course, where there is no Upper House of Legislature in any State, appropriate changes may have to be made in the proposed Article since Article 61 is premised upon the existence of two Houses of Parliament."

We extract below the relevant portions of the recommendations made by the National Commission (different from what was proposed), after considering the responses received:

> "8.14.2 After carefully considering the public responses and after full deliberations, the Commission does not agree to dilute the powers of the President in the matter of selection and appointment of Governors. However, the Commission feels that the Governor of a State should be appointed by the President, after consultation with the Chief Minister of that State. Normally the five year term should be adhered to and removal or transfer of the Governor should be by following a similar procedure as for appointment i.e. after consultation with the Chief Minister of the concerned State.
>
> 8.14.3 The Commission recommends that in the matter of selection of a Governor, the following maters mentioned in para 4.16.01 of Volume I of the Sarkaria Commission Report should be kept in mind:
>
> . He should be eminent in some walk of life.
>
> . He should be a person from outside the State.
>
> . He should be a detached figure and not too intimately connected with the local politics of the State.
>
> . He should be a person who has not taken too great a part in politics generally, and particularly in the recent past.

34. These recommendations howsoever logical, or deserving consideration and acceptance, remain recommendations. They cannot override the express provisions of the Constitution as they stand. Nor can they assist in interpreting Article 156. The very fact that such recommendations are made, shows that the position under the existing Constitutional provisions is otherwise. They are suggestions to be considered by those who can amend the Constitution. They do not assist in interpreting the existing provisions of the Constitution.

Constituent Assembly Debates

35. Both sides relied upon the Constituent Assembly Debates to support their respective interpretation of Article 156(1). The petitioners contended that the founding fathers proceeded on the assumption that the removal will only be on the ground of bribery and corruption, violation of the Constitution, or any other legitimate ground attributable to an act or omission on the part of the Governor. The respondents point out that security of tenure and other alternatives were considered and consciously rejected to opt for Governors holding office during the pleasure of the President.

36. The Constitutional Assembly debates shows that Mr. K.T. Shah had proposed an amendment that "the Governor shall hold office for a term of five years from the date on which he enters upon his office, and shall during that term be irremovable from his office." He moved another amendment for addition of a clause that a Governor may be removed from office by reason of physical or mental incapacity duly certified, or if found guilty of bribery or corruption. He stated :

> "This is, as I conceive it, different fundamentally from the appointment during the pleasure of the President. The House, I am aware, has just passed a proposition by which the Governor is to be appointed by the President and it would be now impossible for any one to question that proposition. I would like, however to point out, that having regard to the appointment as against the elective principle, we must not leave the Governor to be entirely at the mercy or the pleasure of the President. We should see to it, at any rate that if he is to be a constitutional head of the province, if he is to be acting in accordance with the advice of his ministers, if we desire to remove any objection that might possibly be there to the principle of nomination, we should see to it that at least while he is acting correctly, in accordance with the Constitution following the advice of his ministers, he should not be at the mercy of the President

> who is away from the Province and who is a national and not a local authority. This is all the more important pending the evolution of a convention, such as was suggested by one of the previous speakers, that the appointment, even if agreed to, should be on the advice of the local Ministry. I do not know if such a convention can grow up in India, but even if it grows up, and particularly if it grows up, it would be of the utmost importance that no non-provincial authority from the Centre should have the power to say that the Governor should be removable by that authority; So long as he acts in accordance with the advice of the constitutional advisers of the province, he should I think be irremovable during his term of office, that is, five years according to this article.
>
> There is of course a certain provision with regard to resignation voluntarily or other contingencies occurring whereby the Governor may be removed. But, subject to that, and therefore to the entire Constitution, the period should be the whole period and not at the pleasure of the President."

Prof. Shibban Lal Saksena also objected to the proposed Article (in the present form). He said :

> "Just now we have accepted a provision whereby the Governor shall be nominated by the President. Already we feel that there democracy has been abandoned. Now, Sir, comes this provision whereby the Governor shall hold office only at the pleasure of the President. Even in the case of the Supreme Court, we have provided that once the Judges of the Supreme Court has been appointed, they will be removable only after an address presented by both the Houses of Parliament, and by two-thirds majority of the members present and voting. In the case of the Governor, you want to make a different provision. It seems to me, Sir, to be an extraordinary procedure and it completely takes away the independence of the Governor. He will be purely

a creature of the President, that is to say, the Prime Minister and the party in power at the Centre. When once a Governor has been appointed, I do not see why he should not continue in office for his full term of five years and why you should make him removable by the President at his whim. It only means that he must look to the President for continuing in office and so continue to be subservient to him. He cannot be independent. He will then have no respect. Sir, Dr. Ambedkar has not given any reasons why he has made this change. Of course, the election of the Governors has been done away with, but why makes him removable by the President at his pleasure? The original article says: "A governor may, for violation of the Constitution, be removed from office by impeachment …….. It means that a Governor can only be removed by impeachment by both the Houses. Now, he will be there only at the pleasure of the President. Such a Governor will have no independence and my point is that the Centre might try to do some mischief through that man. Even if he is nominated, he can at least be independent if after he is appointed he is irremovable. Now, by making him continue in office at the pleasure of the President, you are taking away his independence altogether. This is a serious deviation and I hope the House will consider it very carefully. Unless he is able to give strong reasons for making this change, I hope Dr. Ambedkar will withdraw his amendment."

Sri Lokanath Misra expressed a slightly different point of view:

"Mr. President, Sir, after having made the decision that Governors shall be appointed by the President, it naturally follows that the connected provisions in the Draft Constitution should accordingly be amended, and in that view, I accept the amendment that has now been moved by Dr. Ambedkar. That amendment suggests that the Governor shall be removable as the President pleases, that

is, a Governor shall hold office during the pleasure of the President and that whenever he incurs the displeasure of the President, he will be out. When the President has appointed a man, in the fitness of things the President must have the right to remove him when he is displeased, but to remove the evil that has now crept in by doing away with election for the office of the Governor, it would have been much better if the State legislature too had been given the power to impeach him not only for violation of the Constitution but also for misbehaviour. I use the word 'misbehaviour' deliberately because, when a Governor who is not necessarily a man of that province is appointed to his office, it is but natural that the people of the province should have at least the power to watch him, to criticize him, through their chosen representatives. If that right had been given, in other words, if the provision for the impeachment of the Governors by the State legislatures had been there, it would have been a safeguard against improper appointment of Governor by the President. One of the main objections to the appointment of the Governor by the President has been that he will be a man who has no roots in the province and no stake, that he will be a man who will have no connection with the people, that he will be a man beyond their reach and therefore can go on merrily so long as he pleases the President, the Prime Minister of the Union and the Premier of the Province. But they are not all. It would have been much better if the Governor's removal had been made dependent not only on the displeasure of the President but on the displeasure of the State legislature also which represents the people and that would have been a safeguard against the evil that has been caused by the provision for the appointment of Governor by the President."

Dr. B.R. Ambedkar replied thus:

"Sir, the position is this: this power of removal is given to

the President in general terms. What Professor Shah wants is that certain grounds should be stated in the Constitution itself for the removal of the Governor. It seems to me that when you have given the general power, you also give the power to the President to remove a Governor for corruption, for bribery, for violation of the Constitution or for any other reason which the President no doubt feels is legitimate ground for the removal of the Governor. It seems, therefore, quite unnecessary to burden the Constitution with all these limitations stated in express terms when it is perfectly possible for the President to act upon the very same ground under the formula that the Governor shall hold office during his pleasure. I, therefore, think that it is unnecessary to categorize the conditions under which the President may undertake the removal of the Governor."

37. Thereafter the Article in the present form was adopted, rejecting the suggestions/amendments proposed by Mr. K.T. Shah, Prof. Shibban Lal Saksena and Mr. Lokanath Mishra. The debates show that several alternatives were considered and ultimately the Article in its present form was adopted. The debates however disclose the following:

(i) The intention of the founding fathers was to adopt the route of Doctrine of Pleasure, instead of impeachment or enquiry, with regard to removal of Governors.

(ii) It was assumed that withdrawal of pleasure resulting in removal of the Governor will be on valid grounds but there was no need to enumerate them in the Article.

38. In Constitutional Law of India (4th Ed.,Vol.2, page 2066) H.M. Seervai refers to the scope of Article 156(1) thus:

"A difficulty, however, arises from the fact that the Governor holds office during the pleasure of the President and can

be removed by him. As the President acts on the advice of his ministry, it may be contended that if the Governor takes action contrary to the policy of the Union Ministry he would risk being removed from his post as Governor, and, therefore, he is likely to follow the advice of the Union Govt. Whilst not denying the force of this contention, it is submitted that Article 156(1) has a very different purpose. It is submitted that a responsible Union Ministry would not advise, and would not be justified in advising the removal of a Governor because in the honest discharge of his duty, the Governor takes action which does not fall in line with the policy of the Union Ministry. To hold otherwise would mean that the Union executive would effectively control the State executive which is opposed to the basic scheme of our federal Constitution. Article 156(1) is designed to secure that if the Governor is pursuing courses which are detrimental to the State or to India, the President can remove the Governor from his office and appoint another Governor. This power takes the place of an impeachment which clearly is a power to be exercised in rare and exceptional circumstances."

39. The provision for removal at the pleasure of an authority without any restriction, as noticed above, applies to Ministers as also the Attorney General apart from Governors. Persons of calibre, experience, and distinction are chosen to fill these posts. Such persons are chosen not to enable them to earn their livelihood but to serve the society. It is wrong to assume that such persons having been chosen on account of their stature, maturity and experience will be demoralized or be in constant fear of removal, unless there is security of tenure. They know when they accept these offices that they will be holding the office during the pleasure of the President.

Need for reasons

40. The petitioner contends that the removal of a Governor can only be for compelling reasons which is something to do

with his capacity to function as a Governor. According to the petitioner, physical or mental disability, acts of corruption or moral turpitude or behaviour unbecoming of a Governor like being involved in active politics, or indulging in subversive activities are valid reasons for removal. In other words, it is contended that there should be some fault or draw back in the Governor or in his actions before he could be removed from office. On the other hand, it is contended by the respondents that removal need not only be for the reasons mentioned by the petitioner but can also be on two other grounds, namely, loss of confidence in the Governor or the Governor being out of sync with the policies and ideologies of the Union Government. There is thus a consensus to the extent that a Governor can be removed only for a valid reason, and that physical and mental incapacity, corruption and behaviour unbecoming of a Governor are valid grounds for removal. There is however disagreement as to what else can be grounds for removal. We are of the view that there can be other grounds also. It is not possible to put the reasons under any specific heads. The only limitation on the exercise of the power is that it should be for valid reasons. What constitute valid reasons would depend upon the facts and circumstances of each case.

41. We have however already rejected the contention that the Governor should be in sync with the ideologies of the Union Government. Therefore, a Governor cannot be removed on the ground that he is not sync or refuses to act as an agent of the party in power at the Centre. Though the Governors, Ministers and Attorney General, all hold office during the pleasure of the President, there is an intrinsic difference between the office of a Governor and the offices of Ministers and Attorney General. Governor is the Constitutional Head of the State. He is not an employee or an agent of the Union Government nor a part of any political team. On the other hand, a Minister is hand-picked member of the Prime Minister's team. The relationship between the Prime Minister and a Minister is purely political. Though the Attorney General holds a public

office, there is an element of lawyer-client relationship between the Union Government and the Attorney General. Loss of confidence will therefore be very relevant criterion for withdrawal of pleasure, in the case of a Minister or the Attorney General, but not a relevant ground in the case of a Governor.

(v) Judicial review of withdrawal of President's pleasure

42. When a Governor holds office during the pleasure of the Government and the power to remove at the pleasure of the President is not circumscribed by any conditions or restrictions, it follows that the power is exercisable at any time, without assigning any cause. However, there is a distinction between the need for a cause for the removal, and the need to disclose the cause for removal. While the President need not disclose or inform the cause for his removal to the Governor, it is imperative that a cause must exist. If we do not proceed on that premise, it would mean that the President on the advice of the Council of Ministers, may make any order which may be manifestly arbitrary or whimsical or mala fide. Therefore, while no cause or reason be disclosed or assigned for removal by exercise of such prerogative power, some valid cause should exist for the removal. Therefore, while we do not accept the contention that an order under Article 156 is not justiciable, we accept the contention that no reason need be assigned and no cause need be shown and no notice need be issued to the Governor before removing a Governor.

43. The traditional English view was that prerogative powers of the Crown conferred unfettered discretion which could not be questioned in courts. Lord Ruskill attempted to enumerate such prerogative powers in *Council of Civil Service Unions v. Minister for the Civil Service* - 1985 AC 374 :

> "Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not,

I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."

However, the contemporary English view is that in principle even such 'political questions' and exercise of prerogative power will be subject to judicial review on principles of legality, rationality or procedural impropriety. (See decision of House of Lords in : *R (Bancoult) vs. Foreign Secretary* – 2009 (1) AC 453). In fact, *De Smith's Judicial Review* (6th Ed. 2007 Page 15) states :

"Judicial review has developed to the point where it is possible to say that no power — whether statutory or under the prerogative — is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of public power, its scope and its substance. As we shall see, even when discretionary powers are engaged, they are not immune from judicial review."

44. In *State of Rajasthan v. Union of India* 1977 (3) SCC 592 , this Court (Bhagwati J., as he then was) held:

"But merely because a question has a political complexion that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination….. the Court cannot fold its hands in despair and declare 'Judicial hands off'. *So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so*. …This Court is the ultimate interpreter of the Constitution

and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits*. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law. … Where there is manifestly unauthorized exercise of power under the Constitution, it is the duty of the Court to intervene*. Let it not be forgotten, that to this Court as much as to other branches of Government, is committed the conservation and furtherance of democratic values. The Court's task is to identify those values in the constitutional plan and to work them into life in the cases that reach the Court. … The Court cannot and should not shirk this responsibility…."

In the said decision, Chandrachud, J. (as he then was) observed thus :

"They may not choose to disclose them but if they do so, as they have done now, they cannot prevent a judicial scrutiny thereof for the limited purpose of seeing whether the reasons bear any rational nexus with the action proposed. I am inclined to the opinion that the Government cannot claim the credit at the people's bar for fairness in disclosing the reasons for the proposed action and at the same time deny to this Court the limited power of finding whether the reasons bear the necessary nexus or are wholly extraneous to the proposed action. The argument that "if the Minister need not give reasons, what does it matter if he gives bad ones" overlooks that bad reasons can destroy a possible nexus and may vitiate the order on the ground of mala fides."

In *Kihota Hollohon v. Zachilhu* 1992 [Supp. (2) SCC 651] this Court held:

"The principle that is applied by the courts is that in spite of a finality clause it is open to the court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. Such an action can be ultra vires for the reason that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colorable exercise of power based on extraneous and irrelevant considerations."

45. In *R.C. Poudyal v. Union of India* [1994 Supp (1) SCC 324], in the context of Article 371-F, it was contended on behalf of Union of India that the terms and conditions of the admission of a new territory into the Union are eminently political questions which the Court should decline to decide as these questions lack adjudicative disposition. A Constitution Bench of this Court referred to various decisions of the American Supreme Court including *Baker v. Carr*, 369 US 186 and *Powell v. McCormack*, 395 US 486 where the question whether the 'political thickets' docrine was a restraint on judicial power, was considered, and held that certain controversies previously immune from adjudication, were justiciable, apart from narrowing the operation of the doctrine in other areas. This Court held :

"The power to admit new States into the Union under Article 2 is, no doubt, in the very nature of the power, very wide and its exercise necessarily guided by political issues of considerable complexity many of which may not be judicial manageable. But for that reason, it cannot be predicated that Article 2 confers on the Parliament an unreviewable and unfettered power immune from judicial scrutiny. *The power is limited by the fundamentals of the Indian constitutionalism and those terms and conditions which the Parliament may deem fit to impose*, cannot be inconsistent and irreconcilable with the foundational

principles of the Constitution and cannot violate or subvert the constitutional scheme."

[emphasis supplied]

46. This Court has examined in several cases, the scope of judicial review with reference to another prerogative power – power of the President/Governor to grant pardon etc., and to suspend, remit or commute sentences. The view of this Court is that the power to pardon is a part of the constitutional scheme, and not an act of grace as in England. It is a constitutional responsibility to be exercised in accordance with the discretion contemplated by the context. It is not a matter of privilege but a matter of performance of official duty. All public power including constitutional power, shall never be exercisable arbitrarily or *mala fide*. While the President or the Governor may be the sole Judge of the sufficiency of facts and the propriety of granting pardons and reprieves, the power being an enumerated power in the Constitution, its limitations must be found in the Constitution itself. Courts exercise a limited power of judicial review to ensure that the President considers all relevant materials before coming to his decision. As the exercise of such power is of the widest amplitude, whenever such power is exercised, it is presumed that the President acted properly and carefully after an objective consideration of all aspects of the matter. Where reasons are given, court may interfere if the reasons are found to be irrelevant. However, when reasons are not given, court may interfere only where the exercise of power is vitiated by self-denial on wrong appreciation of the full amplitude of the power under Article 72 or where the decision is arbitrary, discriminatory or mala fide [vide *Maru Ram v. Union of India* [1981 (1) SCC 107], *Kehar Singh v. Union of India* [1989 (1) SCC 204] etc.]. In *Epuru Sudhakar v. Government of Andhra Pradesh* [2006 (8) SCC 161], one of us (Kapadia J.) balanced the exercise of prerogative power and judicial review of such exercise thus:

"The controlling factor in determining whether the exercise

of prerogative power is subject to judicial review is not its source but its subject matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. ……Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be the subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty."

47. Exercise of power under Article 156(1) being an executive power exercised on the advice tendered by the Council of Ministers, the question is whether the bar contained in clause (2) of Article 74 will apply. The said clause provides that the question whether any, and if so what, advice was tendered, shall not be enquired into by any court. This clause has been the subject- matter of a nine-Judge Bench decision in *S.R. Bommai v. Union of India* [1994 (3) SCC 1]. This Court has held that Article 74(2) merely bars an inquiry into the question whether any, and if so what, advice was tendered by the Council of Ministers to the President but does not bar the scrutiny of the material on the basis of which the President has made the order. This Court also held that while an order issued in the name of the President could not be challenged on the ground that it was contrary to the advice tendered by the Council of Ministers or was issued without obtaining the advice from the Ministers, it does not bar the court from calling upon the Union of India to disclose to the court the material on which the President has formed the requisite satisfaction. The bar

contained in Article 74(2) will not come in the way of the court inquiring whether there was any material on the basis of which such advice was given, whether such material was relevant for such advice and whether the material was such that a reasonable man could have come to the conclusion which was under challenge. Therefore, though the sufficiency of the material could not be questioned, legitimacy of the inference drawn from such material was open to judicial review.

48. The extent and depth of judicial review will depend upon and vary with reference to the matter under review. As observed by Lord Steyn in *Ex parte Daly* [2001 (3) All ER 433], in law, context is everything, and intensity of review will depend on the subject-matter of review. For example, judicial review is permissible in regard to administrative action, legislations and constitutional amendments. But the extent or scope of judicial review for one will be different from the scope of judicial review for other. *Mala fides* may be a ground for judicial review of administrative action but is not a ground for judicial review of legislations or constitutional amendments. For withdrawal of pleasure in the case of a Minister or an Attorney General, loss of confidence may be a relevant ground. The ideology of the Minister or Attorney General being out of sync with the policies or ideologies of the Government may also be a ground. On the other hand, for withdrawal of pleasure in the case of a Governor, loss of confidence or the Governor's views being out of sync with that the Union Government will not be grounds for withdrawal of the pleasure. The reasons for withdrawal are wider in the case of Ministers and Attorney-General, when compared to Governors. As a result, the judicial review of withdrawal of pleasure, is limited in the case of a Governor whereas virtually nil in the case of a Minister or an Attorney General.

49. Article 156(1) provides that a Governor shall hold office during the pleasure of the President. Having regard to Article 74, the President is bound to act in accordance with the advice of the Council of Ministers. Therefore, even though under Article

156(1) the removal is at the pleasure of the President, the exercise of such pleasure is restricted by the requirement that it should be on the advice of the Council of Ministers. Whether the removal of Governor is open to judicial review? What Article 156(1) dispenses with is the need to assign reasons or the need to give notice but the need to act fairly and reasonably cannot be dispensed with by Article 156(1). The President in exercising power under Article 156(1) should act in a manner which is not arbitrary, capricious or unreasonable. In the event of challenge of withdrawal of the pleasure, the court will necessarily assume that it is for compelling reasons. Consequently, where the aggrieved person is not able to establish a *prima facie* instance of arbitrariness or malafides, in his removal, the court will refuse to interfere. However, where a prima facie case of arbitrariness or malafides is made out, the Court can require the Union Government to produce records/materials to satisfy itself that the withdrawal of pleasure was for good and compelling reasons. What will constitute good and compelling reasons would depend upon the facts of the case. Having regard to the nature of functions of the Governor in maintaining centre-state relations, and the flexibility available to the Government in such matters, it is needless to say that there will be no interference unless a very strong case is made out. The position, therefore, is that the decision is open to judicial review but in a very limited extent.

50. We summarise our conclusions as under :

(i) Under Article 156(1), the Governor holds office during the pleasure of the President. Therefore, the President can remove the Governor from office at any time without assigning any reason and without giving any opportunity to show cause.

(ii) Though no reason need be assigned for discontinuance of the pleasure resulting in removal, the power under Article 156(1) cannot be exercised in an arbitrary, capricious or unreasonable manner. The power will have to be exercised in rare and exceptional circumstances for

valid and compelling reasons. The compelling reasons are not restricted to those enumerated by the petitioner (that is physical/mental disability, corruption and behaviour unbecoming of a Governor) but are of a wider amplitude. What would be compelling reasons would depend upon the facts and circumstances of each case.

(iii) A Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre. Nor can he be removed on the ground that the Union Government has lost confidence in him. It follows therefore that change in government at Centre is not a ground for removal of Governors holding office to make way for others favoured by the new government.

(iv) As there is no need to assign reasons, any removal as a consequence of withdrawal of the pleasure will be assumed to be valid and will be open to only a limited judicial review. If the aggrieved person is able to demonstrate prima facie that his removal was either arbitrary, malafide, capricious or whimsical, the court will call upon the Union Government to disclose to the court, the material upon which the President had taken the decision to withdraw the pleasure. If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, whimsical, or malafide, the court will interfere. However, the court will not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient.

51. The writ petition is disposed of accordingly.

TP (C) No.663 of 2004

52. In view of our decision in WP(C) No.296 of 2004, this Transfer Petition is dismissed.

B.B.B. Petitions disposed of.

SATHEEDEVI

v.

PRASANNA AND ANR.

(Civil Appeal No. 4347 of 2010)

MAY 7, 2010

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

Kerala Court-Fees and Suits Valuation Act, 1959 – s.40 – Interpretation of – Suits for cancellation of sale deed – Computation of Court fees – Held: When there is a special rule in the Act for valuing the property for the purpose of court fee, that method of valuation must be adopted in preference to any other method – Deeming clause in substantive part of s.40(1) makes it clear that in a suit filed for cancellation of a document which creates any right, title or interest in immovable property, the court fees is required to be computed on the value of the property for which the document was executed, and not on its market value – Since s.40 contains a special rule for valuing the property for the purpose of court fee, there is no reason why the expression 'value of the property' used in s.40(1) should be substituted with the expression 'market value of the property'.

Words and Phrases – Expression "value of the property" – Meaning of – In the context to s.40 of the Kerala Court-Fees and Suits Valuation Act, 1959.

Interpretation of statutes – Two well recognised rules of interpretation – Held: First and primary rule of construction is that intention of the legislature must be found in the words used by the legislature itself – The other important rule of interpretation is that the Court cannot rewrite, recast or reframe the legislation because it has no power to do so.

The appellant owned 9.98 acres of rubber plantation. She executed power of attorney in favour of her daughter

(respondent no.1) in respect of the said property. After sometime, respondent no.1 transferred the property to her husband (respondent no.2) by a registered sale deed.

The appellant filed suit for cancellation of the sale deed by respondent no.1 in favour of respondent no.2. In the plaint, the value of the property was shown as Rs.7 lakhs and accordingly, the court fees was paid. However, the trial Court directed the appellant to pay court fee on the market value of the plaint property.

The High Court upheld the trial court order holding that in terms of s.40 of the Kerala Court-Fees and Suits Valuation Act, 1959, the appellant was required to pay court fees on market value of the property and not on the value specified in the sale deed.

Before this Court, the appellant contended that the interpretation placed by the Courts below on s.40 of the Act was *ex facie* erroneous and liable to be set aside because that section does not provide for payment of court fee on the market value of the property. The appellant contended that in terms of s.40(1), court fees is required to be paid on the value of the property for which the document was executed and the appellant had correctly paid the court fees as per the value of the property specified in the sale deed i.e., Rs. 7 lakhs.

Allowing the appeal, the Court

HELD:1. There are two well recognised rules of interpretation of statutes. The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction, only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted

in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. The other important rule of interpretation is that the Court cannot rewrite, recast or reframe the legislation because it has no power to do so. The Court cannot add words to a statute or read words which are not therein. Even if there is a defect or an omission in the statute, the Court cannot correct the defect or supply the omission. [Para 10] [674-H; 675-A-D]

Kanai Lal Sur v. Paramnidhi Sadhukhan **1958 SCR 360;** *Union of India v. Deoki Nandan Aggarwal* **1992 Supp (1) SCC 323 and** *Shyam Kishori Devi v. Patna Municipal Corporation* **(1966) 3 SCR 366, relied on.**

2.1. Section 7 of the Kerala Court-Fees and Suits Valuation Act, 1959 lays down different modes for determination of the market value of the property for the purpose of payment of court fee. Sub-section (1) of Section 7 begins with the expression "Save as otherwise provided" and lays down that where the fee payable under the Act depends on the market value of any property, such value shall be determined as on the date of presentation of the plaint. From the plain language of Section 7(1), it is evident that it merely specifies the methodology for determination of the market value of the property where the court fee payable under some other provisions of the Act depends on the market value of the property which is subject matter of the suit. Sections 25, 27, 29, 30, 37, 38, 45 and 48 deal with different kinds of suit i.e., suits for declaration, suits for injunction, suits for possession under the Specific Relief Act, 1877, suits for possession not otherwise provided for, partition suits, suits for joint possession, suits under the Survey and Boundaries Act and interpleader suits. These sections provide for payment of court fee computed on the market

value of the property. Sub-section (2) of Section 7 lays down that the market value of the agricultural land in suits falling under Sections 25(a), 25(b), 27(a), 29, 30, 37(1), 37(3), 38, 45 and 48 shall be deemed to be ten times the annual gross profits of such land where it is capable of yielding annual profits minus the assessment, if any, made by the Government. In terms of sub-section (3), the market value of a building in cases where its rental value has been entered in the registers of any local authority, shall be ten times such rental value and in other cases, the actual market value of the building as on the date of the plaint. Clause (a) of sub-section (3) lays down that market value of any property other than agricultural land and building shall be the value it will fetch on the date of institution of the suit. Sub-section (4) lays down that where subject matter of the suit is only a restricted or fractional interest in a property, the market value of the property shall be deemed to be the value of the restricted or fractional interest. [Para 11] [675-E-H; 676-A-D]

2.2. Section 40 deals with suits for cancellation of decrees etc. which are not covered by other sections. If this section is interpreted in the light of the expression 'save as otherwise provided' used in Section 7(1), it becomes clear that the rule enshrined therein is a clear departure from the one contained in Section 7 read with Sections 25, 27, 29, 30, 37, 38, 45 and 48 which provide for payment of court fee on the market value of the property. In that sense, Section 40 contains a special rule. Section 40(1) lays down that in a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject matter of the suit and further lays down that such value shall be deemed to be if the

whole decree or other document sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed. If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property constitute the basis for fixation of court fee. Sub-section (2) lays down that if the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular item of the property belonging to the plaintiff or the plaintiff's share in such property, fee shall be computed on the value of such property, or share or on the amount of the decree, whichever is less. The deeming clause contained in the substantive part of Section 40(1) makes it clear that in a suit filed for cancellation of a document which creates any right, title or interest in immovable property, the court fees is required to be computed on the value of the property for which the document was executed. To put it differently, the value of the property for which the document was executed and not its market value is relevant for the purpose of court fee. If the expression 'value of the subject matter of the suit' was not followed by the deeming clause, it could possibly be argued that the word 'value' means the market value, but by employing the deeming clause, the legislature has made it clear that if the document is sought to be cancelled, the amount of court fee shall be computed on the value of the property for which the document was executed and not the market value of the property. The words "for which" appearing between the words "property" and "other documents" clearly indicate that the court fee is required to be paid on the value of the property mentioned in the document, which is subject matter of challenge. [Para 11] [676-E-H; 677-A-F]

2.3. If the legislature intended that fee should be payable on the market value of the subject matter of the

suit filed for cancellation of a document which purports or operates to create, declare, assign, limit or extinguish any present or future right, title and interest, then it would have, instead of incorporating the requirement of payment of fees on value of subject matter, specifically provided for payment of court fee on the market value of the subject matter of the suit as has been done in respect of other types of suits mentioned in Sections 25, 27, 29, 30, 37, 38, 45 and 48. The legislature may have also, instead of using the expression "value of the property for which the document was executed", used the expression "value of the property in respect of which the document was executed". However, the fact of the matter is that in Section 40(1) the legislature has designedly not used the expression 'market value of the property'. [Para 12] [677-G-H; 678-A-B]

2.4. If the interpretation placed by the trial Court and the High Court on the expression "value of the property for which the document was executed" is accepted as correct, then the word `value' used in Section 40(1) of the Act will have to be read as `market value' and there is no compelling reason to add the word `market' before the word `value' in Section 40(1) of the Act. [Para 13] [678-C-D]

2.5. When there is a special rule in the Act for valuing the property for the purpose of court fee, that method of valuation must be adopted in preference to any other method and, as Section 40 of the Act certainly contains a special rule for valuing the property for the purpose of court fee there is no reason why the expression 'value of the property' used in Section 40(1) should be substituted with the expression 'market value of the property'. The legislature has designedly used different language in Section 40 of the Act and the term 'market value' has not been used therein. [Paras 30 and 31] [696-C-D; 697-C]

2.6. The impugned order of the High Court as also the order passed by the trial Court directing the appellant to pay court fee on the market value of the property, in respect of which the sale deed was executed by respondent No.1 in favour of respondent No.2, are set aside. The trial Court is directed to proceed with the case and decide the same in accordance with law. [Para 32] [697-D-E]

Balireddi v. Khatipulal Sab **AIR 1935 Madras 863 and** *Kutumba Sastri v. Sundaramma* **AIR 1939 Madras 462, distinguished.**

Venkata Narasimha Raju v. Chandrayya **AIR 1927 Madras 825;** *Navaraja v. Kaliappa Gounder* **(1967) 80 Madras Law Weekly 19 (SN);** *Arunachalathammal v. Sudalaimuthu Pillai* **(1968) 83 Madras Law Weekly 789;** *Andalammal v. B. Kanniah* **(1971) II Madras Law Journal 205 and** *Allam Venkateswara Reddy v. Golla Venkatanarayana and others* **AIR 1975 Andhra Pradesh 122, approved.**

Sengoda Nadar v. Doraiswami Gounder and others **AIR 1971 Madras 380;** *S. Krishna Nair and another v. N. Rugmoni Amma* **AIR 1976 Madras 208;** *Krishnan Damodaran v. Padmanabhan Parvathy* **(1972) Kerala Law Times 774;** *P.K. Vasudeva Rao v. Hari Menon* **AIR 1982 Kerala 35;** *Pachayammal v. Dwaraswamy Pillai* **(2006) 3 Kerala Law Times 527;** *Appikunju Meerasayu v. Meeran Pillai* **(1964) Kerala Law Times 895;** *Uma Antherjanam v. Govindaru Namboodiripad and others* **(1966) Kerala Law Times 1046;** *R. Rangiah v. Thimma Setty* **(1963) 1 Mysore Law Journal 67 and** *Smt. Narbada v. Smt. Aashi* **AIR 1987 Rajasthan 162, overruled.**

Venkatasiva Rao v. Satyanarayanamurthi **AIR 1932 Madras 605;** *Narasamma v. Satyanarayana* **AIR 1951 Madras 793 and** *T. Tharamma v. T. Ramchandra Reddy and others* **AIR 1968 Andhra Pradesh 333, referred to.**

Case Law Reference:

(1972) Kerala Law Times 774	overruled	Para 5
AIR 1982 Kerala 35	overruled	Para 5
(2006) 3 Kerala Law Times 527	overruled	Para 5
(1971) II Madras Law Journal 205	approved	Para 6
AIR 1975 Andhra Pradesh 122	approved	Para 6
AIR 1939 Madras 462	distinguished	Para 7
(1964) Kerala Law Times 895	overruled	Para 7
(1966) Kerala Law Times 1046	overruled	Para 7
AIR 1968 Andhra Pradesh 333	referred to	Para 7
AIR 1971 Madras 380	overruled	Para 7
AIR 1976 Madras 208	overruled	Para 7
AIR 1987 Rajasthan 162	overruled	Para 7
1958 SCR 360	relied on	Para 10
1992 Supp (1) SCC 323	relied on	Para 10
(1966) 3 SCR 366	relied on	Para 10
AIR 1927 Madras 825	approved	Para 15
AIR 1935 Madras 863	distinguished	Para 16
AIR 1932 Madras 605	referred to	Para 16
(1967) 80 Madras Law Weekly 19 (SN)	approved	Para 18
(1968) 83 Madras Law Weekly 789	approved	Para 19
AIR 1951 Madras 793	referred to	Para 20

(1963) 1 Mysore Law Journal 67 **overruled** **Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 4347 of 2010.

From the Judgment & Order dated 21.07.2008 of the High Court of Kerala at Ernakulam in WP (C) No. 21820 of 2008.

Bechu Kurian Thomes, R.Basant, Liz Mathew for the Appellant.

T.L.V. Iyer, Subramonium Prasad for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. This appeal filed for setting aside order dated 21.7.2008 passed by the learned Single Judge of Kerala High Court in Writ Petition No.21820 of 2008 whereby he declined to interfere with the direction given by Sub Judge, Palakkad (hereinafter described as 'the trial Court') to the appellant to pay court fee on the market value of the plaint schedule property raises an important question of law relating to interpretation of Section 40 of the Kerala Court-Fees and Suits Valuation Act, 1959 (for short, 'the Act').

3. The appellant owned 9.98 acres rubber plantation. She executed power of attorney No.376/2006 in favour of her own daughter (respondent No.1 herein). After sometime, respondent No.1 transferred the property to her husband (respondent No.2 herein) by registered sale deed No.1784/2007. The appellant filed O.S. No.231/2007 for cancellation of the power of attorney by alleging that respondent No.1 had misused the same and sold the property to her husband. By an order dated 21.5.2008, the trial Court directed the appellant to pay court fees on the market value of the plaint schedule property. The appellant

challenged that order in Writ Petition No.17032/2008 (C) which was disposed of by the learned Single Judge of Kerala High Court vide his order dated 26.6.2008, the relevant portion of which reads as under:

> "The learned counsel appearing for the petitioner further submitted that in view of the contentions raised in the plaint, petitioner has to file an application for amendment of the plaint modifying the relief sought for. In the nature of the contentions raised in the plaint, an amendment of the relief is definitely necessary, as found by the learned Sub Judge. In such circumstances, Writ Petition is disposed granting liberty to the petitioner to amend the plaint and to pay the necessary court fee payable on such pleading. It is made clear that the fact that a time limit is fixed by this Court will not prevent the court from granting amendment, as it is necessary for an appropriate adjudication of the dispute involved in the suit. It is made clear that the actual court fee payable by the plaintiff is to be decided by the trial Court afresh, taking into consideration the relief sought for in the plaint, in the light of the amendment of the pleading."

4. In furtherance of the direction given by the High Court, the appellant applied for and she was granted permission to amend the plaint and to incorporate prayer for cancellation of the sale deed executed by respondent No.1 in favour of respondent No.2. In the amended plaint, value of the property was shown as Rs.7,00,000/- and accordingly, the court fees was paid. However by an order dated 3.7.2008, the trial Court directed the appellant to pay court fee on the market value of the plaint schedule property which was assessed at Rs.12 lakhs per acre.

5. Writ Petition No.21820/2008 filed by the appellant against the above mentioned order was dismissed by the learned Single Judge, who referred to the judgments of the

Division Bench in *Krishnan Damodaran v. Padmanabhan Parvathy* (1972) Kerala Law Times 774, *P.K. Vasudeva Rao v. Hari Menon* AIR 1982 Kerala 35 and *Pachayammal v. Dwaraswamy Pillai* (2006) 3 Kerala Law Times 527 and held that in terms of Section 40 of the Act, the writ petitioner is required to pay court fees on market value of the property and not on the value specified in the sale deed.

6. Shri Bechu Kurian Thomas, learned counsel for the appellant argued that the interpretation placed by the trial Court and the High Court on Section 40 of the Act is *ex facie* erroneous and impugned order is liable to be set aside because that section does not provide for payment of court fee on the market value of the property for which the document, which is subject matter of the suit, was executed. Learned counsel emphasized that in terms of Section 40(1), court fees is required to be paid on the value of the property for which the document was executed and submitted that the appellant had correctly paid the court fees as per the value of the property specified in the sale deed i.e., Rs. 7 lakhs. In support of his arguments, the learned counsel relied upon the judgments of the learned Single Judges of Madras High Court in *Andalammal v. B. Kannaiah* (1971) 2 Madras Law Journal 205 and of Andhra Pradesh High Court in *Allam Venkateswara Reddy v. Golla Venkatanarayana and others* AIR 1975 Andhra Pradesh 122.

7. Shri T.L.V. Iyer, learned senior counsel appearing for the respondent argued that the expression 'value of the property' for which the document was executed means market value of the property and the same cannot be read as value specified in the document. Learned senior counsel submitted that different High Courts have, following the judgment of the Full Bench of Madras High Court in *Kutumba Sastri v. Sundaramma* AIR 1939 Madras 462, consistently held that the market value of the property has to be taken into consideration for the purpose of payment of the court fees. Learned senior

counsel relied upon the judgments of different High Courts - *Appikunju Meerasayu v. Meeran Pillai* (1964) Kerala Law Times 895, *Uma Antherjanam v. Govindaru Namboodiripad and others* (1966) Kerala Law Times 1046, *T. Tharamma v. T. Ramchandra Reddy and others* AIR 1968 Andhra Pradesh 333, *Sengoda Nadar v. Doraiswami Gounder and others* AIR 1971 Madras 380, *Allam Venkateswara Reddy v. Golla Venkatanarayana and others* (supra), *S. Krishna Nair and another v. N. Rugmoni Amma* AIR 1976 Madras 208 and *Smt. Narbada v. Smt. Aashi* AIR 1987 Rajasthan 162 and argued that the learned Single Judge did not commit any error by refusing to interfere with the order of the trial Court.

8. We have considered the respective submissions. Sections 7(1) (2) (3) (3A) (4), 25(a) (b), 27(a), 29, 30, 37(1) (3), 38, 40, 45 and 48 of the Act which have bearing on the issue raised by the appellant, read as under:

"7. Determination of market value

(1) Save as otherwise provided, where the fee payable under this Act depends on the *market value* of any property, such value shall be determined as on the date of presentation of the plaint.

(2) The *market value* of agricultural land in suits falling under Section 25(a), 25(b), 27(a), 29, 30, 37(1), 37(3), 38, 45 or 48 shall be deemed to be ten times the annual gross profits of such land where it is capable of yielding annual profits minus the assessment if any made to the Government.

(3) The *market value* of a building shall in cases where its rental value has been entered in the registers of any local authority, be ten times such rental value and in other cases the actual *market value* of the building as on the date of the plaint.

(3A) The *market value* of any property other than agricultural land and building falling under sub-sections (2) and (3) shall be the value it will fetch on the date of institution of the suit.

(4) Where the subject-matter of the suit is only a restricted or fractional interest in a property, the *market value* of the property shall be deemed to be the value of the restricted or fractional interest and the value of the restricted or fractional interest shall bear the same proportion to the market value of the absolute interest in such property as the net income derived by the owner of the restricted or fractional interest bears to the total net income from the property.

25. Suits for declaration.– In a suit for a declaratory decree or order, whether with or without consequential relief, not falling under Section 26–

(a) where the prayer is for a declaration and for possession of the property to which the declaration relates, fee shall be computed on the *market value* of the property or on rupees one thousand whichever is higher;

(b) where the prayer is for a declaration and for consequential injunction and the relief sought is with reference to any immovable property, fee shall be computed on one-half of the *market value* of the property or on rupees one thousand, whichever is higher;

27. Suits for injunction.– In a suit for injunction–

(a) Where the reliefs sought is with reference to any immovable property, and

(i) where the plaintiff alleges that his title to the property is denied, or

(ii) where an issue is framed regarding the plaintiff's title to the property,

fee shall be computed on one-half of the *market value* of the property or on rupees five hundred, whichever is higher;

29. Suits for possession under the Specific Relief Act, 1877.– In a suit for possession of immovable property under Section 9 of the Specific Relief Act, 1877 (Central Act 1 of 1877), fee shall be computed on one-third of the market value of the property or on rupees one hundred and fifty, whichever is higher.

30. Suits for possession not otherwise provided for.– In a suit for possession of immovable property not otherwise provided for, fee shall be computed, on the market value of the property or on rupees one thousand, whichever is higher.

37. Partition suits

(1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

(2) xxx xxx xxx

(3) Where, in a suit falling under sub-section (1) or sub-section (2), a defendant claims partition and separate possession of his share of the property, fee shall be payable on his written statement computed on half the market value of his share or at half the rates specified in sub-section (2), according as such defendant has been excluded from possession or is in joint possession.

38. Suits for joint possession.– In a suit for joint possession of joint family property or of property owned,

jointly or in common, by a plaintiff who has been excluded from possession, fee shall be computed on the market value of the plaintiff's share.

40. Suits for cancellation of decrees, etc.–

(1) In a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject-matter of the suit, and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed;

if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property.

(2) If the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular item of property belonging to the plaintiff or to the plaintiff's share in any such property, fee shall be computed on the value of such property, or share or on the amount of the decree, whichever is less.

Explanation.– A suit to set aside an award shall be deemed to be a suit to set aside a decree within the meaning of this section.

45. Suits under the Survey and Boundaries Act.–In a suit under Section 14 of the Madras Survey and Boundaries Act, 1923, Section 13 of the Travancore Survey and Boundaries Act of 1094, or Section 14 of the Cochin Survey Act, II of 1074, fee shall be computed on one-half of the market value of the property affected by the determination of the boundary or on rupees one thousand,

whichever is higher.

48. Interpleader suits.

(1) In an interpleader suit, fee shall be payable on the plaint at the rates specified in Section 50.

(2) Where issues are framed as between the claimants, fee shall be payable computed on the amount of the debt or the money or the market value of other property, movable or immovable, which forms the subject-matter of the suit. In levying such fee, credit shall be given for the fee paid on the plaint; and the balance of the fee shall be paid in equal shares by the claimants who claim the debt or the sum of money or the property adversely to each other.

(3) Value for the purpose of determining the jurisdiction of Courts shall be the amount of the debt, or the sum of money or the market value of other property to which the suit relates."

9. Section 7 (iv), (iv-A) (as inserted by Madras Act of 1922) and (v) of the Court-fees Act, 1870 (for short, 'the Court-fees Act'), which have been considered in various judgments of Madras High Court relied upon by learned counsel for the respondents reads as under:-

"7. Computation of fees payable in certain suits.– The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:– "

xxx xxx xxx

(iv) In suits–

for movable property of no market-value.–(a) for moveable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

to enforce a right to share in joint family property.–(b) to enforce the right to share in any property on the ground that it is joint family property,

for a declaratory decree and consequential relief.–(c) to obtain a declaratory decree or order, where consequential relief is prayed,

for an injunction.–(d) to obtain an injunction,

for easements.–(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

for accounts.–(f) for accounts–

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal;

In all such suits the plaintiff shall state the amount at which he values the relief sought

(iv-A) In a suit for cancellation of a decree for money or other property having a money value or other document securing money or other property having such value, the valuation should be according to the value of the subject-matter of the suit and such value shall be if the whole decree is sought to be cancelled, the amount or value of the property for which the decree was passed, and if a portion of the decree is sought to be cancelled, such part of the amount or value of the property.

(added by Madras Act of 1922)

for possession of land, houses and gardens.– (v) In suits for the possession of land, houses, and gardens – according to the value of the subject-matter; and such value shall be deemed to be–

where the subject-matter is land, and–

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government,

or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue;

and such revenue is permanently settled – ten times the revenue so payable;

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid;

and such revenue is settled, but not permanently – five times the revenue so payable;

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

and net profits have arisen from the land during the year next before the date of presenting the plaint –

fifteen times such net profits;

but where no such net profits have arisen therefrom – the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood;

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned – the market-value of the land:"

10. Before proceeding further, we may notice two well recognized rules of interpretation of statutes. The first and

primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction, only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise – *Kanai Lal Sur v. Paramnidhi Sadhukhan* 1958 SCR 360. The other important rule of interpretation is that the Court cannot rewrite, recast or reframe the legislation because it has no power to do so. The Court cannot add words to a statute or read words which are not therein.Even if there is a defect or an omission in the statute, the Court cannot correct the defect or supply the omission. – *Union of India v. Deoki Nandan Aggarwal* 1992 Supp (1) SCC 323, *Shyam Kishori Devi v. Patna Municipal Corporation* (1966) 3 SCR 366.

11. Section 7 of the Act lays down different modes for determination of the market value of the property for the purpose of payment of court fee. Sub-section (1) of Section 7 begins with the expression *"Save as otherwise provided"* and lays down that where the fee payable under the Act depends on the market value of any property, such value shall be determined as on the date of presentation of the plaint. From the plain language of Section 7(1), it is evident that it merely specifies the methodology for determination of the market value of the property where the court fee payable under some other provisions of the Act depends on the market value of the property which is subject matter of the suit. Sections 25, 27, 29, 30, 37, 38, 45 and 48 deal with different kinds of suit i.e., suits for declaration, suits for injunction, suits for possession under the Specific Relief Act, 1877, suits for possession not otherwise provided for, partition suits, suits for joint possession,

suits under the Survey and Boundaries Act and interpleader suits. These sections provide for payment of court fee computed on the market value of the property. Sub-section (2) of Section 7 lays down that the market value of the agricultural land in suits falling under Sections 25(a), 25(b), 27(a), 29, 30, 37(1), 37(3), 38, 45 and 48 shall be deemed to be ten times the annual gross profits of such land where it is capable of yielding annual profits minus the assessment, if any, made by the Government. In terms of sub-section (3), the market value of a building in cases where its rental value has been entered in the registers of any local authority, shall be ten times such rental value and in other cases, the actual market value of the building as on the date of the plaint. Clause (a) of sub-section (3) lays down that market value of any property other than agricultural land and building shall be the value it will fetch on the date of institution of the suit. Sub-section (4) lays down that where subject matter of the suit is only a restricted or fractional interest in a property, the market value of the property shall be deemed to be the value of the restricted or fractional interest. Section 40 deals with suits for cancellation of decrees etc. which are not covered by other sections. If this section is interpreted in the light of the expression `save as otherwise provided' used in Section 7(1), it becomes clear that the rule enshrined therein is a clear departure from the one contained in Section 7 read with Sections 25, 27, 29, 30, 37, 38, 45 and 48 which provide for payment of court fee on the market value of the property. In that sense, Section 40 contains a special rule. Section 40(1) lays down that in a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject matter of the suit and further lays down that such value shall be deemed to be if the whole decree or other document sought to be cancelled, the amount or value of the property for which the decree was

passed or other document was executed. If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property constitute the basis for fixation of court fee. Sub-section (2) lays down that if the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular item of the property belonging to the plaintiff or the plaintiff's share in such property, fee shall be computed on the value of such property, or share or on the amount of the decree, whichever is less. The deeming clause contained in the substantive part of Section 40(1) makes it clear that in a suit filed for cancellation of a document which creates any right, title or interest in immovable property, the court fees is required to be computed on the value of the property for which the document was executed. To put it differently, the value of the property for which the document was executed and not its market value is relevant for the purpose of court fee. If the expression `value of the subject matter of the suit' was not followed by the deeming clause, it could possibly be argued that the word `value' means the market value, but by employing the deeming clause, the legislature has made it clear that if the document is sought to be cancelled, the amount of court fee shall be computed on the value of the property for which the document was executed and not the market value of the property. The words "for which" appearing between the words "property" and "other documents" clearly indicate that the court fee is required to be paid on the value of the property mentioned in the document, which is subject matter of challenge.

12. If the legislature intended that fee should be payable on the market value of the subject matter of the suit filed for cancellation of a document which purports or operates to create, declare, assign, limit or extinguish any present or future right, title and interest, then it would have, instead of incorporating the requirement of payment of fees on value of subject matter, specifically provided for payment of court fee

on the market value of the subject matter of the suit as has been done in respect of other types of suits mentioned in Sections 25, 27, 29, 30, 37, 38, 45 and 48. The legislature may have also, instead of using the expression "value of the property for which the document was executed", used the expression "value of the property in respect of which the document was executed". However, the fact of the matter is that in Section 40(1) the legislature has designedly not used the expression 'market value of the property'.

13. If the interpretation placed by the trial Court and the High Court on the expression "value of the property for which the document was executed" is accepted as correct then the word `value' used in Section 40(1) of the Act will have to be read as `market value' and we do not see any compelling reason to add the word `market' before the word `value' in Section 40(1) of the Act.

14. We may now advert to the judgments relied upon by the learned counsel for the parties and some other judgments of different High Courts in which Section 40(1) of the Act and similar provisions of other State legislations have been interpreted.

15. In *Venkata Narasimha Raju v. Chandrayya* AIR 1927 Madras 825, the Division Bench of Madras High Court interpreted Section 7 (v) (a) of the Court-fees Act as amended by Madras Act of 1922 and observed:

> "One point raised is whether the market value of the property should not be taken for the purpose of this valuation, or whether the statutory value should be adopted. *We think the latter is the proper course as there is nothing in the Act to show that the market value is the value contemplated in S.7 (iv) (a). When there is in the Act itself a special rule as to valuing property in suits for Court-fees, we think it is proper to take that method of valuation in preference to any other method to get the value where*

there is no indication that any other method should be adopted."

(emphasis supplied)

16. In *Balireddi v. Khatipulal Sab* AIR 1935 Madras 863, the learned Single Judge of the High Court considered the question whether in a suit for setting aside mortgage deeds and sale deeds, the plaintiff is required to pay court-fees on the market value of the property and answered the same in affirmative. The learned Judge referred to two earlier judgments in *Venkata Narasimha Raju v. Chandrayya* (supra) and *Venkatasiva Rao v. Satyanarayanamurthi* AIR 1932 Madras 605 but disagreed with the ratio of those judgments and held:

"The amount of court-fee payable depends upon "the value of the subject-matter of the suit," that is what the section says. Where a document securing money is sought to be cancelled, the section goes on to say, that the value of the subject-matter shall be deemed to be "the amount for which the document is executed." In the case of a mortgage instrument therefore the court-fee has to be computed on the amount for which the instrument is executed, in other words, the principal amount secured by it. This is the plain effect of the words of the section, and I fail to see how the method of computation fixed in S.7(v) can possibly be applied. Now as regards the sale-deed, the question arises, is the value referred to in the section, the actual value of the property, that is to say, its market value or the artificial value prescribed by S.7 (v)? The last mentioned section deals with suits for possession and the legislature has expressly enacted that in such suits the value shall be determined in a particular manner. Cl. (iv-A) refers simply to "the value of the property," which means "value" as generally understood, whereas Cl. (v) prescribes an artificial method of valuation. There is no reason to construe Cl. (iv-A) in the light of Cl. (v) which deals with a specific matter; indeed, when the legislature intends to

prescribe an artificial method, it says so in express terms, as Cl. (iv-c) also shows. I am therefore of the opinion that in the case of the sale-deeds, the amount of court-fee payable must be computed on the market value of the properties with which they deal."

17. In *Kutumba Sastri v. Sundaramma* (supra), the Full Bench of Madras High Court interpreted paragraph (iv-A) of Section 7 of the Court-fees Act. The Full Bench referred to the earlier judgments in *Venkata Narasimha Raju v. Chandrayya* (supra), *Venkatasiva Rao v. Satyanarayanamurthi* (supra), *Balireddi v. Khatipulal Sab* (supra) and approved the view expressed by the learned Single Judge in *Balireddi v. Khatipulal Sab* (supra) by making the following observations:

"We consider that the view taken by Venkatasubba Rao J. in 59 Mad 240 is preferable to that taken in 53 MLJ 267. Para (iv-A) deals with suits where it is necessary for the plaintiff to seek the cancellation of a decree or of a deed. Para (v) relates merely to suits for possession. In a suit for possession it is not always necessary to set aside a decree or a document. Where a suit is merely for possession the Act says how the value of the subject-matter shall be arrived at. When adding para (iv-A) to S.7 the Legislature did not say that in a suit falling within the new paragraph the valuation of the subject-matter should be arrived at in accordance with the method indicated in para (v). It said that a suit within para (iv-A) should be valued according to the value of the property, and the value of the property, unless there is an indication to the contrary, must mean to its market value. By the Amending Act of 1922 para (iv-C) was also amended. Before the amendment, this paragraph provided that in a suit to obtain a declaratory decree or order where a consequential relief was prayed, the value should be according to the value of the relief sought by the plaintiff. The Amending Act inserted the Proviso to the effect that

in a suit coming under this paragraph in a case where the relief sought is with reference to immovable property the valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph *(v). There the Legislature expressly provided that the method of calculation was to be in accordance with para (v) but in adding para (iv-A) no such direction was given. The court-fee is to be calculated on the amount or the value of the property and to give the wording of para (iv-A) its plain meaning the valuation must be the valuation based on the market value of the property at the date of the plaint."*

(emphasis supplied)

18. In *Navaraja v. Kaliappa Gounder* (1967) 80 Madras Law Weekly 19 (SN), the learned Single Judge noted that in the earlier suit, the properties were valued at Rs.4000/-, referred to Section 40(1) of the Madras Court-fees and Suits Valuation Act, 1955, which is *pari materia* to the Section 40 of the Act and observed:

"……that as the decree itself specified the value of the property it will fall within the language of Section 40(1), namely, the amount or value of the property for which the decree was passed and ordered that the court-fee has to be paid calculated on the sum of Rs.4000, which is the value given in the decree, and not the market value of the properties on the date of the filing of the plaint."

(emphasis supplied)

19. In *Arunachalathammal v. Sudalaimuthu Pillai* (1968) 83 Madras Law Weekly 789, another learned Single Judge examined the correctness of order passed by the Subordinate Judge, Tirunelveli, who had allowed the plaintiff to pay the court-fee for the cancellation of settlement deed on the value of the document i.e. Rs.3500/-. While dismissing the revision filed by

the defendants, the learned Judge referred to Section 40(1) of the Madras Act, distinguished the Full Bench judgment in *Kutumba Sastri v. Sundaramma* (supra) and observed:

"It will be seen that the section provides for suits (1) relating to cancellation of a decree for money, (2) cancellation of a decree for other property having a money value, and (3) cancellation of other document which purports or operates to create, declare, assign, limit or extinguish rights in moveable or immoveable property. The sub-section provides that fee shall be computed on the value of the subject matter of the suit. Then it proceeds to state how such value should be calculated. It provides that if the whole decree is sought to be cancelled, the amount or value of the property for which the decree was passed should be taken into account. In the case of other document which purports or operates to create, declare, assign, limit or extinguish rights in moveable or immoveable property, the value shall be deemed to be the value of the property. It is not clear as to whether the words "the amount or value of the property for which the decree was passed" are applicable to the cancellation of a document which creates or declares rights in moveable or immoveable property. *In the case of suits for cancellation of either documents, apart from suits for cancellation of a decree for money or other property, the above clause would be certainly applicable. This would mean that in the case of suits for cancellation of other documents, the value of the subject matter of the suit shall be deemed to be the amount for which the documents was executed. It was submitted on behalf of the defendants that even in the case of a suit for cancellation of other documents, the value shall be deemed to be the value of the property. But this contention would ignore the effect of the words "value of the property for which the decree was passed". Even conceding that the value of the property should be taken into account in suits for cancellation of other*

documents, there are two modes provided for to compute the value of the subject matter of the suit, (1) the value of the property and (2) the amount for which the document was executed.

Mr. Venugopalachari, learned counsel for the petitioners, submitted that this view is opposed to the one taken in the decision in Kutumba Sastri v. Sundaramma where the Full Bench held that in a suit for cancellation of a deed of conveyance the valuation must be the valuation based on the market value of the property at the date of the plaint. The Full Bench was considering the question as to the Court fee payable in a suit for cancellation of a deed of conveyance and for possession of the property covered by the deed. The court held that the plaintiff should value his relief in accordance with the provisions of S.7(4)(A), and not according to S.7(V) of the old Court fees Act, 1870. After referring to the difference of opinion between the various decisions, the Full Bench preferred the view taken in Bali Reddi v. Khatifulal Sab 59 Mad. 240, followed in Venkatakrishniah v. All Sahib 48 L.W. 277. S. 7(4-A), of the old Act is slightly differently worded and it runs as follows:-

> "In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject matter of the suit, and such value shall be deemed to be—
>
> if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed,
>
> if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property".

It will be seen that the above section relates to a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value. There was some doubt whether the third part of the section relating to either document securing money would include sales. In Balireddy v. Badul Sabar, Venkatasubba Rao, J. referring to his earlier decision in Doraiswami v. Thangavelu held that sale deeds would come within the meaning of this section. Whether this sub-section includes sale deeds or need not detain us, as S. 40(1) of Madras Act XIV of 1955 is differently worded and there can be no doubt that it brings within its purview sale deeds as it relates to other documents which purports or operates to create, declare, assign, limit or extinguish any right in moveable or immoveable property, S. 7(iv-A) of the old Act states that the value be deemed to be "if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed". The same words are used in S. 40(1) of the new Act. In construing this sub-clause in S. 7(iv-A) of the old Act, the Full Bench pointed out in the decision cited above that the suit within the meaning of the above section should be valued according to the value of the property, unless there is an indication to the contrary, must mean its market value. It may be noted that the court was considering the value of the property and does not appear to have taken note of the words "the other document executed".

As already pointed out, S. 7(iv-A) of the Old Act as well as S. 40(1) of the present Act deal with suits for cancellation of a decree for money, cancellation of a decree for other property having a money value and suit

for cancellation other document. In the case of other documents, the clause "the amount or the value of the property for which the decree was passed" cannot be held to be applicable and the only clause that can be properly applied is only the value for which the document was executed. In the third category in S. 40(1), to the words `other document, the words `which purports or operates to create, declare, assign, limit or extinguish' rights in moveable or immoveable property are included. *Obviously in suits for cancellation of other documents referred to in S. 40(1) of the new Act the valuation should be the value of the other document executed. In Balireddy v. Abdul Satar the court refers to the section which says that the value of the subject matter shall be deemed to be the amount for which the document is executed. But it confined its discussion to the actual value of the property and held that it referred only to the market value. This decision also does not refer to the valuation of the document on the basis of the amount for which the document is executed."*

(emphasis supplied)

20. In *Appikunju Meerasayu v. Meeran Pillai* (supra), the learned Single Judge of Kerala High Court relied on the judgment of Madras High Court in *Narasamma v. Satyanarayana* AIR 1951 Madras 793 and observed:

"As I have pointed out earlier, the emphasis in S.40(1) of the Court Fees Act is regarding the subject matter of this suit and in respect of that subject matter which admittedly is immovable property it will have to be valued on the amount or valued as the property which was no doubt covered by the decree in O.S. 21/1125. But the value or amount must certainly be the market value as on the date of the filing of the suit."

The same view was reiterated by another learned Single

Judge of the Kerala High Court in *Uma Antherjanam v. Govindaru Namboodiripad and others* (supra).

21. In *Sengoda Nadar v. Doraiswami Gounder and others* (supra), the learned Single Judge of Madras High Court referred to earlier judgments but disagreed with the view expressed by the other learned Single Judges in *Navaraja v. Kaliappa Gounder* (supra) and *Arunachalathammal v. Sudalaimuthu Pillai* (supra) and followed the ratio of Full Bench judgment by recording the following observations:

"With respect, I need hardly add that this is not the correct reading of the Full Bench decision. He has concluded by stating that obviously in suits for cancellation of "other documents" referred to in Section 40 (1) of the present Act, the valuation should be the value of the other document executed. I have already pointed out that in the documents just as in the case of decrees, the distinction is between those that dealt with money and those that dealt with property. The amount mentioned in the decree or the document is relevant only when the question is with regard to the decree for money or document securing money. But in the case of decrees or documents dealing with property of money value, the value of the subject-matter of the suit should be computed on the value of the property for which the decree was passed or the document was executed. I need not repeat that the valuation in respect of the property dealt with by the decree or document should be the market value and such a market value should be as on the date of suit."

22. In *S. Krishna Nair and another v. N. Rugmoni Amma* (supra), another learned Single Judge followed the ratio of *Sengoda Nadar v. Doraiswami Gounder and others* (supra) and held that in a suit for cancellation of decree, the property is to be valued under Section 40(1) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and the court fee is

required to be paid on the market value of the property as on the date of the plaint.

23. In *Krishnan Damodaran v. Padmanabhan Parvathy* (supra), the Division Bench of Kerala High Court reiterated the views expressed in *Kutumba Sastri v. Sundaramma* (supra), *Appikunju Meerasayu v. Meeran Pillai* (supra) and *Sengoda Nadar v. Doraiswami Gounder and others* (supra) and held that court fee is payable on the market value of the property covered by the document and not on the basis of the valuation given in the document.

24. In *P.K. Vasudeva Rao v. Hari Menon* (supra), the Division Bench of the Kerala High Court held as under:

> "True, as contended for on behalf of the plaintiff-revision petitioner, S.40 nowhere uses the expression 'market value'. But it is clear therefrom that the legislative intent is to levy court-fee on the just equivalent in money of the 'other property' comprised in the decree or portion thereof sought to be set aside; or dealt with in the 'other document' or part thereof sought to be cancelled. The section opens by saying that 'in a suit for cancellation of a decree for money or other property having a money value' (emphasis supplied) 'fee shall be computed on the value of the subject matter of the suit'. 'Money value' of a property is its worth in terms of the currency of the land or in other words, is such money-equivalent thereof in open market; and not any amount less than that as where it is overvalued at a fancy-price. It cannot be that when, what is sought to be cancelled is a decree or part thereof for 'other property', i.e. property other than money, the value of such property for computation of court-fees is its 'money-value', and when, what is sought to be cancelled is a document or part thereof in respect of 'other property', the value of such property for such computation is not its 'money-value'. Value of the subject matter, namely, value of the 'other property' in both cases is its money-value.

The object of the second and the third paras in sub-section (1) of S.40 is not to introduce any fiction but to provide for two situations, namely, (i) where the decree or the document as a whole is sought to be cancelled and (ii) where only part thereof is sought to be cancelled. In the first situation, the value of the subject matter is the amount for which the decree was passed or the document was executed; or the value of the property concerning which the decree was passed or the document was executed. In the second class of cases, the value of the subject matter of the suit is such part of the amount for which the decree was passed or the document was executed, in respect of which part, the decree or the document is sought to be cancelled; or the value of such part of the property concerning which the decree was passed or the document was executed, in respect of which part, the decree or the document is sought to be cancelled.

Section 40(1) has to be read as a whole. So read: (A) when the suit is for cancellation of a decree or other document for money, then the value of the subject-matter of the suit will be:- (i) the whole amount for which the decree was passed or the document was executed, if what is sought to be cancelled is the whole of the decree or the whole of the document; and (ii) such part of the amount for which the decree was passed or the document was executed, if only part of the decree or part of the document is sought to be cancelled; (B) when the suit is for cancellation of a decree or other document for a property having money-value, then, the value of the subject-matter of the suit will be:- (i) if the whole of the decree or the document is sought to be cancelled – the value of the property covered by the decree or the document; and (ii) if only part of the decree or of the document is to be cancelled; value of such part of the property in respect of which the decree was passed or the document was executed and to which extent such decree or such document is to be cancelled. We are not

impressed with the submission that there is a distinction between the expressions 'the value of the property for which the decree was passed or other document was executed' and 'the value of the property in respect of which the decree was passed or other document was executed' for the purpose of computation of court-fees. The scheme of S.40 is to make court-fees leviable on the sum of money or portion thereof, when what the plaintiff seeks is to get rid of his obligation and liability therefor or part thereof under a decree passed or a document executed by cancellation thereof, and on the money-equivalent of the property or portion thereof, when what he seeks to get rid of is his obligation and liability in relation to that property or portion thereof under a decree passed or a document executed in respect of it by cancellation thereof."

25. In *R. Rangiah v. Thimma Setty* (1963) 1 Mysore Law Journal 67, the Division Bench of Mysore High Court interpreted Section 4(iv)(A) of Mysore Court Fees Act, which is substantially similar to Section 40 of the Act and held that:

"Now, one thing which is very clear from the paragraphs 1 & 2 of S.4 (iv) A is that in a suit brought for the cancellation of a document executed for the purpose of securing property, the Court Fee payable is on the value of such property. Although those paragraphs do not refer in terms to the market value of the property, as some of the other parts of the Act do, I have no doubt in my mind that the word 'value' occurring in those paragraphs has reference to no other value than the market value. The word 'value' when it occurs in an enactment like the Court Fees Act, has to my mind, particularly known and definite meaning. That word has reference to the price which the property will fetch when exposed to the test of competition.

Mr. Gopivallabha Iyengar had to admit that the word 'value' occurring in the first paragraph would have to be understood as the market value if paragraphs 2 and 3 did

not exist in S.4(iv) A. If, therefore, the word 'value' occurring in the first paragraph means market value, I see nothing in paragraphs 2 and 3 on which Mr. Gopivallabha Iyengar strongly relied which can persuade me to take the view that the word 'value' occurring in the first paragraph which, as ordinarily understood, is the market value, should be understood differently.

Paragraph 2 does no more than to merely provide that, if a document is sought to be cancelled in its entirety, the Court Fee is payable on the value of the whole of the property in respect of which the document is executed. Likewise paragraph 3 merely provides that where the cancellation sought is a partial cancellation, Court Fee is payable only on the value of the property in respect of which cancellation is sought. It is for that purpose that the words "value shall be deemed to be" are used by the Legislature in the first paragraph of the clause and not for the purpose of assigning to the word 'value' occurring in the first paragraph a meaning different from that which has to be ordinarily given to it.

It is no doubt true that the second paragraph of S.4(iv) A directs that the Court Fee payable in a suit brought for the cancellation of a document is the Court Fee on the value of the property 'for which' the document was executed. Ordinarily the expression 'for which' occurring in that paragraph might have justified the interpretation that the amount on which the Curt Fee has to be paid is the amount specified in the document. But, that, that would not be correct way of understanding those words occurring in paragraph 2 of that clause is clear from the fact that S.4(iv) A does not provide merely for cancellation of a document executed for a specified consideration such as a sale deed, but also provides for the payment of Court Fee even in suits brought for cancellation of other documents such as a deed of settlement, a gift deed or a trust deed. In the

latter category of cases it would not be appropriate to regard those documents as executed for a consideration or a specified amount and those cases would not be cases in which there would be any value 'for which the document is executed.

The second paragraph which requires the payment of Court Fee on the value of the property 'for which' the document was executed, does not, when properly understood, direct the payment of such Court Fee on the value for which the document was executed, but on the value of the property for which it was executed. In other words, the words 'for which' occurring in that paragraph do not refer to the value but to the property to which the document relates. The words 'for which occurring in that paragraph, in my opinion, mean 'for securing which', so that what that paragraph directs is the payment of Court Fee on the value of the property for securing which the document is executed.

That, that is the correct interpretation is indicated by the word 'securing' occurring in the first paragraph of the clause in the context of a document of which cancellation is sought.

It therefore follows that what is relevant for the purpose of S.4(iv) A is not the value of the property specified in the document but its real and actual value when the suit is brought. It is on that value that the Court fee has to be paid if the suit is for the cancellation of a document recording a transaction involving such property."

26. In *Pachayammal v. Dwaraswamy Pillai* (supra), another Division Bench of Kerala High Court interpreted Sections 7 and 40 of the Act and held:

"Section 7 of the Act though deals with determination of market value, it starts with a saving clause. A reading of

Section 7(1) makes it clear that if there is a specific provision in the Act for valuing the suit, the Sub-sections (2) to (4) of Section 7 can have no application. According to the counsel for the petitioners, Section 40 is an independent provision for valuation of suits for cancellation of decrees and documents and in view of Section 7(1), market value of the property is not a criteria at all. Whenever market value of the property is to be taken into account, it is specifically stated in the statute. Sections 24, 25, 27, 29, 30, 37, 38, 45 & 48 etc, specifically provide that market value of the property involved in the suit is to be taken as basis for valuation. But, the word 'market' is conspicuously absent in Section 40. When the section is plain and unambiguous, courts should not venture to add words to it to give an entirely different scope to the said provisions never intended by the legislature. Therefore, it was argued that concept of "market value of the property' cannot be brought into Section 40. Learned Counsel invited our attention to the decisions of the Apex Court in Gurudevdatta VKSSS Maryadit and Ors. v. State of Maharashtra and Ors (2001) 4 SCC 534 (Paragraph 26) and Padma Sundara Rao (Dead) and Ors. v. State of T.N. and Ors. (2002) 3 SCC 533 (Paragraphs 14 and 15). It is true that when the words of a statute are clear, plain or unambiguous, i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. The rule stated by TINDAL, C.J. in Sussex Peerage case, (1844) 11 Cl & F 85, p. 143) is in the following form: "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver".

Here, the question is what is clearly stated in Section 40 as the criteria for valuation of suit filed for cancellation of

a document. Section 40 of the Act mandates that if a suit is filed for cancelling a document which creates, assigns or extinguishes the right, title or interest in an immovable property, if the whole document is to be cancelled, *the value of the property* for which the document was executed and if plaint is only to cancel part of the document, *such part of the value of property for which document was executed* is the basis for suit valuation. Therefore, value depends on the value of property for which document was executed and sought to be cancelled and not the value mentioned in the document. Here, a gift deed is sought to be cancelled. Then on a plain meaning of Section 40, suit should be valued at the value of the property for which gift deed was executed and not the value of the document or value mentioned in the document. If a gift deed is executed out of love and affection, which is a valid consideration, suit valuation depends upon not on estimation of value of love and affection or null value, but, on the value of the property covered by the gift deed. Then the question is what is the value of property at the time of filing the suit. In legal terms value of property means market value of property and when valuation is considered with regard to suit valuation, it can only be market value of property at the time of filing the suit and nothing else. Section 7(1) clearly states that except otherwise provided, court fee payable under the Act depends on the market value determined on the date of presentation of plaint. No contrary indication is made in Section 40."

27. In *Smt. Narbada v. Smt. Aashi* AIR 1987 Rajasthan 162, the learned Single Judge of Rajasthan High Court followed the ratio of the Division Bench of Kerala High Court in *P.K. Vasudeva Rao v. Hari Menon* (supra) and held that in a suit for cancellation of decree, the court fee is required to be paid on the market value of the property.

28. In *Andalammal v. B. Kanniah* (1971) II Madras Law

Journal 205, the learned Single Judge considered the question relating to court fee in the context of a suit filed for cancellation of a settlement deed on the ground that the same had been procured by fraudulent misrepresentation. In the settlement deed, the property was valued at Rs.10,000/-. The learned trial Court held that the suit should be valued on the market value of the property as on the date of plaint and not on the basis of the value of suit in the settlement deed and accordingly directed the plaintiff to pay deficit court fee after furnishing the market value of the property. The learned Single Judge referred to Section 40 of the Madras Act and held:

> "It is important to mark the words "the amount or value of the property for which the document was executed". If the Legislature had said "the amount or value of the property in respect of which the document was executed", it would be reasonable to hold that the basis shall be the market value of the property, regardless of what the document says it is. But as the section refers to "the amount or value of the property for which the document was executed", the legislative intent is clear that the basis for the purpose of valuation shall be the amount or value mentioned in the document itself. Evidently, the intention of the Legislature is that when a person seeks to cancel a document executed by himself, he shall pay Court-fee upon the value which he has chosen to put upon the property in the document he seeks to cancel. The word "value" ordinarily connotes the price set on a thing, and when the Legislature directs that the value of the subject-matter shall be deemed to be the amount or value of the property for which the document was executed, I see no warrant for ignoring the plain language or the section and holding that the value shall be the market value of the property. In fact, the Legislature has expressly used the words "market value" in twelve other sections of the Act in contra distinction to the word "value" used in section 40(1) of the Act. I, therefore, hold that the Court-fee paid by the petitioner

upon the basis of the value of the property as given in the settlement deed is correct."

29. In *Allam Venkateswara Reddy v. Golla Venkatanarayana* AIR 1975 A.P. 122, a learned Single Judge of Andhra Pradesh High Court construed Section 37 of the Andhra Pradesh Court-fees and Suits Valuation Act, which is *pari materia* to Section 40 of the Act, and held:

"Section 37(1) contemplated two kinds of suits, viz. suits for cancellation of decrees, whether they are for money or for property having a money value and suits for cancellation of documents creating or extinguishing rights whether in money, movable or immovable property. It is stated therein that for the purpose of payment of court-fee in the suit the fee shall be computed on the basis of the value of the subject-matter of the suit and that such value shall be deemed to be the one indicated in clause (a) of Section 37(1) wherein it is mentioned that if the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed shall be deemed to be the value for computation of court-fee . From this it is very clear that for cancellation of a document regarding a property the value shall be deemed to be the amount for which the document regarding a property the value shall be deemed to be the amount for which the document sought to be cancelled was executed with regard to the property. In the present case, the two sale deeds in question were executed for a sum of Rs.18,000/-. Therefore, the court-fee has to be paid on that amount and not on the present market value of the properties which are the subject-matter of the two sale deeds. A reading of Section 37 does not show that the court-fee has to be computed on the basis of the present market value of the document sought to be cancelled."

30. In view of our analysis of the relevant statutory

provisions, it must be held that the judgments of the Division Bench of Madras High Court and of the learned Single Judges in *Venkata Narasimha Raju v. Chandrayya* (supra), *Navaraja v. Kaliappa Gounder* (supra), *Arunachalathammal v. Sudalaimuthu Pillai* (supra) and *Andalammal v. B. Kanniah* (supra) as also the judgment of the learned Single Judge of Andhra Pradesh High Court in *Allam Venkateswara Reddy v. Golla Venkatanarayana* (supra) lay down correct law. In the first of these cases, the Division Bench of Madras High Court rightly observed that when there is a special rule in the Act for valuing the property for the purpose of court fee, that method of valuation must be adopted in preference to any other method and, as mentioned above, Section 40 of the Act certainly contains a special rule for valuing the property for the purpose of court fee and we do not see any reason why the expression 'value of the property' used in Section 40(1) should be substituted with the expression 'market value of the property'.

31. The judgment of the learned Single Judge of Madras High Court in *Balireddi v. Khatipulal Sab* (supra)**,** which was approved by the Full Bench of that Court in *Kutumba Sastri v. Sundaramma* (supra) turned primarily on the interpretation of Section 7(iv-A) of the Court Fee Act as amended by Madras Act which refers to the value of the property simpliciter and the Court interpreted the same as market value. Neither the learned Single Judge nor the Full Bench were called upon to interpret a provision like Section 40 of the Act. Therefore, the ratio of those judgments cannot be relied upon for the purpose of interpreting Section 40 of the Act. In *Arunachalathammal v. Sudalaimuthu Pillai* (supra)**,** the learned Single Judge rightly distinguished the judgment of the Full Bench by making a pointed reference to the language employed in Section 40(1) of the Madras Act No.XIV of 1955, which is identical to Section 40 of the Act. In *Sengoda Nadar v. Doraiswami Gounder and others* (supra) and *S. Krishna Nair and another v. N. Rugmoni Amma* (supra), the other learned Single Judges did not correctly appreciate the ratio of the judgment of the coordinate

Bench in *Arunachalathammal v. Sudalaimuthu Pillai* (supra) and distinguished the same without assigning cogent reasons. We may also observe that if the learned Single Judges felt that the view expressed by the co-ordinate Bench was not correct, they ought to have referred the matter to the larger Bench. The judgments of the Division Benches of Kerala High Court in *Krishnan Damodaran v. Padmanabhan Parvathy* (supra), *P.K. Vasudeva Rao v. Hari Menon* (supra) and *Pachayammal v. Dwaraswamy Pillai* (supra) and of the learned Single Judges in *Appikunju Meerasayu v. Meeran Pillai* (supra) and *Uma Antherjanam v. Govindaru Namboodiripad and others* (supra) also do not lay down correct law because the High Court did not appreciate that the legislature has designedly used different language in Section 40 of the Act and the term 'market value' has not been used therein. The same is true of the judgments of the learned Single Judges of Mysore and Rajasthan High Courts noticed hereinabove.

32. In the result, the appeal is allowed. The impugned order of the learned Single Judge of Kerala High Court as also the order passed by the trial Court directing the appellant to pay court fee on the market value of the property, in respect of which the sale deed was executed by respondent No.1 in favour of respondent No.2, are set aside. The trial Court shall now proceed with the case and decide the same in accordance with law. The parties are left to bear their own costs.

B.B.B. Appeal allowed.

UNION OF INDIA
v.
RAMESH RAM & ORS. ETC.
(Civil Appeal Nos. 4310-4311 of 2010)

MAY 7, 2010

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

Constitution of India, 1950:

Articles 14, 16(4) and 335 – Reservation in Central Civil Services – Meritorious Reserved Category candidates placed in the list of unreserved category candidates – Exercising choice to migrate to reserve category for the purpose of allocation of service in the order of their preferences – HELD: The reserved category candidates "belonging to OBC, SC/ ST categories" who are selected on merit and placed in the list of General/Unreserved category candidates can choose to migrate to the respective reserved category at the time of allocation of services and they would be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas – The seat vacated by MRC candidate in the general pool will be offered to General Category candidates, otherwise the aggregate reservation could possibly exceed 50% of all available posts and it would not be in accordance with the decision in Indira Sawhney that aggregate reservation should not exceed 50% of all the available posts – Such migration as envisaged by Rule 16 (2) of Civil Services Examination Rules is not inconsistent with Rule 16 (1) of the Rules or Articles 14, 16 (4) and 335 of the Constitution – By operation of Rule 16 (2), the reserved status of an MRC candidate is protected so that his/ her better performance does not deny him of the chance to be allotted

to a more preferred service – Validity of r.16(2) upheld – Civil Services Examination Rules – Rule 16(1) and 16(2).

Articles 14, 16(4) and 335 – Reservation in service vis-à-vis reservation for admission to P-G Medical courses – HELD: There is an obvious distinction between qualifying through an entrance test for securing admission in a medical college and qualifying in the UPSC examinations for filling up vacancies in the various civil services – In UPSC examinations, candidates also compete amongst themselves to secure the service of their choice in the order of their preferences – The judgment in Ritesh R. Sah[1] dealing with admission to post-graduate medical courses, cannot be readily applied to the examinations conducted by the UPSC.

In the Civil Services Examination 2005, certain Meritorious Reserved Category candidates (MRCs), who were selected on merit and recommended against unreserved vacancies, opted for reserved vacancies for the purpose of service allocation and got the service of higher choice in the order of their preferences. Consequently, equal number of general category candidates from the consolidated reserve list (wait list) were recommended by the UPSC. Some of the OBC candidates in the reserve list filed application before the Central Administrative Tribunal challenging Rule 16(2) of the Civil Services Examination Rules, contending that adjustment of OBC merit candidates against the vacancies reserved for OBCs was illegal. The Tribunal held that meritorious OBC candidates who were selected on merit should be adjusted against 'General Category'. However, the Tribunal ordered that Rule 16(2) would be applied in terms of the decision of the Supreme Court in *Anurag Patel's* **case[2], to ensure that allocation of service**

1. *Ritesh R. Sah v. Dr. Y.L. Yamul* **1996 (2) SCR 695.**

2. *Anurag Patel vs. U.P. Public Service Commission & Ors.,* **2004 (4) Suppl. SCR 888.**

was in accordance with rank-cum-preference with priority given to meritorious candidates for service allocation. But, the High Court held Rule 16(2) as unconstitutional, set aside the select list and directed the Central Government and the UPSC to do the service allocation afresh de hors Rule 16(2). Aggrieved, the Union of India and other aggrieved persons filed the appeals and the writ petitions.

The questions for consideration before the Court were: (i) "Whether the Reserved Category candidates who were selected on merit (i.e. MRCs) and placed in the list of General Category candidates could be considered as Reserved Category candidates at the time of "service allocation"?; (ii) Whether Rules 16 (2), (3), (4) and (5) of the CSE Rules are inconsistent with Rule 16 (1) and violative of Articles 14, 16 (4) and 335 of the Constitution of India?" and (iii) "Whether the order of the Central Administrative Tribunal was valid to the extent that it relied on *Anurag Patel v. Uttar Pradesh Public Service Commission and Others* **(2005) 9 SCC 742[3] (which in turn had referred to the judgment in** *Ritesh R. Sah v. Dr. Y.L.Yamul and Others* **(1996) 3 SCC 253[4], which dealt with reservations for the purpose of admission to post-graduate medical courses); and whether the principles followed for reservations in admissions to educational institutions can be applied to examine the constitutionality of a policy that deals with reservation in civil services."**

Disposing of the matters, the Court

HELD: 1.1. MRC candidates who avail the benefit of Rule 16 (2) of the Civil Services Examination Rules and are adjusted in the reserved category should be counted

3. **(2004) 4 Supp. SCR 888.**

4. **1996 (2) SCR 695.**

as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the General Pool will be offered to General Category candidates. This is the only viable solution since allotting these General Category seats (vacated by MRC candidates) to relatively lower ranked Reserved Category candidates would result in aggregate reservations exceeding 50% of the total number of available seats. Therefore, there is no hurdle to the migration of MRC candidates to the Reserved Category. [para 32 and 50(i)] [729-E-F; 745-E]

Post Graduate Institute of Medical Education and Research v. Faculty Association **(1998) 2 SCR 845 = (1998) 4 SCC 1; and** *State of Kerala v. N.M. Thomas* **(1976) 1 SCR 906 = (1976) 2 SCC 310 – referred to.**

Union of India v. Satya Prakash **(2006) 3 SCR 789 = (2006) 4 SCC 550, held inapplicable.**

1.2. Rule 16 (2) should not be interpreted in an isolated manner since it was designed to protect the interests of MRC candidates. MRC candidates having indicated their status as SC/ST/OBC at the time of application, begin their participation in the examination process as Reserved Candidates. Having qualified as per the general qualifying standard, they have the additional option of opting out of the Reserved Category and occupying a General post. Where, however, they are able to secure a better post in the Reserved List their placement in the General List should not deprive them of the same. In that respect, the adjustment referred to in Rule 16 (2) does not, in fact, denote any change in the status of the MRC from General to Reserved. To the contrary, it is an affirmation of the Reserved Status of the MRC candidate. Rule 16(2) exists to protect this Reserved Status of the MRC candidates. [para 26] [726-A-C]

1.3. It has also to be noted that when MRC candidates get adjusted against the Reserved Category, the same creates corresponding vacancies in the General Merit List (since MRC candidates are on both lists). These vacancies are of course filled up by general candidates. Likewise, when MRC candidates are subsequently adjusted against the General Category [i.e. without availing the benefit of Rule 16 (2)], the same will result in vacancies in the Reserved Category which must in turn be filled up by Wait Listed Reserved Candidates. Rule 16(2) operates to recognize the *inter se* merit amongst the Reserved Category candidates. The two stage process is designed in a manner that no person included in the first recommended list is subsequently eliminated. Operation of Rule 16 does not result in ouster of any of the candidates recommended in the first list. Many of the wait-listed candidates are accommodated in the second stage, and the relatively lower ranked wait-listed candidates are excluded. Such exclusion is on the basis of merit and the aggrieved parties were never promised a post. It is pertinent to note that these excluded candidates never had any absolute right to recruitment or even any expectation that they would be recruited. Their chances depend on how the MRC candidates are adjusted. [para 27and 34] [726-D-G]

State of Bihar v. M .Neeti Chandra **1996 (5) Suppl. SCR 696 = (1996) 6 SCC 36, referred to.**

1.4. It is significant to note that the aggregate reservation should not exceed 50% of all the available vacancies, in accordance with the decision of this Court in *Indra Sawhney.* If the MRC candidates are adjusted against the Reserved Category vacancies with respect to their higher preferences and the seats vacated by them in the General Category are further allotted to other Reserved Category candidates, the aggregate reservation

could possibly exceed 50 % of all of the available posts. [para 29] [727-E]

Indra Sawhney v. Union of India **1992 (2) Suppl. SCR 454 = (1992) Supp. 3 SCC 217, referred to.**

2.1. With regard to the specific characteristics of the UPSC examinations, this Court holds that the reserved category candidates "belonging to OBC, SC/ ST categories" who are selected on merit and placed in the list of General/Unreserved category candidates can choose to migrate to the respective reserved category at the time of allocation of services. Such migration as envisaged by Rule 16 (2) of Civil Services Examination Rules is not inconsistent with Rule 16 (1) of the Rules or Articles 14, 16 (4) and 335 of the Constitution. The validity of Rule 16 of Civil Service Examination Rules 2005 (notification dated 4.12.2004) is upheld. [para 49, 50(iv) and 51] [745-B-C; 746-A-C]

2.2. The current process entails that a Reserved Candidate, although having done well enough in the examination to have qualified in the open category, does not automatically rescind his/her right to a post in the Reserved Category. By operation of Rule 16 (2), the reserved status of an MRC candidate is protected so that his/ her better performance does not deny him of the chance to be allotted to a more preferred service. If such rule is declared redundant and unconstitutional vis-à-vis Article 14, 16 and 335 then the whole object of equality clause in the Constitution would be frustrated and the MRC candidates selected as per the general qualifying standard would be disadvantaged since the candidate of his/her category who is below him/her in the merit list, may, by availing the benefits of reservation, attain a better service when allocation of services is made. Rule 16 in essence and spirit protects the pledge outlined in the Preamble of the Constitution which conceives of equality

of *status and opportunity*. [para 34, 40 and 50(ii)] [730-G-H; 745-F; 737-D-E]

2.3. It is significant to note that affirmative action measures should be scrutinized as per the standard of proportionality. This means that the criteria for any form of differential treatment should bear a rational correlation with a legitimate governmental objective. In the instant case, a distinction has been made between Meritorious Reserved Category candidates and relatively lower ranked Reserved Category candidates. The amended Rule 16 (2) only seeks to recognize the *inter se* merit between two classes of candidates i.e. (a) meritorious reserved category candidates and (b) relatively lower ranked reserved category candidates, for the purpose of allocation to the various Civil Services with due regard for the preferences indicated by them. [para 48 and 50(iii)] [744-G-H; 745-A-G]

2.4. The proviso to Rule 16 (1) and Rule 16 (2) operate in different dimensions and it cannot be said that these provisions are contradictory or inconsistent with each other. Rule 16 (1) mandates that after the interview phase, the candidates will be arranged in the order of merit on the basis of aggregate marks obtained in the main examination. Later on, the UPSC shall fix qualifying marks for recommending the candidates for the unreserved vacancies. Proviso to sub-rule (1) lays down that a candidate who belongs to SC, ST or OBC category and who has qualified on his own in the merit list shall not be recommended against the vacancies reserved for such classes if such candidate has not availed of any of the concessions or relaxations in the eligibility or the selection criteria. [para 33 and 47] [744-C; 730-A-C]

2.5. When MRC candidates do not choose to accept the General Category slot available to them on account of their merit, but opt to occupy a slot reserved for

reservation category candidates, because that post is more attractive, then counting him/ her against reservation quota will not violate the law laid down in *Indra Sawhney.* **[para 37] [735-H; 736-A-C]**

Indra Sawhney v. Union of India **1992 (2) Suppl. SCR 454 = (1992) Supp. 3 SCC 217;** *M. Nagaraj v. Union of India* **2006 (7) Suppl. SCR 336 = (2006) 8 SCC 212, referred to.**

2.6. Article 16(4) of the Constitution empowers the State to initiate measures in order to protect and promote the interests of backward classes (OBC, SC and ST). The impugned measures in no way offend the equality clause since this particular clause was inserted to safeguard the concerns of certain classes and shield their legitimate claims in the domain of public employment. Rule 16 (2) and the subsequent sub-rules merely recognize and advance *inter se* merit among the Reserved Category candidates. [para 39] [736-F-H; 737-A-B]

3.1. The decision in *Anurag Patel* **rectified the anomaly which had occurred since the U.P.P.S.C. had allotted services of lower preference to the candidates of backward classes who were meritorious enough to qualify as per the criteria laid down for General Category candidates. Such meritorious candidates were disadvantaged on account of qualifying on merit which was patently offensive to the principles outlined in Articles 14 and 16 of the Constitution. This Court had reached such conclusion to ensure that allocation of service is in accordance with the rank-cum-preference basis with priority given to meritorious candidates for service allocation. [para 43] [742-A-C]**

Anurag Patel vs. U.P. Public Service Commission & Ors., **2004 (4) Suppl. SCR 888 = 2005 (9) SCC 742, referred to.**

3.2. The judgment in *Ritesh R. Sah* **was given in**

relation to reservation for admission to post-graduate medical courses and the same cannot be readily applied to the examinations conducted by the UPSC. The ultimate aim of Civil Services aspirants is to qualify for the most coveted services and each of the services have quotas for reserved classes, the benefits of which are availed by MRC candidates for preferred service. The benefit accrued by different candidates who secure admission in a particular educational institution is of a homogeneous nature. However, the benefits accruing from successfully qualifying in the UPSC examination are of a varying nature since some services are coveted more than others. [para 44] [742-D-F]

3.3. There is an obvious distinction between qualifying through an entrance test for securing admission in a medical college and qualifying in the UPSC examinations since the latter examination is conducted for filling up vacancies in the various civil services. In the former case, all the successful candidates receive the same benefit of securing admission in an educational institution. However, in the latter case there are variations in the benefits that accrue to successful candidates because they are also competing amongst themselves to secure the service of their choice. [para 24] [724-F-G]

3.4. The order of the CAT is valid to the extent that it relied on the ratio propounded by this Court in *Anurag Patel v. Uttar Pradesh Public Service Commission*. **Even though that decision had in turn relied on the verdict of this Court in** *Ritesh R. Sah v. Dr. Y.L.Yamul and Others,* **the latter case is distinguishable from the present case with respect to the facts in issue. However, the conclusions arrived at by the Central Administrative Tribunal in its order cannot be approved as it failed to take note of the unique characteristics of the UPSC examinations. [para 45] [742-G-H; 743-A]**

Ritesh R. Sah v. Dr. Y.L.Yamul **1996 (2) SCR 695 = (1996) 3 SCC 253, distinguished.**

R.K. Sabharwal v. State of Punjab **1995 (2) SCR 35 = (1995) 2 SCC 745, held inapplicable.**

Anurag Patel vs. U.P. Public Service Commission & Ors., **2004 (4) Suppl. SCR 888 – (2005) 9 SCC 742, referred to.**

Case Law Reference:

2004 (4) Suppl. SCR 888	**referred to**	**para 8**
1996 (2) SCR 695	**distinguished**	**para 13(III)**
(2006) 3 SCR 789	**held inapplicable**	**para 17**
1992 (2) Suppl. SCR 454	**referred to**	**para 29**
(1998) 2 SCR 845	**referred to**	**para 30**
(1976) 1 SCR 906	**referred to**	**para 31**
1996 (5) Suppl. SCR 696	**referred to**	**para 36**
2006 (7) Suppl. SCR 336	**referred to**	**para 38**
1995 (2) SCR 35	**held inapplicable**	**para 46**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4310-4311 of 2010.

From the Judgment & Order dated 20.03.2008 of the High Court of Judicature at Madras in W.P. No. 1814 and 1815 of 2008.

WITH

C.A. Nos. 4315-4316 of 2010

C.A. Nos. 4319 of 2010

C.A. Nos. 4324-4328 of 2010

W.P. (C) No. 297, 312, 336, 414, 416 and 539 of 2008.

Gopal Subramanium, Sol. Genl. of India, Indira Jaisingh, ASG, A. Maiarputham, Raju Ramchandra, Prof. Ravi Verma Kumar, Nidesh Gupta, P.S. Patwalia, P.P. Rao, Raju Ramchandran, Tufail A. Khan, Chinmoy P. Shama, Aman Ahluwalia, Madhuima Tatia, Anil Katiyar, Shree Prakash Sinha, Vijay Kumar, Shankar N. Mrigank Prabhakar, Shekhar Kumar, E.C. Vidyasagar, Shiva Pujan Singh, Prabhash Kumar Yadav, P. Soma Sundaram, Anadaselvam, Anirudh Sharma, Shaffi Mather (for Subramonium Prasad), Ajay Bansal, Devendra Singh, Ajay Choudhary, Vibha Datta Makhija, Ajay Pratap Singh, Tushar Bakshi, Ajit Singh, Rudreshwar Singh, Philemon Nongbri, Kumar Ranjan, Y.C. Simhadri, Shishir Pinaki, Kaushik Poddar, Gopal Jha, Sukant Vikram, Tapesh Kumar Singh, Ramesh, Divya Singh, Sharad Pandey, Praveen Aggrawal , Vijay Kumar, Santosh Paul, Arvind Gupta, S.N. Bundela, K.K. Bhat, M.J. Paul, Dharsam Bir Raj Vohra, Binu Tamta, V. Mohana, Sanjay Jain, Vinay Kumar Garg, Dharmendra Kr. Sinha, M.M. Singh, S.K. Singh of the appearing parties.

The Judgment of the Court was delivered by

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

2. The constitutional validity of sub-rules (2) to (5) of Rule 16 of the Civil Service Examination Rules (hereinafter 'Rules') relating to civil services examinations held by the Union Public Service Commission in the years 2005 to 2007 is the subject-matter of these appeals by special leave. A three Judge Bench of this Court, by order dated 14.5.2009 has referred these cases to the Constitution Bench as it raises an important legal question as to whether candidates belonging to reserved category, who get recommended against general/unreserved vacancies on account of their merit (without the benefit of any

relaxation/concession), can opt for a higher choice of service earmarked for Reserved Category and thereby migrate to reservation category.

3. Selection to three All India Services (Indian Administrative Service, Indian Foreign Service and Indian Police Service) and fifteen Group 'A' Services and three Group 'B' officers in various Government departments are made by the Union Public Service Commission (hereinafter 'UPSC'), by conducting Civil Service Examinations periodically. Civil Service Examinations are held as per the Civil Service Examinations Rules notified in regard to each examination. The Rules for the Civil Service Examination which was to be held in 2005 by the UPSC were published by the Department of Personnel and Training (hereinafter 'DOP&T') vide Notification dated 4.12.2004.

4. To appreciate the issue, it will be necessary to refer to the relevant rules. The Preamble to the Rules enumerates 21 services. Rule 1 provides that the examination will be conducted by the UPSC in the manner prescribed in Appendix-I to the Rules.

(4.1) Rule 2 of the Rules relates to preferences and is extracted below:

> "2. A candidate shall be required to indicate in his/her application form for the Main Examination his/her order of preferences for various services/posts for which he/she would like to be considered for appointment in case he/she is recommended for appointment by Union Public Service Commission.
>
> A candidate who wishes to be considered for IAS/IPS shall be required to indicate in his/her application if he/she would like to be considered for allotment to the State to which he/she belongs in case he/she is appointed to the IAS/IPS.

> *Note.*—The candidate is advised to be very careful while indicating preferences for various services/posts. In this connection, attention is also invited to rule 19 of the Rules. The candidate is also advised to indicate all the services/posts in the order of preference in his/her application form. In case he/she does not give any preference for any services/posts, it will be assumed that he/she has no specific preference for those services. If he/she is not allotted to any one of the services/posts for which he/she has indicated preference, he/she shall be allotted to any of the remaining services/posts in which there are vacancies after allocation of all the candidates who can be allocated to services/posts in accordance with their preferences."

(4.2) Rule 3 relates to number of vacancies and provision for reservation and it reads as follows:

> "3. The number of vacancies to be filled on the result of the examination will be specified in the Notice issued by the Commission.
>
> Reservation will be made for candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes and physically disabled categories in respect of vacancies as may be fixed by the Government."

(4.3) Rule 15 provides for three examinations namely preliminary examination, main written examination and interview test as follows:

> "15. Candidates who obtained such minimum qualifying marks in the Preliminary Examination as may be fixed by the Commission at their discretion shall be admitted to the Main Examination; and candidates who obtain such minimum qualifying marks in the Main Examination (written) as may be fixed by the Commission at their

discretion shall be summoned by them for an interview for personality test:

Provided that candidates belonging to the Scheduled Castes or Scheduled Tribes or Other Backward Classes may be summoned for an interview for a personality test by the Commission by applying relaxed standards in the Preliminary Examination as well as Main Examination (Written) if the Commission is of the opinion that sufficient number of candidates from these communities are not likely to be summoned for interview for a personality test on the basis of the general standard in order to fill up vacancies reserved for them."

(4.4) Rule 16 lays down the manner of selection, preparation of merit list and selection of candidates. The said rule is extracted below:

"16.(1) After interview, the candidates will be arranged by the Commission in the order of merit as disclosed by the aggregate marks finally awarded to each candidate in the Main Examination. Thereafter, the Commission shall, for the purpose of recommending candidates against unreserved vacancies, fix a qualifying mark (hereinafter referred to as general qualifying standard) with reference to the number of unreserved vacancies to be filled up on the basis of the Main Examination. For the purpose of recommending Reserved Category candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes against reserved vacancies, the Commission may relax the general qualifying standard with reference to number of reserved vacancies to be filled up in each of these categories on the basis of the Main Examination:

Provided that the candidates belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes who have not availed themselves of any of the

concessions or relaxations in the eligibility or the selection criteria, at any stage of the examination and who after taking into account the general qualifying standards are found fit for recommendation by the Commission shall not be recommended against the vacancies reserved for Scheduled Castes, Scheduled Tribes and the Other Backward Classes.

(2) While making service allocation, the candidates belonging to the Scheduled Castes, the Scheduled Tribes or Other Backward Classes recommended against unreserved vacancies may be adjusted against reserved vacancies by the Govt. if by this process they get a service of higher choice in the order of their preference.

(3) The Commission may further lower the qualifying standards to take care of any shortfall of candidates for appointment against unreserved vacancies and any surplus of candidates against reserved vacancies arising out of the provisions of this rule, the Commission may make the recommendations in the manner prescribed in sub-rules (4) and (5).

(4) While recommending the candidates, the Commission shall, in the first instance, take into account the total number of vacancies in all categories. This total number of recommended candidates shall be reduced by the number of candidates belonging to the Scheduled Castes, the Scheduled Tribes and Other Backward Classes who acquire the merit at or above the fixed general qualifying standard without availing themselves of any concession or relaxation in the eligibility or selection criteria in terms of the proviso to sub-rule (1). Along with this list of recommended candidates, the Commission shall also declare a consolidated reserve list of candidates which will include candidates from general and reserved categories ranking in order of merit below the last recommended

candidate under each category. The number of candidates in each of these categories will be equal to the number of Reserved Category candidates who were included in the first list without availing of any relaxation or concession in eligibility or selection criteria as per proviso to sub-rule (1). Amongst the reserved categories, the number of candidates from each of the Scheduled Caste, the Scheduled Tribe and Other Backward Class categories in the reserve list will be equal to the respective number of vacancies reduced initially in each category.

(5) The candidates recommended in terms of the provisions of sub-rule (4), shall be allocated by the Government to the services and where certain vacancies still remain to be filled up, the Government may forward a requisition to the Commission requiring it to recommend, in order of merit, from the reserve list, the same number of candidates as requisitioned for the purpose of filling up the unfilled vacancies in each category."

(4.5) Rule 19 provides that due consideration will be given at the time of making allocation on the results of the examination to the preferences expressed by a candidate for various services at the time of his application and the appointment to various services will also be governed by the Rules/Regulations in force, as applicable to the respective Services at the time of appointment.

5. The total vacancies notified by the participating services for the Civil Service Examination, 2005 were 457 made up of General Category : 242, OBC category : 117, Scheduled Castes : 166 and Scheduled Tribes : 32. As per Rule 16(1) and (4), UPSC recommended 425 candidates in the first phase made up of the following: General — 210, OBC — 117 (including 31 merit candidates); Scheduled Castes — 66 (including 1 merit candidate) and Scheduled Tribes — 32. A consolidated Reserve list (wait-list) was also prepared consisting of 64 candidates. The DOP&T after allocation of the

candidates from the first list, made a requisition for recommendation of candidates through the operation of the reserve list. 26 Meritorious OBC candidates and one Meritorious Scheduled Caste candidate recommended against unreserved vacancies, opted for reserved vacancies as by that process, they got a service of higher choice in the order of preference. If the said 27 meritorious reserved category candidates had been considered only for service allocation against unreserved vacancies in competition with the General Category candidates, they would have got a service of lower choice. Rule 16(2) enabled the meritorious candidate of any of the reservation categories to get a service of higher preference so that he may not be placed at a disadvantaged position vis a vis other candidates of his category.

6. The DOP&T could therefore adjust only 5 out of the 31 Meritorious Category OBC candidates through their merit-cum-service preference option as General Candidates. As a result, the UPSC recommended under Rule 16(5) of the Rules, 27 General Category candidates and 5 OBC candidates from the consolidated Reserve List.

7. Certain OBC candidates in the Reserve (wait list) filed applications before the Central Administrative Tribunal, Madras Bench, challenging Rule 16(2). It was contended that adjustment of OBC merit candidates against OBC reservation vacancies was illegal. According to them, such candidates should be adjusted against the general (unreserved) vacancies, as that would have allowed more posts for OBC candidates and would have allowed the lower ranked OBC candidates a better choice of service. They contended that more meritorious OBC candidates should be satisfied with lower choice of service as they became general (unreserved) candidates by reason of their better performance.

8. The Tribunal, after interpreting amended Rule 16(2) in the light of the various judgments of this Court, concluded that

meritorious OBC candidates who were selected on merit must be adjusted against the 'General Category'. However, it ordered that Rule 16(2) may be applied in terms of decision of this Court in *Anurag Patel vs. U.P. Public Service Commission & Ors.,* (2005) 9 SCC 742, to ensure that allocation of service is in accordance with rank-cum-preference with priority given to meritorious candidates for service allocation.

9. The Union of India and other aggrieved candidates preferred Writ Petitions before the Madras High Court challenging the order of the Central Administrative Tribunal. Some other aggrieved candidates got themselves impleaded in the said proceedings. By the impugned order dated 20.3.2008, the High Court held Rule 16(2) as unconstitutional. Consequently, the High Court set aside the select lists and directed the Government of India and UPSC to redo service allocation *de hors* Rule 16(2).

10. The first batch of civil appeals @ SLP [C] Nos. 13571-13572 of 2008 is filed by the Union of India against the said order dated 20.3.2008 in W.P. [C] Nos.1814 & 1815 of 2008. Other persons aggrieved by the said order have filed the remaining civil appeals. Being aggrieved by the action of the Union Public Service Commission and the Government of India by which candidates in Reserved Category selected in General Category were given choice to opt for service of higher preference in terms of Rule 16(2) of the Rules, some of the reservation category candidates have filed Writ Petition (C) Nos.297, 312, 336 & 416 of 2008 under Art. 32 of the Constitution of India to declare Rule 16(2),(3),(4) and (5) of the Civil Services Examination Rules, 2005 as *ultra vires* being inconsistent with Rule 16(1) of the said Rules, as violative of Articles 14, 16(4) and 335 of Constitution of India, consequential reliefs.

11. We heard Mr. Gopal Subramanium, Learned Solicitor

General of India, on behalf of the Union of India. Ms. Indira Jaisingh, Learned ASG appeared in W.P. (C) No. 297/1008. Mr. P.P. Rao, Sr. Adv., Mr. P.S. Patwalia, Sr. Adv. and Mr. Anirudh Sharma, Adv. represented the appellants in the other appeals. Mr. Raju Ramachandran, Sr. Adv., Mr. Nidheesh Gupta, Sr. Adv., Prof. Ravi Varma Kumar, Sr. Adv., Mr. Santosh Paul, Adv., Mr. S.P. Sinha, Adv., Mr. Praveen Agarwal, Adv., and Mr. Shiv Pujan Singh Adv., appeared on behalf of the writ petitioners and the respondents in the writ appeals.

12. The case of the contesting respondents is that the newly introduced system which is different from the single list system followed earlier (prior to amendment of CSE Rules) will undermine the rights of the Reserved Category candidates to get assigned to services of higher preference (e.g. IAS, IPS or IRS). They also urged that this system will reduce the aggregate number of reserved candidates who will be selected while simultaneously increasing the number of general candidates. It also puts candidates who come through the second list at a disadvantage in terms of seniority and promotions for rest of their career in their respective services. By the impugned order, the High Court had vindicated these grievances, particularly those raised by OBC candidates.

13. In the light of the submissions made by the learned counsel appearing for different appellants, the following questions arise for consideration:

I. Whether the Reserved Category candidates who were selected on merit (i.e. MRCs) and placed in the list of General Category candidates could be considered as Reserved Category candidates at the time of "service allocation"?

II. Whether Rule 16 (2), (3), (4) and (5) of the CSE Rules are inconsistent with Rule 16 (1) and violative of Articles 14, 16 (4) and 335 of the Constitution of India?

III. Whether the order of the Central Administrative Tribunal was valid to the extent that it relied on *Anurag Patel v. Uttar Pradesh Public Service Commission and Others,* (2005) 9 SCC 742 (which in turn had referred to the judgment in *Ritesh R. Sah v. Dr. Y.L.Yamul and Others,* (1996) 3 SCC 253, which dealt with reservations for the purpose of admission to post graduate medical courses); and whether the principles followed for reservations in admissions to educational institutions can be applied to examine the constitutionality of a policy that deals with reservation in civil services.

Re: Question I

14. The relevant provision is Rule 16(2) of the Civil Services Examination Rules which was amended by a notification dated 4.12.2004 issued by the Ministry of Personnel, Public Grievances, and Pensions (DOP&T), New Delhi. The appellants' contention is that the amended Rule 16 (2) intends to rectify an anomaly, as otherwise, the interests of the Meritorious Reserved Category (hereinafter 'MRC') candidates who have toiled hard to qualify as per the general qualifying standard would be jeopardized. Such candidates could find themselves in a position where Reserved Category candidates who are less meritorious than them can possibly secure posts in a service of a higher preference. The Union Government contends that the object of amending Rule 16 (2) is to ensure that such an adverse incongruous position does not arise for more meritorious candidates.

15. Mr. Gopal Subramanium, the Learned Solicitor General of India, has brought forth three implications and repercussions of the amended Rule 16 once it comes into operation:

(i) It affords a Meritorious Reserved Candidate the benefit of reservation insofar as Service Allocation is concerned. In other words, if such a Meritorious Reserved Candidate - although entitled to a post in the General list- is able to

secure a better (or more preferred) post in the Reserved List, Rule 16 (2) comes to his aid, and he is able to secure the better post. This preserves and protects *inter se* merit amongst the Reserved Candidates.

(ii) When Rule 16 (2) enables a Meritorious Reserved Candidate to secure a post in the Reserved Category, that Candidate is to be treated as a Reserved Candidate (consistent with his Reserved Category status as per the application form).

(iii) Once Rule 16 (2) is operated, the General post that would otherwise have been available to the Meritorious Reserved Candidate is now filled up by a (Wait Listed) General Candidate.

The Respondents have objected to the effect of Rule 16 (2) in so far as the second and third aspects are concerned. They have no grievance with respect to the first aspect. They contend that when an MRC candidate is entitled to a General Merit slot, chooses to opt for a slot earmarked for a reservation category the result should be a mutual exchange between the meritorious reserved candidate and the reserved candidate. The MRC candidate will carry the tag of a general candidate even when he occupies the reservation post and the occupant of the reservation post will migrate to the general merit slot vacated by the MRC candidate. If the MRC candidate migrating to reservation category slot is counted as a reservation candidate, to that extent there will be a reduction in the posts meant for reservation category candidates.

16. The Civil Services Examination conducted by Union Public Service Commission (UPSC) has three stages: Preliminary Examination, Main Examination, and Interview. The candidates appearing in the Examination have to render information in the application form indicating their status as General, Other Backward Class (OBC), Scheduled Castes (SC)

or Scheduled Tribes (ST). Moreover, at a later stage the candidates have to furnish their preferences of services in which they have to indicate their choices in the event of qualification. This has been spelt out in Rule 2 of the CSE Rules.

17. In support of their contentions, the respondents have relied upon the following observations of this Court in *Union of India v. Satya Prakash,* (2006) 4 SCC 550, (at paras. 18, 19 and 20):

> "18. By way of illustration, a Reserved Category candidate, recommended by the Commission without resorting to relaxed standard (i.e. on merit) did not get his own preference 'say IAS' in the merit/open category. For that, he may opt a preference from the Reserved Category. But simply because he opted a preference from the Reserved Category does not exhaust quota of OBC category candidate selected under relaxed standard. Such preference opted by the OBC candidate who has been recommended by the Commission without resorting to the relaxed standard (i.e. on merit) shall not be adjusted against the vacancies reserved for the Scheduled Castes, Scheduled Tribes and other Backward Classes. This is the mandate of proviso to Sub-rule 2 of Rule 16.
>
> 19. In other words, while a Reserved Category candidate recommended by the Commission without resorting to the relaxed standard will have the option of preference from the Reserved Category recommended by the Commission by resorting to relaxed standard, but while computing the quota/percentage of reservation he/she will be deemed to have been allotted seat as an open category candidate (i.e. on merit) and not as a Reserved Category candidate recommended by the Commission by resorting to relaxed standard.
>
> 20. If a candidate of Scheduled Caste, Scheduled Tribe and other Backward Class, who has been recommended

> by the Commission without resorting to the relaxed standard could not get his/her own preference in the merit list, he/she can opt a preference from the Reserved Category and in such process the choice of preference of the Reserved Category recommended by resorting to the relaxed standard will be pushed further down but shall be allotted to any of the remaining services/posts in which there are vacancies after allocation of all the candidates who can be allocated to a service/post in accordance with their preference."

18. The decision in *Satya Prakash* was rendered prior to the amendment of Rule 16(2) and the learned judge had not contemplated the present version of the rule. Hence, this decision is clearly distinguishable from the present case. Prior to the decision in *Satya Prakash's case* (supra.), the practice had been that a single list of successful candidates was released in respect of all the vacancies. At that time, MRC candidates were initially treated as general candidates and had Rule 16(2) not been amended, a single list would have been released for all 457 posts which were vacant in the year under consideration. Accordingly, such a list would have contained 242 General candidates (including 32 MRC candidates). There would have been a separate list for 117 OBCs, 66 SCs and 32 STs (excluding MRC candidates). When the MRC Candidates were shifted from the general list to the reserved list, there was an ouster of the relatively lower ranked Reserved Category candidates who were initially selected as part of the reserved list. For example when 27 MRC candidates (26 belonging to OBC and 1 SC) would have moved from the General List to the Reserved List, 26 OBC and 1 SC candidates who were ranked lower among the 117 OBC and 66 SC candidates initially selected in the Reserved Category, would have been ousted.

19. The unamended as well as amended Rule 16 (2) are as follows:-

Rule 16 (2) in the old Civil Service Examination Rules	**Rule 16 (2) in the current Civil Service Examination Rules (vide notification dated 4.12.2004)**
The candidates belonging to any of the Scheduled Castes or Scheduled Tribes or the Other Backward Classes may, to the extent of the number of vacancies reserved for the Scheduled Castes and the Scheduled Tribes and the Other Backward Classes be recommended by the Commission by a relaxed standard, subject to the fitness of these candidates for selection to services. Provided that the candidates belonging to the Scheduled Castes and the Scheduled Tribes and the Other Backward Classes who have been recommended by the Commission without resorting to the relaxed standard referred to in this sub-rule shall not be adjusted against the vacancies reserved for the Scheduled Castes and the Scheduled Tribes and the Other Backward Classes.	While making service allocation, the candidates belonging to the Scheduled Castes, the Scheduled Tribes or Other Backward Classes recommended against unreserved vacancies may be adjusted against reserved vacancies by the Government, if by this process, they get a service of higher choice in the order of their preference.

20. The UPSC declares results in two stages and the same was done in the year 2006. As per the final result of CSE 2005, out of 457 vacancies, 425 candidates were recommended for appointment which included 210 General, 117 OBC, 66 SC and 32 ST candidates. The UPSC was maintaining a consolidated reserve list, i.e. a Wait List of 64 candidates (consisting of 32 general, 31 OBC and 1 SC candidate) ranking in order of merit below the last recommended candidate under each of these categories as per Rule 16 (4) and (5) of the CSE Rules, 2005. Admittedly, 31 OBC category candidates who had qualified in the General Merit List were not included in the General Category and instead they were part of 117 OBC category candidates selected as part of the Reserved Category. Hence, an equal number of OBC category candidates who were ranked lower in the order of merit as part of the Reserved Category seats were initially ousted. The purpose of including those OBC category candidates who had qualified in the General Category was to give them a higher preferred service from the vacancies under the OBC category. The CSE rules were accordingly amended to allow for such a migration.

21. The Learned Solicitor General has described in detail how along with the list of recommended candidates, the UPSC also prepares a Consolidated Reserve List. This Consolidated Reserve List is a Wait List for filling the remaining 32 vacancies. It contained two parallel sub-lists: Wait List A consisting of 32 General Candidates and Wait List B consisting of 32 Reserved Candidates (31 OBCs and 1 SC) the 1 SC candidate would be positioned in the Wait List at the same position in which the 1 SC candidate was placed amongst the 32 MRC candidates. Two Wait Lists are prepared so that depending on how the 32 MRCs are placed and in whatever contingency - whether they are adjusted against General or Reserved Posts - there will remain a sufficient number of candidates (both general and reserved) to be adjusted against the balance 32 posts in the second stage.

22. When Department of Personnel and Training (DoP&T) received the Lists, the 32 MRC candidates were added to the list of 210 General candidates but at the same time they were positioned in the reserved lists of 117 OBC candidates and 66 SC candidates as well. The UPSC list counts the MRC candidates as part of the Reserved List for the purpose of ascertaining the reservation quota in terms of percentage. The rationale cited for this method is that for the purpose of service allocation, the DOP&T initially counts the MRC candidates in both the General and the Reserved Lists. These candidates are then placed against the better of the two services available to them under either of these categories which is of course based on their order of preference. A Service is allocated by moving downwards in the merit list in a serial manner, with each candidate in the merit list getting the best available option as per his/her preference.

23. The respondents have also placed strong reliance on this Court's decision in *Ritesh R. Sah v. Dr. Y.L.Yamul* (1996) 3 SCC 253). The question in that case was whether a Reserved Category candidate who is entitled to be selected for admission in open competition on the basis of his/her own merit should be counted against the quota meant for the Reserved Category or should he be treated as a general candidate. The Court reached the conclusion that when a candidate is admitted to an educational institution on his own merit, then such admission is not to be counted against the quota reserved for Schedule Castes or any other Reserved Category. However, it is pertinent to note that this decision was given in the context of admissions to medical colleges in which G.B. Pattanaik J. (as His Lordship then was) had held:

> "17. …In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a Reserved Category cannot be considered to be admitted against seats reserved for Reserved Category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious Reserved Category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the Reserved Category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for Reserved Category and thereafter the cases of less meritorious Reserved Category candidates should be considered and they will be allotted seats in whichever colleges the seats should be available. In other words, while a Reserved Category candidate entitled to admission on the basis of his merit will have the option of taking admission to the colleges where a specified number of seats have been kept reserved for Reserved Category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a Reserved Category candidate…"

24. There is an obvious distinction between qualifying through an entrance test for securing admission in a medical college and qualifying in the UPSC examinations since the latter examination is conducted for filling up vacancies in the various civil services. In the former case, all the successful candidates receive the same benefit of securing admission in an educational institution. However, in the latter case there are variations in the benefits that accrue to successful candidates because they are also competing amongst themselves to secure the service of their choice. For example, most candidates opt for at least one of the first three services [i.e. Indian Administrative Service (IAS), Indian Foreign Service (IFS) and Indian Police Service (IPS)] when they are asked for preferences. A majority of the candidates prefer IAS as the first option. In this respect, a Reserved Category candidate who has qualified as part of the general list should not be disadvantaged

by being assigned to a lower service against the vacancies in the General Category especially because if he had availed the benefit of his Reserved Category status, he would have got a service of a higher preference. With the obvious intention of preventing such an anomaly, Rule 16 (2) provides that an MRC candidate is at liberty to choose between the general quota or the respective Reserved Category quota.

25. Some factual examples can clarify the position. In 2005, an MRC (OBC) candidate attained 21st Rank overall. With respect to his position in the General Merit List, there were General Category IAS vacancies available, and he occupied the 17th out of 45 General vacancies in the IAS. Thus, he did not need the assistance of Rule 16(2) to get a post in a more preferred service since he was adjusted against the General List. Accordingly, he opted out of the Reserved Category. This was in line with the proposition that when a candidate is entitled to a certain post on his merit alone, he should not be counted against the reserved quota. In contrast, another candidate who was an MRC (OBC) candidate obtained 64th Rank overall in the CSE 2005. At his position in the General List, he was entitled to a post in the IPS since the General Category IAS vacancies had been exhausted by candidates above him in the General merit list. However, IPS was his second preference while IAS was his first preference. If he were to be considered against the vacancies in the Reserved Category, he would be entitled to a post in the IAS because the 22 OBC IAS vacancies had not been exhausted at that point of time. By the operation of Rule 16 (2), he was able to secure a post in the IAS, while retaining his Reserved Status. Having availed of this benefit, he was adjusted against the Reserved (OBC) category.

26. Learned Counsel for respondent questioned the rationale of declaring the CSE results in two phases in order to support the proposition that even if MRC candidates are given a service of a higher preference, they should not oust lower-ranked Reserved Category candidates. However, Rule

16 (2) should not be interpreted in an isolated manner since it was designed to protect the interests of MRC candidates. MRC candidates having indicated their status as SC/ST/OBC at the time of application, begin their participation in the examination process as Reserved Candidates. Having qualified as per the general qualifying standard, they have the additional option of opting out of the Reserved Category and occupying a General Post. Where, however, they are able to secure a better post in the Reserved List their placement in the General List should not deprive them of the same. In that respect, the adjustment referred to in Rule 16 (2) does not, in fact, denote any change in the status of the MRC from General to Reserved. To the contrary, it is an affirmation of the Reserved Status of the MRC candidate. Rule 16(2) exists to protect this Reserved Status of the MRC candidates.

27. We must also take note of the fact that when MRC candidates get adjusted against the Reserved Category, the same creates corresponding vacancies in the General Merit List (since MRC candidates are on both lists). These vacancies are of course filled up by general candidates. Likewise, when MRC candidates are subsequently adjusted against the General Category [i.e. without availing the benefit of Rule 16 (2)], the same will result in vacancies in the Reserved Category which must in turn be filled up by Wait Listed Reserved Candidates. Moreover, the operation of Rule 16 does not result in the ouster of any of the candidates recommended in the first list. Many of the wait-listed candidates are accommodated in the second stage, and the relatively lower ranked wait-listed candidates are excluded. It is pertinent to note that these excluded candidates never had any absolute right to recruitment or even any expectation that they would be recruited. Their chances depend on how the MRC candidates are adjusted.

28. In the impugned judgment, the High Court had reasoned that allocation to a particular post cannot be distinguished from allocation to a service for the purpose of reservation. However,

the High Court had not considered the fact that in the CSE examination, the candidates are not competing for similar posts in one service but are instead competing for posts in different services that correspond to varying preferences. Furthermore, the impugned judgment did not appreciate the possibility that when an SC/ST/OBC candidate qualifies on merit (i.e. without any relaxation/concession) there can be a situation where a lower ranked OBC candidate gets allotted to a better service in comparison to a higher ranked SC/ST/OBC candidate simply because the higher ranked OBC candidate performed well enough to qualify in the General Category. Such a situation is anomalous. As we have already discussed, the High Court's reliance on the decision of this Court in *Union of India v. Satya Prakash,* (supra.), is not tenable since it dealt with the effect of Rule 16 (2) as it existed prior to the amendment notified on 4.12.2004.

29. A significant aspect which needs to be discussed is that the aggregate reservation should not exceed 50% of all the available vacancies, in accordance with the decision of this Court in *Indra Sawhney v. Union of India,* (1992) Supp 3 SCC 217. If the MRC candidates are adjusted against the Reserved Category vacancies with respect to their higher preferences and the seats vacated by them in the General Category are further allotted to other Reserved Category candidates, the aggregate reservation could possibly exceed 50 % of all of the available posts.

30. In *Post Graduate Institute of Medical Education and Research v. Faculty Association,* (1998) 4 SCC 1, G.N. Ray J. had clearly stated that the upper ceiling of 50% reservations should not be breached:

> "32. Articles 14, 15 and 16 including Articles 16(4), 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also

> for the other members of the community who do not belong to reserved classes. Such a view has been indicated in the Constitution Bench decision of this Court in Balaji case, Devadasan case and Sabharwal case. Even in Indra Sawhney case the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15 (4) is an enabling provision like Article 16 (4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15 (4) [sic 16 (4)] must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in *State of A.P. v. U.S.V. Balram* and *C.A. Rajendran v. Union of India.* It has been indicated in Indra Sawhney that clause (4) of Article 16 is not in the nature of an exception to clauses (1) and (2) of Article 16 but an instance of classification permitted by clause (1). It has also been indicated in the said decision that clause (4) of Article 16 does not cover the entire field covered by clauses (1) and (2) of Article 16. In Indra Sawhney case this Court has also indicated that in the interests of the backward classes of citizens, the State cannot reserve all the appointments under the State or even a majority of them. The doctrine of equality of opportunity in clause (1) of Article 16 is to be reconciled in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality."

31. In *State of Kerala v. N.M. Thomas,* (1976) 2 SCC 310, the same proposition was enunciated by A.N. Ray, C.J. who had held:

> "26. The respondent contended that apart from Article 16 (4) members of scheduled castes and scheduled tribes

were not entitled to any favoured treatment in regard to promotion. In T.Devadasan v. Union of India reservation was made for backward classes. The number of reserved seats which were not filled up was carried forward to the subsequent year. On the basis of "carry forward" it was found that such reserved seats might destroy equality. To illustrate, if 18 seats were reserved and for two successive years the reserved seats were not filled and in the third year there were 100 vacancies the result would be that 54 reserved seats would be occupied out of 100 vacancies. This would destroy equality. On that ground "carry forward" principle was not sustained in Devadasan's case (supra). The same view was taken in the case of *M.R.Balaji v. State* of Mysore. It was said that not more than 50 per cent should be reserved for backward classes. This ensures equality. Reservation is not a constitutional compulsion but is discretionary according to the ruling of this Court in *Rajendran's* case (supra)."

32. Therefore, we are of the firm opinion that MRC candidates who avail the benefit of Rule 16(2) and are eventually adjusted in the Reserved Category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the general pool will therefore be offered to General Category candidates. This is the only viable solution since allotting these General Category seats (vacated by MRC candidates) to relatively lower ranked Reserved Category candidates would result in aggregate reservations exceeding 50% of the total number of available seats. Hence, we see no hurdle to the migration of MRC candidates to the Reserved Category.

Re: Question II

33. We have extracted Rule 16 of the Civil Service Examination Rules, as per notification dated 4.12.2004 issued by the Ministry of Personnel, Public Grievances and Pensions

(Department of Personnel and Training), New Delhi. A perusal of the rule discloses the following: Rule 16 (1) mandates that after the interview phase, the candidates will be arranged in the order of merit on the basis of aggregate marks obtained in the main examination. Later on, the UPSC shall fix a qualifying mark for recommending the candidates for the unreserved vacancies. Proviso to sub-rule (1) lays down that a candidate who belongs to the SC, ST & OBC categories and who has qualified on his own in the merit list shall not be recommended against the vacancies reserved for such classes if such candidate has not availed of any of the concessions or relaxations in the eligibility or the selection criteria. The other sub-rules provide as to how Meritorious Reserve Category candidates are to be adjusted and once they get services of their preference after availing the benefit of their reserved status (as SC, ST, OBC or any other applicable category), the candidates whose names are in the consolidated reserve lists are to be subsequently adjusted. The consolidated wait list includes the candidates from General Category and Reserved Category. If an MRC candidate who belongs to OBC category has availed the benefit of his status for better service allocation then the seat vacated by him will go to a General Category candidate. If he chooses not to avail the benefits of special status then he would be counted in General Category and the seat vacated by him in the Reserved Category will automatically go to a candidate who belongs to the same Reserved Category.

34. As per the submissions made before this Court, in the year 2005, 27 MRC candidates were adjusted against Reserved Category and 5 MRC candidates were adjusted in General Category. As already explained, the current process entails that a Reserved Candidate, although having done well enough in the examination to have qualified in the open category, does not automatically rescind his/her right to a post in the Reserved Category. Furthermore, Rule 16(2) operates to recognize the *inter se* merit amongst the Reserved Category

Candidates. The two stage process is designed in a manner that no person included in the first recommended list is subsequently eliminated. However, since the wait list contains more candidates than available posts, it is inevitable that some persons in the wait list will necessarily be excluded. Such exclusion is on the basis of merit and the aggrieved parties were never promised a post.

35. The following chart presented by the Learned Solicitor General explains how service allocation has been done for the years 2005, 2006 and 2007:

Service Allocation in the Years 2005, 2006, 2007

Vacancy Position

Year	General Vacancies	OBC Vacancies	SC Vacancies	ST Vacancies	Total Vacancies
2005	242	117	66	32	457
2006	273	144	80	36	533
2007	382	190	109	53	734

Candidates Recommended Against vacancies in the first case

Year	General Candidates	OBC Candidates	SC Candidates	ST Candidates	Total Candidates
2005	210	117 (including 31 merit candidates)	66 (including 1 merit) candidates)	32	425
2006	214	144 (including 41 merit candidates)	80 (including 15 merit candidates)	36 (including 2 merit candidates)	474
2007	286	190 (including 76 merit candidates)	109 (including 19 merit candidates	53 (including 1 merit canidates	638

However, we have been apprised that on account of the intervening order of the CAT Chennai Bench (dated 17.09.07 in O.A. No. 690 and 775 of 2006), the Department of Personnel & Training (DOP&T) has not been able to proceed with service allocation against the second list. Similarly, for the years 2006 and 2007, the UPSC is maintaining a Consolidated Reserve List of 116 and 192 candidates respectively, but DOP&T has not sent any requisition for the second list as per Rule 16(5).

36. In *State of Bihar v. M .Neeti Chandra,* (1996) 6 SCC 36, this Court was confronted with broadly analogous issues. In that case, the Controller of Examinations, Health Services, Government of Bihar, Patna had issued the prospectus for a competitive examination for admission to post graduate courses in Patna Medical College (Patna), Darbhanga Medical College (Laheria Sarai), Rajendra Medical College (Ranchi) and Mahatma Gandhi Medical College (Jamshedpur) for the year 1992. The prospectus contained the following provisions with respect to reservations:

> "The reservation of seats for various categories shall be as per the decision of the government. There will be no economic criteria for the reservation.
>
> | | |
> |---|---|
> | Scheduled Caste | 14% |
> | Scheduled Tribe | 10% |
> | Extremely Backward Class | 14% |
> | Backward Class | 9% |
> | *Ladies* | *3%* |

The Government of Bihar acting through the Department of Personnel and Administrative Reforms published a resolution dated 7-2-1992, bearing No. 11/K1-1022/91-K 20 [Hereinafter "Resolution No. 20"]. Paragraph 6 of the same is reproduced below:

"As there is provision in direct appointment to the effect that the candidates belonging to reserved classes, who are selected on the basis of merit would not be adjusted against reserved seats, similarly maintaining the same arrangement here also the candidates selected on the basis of merit for admission into professional training institutes would not be adjusted against the reserved quota for the candidates of the reserved classes".

The High Court of Patna which considered the matter devised a method to remove the anomalies. It initiated a process of allotment of seats by which the reserved seats were offered first (i.e. before the general seats are filled first) to the candidates of the Reserved Category on merit, and after all the reserved seats were so filled up, all other qualifying candidates of the Reserved Category were 'adjusted' against open seats in the General Category along with the general merit candidates and offered seats on merit-cum-choice basis. Furthermore, the High Court made arrangement for the Reserved Category of girls who could get seats under the reservation for girls or under those reserved for SCs /STs etc., thereby retaining a choice between one of the two reservations. The girls in excess of the reserved vacancies could seek admission on general merit. The High Court held that by this procedure all the anomalies in the procedure for allotment of seats could be removed. In the meantime, another resolution was passed which was supposed to rectify the anomalies arising out of the operation of the previous Resolution. The Resolution dated 22-3-1994 provided that casual vacancies occurring at a later stage in the General Category or Reserved Category would be filled from amongst the candidates of the respective category on merit and in that process no candidate would be allotted a college/course below the choice of the college or course already allotted. The High Court observed that the resolution takes care of the grievances of the candidates who by reason of readjustment at the State for filling up subsequent vacancies often had to lose the college/course of their choice but it did not address the anomaly that

arises when preparing the main merit list as per Resolution No. 20.

State of Bihar moved this Court in appeal against the judgment of the Patna High Court and the main ground was that if the method suggested by the High Court was followed, all students of Reserved Category who had secured the minimum marks would have to be admitted even though there may not be adequate number of vacancies for them. A.M. Ahmadi, C.J. pronounced this contention to be very genuine and laid down:

"10. Let us take a situation in which in a particular Reserved Category there are x number of seats but the candidates qualifying according to criteria fixed for that category are x+5 with the best among them also qualifying on merit as general candidates. According to the arrangement made by Circular No. 20, the first candidate gets a choice along with the General Category candidate but being not high enough in the list, gets a choice lesser than what he could secure in the Reserved Category to which he was entitled. The x number of seats could then be filled up with the four qualifying candidates being denied admission for want of seats. This would have been harsh for the best candidate as well as violative of Articles 14 and 16 of the Constitution. On the other hand, if the direction of the High Court is followed, the first x number of candidates get seats according to merit against the reserved seats but the remaining will also have to be 'adjusted' against the open seats for regular candidates. These will be those who are not qualified according to general merit criteria and so will necessarily displace 5 general candidates who would be entitled to seats on merit.

11. In a particular year, the number of such candidates may be much larger and thus the method evolved by the High Court may create much hardship. The method will also not be in tune with the principles of equality. Hence the method evolved by the High Court will have to be struck down.

12. If however, the word 'adjusted 'is read to mean considered along with the general merit list candidates, it will lose much of its value. As per the above illustration, the 5 candidates qualifying on Reserved Category criteria having not secured enough marks according to general criteria, cannot, at all be allotted any seat in the General Category.

13. At the same time, as pointed out above, all is not well with the Government Circular No.20 as it operates against the very candidates for whom the protective discrimination is devised. The intention of Circular No. 20 is to give full benefit of reservation to the candidates of the reserved. However, to the extent the meritorious among them are denied the choice of college and subject which they could secure under the rule of reservation, the circular cannot be sustained. The circular, therefore, can be given effect only if the Reserved Category candidate qualifying on merit with general candidates consents to being considered as a general candidate on merit-cum-choice basis for allotment of college/institution and subject."

37. Learned Counsel on behalf of the petitioner in W.P.(C) No. 297 of 2008 has relied upon the following observations of Jeevan Reddy J., in *Indra Sawhney v. Union of India* (supra.) (para 811) :

"811. …it is well to remember that the reservations under Article 16 (4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

The said observations are not of any assistance as no MRC candidate occupying a General Category slot is being counted against the quota for the Reserved Category. For example

those MRC candidates belonging to the OBC category who cut across the general qualifying standard and are appointed to general posts are not being counted within the 27% quota earmarked for OBCs. However, MRC candidates who retain their reserved status and avail of the benefit of Rule 16 (2) to occupy a reserved post are counted against the reservation quota. When MRC candidates do not choose to accept the General Category slot available to them on account of their merit, but opt to occupy a slot reserved for reservation category candidates, because that post is more attractive, then counting him/ her against reservation quota will not violate the law laid down in *Indra Sawhney (supra.).*

38. In *M. Nagaraj v. Union of India* (2006) 8 SCC 212, a Constitution Bench of this Court held:

"102. … Equality has two facets- "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas "formal equality" is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of society within the framework of liberal democracy. Egalitarian equality is proportional equality."

39. Article 16 (4) of the Constitution provides that nothing in Article 16 shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Article 16(4) empowers the State to initiate measures in order to protect and promote the interests of backward classes (OBC, SC & ST). The impugned measures in no way offend the equality clause since this particular clause was inserted to safeguard the concerns of certain classes and shield their legitimate claims in the domain of public employment. On behalf of the respondents in the appeals, it was submitted Rules 16 (2), (3), (4) & (5) infringes Article 16(4). We do not accept this

proposition since Rule 16 (2) and the subsequent sub-rules merely recognize and advance *inter se* merit among the Reserved Category candidates in the manner that has been demonstrated before us by Learned Solicitor General.

40. Therefore, Rule 16 protects the interests of a Reserved Category candidate selected in the general (unreserved) category by giving him the option either to retain his position in the open merit category or to be considered for a vacancy in the Reserved Category, if it is more advantageous to him/her. The need for incorporating such a provision is to arrest arbitrariness and to protect the interests of the Meritorious Reserved Category candidates. If such rule is declared redundant and unconstitutional vis-à-vis Article 14, 16 and 335 then the whole object of equality clause in the Constitution would be frustrated and the MRC candidates selected as per the general qualifying standard would be disadvantaged since the candidate of his/her category who is below him/her in the merit list, may by availing the benefits of reservation attain a better service when allocation of services is made. Rule 16 in essence and spirit protects the pledge outlined in the Preamble of the Constitution which conceives of equality of *status and opportunity*.

Re: Question III

41. Central Administrative Tribunal, Chennai Bench in O.A. No. 690 of 2006 and 775 of 2006 had given the following directions -:

> "(i) The impugned Rule 16 (2) is declared as valid so long as it is confined to allocation of services and confirms to the ratio of Paras 4 to 6 of Anurag Patel order of the Hon'ble Apex Court.
>
> (ii) The Supplementary List issued by the second respondent to the first respondent dated 3.4.2007 is set aside. This would entail issue of a fresh supplementary

> result from the reserved list of 64 in such a way that adequate number of OBCs are announced in lieu of the OBCs who have come on merit and brought under General Category. The respondents are directed to rework the result in such a way the select list for all the 457 candidates are announced in one lot providing for 242-general, 117 OBC, 57 SC and 41 ST and also ensure that the candidates in OBC, SC & ST who come on merit and without availing any reservation are treated as general candidates and ensure that on equal number of such reserved candidates who are of merit under General Category, are recruited for OBC, SC & ST respectively and complete the select list for 457. Having done this exercise, the respondents should apply Rule 16 (2) to ensure that allocation of the service is in accordance with rank-cum-preference with priority given to meritorious reserved candidates for service allocation by virtue of Rule 16 (2) which is as per para 5 of Anurag Patel order. The entire exercise, as directed above, should be completed as per the order.
>
> (iii) Applying the ratio of Anurag Patel decision of Hon'ble Apex Court (Paras 6 & 7), if there is need for re-allocation of services, the respondents will take appropriate measures to that extent and complete this process also within two months from the date of receipt of a copy of this order."

The CAT had also issued the following direction as to how the results of the UPSC examinations (2005) should have been announced:

> "52. If the UPSC had followed the decision of the Hon'ble Apex Court cited supra and released the select list in one go for all the 457 vacancies then it would have ensured that the select list contained not only 117 OBCs but also an additional number of OBC candidates by this number,

in additional to 117 under 27% reservation, while simultaneously be number of general candidates recruited will be less to the extent of OBCs recruited on merit and included in the general list in the result of Civil Services Examination, 2005. Once this order is met, the successful candidates list will include 242 candidates in the General Category which is inclusive of all those Reserved Category candidates coming on merit plus 117 OBC, 57 SC and 41 ST exclusively from these respective reserved categories by applying relaxed norms for them.. If such a list is subjected to Rule 16(2) of Civil Services Examination, 2005 in present form for making service allocation only and then services are allotted based on Rule 16(2) in this context, then the announcement of recruitment result and allocation services will be both in accordance with law as per various judgments the Hon'ble Apex Court and in accordance with the extent orders issued by the Respondent No.1 and also in keeping with spirit of Rule 16 (2) so that, the meritorious reserved candidates get higher preference service as compared to their lower ranked counter parts in OBC, ST,SC. In doing so, the respondents also would notice that the steps taken by them in accordance with the Rules 16 (3)(-)(5) are redundant once they issue the result of recruitment in one phase, instead of two as they have become primary cause for the litigation and avoidable confusion in the minds of the candidates seeking recruitment."

42. We may refer to the brief facts in *Anurag Patel v. Uttar Pradesh Public Service Commission,* (supra.), referred to by the Tribunal. In the year 1990, the Uttar Pradesh Public Service Commission [hereinafter 'UPPSC') conducted a combined State Services/Upper Subordinate Services examination for selection to various posts such as Deputy Collectors in U.P. Civil (Executive) Services, Deputy Superintendent of Police in U.P. Police Services, Treasury Officers/Account Officers in U.P.

Finance and Accounts Services, Sales Tax Officers, Assistant Regional Transport Officers, District Supply Officers and various other posts. Pursuant to the notification issued by the UPPSC, a large number of candidates appeared for selection. The UPPSC published the list of selected candidates in August, 1992. Altogether 358 posts in various categories were filled up. The candidates belonging to the Backward Classes were entitled to get reservation in selection in respect of 57 posts in various categories, out of a total number of 358 posts. The posts in each category of service were filled up by choice of the candidate and the person who secured higher position in the merit list opted for U.P. Civil (Executive) Service and those who could not get the higher and important category of service had to be satisfied with posts in services of lesser importance. In each category of service, posts were reserved for SCs/STs, Backward Classes and handicapped persons etc. The UPPSC treated the candidates belonging to SC/ST and Backward Classes who got selection to the seats (posts) earmarked for general candidates as candidates in the General Category and allotted them to various services depending upon the rank secured by them in the select list. SC/ST and BC Candidates, who got lower rank in merit lists of general category candidates got posting in lesser important services. However, the SC/ST and BC Candidates who got selected to posts reserved in each category even though they secured lesser rank in the whole list got appointed to reserved posts in each category. This mode of appointments caused serious injustice to candidates who initially applied in the Reserved Category, yet they got selected to the general seats (posts) as they were meritorious and were entitled to get selected along with the general candidates. However, their merit and ability did not pay any dividends as they got appointment only to lesser important posts. This Court held:

"4. ... The authorities should have compared the candidates who are to be appointed on general merit as also

candidates who are to be appointed as against the reserved vacancies and while making appointments the inter se merit of the reserved candidates should have been considered and they must have been given the option treating each service separately. As this exercise was not followed, less meritorious candidates got appointment to higher posts whereas more meritorious candidates had to be satisfied with posts of lower category.

5. …in the instant case, as noticed earlier, out of 8 petitioners in Writ Petition No. 22753 of 1993, two of them who had secured Ranks 13 and 14 in the merit list, were appointed as Sales Tax Officer II, whereas the persons who secured Ranks 38, 72 and 97, ranks lower to them, got appointment as Deputy Collectors and the Division bench of the High Court held that it is a clear injustice to the persons who are more meritorious and directed that a list of all selected Backward Class candidates shall be prepared separately including those candidates selected in the General Category and their appointments to the posts shall be made strictly in accordance with merit as per the select list and preference of a person higher in the select list will be seen first and the appointment given accordingly, while preference of a person lower in the list will be seen only later. We do not think any error or illegality in the direction issued by the Division Bench of the High Court.

6. If these candidates who got selection in the General Category are allowed to exercise preference and then are appointed accordingly the candidates who were appointed in the reserved categories would be pushed down in their posts and the vacancies thus left by the General Category candidates belonging to Backward Classes. There will not be any change in the total number of posts filled up either by the General Category candidates or by the Reserved Category candidates."

43. The decision in *Anurag Patel* (supra.) rectified the anomaly which had occurred since the U.P.P.S.C. had allotted services of lower preference to the candidates of backward classes who were meritorious enough to qualify as per the criteria laid down for General Category candidates. Such meritorious candidates were disadvantaged on account of qualifying on merit which was patently offensive to the principles outlined in Articles 14 and 16 of the Constitution. This Court had reached such conclusion to ensure that allocation of service is in accordance with the rank-cum-preference basis with priority given to meritorious candidates for service allocation.

44. The decision in *Anurag Patel* (supra.) in turn referred to the earlier decision in *Ritesh R. Sah v. Dr. Y.L.Yamul and Others* (supra.). However, we have already distinguished the judgment in *Ritesh R. Sah*. That decision was given in relation to reservation for admission to post-graduate medical courses and the same cannot be readily applied in the present circumstances where we are dealing with the examinations conducted by the UPSC. The ultimate aim of Civil Services aspirants is to qualify for the most coveted services and each of the services have quotas for reserved classes, the benefits of which are availed by MRC candidates for preferred service. As highlighted earlier, the benefit accrued by different candidates who secure admission in a particular educational institution is of a homogeneous nature. However, the benefits accruing from successfully qualifying in the UPSC examination are of a varying nature since some services are coveted more than others.

45. The order of the CAT is valid to the extent that it relied on the ratio propounded by this Court in *Anurag Patel v. Uttar Pradesh Public Service Commission* (supra.). Even though that decision had in turn relied on the verdict of this Court in *Ritesh R. Sah v. Dr. Y.L.Yamul and Others,* (supra.), the latter case is distinguishable from the present case with respect to

the facts in issue. However, we cannot approve of the conclusions arrived at in the Central Administrative Tribunal order as it failed to take note of the unique characteristics of the UPSC examinations.

46. Reference was also made to *R.K. Sabharwal v. State of Punjab,* (1995) 2 SCC 745*,* this Court had declared that the State shall not count a Reserved Category candidate selected in the open category against the vacancies in the Reserved Category. However, by this it could not be inferred that if the candidate himself wishes to avail a vacancy in the Reserved Category, he shall be prohibited from doing so. After considering the counsels' submissions and deliberations among ourselves, we are of the view that the ratio in that case is not applicable for the purpose of the present case. That case was primarily concerned with the Punjab Service of Engineers in the Irrigation Department of State of Punjab. The decision was rendered in the context of the posts earmarked for the Scheduled Castes/ Scheduled Tribes and Backward Classes on the roster. It was noted that once such posts are filled the reservation is complete. Roster cannot operate any further and it should be stopped. Any post falling vacant in a cadre thereafter, is to be filled from the category - reserved or general - due to retirement or removal of a person belonging to the respective category. Unlike the examinations conducted by UPSC which includes 21 different services this case pertains to a single service and therefore the same cannot be compared with the examination conducted by UPSC. The examination conducted by UPSC is very prestigious and the top-most services of this nation are included in this examination. In this respect, it is obvious that there is fierce competition amongst the successful candidates as well to secure appointments in the most preferred services. This judgment is strictly confined to the enabling provision of Article 16 (4) of the Constitution under which the State Government has the sole power to decide whether there is a requirement for reservations in favour

of the backward class in the services under the State Government. However, the present case deals with positions in the various civil services under the Union Government that are filled through the examination process conducted by the UPSC. Therefore, the fact-situation in *R.K. Sabharwal's* case is clearly distinguishable.

47. The proviso to Rule 16 (1) and Rule 16 (2) operate in different dimensions and it is untenable to argue that these provisions are contradictory or inconsistent with each other. As mentioned earlier, in the examination for the year 2005, 32 reserved candidates (31 OBC candidates and 1 SC candidate) qualified as per the general qualifying standard [Rule 16 (1)]. These MRC candidates did not avail of any of the concessions and relaxations in the eligibility criteria at any stage of the examination, and further they secured enough marks to place them above the general qualifying standard. MRC candidates are entitled to one of the two posts - one depending on their performance in the General list and other depending on their position in the Reserved List. When MRC candidates are put in the General list on their own merit they do not automatically relinquish their reserved status. By the operation of Rule 16 (2), the reserved status of an MRC candidate is protected so that his/ her better performance does not deny such candidate the chance to be allotted to a more preferred service. Where, however, an MRC is able to obtain his preferred post by virtue of his /her ranking in the General List, he/ she is not counted as a Reserved Candidate and is certainly not counted amongst the respective reservation quota.

48. We must also remember that affirmative action measures should be scrutinized as per the standard of proportionality. This means that the criteria for any form of differential treatment should bear a rational correlation with a legitimate governmental objective. In this case a distinction has been made between Meritorious Reserved Category candidates and relatively lower ranked Reserved Category

candidates. The amended Rule 16(2) only seeks to recognize the inter-se merit between these two classes of candidates for the purpose of allocation to the various civil services with due regard for the preferences indicated by the candidates.

49. With regard to the specific characteristics of the UPSC examinations we hold that Reserved Category candidates (belonging to OBC, SC or ST categories among others) who are selected on merit and placed in the list of general/ unreserved Category candidates can choose to migrate to the respective reserved categories at the time of allocation of services. Such migration is enabled by Rule 16 (2) of the Civil Services Examination Rules, which is not inconsistent with Rule 16 (1) of the same or even the content of Articles 14, 16 (4) and 335 of the Constitution of India.

50. We sum up our answers-:

(i) MRC candidates who avail the benefit of Rule 16 (2) and adjusted in the reserved category should be counted as part of the reserved pool for the purpose of computing the aggregate reservation quotas. The seats vacated by MRC candidates in the General Pool will be offered to General category candidates.

(ii) By operation of Rule 16 (2), the reserved status of an MRC candidate is protected so that his/ her better performance does not deny him of the chance to be allotted to a more preferred service.

(iii) The amended Rule 16 (2) only seeks to recognize the *inter se* merit between two classes of candidates i.e. a) meritorious reserved category candidates b) relatively lower ranked reserved category candidates, for the purpose of allocation to the various Civil Services with due regard for the preferences indicated by them.

(iv) The reserved category candidates "belonging to OBC,

SC/ ST categories" who are selected on merit and placed in the list of General/Unreserved category candidates can choose to migrate to the respective reserved category at the time of allocation of services. Such migration as envisaged by Rule 16 (2) is not inconsistent with Rule 16 (1) or Articles 14, 16 (4) and 335 of the Constitution.

51. In view of the above, the civil appeals are allowed and the judgment of the Madras High Court is set aside. The writ petitions challenging the validity of Rule 16(2) are dismissed. The validity of Rule 16 of Civil Service Examination Rules 2005 (vide notification dated 4.12.2004) is upheld. There will be no order as to costs.

R.P. Matters disposed of.

JT. COMMISSIONER OF INCOME TAX, SURAT
v.
SAHELI LEASING & INDUSTRIES LTD.
(Civil Appeal No. 4278 of 2010)

MAY 7, 2010

[K.G. BALAKRISHNAN CJI, DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Income Tax Act, 1961 – s.271 (1)(c) – Levy of penalty under – Where assessed income is nil or loss – Permissibility of – Held: Penalty is leviable, even if no tax was payable.

Judgment:

Cryptic judgment – Held: Brevity without clarity is likely to enter the realm of absurdity, which is impermissible – Guidelines regarding writing of judgment – Reiterated.

Writing of judgment – Guidelines issued by Supreme Court regarding manner of writing judgments – Non-adherence of – Deprecated.

The question for consideration in the present appeals was whether penalty can be levied u/s.271(1)(c) of Income tax Act, where assessed income is loss, despite the fact that Explanation 4(a) was added to the Act and subsequently, further clause (a) was replaced by another clause (a) which is clarificatory in nature.

Allowing the appeals, the Court

HELD: 1.1. The Division Bench of High Court has decided the question of law as projected before it in the appeal preferred u/s.260(A) of the Income Tax Act, 1961, in a most casual manner. The order is not only cryptic but does not even remotely deal with the arguments which were sought to be projected by the Revenue before it. It is true that brevity is an art but brevity without clarity is

likely to enter into the realm of absurdity, which is impermissible. This is what has been reflected in the impugned order. This Court, time and again, reminded the courts performing judicial functions, the manner in which judgments/orders are to be written but, those guidelines issued from time to time are not being adhered to. Therefore, the Court once again would like to reiterate few guidelines for the Courts, while writing orders and judgments to follow the same. [Paras 3, 4, 5 and 6] [751-E-H; 752-A]

1.2. The guidelines are only illustrative in nature, not exhaustive and can further be elaborated looking to the need and requirement of a given case: (i) Nothing should be written in the judgment/order, which may not be germane to the facts of the case. It should have a co-relation with the applicable law and facts. The *ratio decidendi* should be clearly spelt out from the judgment/ order. (ii) After preparing the draft, it is necessary to go through the same to find out, if anything, essential to be mentioned, has escaped discussion. (iii) The ultimate finished judgment/order should have flow and perfect sequence of events, which would continue to generate interest in the reader. (iv) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity. The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative. (v) Language should not be rhetoric and should not reflect a contrived effort on the part of the author. (vi) After arguments are concluded, an endeavour should be made to pronounce the judgment

at the earliest and in any case not beyond a period of three months. Keeping it pending for long time sends a wrong signal to the litigants and the society. (vii) It should be avoided to give instances, which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society. [Para 7] [752-B-H; 753-A-C]

1.3. In the instant case, considering the important question of law and its wide repercussions, it was least expected from the Division Bench of the High Court to have dealt with the issue more seriously, keeping in mind the question of law that was being answered by it. At the High Court level, when a matter is considered on merits by a Division Bench, not only factual but even legal aspect of the matters is required to be considered at some length. [Paras 11 and 21] [754-C; 756-F]

2.1. The purpose behind Section 271(1)(c) of the Income Tax Act, 1961 is to penalise the assessee for - (a)concealing particulars of income and / or (b) furnishing inadequate particulars of such income. Whether income returned was a profit or loss, was really of no consequence. Therefore, even if no tax was payable, the penalty was still leviable. It is in that context, to be noted that even prior to the amendment it could not be read to mean that if no tax was payable by the assessee, due to filing of return, disclosing loss, the assessee was not liable to pay penalty even if the assessee had concealed and/or furnished inadequate particulars. [Para 24] [757-B-C]

2.2. Some of the High Courts had taken a contrary view, thus, Parliament in its wisdom thought it fit to clarify the position by changing the expression "any" by "if any". Thus, this was not a substantive amendment which created imposition of penalty for the first time. The

amendment by the Finance Act of the relevant year as specifically noted in the notes on clauses shows that proposed amendment was clarificatory in nature and would apply to all assessments even prior to the assessment year 2003-2004. [Para 25] [757-D-E]

2.3. Even if Assessee has disclosed NIL income and on verification of the record, it is found that certain income has been concealed or has wrongly been shown, in that case, penalty can still be levied. [Para 30] [759-D]

CIT vs. Gold Coin Health (P) Ltd. **(2008) 304 ITR 308 (SC), relied on.**

*CIT vs. Elphinstone Spinning and Weaving Mills Co. **Ltd.*** **XL ITR 142, distinguished.**

Virtual Soft Systems Ltd. vs. CIT **(2007) 289 ITR 83 SC;** *CIT Vs. Harprasad and Co. P. Ltd* **(1975) 99 ITR 118;** *Reliance Jute and Industries Ltd. vs. CIT* **(1979) 120 ITR 921, referred to.**

Case Law Reference:

304 ITR 308 (SC)	**Relied on.**	**Para 19**
CIT (2007) 289 ITR 83 SC	**Referred to.**	**Para 20**
(1975) 99 ITR 118	**Referred to.**	**Para 27**
CIT (1979) 120 ITR 921	**Referred to.**	**Para 27**
XL ITR 142	**Distinguished.**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No(s). 4278 of 2010.

From the Judgment & Order dated 08.08.2006 of the High Court Gujarat at Ahmedabad in Tax Appeal No. 1905 of 2005.

WITH

C.A. No. 4279 of 2010

Mohan Parasaran, ASG, V. Shekhar, H.R. Rao, D.L. Chidanand (for B.V. Balaram Das) for the Appellant.

D.N. Sawhney, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma for the Respondent

The Judgment of the Cort was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. The facts of both the appeals being identical, the facts of civil appeal arising out of S.L.P.(C) No.5241 of 2007 are being referred to in this judgment.

3. On a first flush, after bare perusal of the impugned order passed in Revenue Tax Appeal No. 1904 of 2005, decided on 8.8.2006 by Division Bench of the High Court of Gujarat at Ahmedabad, we thought of remanding the matter for a fresh decision on merits, in accordance with law but, on a deeper and studied scrutiny, we thought it apt instead of directing to remit, it would be just and proper to consider the matter on merits ourselves and to set at rest the legal controversy involved in the appeal. It is further so that Division Bench in the impugned order has decided the question of law as projected before it in the appeal preferred under Section 260 (A) of the Income Tax Act, 1961, (hereinafter referred to as 'the Act') in a most casual manner. The order is not only cryptic but does not even remotely deal with the arguments which were sought to be projected by the Revenue before it.

4. This Court, time and again, reminded the courts performing judicial functions, the manner in which judgments/ orders are to be written but, it is, indeed, unfortunate that those guidelines issued from time to time are not being adhered to.

5. No doubt, it is true that brevity is an art but brevity without clarity likely to enter into the realm of absurdity, which is impermissible. This is what has been reflected in the impugned order which we would reproduce hereinafter.

6. We, therefore, before proceeding to decide the matter on merits, once again would like to reiterate few guidelines for the Courts, while writing orders and judgments to follow the same.

7. These guidelines are only illustrative in nature, not exhaustive and can further be elaborated looking to the need and requirement of a given case:-

(a) It should always be kept in mind that nothing should be written in the judgment/order, which may not be germane to the facts of the case; It should have a co-relation with the applicable law and facts. The ratio decidendi should be clearly spelt out from the judgment / order.

(b) After preparing the draft, it is necessary to go through the same to find out, if anything, essential to be mentioned, has escaped discussion.

(c) The ultimate finished judgment/order should have sustained chronology, regard being had to the concept that it has readable, continued interest and one does not feel like parting or leaving it in the midway. To elaborate, it should have flow and perfect sequence of events, which would continue to generate interest in the reader.

(d) Appropriate care should be taken not to load it with all legal knowledge on the subject as citation of too many judgments creates more confusion rather than clarity. The foremost requirement is that leading judgments should be mentioned and the evolution that has taken place ever since the same were pronounced and thereafter, latest judgment, in which all previous judgments have been considered, should be mentioned. While writing judgment, psychology of the reader has also to be borne in mind, for the perception on that score is imperative.

(e) Language should not be rhetoric and should not reflect a contrived effort on the part of the author.

(f) After arguments are concluded, an endeavour should be made to pronounce the judgment at the earliest and in any case not beyond a period of three months. Keeping it pending for long time, sends a wrong signal to the litigants and the society.

(g) It should be avoided to give instances,which are likely to cause public agitation or to a particular society. Nothing should be reflected in the same which may hurt the feelings or emotions of any individual or society.

8. Aforesaid are some of the guidelines which are required to be kept in mind while writing judgments. In fact, we are only reiterating what has already been said in several judgments of this Court.

9. Aforesaid background has been given after going through the impugned judgment of Division Bench of the High Court. Following substantial question of law, as contemplated under Section 260 A of the Act, was formulated to be answered by it :

"Whether, on the facts and in the circumstances of the case, and in law, the Income Tax Appellate Tribunal is right in coming to the conclusion that where assessed income is loss, penalty cannot be levied under section 271 (1) (c) of the Income Tax Act in spite of the fact that Explanation 4 (a) was added in the Income Tax Act with effect from 1.4.1976 and subsequently, further clause (a) was replaced by another clause (a) which is in clarificatory nature, with effect from 1.4.2003?"

10. However, the Division Bench in its wisdom thought it fit to dispose of the appeal as under:-

"Admitted facts are that the appellant has filed return

showing loss and the income is also assessed as "NIL income". When the return was shown as loss as well as assessment of income is also NIL, no penalty under Section 271 (1) (c) of the Income Tax Act is attracted. No case is made out for admission of the appeal. The appeal stands dismissed at admission stage.

Sd/- Judge
Sd/- Judge"

11. Considering the important question of law and its wide repercussions, it was least expected from the Division Bench of the High Court to have dealt with the issue more seriously, keeping in mind the question of law that was being answered by it.

12. Feeling aggrieved, this appeal has been preferred by Revenue before us.

Factual matrix is as under:-

13. On return being filed by the Respondent/Assessee, an order under Section 143 (3) of the Act was passed on 27.2.1998, showing total income of Rs. NIL for assessment year 1995-1996.

14. During the course of assessment proceedings, it was noticed that Assessee had claimed depreciation, which was viewed to be incorrect. Thus, an amount of Rs. 24,22,531/- was disallowed out of depreciation. Penalty proceedings under Section 271 (1) (c) of the Act were initiated. In response to the show cause notice issued by the Revenue, Assessee filed its reply denying the allegations and contending that no penalty can be imposed on it, when returned income was NIL.

15. Penalty was sought to be imposed in respect of an item having an effect in reducing the loss. No appeal was filed against the item, added to the income on account of which the loss was reduced. Admittedly, Assessee, a leasing company

had claimed depreciation on plant and machinery @ 100% on various items. The statement of depreciation filed along with the computation of income showed the claim at Rs.1,05,08,824/-. On enquiries being made it was revealed that 100% depreciation was claimed along with Lease Agreements entered into with different parties. Even though, terms and conditions of the Lease Agreements entered into with different parties were the same, except the names of the parties had been changed. Even after dis-allowance of the said depreciation, the taxable income of the Assessee was NIL and hence, there was no tax liability. According to Assessee, in such a case no penalty under Section 271 (1) (c) could have been levied.

16. Deputy Commissioner of Income tax, Special Range-2, Surat, on the basis of the discussion in the order held that Assessee was liable to pay penalty, with reference to such additions to income to be treated as its total income, with reference to explanation 4 (a) to Section 271 (1) (c) of the Act. Accordingly, the penalty was levied on concealed income of Rs. 24,22,531/- at minimum rate of 100% of tax sought to be evaded. Thus, a penalty of Rs. 11,14,364/- was imposed on the Assessee.

17. Feeling aggrieved thereof, Assessee preferred an appeal before the Commissioner of Income Tax (Appeals-II). Considering various judgments of the Tribunal and the High Courts, the appeal of the Assessee came to be dismissed and penalty levied on it stood confirmed.

18. Assessee preferred further appeal before the Income-Tax Appellate Tribunal, Ahmedabad. Tribunal, on the strength of an earlier order passed by Special Bench of Ahmedabad Tribunal in the case of *Apsara Processors (P) Ltd. and Ors.* in ITA No. 284/Ahd./2004 dated 17.12.2004 came to the conclusion that no penalty can be levied, if the returned income and the assessed income is loss. Accordingly, the orders passed by the Assessing Officer as well as Commissioner

(Appeals) were set aside and quashed and the penalty imposed on the Assessee was deleted. It was this order of the Tribunal which was carried further by filing Appeal under Section 260A of the Act in the High Court, which met the fate of dismissal by the Division Bench.

19. Shri V. Shekhar, learned senior counsel appearing for the appellant at the outset contended that the point projected in this appeal stands answered in favour of the Revenue by a judgment of Bench of three learned Judges of this Court reported in (2008) 304 ITR 308 (SC) titled *CIT Vs. Gold Coin Health (P) Ltd*.

20. In Gold Coin (supra) an earlier judgment of this Court, reported in (2007) 289 ITR 83 SC titled *Virtual Soft Systems Ltd. Vs. CIT*, pronounced by two learned Judges has been over-ruled.

21. It is pertinent to point out here that in *Gold Coin* (supra), what was being challenged by the Revenue, was the order passed by same Bench of the High Court of Gujarat at Ahmedabad, which finds place at page 309, wherein before proceeding to decide the matter, the three learned judges of this Court thought it fit to reproduce the same. The question of law as projected in *Gold Coin* (supra) before the High Court and the question of law as projected in this appeal is identical but what is being deciphered by us is the manner in which the impugned judgment has been written and pronounced. After all, at the High Court level, when a matter is considered on merits by a Division Bench, not only factual but even legal aspect of the matters is required to be considered at some length.

22. The matter of Gold Coin (supra) was placed before three learned judges of this Court, as correctness and propriety of the order passed by two learned judges of this Court in *Virtual Soft Systems* (supra) was doubted. Thus, to clear the doubts, on the correct exposition of law, a three Judge Bench was constituted which decided the matter in Gold Coin (supra).

23. It is to be seen that purpose behind Section 271 (1)(c) of the Act is to penalise the Assessee for -

(a) concealing particulars of income and / or

(b) furnishing inadequate particulars of such income.

24. Whether income returned was a profit or loss, was really of no consequence. Therefore, even if no tax was payable, the penalty was still leviable. It is in that context, to be noted that even prior to the amendment it could not be read to mean that if no tax was payable by the Assessee, due to filing of return, disclosing loss, the Assessee was not liable to pay penalty even if the Assessee had concealed and/or furnished inadequate particulars.

25. Some of the High Courts had taken a contrary view, thus, Parliament in its wisdom thought it fit to clarify the position by changing the expression "*any"* by "*if any"*. Thus, this was not a substantive amendment which created imposition of penalty for the first time. The amendment by the Finance Act of the relevant year as specifically noted in the notes on clauses shows that proposed amendment was clarificatory in nature and would apply to all assessments even prior to the assessment year 2003-2004.

26. Thus, in *Gold Coin* (supra), after combined reading of the recommendations of Wanchoo Committee, and Circular No. 204 dated 24.7.1976, it was clarified that points had been made clear with regard to Explanation 4 (a) to Section 271 (1) (c) (iii) to intend to levy penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income, but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or minus figure. Therefore, even during the period between 1.4.1976 and 1.4.2003, the position was that penalty was still leviable in a

case where addition of concealed income reduces the returned loss.

27. In the aforesaid case, the expression "income" in the statute appearing in Section 2 (24) of the Act has been clarified to mean that it is an inclusive definition and includes losses, that is, negative profit. This has been held so on the strength of earlier judgments of this Court in *CIT Vs. Harprasad and Co. P. Ltd* (1975) 99 ITR 118 and followed in *Reliance Jute and Industries Ltd. Vs. CIT* (1979) 120 ITR 921. After elaborate and detailed discussion, this Court held with reference to the charging provisions of statute that the expression "income" should be understood to include losses. The expression "profits and gains" refers to positive income whereas "losses" represent negative profit or in other words minus income.

28. Considering this aspect of the matter in greater details, *Gold Coin* (supra) over-ruled the view expressed by two learned judges in *Virtual Soft Systems* (supra).

29. Relevant paras 11 and 12 of *Gold Coin* (supra) dealing with income and losses are reproduced herein below:-

"11. When the word "income" is read to include losses as held in Harprasad's case it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if th final assessed income is a loss, still penalty was leviable thereon even during the period April 1, 1976 to April1, 2003. Even in the Circular dated July 24, 1976, referred to above, the position was clarified by the Central Board of direct Taxes (in short "the CBDT"). It is stated that in a case where on setting off the concealed income against any loss incurred by the Assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case 'the tax sought to be

evaded" will be tax chargeable on concealed income as if it is "total income".

12. Law is well-settled that the applicable provision would be the law as it existed on the date of the filing of the return. It is of relevance to note that when any loss is returned in any return it need not necessarily be the loss of the concerned previous year. It may also include carried forward loss which is required to be set up against future income under Section 72 of the Act. Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accounting years."

30. The necessary consequence thereof would be that even if Assessee has disclosed NIL income and on verification of the record, it is found that certain income has been concealed or has wrongly been shown, in that case, penalty can still be levied. The aforesaid position is no more *res integra* and according to us, it stands answered in favour of the Revenue and against the Assessee.

31. The learned senior counsel appearing for the respondent Assessee, Mr. D.N Sawhney, contended that the observations made in Gold Coin (supra) can at best be treated as obiter but not as binding precedent. According to him, the earlier judgment of the Coordinate Bench in *CIT Vs. Elphinstone Spinning and Weaving Mills Co. Ltd. XL ITR 142, w*ould still hold the field and applies fully to the facts of the said case.

32. Much emphasis has been laid on the following observations in *Elphinstone* (supra) reproduced hereinbelow:

"There is no doubt that if the words of a taxing statute fail, then so much the tax. The courts cannot, except rarely and in clear cases, help the draftsmen by a favourable construction. Here, the difficulty is not one of inaccurate

language only. It is really this that a very large number of taxpayers are within the words but some of them are not. Whether the enactment might fail in the former case on some other ground (as has happened in another case decided today) is not a matter we are dealing with at the moment. It is sufficient to say there that the words do not take in the modifications which the learned counsel for the appellant suggests. The word "additional" in the expression "additional income-tax" must refer to a state of affairs in which there has been a tax before. The words "charge on the total income" are not appropriate to describe a case in which there is no income or there is loss. The same is the case with the expression "profits liable to tax" The last expression "dividends payable out of such profits" can only apply when there are profits and not when there are no profits.

It is clear that the Legislature had in mind the case of persons paying dividends beyond a reasonable portion of their income. A rebate was intended to be given to those who kept within the limit and an enhanced rate was to be imposed on those who exceeded it. The law was calculated to reach those persons who did the latter even if they resorted to the device of keeping profits back in one year to earn rebate to pay out the same profits in the next. For this purpose, the profits of the earlier years were deemed to be profits of the succeeding years. So far so good. But the Legislature failed to fit in the law in the scheme of the Indian Income-tax Act under which and to effectuate which the Finance Act is passed. The Legislature used language appropriate to income, and applied the rate to the "total income". Obviously, therefore, the law must fail in those cases where there is no total income at all, and the courts cannot be invited to supply the omission made by the Legislature."

33. In a first glance, after considering arguments of both

sides, we thought that matter required to be referred to a larger Bench for considering the issue involved in this appeal but on deeper scanning of the judgments in *Gold Coin* (supra) and *Elphinstone* (supra), we came to the conclusion that the ratio decidendi of *Gold Coin* (supra) fully covers the issue and the case of *Elphinstone* (supra) has no application to the facts of the said case.

34. Both cases are distinguishable on the following broad grounds, namely:

(i) *Gold Coin Health* (supra) arose under the Income Tax Act, 1961, whereas Elphinstone(supra) arose under the repealed Income Tax Act of 1922. (Though this is only a distinguishing feature noticed in 2 decisions which is not of much significance).

(ii) The question that fell for consideration in Gold Coin (supra) was what would be the true interpretation of Section 271 (1) (c) in the context of amendments made therein whereas, the question in *Elphinstone* (supra) was in relation to chargeability of "additional tax" on "dividend income" earned by Assessee under paragraph – B of First Schedule to the Income Tax Act, 1922.

(iii) Elphinstone (supra) interpreted five words occurring in para-B of First Schedule namely; "additional", "additional Income Tax", "charge on the total income", "profits liable to tax" and lastly, "dividends payable out of such profits", whereas, in Gold Coin's case, the question arose whether word "income" includes loss for the purpose of imposition of penalty u/s 271 (1) (c) and if Assessee incurs loss in any particular year then whether penalty u/s 271 (1) (c) can still be imposed on him. This has been categorically answered in Gold Coin (supra) in favour of Revenue and against the Assessee.

(iv) The object of imposing penalty is different than that of

determining Assessee's liability to pay tax or additional tax under any charging section. The interpretation applied to penalty provision thus, cannot be applied while interpreting any charging section for payment of income tax or additional tax. In other words, both provisions i.e. penalty and charging have different objects and consequences. They operate in different fields qua Assessee.

(v) The liability to pay additional tax under First Schedule on the income earned out of dividend implies that Assessee is first required to pay "tax" and then additional tax on the specified income. It was basically this issue which was examined in *Elphinstone* (supra) wherein Their Lordships considered the object for enacting first para of schedule. This object has nothing to do with penalty provisions.

(vi) A particular word occurring in one Section of the Act, having a particular object cannot carry the same meaning when used in different Section of the same Act, which is enacted for different object. In other words, one word occurring in different Sections of the Act can have different meaning, if the object of the two Sections are different and when both operate in different fields.

(vii) Question of law involved in this appeal is directly covered by the decision of *Gold Coin* (supra) and is to be answered accordingly.

(viii) Elphinstone (supra), therefore, has no bearing over the view taken in Gold Coin (supra) case and even if it had been taken note of, the decision taken therein would have been the same due to aforementioned distinguishing feature.

(ix) The issue involved in *Gold Coin* (supra) being entirely different than the one involved in *Elphinstone* (supra), the view taken by this Court in both the decisions are correct

operating in the respective fields, requiring no reconsideration of the matter.

(x) In order to enable the Court to refer any case to a larger Bench for reconsideration, it is necessary to point out that particular provision of law having a bearing over the issue involved was not taken note of or there is an error apparent on its face or that a particular earlier decision was not noticed, which has a direct bearing or has taken a contrary view. Such does not appear to be a case herein. Thus, it does not need to be referred to a larger Bench as in our considered opinion; it is squarely covered by the judgment of this Court in *Gold Coin* (supra).

35. In the light of the aforesaid discussion, we have no doubt in our mind that the ratio of *Elphinstone* (supra) has no application to the facts of the case and the question of law projected stands squarely answered in favour of the Revenue and against the Assessee in *Gold Coin* (supra) as a result thereof, appeal by Revenue stands hereby allowed. Impugned order passed by Income Tax Appellate Tribunal and confirmed by Division Bench are hereby set aside and quashed. The Revenue, therefore, would be at liberty to proceed further against the Assessee on merits in accordance with law.

36. Appeals stand allowed as mentioned hereinabove but with no order as to costs.

K.K.T. Appeals allowed.

BALRAJE @ TRIMBAK

v.

STATE OF MAHARASHTRA

(Criminal Appeal No.1978 of 2008)

MAY 10, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Penal Code, 1860: s.302 – Single knife blow on vital part i.e. chest of the deceased caused by appellant resulting in death of deceased – Conviction of appellant under s.302 by courts below – Interference with – Held: Not called for – There were categorical statements of eye-witnesses proving the involvement of appellant in the offence – Acquittal of other co-accused would not affect the conviction of appellant as there was cogent, credible and truthful evidence of witnesses against him – Evidence.

Evidence: Testimony of related/interested/injured witnesses – Evidentiary value of.

Prosecution case was that there was enmity between the family of the appellant-accused and the family of the deceased. On the fateful day, at 11.30 p.m. when deceased was sleeping in his house, appellant called the deceased to open the door. When the deceased opened the door, his wife PW-2 also followed him. Appellant pulled deceased out and gave knife blow on his chest. On hearing the commotion, PW-1 residing on the first floor of the same building came down. Appellant inflicted a knife blow on his leg. A-4 also inflicted blow on the chest of the deceased. The three other accused beat the deceased with wooden pieces. Thereafter appellant and the other accused persons ran away in a jeep. The deceased and PW-1 were taken to the hospital. Deceased died at 3.30 a.m. The Trial Court convicted the appellant

and the three other accused under Sections 302/34 IPC. High Court dismissed the appeal in respect of the appellant and allowed the appeal of the other three accused persons. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1. The evidences of PW-1, PW-2 and PW-4 clearly proved the involvement of the appellant. Though some of the witnesses turned hostile, it did not affect the prosecution case because of the clear and categorical statements of PWs 1, 2 and 4. Taking note of the fact that the name of the appellant was mentioned in the earliest report i.e. FIR and evidence of PW-1, PW-2 and PW-4, the High Court was fully justified in accepting the case of the prosecution in so far as the appellant was concerned. [Paras 10, 11] [773-B-D]

Baul v. State of U.P. **1968 (2) SCR 450, distinguished.**

Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P. **(2006) 2 SCC 450;** *Dinesh Kumar v. State of Rajasthan* **(2008) 8 SCC 270, referred to.**

2. In view of the fact that one blow was on the vital part i.e. chest and the deceased died due to the said injury, the courts below were fully justified in convicting him under Section 302 and imposing life sentence. [Para 12] [744-A-B]

3. The witnesses examined on behalf of the prosecution, whose testimony was relied upon, clearly deposed that appellant assaulted the deceased with a knife. In his examination under Section 313 Cr.P.C. a specific question was put to the appellant and he was made aware of the basic ingredients of the offence and the main facts sought to be established against him were explained to him. Thus, he can be convicted under Section 302 IPC for having committed the murder. Law

is fairly well settled that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence. The High Court found that the role ascribed to the others was not fully satisfied. The conclusion arrived at by the High Court is upheld. [Paras 13, 14] [774-C-H; 775-A-C]

Radha Mohan Singh @ Lal Saheb & Others vs. *State of U.P.* **(2006) 2 SCC 450, relied on.**

Case Law Reference:

1968 (2) SCR 450	**distinguished**	**Para 12**
(2006) 2 SCC 450	**referred to**	**Para 12**
(2008) 8 SCC 270	**referred to**	**Para 12**
(2006) 2 SCC 450	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1978 of 2008.

From the Judgment & Order dated 17.04.2008 of the High Court of Judicature at Bombay bench at Aurangabad in Criminal Appeal No. 310 of 1997.

U.U. Lalit, Nitin Sangra, Chinmay A. Khalakkar, Chandan Ramamurthi for the Appellant.

Sankar Chillarge, Asha Gopalan Nair for the Respondent.

The Judgment of the was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the final judgment and order dated 17.04.2008 passed by the High Court of Judicature at Bombay, Bench at Aurangabad in Criminal Appeal No. 310 of 1997 whereby the High Court dismissed the appeal of the appellant confirming his conviction and sentence awarded by the Sessions Judge, Beed in Sessions Case No. 131 of 1996 on 11.09.1997.

2.The case of the prosecution is as under:

(a) The deceased-Kailas was residing in Bedre Galli at Georai along with his family. The house of appellant-accused is opposite to the house of the deceased. There was enmity between the family of the appellant-accused and the family of the deceased. It is said that they were on inimical terms with each other. On 21.07.1996, at about 11.30 p.m., when Kailas was sleeping in the front room of his house, his wife Kausalyabai (PW-2) and their children were sleeping in the rear side of the room, Balraje - the appellant had called the deceased to open the door. On hearing the noise of opening the door by Kailas, his wife followed him. When Kailas opened the door, Balraje pulled him out by holding his banian, as a result the banian was torn and came into the hands of Balraje which he threw away and then he gave a knife blow on the chest of Kailas. Thereafter, Kailas started running towards upstairs and called Rameshwar Burande (PW-1), who was residing on the first floor of the building. On hearing the commotion,

Rameshwar (PW-1) started coming down. Balraje inflicted a knife blow on the leg of PW-1 and made him to fall on the ground. Sherya Mote (A-4) also inflicted blow on the chest of Kailas and he was thrown on the ground from the steps. The other three persons beat Kailas with wooden pieces. On hearing shouts, people gathered and the appellant along with three persons ran away in a jeep which was brought by them. The neighbours had taken Kailas and Rameshwar (PW-1) to the hospital at Georai in a Auto Rickshaw. Dr. Talwadkar, (PW-17), after giving first aid, referred them to the Civil Hospital at Beed as he found that the condition of the injured was critical. Then they were carried to the Civil Hospital, Beed in a jeep. Kailas died in the Civil Hospital between 3.00 to 3.30 a.m

(b) The complaint of PW-1 was recorded in the Civil Hospital, Beed which is Ex. 35. On the basis of the said complaint, FIR was registered with the Police Station, Beed, for the offences punishable under Sections 147, 148 and 307 read with Section 149 of the Indian Penal Code. The said complaint was then forwarded to the Police Station, Georai. P.I. Kendre, PW-19, had received the complaint filed by PW-1 at about 9.30 a.m. on 22.07.1997. On the basis of the said complaint, P.S.I. Gajare registered Crime No. 132/96 and handed over the investigation to P.I. Kendre (PW-19). PW-19 went to the place of incident and had drawn a panchnama of place of offence (Ex.54). During the Panchanama, he noticed blood stained mattress, pillow, bed sheet, torn piece of banian, one chappal and a piece of wood were lying on the spot. He then went to the house of Balraje – the appellant herein in his search but he was not there. During his visit to the house, he found that one jeep was parked in the premises and there were blood stains in the jeep. He then attached the said jeep under panchanama as Ex.55. In the said jeep, he found a piece of plank used in the assault and one slipper. He had also seized a piece of stepney and pieces

of seat covers which were stained with blood in order to send it to the chemical analyzer.

(c) Initially the crime was registered for an offence punishable under Section 307 of the IPC but later on it was converted to Section 302 of the IPC. After the death of Kailas, the panchanama of the inquest of the dead body was prepared which was filed as Ex.29. The clothes which were on the dead body were seized and placed as Ex.30. The postmortem on the dead body was conducted by Dr. Sudam Mogale (PW-3). The clothes of PW-1 were also seized. On 25.07.1996, Balraje - the appellant herein and Suresh Mote A-2 were arrested while they were traveling in a car. The said car was also attached under panchanama Ex. 43. The Investigating Officer found one receipt of Hotel Manor, Aurangabad from the car which shows that accused had stayed in the said hotel in the night of 22.07.1996. On 26.07.1996, during the interrogation, the appellant made a statement that the weapon used by him in the assault was concealed by him at a particular place and he would take it out if the panch witnesses and police accompany him. Thereafter, they went in a police jeep and the appellant took out one knife which was kept beneath Ashoka tree. There were blood stains on the said knife. On 31.07.1996, police interrogated Kailas (A-4) also and during the said interrogation he made a statement that he concealed the knife in the field. Thereafter, the police got the knife from that place. On 05.08.1996, P.I. Kendre (PW-19) then requested the Naib Tehsildar for preparing the sketch map of the place of incident and the map was prepared which is filed as Ex.61.

(d) On 13.02.1997, charges were framed against the accused persons for the offences punishable under Sections 147, 148, 324, 302 read with Section 149 I.P.C. The prosecution had examined 19 witnesses and recorded their evidence. The Sessions Judge, Beed, by order dated

11.09.1997 convicted the appellant and three other accused, namely, Suresh Mote, Dutta Kale and Kailas @ Shreya Bhagwan Mote guilty for the offence punishable under Section 302/34 IPC and sentenced them to suffer imprisonment for life and to pay a fine of Rs.1000/- each, in default, to undergo R.I. for one month under Section 235(2) of the Code of Criminal Procedure.

(e) Challenging the said judgment and order of conviction and sentence, the appellant and the other three accused filed Criminal Appeal No. 310 of 1997 before the High Court. The High Court by the impugned judgment and order dated 17.04.2008 dismissed the appeal in respect of appellant thereby confirming the conviction and sentence of the appellant and allowed the appeal in respect of the other three accused acquitting them from the charge of offence under Section 302/34 IPC. Aggrieved by the said judgment, the appellant has filed this appeal by way of special leave petition before this Court.

3. Heard Mr. U.U. Lalit, learned senior counsel for the appellant and Mr. Sankar Chillarge, learned counsel for the respondent-State.

4. Learned senior counsel for the appellant after taking us through all the relevant materials contended that the High Court has committed an error in upholding the conviction of the appellant when on the same set of evidence the other accused were acquitted by the High Court. He also submitted that when the alleged eye-witnesses Rameshwar Burandi, (complainant) PW-1 and Rekha Gire PW-4 narrated about the prosecution story, the High Court having disbelieved their version in respect of others, erroneously relied the same in the case of the appellant while upholding the conviction and sentence. He further pointed out that PW-1, PW-2 and PW-4 are not eye-witnesses considering the spot panchnama. He also submitted that in view of material contradiction and omissions in the alleged prosecution witnesses, the Courts below are not

justified in confirming the conviction of the sentence of the appellant alone. On the other hand, learned counsel appearing for the respondent-State by taking us through the prosecution witnesses and documents submitted that the Courts below were justified in relying on the evidence of Rekha Gire (PW-4), Raghunath (PW-12), and Bharat (PW-10) who are residing in the adjacent houses in addition to PW-1 & PW-2, eye witnesses. He further pointed out that certain discrepancies even, if any, are minimal and it had not affected the prosecution case.

5. We have perused the relevant materials and considered the rival contentions.

6. Among the witnesses examined on the side of the prosecution, Rameshwar Burande (PW-1), son of the deceased, Kausalyabai (PW-2) and Rekha Gire (PW-4) are material eye-witnesses proving the involvement of the appellant. According to PW-1, on the fateful night between 11:30 to 12:00, on hearing cries of PW-2, he woke up and noticed the appellant-Balraje dragging Kailas from the house and inflicted blow with knife on the abdomen. He also explained that in order to escape from the accused, he started running towards upstairs. In order to help the deceased while he was climbing down the staircase, two persons pulled him down by holding his legs and gave one blow with some sharp weapon on his legs, as a result, he fell injured at the bottom of the staircase. The presence of Rameshwar Burande (PW-1) at the place of incident cannot be disbelieved. Added to it, he also sustained injuries in the incident.

7. One Raghunath Bedre, step-brother of the deceased Kailas and neighbor was examined as PW-12. He explained that the father and grand-father of the appellant were residing in the opposite house till 1990. He further deposed that on the date of the incident, he heard cries around 11:30 p.m. and immediately he woke up. He opened the door of his house and came out and saw the appellant and three others standing on

the road holding knives and sticks in their hands.

8. According to Kausalyabai (PW-2), she was at the house at the relevant time with her husband and at about 11.30 p.m. when they were asleep there was a call from outside, "Kailas open the door" and, thereafter, Kailas went and opened the door and she followed him. At that time, the accused asked him to come out, but Kailas was not ready and, therefore, accused caught hold of baniyan of Kailas and dragged him out of the house and inflicted blow with knife on the abdomen. She also explained that in order to escape from the accused her husband started running towards upper storey by the staircase and called PW-1 for help and while he (PW-1) was climbing down the staircase to help the deceased, two persons pulled him down by holding his legs and gave one blow on his legs, as a result, he fell injured at the bottom of the staircase.

9. The evidence of PW-2 is supported by the evidence of Rekha Gire (PW-4). In her evidence, PW-4 explained that she was residing with her husband Dilip Dire in the house adjacent to the house of the deceased. She asserted that she knew the appellant since childhood. According to her, on the night, since her husband had gone to his native place while she was sleeping, she heard a noise of jeep at about 11:00-11:30 p.m. and she opened the door on the belief that her husband had arrived. But, appellant and four others alighted from the jeep, entered the house of the deceased and asked him to open the door. She further narrated that the appellant pulled out the deceased by holding his baniyan and stabbed Kailas, the deceased, with knife. Kailas was running towards upstairs by calling Rameshwar Burande PW-1. She further explained that though other four accused also ran along with the appellant, it was appellant-Balaraje who inflicted one more knife blow on the person of Kailas while he was lying on the ground and thereafter, all the assailants went away in the jeep. Moreover, Rekha Gire (PW-4), among the persons who alighted from the jeep, identified only the appellant. She also explained how the

deceased being thrown on the ground while he was trying to climb the staircase, appellant giving blow with knife on the abdomen and the other accused giving blow with knife on the chest.

10. The analysis of evidences of PW-1, PW-2 and PW-4 clearly prove the involvement of the appellant-Balraje. Though some of the witnesses turned hostile it had not affected the prosecution case because of the clear and categorical statements of PWs 1, 2 and 4. Since all the three identified the appellant and his name find place in the First Information Report itself lodged by PW-1, the High Court has rightly confirmed his conviction and sentence.

11. It is true that the prosecution has implicated four persons in the commission of offence. The material witnesses PW-1, PW-2 and PW-4 specifically asserted and identified the role of the appellant alone. Taking note of the fact that his name was mentioned in the earliest report i.e. FIR and evidence of PW-1, PW-2 and PW-4, we are of the view that the High Court is fully justified in accepting the case of the prosecution in so far as the appellant is concerned.

12. Mr. Lalit, learned senior counsel for the appellant submitted that in view of the fact that there was only one injury on the deceased alleged to have been caused by the appellant, the Court is not justified in convicting and sentencing him under Section 302. In other words, according to him, even if the prosecution case is accepted, conviction and proper sentence would be only under Section 325 for which he relied on decision of this Court *Baul vs. State of U.P.* reported in 1968 (2) SCR 450. On the other hand, Mr. Sankar Chillarge, learned counsel for the State submitted that in view of categorical statements of PWs-1, 2, 4 and 11 coupled with the post-mortem report, conviction under Section 302 is appropriate and sentence awarded is maintainable for which he relied on *Radha Mohan Singh @ Lal Saheb & Ors. vs. State of U.P.* (2006) 2 SCC 450 and *Dinesh Kumar vs. State of Rajasthan* (2008) 8 SCC

270. As discussed above, and in view of the fact that one blow is on the vital part i.e. chest and the deceased died due to the said injury, the Court is fully justified in convicting him under Section 302 and imposing life sentence. Since we have already discussed the evidence of those persons in the earlier part of our order, there is no need to refer the same once again. In view of the factual details, the decision relied on by Mr. Lalit is distinguishable and not applicable to the case on hand.

13. Learned senior counsel for the appellant submitted that having framed charges against all the accused and after acquittal of all the accused except the appellant, the same cannot be sustained. We are unable to accept the said contention. As observed in *Radha Mohan Singh @ Lal Saheb & Others vs. State of U.P.* (2006) 2 SCC 450, in view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that failure of justice would in fact occasion. In the present case, the witnesses examined on behalf of the prosecution, whose testimony has been relied upon, clearly deposed that appellant has assaulted the deceased with a knife. In his examination under Section 313 Cr.P.C. a specific question was put to the appellant and he was made aware of the basic ingredients of the offence and the main facts sought to be established against him were explained to him. Thus, he can be convicted under Section 302 IPC for having committed the murder.

14. Law is fairly well settled that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted

that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence. In our case, as observed earlier, the Trial Court and the High Court have analysed the testimony of PWs 1, 2 and 4 in great detail. It is revealed that the appellant had inflicted the first blow on the deceased in his chest and he fell on the ground. The High Court found that the role ascribed to the others was not fully satisfied.

15. In the light of the discussion we do not find any merit in the appeal, on the other hand, we are in agreement with the conclusion arrived at by the High Court, consequently, the appeal fails and the same is dismissed.

D.G. Appeal dismissed.

MONIRUDDIN AHMED @ LALU DEALER & ORS.
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 272 OF 2007)

MAY 10, 2010

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

Penal Code, 1860 – s.302 – Accused persons, carrying deadly weapons, chased the informant and his associates – Death of one person – Conviction of accused-appellants by trial Court – Upheld by High Court – Justification of – Held: Justified – Four prosecution witnesses narrated the incident in the same manner – High Court rightly observed that though the witnesses did not place their medical reports about their injuries, their presence at the spot could not be doubted and rightly believed their version – Presence of the appellants at the scene of occurrence was established satisfactorily by the prosecution through reliable evidence – Plea of alibi by appellant no.1 not substantiated – Absolute evidence indicated he was not only at the spot but also caused the death of the victim by a fatal blow with spear.

According to the prosecution, the appellants and few others, armed with deadly weapons such as spears, axes, bombs etc., launched an attack on the informant and his associates, causing death of one person.

Placing reliance upon the statements of the eye-witnesses and the post-mortem report, the trial Court convicted 12 accused persons including the appellants u/ss.148 and 302/149 IPC and sentenced them to rigorous imprisonment for life. On appeal, the High Court upheld the conviction of appellants u/s. 302 IPC and sentenced them to undergo life imprisonment.

In this Court, it was contended by the appellants that the prosecution had not established their guilt beyond doubt.

Dismissing the appeal, the Court

HELD: 1.1. Among the eye-witnesses present at the spot, PW7 who sustained injuries in the incident narrated that the appellants and many others chased him and his associates on seeing them. Frightened by their aggressive look, PW7 and other witnesses started fleeing towards the field. He further asserted that he noticed appellant no.1 and another accused throwing bombs towards them. One of the bombs struck the deceased, as a result he fell down on the ground in the field. At that time, all the appellants and other accused surrounded him and appellant no.1 struck him with a 'pathtangi', the other accused persons also assaulted him with 'lathi', 'henso' and 'bollom'. [Para 6] [781-H; 782-A-C]

1.2. The other injured witness PW8 also narrated the incident as explained by PW7. According to him, on seeing the aggressive mood of the accused, he and his associates escaped through paddy fields. When they were on the move, he saw appellant no.1 and another accused throwing bombs towards the deceased. As explained by PW7, PW8 also informed the Court that on encircling appellant no.1 struck the deceased with a spear, another accused delivered a blow on him with a 'pathtangi'. In the same manner, as explained by PWs7 and 8, PW9 referred to the involvement of the appellants and others, their overt act and the weapons used by them. He also testified that by the merciless act of the appellants, ultimately, it resulted in death of the victime. [Para 7] [782-D-F]

1.3. Another witness relied on by the prosecution is PW 12. He was also present at the spot. Like PWs 7, 8

and 9, he also narrated the incident how the accused chased and ultimately caused the death of the victim. As rightly observed by the High Court, though the above-said witnesses did not place their medical reports about their injuries, their presence at the spot cannot be doubted and it rightly believed their version. An analysis of the prosecution witnesses clearly shows that the fatal blow with spear was delivered by appellant no.1. It is also clear that the appellants and others chased the deceased with deadly weapons in their hands. Among the several accused, the role played by the appellants had been analysed by the High Court and it rightly concluded that the appellants alone were responsible and confirmed their conviction and sentence. On perusal and analysis of the evidence of PWs 7, 8, 9 and 12, it is clear that the prosecution established the charge against the appellants under Sections 148 and 302/149 of IPC. Though appellant no.1took the plea of alibi, the same was not substantiated. [Para 8] [782-G-H; 783-A-C]

2. It is basic law that prosecution is to prove that the accused was present at the scene and had participated in the crime. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. However, once the prosecution succeeds in discharging its burden, it is incumbent on the accused, who adopts the plea of alibi, to prove it with certainty so as to exclude the possibility of his presence at the place of occurrence. It is also settled that when the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. In the case on hand, the absolute evidence indicated the presence of appellant no.1 at the scene of occurrence. He was not only at the

spot but also caused the death of the victim by a fatal blow with spear. As rightly observed by the High Court, the stand taken by the defence witnesses is unacceptable. [Para 8] [783-B-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 272 of 2007.

From the Judgment & Order dated 08.02.2006 of the High court at Calcutta in C.R.A. No. 339 and 354 of 2002.

K.N. Balagopal, A.P. Mukundan, M.K. Balakrishnan and Naresh Kumar for the Appellants.

Radha Rangaswamy for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the final judgment and order dated 08.02.2006 passed by the High Court of Calcutta in C.R.A. Nos. 339 and 354 of 2002, in and by which the High Court confirmed the conviction of the appellants herein under Section 302 and sentenced them to undergo life imprisonment.

2. *Case of the prosecution in brief:*

(i) According to the prosecution, on 21.10.1982, at about 1 p.m., the appellants and few others armed with deadly weapons like spears, axes, bombs etc., launched an attack on the informant and his associates. Finding their lives at stake, the witnesses scampered through the fields. While chasing the witnesses, the miscreants viz., Lalu Dealer and Salim threw bombs at regular intervals. A bomb hurled by them struck a person called Tulu. As he fell into the ground, he was encircled by six persons. Finding the injured in helpless condition, Lalu the first appellant struck him with a spear. Another accused called Rausan also struck him with a deadly weapon. After

seeing some residents of the locality crowding around, the miscreants stopped chasing the other witnesses. The informant and other witnesses saved their lives, hiding in the paddy fields. With the injured succumbing to his injury, the matter was reported to the local Police Station.

(ii) A case of murder was instituted by Bharatpur Police Station. After conducting inquest over the dead body, the Investigating Officer sent the dead body to the hospital for post-mortem and also prepared a sketch-map with an index. Some of the incriminating articles found at the spot were also seized and sent for chemical examination. Meanwhile, the available witnesses were examined by the Investigating Officer. Finally, on examination of all available witnesses and collection of the post-mortem report, injury report and Analyst's report, the charge-sheet was submitted. Following the commitment of the case to the Court of Sessions, charge under Sections 108 and 302/149 of IPC were framed against 42 accused persons.

(iii) The accused persons having pleaded innocence, the prosecution examined 16 witnesses to prove their case.

(iv) Relying heavily on the statements of the eye-witnesses and the post-mortem report, the trial Judge convicted 12 accused persons under Sections 148 and 302/149 IPC. They were sentenced to rigorous imprisonment for life and fine of Rs.4,000/- each, in default, rigorous imprisonment for four months for commission of offences under Section 302/149 IPC. They were also sentenced to rigorous imprisonment for two years and fine of Rs.1,000/- each, in default, rigorous imprisonment for two months for commission of offences under Section 148 of IPC.

(v) Aggrieved by the said judgment and order of conviction, the appellants herein and 9 others moved the High Court in C.R.A. No. 339 of 2002 and C.R.A. No. 354 of 2002. C.R.A. 339 of 2002 was preferred by Moniruddin Ahmed

@ Lalu Dealer and the other C.R.A. No. 354 of 2002 was preferred by the other 9 accused and 2 of the appellants herein. The High Court, by its judgment and order dated 08.02.2006, dismissed C.R.A. No. 339 of 2002 moved by Moniruddin Ahmed @ Lalu Dealer while allowing C.R.A. No. 354 of 2002 in part moved by the other 9 accused and upheld the conviction of 2 of the appellants herein viz., Rausan Sekh and Salim Sekh. Aggrieved by the above conviction, the appellants have approached this Court by way of special leave.

3. Heard Mr. K.N. Balagopal, learned senior counsel appearing for the appellants and Ms. Radha Rangaswamy, learned counsel appearing for the State.

4. Learned senior counsel for the appellants submitted that there should not be any conviction and sentence on disjointed and scrappy evidence. The trial Court as well as the High Court failed to take into account various infirmities that crept into the evidence during the trial. He further submitted that the Courts below committed an error in relying on the evidence of PWs 7 and 8 as they had not seen the incident. In the same manner, PW 9 who was at the relevant time in the roof of the house, it was not possible for him to see the incident from a long distance. On the contrary, learned counsel for the State submitted that PWs 7 and 8 - injured witnesses, PWs 9 and 12 who also witnessed the occurrence clearly established the prosecution case. It is further submitted that the statement of eye-witnesses being consistent and coherent, the trial Court rightly relied on their statements.

5. We have carefully perused the materials and considered the rival submissions.

6. Though, charge sheet was laid against 42 accused persons, we are concerned about the role of three appellants and whether prosecution has established their guilt beyond doubt. Among the eye-witnesses present at the spot, PW 7 who

sustained injuries in the incident narrated that the appellants Moniruddin Ahmed @ Lalu Dealer, Salim Dafadar @ Sekh, Rausan Sekh, Ibrahim Sekh, Abu Siddiki, Motor Sekh, Mantu Sekh and many others chased him and his associates on seeing them near the Talsouri Tank. Frightened by their aggressive look, PW 7 and other witnesses started fleeing towards the field. He further asserted that he noticed Lalu Dealer and Salim Sekh throwing bombs towards them. One of the bombs struck Abdul Hasib, as a result he fell down on the ground in the field of Abu Bakkar. At that time, all the appellants and other accused surrounded him and Lalu Dealer struck him with a 'pathtangi', the other accused persons also assaulted him with 'lathi', 'henso' and 'bollom'.

7. The other injured witness PW 8 also narrated the incident as explained by PW 7. According to him, on seeing the aggressive mood of the accused, he and his associates escaped through paddy fields. When they were on the move, he saw accused Lalu Dealer and Salim Dafadar throwing bombs towards Abdul Hasib. As explained by PW 7, PW 8 also informed the Court that on encircling Lalu Dealer struck Abdul Hasib with a spear, Rausan delivered a blow on him with a 'pathtangi'. In the same manner, as explained by PWs 7 and 8, PW 9 referred to the involvement of the appellants and others, their overt act and the weapons used by them. He also testified that by the merciless act of the appellants, ultimately, it resulted in death of Abdul Hasib.

8. Another witness relied on by the prosecution is PW 12. He was also present at the spot. Like PWs 7, 8 and 9, he also narrated the incident how the accused chased and ultimately caused the death of Abdul Hasib. As rightly observed by the High Court, though the above-said witnesses did not place their medical reports about their injuries, their presence at the spot cannot be doubted and rightly believed their version. An analysis of the prosecution witnesses clearly shows that the fatal blow with spear was delivered by Lalu Dealer – the first

appellant. It is also clear that the appellants and others chased the deceased with deadly weapons in their hands. In our view, among the several accused the role played by the appellants had been analysed by the High Court and rightly concluded that the appellants alone were responsible and confirmed their conviction and sentence. On perusal and analysis of the evidence of PWs 7, 8, 9 and 12, we are satisfied that the prosecution has established the charge against the appellants under Sections 148 and 302/149 of IPC.. Though the first appellant took the plea of alibi, the same was not substantiated. It is basic law that prosecution is to prove that the accused was present at the scene and had participated in the crime. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. However, once the prosecution succeeds in discharging its burden, it is incumbent on the accused, who adopts the plea of alibi, to prove it with certainty so as to exclude the possibility of his presence at the place of occurrence. It is also settled that when the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. In the case on hand, we have already noted the absolute evidence indicating the presence of Lalu Dealer at the scene of occurrence. He was not only at the spot but also caused the death of Abdul Hasib by a fatal blow with spear. As rightly observed by the High Court, the stand taken by the defence witnesses is unacceptable.

9. In the light of the above discussion, we are in agreement with the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed.

B.B.B. Appeal dismissed.

DENEL (PROPRIETARY LIMITED)
v.
BHARAT ELECTRONICS LTD. & ANR.
(Arbitration Petition No. 16 of 2009)

MAY 10, 2010

[H.L. DATTU, J.]

Arbitration and Conciliation Act, 1996 – s. 11(6) – Dispute between parties regarding payment of certain amounts towards Purchase Orders – Arbitration clause of the agreement specifying 'Managing Director' of respondent-company to be arbitrator – Petition for appointment of arbitrator – Held: Generally court not to interdict appointment of an arbitrator, chosen by the parties under the terms of the contract – In the peculiar facts of the case, it is in the interest of both the parties to appoint an arbitrator other than the Managing Director of the respondent-Company – Retired Judge of Supreme Court appointed as sole arbitrator.

Respondent-Corporation entered into a contract with the appellant-Company. The 'general terms and conditions of the Purchase Order' contained an arbitration clause. As per the clause, 'Managing Director or his nominee' of the respondent-Corporation would be appointed as arbitrator.

The petitioner after performing its obligation in terms of purchase orders, raised a demand. Respondent though admitted their liability, refused to settle the amounts on the ground that they were prohibited by the Ministry. Later the respondent denied its liability. Hence the petition u/s. 11 (6) of Arbitration and Conciliation Act, 1996.

Allowing the petition, the Court

HELD: 1. There is a dispute between the parties in regard to payment of certain amounts towards Purchase Orders/Invoice. Since, there is a failure on the part of the respondent in making appointment of an arbitrator for resolving the dispute in accordance with the understanding of the parties which is reflected in the Purchase Order, the prayer of the petitioner requires to be granted. [Para 23] [795-B-C]

2. The court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation. The said principle has to abide by in the normal course. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the company against whom the dispute is raised. In addition to that, the said Managing Director of the Company which is a 'Government Company' is also bound by the direction/ instruction issued by his superior authorities. It is also the case of the respondent that though it is liable to pay the amount due under the Purchase Orders, it is not in a position to settle the dues only because of the directions issued by Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties. [Para 22] [794-D-H; 795-A]

3. In the light of the peculiar facts and circumstances of the instant case, it would be in the interest of both parties and to do complete justice, an arbitrator other than the Managing Director of the respondent requires to

be appointed to settle the dispute. A retired judge of Supreme Court is appointed as the sole arbitrator. [Paras 25 and 26] [795-E-F]

Indian Oil Corporation Ltd. and Ors. vs. Raja Transport Pvt. Ltd., **(2009) 8 SCC 520;** *You One Engineering and Construction Co. Ltd. and Anr.* vs. *National Highways Authority of India (NHAI)* **(2006) 4 SCC 372;** *Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr.* **(2000) 8 SCC 151;** *Bhupinder Singh Bindra v. Union of India and Anr.* **AIR1995 SC 2464, referred to.**

Case Law Reference:

(2009) 8 SCC 520	**Referred to.**	**Para 16**
(2006) 4 SCC 372	**Referred to.**	**Para 17**
(2000) 8 SCC 151	**Referred to.**	**Para 22**
AIR 1995 SC 2464	**Referred to.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Arbitration Petition No. 16 of 2009.

Under Section 11(6) of the Arbitration and Conciliation Act-1996.

V.Giri, Madhu S., K.C. Dua, for the Appellant.

S.N. Bhat for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. The Petitioner has filed the present Arbitration Petition under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). It is prayed in the petition to appoint a sole arbitrator to adjudicate the dispute between the parties.

2. The Petitioner is a company wholly owned by the Government of the Republic of South Africa, duly incorporated as per the laws of the Republic of South Africa, with its main business address at Denel Head Office, Nelmapius Drive, Irene, Pretoria, Republic of South Africa.

3. The Respondent is a Corporation duly registered under the Companies Act, 1956, having its registered office at Pune, Maharashtra. It is a Government of India Enterprise, Ministry of Defence, Government of India.

4. The Petitioner - company had several internal divisions, one of them being Denel Eloptro at the time when the contracts between Petitioner and Respondent were entered into. The name of the said division was changed from Delnel Eloptro to Denel Ptonics with effect from 1st April, 2004. The Optronics division was not a separate legal entity, but was only a business unit of the Petitioner.

5. The Respondent in the year 2004, placed certain purchase orders with Denel Eloptro for supply of various electronic equipments which are listed as under:

1. PUR/PN/C1/621977 dated 28th July 2004

2. PUR/PN/CN/621973 dated 28th July 2004

3. PUR/PN/C1/622029 dated 11th December 2004

6. The 'General Terms and Conditions of the Purchase Order (Foreign) contains an Arbitration Clause. Clause 10 of the Purchase Order, inter-alia, provides for arbitration in case of dispute arising from the interpretation or from any matter relating to the rights and obligations of the parties. It also refers to the appointment of the 'Managing Director or his nominee' of the respondent as the arbitrator. It is not in dispute that the said Clause in the Purchase Order is a valid arbitration agreement in terms of Section 2(b) read with Section 7 of the Act. The Petitioner before the delivery of the goods to the

Respondent as per the orders placed by them entered into a credit insurance policy with one Credit Guarantee Insurance Corporation of Africa Ltd. (hereinafter referred to as "Corporation") in respect of the said Purchase Orders.

7. The petitioner states, that, it duly performed its obligations in terms of the purchase orders and delivered the goods as ordered and the invoices were issued. The said delivery of goods was also accepted by the respondent without raising any objection. It is further stated, that, as the goods were accepted and utilized, the respondent was liable to pay the value of the goods in a sum of GBP 34,894.75(Thirty Four Thousand Eight Hundred and Ninety Four and 75 Pence Pound Sterling).

8. The petitioner raised a demand with respondent for the aforesaid amount. However, the respondent vide letter dated 4th May 2005, refused to pay the said amount, only on the ground that it is a "Government Company" under the Ministry of Defence, Government of India and in view of the direction issued by the Ministry to withhold payment of the said invoices, it is unable to settle the amounts due to the petitioner.

9. The Insurance Corporation also requested, vide its letter dated 29th May 2006, to pay the amount raised against them. The respondent by its reply letter dated 8th June 2006 addressed to the Corporation – insurer, inter alia contended, that, as per the guide-lines issued by the Ministry of Defence, Government of India, to discontinue dealings with M/s DENEL (PYT) LTD., and withhold payment due if any, it is unable to satisfy its liability to the petitioner.

10. Petitioner through its Advocate addressed a letter dated 29th November, 2006, inter-alia, requesting them to make payments towards three Purchase Orders – PUR/PN/CI/621977 dated 28.07.2004, PUR/PN/CN/621973 dated 28.07.2004 and PUR/PN/CI/622029 dated 11.12.2004.

11. The respondent through its Advocates and Solicitors, vide their letter dated 18th December, 2006, though admitted their liability towards the aforesaid Purchase Orders, refuse to settle the amounts due only on the ground, that, they are prohibited from making any payments to the petitioner by the Ministry of Defence, Government of India vide its letter/ communication dated 21st April, 2005.

12. The petitioner was constrained to issue notice dated 30th May, 2009 to the respondent which was served on the respondent and its Managing Director through fax on 30th May 2009 and through speed post and courier on 2nd June 2009 and 6th June 2009, respectively. In the said notice, the petitioner cited Clause 10 of the General Terms and Conditions of the Purchase Orders which provides for reference of disputes to arbitration and accordingly requested the respondent, to refer the disputes for adjudication in accordance with Arbitration and Conciliation Act, 1996. It was also stated, that, since the arbitration clause provides only for the appointment of Managing Director or his nominee, instead of mutually agreed independent arbitrator, the said clause is invalid and accordingly requested the respondent for appointment of mutually agreed independent arbitrator to adjudicate the disputes which have arisen between the petitioner and respondent.

13. In response to the notice issued by the petitioner, the respondent by its letter dated 24th June 2009 for the first time disputed its liability for the payment of the amount demanded by the petitioner. It was also stated, that the names proposed by the petitioner for the appointment of the arbitrator was not acceptable, as Clause 10 of the General Terms and Conditions of the Purchase Order does not permit the same and, further they are not willing to refer the dispute to the arbitrator, since the direction issued by the Ministry of defence is in full force and effect, and they are protected under Section 56 of the Indian Contract Act, 1872.

14. In the light of the aforesaid factual background, the petitioner has invoked the jurisdiction of this Court by filing the petition under Section 11(6) of the Arbitration and Conciliation Act 1996, to appoint an arbitrator to resolve the dispute between the parties.

15. After service of the notice, the parties have exchanged their pleadings.

16. The learned senior counsel for the petitioner, Sri V. Giri would submit, that, in view of the specific clause for referring the disputes between the parties for arbitration, the respondent was not justified in refusing to refer the dispute to sole independent arbitrator on the only ground, that, they are prohibited from making any payment to the petitioner by the Ministry of Defence, Government of India. It is further contended, that, Clause-10 of the Purchase Order provides for referral of disputes between the parties to the Managing Director or his nominee and since the Managing Director being the appointee of the Central Government, the petitioner genuinely apprehends that it may not get any justice in the hands of the Managing Director, since he cannot go against the directions issued by the Ministry of Defence, Government of India and, therefore, it would be appropriate to appoint independent sole arbitrator. In aid of his submission, reliance is placed on the observations made by this Court in the case of *Indian Oil Corporation Ltd. & Ors. Vs. Raja Transport Pvt. Ltd.,* [(2009) 8 SCC 520]. At paras 34 to 37, this Court has observed as under:

> "**34.** The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer

whose decision is the subject-matter of the dispute.

35. Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

36. The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities. For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person.

37. Subject to the said clarifications, we hold that a person being an employee of one of the parties (which is the State or its instrumentality) cannot *per se* be a bar to his acting as an arbitrator. Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias."

17. Sri S.N. Bhat, learned counsel for the respondent would submit, that the petition filed by the petitioner is premature,

since respondent though stated in its notice that there is arbitration clause in the Purchase Order which provides for referral of the disputes to its Managing Director or its nominee, the petitioner had suggested that the disputes need not be referred to the 'named arbitrator', since he is not mutually agreed independent arbitrator and, therefore, there was no failure on the part of the respondent in responding to the request made by the petitioner. It is further contended, that, in view of Clause-10 of the Purchase Order which provides for appointment of the arbitrator, only the 'named person' in the Clause-10 can be appointed and, therefore, the petitioner-company cannot request for appointment of independent arbitrator for resolving disputes, if any, between the parties. The learned counsel relies on the observations made by this Court in the case of You *One Engineering & Construction Co. Ltd. & Anr. Vs. National Highways Authority of India (NHAI),* [(2006) 4 SCC 372]. It is stated in the said decision:

> "Although the learned counsel for the petitioners contended that this is a situation falling within the contemplation of clause (*c*) of Section 11(6) of the Act, namely, that the institution i.e. IRC failing to perform the function entrusted to it under the appointment procedure, I am not satisfied. Under the appointment procedure agreed to under clause 67.3, each of the parties to the dispute is required to nominate its arbitrator and the third arbitrator is to be chosen by the two arbitrators appointed by the parties and he shall act as the presiding arbitrator. Clause 67.3(*ii*) provides that in case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the President of the Indian Roads Congress."

18. The petitioner has prayed before this Court for the appointment of the sole arbitrator. The petitioner has submitted, that, it is clear from the invoices and the correspondence

between the parties particularly dated 4th May 2005 and 8th June 2006, that the respondent has not disputed the liability of payment due to the petitioner. Therefore, as the respondent now seeks to avoid the payment of the amount due to the petitioner, there is dispute between the parties which requires to be referred for arbitration before the arbitrator.

19. Clause 10 of the 'General Terms and Conditions to Purchase Order' does constitute a valid arbitration clause as it shows the intention of the parties to appoint an arbitrator and refer the dispute between the parties for the arbitration proceedings under the Arbitration and Conciliation Act 1996. The wordings of Clause 10 are as follows:

"ARBITRATION: *All disputes regarding this order shall be referred to our Managing Director or his nominee for arbitration who shall have all powers conferred by Indian Arbitration and Conciliation Bill, 1996 for the time in force*."

20. Section 11 of the Act provides for the appointment of arbitrators and sub-section (6) of Section 11 of the Act under which the present petition is before this Court reads as under:

"*6) Where, under an appointment procedure agreed upon by the parties, -*

(a) A party fails to act as required under that procedure; or

(b) The parties, or the two appointed arbitrators, fail to reach an

agreement expected of them under that procedure; or

(c) A person, including an institution, fails to perform any function

entrusted to him or it under that procedure,

A party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment"

21. Sub-section (6) of Section 11 of the Act provides, that, when the parties fail to reach to an agreement as regards the appointment of the arbitrator, can request the Chief Justice or any person or institution designated by him to come to the rescue of the parties. Therefore, petitioner in the present case has sought the appointment of the arbitrator by this Court so that the dispute between the parties can be resolved.

22. In the case of *Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.,* [(2000) 8 SCC 151], this Court while considering the powers of the Court to appoint arbitrator under Section 8 of the Arbitration Act, 1940, cited the decision of this Court in the case of *Bhupinder Singh Bindra v. Union of India and Anr.* [AIR1995 SC 2464]. It was held in that case that "*It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation*." The said principle has to abide by in the normal course. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the company against whom the dispute is raised (the Respondents). In addition to that, the said Managing Director of Bharat Electronics Ltd which is a 'Government Company', is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the Purchase Orders, it is not in a

position to settle the dues only because of the directions issued by Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties.

23. The facts narrated by me would clearly demonstrate that there is a dispute between the parties in regard to payment of certain amounts towards Purchase Orders/Invoice. Since, there is a failure on the part of the respondent in making appointment of an arbitrator for resolving the dispute in accordance with the understanding of the parties which is reflected in the Purchase Order, the prayer of the petitioner requires to be granted.

24. Before parting with the case, in my considered opinion, the decision on which reliance is placed by Shri S.N. Bhat, learned counsel for the respondent, would not assist him to drive home his point.

25. Therefore, in the light of the peculiar facts and circumstances of this case, it would be in the interest of both parties and to do complete justice, an arbitrator other than the Managing Director of the Respondent requires to be appointed to settle the dispute.

26. For the foregoing reasons, the Arbitration Petition is allowed. Hon'ble Dr. Justice Arijit Pasayat (Retired) is appointed as the sole arbitrator.

27. The Arbitrator will be at liberty to fix his own remuneration and other terms and conditions with regard to holding of the arbitration proceedings.

K.K.T. Arbitration Petition allowed.

GOVT. OF ANDHRA PRADESH & ORS.

v.

M/S. OBULAPURAM MINING CO. PVT. LTD.& ORS. ETC.

(Special Leave Petition (c) Nos.7366-7367 of 2010)

MAY 10, 2010

[K.G. BALAKRISHNAN, CJI, DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Interim Orders:

Mines and minerals – Right to mine iron ore – Boundaries of areas covered under mining leases disputed – Committee constituted to demarcate boundaries – HELD: Meanwhile, respondent No.1-Company can be allowed to start the mining operation only in the undisputed area which neither falls in the State of Karnataka nor would be abutting Karnataka boundary – It will not be permitted to do any mining operation in those areas which according to the base Map dated 4.5.2010 Annexure 'A' fall within its leased area but may be falling in the leased area of other lessees – This permission is granted to respondent No.1 to work out equities between the parties but on account of it, respondent No.1 shall not be able to claim any right as the same would be finally adjudicated upon at the time of hearing of the special leave petitions – The Committee constituted by order dated 22.3.2010 passed by Supreme Court would continue to earmark the boundaries of States of Andhra Pradesh and Karnataka – Since State of Karnataka is not a party respondent in this litigation, Chief Secretary of that State would appoint officers of its Forest Department and Mining Department so that it could cooperate and render full assistance in the exercise of demarcation within the stipulated period – For the purpose of effective demarcation to be carried out by the Committee, it shall be open for it to ask respondent No.1 to stop mining operations in that area where

demarcation is to be done and the same shall be strictly obeyed by respondent No.1.

CIVIL APPELLATE JURISDICTION : SLP (Civil) No(s). 7366-67 of 2010.

From the Judgment & Order dated 26.02.2010 of the High Court of Judicature, Andhra Pradesh at Hyderabad in W.P. No. 25910 of 2009 and W.P. No. 26083 of 2009.

G.E. Vahanvati, AG, Gopal Subramaniam, SG, K. Parasaran, P.P Rao, Mukul Rohatgi, P.S. Narasimha, T.V. Ratnam, Paari Vendhan, K. Raghavacharayulu, Sridhar Potaraju, Madukar, D.Julius R., Gaichangpau Gangmei, Aman Ahluwalia, D.S. Mahra, G. Umapathy, M.M. Manivel (for Rakesh K. Sharma), for the apearing parties.

The following order of the Court was delivered

O R D E R

1. Determination of right to mining iron ore, a natural resource, has reached this Court in second round of litigation. Respondent No.1 in both the Special Leave Petitions had challenged the Order of State of Andhra Pradesh issued on 25.11.2009, suspending the mining operations of the respondent No.1-Company (R-1 is different in both SLP's), based on the proceedings of Principal Chief Conservator of Forests, Hyderabad dated 6.11.2009, 20.11.2009 and letter dated 23.11.2009 issued by Member of Central Empowered Committee. Against the interim order passed in favour of the respondent No.1-Company by the High Court of Judicature at Hyderabad, State had preferred to approach this Court in SLP(C)Nos.35169-35170 of 2009 titled *Government of Andhra Pradesh & Ors.* Vs. *M/s Obulapurm Mining Co. Pvt. Ltd. & Ors.* on the ground that no case was made out by respondent No.1-Company for grant of injunction, against those orders challenged in the writ petition and therefore, those

interim orders passed by the Division Bench of the High Court be vacated and till the pendency of the Special Leave Petitions in this Court, they be stayed.

2.Those matters had come up for hearing before this Court on 14.1.2010. Since the Special Leave Petitions were against the interim orders passed by the High Court, it was deemed fit and proper to dispose of the same with a request to the High Court to consider the matter on merits, in accordance with law, within a period of four weeks. However, it was directed that the interim order passed by this Court would continue, meaning thereby that no mining operation would be carried out by respondent no.1 till the pendency of the writ petitions.

3. The relevant part of the said order dated 14.1.2010, passed by this Court is reproduced hereinbelow for ready reference:

> "We make it clear that both the parties are allowed to raise their contentions in respect of the report of the C.E.C. The pendency of any matter regarding this before this Court need not preclude the High Court from considering the C.E.C. Report on merits. We also make it clear that this Court had not specifically directed the C.E.C. to file its Report as regards these leases. The High Court shall also hear the C.E.C. who is made as one of the respondents in these proceedings. The facts stated by the C.E.C. may be considered on merits by the High Court. One of the conditions in the impugned order is that the State Government shall be free to identify, demarcate and fix the boundaries of the leased areas after giving notices to the applicants. It may be done by the State Government and the interim stay ordered by this Court will continue, except as regards this condition, till the High Court passes a final order. The parties would appear before the High Court on 18.01.2010. These appeals are disposed of accordingly. Consequently, Special Leave Petition (C)Nos. 1301/2010

and 1379/2010 are also disposed of. No costs.

As learned counsel for the respondent points out that they have got international agreements, the High Court should endeavour to dispose of the matters as early as possible, at least within a period of four weeks."

4. In the light of the aforesaid order passed by this Court, the matter was heard again by the Division Bench of the High Court on merits. By a detailed and reasoned judgment and order, High Court was pleased to allow the writ petitions filed by respondent No.1 and the orders challenged in the writ petitions were set aside and quashed.

5. State of Andhra Pradesh, once again feeling aggrieved by the impugned final order, approached this Court by filing two separate Special Leave Petitions. The same came up for hearing before the Bench on 11.3.2010. On the said date, the following Order came to be passed:

"List on 22.3.2010.

Status quo shall be maintained till then."

6. On 22.3.2010, the matter was heard for some time through their learned counsel appearing for both sides. Looking to the serious allegations and counter-allegations levelled by the parties, as an interim measure, it was thought fit to first work out the boundaries of the disputed mining leases and the same be determined/demarcated by experts, only then, it was thought fit to pass an appropriate order with regard to vacating/ modifying order of status quo dated 11.3.2010. Relevant operative part of the order dated 22.3.2010 is reproduced hereinbelow:

"As an interim measure, we direct that boundaries of these six mining leases be determined/demarcated by a team consisting of senior representatives/officer of the Survey of India from Dehradun Headquarters Heading the

Team. Others would be member from MoEF, Mining Department, Forest Department and Revenue Department of State of Andhra Pradesh. Representatives of lessees with assistance of surveyor, if any, can be represented in the team of survey only to facilitate the team to complete the work as mentioned hereinabove at an early date.

The first respondent have got three mining leases consisting of 68.5 hectares, 25.98 hectares and 39.5 hectares respectively. The team headed by Survey of India is directed to survey in respect of 68.5 hectares of land first and to file a Report on or before 9.4.2010. As soon as the survey of this lease is over, they can proceed with the rest of the mining leases held by the other five lessees. The team shall meet on 26.3.2010 and start measurement work soon thereafter on day-to-day basis. There shall be no mining operations in these leases till 9.4.2010.

Copy of this order be remitted to Survey of India Headquarters, Dehradun immediately and it be faxed also.

List on 9.4.2010."

7. An interim Report came to be submitted by the Committee constituted by this Court on 9.4.2010. In the said interim Report, following recommendations for further work were asked for:

"(1) The lease sketches based on which the leases have been allotted to different mine holders, have quite appreciable linear and angular misclosures. They need to be revised by Government of Andhra Pradesh.

(2) All lease area sketches in each cluster should be made with reference to at least two common reference points which are permanent in nature like village tri-junction, village boundary/inter-State boundary pillars with their co-ordinates. Offset from interstate boundary should be

clearly mentioned on sketches.

(3) Inter-state boundary between Andhra Pradesh and Karnataka States has been demarcated as shown by local officials of both the Govts. as appearing on latest Survey of India topographical map. But it has to be verified by the govt. concerned. Lease areas are adjoining inter-state boundary falling in Bellary reserved forest. There is a long standing boundary dispute between adjoining states in this area. This issue has to be resolved before demarcation can be started.

(4) There should be no mining operation during survey work.

Once the above requirements for initiation of surveying and demarcation work is fulfilled, Survey of India team can demarcate the boundaries of all six leases with boundary pillars co-ordinated in grid as well as spherical terms."

8. In view of this, we directed that matter be listed for further hearing on 23.4.2010 but Final Report was not filed by the said date, instead, was filed subsequently on 30.4.2010, alongwith Annexures. While submitting the Final Report, Committee made the following recommendations:

"(3)Recommendations:

(3.1)Considering major discrepancies in mining lease sketches, entire lease sketches issued in Bellary Reserve Forest area need to be reviewed. All lease sketches have to be re-drawn correctly with reference to at least two reference (permanent) points on ground. Two departments of same Government should not issue two different approved sketches.

(3.2) Ministry of Home Affairs, Government of India, Chief Secretary, Government of Andhra Pradesh and Chief

Secretary of Karnataka may be directed to decide the Inter-State boundary between Karnataka & Andhra Pradesh in Bellary Reserve Forest area to facilitate demarcation work.

(3.3) There should be no mining operations during demarcation work.

(3.4) To avoid any dispute in future, all pillars on boundaries of mine leases should be provided latitude and longitude which will be done during demarcation work."

9. In the light of the aforesaid recommendations having been made by the Committee constituted by this Court, we have heard learned counsel for parties at length, perused the interim as well as final Report, as also the records.

10. Mr. Goolam E. Vahanvati, learned Attorney General appearing for the State of Andhra Pradesh as well as Mr. Gopal Subramaniam, learned Solicitor General appearing for Survey of India, strenuously contended before us that unless recommendations of the final Report of the Committee are not implemented in letter and spirit, respondent No.1-Company should not be allowed to carry on mining of Iron Ore as the mining operations are likely to seriously affect demarcation and determination of boundaries between two States, i.e. State of Andhra Pradesh and State of Karnataka. It was further contended by them that the said exercise is likely to be completed within a period of three months. In the meanwhile the interim order of status quo passed by this Court, in earlier round of litigation, which is in operation for the last about four months should be allowed to continue till the said exercise is completed.

11. On the other hand, learned senior counsel appearing for Respondent No.1, Mr. K. Parasaran, Mr. P.P. Rao, Mr. Mukul Rohatgi, ably assisted by their juniors vehemently contended before us that the final Report filed by Survey of India

would reveal that respondent No.1-Company cannot be blamed at all as it has neither encroached nor has done any mining operations out of the leased area. Therefore, they have contended that no prima facie case has been made out by the petitioners to stop the mining operations even now. It was also contended by them that the time has now come when equities are to be worked out and looking to the international contracts entered into by respondent No.1 with various international Companies, this Court should allow the mining operation, at least from those areas which can be said to be undisputed.

12. It was also suggested during the course of the hearing by the learned counsel appearing for respondent No.1 that in any case, they would not carry out mining operations within 100 to 150 metres from the Karnataka border as has been shown in the base map filed by Survey of India on 4.5.2010 (Annexure 'A') which shall form part of this order. It was also submitted by them that to safeguard the interest of the petitioner-State, they would erect a barbed wire fencing throughout Karnataka border with regard to those leases which are abutting Karnataka border 150 metres away from the same and in any case, would not carry out any mining operations in those areas or other disputed areas till final demarcation of boundaries is completed.

13. On the submissions as having been advanced by learned counsel for parties, we have given our serious thought and deliberations to the same. In our considered opinion, respondent No.1-Company can be allowed to start the mining operation only with regard to undisputed area which neither falls in the State of Karnataka nor would be abutting Karnataka boundary. It will also not be permitted to do any mining operation in those areas which according to the base Map dated 4.5.2010 Annexure 'A' fall within its leased area but may be falling in the leased area of other lessees. To clarify further, we direct that mining operations, if at all are to be carried out by respondent No.1, then it shall be done only and only in the

undisputed areas. If they try to encroach upon any other area, then it shall be open for the petitioners to forthwith stop the mining operations of respondent No.1. This permission is granted to Respondent No.1 to work out equities between the parties but on account of it Respondent No.1 shall not be able to claim any right as the same would be finally adjudicated upon at the time of hearing of the Special Leave Petitions.

14. To oversee the directions to be followed by respondent No.1, the same Committee appointed by us would put a temporary fence at the Karnataka border as per base map (Annexure 'A') at the cost of respondent No.1 and be further at liberty to visit the spot at any time and to report the matter to us. In case of any violation thereof respondent No.1 would be exposing itself for committing contempt of this Court. Mining operations can be started by the respondent No.1 only after it would put a barbed wire fencing of 10' high throughout Karnataka border.

15. The Committee constituted vide order dated 22.3.2010 passed by this Court would continue to earmark the boundaries of State of Andhra Pradesh and State of Karnataka. Since State of Karnataka is not a party respondent in this litigation, we request the Chief Secretary of State of Karnataka to appoint officers of its Forest Department and Mining Department so that it could cooperate and render full assistance in the exercise of demarcation within the stipulated period.

16. Even though, the Committee has requested us for grant of further period of three months to effectively complete the process of demarcation, but we deem it fit and proper to grant only two months' time to them keeping in mind, the ensuing rainy season.

17. We also clarify that either of the parties would be at liberty to approach this Court for further directions, if need, so arises. With the aforesaid directions, the interim order passed

by this Court on 11.3.2010 and extended from time to time stands modified to the aforesaid extent.

18. All parties would fully co-operate with the Committee to complete the demarcation work at the earliest and would not cause any hindrance in its work. They would also not in any manner try to overreach this order.

19. For the purpose of effective demarcation to be carried out by Committee, it shall be open for it to ask respondent No.1 to stop mining operations in that area where demarcation is to be done and the same shall be strictly obeyed by respondent No.1.

20. Special Leave Petitions be listed for hearing in due course.

R.P. Special Petitions adjourned.

GOVERNMENT OF INDIA & ORS.

v.

B. ANIL KUMAR & ORS.

(Civil Appeal No. 8273 of 2004)

MAY 11, 2010

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

Service Law:

Central Civil Services (Revised Pay) Rules, 1986 – r. 7 (1)(B) – Re-fixation of pay – Special pay – Entitlement of – Respondents were investigators as on 01.01.1986 – Promotion to the post of Assistant Superintendents after 01.01.1986 – Grant of revised pay scale of 1600-2660 as recommended by Fourth Pay Commission – Benefit of special pay of Rs. 75/- p.m. as awarded by Board of Arbitration for the said post in their existing scale-Rs. 470-750 in fixing the scale – Entitlement of – Held: Respondents would be covered u/r. 7(1)(B) which covers employees whose existing emoluments include special pay, but special pay has not been continued with the revised scale of pay – As per FR 22(a)(1) on promotion to a post carrying duties and responsibilities of greater importance, Government servant is entitled to his initial pay 'in the time scale of higher post' – Special pay of Rs. 75/- p.m. was for the post of Assistant Superintendent in the existing scale of pay of Rs. 470-750 irrespective of who held the post – The 1986 Rules and F.Rs. 22 and 25 have to be read consistent with the equality clauses in Articles 14 and 16 – All Assistant Superintendents who are performing the same nature of duties and responsibilities would be entitled to special pay – Thus, respondents entitled to the benefit of special pay of Rs. 75/- pm in fixation of its initial pay – Order of High Court upheld – Fundamental Rules 22(a)(1) – Constitution of India, 1950 – Article 14, 16.

The respondents were working in the post of Investigators, in NSSO, Government of India, in the pay-scale of Rs.425-700 prior to 01.01.1986. The next higher post is of Assistant Superintendent. In the year 1978, the Assistant Superintendents raised a demand that the existing pay-scale of Rs.470-750 of the post of Assistant Superintendents be raised to Rs.550-900 with effect from 01.01.1978. The Board of Arbitration made the Award with effect from 01.05.1982 that the Assistant Superintendents be given pay at the existing scale of Rs.470-750 plus a special pay of Rs.75/- pm which would be counted as pay. During pendency before the Board, the Central Fourth Pay Commission made recommendations that the pay-scale of Assistant Superintendents be revised to Rs.1600-2660 with effect from 01.01.1986. The Award of the Board was implemented. The respondents were promoted to the post of Assistant Superintendents after 01.01.1986 and were not given the benefit of the special pay and were only given the pay in the revised scale of Rs.1600-2660. The respondents challenged the same. The tribunal held that the respondents are entitled to the re-fixation of their pay by merging the special pay of Rs.75/- with their basic pay in the then existing pay-scale of Rs.470-750 on the basis of the recommendations of the Fourth Pay Commission with effect from 01.01.1986 and for subsequent corresponding revised pay scales on the basis of the recommendations of the Fifth Pay Commission. The Division Bench of High Court directed that the respondents would be entitled to have the benefit of special pay of Rs.75 in the revised pay-scale of Rs.1600-2660 as recommended by the Fourth Pay Commission and the revised pay-scale of the respondents as recommended by the Fifth Pay Commission will have to be appropriately fixed taking into consideration the special pay of Rs.75/- and its merger in the Fifth Pay Commission scales. Hence the appeal.

Dismissing the appeal, the Court

HELD: 1.1. The High Court gave good reasons for coming to the conclusion that the respondents, who were promoted to the post of Assistant Superintendent after 01.01.1986, were entitled to have the benefit of Rs.75/- as special pay in the revised pay-scale of Rs.1600-2660 that (1) in paragraphs 10.359, 10.360, 10.361 and 10.362 of the recommendations of the Fourth Pay Commission, which deal with the pay-scale of Assistant Superintendents in National Sample Survey Organization, Department of Statistics, there is no reference to the pending proceedings before the Board of Arbitration and hence it is difficult to hold that the Fourth Pay Commission has taken into consideration the dispute regarding the pay-scale of Assistant Superintendents pending before the Board of Arbitration; (2) the Board of Arbitration referred to the recommendations of the Fourth Pay Commission that the pay-scale of Assistant Superintendents should be Rs.1600-2600 and yet the Board of Arbitration awarded a special pay of Rs.75/- per month for Assistant Superintendents and did not restrict the grant of such special pay upto 01.01.1986; (3) the special pay of Rs.75/- per month was attached to the scale of pay of Assistant Superintendents and employees holding the post of Assistant Superintendent, whether prior to 01.01.1986 or subsequent to 01.01.1986, were, therefore, entitled to the benefit of Rs.75/- towards special pay. [Para 10] [816-D-H; 817-A-B]

1.2. The recommendations of the Fourth Pay Commission were implemented by the Central Civil Services (Revised Pay) Rules, 1986. Rule 7(1)(A) of the 1986 Rules covers cases of employees whose existing emoluments do not include special pay, Rule 7(1)(B) covers cases of employees whose existing emoluments include special pay, but special pay has not been continued with the revised scale of pay and Rule 7(1)(C)

covers cases of employees whose existing emoluments include special pay, but in whose case special pay has been continued with the revised scale of pay. All those employees who were Assistant Superintendents as on 01.01.1986 for whom special pay was awarded by the Board of Arbitration with effect from 01.05.1982 and for whom special pay did not continue with the revised scale of pay would, therefore, be covered under Rule 7(1)(B) and not under Rule 7(1)(A) or 7(1)(C) of the 1986 Rules. This is the reason why the Ministry of Finance, Department of Expenditure, in its letter dated 04.07.1989 directed that pay in the revised scale of Rs.1600-2660 with effect from 01.01.1986 will be fixed under Rule 7(1)(B) of the 1986 Rules. [Para 11] [817-C-G]

1.3. A plain reading of F.R. 22(a)(1) would show that where a Government servant holding a post is promoted to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, "his initial pay in the time scale of the higher post" shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued. Thus, on promotion to a post carrying duties and responsibilities of greater importance, a Government servant is entitled to his initial pay "in the time scale of the higher post". In the instant case, the higher post to which the respondents were promoted after 01.01.1986 was the post of Assistant Superintendent. If, therefore, the special pay of Rs.75/- as was awarded by the Board of Arbitration is for the higher post of Assistant Superintendent, the respondents would be entitled to the benefit of special pay, but if the special pay was only for the Assistant Superintendents then serving, and not for the post of Assistant Superintendent, the respondents would not be entitled to the benefit of special pay having been

promoted after 01.01.1986. [Para 12] [818-E-H; 819-A-B]

1.4. 'Special Pay' has been defined in F.R. 25 as an addition, of the nature of pay, to the emoluments of a post or of a Government servant, granted in consideration of (a) the specially arduous nature of the duties; or (b) a specific addition to the work or responsibility. Hence, special pay can be attached to either 'a post' or 'a Government servant'. [Para 13] [819-B-C]

1.5. It is clear from a perusal of the reference and the award of the Board of Arbitration that the special pay of Rs.75/- per month was for the post of Assistant Superintendent in the existing scale of pay of Rs.470-750 irrespective of who held the post. Therefore, the respondents, who have been promoted to the post of Assistant Superintendent after 01.01.1986, would be entitled to the benefit of special pay of Rs.75/- per month in the fixation of its initial pay. [Para 14] [819-G-H]

1.6. The 1986 Rules and F.Rs. 22 and 25 have to be read consistent with the equality clauses in Articles 14 and 16 of the Constitution and so read, all Assistant Superintendents who are performing the same nature of duties and responsibilities would be entitled to the special pay and to deny such benefit of special pay to the respondents, who have been promoted to the post of Assistant Superintendents after 01.01.1986, would violate of Articles 14 and 16 of the Constitution. [Para 15] [820-A-B]

1.7. Once the Court holds that under the 1986 Rules read with the Fundamental Rules and Articles 14 and 16 of the Constitution, the respondents were entitled to the benefit of special pay along with the revised scale of pay of Rs.1600-2660 as recommended by the Fourth Pay Commission, the court can itself grant the relief and need not direct the respondents to move the Government for

reconsideration for fixation of their pay-scales. The order of High Court is upheld. [Paras 18 and 19] [821-E-F]

Telecommunication Research Centre Scientific Officers' (Class I) Association and Ors. v. *Union of India & Ors.* **(1987) 1 SCC 582;** *M.P. Singh, Deputy Superintendent of Police, C.B.I. and Ors.* v. *Union of India and Ors.* **(1987) 1 SCC 592, referred to.**

Case Law Reference:

(1987) 1 SCC 592	**Referred to.**	**Para 8, 16**
(1987) 1 SCC 582	**Referred to.**	**Para 8, 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8273 of 2004.

from the Judgment & Order dated 12.08.2003 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 7596 of 2003.

Indira Jaisingh, ASG, T.S. Doabia, Ashok Bhan, Shailendra Saini, Samridhi Sinha, Sonam Anand (for B.V. Balaram Das) for the Appellants.

P.S. Narsimla, S. Uday Kumar Sagar, Bina Madhavan, Anandita Pujari (for Lawyer's Knit & Co.), for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J.1. This is an appeal against the judgment and order dated 12.08.2003 of the Division Bench of the Andhra Pradesh High Court in Writ Petition No.7596 of 2003 (for short 'the impugned judgment').

2. The relevant facts very briefly are that the respondents herein were working in the post of Investigators in the National Sample Survey Organisation, Government of India, Ministry of Planning and Implementation, Department of Statistics at Hyderabad, in the pay-scale of Rs.425-700 prior to

01.01.1986. The next higher post is the post of Assistant Superintendent. In the year 1978, there was a demand by the Assistant Superintendents working in the operation units under the Director, National Sample Survey Organisation, that the existing pay-scale of Rs.470-750 of the post of Assistant Superintendents be raised to Rs.550-900 with effect from 01.01.1978. The demand was referred to the Board of Arbitration for adjudication on 12.02.1985. When the reference was pending before the Board of Arbitration, the Central Fourth Pay Commission made recommendations that the pay-scale of Assistant Superintendents be revised to Rs.1600-2660 with effect from 01.01.1986. Thereafter, on 05.01.1989 the Board of Arbitration made the Award with effect from 01.05.1982 to the effect that the Assistant Superintendents be given pay at the existing scale of Rs.470-750 plus a special pay of Rs.75/- per month and this special pay be counted as pay for all purposes as per the rules. On 04.07.1989, the Ministry of Finance, Department of Expenditure, issued an order that the Ministry has agreed to the proposal of the Department of Statistics to implement the Award of the Board of Arbitration and allow special pay of Rs.75/- with effect from 01.05.1982 to the Assistant Superintendents in the Operation Units of the National Sample Survey Organisation, but the special pay will continue upto 31.12.1985 and will not be available in the higher revised scale of Rs.1600-2660 with effect from 01.01.1986. The respondents who were promoted to the post of Assistant Superintendents after 01.01.1986 were not given the benefit of the special pay and were only given the pay in the revised scale of Rs.1600-2660 as recommended by the Fourth Pay Commission.

3. Aggrieved, the respondents moved the Central Administrative Tribunal, Hyderabad Bench, (for short 'the Tribunal') in O.A. No. 827 of 2002 and by order dated 22.01.2003 the Tribunal allowed the O.A. declaring that the respondents are entitled to the re-fixation of their pay by merging the special pay of Rs.75/- with their basic pay in the

then existing pay-scale of Rs.470-750 on the basis of the recommendations of the Fourth Pay Commission with effect from 01.01.1986 and for subsequent corresponding revised pay scales on the basis of the recommendations of the Fifth Pay Commission and directed the appellants to take steps to get the pay of the respondents re-fixed accordingly and further directed that the respondents shall be paid all the arrears of salary as a result of re-fixation of their pay.

4. The appellants challenged the order dated 22.01.2003 of the Tribunal before the High Court and by the impugned judgment, the Division Bench while sustaining the order of the Tribunal modified the same directing that the respondents would be entitled to have the benefit of special pay of Rs.75 in the revised pay-scale of Rs.1600-2660 as recommended by the Fourth Pay Commission and the revised pay-scale of the respondents as recommended by the Fifth Pay Commission will have to be appropriately fixed taking into consideration the special pay of Rs.75/- and its merger in the Fifth Pay Commission scales.

5. Miss Indira Jaising, learned Additional Solicitor General appearing for the appellants, submitted that the Tribunal and the High Court failed to appreciate that the Fourth Pay Commission, while recommending revision of the pay-scale of Assistant Superintendents from Rs.470-750 to Rs.1600-2660 with effect from 01.01.1986 had taken into consideration the duties and responsibilities of the Assistant Superintendents and, therefore, the special pay of Rs.75/- given to Assistant Superintendents prior to 01.01.1986 pursuant to the Award of the Board of Arbitration would not be available to those who were promoted as Assistant Superintendents after 01.01.1986. She submitted that the respondents who were promoted to the post of Assistant Superintendent after 01.01.1986 would therefore not be entitled to the benefit of the special pay of Rs.75/- as awarded by the Board of Arbitration for fixation of their scale. She submitted that the benefit of Rule 7(1)(B) of

the Central Civil Services (Revised Pay) Rules, 1986 (for short 'the 1986 Rules') will be available only to those who were in receipt of the special pay as on 01.01.1986 and as the respondents were not Assistant Superintendents as on 01.01.1986 and were not in receipt of the special pay of Rs.75/- as awarded by the Board of Arbitration, they were not entitled to the benefit of the special pay. She further submitted that the respondents are also not entitled to the benefit of Rule 7(1)(B) of the 1986 Rules as the rule only applies to those who are in receipt of special pay granted by the Fourth Pay Commission and Assistant Superintendents were not given any special pay by the Fourth Pay Commission. She submitted that the pay of the respondents who were promoted as Assistant Superintendents after 01.01.1986 has to be fixed in accordance with F.R. 22(a)(1) and not in accordance with Rule 7(1) A or Rule 7(1)B of the 1986 Rules.

6. Miss Jaising submitted that some of the aggrieved Assistant Superintendents, who have been denied the benefit of special pay of Rs.75/-, had filed O.A. No.695 of 1990 before the Central Administrative Tribunal, Madras Bench, and O.A. No.1232 of 1997 before the Central Administrative Tribunal, Hyderabad Bench, and the two Benches of the Tribunal disposed of the O.As. with the direction to the applicants to approach the Anomalies Committee of the respective Pay Commissions. She submitted that in the present case also the Tribunal and the High Court, instead of allowing the benefit of special pay to the respondents, should have directed the respondents to approach the authorities for reconsideration of the fixation of their pay-scale after giving the benefit of special pay as awarded by the Board of Arbitration.

7. Mr. P.S. Narasimha, learned counsel appearing for the respondents, on the other hand, submitted that the Tribunal and the High Court had given good reasons to hold that the respondents who were promoted to the post of Assistant Superintendent after 01.01.1986 were also entitled to the

benefit of special pay of Rs.75/- per month as awarded by the Board of Arbitration in fixation of their pay in the revised pay-scales as recommended by the Fourth Pay Commission. He further submitted that the Award dated 05.01.1989 of the Board of Arbitration itself states that the special pay of Rs.75/- per month as awarded will count for all purposes as per rules and, therefore, will have to be counted for the purpose of fixation of the revised pay-scale in accordance with Rule 7(1)(B) of the 1986 Rules. He submitted that the order dated 04.07.1989 of the Ministry of Finance, Department of Expenditure, also states that the special pay will be recognized and be implemented for the purpose of revision according to Rule 7(1)(B) of the 1986 Rules. He argued that Rule 7(1)(B) of the 1986 Rules provides that the special pay will be added to the existing emoluments for the purpose of fixation of the revised pay-scale and hence the respondents who had been promoted as Assistant Superintendents were entitled to this benefit of addition of special pay of Rs.75/- per month in the existing emoluments for fixing their pay in the revised scale.

8. Mr. Narasimha also argued that there cannot be different pay for persons working in the same post of Assistant Superintendents as this would amount to discrimination and would be violative of Articles 14 and 16 of the Constitution of India. He relied on the decisions of this Court in *Telecommunication Research Centre Scientific Officers' (Class I) Association & Ors. v. Union of India & Ors. [(1987) 1 SCC 582] and M.P. Singh, Deputy Superintendent of Police, C.B.I. & Ors. v. Union of India & Ors.* [(1987) 1 SCC 592] for the proposition that there can be no discrimination in matters of pay. He submitted that the Assistant Superintendents have been given the benefit of special pay of Rs.75/- after 01.01.1986 and that their revised pay has been fixed accordingly, whereas the respondents who have been promoted to the post of Assistant Superintendent after 01.01.1986 have been denied the benefit of special pay while fixing their revised scale of pay and this amounts to

discrimination against the respondents.

9. Mr. Narasimha finally submitted that the respondents were not parties to O.A. No.695 of 1990 or O.A. No.1232 of 1997 in which directions for reconsideration were given by the Tribunal and that they had separately moved the Central Administrative Tribunal, Hyderabad Bench, and the Tribunal, after considering all the facts and circumstances of the case, have directed the appellants to give the benefit of special pay of Rs.75/- while re-fixing the revised pay-scale of the respondents on the basis of the recommendations of the Fourth Pay Commission and the directions given by the Tribunal in O.A. No.695 of 1990 and O.A. No.1232 of 1997 to approach the authorities for reconsideration were not binding on them.

10. We have read the impugned judgment and we find that the High Court has given good reasons for coming to the conclusion that the respondents, who were promoted to the post of Assistant Superintendent after 01.01.1986, were entitled to have the benefit of Rs.75/- as special pay in the revised pay-scale of Rs.1600-2660. The reasons given by the High Court are: (1) in paragraphs 10.359, 10.360, 10.361 and 10.362 of the recommendations of the Fourth Pay Commission, which deal with the pay-scale of Assistant Superintendents in National Sample Survey Organisation, Department of Statistics, there is no reference to the pending proceedings before the Board of Arbitration and hence it is difficult to hold that the Fourth Pay Commission has taken into consideration the dispute regarding the pay-scale of Assistant Superintendents pending before the Board of Arbitration; (2) On the other hand, the Board of Arbitration has in its deliberations quoted in the impugned judgment referred to the recommendations of the Fourth Pay Commission that the pay-scale of Assistant Superintendents should be Rs.1600-2600 and yet the Board of Arbitration has awarded a special pay of Rs.75/- per month for Assistant Superintendents and has not restricted the grant of such special pay upto 01.01.1986; (3)

The special pay of Rs.75/- per month was attached to the scale of pay of Assistant Superintendents and employees holding the post of Assistant Superintendent, whether prior to 01.01.1986 or subsequent to 01.01.1986, were, therefore, entitled to the benefit of Rs.75/- towards special pay.

11. We would like to give, in addition, a few more reasons in support of the conclusion of the High Court that the respondents, who were promoted to the post of Assistant Superintendents after 01.01.1986, are entitled to have the benefit of Rs.75/- as special pay in the revised pay-scale of Rs.1600-2660 as recommended by the Fourth Pay Commission. The recommendations of the Fourth Pay Commission were implemented by the 1986 Rules. Rule 7(1)(A) of the 1986 Rules covers cases of employees whose existing emoluments do not include special pay, Rule 7(1)(B) covers cases of employees whose existing emoluments include special pay, but special pay has not been continued with the revised scale of pay and Rule 7(1)(C) covers cases of employees whose existing emoluments include special pay, but in whose case special pay has been continued with the revised scale of pay. All those employees who were Assistant Superintendents as on 01.01.1986 for whom special pay was awarded by the Board of Arbitration with effect from 01.05.1982 and for whom special pay did not continue with the revised scale of pay would, therefore, be covered under Rule 7(1)(B) and not under Rule 7(1)(A) or 7(1)(C) of the 1986 Rules. This is the reason why the Ministry of Finance, Department of Expenditure, in its letter dated 04.07.1989 directed that pay in the revised scale of Rs.1600-2660 with effect from 01.01.1986 will be fixed under Rule 7(1)(B) of the 1986 Rules.

12. The contention of the appellants, however, is that the respondents, who were Investigators as on 01.01.1986 and were promoted to the post of Assistant Superintendent after 01.01.1986, would not be covered under Rule 7(1)(B) of the 1986 Rules and that on such promotion their pay would be fixed

under F.R. 22(a)(1), the relevant portion of which is quoted hereinbelow:

> "F.R.22: The initial pay of a Government servant who is appointed to a post on a time scale of pay is regulated as follows:-
>
> (a)(1): Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or rupees twenty five only, (now Rs.100) which is more."

A plain reading of F.R. 22(a)(1), quoted above, would show that where a Government servant holding a post is promoted to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, "his initial pay in the time scale of the higher post" shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued. Thus, on promotion to a post carrying duties and responsibilities of greater importance, a Government servant is entitled to his initial pay "in the time scale of the higher post". In the present case, the higher post to which the respondents were promoted after 01.01.1986 was the post of Assistant Superintendent. If, therefore, the special pay of Rs.75/- as has been awarded by the Board of Arbitration is for the higher post of Assistant Superintendent, the respondents would be entitled to the

benefit of special pay, but if the special pay was only for the Assistant Superintendents then serving, and not for the post of Assistant Superintendent, the respondents would not be entitled to the benefit of special pay having been promoted after 01.01.1986.

13. 'Special Pay' has been defined in F.R. 25 as:

> "an addition, of the nature of pay, to the emoluments of a post or of a Government servant, granted in consideration of (a) the specially arduous nature of the duties; or (b) a specific addition to the work or responsibility".

Hence, special pay can be attached to either 'a post' or 'a Government servant'.

14. We find that the reference that was made to the Board of Arbitration was whether the pay-scale of Assistant Superintendent of the Field Operations Division of NSSO, Government of India, be revised from the existing scale of Rs.470-750 to Rs.550-900 with effect from 01.01.1978 and the Board of Arbitration gave the following Award:

> "The Assistant Superintendents of the FOD of the NSSO, Government of India, shall be given pay at the existing scale of Rs.470-750 plus a special pay of Rs.75/- per month. This special pay shall count as pay for all purposes as per rules. This award shall take effect from 1st May 1982"

It is thus clear from a perusal of the reference and the award of the Board of Arbitration that the special pay of Rs.75/- per month was for the post of Assistant Superintendent in the existing scale of pay of Rs.470-750 is irrespective of who held the post. Therefore, the respondents, who have been promoted to the post of Assistant Superintendent after 01.01.1986, would be entitled to the benefit of special pay of Rs.75/- per month in the fixation of its initial pay.

15. In our considered opinion, the 1986 Rules and F.Rs. 22 and 25 have to be read consistent with the equality clauses in Articles 14 and 16 of the Constitution and so read, all Assistant Superintendents who are performing the same nature of duties and responsibilities would be entitled to the special pay and to deny such benefit of special pay to the respondents, who have been promoted to the post of Assistant Superintendents after 01.01.1986, would violate of Articles 14 and 16 of the Constitution. In support of this view, we may now cite the authorities.

16. In *M.P. Singh, Deputy Superintendent of Police, C.B.I. & Ors. v. Union of India & Ors.* (supra), this Court held:

> **"10.** From the foregoing discussion it emerges that the Special Pay that was being paid to all the officers in the cadre of Sub-Inspectors, Inspectors and Deputy Superintendents of Police in the Central Investigating Units of the Central Bureau of Investigation has nothing to do with any compensation for which the deputationists may be entitled either on the ground of their richer experience or on the ground of their displacement from their parent departments in the various States, but it relates only to the arduous nature of the duties that is being performed by all of them irrespective of the fact whether they belong to the category of the "deputationists" or to the category of the "non-deputationists". That being the position, the classification of the officers working in the said cadres into two groups, namely, deputationists and non-deputationists for paying different rates of Special Pay does not pass the test of classification permissible under Articles 14 and 16 of the Constitution of India since it does not bear any rational relation to the object of classification."

17. Similarly, in *Telecommunication Research Centre Scientific Officers' (Class I) Association & Ors. v. Union of India & Ors.* (supra), this Court held:

"10. Following the decision of this Court in *Randhir Singh* v. *Union of India* ((1982) 1 SCC 618) and the decision of this Court in (*M.P. Singh* v. *Union of India* (1987) 1 SCC 592 (Writ Petition Nos. 13097-13176 of 1984 decided today) we hold that the direct recruits (to which category the petitioners belong) in the Telecommunication Research Centre are entitled to the Special Pay at the same rates at which it is paid to the transferred officers working in that centre with effect from the date from which the transferred officers have been drawing the Special Pay. We accordingly direct Respondent 1 — Union of India to pay the Special Pay to the direct recruits with effect from the date on which the transferred officers commenced to draw the Special Pay up to date and to continue to pay it in future also as long as the transferred officers continue to get it. The arrears of the Special Pay up to date payable to the direct recruits shall be paid within four months from today."

18. Once the Court holds that under the 1986 Rules read with the Fundamental Rules and Articles 14 and 16 of the Constitution, the respondents were entitled to the benefit of special pay along with the revised scale of pay of Rs.1600-2660 as recommended by the Fourth Pay Commission, the Court can itself grant the relief and need not direct the respondents to move the Government for reconsideration for fixation of their pay-scales.

19. For the aforesaid reasons, we sustain the impugned judgment of the High Court and dismiss this appeal with no order as to costs.

N.J. Appeal dismissed.

K.A. ABBAS

v.

SABU JOSEPH & ANR.

(Criminal Appeal No. 1052 of 2010 etc.)

MAY 11, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Code of Criminal Procedure, 1973:

ss. 357(3), 431 and 421 – Sentence of imprisonment for default in payment of compensation – Propriety of – Held: Imposition of such sentence is permissible – Payment of compensation is to accommodate the interest of the victims – In view of s. 431 compensation is also recoverable as a fine – s. 421 provides for imprisonment for non-payment of fine – Sentence / Sentencing.

s. 357(3) – Power of court to pay compensation – Scope and purpose of – Discussed – Use of such power is a constructive approach to crimes – Recommendation to the courts to use this power liberally so as to meet the ends of justice in a better way.

Negotiable Instruments Act, 1881:

s. 138 – Conviction under – By trial court – Imposition of fine of Rs. 5 lakhs with default stipulation – As per order of appellate court as well as revision court, accused depositing amount of Rs. 2 lakhs towards compensation – Revision court directing the accused to deposit Rs. 4 lakhs towards balance amount of compensation – On appeal, held: Direction to deposit amount of Rs. 4 lakhs is based on factual error – Since the accused has already deposited Rs. 2 lakhs, he is required to deposit only Rs. 3 lakhs as due compensation.

In a complaint u/s. 138 of Negotiable Instruments Act, 1881, the trial court found the applicant-accused guilty

and sentenced him to simple imprisonment for one year. In addition it directed payment of compensation of Rs. 5 lakhs to the complainant u/s. 357 (3) CrPC and in default to undergo simple imprisonment for further period of two months.

Appellate court at the time of entertaining the appeal directed the accused to deposit Rs. 1 lakh being a part of the compensation, which was deposited. Eventually order of trial court was confirmed.

In Revision Petition, High Court by an interim order directed the accused to deposit Rs. 1 lakh. High Court in the facts of the case, modified the sentence to the effect that if the accused paid the balance compensation amount of Rs. 4 lakhs within a specified period, the term of imprisonment would be reduced to the period till the rising of the Court and in case of default to undergo simple imprisonment for three months by way of default sentence. Hence, the present appeals by the accused as well as by the complainant.

Partly allowing the appeal of the accused and dismissing the appeal of the complainant, the Court

HELD: 1.1. Section 357 Cr.P.C. empowers the courts, not just to impose a fine alone or fine along with the sentence of imprisonment, but also when the situation arises, direct the accused to pay compensation to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced. [Para 15] [831-G-H]

1.2. Section 357(3) Cr.P.C. empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the

action of accused. This power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in criminal justice system. Therefore, it is recommended to all the courts to exercise this power liberally so as to meet the ends of justice in a better way. [Para 19] [834-F-H; 835-A-B]

Sarwan Singh and Ors. v. State of Punjab **AIR 1978 SC 1525;** *Balraj v. State of U.P.* **AIR 1995 SC 1935;** *Hari Kishan v. Sukhbir Singh and Ors.* **AIR 1988 SC 2127, relied on.**

Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr. **(2007) 6 SCC 528, referred to.**

2.1. A sentence of imprisonment can be granted for default in payment of compensation awarded u/s. 357(3) Cr.PC. The whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that no purpose is served by keeping a person behind bars. Instead directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment. Hence on default of payment of this compensation, there must be a just recourse. Not imposing a sentence of imprisonment would mean allowing the accused to get away without paying the compensation and imposing another fine would be impractical as it would mean imposing a fine upon

another fine and therefore would not ensure proper enforcement of the order of compensation. While passing an order u/s.357(3), it is imperative for the courts to look at the ability and the capacity of the accused to pay, otherwise the very purpose of granting an order of compensation would stand defeated. [Para 27] [841-A-E]

2.2. Section 431 clearly provides that an order of compensation u/s. 357(3) will be recoverable in the same way as if it were a fine. Section 421 further provides the mode of recovery of a fine and the Section clearly provides that a person can be imprisoned for non-payment of fine. Therefore, going by the provisions of Cr.P.C., the intention of the legislature is clearly to ensure that mode of recovery of a fine and compensation is on the same footing. [Para 29] [843-B-C]

Hari Kishan v. Sukhbir Singh and Ors. **AIR 1988 SC 2127;** *Balraj vs. State of U. P.* **AIR 1995 SC 1935;** *Suganthi Suresh Kumar v. Jagdeeshan* **(2002) 2 SCC 420;** *Vijayan v. Sadanandan K. and Anr.* **(2009) 6 SCC 652;** *Shantilal v. State of M.P.* **(2007) 11 SCC 243;** *Kuldip Kaur v. Surinder Singh and Anr.* **AIR 1989 SC 232, relied on.**

Ettappadan Ahammedakutty @ Kunhappu v. E.P Abdullakeya @ Kunhi Bappu **(2009) 6 SCC 660, distinguished.**

Radhakrishna Nair vs. Padmanabhan, **(2000) 2 KLT 349, referred to.**

R v. Oliver John Huish **1985 (7) Cr. App. R.(S.) 272, referred to.**

3. The accused has already deposited Rs.2 lakhs towards the compensation amount of Rs. 5 lakhs, before the Judicial Magistrate in pursuance of orders passed by the Sessions Court and the High Court. Therefore, the accused needs to pay a further amount of Rs. 3 lakhs

instead of 4 lakhs as directed by the High Court, towards the compensation amount of Rs. 5 lakhs. [Para 34] [844-F-H; 845-A]

4. Looking into the facts and circumstances of the case and the nature of the offence, there is no good reason to interfere with the quantum of sentence imposed and the same is not required to be enhanced. [Para 33] [844-E]

Case Law Reference:

AIR 1978 SC 1525	**Relied on.**	**Para 17**
AIR 1995 SC 1935	**Relied on.**	**Paras 18 and 21**
AIR 1988 SC 2127	**Relied on.**	**Paras 19 and 21**
(2007) 6 SCC 528	**Referred to.**	**Para 20**
1985 (7) Cr. App. R. (S.) 272	**Referred to.**	**Para 22**
(2002) 2 SCC 420	**Relied on.**	**Para 23**
(2009) 6 SCC 652	**Relied on.**	**Para 24**
(2007) 11 SCC 243	**Relied on.**	**Para 25**
AIR 1989 SC 232	**Relied on.**	**Para 26**
(2009) 6 SCC 660	**Distinguished.**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1052 of 2010.

From the Judgment & Order dated 03.10.2007 of the High Court of Kerala at Ernakulam in Crl. Revision Petition No. 1387 of 2006(C).

WITH

Crl. A. No. 1053 of 2010.

A. Raghunath, T.T.K. Deepak & Co., P.V. Dinesh, P. Rajesh, H.B. Manav, Nishe Rajen Shonger, A.P. Jyothish for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted in both the special leave petitions.

2. These two appeals are directed against the judgment and order of the High Court of Kerala in Crl. Rev. Petition No.1387 of 2006 dated 03.10.2007.

3. Since parties are common and the legal issues are identical, they are heard together and disposed of by this common order.

4. The factual matrix in brief is as under:- The facts in criminal revision petition No.1387 of 2006 may be noticed for the purpose of disposal of the appeals. The appellant (accused) and the respondent (complainant) are employed as High School assistants in SSHSS school in Moorkanand. The respondent has filed a complaint against the appellant before the learned Magistrate for an offence under Section 138 of the Negotiable Instruments Act (the 'Act' for short). The complainant's case is that the appellant, who was due in a sum of Rs.5,00,000/-, issued a cheque dated 16.06.2003 in respect of that liability, and when the cheque was presented for encashment, the same was returned with an endorsement of "insufficiency of funds."

5. The complainant, through his Advocate, had issued notice to the appellant demanding the payment and that in spite of the service of notice, the appellant failed to pay the amount covered by the cheque and thus has committed an offence under Section 138 of the Act and, accordingly, has approached the learned Magistrate for appropriate reliefs.

6. The learned Magistrate after taking cognizance of the

offence and after recording the evidence of the parties and after analyzing the same, has found the accused guilty of the offence punishable under Section 138 of the Act and sentenced to simple imprisonment for one year. In addition to that he had directed to pay a compensation of Rs. 5 lakhs to the complainant under Section 357(3) of the Cr.PC, and in default, to undergo simple imprisonment for a further period of two months.

7. The accused filed appeal before the Sessions Court, Manjeri being Criminal Appeal No. 59 of 2004. The Sessions Court while entertaining the appeal had directed the petitioner to deposit Rs. one lakh within one month being a part of the compensation amount. The appellant has complied with that order by depositing the amount as directed before the Judicial 1st Class Magistrate, Manjeri. Eventually, the Sessions Judge by his order dated 21.03.2006 confirmed the judgment of conviction and sentence passed by learned Magistrate.

8. The accused preferred revision petition being Criminal Revision Petition No. 1387 of 2006 before the High Court of Kerala at Ernakulam. The High Court passed an interim order directing the petitioner to deposit an amount of Rs. 1 lakh before the Judicial Magistrate and, accordingly, the said amount was also deposited. The High Court while disposing of the Revision Petition has observed that the courts below had appreciated the facts correctly and there is no error, illegality or impropriety in the finding recorded by the courts below to set aside the conviction and sentence. The High court has further stated that the only question which requires to be answered is, whether a proper sentence has been imposed on the accused by the courts below. The court after taking into consideration the peculiar facts and circumstances of the case has modified the sentence imposed on the accused to the extent, that, if the petitioner pays the compensation amount of Rs. 4 lakhs (keeping in mind that the petitioner had deposited an amount of Rs. 1 lakh before the trial court towards the

compensation amount) within a period of five months, then he needs to undergo imprisonment only till the rising of the court and if the petitioner commits default in making the payment aforesaid, he shall undergo simple imprisonment for three months by way of default sentence.

9. Being aggrieved, the accused is before this court by way of Criminal Appeal arising out of SLP (Crl.) No. 334 of 2008. The main contention of the accused is that this court in Criminal Appeal No. 1013 of 2007 has held, that, while exercising jurisdiction under Section 357(3) of the Cr.PC, no direction can be issued that in default of payment of compensation, the accused shall suffer simple imprisonment. In effect the Supreme Court has confirmed the judgment passed in the case of *Radhakrishna Nair v. Padmanabhan* [(2000) 2 KLT 349], wherein the Kerala High Court had given a similar finding. The accused also contends, that, there is a factual error in the judgment of the High court to the effect that the accused had already deposited Rs. 2 lakhs towards paying the compensation amount pursuant to interim orders of the Sessions Court and the High Court respectively, instead the High Court has observed that only Rs. 1 lakh has been deposited.

10. The complainant being aggrieved by the sentence imposed on the accused has filed SLP (Crl) No. 4099 of 2008. The contention of the complainant is that, the sentence imposed is very minimal and will defeat the very purpose of Section 138 of N.I Act and if for any reason the default sentence is deleted then there is no chance of the accused paying the compensation . In this regard, the complainant relies on the observation of this court in the case of *Suganthi Suresh Kumar v. Jagdeeshan,* [(2002) 2 SCC 420].

11. Heard learned counsel for both sides. The learned counsel for the accused submits, that, the default sentence imposed by the learned Judge of the High Court is against the dicta of this Court in the case of *ETTAPPADAN AHAMMED*

KUTTY @ KUNHAPPU VS. E.P. ABDULLAKEYA @ KUNHI BAPPU AND ANOTHER (Criminal Appeal No. 1031 of 2007). Per contra, the learned counsel for the respondent ably justifies the impugned judgment. The learned counsel also relies on the observations made by this Court in the case of *Suganthi Suresh Kumar Vs. Jagdeeshan,* [(2002) 2 SCC 420].

12. The main question that requires to be considered and decided is, whether in default of payment of compensation ordered under Section 357 (3) of the Cr.P.C., a default sentence can be imposed ?

13. Let us now look at the relevant provisions and the decision of this court on which reliance is placed by learned counsel.

14. Section 357 of Cr.PC reads:-

"(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the court may, when passing judgment order the whole or any part of the fine recovered to be applied-

(a) In defraying the expenses properly incurred in the prosecution,

(b) In the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion, of the court, recoverable by such person in a Civil Court;

(c) When, any person is convicted of any offence for having caused the death of another person or of having abetted the commission of shelf all offence, in paying in, compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855) entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) When any person is convicted of any offence which includes theft, criminal, misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of stolen property knowing or having reason to believe the same to be stolen in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case, which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal his elapsed, or if an, appeal be presented, before the decision of the appeal.

(3) When a court imposes a sentence, of which fine does not form a part, the court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person his been so sentenced.

(4) An order under this section may also be made by all Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall take into account any sum paid or recovered as compensation under this section."

15. Essentially the section empowers the courts, not to just impose a fine alone or fine along with the sentence of imprisonment, but also when the situation arises, direct the accused to pay compensation to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

16. The above view we have taken is supported by the decisions of this Court, to which we presently refer.

17. In the case of *Sarwan Singh and ors. v. State of Punjab* (AIR 1978 SC 1525), this court has noticed the object and genesis of the section.

"10. The law which enables the Court to direct compensation to be paid to the dependants is found in Section 357 of the CrPC (Act 2 of 1974). The corresponding provision in the 1898 Code was Section 545. Section 545 of the CrPC (Act 5 of 1898) was amended by Act 18 of 1923 and by Act 26 of 1955. The amendment which is relevant for the purpose of our discussion is 545(1)(bb) which, for the first time was inserted by Act 26 of 1955. By this amendment the court is enabled to direct the accused, who caused the death of another person, to pay compensation to the persons who are, under the Fatal Accidents Act, entitled to recover damages from the persons sentenced, for the loss resulting to them from such death. In introducing the amendment, the Joint Select Committee stated "when death has been caused to a person, it is but proper that his heirs and dependants should be compensated, in suitable cases, for the loss resulting to them from such death, by the person who was responsible for it. The Committee proceeded to state that though Section 545 of the Code as amended in 1923 was intended to cover such cases, the intention was not however very clearly brought out and therefore in order to focus the attention of the courts on this aspect of the question, the Committee have amended Section 545 and it has been made clear that a fine may form a part of any sentence including a sentence of death and it has also been provided that the persons who are entitled under the Fatal Accidents Act, 1855, to recover damages from the person sentenced may be compensated out of the fine imposed. It also expressed

its full agreement with the suggestion that at the time of awarding judgment in a case where death has resulted from homicide, the court should award compensation to the heirs of the deceased. The Committee felt that this will result in settling the claim once for all by doing away with the need for a further claim to a civil Court, and avoid needless worry and expense to both sides. The Committee further agreed that in cases where the death is the result of negligence of the offender, appropriate compensation should be awarded to the heirs. By the introduction of Clause (bb) to Section 545(1), the intention of the legislature was made clear that, in suitable cases, the heirs and dependents should be compensated for the loss that resulted to them from the death, from a person who was responsible for it. The view was also expressed that the court should award compensation to the heir of the deceased so that their claims would be settled finally. This object is sought to be given effect to by Section 357 of the new Code (Act 2 of 1973). Section 357(3) provides that when a court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount, as may be specified in the order, to the person who has suffered any Joss or injury by reason of the act for which the accused person has been so sentenced. The object of the section therefore, is to provide compensation payable to the persons who are entitled to recover damages from the person sentenced even though fine does not form part of the sentence. Though Section 545 of 1898 Code enabled the court only to pay compensation out of the fine that would be imposed under the law, by Section 357(3) when a Court imposes a sentence, of which fine does not form a part, the Court may direct the accused to pay compensation. In awarding compensation it is necessary for the court to decide whether the case is a fit one in which compensation has to be awarded. If it is found that compensation should be paid, then the capacity

of the accused to pay a compensation has to be determined. In directing compensation, the object is to collect the fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation for, imposing a default sentence for non-payment of fine would not achieve the object. If the accused is in a position to pay the compensation to the injured or his dependents to which they are entitled to, there could be no reason for the Court not directing such compensation. When a person, who caused injury due to negligence or is made vicariously liable is bound to pay compensation it is only appropriate to direct payment by the accused who is guilty of causing an injury with the necessary Mens Rea to pay compensation for the person who has suffered injury."

18. In *Balraj v. State of UP* (AIR 1995 SC 1935), this court has held, that, Section 357(3) Cr. P.C. provides for ordering of payment by way of compensation to the victim by the accused. It is an important provision and it must also be noted that power to award compensation is not ancillary to other sentences but it is in addition thereto.

19. In *Hari Kishan v. Sukhbir Singh and ors.* (AIR 1988 SC 2127), this court has observed that, Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with Sub-section (1). We are concerned only with Sub-section (3). It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended

to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

20. In *Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. and Anr.,* [(2007) 6 SCC 528], this court differentiated between fine and compensation, and while doing so, has stated that the distinction between Sub-Sections (1) and (3) of Section 357 is apparent. Sub-section (1) provides for application of an amount of fine while imposing a sentence of which fine forms a part; whereas Sub-Section (3) calls for a situation where a Court imposes a sentence of which fine does not form a part of the sentence.

The court further observed:-

"19. Compensation is awarded towards sufferance of any loss or injury by reason of an act for which an accused person is sentenced. Although it provides for a criminal liability, the amount which has been awarded as compensation is considered to be recourse of the victim in the same manner which may be granted in a civil suit."

Finally the court summed up:-

"22. We must, however, observe that there exists a distinction between fine and compensation, although, in a way it seeks to achieve the same purpose. An amount of compensation can be directed to be recovered as a 'fine' but the legal fiction raised in relation to recovery of fine only, it is in that sense `fine' stands on a higher footing than compensation awarded by the Court."

21. Moving over to the question, whether a default

sentence can be imposed on default of payment of compensation, this court in the case of *Hari Singh v. Sukhbir Singh and in Balraj v. State of U.P,* has held that it was open to all courts in India to impose a sentence on default of payment of compensation under sub-section (3) of Section 357. In *Hari Singh v. Sukhbir Singh* (supra), this court has noticed certain factors which requires to be taken into consideration while passing an order under the section:-

"11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The Court may enforce the order by imposing sentence in default."

22. This position also finds support in the case of *R v. Oliver John Huish;* [1985] 7 Cr. App. R.(S.) 272. The Lord Justice Croom – Johnson speaking for the Bench has observed:

"When compensation orders may possibly be made the most careful examination is required. Documents should be obtained and evidence either on affidavit or orally should be given. The proceedings should, if necessary, be adjourned, in order to arrive at the true state of the defendant's affairs.

Very often a compensation order is made and a very light sentence of imprisonment is imposed, because the court recognizes that if the defendant is to have an opportunity of paying the compensation he must be enabled to earn

the money with which to do so. The result is therefore an extremely light sentence of imprisonment. If the compensation order turns out to be virtually worthless, the defendant has got off with a very light sentence of imprisonment as well as no order of compensation. In other words, generally speaking, he has got off with everything."

23. The law laid down in *Hari Singh v. Sukhbir Singh* (supra) was reiterated by this court in the case of *Suganthi Suresh Kumar v. Jagdeeshan,* [(2002) 2 SCC 420]. The court observed:-

"5. In the said decision this Court reminded all concerned that it is well to remember the emphasis laid on the need for making liberal use of Section 357(3) of the Code. This was observed by reference to a decision of this Court in 1989 Cri LJ 116 *Hari Singh Vs. Sukhbir Singh.* In the said decision this Court held as follows:-

"The quantum of compensation may be determined by taking into account the nature of crime, the justness of the claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. *The court may enforce the order by imposing sentence in default."*

(emphasis supplied)

"10. That apart, Section 431 of the Code has only prescribed that any money (other than fine) payable by virtue of an order made under the Code shall be recoverable "as if it were a fine". Two modes of recovery of the fine have been indicated in Section 421(1) of the

Code. The proviso to the Sub-section says that if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant for levy of the amount."

The court further held:-

"11. When this Court pronounced in *Hari Singh v. Sukhbir Singh* (supra) that a court may enforce an order to pay compensation "by imposing a sentence in default" it is open to all courts in India to follow the said course. The said legal position would continue to hold good until it is overruled by a larger bench of this court. Hence learned single judge of High Court of Kerala has committed an impropriety by expressing that the said legal direction of this Court should not be followed by the subordinate courts in Kerala. We express our disapproval of the course adopted by the said judge in *Rajendran v. Jose* 2001 (3) KLT 431. It is unfortunate that when the Sessions judge has correctly done a course in accordance with the discipline the Single judge of the High Court has incorrectly reversed it."

24. In order to set at rest the divergent opinion expressed in *Kunhappu's* case (supra), this Court in the case of *Vijayan v. Sadanandan K. and Anr.,* [(2009) 6 SCC 652], after noticing the provision of Section 421 and 431 of Cr.PC, which dealt with mode of recovery of fine and Section 64 of IPC, which empowered the courts to provide for a sentence of imprisonment on default of payment of fine, the Court stated:

"17. We have carefully considered the submissions made on behalf of the respective parties. Since a decision on the question raised in this petition is still in a nebulous state, there appear to be two views as to whether a default sentence on imprisonment can be imposed in cases where compensation is awarded to the complainant under

Section 357(3) Cr.P.C. As pointed out by Mr. Basant in *Dilip S. Dahanukar's* case, the distinction between a fine and compensation as understood under Section 357(1)(b) and Section 357(3) Cr.P.C. had been explained, but the question as to whether a default sentence clause could be made in respect of compensation payable under Section 357(3) Cr.P.C, which is central to the decision in this case, had not been considered."

The court further held:-

"22. The provisions of Sections 357(3) and 431 Cr.P.C., when read with Section 64 IPC, empower the Court, while making an order for payment of compensation, to also include a default sentence in case of non-payment of the same. The observations made by this Court in *Hari Singh's* case (supra) are as important today as they were when they were made and if, as submitted by Dr. Pillay, recourse can only be had to Section 421 Cr.P.C. for enforcing the same, the very object of Sub-section (3) of Section 357 would be frustrated and the relief contemplated therein would be rendered somewhat illusory."

25. In *Shantilal v. State of M.P.,* [(2007) 11 SCC 243], it is stated, that, the sentence of imprisonment for default in payment of a fine or compensation is different from a normal sentence of imprisonment. The court also delved into the factors to be taken into consideration while passing an order under Section 357(3) of the Cr.PC. This court stated:-

"The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of

fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the *power*, but the *duty* of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine."

26. In *Kuldip Kaur v. Surinder Singh and anr.* (AIR 1989 SC 232), in the context of Section 125 Cr.PC observed that sentencing a person to jail is sometimes a mode of enforcement. In this regard the court stated:-

"6. A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a 'mode of enforcement'. It is not a 'mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. The purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance 'without sufficient cause' to comply with the order. It would indeed be strange to hold that a person who 'without reasonable cause' refuses to comply with the order of the Court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute for the recovery of the amount of monthly allowance which has fallen in arrears."

27. From the above line of cases, it becomes very clear, that, a sentence of imprisonment can be granted for default in payment of compensation awarded under Section 357(3) of Cr.PC. The whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that there is no purpose is served by keeping a person behind bars. Instead directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. Therefore, this grant of compensation is sometimes in lieu of sending a person behind bars or in addition to a very light sentence of imprisonment. Hence on default of payment of this compensation, there must be a just recourse. Not imposing a sentence of imprisonment would mean allowing the accused to get away without paying the compensation and imposing another fine would be impractical as it would mean imposing a fine upon another fine and therefore would not ensure proper enforcement of the order of compensation. While passing an order under Section 357(3), it is imperative for the courts to look at the ability and the capacity of the accused to pay the same amount as has been laid down by the cases above, otherwise the very purpose of granting an order of compensation would stand defeated.

28. Section 421 of Cr.PC reads:-

"421. Warrant for levy of fine.

(1) When an offender has been sentenced to pay a the court passing the sentence make action for the recovery of the fine in either or- both of the following ways, that is to say, it may -

(a) Issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender

(b) Issue a warrant to the Collector of the district, authorizing him to realize the amount as arrears of land

revenue from the movable or immovable property, or both of the defaulters;

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary so to do, or unless it has made an order for the payment of expenses or compensation out of the fine under section 357.

(2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the court issues a warrant to the Collector under clause (b) of sub-section (1), the Collector shall realize the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

Section 431 of Cr.PC reads:-

"431. Money ordered to be paid recoverable as a fine.

Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine.

Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be

construed as if in the proviso to sub-section (1) of section 421, after the words and figures "under section 357", the words and figures "or an order for payment of costs under section 359" had been inserted."

29. Section 431 clearly provides that an order of compensation under Section 357 (3) will be recoverable in the same way as if it were a fine. Section 421 further provides the mode of recovery of a fine and the section clearly provides that a person can be imprisoned for non-payment of fine. Therefore, going by the provisions of the code, the intention of the legislature is clearly to ensure that mode of recovery of a fine and compensation is on the same footing. In light of the aforesaid reasoning, the contention of the accused that there can be no sentence of imprisonment for default in payment of compensation under Section 357 (3) should fail.

30. A similar position is also prevalent in other countries. In the United Kingdom, Section 82 (3) of Magistrates' Courts Act, 1980 allows for a sentence of imprisonment for default in payment of a fine or any financial order. The Section reads:-

"Where on the occasion of the offender's conviction a magistrates' court does not issue a warrant of commitment for a default in paying any such sum as aforesaid or fix a term of imprisonment under the said Section 77(2) which is to be served by him in the event of any such default, it shall not thereafter issue a warrant of commitment for any such default or for want of sufficient distress to satisfy such a sum unless:-

(a) he is already serving a sentence of custody for life, or a term of imprisonment, detention in a young offender institution, or detention under Section 9 of the Criminal Justice Act, 1982; or

(b) the court has since the conviction inquired into his means in his presence on at least one occasion."

31. In Australia, under Section 4 of the Sentencing Act, 1997 the definition of "fine" includes a compensation order. Procedure for enforcement of fines is provided for in Section 47(7) of the Act and provides for a sentence of imprisonment or default in payment of fine.

32. The Learned Counsel for the accused has placed reliance on the decision of this court in the case of *Ettappadan Ahammedakutty v. E.P Abdullakeya* (Criminal Appeal no. 1013 of 2007), which reiterated the position taken by the Kerala High Court in a case reported in 2000 (2) KLT 349; wherein it was held that no sentence of imprisonment can be passed on default of paying compensation awarded under Section 357(3). But in light of several decisions reiterating the opposite stand, this case needs to be viewed in isolation and cannot be taken to be against the established position preferred by the Supreme Court on this issue over a period of two decades.

33. The complainant in the Civil Appeal arising out of S.L.P.(Crl.) No.4099 of 2008 has contended that the sentence imposed for default in payment of the compensation amount is very minimal and, therefore, the sentence imposed by the High Court requires to be enhanced. In our considered view, looking into the facts and circumstances of the case and the nature of the offence, we find no good reason to interfere with the quantum of sentence imposed.

34. The contention of the accused as regards a factual error made by the High Court, wherein the High Court stated that the accused had deposited Rs. 1 lakh towards the compensation amount requires to be accepted. It is to be noted that the accused has already deposited Rs.2 lakhs towards the compensation amount of Rs. 5 lakhs, before the Judicial Magistrate in pursuance of orders passed by the Sessions Court and the High Court. Therefore, the appeal of the accused, i.e. Criminal Appeal arising out of Special Leave Petition (Crl.) No.334 of 2008 is allowed to the extent that he needs to pay a further amount of Rs. 3 lakhs towards the compensation amount

of Rs. 5 lakhs. The remaining part of the sentence passed by the High Court requires to be confirmed.

35. In the result, the conviction and sentence passed against the accused in Criminal Appeal arising out of S.L.P.(Crl.) No.334 of 2008 are confirmed with the modification, as observed in the earlier paragraph. Criminal Appeal arising out of S.L.P.(Crl.) No.334 of 2008 is, accordingly, partly allowed. Since, we are of the opinion that modification of the sentence is not warranted in the facts and circumstances of the case, Criminal Appeal arising out of Special Leave Petition (Crl.) No. 4099 of 2008 filed by the complainant is dismissed.

K.K.T. Appeal disposed of.

PROJECT OFFICER, IRDP AND ORS.

v.

P. D. CHACKO

(Civil Appeal No. 4392 of 2010)

MAY 11, 2010

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

Service Law – Retirement – Kerala Service Rules, 1959 – Part I, r.60(b) – Exception clause conferring benefit of higher age of superannuation for specified category of government employees – Entitlement under – Respondent worked as a full time menial in an aided school from 1968 to 1976 – Subsequently, he resigned from the post and joined a government department – Claim by respondent that since he was in service of an aided school as on 7-4-1970, he was entitled to benefit u/r.60(b) and thus continue in service upto 60 years of age as against the normal superannuation age of 55 years – Tenability of – Held: Not tenable – In order to get benefit of r.60(b), concerned government servant must have been in last grade service as on 7-4-1970 and continued to be in that last grade service – Respondent failed to produce any documents to show that the post he was holding i.e., full time menial in an aided school was included in the categories of posts in the special rules for last grade service nor did he show that he had continued to be in the last grade service as defined in r.12(16A) as on 7-4-1970 – Also no material was produced by respondent to establish that the service of full time menial in an aided school as on 7-4-1970, was saved by r.60(b).

Interpretation of Statutes – Exception clause – Interpretation of – Held: An exception clause has to be strictly interpreted and cannot be assumed but be proved – Exception clause is always subject to the rule of construction and in case of doubt, it must befriend the general provision

and disfavour the exception – If any category of person claims exception from the operation of the statute, it must establish that it comes within the exception.

Respondent worked as a full time menial in an aided school from 1968 to 1976. Subsequently, he resigned from the post and joined as a Peon in a government department.

Respondent had raised a claim that he was entitled to continue in service up to 60 years of age as per rule 60(b) Part-I of the Kerala Service Rules, 1959 stating that he was in the "last grade service" as on 7-4-1970 and continued to be in the "last grade service". The claim was rejected by the department. Respondent challenged the rejection before High Court. The High Court gave direction to confer the benefit of rule 60(b) Part-I on the respondent, which was challenged in the present appeal.

Before this Court, the question which arose for consideration was whether the respondent, who was in service of an aided school as on 7-4-1970, was entitled to get the benefit of rule 60(b) Part-I so as to continue in government service upto 60 years of age.

Allowing the appeal, the Court

HELD:1.1. Rule 60 of the Kerala Service Rules (KSR) dealing with the retirement of officers appears in Chapter VIII of Part I KSR under the heading 'compulsory retirement'. Rule 60(a) is the substantive part of the Rule, which deals with the age of retirement and Rule 60(b) deals with a specified category of officers in the "last grade" which is an exception to the main provision. [Para 9] [852-H; 853-A]

1.2. Rule 60(a) prescribes 55 years as the age of retirement in respect of government servants. However, Government servant shall be permitted to continue beyond 55 years, with the sanction of the Government on public grounds which must be recorded in writing. In

very special circumstances, a Government servant may be retained in service beyond 60 years of age. An exception has however been made in respect of a specified category of government servants under clause ' b' of Rule 60. Clause 'b' of the Rule 60 provides that officers who were in the "last grade service" as on 07.04.1970 would retire on attaining the age of 60 years, provided they continued to be in "last grade service" as defined in Rule 12(16A). Therefore, in order to get benefit of Rule 60(b) two conditions have to be satisfied. The first condition is that the government servant concerned must have been in "last grade service" as on 07.04.1970 and the second condition is that the benefit of Clause 'b' would be available only as long as such person continues to be in the "last grade service" as defined in Rule 12(16A). [Para 9] [853-E-G; 854-C]

1.3. Prior to 07.04.1970, government servants who were in "last grade service" were entitled to higher age of superannuation of 60 years, however with effect from 07.04.1970 they were brought on par with other government servants with the result that they had to retire on attaining the age of superannuation of 55 years. Government felt it was necessary to protect them and hence Clause 'b' was introduced in Rule 60 giving them, the benefit of continuance in service, till they attained the age of 60 years. Normal age of superannuation in a government service is 55 years. Evidently, the said clause was introduced by way of exception to Clause 'a' of Rule 60 to protect their right to continue up to 60 years of age. The benefit of exception clause is, therefore, available only to a specified category of employees who were in "last grade service" as defined in Rule 12(16A) of the Rules. Rule 60(a) stipulates the age of retirement of government servants as 55 years but an exception has been carved out to a specified category of government servants but for that they also would have fallen in Rule 60(a). By judicial interpretation one cannot enlarge the

scope of an exception clause, which is meant for a specified category of government employees. [Para 11] [854-G-H; 855-A-B]

2. Exception clause is normally part of the enacting section, unlike a proviso which follows an enacting part. It is trite law that an exception clause has to be strictly interpreted and cannot be assumed but be proved. Exception clause is always subject to the rule of construction and in case of doubt, it must befriend the general provision and disfavour the exception. If any category of person claims exception from the operation of the statute it must establish that it comes within the exception. [Paras 12 and 13] [855-C, F]

Crawford's interpretation of Laws **(1989) page 128, referred to.**

3. In the case at hand, the respondent has not produced any materials to show that the post he was holding i.e., full time menial in an aided school was included in the categories of posts in the special rules for "last grade service". Further, the respondent has to show that he continued to be in the "last grade service" as defined in Rule 12(16A) as on 07.04.1970. Respondent has not produced any materials either before the High Court or before this Court to establish that the service of full time menial in an aided school as on 07.04.1970, has been saved by Clause (b) of Rule 60 Part-I KSR. No materials have been produced to show that the aided school service would fall under the above mentioned provisions, or in the "last grade service" as defined under Rule 12(16A). [Paras 14 and 15] [855-G-H; 856-B]

4.1. Part-III KSR deals with pension. Chapter 2 of that Part deals with "qualifying service". Rule 14 E says that service in an aided school put in by government employees prior to any other government service qualify for pension. If the intention of the rule making authority was to give the benefit of continuous service of 60 years

of age for those who were in aided school service then the same would have been specifically provided in the rules. Aided school service prior to government service is reckoned as qualifying years of service only for calculating pension not for continuity of service up to 60 years of age. [Para 16] [856-C, D]

4.2. Respondent's prior service in an aided school, it is informed has already been reckoned for the purpose of calculating pension but the period he has served from 55 years of age to 60 years of age on the basis of court's order cannot be reckoned for the purpose of pension and other service benefits since he was not legally entitled to get the benefit of Rule 60(b) Part-I KSR. However, salary if any paid to the respondent for the above period shall not be recovered. [Para 16] [856-F]

CIVIL APPELLATE JRISDICTION : Civil Appeal No. 4392 of 2010.

From the Judgment & Order dated 15.01.2007 of the High Court of Kerala at Ernakulam in W.A. No. 35 of 2007.

G. Prakash for the Appellant.

Bina Madhavan (for Lawyer's Knit & Co.) for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The question that falls for our consideration in this case is whether the respondent who was in service as on 07.04.1970 as a full time menial in an aided school is entitled to get the benefit of Rule 60(b) Part-I Kerala Service Rules, (KSR for short) so as to continue in government service upto 60 years of age.

3. The respondents entered service in an aided school on 25.06.1968 and worked as a full time menial upto 09.04.1976. He resigned from the post and joined as a Peon in the Tribal Welfare Department of the Government of Kerala on

10.04.1976. Respondent had raised a claim that he was entitled to continue in service up to 60 years of age as per Rule 60(b) Part-I KSR since he was working as a full time menial in an aided school as on 07.04.1970 and continued to be in the last grade till he attained the age of 55 years. His claim was rejected by the Department *vide* order No.E-49227/2001.

4. Feeling aggrieved by that order he preferred a writ petition O.P.No.29317/2001 before the Kerala High Court. Learned Single Judge of the Kerala High Court on 25.05.2006 allowed the writ petition holding that had he remained in the aided school service he would have continued upto 60 years of age, hence he was entitled to the benefit of Rule 60(b) Part-I KSR. Learned single judge gave a direction to allow the respondent to continue in service till he attained 60 years of age and to settle his pension and other benefits accordingly. State of Kerala and Others preferred writ appeal no.35 of 2007 before the Division Bench of the Kerala High Court and the appeal was dismissed on 15th January, 2007 at the admission stage. Feeling aggrieved by that judgment this appeal has been preferred by the State of Kerala and their officers.

5. Mr. G. Prakash, learned counsel appearing for the State of Kerala submitted that the High Court has committed a grave error in holding that the respondent who was working as a full time menial in an aided school as on 07.04.1970 was entitled to get the benefit of Rule 60(b) of Part-I KSR. Counsel submitted that the service in an aided school has not been included in the last grade service as defined in GO(P)82/66/PD dated 08.03.1966 and as per the government decision no.1 under Rule 14 in Part-III KSR the said period can be counted only for pensionary benefits but does not confer any right to the incumbent to continue in service upto 60 years of age. Consequently, provisional pension has already been sanctioned to the respondent considering his regular service till he attained the age of 55 years under Rule 3A Part-III KSR.

6. Ms. Beena Madhavan, learned counsel appearing for

respondent submitted that the service put in by the respondent in the aided school from 25.06.1968 to 09.04.1976 should be taken into consideration for the purpose of granting benefit under Rule 60(b) of Part-I KSR. Learned counsel submitted as per Rule 29(b) of Part-III KSR past service would be counted if a person resigns from a service to join another service. Learned counsel also referred to Rule 14E of KSR Part-III and submitted that the aided school service put in by the government employee prior to his entry in service would qualify not only for the purpose of pension, but also for continuity in service upto 60 years of age. Learned counsel, therefore, submitted that respondent had satisfied all the criteria for claiming the benefit of Rule 60(b) Part-I KSR and the High Court has rightly granted the benefit.

7. The primary question that arises for consideration is whether the respondent who was in service of an aided school as on 07.04.1970 was entitled to continue in service till he attained 60 years of age as per clause 'b' of Rule 60 of Part-I KSR.

8. KSR was introduced by the Government of Kerala under the proviso to Article 309 of the Constitution of India with effect from 01.11.1959 and these rules are deemed to have been made under the Kerala Public Service Act (Act 19 of 1968). KSR contains 3 parts. Part-I contains rules relating to general conditions of service, pay fixation, leave, joining time, foreign service etc. Part-II contains rules relating to traveling allowance and Part-III contains rules of pension. These rules are applicable to all officers who entered service on or after 01.11.1956 and those who entered in service prior to 01.11.1956 and who opted to be governed by these rules. Since introduction of these rules government has issued various amendments and several executive orders by way of directions, instructions, clarification etc. Government has also reserved to itself the power to modify these rules from time to time.

9. Rule 60 dealing with the retirement of officers appears

in Chapter VIII of Part I KSR under the heading 'compulsory retirement'. Rule 60(a) is the substantive part of the Rule, which deals with the age of retirement and Rule 60(b) deals with a specified category of officers in the last grade which is an exception to the main provision. Rule 60(a) and (b) read as follows:-

> "60(a) Except as otherwise provided in these rules the date of compulsory retirement of an officer shall take effect from the afternoon of the last day of the month in which he attains the age of 55 years. He may be retained after this date only with the sanction of Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances.
>
> (b) Officers in the Last Grade Service on the 7th April, 1970 will retire on the afternoon of the last day of the month in which they attain the age of 60 years provided that this benefit will be available to them only as long as they continue to be in the Last Grade Service as defined in Rule 12(16A)"

Rule 60(a) prescribes 55 years as the age of retirement in respect of government servants. However, Government servant shall be permitted to continue beyond 55 years, with the sanction of the Government on public grounds which must be recorded in writing. In very special circumstances a Government servant may be retained in service beyond 60 years of age. An exception has however been made in respect of a specified category of government servants under clause ' b' of Rule 60. Clause 'b' of the Rule 60 provides that officers who were in the last grade service as on 07.04.1970 would retire on attaining the age of 60 years, provided they continued to be in last grade service as defined in Rule 12(16A) of the Rules. Rule 12(16A) of Part-I KSR defines 'Last Grade Service', which reads as follows :-

> [16(A) *Last Grade Service* – "Last Grade Service" means service in any post included in the Kerala Last Grade Service constituted by the Special Rules for the Kerala Last Grade Service, published under G.O. (P) No.82 Public (Rules) Department, dated the 8th March, 1966, in Part-I of the Kerala Gazette No.14 dated the 5th April, 1966, as amended from time to time, and includes service in any post declared by the Government to be a post in the Last Grade Service]

Therefore, in order to get benefit of Rule 60(b) two conditions have to be satisfied. The first condition is that the government servant concerned must have been in last grade service as on 07.04.1970 and the second condition is that the benefit of Clause 'b' would be available only as long as such person continues to be in the last grade service as defined in Rule 12 (16A) of the rules.

10. Let us examine why this benefit has been extended to a specified category of government servants, i.e., "Officers in the Last Grade Service" as on 7th April, 1970. Certain categories of posts have been included in the Kerala Last Grade Service by the State of Kerala in exercise of the powers conferred by the proviso to article 309 of the Constitution of India vide Notification GO(P)No.82/66/PD dated 8th March, 1966 called 'special rules' for the Kerala Last Grade Service. Rule 1 of the special rules contain various categories of posts which *inter alia* include any other post in the Last Grade Service as defined in Clause 16A of Rule 12 in Part-I KSR and who has not been included in any other service.

11. Prior to 07.04.1970 government servants who were in last grade service were entitled to higher age of superannuation of 60 years, however with effect from 07.04.1970 they were brought on par with other government servants with the result that they had to retire on attaining the age of superannuation of 55 years. Government felt it was necessary to protect them and hence Clause 'b' was introduced in Rule 60 giving them, the benefit of continuance in service, till they attained the age of 60 years. Normal age of superannuation in a government service is 55 years. Evidently, the said clause was introduced

by way of exception to Clause 'a' of Rule 60 to protect their right to continue up to 60 years of age. The benefit of exception clause is, therefore, available only to a specified category of employees who were in last grade service as defined in Rule 12(16A) of the Rules. Rule 60(a) stipulates the age of retirement of government servants as 55 years but an exception has been carved out to a specified category of government servants but for that they also would have fallen in Rule 60(a). By judicial interpretation we cannot enlarge the scope of an exception clause, which is meant for a specified category of government employees.

12. Exception clause, is normally, part of the enacting section, unlike a proviso which follows an enacting part. Crawford's interpretation of Laws (1989) page 128, speaks of exception as follows:-

> The exception, however, operates to affirm the operation, of the Statute to all cases not excepted and excludes all other exceptions; that is, it exempts something which would otherwise fall within the general words of the Statute".

13. It is trite law that an exception clause has to be strictly interpreted and cannot be assumed but be proved. Exception clause is always subject to the rule of construction and in case of doubt, it must befriend the general provision and disfavour the exception. If any category of person claims exception from the operation of the statute it must establish that it comes within the exception.

14. The respondent has not produced any materials before us to show that the post he was holding i.e., full time menial in an aided school was included in the categories of posts in the special rules for last grade service. Further, the respondent has to show that he continued to be in the last grade service as defined in Rule 12(16A) of the Rules as on 07.04.1970. Respondent has not produced any materials either before the High Court or before this Court to establish that the service of full time menial in an aided school as on 07.04.1970, has been

saved by Clause (b) of Rule 60 Part-I KSR.

15. Rule 2 of Chapter 1 KSR says subject to the provisions of Rule 3, rules in Parts I and II apply to every person in the whole time employment of the government subject to certain exceptions. No materials have been produced before us to show that the aided school service would fall under the above mentioned provisions, or in the Last Grade Service as defined under Rule 12(16A) of the Rules.

16. Part-III KSR deals with pension. Chapter 2 of that Part deals with "qualifying service". Rule 14 E of the above mentioned Rules says that service in an aided school put in by government employees prior to any other government service qualify for pension. If the intention of the rule making authority was to give the benefit of continuous service of 60 years of age for those who were in aided school service then the same would have been specifically provided in the rules. Aided school service prior to government service is reckoned as qualifying years of service only for calculating pension not for continuity of service up to 60 years of age. Rule 29(b) Part III is also, not applicable to the facts of the case, since in this case we are concerned with the question whether the respondent falls within the exception clause (b) of Rule 60. Respondent's prior service in an aided school, we are informed has already been reckoned for the purpose of calculating pension but the period he has served from 55 years of age to 60 years of age on the basis of court's order cannot be reckoned for the purpose of pension and other service benefits since he was not legally entitled to get the benefit of Rule 60(b) Part-I KSR. However, salary if any paid to the respondent for the above period shall not be recovered.

17. For the above mentioned reasons, we are inclined to allow this appeal and set aside the judgment of the Kerala High Court and uphold the order passed by the Department E-49227 of 2001.

B.B.B. Appeal allowed.